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Third Report on the Law of Treaties by Mr. G.G. Fitzmaurice, Special Rapporteur

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LAW OF TREATIES

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Third report by G. G. Fitzmaurice, Special Rapporteur

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INTRODUCTION

1. For the general scheme of the Special Rapporteur's work on treaties, he refers to paragraphs 1 and 2 of his second report (A/CN.4/107) prepared in 1957. In that report, the subject of termination of treaties, which was to form part III of a first chapter of a treaty code, was considered—this first chapter being devoted to the topic of the validity of treaties in its different forms. After submitting in 1956 a first report on formal validity (conclusion of treaties) (A/CN.4/101), constituting part I of the proposed chapter, the Rapporteur decided, for reasons explained fully in paragraph 2 of his second report, to

deal next with the subject of temporal validity (termination and suspension) although this would really form part III of the proposed chapter, whilst a part II on essential validity (intrinsic legality and force of treaties) would eventually come between part I (conclusion) and part III (termination). The present report contains this part II, though only in provisional form. The Rapporteur hesitated whether, for this year, he should not complete certain parts of his second report then left open—see in particular paragraphs 211 and 227 of the commentary in that report. But it seemed to him that, since the topic of essential validity is both necessary in order to complete the subject of validity as a whole, and also has distinct affinities with the topics both of the conclusion and the termination of treaties (a number of analogies and questions of cross-classification arising), it would be of use to the members of the Commission, when considering his first and second reports, to have before them a set of articles on essential validity with a commentary thereon—if only to see how this would fit into the general scheme of the work.

2. The topic of essential validity is not free from difficulty, and raises (if less acutely) a number of the same problems of classification, arrangement, differentiation between the cases of different types and classes of treaties etc. as arose on the other two reports, and particularly in connexion with the topic of termination. But the treatment of essential validity as a topic is subject to a difficulty of its own, to which the other two main aspects of validity are not—namely the extreme paucity of the material (decided cases, discussion by writers, etc.) dealing with it. There is a reason for this. The fact is that, whereas many concrete problems have arisen internationally in connexion with the process of concluding treaties, and equally in connexion with the process of termination, and many actual cases of termination, both legitimate and illegitimate, have occurred, there have been hardly any cases—or very few—raising the issue of essential validity; and, as regards some of the forms it can theoretically take, virtually none at all.

3. It is not difficult to see why this should be so, for this is essentially a sphere in which conditions in the international field differ very considerably from those in the domestic field. The point is best presented as follows. In private law, the question of flaws in the validity of contracts (for example, fraud and mistake) has reference (both actively and passively) mainly to the case of individuals. It is individuals who made mistakes, or are misled, or who misrepresent or conceal, or are subjected to coercion. Questions of capacity also, at any rate of incapacity arising from status, relate largely to individuals (minors, wards, persons of unsound mind, etc.). All these questions are of course capable of arising with reference to corporate and other juristic entities, but in fact do so relatively seldom, and even when they do, they tend to arise in a different way. For instance, it is possible to imagine physical coercion practised on the manager or director of a corporation to induce him to sign a contract on behalf of the corporation; but it is difficult to imagine coercion applied to the corporation itself, as an entity, *except* in that way. No company would be able to challenge the validity of a contract it had entered into with a rival company merely on the ground that this company had threatened to put it out of business if it did not. The parallel here with the international situation is very close, and also significant. It is something resembling this attitude of domestic law on the subject of duress that also in very large measure accounts for the traditional doctrine of international law that a treaty is not invalid because of duress or coercion applied or threatened to the State itself, but only if it is applied or threatened to the person of the individual negotiator or plenipotentiary. The significance, however, is that this is so because a State is closer in its nature to a corporate entity than it is to an individual, and this also accounts for the fact that a large part of the private law on the essential validity of contracts—which has been evolved mainly with reference to the position and actions of individuals rather than of corporate entities—is inapplicable or inappropriate to the case of States, international organizations and other entities that may possess a certain treaty-making capacity such as insurgents recognized as having belligerent rights, *de facto* authorities in control of specific territory etc.; for all these resemble corporate entities in their nature far more than they do individuals. It follows quite naturally that, whereas in the private law textbooks on contract, extensive sections are devoted to flaws affecting the validity of contracts (fraud, mistake, etc.), and these sections are of considerable complexity, and may contain very great refinements, the corresponding sections of international law textbooks are usually extremely brief, and only deal with the matter in a broad general way; for much of what is contained in textbooks on contract does not arise in the international field. An illustration is afforded by the case of mistaken identity, which occupies much space in the books on contract law—the sort of case in which A contracts with B believing him to be C, in circumstances in which A would not otherwise have entered into the contract. In private law this type of case can give rise to many complications and refinements; but in international law it can hardly arise. States do not mistake one another's identities. The question of their treaty-making capacity may arise, but that is a different matter, and even here very few concrete cases have occurred. In the same way, questions such as those of fraud and error seldom arise, for the whole process of treaty making is too deliberate, and subjected to too many checks, to afford more than a rather remote chance of such situations occurring.

4. It is indeed significant, as pointing in the same direction, that the international law aspects of this matter to which the fullest discussion has been accorded by the authorities, are precisely those in which there exists a definite private law analogy in the field of corporate and not merely of individual rights and actions, such as the question of the authority of an organ of the State to enter into treaties on its behalf and the question of domestic consents and constitutional limitations, or the question of the legality of the object of a treaty. These questions are paralleled in the private field by those of the authority of an officer of a corporation to bind it, and of the legality of certain contracts as being contrary to specific prohibitions of law, or to public policy.

5. The conclusion to which these considerations might seem to tend is that in the international field the question of the essential validity of contractual instruments (treaties) is not of primary importance, and certainly cannot compare in importance with other aspects of treaty law. Nevertheless the subject is not wholly lacking in importance, and certainly involves much that is of juridical interest. Even if certain situations occur but seldom, international law cannot entirely neglect to provide for them. There are clearly dangers in failing to define (and therefore to circumscribe) concepts which, if left undefined and uncircumscribed, might be made the

basis of processes that could be detrimental to the stability and certainty of the treaty obligation.

6. The Rapporteur will almost certainly present a supplementary report on this subject at some later stage. For instance, he does not feel he has fully thought out all the implications of the question of treaties that are in conflict with international law or with other treaties. But he hopes to have said enough to show that this question is not a simple one and cannot satisfactorily be dealt with (as it sometimes has been) on the basis merely of a few broad generalizations. There is also more to be said about such topics as constitutional limitations and requirements respecting the exercise of the treaty-making power by a State; and about the use or threat of force in obtaining the conclusion of a treaty. But it would be of great assistance to the Rapporteur, on these and other points, to have, when possible, some indication of the Commission's views: hence this report.

1. TEXT OF ARTICLES OF CODE

First Chapter. The validity of treaties

[Part II, which appears below, provisionally completes the first chapter on the validity of treaties, this first chapter consisting of three parts as follows:

Part I. Formal validity (framing and conclusion of treaties), which was dealt with in the Special Rapporteur's first report on the law of treaties (A/CN.4/101);

Part II. Essential validity (intrinsic legality and operative force), the text of which is given below;

Part III. Temporal validity (duration, termination, revision and modification of treaties), which was dealt with in the Special Rapporteur's second report on the law of treaties (A/CN.4/107).]

Part. II. Essential validity (intrinsic legality and operative force of treaties)[1]

SECTION A. GENERAL CHARACTER OF THE REQUIREMENT OF ESSENTIAL VALIDITY

Article 1. Definitions

1. For the purposes of this part of the present Code, the following terms have the meanings respectively assigned to them hereunder:

[This is left blank for the present, for the reasons given in the commentary.]

2. Unless the contrary is stated or necessarily results from the context:

(*a*) Lack of essential validity may attach to parts of treaties even where the treaty as a whole is not invalidated;

(*b*) References to a party (or to "the other party") to a treaty, are, in the case of plurilateral or multilateral treaties, to be regarded as being equally references to the parties (or to the "other parties") to the treaty;

(*c*) In the case of plurilateral or multilateral treaties, invalidity, considered in relation to any individual party to the treaty, is to be regarded as referring not to the invalidity of the treaty itself—as a whole—but to the possible invalidity of the participation of that individual party.

Article 2. The concept of essential validity

1. Essential validity which, as indicated in article 10, paragraph 4, of part I of the present Code [A/CN.4/101], denotes validity in point of substance, having regard to the requirements of contractual jurisprudence, is a term used to describe that intrinsic or inherent validity which a treaty must possess, in addition to its formal validity (regularity of conclusion) and its temporal validity (continuing existence and non-termination), in order to have full obligatory force and give rise to international obligations. Accordingly, the question of essential validity presupposes the existence of an instrument regularly concluded as to its form, and having entered into force in the manner provided in part I of the present Code, and not having been terminated or come to an end in the manner provided in part III [A/CN.4/107].

2. It follows that, in the sense indicated in paragraph 1 above, the essential validity of a treaty consists in the presence of all those conditions which, assuming the regular conclusion of the treaty as such (formal validity), and its non-termination (temporal validity), are necessary in order to render it juridically operative and effective; and correspondingly in the absence of any circumstances vitiating it or rendering it otherwise void, inoperative or unenforceable.

3. For the purposes of the present Code, the notion of essential validity comprises the absence not only of elements causing the treaty (although existing as such) to be vitiated, but also of elements causing the instrument concerned (despite the apparent regularity of its conclusion) wholly to lack the status and character of a treaty; and of elements causing it (although in existence as a treaty and not tainted by any vice) to be inoperative and without effect, or unenforceable. Thus the notion of invalidity arising from lack of essential validity comprises inexistence, ineffectiveness, and unenforceability, as well as invalidity *stricto sensu.*

[*Alternative method of drafting paragraph 3 (no change of substance)*

3. As [or "In the sense in which"] the term essential validity is employed in the present Code, an instrument may be invalid as a treaty, on account of lack of essential validity, not only because of the presence of elements that vitiate it, but also because of the presence of elements rendering it inexistent as a treaty (despite the formal regularity of its conclusion), or of elements rendering it inoperative, though not tainted by any vice.]

Article 3. The requirement of essential validity in general

In order to be valid, a treaty, or the participation of any party in it, must, in addition to having formal validity in the sense of part I of the present Code, and temporal validity in the sense of part III, possess es-

[1] This part is arranged as follows:

Section A. General character of the requirement of essential validity.

Section B. The specific conditions of essential validity.

Sub-section 1. Requirements attaching to the status of the parties. (Impediment of defective capacity).

Sub-section 2. Requirements (other than formal) attaching to the origin and method of procurement of the treaty. (Impediment of defective consent).

Sub-section 3. Requirements attaching to the object of the treaty. (Impediment of defective content).

Section C. Legal effects of lack of essential validity, and the modalities of its establishment.

sential validity in the sense specified in article 2 above and according to the rules set out in section B below.

Article 4. The special case of plurilateral and multilateral treaties

1. In the case of treaties to which there are more than two parties (plurilateral and multilateral treaties), the requirement of essential validity exists not only for the instrument itself as a treaty, but also for the participation of each party to it. In order that the treaty may be valid for any party, essential validity must attach both to the treaty itself and to the participation of that party.

2. However, except in those cases where, according to its correct interpretation, the operative effect of a treaty is dependent on the participation of a particular party or parties, or of all the States envisaged as parties, lack of essential validity in the participation of a party will not affect the validity of the treaty itself, unless it is a bilateral treaty, or unless the invalidity relates to the participation of all the parties.

3. It follows from paragraph 1 above that, subject to paragraph 2, the provisions of this part of the present Code are, in the case of plurilateral and multilateral treaties, to be read as applying *mutatis mutandis* in respect of the essential validity of the participation of the individual parties, as well as in respect of the essential validity of the treaty itself.

Article 5. Procedural requisites for establishing lack of essential validity

Lack of essential validity must be established. Hence, although such lack of validity avoids or nullifies the treaty —in some cases *ab initio*—the avoidance or nullification, whether of the treaty itself or of any particular participation in it, is not automatic, but subject to compliance with the procedures set out in article 23 below.

Article 6. Classification of the requirements of essential validity

1. The requirements of essential validity may be classified in several ways, of which the following are the chief:

(*a*) According to the positive character of the requirement involved, namely:

(i) Requirements attaching to the status of the parties;

(ii) Requirements attaching to the origin and method of procurement of the treaty;

(iii) Requirements attaching to the object of the treaty.

(*b*) According to the nature of the defect involved, namely:

(i) Defects of capacity;

(ii) Defects of origin or procurement;

(iii) Defects of content.

(*c*) According to the type of effect produced, namely:

(i) Total non-existence of the treaty;

(ii) Vitiation of the treaty;

(iii) Ineffectiveness of the treaty.

2. Heads (*a*) and (*b*) in the foregoing paragraph relate to different facets of the same thing, and are treated together in section B below (The specific conditions of essential validity). Head (*c*) is treated in section C (Legal effects of lack of essential validity, and the modalities of its establishment).

SECTION B. THE SPECIFIC CONDITIONS OF ESSENTIAL VALIDITY

Article 7. Necessity for the presence of all the conditions specified

A treaty will lack essential validity, in the sense of this part of the present Code, if any of the conditions specified in this section are absent, or if any of the corresponding defects are present.

Sub-section 1. Requirements attaching to the status of the parties. (Impediment of defective capacity)

Article 8. Treaty-making capacity

1. Absence of treaty-making capacity may arise either from a general and inherent deficiency attaching to the nature of the entity purporting to enter into the treaty, or from a limitation of status affecting the treaty-making capacity of an entity not inherently wanting in such capacity.

2. The parties to the treaty must possess treaty-making capacity according to international law, that is to say they must be either (*a*) States in the international sense of the term; (*b*) para-Statal entities recognized as possessing a definite if limited form of international personality, for example, insurgent communities recognized as having belligerent status—*de facto* authorities in control of specific territory; (*c*) international organizations (as defined in article 3(*b*) of part I of the present Code) possessed of treaty-making capacity under their constitutions; or (*d*) international authorities set up by treaty to administer certain territory or areas and invested with a treaty-making power. In addition, the parties must conform to the provisions of paragraph 4 below.

3. The component states of a federal union, not possessing any international personality apart from that of the union, do not possess treaty-making capacity. In so far as they are empowered or authorized under the constitution of the union to negotiate or enter into treaties with foreign countries, even if it is in their own name, they do so as agents for the union which, as alone possessing international personality, is necessarily the entity that becomes bound by the treaty and responsible for carrying it out. The same applies *mutatis mutandis* to dependent territories not possessed of statehood as defined in article 3(*a*) in part I of the present Code.

4. The parties must not only possess inherent treaty-making capacity, or possess it *in posse* as entities not regarded by international law as fundamentally lacking in it, but must also possess it *in esse,* and must be contracting within any limits on their capacity arising from their status. [Thus the treaty-making capacity of a dependent or protected State, while not inherently absent, residually and *in abstracto,* is governed by the status of dependency or protection and by the arrangements or situation existing between it and the protecting State. Such an entity may, for the time being, lack all separate treaty-making capacity (i.e. except via the agency of the protecting State), or may possess it only in specified and limited classes of cases. Similarly, international organizations and authorities only have inherent treaty-making capacity within the scope of their purposes and functions, and matters ancillary thereto, and are also subject to any specific limitations arising from the terms of their constitutions.]

5. Where the limitation does not arise from *status,* the case is not one of capacity. A fully sovereign independent State which undertakes not to enter into a

particular treaty or class of treaty may be in breach of its undertaking if it in fact proceeds to do so; but it does not follow that the treaty thus entered into lacks essential validity or falls to be treated as null and void.

6. Equally, limitations imposed upon the treaty-making power of a State by its own constitution or other domestic law provisions do not, in the international sense, create incapacity; nor are they, in that sense, limitations on the State's capacity. Action in excess of any such limitations will raise an issue, not of international treaty-making capacity, but of the effect of non-compliance with constitutional or other domestic requirements.

7. The case of lack of authority on the part of the individual person or persons negotiating the treaty is equally not a case of capacity, but of authority or credentials affecting the formal, rather than the essential, validity of the treaty. This case is already covered by article 22 in part I of the present Code.

Sub-section 2. Requirements (other than formal) attaching to the origin and method of procurement of the treaty. (Impediment of defective consent)

Article 9. Consent in general

1. The mutual consent of the parties, and reality of consent on the part of each party, is an essential condition of the validity of any treaty, or, as the case may be, of the participation of any particular party.

2. There must accordingly be a *consensus ad idem* on the part of the parties; but the existence of such a consensus will be presumed unless the contrary is established.

3. A consent, apparently regularly given from the purely formal point of view, will nevertheless be deemed to be vitiated as a matter of essential validity if it is subsequently shown to be tainted by material error or lack of *consensus ad idem,* fraud or duress, according to the meaning ascribed to those terms by, and subject to the the conditions specified in, articles 11 to 14 below.

Article 10. The question of compliance with constitutional or other domestic requirements

For the purposes of this part of the present Code, consent means consent on the international plane, and the reality of such consent is not impaired by the fact that, on the domestic plane, certain consents are lacking; or that there has otherwise been a failure by the State concerned, or its authorities, to observe the correct constitutional processes as required by the domestic law for the purpose of proceeding to signature, ratification, accession or other act of participation in the treaty; or to keep within any limitations on the treaty-making power imposed by the domestic law or constitution. These are and remain domestic matters, and the question is governed by the principle stated in Article 9, paragraph 3 of the introduction to the present Code [A/CN.4/101], that because States have no choice but to accept as internationally authentic the acts of the legitimate executive authority of another State, carried out on the international plane in an apparently regular manner, so also are they entitled to rely on the authenticity of such acts, which may not subsequently be denied by the State from whence, through its executive authority, they have emanated.

Article 11. Error and lack of consensus ad idem *(analysis and classification)*

1. Error means material error in some essential particular affecting the basis of the treaty.

2. The cases of error or mistake may, for the purposes of this Code, be classified as follows:

(*a*) Error on the part of both parties, which may take the form either (i) of common and identical error, about the same thing; or (ii) of mutual error, but about different things or in different senses;

(*b*) Error on the part of one party only.

Article 12. Error and lack of consensus ad idem *(effects)*

1. Provided the conditions set out in paragraph 2 below are satisfied, error, if of the kind specified in paragraph 1 of article 11, will:

(*a*) In cases coming within the scope of head (*a*) (i) of paragraph 2 of article 11, invalidate the treaty;

(*b*) In cases coming within the scope of head (*a*) (ii), invalidate the treaty, provided the errors are such as to lead to a lack of *consensus ad idem* sufficient to preclude any common basis of agreement;

(*c*) In cases coming within the scope of head (*b*), invalidate the treaty only if the error was induced or contributed to by the fraud, fraudulent misrepresentation, concealment or non-disclosure, or culpable negligence of the other party, but not otherwise.

2. In order to rank as such for the purposes of the present article, the error must, in addition to being a material one as specified in article 11, paragraph 1, above, have the following characteristics:

(*a*) It must be an error of fact not of law;

(*b*) It must not be simply an error of judgment, and must not affect merely the motives of the parties in concluding the treaty, unless these themselves involve a mistaken belief as to the existence or actuality of a fact or state of facts;

(*c*) It must be excusable and not such as could have been avoided by the exercise of reasonable care, diligence, investigation or foresight;

(*d*) It must relate to a circumstance, fact, or state of facts assumed to be correct or in existence, or to prevail, at the time of the conclusion of the treaty, and not to something anticipated in the future or occurring subsequently.

3. Although, as provided in paragraph 1(*c*) above, an error made by one party only is not a ground of invalidity unless induced by the fraud, fraudulent misrepresentation, concealment or non-disclosure, or culpable negligence of the other, yet, if the treaty is a plurilateral or multilateral one, an error made by a party which did not take part in the original conclusion of the treaty, affecting the fundamental basis of its own subsequent participation, will constitute a ground on which the invalidity of that participation may be claimed, provided the error in other respects conforms to the conditions of paragraph 2 above.

4. The invalidity of a treaty on the basis of an error, even if the error is mutual and conforms to the above conditions, cannot be claimed by a party whose own fault or negligence caused or contributed to the error.

Article 13. Fraud or misrepresentation

1. Subject to the provisions of paragraphs 2 to 4 below, fraud or misrepresentation by one party to a treaty, provided it relates to a material particular and has induced, or contributed to inducing, the other party to conclude or participate in the treaty, in such a way that that party would not otherwise have done so, is a circum-

stance vitiating the treaty, or the participation of the other party, as the case may be.

[*Alternative method of drafting paragraph 1 (no change of substance)*

1. Subject to the provisions of paragraphs 2 to 4 below, if the participation of a party to a treaty has been brought about by the fraud or misrepresentation of the other, in a material particular, and in such a way as to induce or contribute to that participation, there is no true consent and the treaty or the participation, as the case may be, *lacks essential validity.*]

2. Fraud or misrepresentation means wilful intent to deceive, i.e. statements or representations made, whether orally or in writing (or by means of maps, plans, photographs, drawings etc.), in the knowledge that they are false (or without belief that they are true, or indifferently as to whether they are true or false), and for the purpose of deceiving and of procuring the conclusion of the treaty or the participation of the other party. Innocent misrepresentation is not fraud, though it may be a ground of mutual error avoiding the treaty or any participation in it on that basis.

3. The fraudulent statement or misrepresentation must be a statement of misrepresentation of fact, not of law.

4. Expressions of opinion, even if intended to mislead, do not constitute fraud or misrepresentation, provided they do not take the form of statements of fact, and are not made in the knowledge that they are false, or in circumstances in which the parties have not equal means of knowledge, or in which the party expressing the opinion has peculiar means of knowledge.

5. The mere concealment or non-disclosure by one party of facts or information in the possession of that party, or to which it has access, even if of a material character, does not constitute fraud, provided the facts or information were equally available or accessible to the other party, or could have become so through the ordinary processes of enquiry, investigation or research. Where, however, knowledge of the facts or of a material particular is exclusively available or accessible to, or within the means of ascertainment of one party only, upon whom the other must necessarily rely for knowledge of them, concealment or non-disclosure will constitute fraud if it relates to facts or circumstances that would clearly have affected the judgment of the other party as to the conclusion of the treaty.

Article 14. Duress

1. Subject to the provisions of paragraphs 2 to 5 below, the conclusion of a treaty brought about by duress or coercion, whether physical or mental, actual or threatened, employed directly and specifically against the persons, of the individual agents, plenipotentiaries, authorities or members of organs engaged in negotiating or signing, or ratifying or acceding to, or any other act of participation in a treaty, vitiates the consent apparently given, and invalidates the act concerned, and consequently the treaty.

2. Duress or coercion against the persons mentioned in paragraph 1 includes duress or coercion, actual or threatened, against their relatives or dependents, but not against their property.

3. Fear (for the physical or mental safety of the individual, his relatives or dependents) being the essential element of duress, any forms of pressure not involving that element, such as argument, entreaty, advice and persuasion, do not in themselves constitute duress, though they may be combined with it; nor does "undue influence", as that term is normally employed in private law, constitute duress.

4. Duress for the purposes of the present article means duress addressed to the persons concerned, as individuals, or as members of the negotiating, ratifying or acceding body or organ, and directed to securing the performance of the act of participation. Duress is not constituted by the threat of the consequences that will or may ensue for the State of which those persons are nationals, in the event of their non-compliance (or for themselves as nationals of that State), nor by their fear of such consequences, nor by the existence of any indirect threat to themselves or their relatives or dependents that may arise from the possibility of such consequences.

5. A treaty which has been signed or otherwise initially concluded under duress within the meaning of the present article, will nevertheless not be invalidated if it is subsequently ratified, or in some other way confirmed by the State concerned, with knowledge of that fact, and without any exercise of duress in respect of the persons of the ratifying or confirming agents, authorities or organs.

Sub-section 3. Requirements attaching to the object of the treaty. (Impediment of defective content)

Article 15. Possibility of the object

1. The object of the treaty must be a possible one. A treaty which, in the literal sense, is impossible of performance, and incapable of any application at all, will even though not strictly invalid *in se,* be abortive and inoperative.

2. The impossibility must exist at the time of the conclusion of the treaty and not arise subsequently, or the case will be one of supervening impossibility, and will fall under the head, not of avoidance, but of termination of treaties, as provided in article 17, case (iv), of part III of the present Code.

3. Where the impossibility arises from facts unknown to both or all of the parties at the time of the conclusion of the treaty, the case is strictly one of common and identical error, and the treaty may be regarded as invalidated, or as rendered inoperative, on that ground.

4. Where the impossibility, existing at the time of the conclusion of the treaty, was then known to one of the parties, but not to the other or others, or has been caused or contributed to by that party; or where the conclusion of the treaty might have been avoided but for that party's fault or negligence, the treaty will nonetheless be inoperative *ab initio,* but the party at fault will be liable to make reparation for any resulting loss or detriment.

Article 16. Legality of the object (general)

1. The object of a treaty must be lawful; but the invalidity of the treaty does not necessarily result from the fact that, in the relations between the parties, it modifies or varies a rule of international law, nor from the sole fact that its provisions are at variance with the provisions of a previous treaty.

2. It is essential to the validity of a treaty that it should be in conformity with or not contravene, or that its execution should not involve an infraction of those principles and rules of international law which are in the nature of *jus cogens.*

3. Incompatibility with the provisions of a previous treaty gives rise *prima facie* to a conflict of obligation,

rather than, necessarily, to the invalidity of the treaty. Such conflict will fall to be resolved in accordance with the provisions of article 18 below.

4. Since a treaty *prima facie* creates direct obligations and rights only for, and as between, the parties to it, and is *res inter alios acta* for and in relation to non-parties, it cannot, even if fully lawful as to its objects, and consistent with previous treaties, bind non-parties or create rights against them, or modify or affect their rights. The issue of illegality is therefore formally and primarily an issue affecting the relations between the parties to the treaty.

Article 17. Legality of the object (conflict with international law)

It being always open, *prima facie,* to any two or more States to agree, for application *inter se,* upon a rule or régime varying or departing from the rules of customary international law in the nature of *jus dispositivum,* a treaty embodying such an agreement cannot be invalid on that ground. Hence it is only if the treaty involves a departure from or conflict with absolute and imperative rules or prohibitions of international law in the nature of *jus cogens* that a cause of invalidity can arise. Since the treaty is in any event *res inter alios acta,* and without force as against non-parties, the invalidity as such of the treaty only affects directly the relations between the parties to it, and means that neither or none of the parties can claim compliance with it on the part of the other or others.

Article 18. Legality of the object (conflict with previous treaties—normal cases)

1. Where a treaty is in conflict with a previous treaty embodying or generally regarded as containing accepted rules of international law in the nature of *jus cogens,* the invalidity of the treaty will ensue on that ground in accordance with the provisions of article 17 above.

2. Subject to the generality of paragraph 1 above, the present article applies primarily to bilateral treaties, and to those pluri- or multilateral treaties which are of the reciprocating type, providing for a mutual interchange of benefits between the parties, with rights and obligations for each involving specific treatment at the hands of and towards each of the others individually. The special case of other kinds of pluri- or multilateral treaties forms the subject of article 19 below.

3. The question of incompatibility or conflict between treaties of the kind specified in paragraph 2 above may arise in any of the following situations:

(*a*) In the case both of bilateral and of pluri- or multilateral treaties:

(i) The two treaties have no common parties: no party to the one is also a party to the other.

(ii) The two treaties have common and identical parties: all the parties to the one are also parties to the other.

(iii) The two treaties have partly common and partly divergent parties: some parties are parties to both, some to the earlier only, and some to the later only. In the case of two bilateral treaties this takes the form that there is one party common to both treaties, and that there are two other parties, one of whom is a party to the earlier treaty only, and the other a party to the later only.

(*b*) In the case of multilateral treaties only, or where at least one of the two treaties is a multilateral treaty:

(iv) Partially common parties, both or all of the parties to the earlier treaty being also parties (but not the only parties) to the later treaty (case of a later treaty to which both or all of the parties to the earlier agree).

(v) Partially common parties, but where some only of the parties to the earlier one are parties to the later, which has no other parties (case of a later treaty to which some only of the parties to the earlier agree, i.e. case of a separate and subsequent treaty on the same subject concluded between less than the full number of the parties to the earlier).

Subject to the provisions of paragraph 1 above, inconsistencies or conflicts arising in these cases are resolved in accordance with the provisions of paragraphs 4 to 8 hereunder.

4. *Case (i) in paragraph 3.* The validity of a treaty cannot be affected merely by the existence of a previous treaty to which neither or none of the parties to the later treaty are also parties.

5. *Case (ii) in paragraph 3.* In so far as there is any conflict, the later treaty prevails, and either in effect modifies or amends the earlier, or abrogates some of its provisions, or supersedes it entirely and, in substance, terminates it.

6. *Case (iii) in paragraph 3.* In so far as there is any conflict, the earlier treaty prevails in the relations between the party or parties to the later treaty who also participated in the earlier one, and the remaining party or parties to that earlier one: but the later treaty is not rendered invalid *in se,* and if, on account of the conflict, it cannot be or is not carried out by the party or parties also participating in the earlier treaty, there will arise a liability to pay damages or make other suitable reparation to the other party or parties to the later treaty not participating in the earlier, provided the other party concerned was not aware of the earlier treaty and of the conflict involved.

7. *Case (iv) in paragraph 3.* The effect is fundamentally the same as in case (ii). In so far as there is any conflict, the later treaty prevails for or in the relations between the parties to it who are also parties to the earlier, and may to that extent in whole or in part modify, abrogate, supersede, or terminate the earlier.

8. *Case (v) in paragraph 3.* The effect is fundamentally the same as in case (iii). In so far as there is any conflict, the earlier treaty prevails in the relations between the parties to the later treaty and the remaining party or paries to the earlier one. However, where the earlier treaty prohibits, as between any of the parties to it, the conclusion of an inconsistent treaty, or if the later treaty necessarily involves for the parties to it action in direct breach of their obligations under the earlier one, then the later treaty will be invalidated and deemed null and void.

Article 19. Legality of the object (conflict with previous treaties—special case of certain multilateral treaties)

In the case of multilateral treaties the rights and obligations of which are not of the mutually reciprocating type, but which are either (*a*) of the interdependent type, where a fundamental breach of one of the obligations of the treaty by one party will justify a corresponding non-performance generally by the other parties, and not merely

a non-performance in their relations with the defaulting party; or (*b*) of the 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—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.

Article 20. Ethics of the object

The unethical character of a treaty which is not actually illegal by virtue of the provisions of articles 16 to 19 above, cannot *per se* be a ground of invalidity as between the parties which have concluded it (and has in any case no force as against non-parties). Nevertheless an international tribunal may refuse to take cognizance of or apply it (even as between the parties, and even if its invalidity has not been claimed) in those cases in which the treaty is clearly contrary to humanity, good morals, or to international good order or the recognized ethics of international behaviour.

SECTION C. LEGAL EFFECTS OF LACK OF ESSENTIAL VALIDITY, AND THE MODALITIES OF ITS ESTABLISHMENT

Article 21. Legal effects (classification)

1. Lack of essential validity, as that term is used herein, may, according to the occasion of it, cause the instrument concerned:

(*a*) To lack all status as, and not to constitute, a treaty at all;

(*b*) Though constituting a treaty qua instrument, to be invalid or inoperative.

2. In cases coming under paragraph 1(*b*) above, lack of essential validity may cause the treaty to be: (*a*) void *ab initio;* (*b*) voidable, and actually void from the date of voidance; (*c*) totally inoperative; (*d*) unenforceable. However, although these are the effects produced in principle and *in posse,* their realization in practice and *in esse* is subject to the procedure specified in article 23 below.

Article 22. Effects in specific cases

1. The effects produced by lack of essential validity in the undermentioned cases, provided the existence of these is established in accordance with the provisions of section B hereof, and article 23 below, are as follows:

(*a*) Lack of capacity of a party to the instrument concerned: the instrument does not rank as a treaty and lacks all status as such; or, in the case of multilateral treaties, the signature, ratification or accession of the entity lacking capacity has no status as such.

(*b*) Error, mistake or lack of *consensus ad idem:* the treaty is void *ab initio.*

(*c*) Fraud, fraudulent representation or concealment: the treaty is voidable.

(*d*) Duress: the treaty is voidable.

(*e*) Impossibility of the object: the treaty is totally inoperative, though not strictly invalid as an instrument.

(*f*) Illegality of the object resulting from conflict with rules of international law in the nature of *jus cogens*: the treaty is unenforceable.

(*g*) Illegality of the object resulting from certain classes of conflicts with previous treaties: the treaty is unenforceable.

(*h*) Unethical character of the object of the treaty as declared by an international tribunal: the treaty is unenforceable.

[*Alternative method of drafting paragraph 1 (no change of substance)*

1. Assuming the existence of the cause of invalidity to be established in accordance with the provisions of section B hereof and article 23 below, then:

(*a*) Lack of treaty status for the instrument concerned either as a whole or as respects the signature, ratification or accession of the entity concerned, results from lack of capacity of one or more parties;

(*b*) Nullity *ab initio* results from error, mistake or lack of *consensus ad idem;*

(*c*) Voidability results from fraud, fraudulent misrepresentation or concealment, and duress;

(*d*) Total inoperativeness *ab initio* results from the impossibility of the object;

(*e*) Unenforceability results from the fundamental illegality of the object of the treaty (whether by reason of certain conflicts with international law or of certain conflicts with earlier treaties), and from the unethical character of the object, if so declared by an international tribunal.]

2. The consequential results flowing from the different effects of lack of essential validity as stated in paragraph 1 above are as follows:

(*a*) Where there is lack of treaty status, or where the treaty is void *ab initio* or totally inoperative, the whole transaction is a nullity and void with retroactive effect: any steps taken in consequence of it are automatically nullified, and, in so far as this may arise and may be possible, there must be a complete *restitutio in integrum* or restoration of the *status quo ante,* but damages or reparation will not, as such, be recoverable except in cases involving an element of fraud.

(*b*) Where the treaty is merely voidable, the obligations of the parties cease as from the date of voidance, but without retroactive effect or the automatic nullification of any steps already taken under or in execution of the treaty: however, so far as material and possible, reparation by way of restoration, restitution or other cancelation or rectification, and ("or" alternatively) damages or other remedy may be claimed by the party aggrieved.

(*c*) Where the treaty is unenforceable, neither party (or "none of the parties") can claim its further performance from the other or others, but no claim by either or any party will lie against another for damages or other remedy or reparation.

Article 23. Procedure for establishing the claim of lack of essential validity

1. The question of lack of essential validity being inherently controversial, and itself liable to be in issue between the parties, neither or no party may unilaterally declare the invalidity of the treaty, or of its own participation therein, on any of the grounds set out in section B hereof. This applies even in the case where an inherent lack of international treaty-making capacity in the entity concerned is the alleged cause of invalidity.

2. Except where, as in the case of common and identical error, the parties are in agreement on the subject; or where, as in certain cases of impossibility of the object (for example, non-existence of the *res* to be dealt with) the element of doubt cannot arise—a party to any instrument

purporting to be a treaty instrument, alleging the invalidity of it, or of its own participation in it, on grounds of lack of essential validity must, within a reasonable period from the occurrence or discovery of the alleged cause of invalidity, address to the other a reasoned statement of the grounds of this claim.

3. If the claim is rejected, or not accepted within a reasonable period, the party making it may offer to submit the matter to an appropriate tribunal to be agreed upon between the parties (or, failing such agreement, to the International Court of Justice). If such an offer is made, but is not accepted within a reasonable period, the party making the claim may declare the suspension of any further performance of the treaty or instrument involved, and, if the offer still remains unaccepted after six months from that date, may declare actual invalidity—with the effects and consequential results specified in articles 21 and 22 above. If the party claiming invalidity does not offer reference to a tribunal, as herein specified, the treaty or instrument involved will be deemed to be valid and in full force and effect.

4. If reference to a tribunal is offered and accepted, it will be for the tribunal to decide what temporary measures, in regard to suspension or otherwise, may be taken by the parties pending the tribunal's decision, and as to the consequences of any finding of invalidity it may give.

5. In those cases where the instrument or treaty itself, or other applicable agreement, contains a provision for reference of any disputes concerning it to arbitration or judicial settlement, such provision shall apply and, in case of conflict, prevail over the preceding paragraphs of the present article.

II. COMMENTARY ON THE ARTICLES

[NOTE: The texts of the articles are not repeated in the commentary. Their page numbers are given in the table of contents at the beginning of the report.[2]]

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

First chapter. The validity of treaties

Part II. Essential validity (intrinsic legality and operative force of treaties)

SECTION A. GENERAL CHARACTER OF THE REQUIREMENT OF ESSENTIAL VALIDITY

Article 1. Definitions

1. *Paragraph 1.* This is left blank for the present, for the same reasons, *mutatis mutandis,* as those given in respect of the corresponding article of part III in paragraphs 1 and 2 of the commentary in the Rapporteur's second report (A/CN.4/107).

2. *Paragraph 2.* A similar reference is made, *mutatis mutandis,* to paragraphs 3 and 4 of the commentary in the second report.

[2] For the arrangement of the articles, see footnote 1.

Article 2. The concept of essential validity

3. This article should be read in conjunction with articles 10 to 12 of part I on the conclusion of treaties (A/CN.4/101) and article 2 of part III on termination (A/CN.4/107).

4. *Paragraph 1.* A treaty is more than the piece of paper it is written on. It must possess substantive effect, and for that purpose it does not suffice that it was regularly concluded as to the manner in which it was drawn up, signed, etc. (i.e. that it possesses formal validity), and that it is still "in force" as an instrument, and has not come to an end or been terminated (i.e. that it possesses temporal validity). These things do not suffice if the treaty is tainted with some inherent vice, or subject to some fundamental flaw, destructive of its essence. In such cases the treaty is a mere shell lacking substance. There is the semblance of outward form, but the inner reality is not there.

5. At the same time, as the final sentence of this paragraph indicates, the whole question of essential validity presupposes the existence of an instrument regularly framed as to its form and method of conclusion, and still in existence as such—i.e. not yet terminated. Otherwise no instrument exists in respect of which the question of its essential validity can arise. However, certain elements are capable of being regarded as relevant either to formal or to essential validity, or in a sense to both—for instance, the question of any irregularity or deficiency in the domestic or constitutional processes preceding or leading up to the signature or ratification of the treaty, by or on behalf of the executive organ of the State. In so far as this invalidates the treaty,[3] is it the *conclusion* of the treaty that is invalidated, or is it rather the case that, if the formalities internationally required were duly complied with, the treaty possesses formal validity as an instrument, but may lack essential validity on the ground of want of any true consent on the part of the State as a whole, arising from the (domestically) unauthorized act of the executive in signing or ratifying it? Either view is possible. For the reasons given in paragraphs 74 and 75 of the commentary to his first report, the Rapporteur has preferred to regard this as a matter appertaining to essential validity. There is again the question of lack of authority in the person of the individual agent who carries out the processes necessary to the conclusion of a treaty—in particular signature. This is capable of being viewed as a matter relating to the reality of the consent given by or on behalf of the State concerned. However, it seems more appropriately to belong to the sphere of form, and to be a question of credentials or full powers, and has been dealt with as such in the first report (articles 20-23). Further reference to these points is made in connexion with articles 8 and 10 (see paragraphs 29, and 33-38 below).

6. *Paragraph 2.* The requirement of essential validity has both a positive and a negative aspect, and may be viewed from either standpoint. Positively, it stipulates that a treaty, though regularly concluded as to form, cannot be valid unless there are present in relation to it a number of other conditions, such as the reality of the consent apparently regularly given. These are the conditions of essential validity. Negatively, it calls for the absence of a number of elements or circumstances which, if present, will have a vitiating effect on the treaty. These are the factors causing or giving rise to lack of essential validity.

[3] Though, actually, the view taken here is that it does not. See paragraphs 33 to 38 below.

These two aspects are merely different facets of the same thing, and are complementary to each other.

7. *Paragraph 3.* The elements whose presence gives rise to lack of essential validity do not all have the same basic character, nor do they all have a similar effect or *modus operandi.* The term "essential validity" itself covers, or has to be regarded as covering, more than the directly vitiating facts, In some classes of cases, for example lack of capacity of the parties, the question is rather whether the instrument concerned (which may otherwise be untainted with any actual vice)[4] has the status or character of a treaty at all. It can be contended that this should be regarded as a matter of form rather than of substance (see remarks made in paragraph 5 above) and in the final draft of this Code it will be for consideration whether it should not be so treated. Then there are cases where the treaty is not so much lacking in essential validity, as fundamentally inoperative because of some basic flaw; yet it may have been regularly concluded and not be tainted by any vice as to consent. This occurs, for instance, when parties enter into a treaty having an object which is in fact (though unknown to them at the time) impossible of achievement, for example, the *res* does not exist.[5] It is in a certain sense inappropriate to speak of lack of validity in this type of case. It is more a question of lack of operative force or effect. However, it is difficult to find a place for this type of case except under the general head of essential validity, and it must probably be regarded as coming under that head, particularly as these cases are almost always cases involving error or mistake on the part of the parties, or even misrepresentation on the part of one of them, and these are unquestionably vitiating elements in the strict sense. At the same time, this type of case (which has certain affinities with that of *supervening* impossibility of performance)[6] could perhaps be regarded as one of automatic termination of the treaty or treaty obligation, rather than as one of essential validity. The theoretical difficulty here is whether such a treaty has any duration in time at all, capable of termination—that is to say, whether any obligation ever arises under it. It will be for eventual consideration where to place this case (an infrequent one in any event);[7] for the present it may remain where it is.

Article 3. The requirement of essential validity in general

8. The previous article having described the concept of essential validity with reference to its nature and place in the general context of the validity of treaties, the present article posits the formal requirement of essential validity. No further discussion seems necessary, since a similar requirement of principle exists under all systems of domestic law in the case of private contracts, and is a familiar element of private contract law.[8]

Article 4. The special case of plurilateral and multilateral treaties

9. *Paragraphs 1 and 2.* As in the case of the topic of termination of treaties (see second report *passim*), the subject of essential validity is complicated (though to a much lesser degree) by the fact that not all treaties have the same character, and in particular by certain ways in which plurilateral or multilateral treaties differ from bilateral ones. It will be seen later (articles 18 and 19) in connexion with the subject of conflict with other treaties, that certain kinds of multilateral treaties are in a special position. The present article deals with a different point. Certain grounds of invalidity, for example, fundamental illegality of the object, affect the treaty as a whole and as such, however many or however few the number of the parties. But others, particularly those relating to the reality of consent, affect the treaty through the party or parties concerned, though sometimes, as in certain cases of error, both or all of the parties may be involved. Even if, however, only one party's consent is vitiated, this will obviously invalidate the whole treaty where the treaty is a bilateral one. But the same result will not necessarily follow (though it may) in the case of treaties having more than two parties. Especially as regards general multilateral treaties will it normally be the case that a vitiating element relating to the participation of a particular party (for example, one acceding subsequently, after the treaty is in force) will only affect the validity and operative effect of that participation, and not of the treaty as such. On the other hand, the mere fact that there are more than two parties will not necessarily prevent the whole treaty from being invalidated by a vitiating element affecting the consent of one of them only, if the treaty was clearly intended to operate for and between *all* the (say, three or four) parties concerned, or not at all. In such cases, lack of valid participation by one of them invalidates the whole treaty. In others, *per contra,* there may be no reason why the treaty should not have force and effect and operate between the remaining parties. The question is essentially one of interpretation of the treaty.

10. *Paragraph 3.* No particular comment is called for.

Article 5. Procedural requisites for establishing lack of essential validity

11. Ideally, this article, in view of article 23, may not be strictly necessary or in the best place. At this stage of the work however, its insertion here seems desirable, in order that the more detailed article setting out the requirements of essential validity, and the specific grounds causing absence of it, may be considered against the background of the proposal that such grounds cannot operate automatically to invalidate the treaty.

Article 6. Classification of the requirements of essential validity

12. While possibly not essential as part of any final code, an article of this type, by presenting a clear picture, may at this stage of the work, and in the same way as articles 6 to 8 in the second report (in the much more complex case of termination of treaties), serve a useful purpose.

13. *Paragraph 1, sub-paragraphs* (a) *and* (b). These are largely self-explanatory and represent a development of paragraph 2 of article 2 (see comments in paragraph 6 above). Taken together, these sub-paragraphs[9] mean that in each category there is a positive requirement necessary for the essential validity of the treaty; but the presence

[4] That is to say, not vitiated by error, fraud, duress, etc.

[5] *Supervening* impossibility owing to the subsequent *extinction* of the *res* is of course a distinct concept, and involves the question of *termination* (see article 17, case (iii), and commentary, para. 97, in the second report) not invalidity.

[6] See article 17, case (iv), and commentary, paras. 98-100, in the second report.

[7] Although, for the reasons given in the introduction to the present report, *all* these cases are rare.

[8] And, of course, a much more conspicuous and actual one.

[9] This is, basically, the classification suggested by Professor Alf Ross of Copenhagen University in his *A Textbook of International Law* (London, Longmans, Green and Co., 1947), sect. 37.

of this positive element consists largely in the absence or non-presence of certain other elements: negatively, therefore, essential validity consists in the absence or non-presence in each category of certain defects, the presence of which will vitiate or invalidate the treaty, render it inapplicable or unenforceable, or prevent its operation. It will be preferable to reserve comment on these specific elements themselves for later articles in which they are dealt with in detail.

14. *Sub-paragraph* (c). This represents in the same way a development of paragraph 3 of article 2, as to which see comments in paragraph 7 above. *Sub-head* (*i*) is based on the distinction drawn by some authorities between the *"acte inexistant"* and the *"acte nul"*.[10] This distinction seems to the Rapporteur to be a valid one. To say that a treaty is a nullity, even where it is deemed to be void *ab initio* and with retroactive effect, is not to say that it did not come into existence as a *treaty instrument*: indeed if it did not, there is nothing that can be said to be null or void *ab initio*. Before these terms (or rather the juridical processes involved in them) can have any significance, there must be something, otherwise possessed of treaty status, in respect of which they can function. There are however certain kinds of acts (not necessarily confined to the case of treaties) which are of such a nature that they cannot be said to possess any juridical status at all, even initially or in embryo. It is more than invalidity or nullity *ab initio*: it is total non-existence (juridically). Examples that have been given,[11] or can be imagined, are such things as a "sentence" of death passed (however much in solemn form) by a band of brigands on one of their number, a purported "cession" of sovereignty over territory effected by a private person, "permission" given by one country to the aircraft of another to fly over the territory of a third,[12] and so on. In cases of this sort, it is, above all, the manifest and self-evident nullity and lack of all possible juridical effect of the transaction that enables it to be treated as actually non-existent. In the field of treaties, the context in which this question arises, or may arise, is that of the treaty-making capacity of the parties; and where this lack of capacity is manifest, as it might be,[13] the doctrine of inexistence is readily applicable and on the same grounds. It is less readily applicable where the lack of capacity is not absolutely manifest, although grounds for asserting it exist. Still less is the doctrine of juridical non-existence readily applicable where the incapacity attaches not to the entity concerned as such and as a category (for example, a municipal council or other local authority has not and never can, *as such*, have any international treaty-making capacity), but to have the performance of certain types of acts (for example, a State not fully *sui juris* may have capacity to enter into certain kinds of treaties but not others, or only with certain consents or through certain agencies etc.).[14] Other possible complications are involved, and further discussion is deferred until article 8 is reached; nevertheless it would seem that despite these difficulties, if incapacity, howsoever arising, is actually established, the position it leads to is the inexistence of the treaty (there is an instrument but it is not a treaty), rather than a treaty which exists but must be deemed to be a nullity.

15. In the cases coming under *sub-head* (*ii*) in this sub-paragraph, the act is not inexistent: there is an instrument which, provided it is not shown to be vitiated in any way, will constitute and rank as a treaty, and which ranks *prima facie* as such. There is a real something, having treaty character, of which it can be said that, for cause shown, it is invalid or invalidated, or a nullity. Nullity itself may be absolute or relative (*nullité absolue* and *nullité relative*) or, in English legal terminology, void *ab initio* (with retroactive effect) or merely voidable.[15]

16. Finally, as regards *sub-head* (*iii*), there are cases in which, although the treaty must be regarded as void, or inoperative or unenforceable, it is difficult or somewhat inappropriate, *at any rate as between the parties*, to speak of vitiation, or of invalidation in that sense. For instance, the parties have made the treaty in proper form, have observed all constitutional requirements, and have truly consented without any taint of error, fraud or duress etc., but the treaty has an object so illegal that no international tribunal would apply or enforce it. The parties have sinned, not so much against each other (as they do where there is error, fraud etc.) as against the law. It is in a certain sense difficult to speak of invalidity in this context because, assuming the parties could apply the treaty purely *inter se* and without affecting the position or rights of third States or their nationals (which is theoretically quite possible)[16] there is, *as between them*, no element vitiating the consent they have chosen to give, though there is an element affecting their obligation to carry out the treaty if they elect to invoke that element. The illegality resides in the object rather than, inherently, in the treaty itself considered as such. In the same way, it is difficult to regard as a normal case of invalidity in the strict sense the situation in which a treaty has been regularly concluded in every respect, but under a common and identical misapprehension on the part of both parties (for example, as to the existence of the *res*, or the possibility of dealing with it in a certain way). Here the treaty is simply sterile, abortive; inoperative rather than (properly speaking) invalid. Nevertheless, subject to what has been said in paragraph 7 above, it is convenient, and to some extent necessary, to treat of it under the head of essential validity. Hence, for all these reasons, that term is used herein in a somewhat extended sense. The essential point is, however, that different kinds of "invalidity" produce different effects.

17. *Paragraph 2.* No comment is necessary.

Section B. The specific conditions of essential validity

Article 7. Necessity for the presence of all the conditions specified

18. It is clear that all the necessary conditions must be present, and the treaty must suffer from none of the

[10] See, for instance, Paul Guggenheim, *Traité de droit international public* (Geneva, Georg et Cie, S.A., 1953), vol. I, pp. 87-90.

[11] Guggenheim, *op. cit.*, p. 88; Hans Kelsen, *Allgemeine Staatslehre* (Berlin, J. Springer, 1925), p. 277.

[12] For instance, if the other party to the instrument were a private corporation.

[13] *Idem.*

[14] However, as will be seen later, because such cases may be controversial, and the question of capacity itself open to argument, invalidity cannot simply be declared unilaterally. See the commentary on article 23.

[15] See Guggenheim, *op. cit.*, p. 93. As will be seen in connexion with articles 21 and 22, there may be differences of opinion as to what cases produce what results.

[16] For instance, if they agreed, in a war purely *inter se*, to apply rules at variance with (or in disregard of) rules of the laws of war having a humanitarian object.

corresponding defects or flaws—otherwise it will, in one form or another, though with varying effect, lack essential validity as that term is used herein.

Sub-section 1. Requirements attaching to the status of the parties. (Impediment of defective capacity)

Article 8. Treaty-making capacity

19. *Paragraph 1.* This paragraph is simply a statement of the two main causes—or rather two main types—of lack of treaty-making capacity: the one arising from an inherent and necessary want of it attaching to the character of the entity concerned (a commercial corporation, a municipal council, etc.); the other from limitations placed or existing on the treaty-making capacity of an entity not inherently incapable of possessing it, for example, a State not fully *sui juris*. In all these cases however, and to whichever of the two categories they belong, the incapacity is a matter of status, and not, so to speak, of contract. Undertakings not to conclude certain kinds of treaties entered into by States which, in principle and as a matter of international status, possess treaty-making capacity, belong to a different category (see the commentary on paragraph 5 of this article).

20. *Paragraph 2.* This states the rule that treaty-making capacity in the parties is a necessary condition of the validity (or more strictly of the existence as such) of any treaty, and indicates the main types of international entity possessing it.

21. ". . . (*a*) States in the international sense of the term . . .". This includes protected States, provided that, though not fully *sui juris,* they have a separate international personality and existence. The limitations on their treaty-making capacity are not inherent, but arise from the causes referred to in the last sentence of this paragraph of the article, and in paragraph 4. There may however be "States" which are not States in the international sense at all. Apart from the component states of a federal union, whose case is specifically mentioned in paragraph 3 of the article, there may be other entities, such as certain indigenous rulerships, called states but not possessing international statehood. A prominent example of states not possessing such statehood used to be afforded by the princely states of India. With them the British Government entered into engagements which took the form of treaties, and were usually called treaties,[17] but which were not in fact treaties in the international sense.[18]

22. ". . . (*b*) para-Statal entities . . .". The case of *de facto* authorities in control of territory, insurgents to whom belligerent rights have been accorded, etc. is difficult to classify. But undoubtedly such entities have a measure of international personality. They are subjects of international law, and have certain international rights and obligations. Within the limits involved by the scope of their personality (as indicated in paragraph 4 of the article), they have treaty-making capacity: for instance, insurgents recognized as belligerents in a civil war would certainly possess the capacity to enter into international agreements with third Powers about the conduct of the civil war, and matters arising out of it, affecting those Powers.

23. ". . . (*c*) international organizations . . .". This case is mentioned for the sake of completeness; but, for the reasons given in paragraph 2 of the commentary to the Rapporteur's first report, it will not be further discussed at present.

24. ". . . (*d*) international authorities set up by treaty to administer certain territory or areas . . .". This case is not the same as the last one. International organizations do not normally administer territory, or if so only incidentally. They exist mainly to carry out certain functions of an economic, social, humanitarian, scientific or utilitarian character. But there may be, and from time to time have been,[19] authorities set up *ad hoc* (usually for a limited period, but this is not a necessary condition) to govern or administer certain territory or a certain region. Even if not specifically invested with treaty-making power under the relevant constitutive instrument, it would seem that such an authority must be inherently possessed, as necessary to the performance of its functions, of capacity to enter into international agreements of treaty character on behalf of, or applicable to, the territory or region with the administration of which it is charged.

25. It has been thought preferable, for the present at any rate, not to bring into this article the difficulties that may arise from the conclusion of treaties with unrecognized entities which, however, may possess all the characteristics of statehood. This is fundamentally more a part of the topic of "Recognition" than of "Treaty-making capacity". Very often the conclusion of a treaty with such an entity will constitute the method selected for recognition, and amount to recognition of it; and on the declaratory view of recognition, which the Rapporteur favours, there is nothing anomalous in this.

26. *Paragraph 3.* It has seemed desirable to make special mention of this case because, while there is no doubt that the component states of a federal union are not States in the international sense of the term, and do not possess any international personality apart from that of the federal union to which they belong, they are in certain cases (for example, it is believed, under the Swiss constitution) specifically empowered by the federal constitution to enter into treaties, and have in fact done so on occasion.[20] But does this amount to any more in effect than a species of appointment, authorization or accrediting of the component state or division of the union, as an agent empowered to conclude treaties on behalf of the union as a whole? It is believed not, for—however much such a treaty might relate only, or have its application confined to the territory or affairs of the component state or division alone—it would be the union as a whole that would be bound by it, and that would be the entity internationally responsibile should the treaty not be carried out. In short, the matter is one of form and convenience rather than of substance.

27. *Paragraph 4.* The portion of this paragraph in brackets would probably be omitted in any final code, and be relegated to the commentary. The only case that gives rise to some difficulty is that of the State not fully *sui juris*—the protected State or State under suzerainty. Arising from this status (and it is a matter of status), there are limitations on the treaty-making capacity of the State concerned—for example it can only enter into treaties with the consent of the suzerain; or through the

[17] Or "Sanads". See the volumes of the series known as *"Aitchison"*.

[18] This was made evident through the doctrine of "paramountcy". As the "Paramount Power" the British Government possessed residually all such rights as were not expressly or by necessary implication conferred on the ruler under the treaty, and in the last resort a right of intervention.

[19] For instance, the various régimes of the Saar, Ruhr, Trieste, the régime at one time proposed for Spitzbergen, etc.

[20] There still exists a treaty between the Canton of Vaud and the United Kingdom regulating the status of British residents in that Canton.

agency of the protecting State; or in respect of certain classes of treaties. If these limitations or conditions are not observed, then the State concerned has exceeded its treaty-making capacity as involved by its status, and there is no treaty. The principle concerned has been clearly stated as follows:

> "A State proposing to enter into treaty relations with another State which is not fully *sui juris*, . . . by reason, for instance, of its dependence in any form upon another State . . . is deemed to have notice of this deviation from normal and complete capacity and must satisfy itself that the proposed treaty falls within the limited capacity of the other contracting State. Treaties made by such States in excess of their capacity are void."[21]

Yet in practice, as both McNair[22] and Hyde have pointed out,[23] such treaties have often been made, and there are practically no recorded cases in which objection to them has been taken on grounds of lack of capacity. It is thought that this fact can be accounted for, both actually and juridically, in one or a combination of the following ways: (*a*) it is not usually in the interests of either of the actual parties to the "treaty" to take any objection; (*b*) the transaction is in effect validated or ratified *ex post facto* if the protecting or suzerain power acquiesces *sub silentio* or takes no formal objection—the lack of capacity is thereby so to speak cured; (*c*) the conclusion of the treaty may well be part of a process (or even constitute the act) whereby the State not fully *sui juris* is becoming so, and is throwing off the status of dependency.

28. *Paragraph 5.* It is noteworthy (and this also applies to the question dealt with in paragraph 6) that in the Harvard Research volume on treaties[24] the case where a State (fully *sui juris*) assumes a treaty obligation not to enter into a certain type of international agreement, and the case where a State's treaty-making capacity is limited by its own constitution, are both considered (together with the case of qualified *status* discussed in paragraph 27 above) as cases of lack or partial lack of (international) treaty-making capacity; but that the authors are clearly in doubt whether these two cases properly come under the head of want of capacity. In the Rapporteur's opinion, they do not. Absence of capacity, properly so called, is essentially a matter of *status*—in private law the minor, the married woman, the person of unsound mind, and so on. If a State fully *sui juris* assumes an obligation not to enter into certain treaties or classes of treaties, the ensuing limitation does not arise from status but from a specific and voluntary undertaking. If, ignoring this undertaking, the State concerned does enter into a treaty of the prohibited kind, it will certainly have committed a breach of the undertaking, and in that way an infraction of the rule of international law that requires the observance of international undertakings: but it does not at all follow that the resulting (the new) treaty will be null and void—and even if it were, it would not, properly speaking, be on the ground of lack of capacity to conclude it. Because no question of status is involved, such cases are better viewed as special instances of conflicts between a new and a previous treaty, and as cases in which a conflict with a previous treaty, or a breach of it, occurs because of the conclusion of a later one. This type of case is considered below in connexion with articles 18 and 19.

29. *Paragraph 6.* Even more clearly not a case of lack of *international* treaty-making capacity is that of domestic limitations placed by a State's own constitution on its treaty-making power. If the State chooses to limit its powers in this way, that is its affair, but it is a domestic matter. *Internationally* the State retains (*in posse* at any rate) all its treaty-making capacity. It could at any time (and at will, so far as any international consideration goes) alter its constitution and resume or take up the full exercise of powers it has always inherently possessed (internationally). Consequently, if a State under such a (domestic) limitation, nevertheless enters into a "prohibited" treaty, the nullity of the treaty cannot be predicated on grounds of lack of international treaty-making capacity. The issue will be a different one, and will fall under the head of the effect on a treaty of a failure by the State or its executive organ, in becoming a party to the treaty, to observe its own domestic constitutional requirements. This is considered below in connexion with article 10.

30. *Paragraph 7.* This seems sufficiently self-explanatory. Some discussion of the matter is contained in paragraph 5 above.

Sub-section 2. Requirements (other than formal) attaching to the origin and method of procurement of the treaty. (Impediment of defective consent)

Article 9. Consent in general

31. *Paragraphs 1 and 2.* These are self-explanatory and call for no special comment.

32. *Paragraph 3.* This also calls for no special comment in itself. Lack of *consensus ad idem*, although it constitutes the end result, is invariably brought about by error or mistake, and is usually dealt with as part of that subject under domestic law. It presupposes the outward semblance of agreement however. If the parties were so much at variance in their views that no agreement at all could be reached, then clearly there is no treaty. If there is an outward semblance of agreement, then, if nevertheless there was a lack of *consensus ad idem*, there must somewhere have been an error or mistake on the part of one or both parties.[25]

Article 10. The question of compliance with constitutional or other domestic requirements

33. The Rapporteur is conscious that the view to which this article gives expression, even as modified by the second paragraph, runs counter to the prevailing current of opinion. Yet he has felt it necessary, or at any

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[21] Arnold D. McNair, "Constitutional Limitations upon the Treaty-making Power", introductory note in *Treaty-making Procedure. A Comparative Study of the Methods obtaining in Different States* compiled by Ralph Arnold (London, Humphrey Milford, 1933), p. 3. The author also cites the maxim *qui cum alio contrahit vel est, vel debet esse, non ignarus conditionis ejus*, and quotes Hyde to the following effect:

> "In the negotiation of treaties with dependent States the burden rests upon the other contracting parties to ascertain the scope of the agreement-making power retained by the former, as well as the mode by which it is to be exercised".

[22] McNair, *op. cit.*

[23] Charles Cheney Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2nd rev. ed. (Boston, Little, Brown and Company, 1947), vol. II, pp. 1377-1379.

[24] Harvard Law School, *Research in International Law, III. Law of Treaties*, Supplement to the *American Journal of International Law*, vol. 29 (1935), pp. 707-710.

[25] It may of course have been induced by fraud or fraudulent misrepresentation, in which case, according to the common-law doctrine at any rate, there is a *consensus*, but one which is vitiated: the contract is voidable but not void *ab initio*. See further, para. 96 below.

rate desirable at this stage, to put it forward as constituting the view which he considers to be the internationally correct one. The contrary view is that (subject to certain safeguards, and to a liability which may exist for the State concerned in certain circumstances to pay damages or make other reparation) failure to comply with domestic requirements or limitations is a ground invalidating the State's participation in the treaty. This view has been argued with all his usual learning and persuasiveness by the present Rapporteur's predecessor, Sir Hersch Lauterpacht; and for the arguments in support of that view it is sufficient to refer to his report covering this topic (A/CN.4/63, part III, sect. I). Nor does the Rapporteur propose at present to develop fully the counter-arguments in support of the view now put forward, beyond noticing one or two salient points.

34. What may for convenience be called the "constitutional requirements" view, is in certain respects difficult to reconcile with the equally current monistic doctrine of the kind that postulates the absolute superiority and prevalence of international over domestic law, at any rate as regards everything that takes place in the international field—for here in effect is a case where domestic or internal constitutional considerations are allowed to prevail over and to determine the character of what purports to be an international act. The Rapporteur is aware that this statement of the matter is criticizable, for the fundamental principle involved, and repeatedly affirmed by international tribunals,[26] is that a State cannot plead or take shelter behind internal constitutional or domestic law difficulties, requirements, limitations or deficiencies in order to evade (or as a ground of non-performance of) its international obligations. But, it may be contended, the whole question here is precisely whether the State has incurred an international obligation. That may be true, although it is not conclusive; but whether or not there is an international obligation there is an international *act*—suppose it consists, for instance, of an instrument of ratification in proper form, on the face of it regular, signed by a normal authority such as the Head of the State or Foreign Minister, as the accredited executive agent of the State in the international sphere, and duly deposited or transmitted to the other party to the treaty, or to a depositary government or international organization, through the usual diplomatic channels—an act which, in itself, has complete international validity according to general international law and practice. Yet the international character and validity of this act is, according to the "constitutional requirements" view, to be governed and determined in the last resort entirely by considerations of an internal domestic character peculiar to the State concerned, and with which the other parties have and can have nothing to do. Thus, according to this view, it would, in the last resort, be domestic not international law which would prevail and govern the character and effect of this international act.

35. It may be urged in reply to this, that it is nevertheless international law which governs, because if international law provides that in certain circumstances domestic considerations shall prevail, then, if in fact they do prevail, and in consequence an international act is invalidated, it is precisely by virtue of a rule of international law that this occurs. But clearly this outcome (which might be valid if international law did in fact contain such a rule) cannot be used as an argument for the view that it does contain one—and this of course is the whole question. If international law did contain such a rule, it would thereby in some sense be denying itself, and acting in a manner contrary to—or at any rate difficult to reconcile with—the prevailing doctrine as to the supremacy of international law over domestic law. This fact creates a strong presumption that it does not.

36. The argument usually advanced—and perhaps the only tenable argument that can be advanced—in favour of the view that in this particular matter international law allows domestic law to prevail, is the argument founded on the necessity for reality of consent. The consent given by the State must be a real consent, not vitiated by constitutional defects; and it must be given by the State as a whole and not merely by a particular organ of the State acting in defiance of another, or at any rate without its consent where, constitutionally, such consent is required; or again, it is said, the consent cannot be real, or is vitiated, or does not really represent the will of the State, if it ignores limitations placed on the treaty-making power of the State by its own constitution.

37. These are clearly weighty arguments. But could they not be used with equal force to invalidate almost any act of the executive authority on the international plane (and not merely in respect of treaties) where such act ran counter to some limitation or requirement imposed by the domestic law? For instance (a not impossible contingency in the present climate of opinion), suppose the domestic law of a country prohibited its ambassadors abroad from enjoying certain privileges and immunities, would this invalidate the act of the executive organ of the State in claiming those very privileges and immunities which, under international law, it was entitled to claim, and the receiving State bound to grant unless waived? Could the receiving State say in effect: "No, for you are prohibited by your own law from claiming these privileges and therefore we are not bound to grant them"? Suppose again that the domestic law of a State, running in advance of average opinion, prohibited the use by its armed forces of certain weapons, although the use of these weapons was perfectly legitimate under international law, and normal as a matter of current practice. Suppose that in a war the armed forces of this country nevertheless use these weapons. Could another country maintain that this was illegal because, in using these weapons, the armed forces were ignoring limitations placed upon their actions by their own domestic or constitutional law requirement?[27] Examples could be multiplied indefinitely, but these will suffice. Admittedly the parallelism with the case of "unconstitutional" participation in a treaty is not exact;[28] but it is close enough[29] to show the sort of possibility that opens out once the view prevails that States are bound (and therefore entitled) in their international dealings to take account of one another's domestic law requirements, constitutional limitations, etc. —once in fact the view prevails that the acts of the ac-

[26] See, for instance, the well-known dictum of the Permanent Court of International Justice in the case of the *Treatment of Polish Nationals in Danzig*, in *Judgments, Orders and Advisory Opinions*, series A/B, No. 44, pp. 24 ff.

[27] Or suppose an even close analogy, that under the domestic law the armed forces, though under the control of the executive, could only make use of certain weapons (even though lawful internationally) with the express consent of the legislature.

[28] Because in the latter case, the other State or States concerned would be affirming a right (the treaty) not denying one.

[29] In the reverse case, for example, where the domestic law might *deny* to *foreign* diplomatic missions privileges and immunities recognized by international law, there would be no question but that the domestic law did *not* prevail. Yet in the other case it is said to prevail. There is certainly an inconsistency here.

credited executive organ of the State, acting as its agents on the international plane, are not conclusive, whether to bind, or to acquire or assert rights on behalf of the State: for if it is the case that the façade of the accredited executive organ, acting as the agent of the State on the international plane, can be pierced for the purpose of determining whether the State is bound by its acts, then it can equally be pierced for the purpose of determining whether the State can assert rights; even ordinary international law rights; and the capacity of States to do so ceases to be governed by international law and becomes governed by their own domestic constitutions and legislation.

38. There is much more to be said on this subject, and on both sides. The Rapporteur will not carry the matter further now, though he may devote part of a supplementary report to this topic at a later stage. In conclusion, the following passage may be noted taken from Hyde, who, as a national of a federal State in which constitutional limitations loom large, cannot be suspected of naturally favouring the view here presented by the Rapporteur:

> "The constitutional or fundamental law of a contracting State may in terms give sharp warning to all concerned as to objectives not to be dealt with, or agencies not to be employed in treaty-making, or modes of procedure that are to be avoided. Disregard of them may not be excusable on the part of a foreign contracting party. That law may, however, also contain inhibitions that are not apparent even to those who negotiate. The provisions of an agreement may thus contemplate the performance of acts or the use of methods which a foreign contracting party may, after diligent effort to inform itself as to the requirements of the law, have no reason to suppose to be at variance with any constitutional restriction. In such case, there may be room for the contention that the other contracting State which proposed or willingly accepted the agreement, and even formally declared it to be constitutional, is not in a position to plead invalidity in justification of non-performance, or in defense of a claim for losses sustained in consequence of a failure to perform. Thus, it may be said that where a contracting State holds out to another assurance that the terms of a proposed agreement are not violative of the fundamental laws of the former, and does so through an agent who is supposedly conversant with the requirements thereof by reason of the character of his connexion with the particular department of his government to which is confided the management of foreign affairs, and when no written constitution is involved, and no published and authoritative instrument notoriously proclaims an opposing view, there is ground for the conclusion that the contracting State holding out such assurance is not in a position to deny the validity of the agreement which has been concluded in pursuance thereof."[30]

Article 11. Error and lack of consensus ad idem *(analysis and classification)*

39. *General remarks.* The case of error (and the same applies in effect to that of fraud and duress) is extraordinarily difficult to deal with in the context of treaty law, for two main and connected reasons: first, the extreme paucity of arbitral or judicial decisions on the subject, the very few recorded cases of error etc. affecting treaties, and the very summary treatment given to the subject by the great majority of writers on international law; and secondly (and of course in effect accounting for the first) the sheer inapplicability in the international field of many of the private law doctrines of contract on which these concepts are based, because of the lack of correspondence in the situations occurring in that field with those which normally occur in the domestic field and which have given rise to the evolution of these concepts, and to the extreme refinements to which they (and error in particular) have been subjected in many systems of private law. This matter has already been referred to in the general introduction to this report (paras. 2 and 3). It is thus that authorities such as, for example, Rousseau,[31] who go fairly deeply into many points of treaty law, prefer to dismiss the question of the *"vices du consentement"* as one which *"ne se pose pas en droit international comme en droit interne"*, and the specific cases of error etc. as mere *"hypothèses d'école"*. It is difficult to quarrel with this view, or to deny the fact that if in private law certain forms of consent are *"entachés de vice"*, in international law the question whether they are, is *"entachée d'invraisemblance"*. Nevertheless, for reasons given in the introduction (para. 5), it is necessary to deal with the matter. Rousseau, apart from drawing attention to the very few concrete cases that have arisen, does not discuss the theoretical aspects of error or fraud at all. Chiefly in connexion with duress however, he does discuss the general question of how far private law concepts on these topics can be imported into the international field, and the various theories which have been prepounded in that connexion. At one extreme, there is the traditional or classical theory of the integral translation of private law contract doctrines into the field of treaties[32] a theory which in modern times has been taken up again by such authorities as Verdross and Weinschel, and, in a more modified form by Le Fur. Next, there are the theories based on a greater or lesser degree of adaptation of the relevant private law concepts to the peculiar conditions of the international field, advocated by such authorities as Fauchille, Westlake, Oppenheim, Anzilotti, Cavaglieri, Strupp and Fernand de Visscher. Finally, at the other extreme, there are the "objectivist" theories of Professors Scelle and Salvioli, which in effect deny the relevance of "contractual" considerations, and propose to determine the validity of the treaty, and of the consent given, solely by reference to the content and object of the treaty and of the reasons why that consent to it was sought or procured, rather than by reference to the character of that consent and of the acts or methods whereby it was obtained.

40. The discussion is an interesting one, but the result is inconclusive. The objectivist theory seems to the Rapporteur difficult to accept, for it implies the view that the end justifies the means: If the object of the treaty is sufficiently good, the vices of its origin may be overlooked. The classical theory cannot be accepted either, for it involves importing into the international field concepts and refinements for which there is simply no place there. This leaves the theories which seek to adopt these

[30] Hyde, *op. cit.*, p. 1385.

[31] Charles Rousseau, *Principes généraux du droit international public* (Paris, Editions A. Pedone, 1944) vol. 1, pp. 339-354.

[32] Whether this view is in fact traditional has been questioned by Lapradelle and Politis in a passage (quoted on p. 1131 of the Harvard Research volume) which takes the opposite view: "Cette proposition semble, a première vue, contredite par la doctrine généralement reçue que les vices du consentement ne sont pas dans le droit du gens, des causes de nullité des traités".

concepts to the situation in the international field: but here the difficulty is to know what kind and degree of adaptations to make, and there is very little that is definite to go upon. The present articles (11 *et seq.*) represent a provisional attempt to meet this difficulty.[33]

41. *Paragraph 1.* It is generally agreed that only basic errors can vitiate a treaty, and it so happens that one of the few judicial decisions in this field supports that view.[34]

42. *Paragraph 2, sub-paragraph* (a). It is usually stated that the error must be mutual; but there are two kinds of mutual error. There is the case where the error is common and identical—the parties are both mistaken, and about the same thing or in the same way; and there are the cases where the parties are both mistaken but about different things or in different ways. This matter is discussed further in paragraph 44 below.

43. *Sub-paragraph* (b). For discussion, see paragraph 45 below.

Article 12. Error and lack of consensus ad idem *(effects)*

44. *Paragraph 1, sub-paragraphs* (a) *and* (b). About the case of common and identical error mentioned in paragraph 42 above, there can be no doubt, if the error is material. It is upon this ground that certain boundary treaties which incorrectly predicated the existence of rivers or other geographical features afterwards found not to be there, have been rectified.[35] In the Harvard Research draft on the law of treaties, article 29, which is entitled "Mutual error", seems to be based on the view that the common and identical form of error is the only one that can invalidate a treaty. The authors, basing themselves on the American Law Institute's *Restatement of the Law of Contract* (sec. 502), deny that there would be grounds of nullity "if mistakes are made by both parties and they relate to different matters".[36] It would seem however that this must depend on whether these errors did or did not prevent the parties from reaching a *consensus ad idem.* If for instance A sells B a chair believing it to be an eighteenth century chair, and B buys it believing it to be a seventeenth century chair, whereas it is in fact a sixteenth century chair, both are mistaken: yet there is a contract, for both intended to buy and sell a chair, and, moreover that identical chair. It may well be that B buys the chair because he hopes to re-sell it to a client interested in seventeenth century furniture; and A may well have sold it because he believes the market for eighteenth century chairs is declining and he should not retain any. Both will be disappointed, but there is no ground upon which either could claim a rescission of the contract. Suppose however that A believes himself to be selling B an armchair, whereas for some reason B thinks that it is a sofa which he is buying from A, then it would not be unreasonable to hold that there is no *consensus ad idem* and therefore no contract.

45. *Sub-paragraph* (c). Into this category fall by far the most difficult cases—that is to say those in which one of the parties will wish unilaterally to avoid the contract on the ground that in concluding it he was under a misapprehension, but for which he would not have done so. It seems best here to follow the doctrine of English contract law based on the necessity for ensuring the stability and certainty of contracts—an aim which also holds good in the field of treaties. This doctrine is broadly to the effect that each party must accept the responsibility for, and suffer the consequences of, its own mistakes, provided these have not been induced or contributed to by the fraud or other culpable act or omission of the other.[37] An example commonly given[38] is the case where A sells B a piece of china, which B buys believing it to be Dresden china. A knows it is not, but, even though he also knows that B thinks it is, and is buying it for that reason, the contract holds good so long as A is simply silent, sells the piece as "china" only, has not contributed to B's error, and does not hold himself out as purporting to sell a piece of Dresden china. Even if B (mistakenly) *thinks* A is purporting to sell it as Dresden, the contract still holds good if A does not know B to be under that misapprehension, although he may be aware of B's mistake about the quality of the china itself. It is only if A personally misrepresents the nature of the china, or, *knowing that B thinks he (A) is selling it as Dresden,* nevertheless allows him to buy it without disclosing that it is not, that the contract will be void.[39] The difference of principle is this—that up to a certain point B's error is simply an error of *judgement* as to the quality of the china, the responsibility for which is his. But beyond that point, B's error becomes (additionally) an error about the nature of A's *offer*—that the china not only is Dresden, but that A is selling it as such. If this further error has been caused by A; or if A, knowing of it, fails to rectify it, then the contract is void. It would obviously not be possible to translate all these refinements (and there are of course many others) into the field of treaties. But there does seem to be good ground for the broad principle that mere unilateral error does not invalidate a treaty unless the error is in some way attributable to the fault of the other side.

46. *Paragraph 2.* Sub-paragraph (a): This is generally admitted—*ignorantia legis neminem excusat. Sub-paragraph* (b): This is in effect covered by what has been said above. *Sub-paragraph* (c): See the Harvard Research volume, page 1129. *Sub-paragraph* (d): The object here is clearly to distinguish the case of factors affecting the essential validity of a treaty (which must therefore be factors existing or occurring contemporaneously with its conclusion), from factors occurring or arising *subsequently,* which cannot therefore affect the essential validity of the treaty *as made,* but can only, if at all, affect the question of its continuing existence. If factors of the latter class have any effect, it is to bring about the *termination* of the treaty but not to nullify it.

47. *Paragraph 3.* The case here contemplated seems (provided the conditions of paragraph 2 of the article are satisfied) to form a reasonable ground of exception to the general rule that unilateral error does not invalidate in the absence of fault on the part of the other party. In this type of case, the error can *ex hypothesi* not be mutual, but may none the less have fundamentally the same sort

[33] Not the first of course in the present context, for these matters were also covered by Sir Hersch Lauterpacht in his first report (A/CN.4/63).

[34] See the *Mavrommatis* case (Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions,* series A/B, No. 14, p. 31).

[35] Such cases (they are few) are cited in almost all the books.

[36] Harvard Law School, *op. cit.,* p. 1131.

[37] *Ibid.*

[38] See a standard textbook for students by Sir William Reynell Anson, *Law of Contracts,* 19th ed. (London, Oxford University Press, 1945, p. 161).

[39] See the English cases of *Smith v. Hughes,* 1871 L.R. 6 Q.B., at p. 610, and *London Holeproof Hosiery Company, Limited v. Padmore,* 1928, T.L.R. 499.

of characteristics as are often to be found in the case of mutual errors, for example, as to the existence of the *res* which is the object of the treaty, or necessary to the discharge of the treaty obligation.

48. *Paragraph 4.* This embodies the principle discussed in paragraph 45 above. See also the Harvard Research volume, page 1131.

Article 13. Fraud or misrepresentation

49. The general observations made in paragraphs 39 and 40 above are equally applicable to the case of fraud. This subject, as indeed that of error and also duress, is equally dealt with in Sir Hersch Lauterpacht's first report (A/CN.4/63, part III, sect. II) already referred to in paragraph 33 above.

50. *Paragraph 1.* This requires no explanation except to say that, although fraud is always fraud, it does not seem that it should invalidate a treaty, if otherwise regular, unless it relates to something material, affecting the basis of the treaty. Furthermore, the fraud must clearly have caused or contributed to causing the other party to enter into the treaty. The misrepresentation must in fact mislead. If it can be shown that it did not affect the judgement of the other party, or that such party knew the correct facts and still entered into the treaty, there is no ground of invalidity.

51. *Paragraph 2.* Various definitions of fraud are possible. This one is based on the leading English case of *Derry v. Peek*[40] and on the Harvard Research volume (p. 1145).

52. ". . . or without belief that they are true, or indifferently as to whether they are true or false . . .". This phrase is based on the dictum of Lord Herschell in giving the decision of the House of Lords in the leading English case of *Derry v. Peek* when he said that:

> ". . . fraud is proved when it is shown that a false representation has been made, (1) knowingly,[41] or (2) without belief in its truth, or (3) recklessly, careless, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states."[42]

53. The second sentence of the paragraph represents what seems to the Rapporteur to be the best way of dealing with the case of innocent misrepresentation, which in private law gives rise to a good deal of difficulty.[43] If the misrepresentation is really innocent, then the party making it is himself under a misapprehension and induces a similar misapprehension in the other. The case therefore becomes one of mutual, or rather common and identical error, and the contract (treaty) will be invalidated on that ground, if the error is a material one.

54. *Paragraph 3.* As parties are presumed to know the law, and only ignorance of it would enable a misrepresentation about it to deceive, such a misrepresentation is not, as a matter of law, fraud.[44]

55. *Paragraph 4.* This deals with a difficult case. Generally speaking mere expressions of opinion (as opposed to affirmations of fact), even if made in the hope of misleading, do not amount to fraud, because an opinion is only an opinion, and it is for the other party to verify or confirm it or take the risk of not doing so. However, in certain cases, an expression of opinion may involve a fraudulent element—in particular when made in the *knowledge* that the opinion is false or incorrect, for in that case there is at least a misrepresentation about the opinion actually held by, and about the state of mind of, the party expressing it. The point may be carried even further: in the English case of *Smith v. The Land and House Property Corporation,* Lord Justice Bowen said:

> ". . . it is often fallaciously assumed that a statement of opinion cannot involve a statement of a fact. In a case where the facts are equally well known to both parties what one of them says to the other is frequently nothing but an expression of opinion . . . But if the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."[45]

On the other hand, *simplex commendatio non obligat,* the sort of encomiums and eulogies, even if exaggerated and possibly untrue, which those who have wares to recommend normally indulge in, rank as mere expressions of opinion so long as they are not actual misdescriptions and do not amount to warranties of quality—not that any of this is very apposite to the case of treaties.

56. *Paragraph 5.* This paragraph is based, so far as the treaty field is concerned, on the Webster-Sparks-Ashburton affair referred to in the Harvard Research volume (pp. 1146-1147).[46] But it also embodies a rule of private contract law to the effect that "mere silence is not misrepresentation"[47] and that "Simple reticence does not amount to legal fraud, however it may be viewed by moralists".[48] This principle might be said to apply where the risk, so to speak, is equal for both parties; but not where it is clearly much greater for one than for the other. The second half of the paragraph is based on the doctrine relating to contracts *uberrimae fidei,* namely, that where the circumstances are such that the material facts are, and must be, peculiarly within the knowledge of one party only, it becomes a duty incumbent on that party to make a full disclosure of them.[49] This is a situation that may well arise in the international field, owing to the difficulty which one country may have in ascertaining the facts as to conditions in or relating to another.[50]

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[40] 1889, 14 Appeal Cases, 337.

[41] That is, in the knowledge of its falsity. [*Note by the Special Rapporteur.*]

[42] 1889, 14 Appeal Cases, 374.

[43] If anyone doubts this, he is invited to read the relevant sections on this subject in one of the latest and clearest English books on contract law: G. C. Cheshire and C. H. S. Fifoot, *The Law of Contract,* 4th ed. (London, Butterworth and Co. (Publishers) Ltd., 1956), pp. 220-225, 239-243, and 243-247.

[44] That is, a misrepresentation about the general law. It may be a fraud to make misrepresentations about a particular *right,* for example, about the contents of a will or deed.

[45] 1884, 28 Chancery Division, 7, at p. 15.

[46] See also John Bassett Moore, *A Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. V, p. 719.

[47] Cheshire and Fifoot, *op. cit.* (footnote 43, above), p. 215.

[48] Lord Campbell in *Walters v. Morgan* (1861), 3 De G.F. and J., at p. 723.

[49] Contract of insurance are a prominent example of this type of case, for only the proposer knows the facts relevant to the proposal for insurance he wishes to make.

[50] A somewhat similar doctrine was enunciated by the International Court of Justice as regards a State's peculiar means of knowledge of what goes on in its territory and the correspond-

Article 14. Duress

57. *Paragraph 1.* This states the traditional rule as it is to be found quasi-universally expressed in the authorities and text-books. The coercion and violence may take the form of a threat only, but, subject to the point contained in paragraph 2 of the article, must be directed against the person or persons concerned in their individual capacity, and not merely against either their State, or against them simply in the sense that as nationals of the State they will, so to speak, share in any misfortunes it suffers as a result of their non-compliance. This matter is further discussed below in connexion with paragraph 4 of the article.

58. ". . . duress or coercion, whether physical or mental . . .". Many writers limit the case to physical coercion, or at any rate do not mention anything else. It is stated, however, in the Harvard Research volume (p. 1157) that the coercion may be physical or mental. In view of certain modern methods of compulsion summed up by the term "brainwashing", there seems to be no doubt at all that this should be covered, even though, since the Harvard volume was drafted some twenty-five to thirty years ago, this type of case was not quite what it had in mind.

59. *Paragraph 2.* This corresponds with the relevant rule of private law and seems necessary.

60. *Paragraph 3.* The first part of this paragraph again corresponds to the private law position, and although the border line between entreaty or persuasion on the one hand, and threats on the other, may sometimes be difficult to draw, the distinction is valid in principle. "Undue influence" is perhaps mainly a doctrine of Anglo-American jurisprudence. It contemplates and covers a good deal more than the influence that one party to a contract can bring to bear on another by reason of some definite relationship between them such as that of parent and child, guardian and ward, doctor and patient, priest and devotee. In these cases the law virtually raises a presumption of undue influence arising from the nature of the relationship. The presumption can of course be rebutted by evidence that no undue influence was employed. But the doctrine also extends to any case in which, even though there is no special relationship between the parties, one can be shown to have acquired an influence over the other which may be open to abuse (for example, that gained by a person of strong will over one of weak intellect).[51] But here the law raises no presumption of undue influence and this must be affirmatively established. In any system of private law the aim of such a doctrine is to protect individuals placed in certain positions. In the international treaty field, however, there seems to be little room for such a doctrine. In considering whether duress or coercion has been used against the persons of negotiators or members of a ratifying authority, it would be inappropriate to take into account such considerations, nor in general would the occasion for doing so arise.

61. *Paragraph 4.* The object of this paragraph is to make it clear that it is for his own (or a dependant's) person that the negotiator must fear, not for his State; and in a direct sense, i.e., not because he may subsequently suffer because his State suffers. In short, a threat that, if the negotiator does not sign, his country will be invaded, or the capital will be bombed, is not duress within the meaning of this article. It is pointed out in the Harvard Research volume (pp. 1153-1154) that some writers[52] have contended that "force cannot be used against a State for the purpose of compelling the acceptance of a treaty without its being necessarily directed against the persons or organs in whom or in which the treaty-making power is vested". Consequently, a threat, for example, of bombing or occupation, is "in the last analysis . . . of necessity addressed to those persons or organs which are charged with the conclusion of treaties and which alone are competent to comply with the terms of the ultimatum . . . therefore . . . indirectly at least, they are subjected to duress". The Harvard volume, however, goes on to state (p. 1154) that "This is not . . . the duress which is envisaged by this Convention, and it is not that which writers on international law generally have in mind when they declare treaties obtained as a result of duress to be invalid or voidable". Clearly this raises the whole issue of the use or threat of force to coerce not the individual negotiator, but the State itself. Something about this must now be said.

62. The Rapporteur is naturally aware that, according to a very strong current of present-day opinion (and according also to the views most eloquently and forcefully expressed by his predecessor as Rapporteur, Sir Hersch Lauterpacht, in his first report (A/CN.4/63, part III, sect. II)), it is not merely in the case of force, or the threat of it, applied to the person of the negotiator or other individual involved in the treaty-making process that the treaty is invalidated, but also if force is used or threatened directly against the State itself. This view cannot be ignored; yet, leaving all theoretical considerations on one side, it is a view that encounters great practical difficulties. 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 paramount consideration, it must follow logically that peace may, in certain circumstances, have to take precedence for the time being over abstract justice—*magna est iustitia et praevalebit*, but *magna est pax: perstat si praestat.*

ing difficulties of knowledge for other States. See the article entitled "The Law and Procedure of the International Court of Justice: International Organizations and Tribunals" by G. G. Fitzmaurice in *The British Year Book of International Law, 1952*, pp. 58 ff.

[51] Or the influence which an older man may exercise over a younger if unduly pressed and abused. See *Smith v. Kay* (1859), 7 H.L.C. 750 at p. 794.

[52] For example, Herbert Weinschel, "Willensmängel bei völkerrechtlichen Verträgen", *Zeitschrift für Völkerrecht* (1929-1930) (Breslau, J.U. Kern's Verlag (Max Müller), 1930), vol. XV, pp. 446 ff.

63. After mature reflection the Rapporteur has come to the conclusion that the whole of this subject, of the greatest importance (as it clearly is), is yet part of a wider problem—the problem of what exactly, in the light of modern conditions and juristic ideas, should be consequences of the illegitimate use or threat of force; and that, viewed in this context, it is neither appropriate nor desirable to attempt to deal with the question of the effect of force on treaties in isolation and apart from its connected elements. With these very general observations he will, for the present, leave the subject, though evidently it will call for further comment later. (See also the point made in regard to this subject towards the middle of paragraph 3 of the introduction to the present report.)

64. *Paragraph 5.* There is general agreement on this point, the rationale of which is obvious.

Sub-section 3. Requirements attaching to the object of the treaty. (Impediment of defective content)

Article 15. Impossibility of the object

65. With this article there is reached the class of case in which the requirement, and the corresponding impediment or defect, attaches to the *content* of the treaty as contrasted with its origin or method of procurement, or the character (i.e., capacity) of the parties.

66. *Paragraph 1.* The object must in the first place be a possible one, or the treaty will have no sphere of operation and will be abortive. This is not strictly a case of an instrument invalid *in se,* but there are grounds for treating it under the head of essential validity which have already been mentioned (see para. 16 above).

67. ". . . in the literal sense . . . impossible . . .". For an attempted definition of "literal impossibility", see subhead (*b*) of case (iv) in article 17 of part III in the rapporteur's second report, which might perhaps also be incorporated here. See also paragraph 98 of the commentary in the same report, relative to the case of supervening or *subsequent* impossibility of performance, which has a certain relevance in the present connexion.

68. *Paragraph 2.* This distinguishes the case of initial and original impossibility from that of supervening impossibility arising from some subsequent occurrence which may bring the treaty to an end but will not render it void or inoperative *ab initio.*

69. *Paragraph 3.* Except in those cases where one party may have misled the other as to the possibility of the object of the treaty (as to which see paragraph 70 below), it seems clear that—since the parties would not have concluded the treaty if they had known it to be impossible of execution—they must have entertained a common and identical error on the subject. The case could in fact be treated as one of error. Nevertheless the defect seems to be one that attaches objectively to the substance of the matter rather than arising subjectively from the state of mind of the parties.

70. *Paragraph 4.* Impossibility being a fact, it is not affected by the circumstance that one of the parties knew of it and has actively or passively misled the other as to the true state of affairs, or has otherwise been at fault, for example, by negligence or failure to make adequate enquiries, or by causing or contributing to the impossibility. The treaty will nonetheless be inoperative. However, in so far as the fault or neglect of one party may have caused the other to take some step in connexion with the conclusion of the treaty which may be to that party's detriment if the treaty proves impossible of execution, or to incur expense in connexion with it, the party at fault may be liable to pay damages or make other suitable reparation. A similar point arose in connexion with article 16, paragraph 4, of part III in the second report. See also paragraph 91 of the commentary to that report.

Article 16. Legality of the object (general)

71. *Paragraph 1.* The implications of this paragraph are discussed below in connexion with paragraphs 2 and 3 of the article and with articles 17 and 18. It states the general principle that treaties must have a "lawful" object, and such a requirement usually figures in the authorities. But in itself it means very little until it is ascertained or determined what this involves, and more particularly what will cause the object to be illegal in such a way as to invalidate the treaty. Neither the mere fact of departure from general rules of international law, nor of conflict with a previous treaty, will of themselves necessarily have that effect. There are a number of different possibilities leading to different results.

72. *Paragraph 2.* This states the principle, to be more fully discussed in connexion with article 17, that it is inconsistency only with certain types of general international law rules that will invalidate a treaty. Within fairly wide limits, international law permits countries, if they so desire, to agree upon rules or a régime, for application *inter se,* that may be different from the normal.

73. *Paragraph 3.* The subject of the legal consequences that result when one treaty is at variance or in conflict with the provisions of another is surrounded with a good deal of confusion—partly owing to the failure to draw sufficiently clear or comprehensive distinctions between the various cases that can arise. Strictly, in the Rapporteur's view, the subject does not belong there at all—that is to say it is not really a question of essential validity. It belongs rather to the general topic of the *effects* of treaties which will form the subject of the second chapter of this Code, the present (first) chapter being on validity. However, it is necessary to treat of it to some extent in the present chapter in deference to the views of a number of authorities who have dealt with it as a matter relating to validity. Therefore this paragraph poses the principle, which the Rapporteur believes to be the correct one, and which will be more fully discussed below in connexion with article 18, that incompatibility with a previous treaty gives rise *primarily* to a conflict of *obligation* and does not necessarily (and certainly does not usually) *invalidate* the later treaty (indeed it may "invalidate" the earlier one, for example, where the parties to the two treaties are identical and the effect of the later treaty is to supersede and therefore terminate the earlier, or at any rate to prevail over it in respect of the occasion of conflict).[53] What the conflict does (except in the special case just noticed), or rather what the conflict *is,* is not so much a conflict between two *treaties* but, as just stated, a conflict between two sets of *obligations* of certain of the parties; but only of certain parties be it noted, for, *ex hypothesi,* this case cannot arise where the parties to the two treaties are wholly common and identical. In all other cases, if there is conflict it will necessarily affect solely the position of those countries which are parties to both treaties. Only for them can this conflict arise. For the countries which are parties to only one of them—in

[53] This was considered in the Special Rapporteur's second report. See article 13 of part III in that report and the commentary on that article.

particular, in the present context, those who are parties *only* to the later treaty—there is no conflict or possible cause of invalidity, at least if they entered into the treaty without knowledge of the previous treaty or of the inconsistency. As will be made clearer presently, this is quite likely to be the case, and if so, then, as "innocent" parties, such countries will be entitled to insist on the full performance of the treaty, or reparation in lieu thereof; and this is a primary reason why, in this type of case, and whatever else may result, the later treaty cannot be *invalid* merely because, in entering into it, one or more of the parties has created a conflict for itself with the provisions of an earlier treaty to which it (but not the other or others) is also a party. The law must evidently provide some means of resolving this conflict, but it cannot always be by pronouncing the automatic invalidity of the later treaty. This must depend on the type of treaty and that question will be considered in connexion with article 19.

74. Where on the other hand there are no parties to the later treaty who are not also parties to the earlier, the case may be different. This occurs only in the pluri- or multilateral treaties, where some of the parties to such a treaty agree upon a different régime for application amongst themselves, or so far as their relations *inter se* are concerned. Even here, for reasons which will be explained, the Rapporteur doubts the desirability of introducing the notion of the necessary invalidity of the later treaty, and believes it would often suffice, and be preferable, to let the matter rest on the simple basis of a conflict of obligation, to be resolved through the medium of the continued validity of the earlier treaty, and its priority or prevalence in the relations between the parties to it who are not also parties to the later treaty, and the parties who are. However, there are considerable complications here because not all treaties function in that way (i.e., "in the relations between the parties"), and further consideration of this matter will be called for below.

75. *Paragraph 4.* The fact that a treaty is *res inter alios acta* for non-parties to it, and therefore *ex hypothesi* cannot (whether its object is lawful or unlawful, or in conflict or not in conflict with a previous treaty) impose any obligations on third States, or affect the legal position or rights of these, is the key to the whole problem of "illegality", and in a certain sense renders that problem otiose and unreal. If even a fully "lawful" treaty cannot impose obligations on, or take away the rights of countries that are not parties to it, it goes without saying that an "unlawful" one cannot. Therefore, much of the discussion on this subject has been beside the point, for it is evident that the only real question that can arise is what situation does an "unlawful" treaty produce for, or as between, the parties to it. This, as will be seen presently, depends on the character of the illegality or conflict, and of the treaty itself.

Article 17. Legality of the object (conflict with international law)

76. This article is largely self-explanatory. The rules of international law in this context fall broadly into two classes—those which are mandatory and imperative in any circumstances (*jus cogens*) and those (*jus dispositivum*) which merely furnish a rule for application in the absence of any other agreed régime, or, more correctly, those the variation or modification of which under an agreed régime is permissible, provided the position and rights of their States are not affected. This distinction is not always made clear in the authorities, with the result that many statements to the effect that treaties are void if "contrary" to international law become misleading. Contrary in what sense, is the question. In actual fact, a very large part of international law falls within the second of the above-mentioned categories. For instance, there would be nothing to prevent two States agreeing on a mutual discontinuance of any claim to diplomatic privileges and immunities for their missions or personnel in each other's territories (a sort of permanent and standing waiver), but both would of course be obliged to continue granting full privileges and immunities to the representatives of other countries. Or again, if the correct limit of territorial waters under general international law is x miles, there is nothing to prevent two States from agreeing that, as between themselves, they will apply a limit of $x + y$ miles, provided that they do not attempt to apply the latter limit in respect of the ships or nationals of third countries.[54] It is therefore only as regards rules of international law having a kind of absolute and non-rejectable character (which admit of no "option") that the question of the illegality and invalidity of a treaty inconsistent with them can arise. Thus if two countries were to agree that, in any future hostilities between them, neither side would be bound to take any prisoners of war, and all captured personnel would be liable to execution, it is clear that even though this was intended only for application as between the parties, and not vis-à-vis any other country that might be involved in hostilities with either of them, such an arrangement would be illegal[55] and void.[56] Most of the cases in this class are cases where the position of the individual is involved, and where the rules contravened are rules instituted for the protection of the individual. A different type of case—on the basis that the planning of wars of aggression is illegal—would be if two countries were to agree to attack a third in circumstances constituting aggression. Apart from the fact that such an arrangement could confer no rights as against the third State concerned, it would be illegal *in se* and void. Oppenheim instances a third type of case, if one State "entered into a convention with another State not to interfere in case the latter should command its vessels[57] to commit piratical acts on the open sea, such treaty would be null and void, because it is a principle of international law that it is the duty of every State to forbid its vessels[58] to commit piracy on the high seas".[59] It is not possible—nor for present purposes necessary—to state exhaustively what are the rules of international law

[54] An agreement to appropriate or assert exclusive jurisdiction *erga omnes* on or over the high seas, would *per contra* be directly contrary to international law, the freedom of the seas as *res communis* being *jus cogens.*

[55] It would in any case be contrary to morals and international good order (see article 20).

[56] That is, in this context unenforceable at law by either party against the other.

[57] This is slightly misconceived, for piracy *jure gentium* properly so called consists essentially in private and unauthorized acts. Acts commanded or authorized by a Government may be illegal under international law on various grounds, but they are not strictly piracy. This was the whole distinction between piracy and privateering under letters of marque. [*Note by the Special Rapporteur.*]

[58] Whether such a duty really exists may be questionable. There is probably a duty to co-operate in the suppression of actual piracy; and no State can object if piracy by its nationals is suppressed by the vessels of another country, even on the high seas. [*Note by the Special Rapporteur.*]

[59] L. Oppenheim, *International Law: A Treatise,* vol. I, *Peace,* 8th ed., H. Lauterpacht (ed.) (London, Longmans, Green and Co., 1955), p. 897.

that have the character of *jus cogens,*[60] but a feature common to them, or to a great many of them, evidently is that they involve not only legal rules but considerations of morals and of international good order. (The case of treaties which are contrary only to morals or good order, and do not involve any conflict with an actual legal rule is considered below in connexion with article 20).[61]

Article 18. Legality of the object (conflict with previous treaties—normal cases)

77. *Paragraph 1.* This paragraph contains a general rule, the occasion for applying which, where application is called for, will be mainly in those cases where invalidity would not otherwise result under paragraphs 3 to 7 of the article. Even where a treaty is of a general and so-called law-making character, and embodies rules in the nature of *jus cogens,* it remains, *as such* technically *res inter alios acta* for non-parties. In so far therefore as it contains general international law rules, this will be either because the treaty declares or codifies existing rules of international law, or because the rules it contains have come to be recognized as rules valid for and *erga omnes,* and have been received into the general body of international law.[62] It will be the underlying conflict with the latter, rather than with the treaty, as such, which evidences them, that will be the cause of any invalidity in a later treaty.

78. *Paragraph 2.* This matter will be more fully explained in connexion with article 19. Suffice it to say that the present article is, as such, concerned mainly with bilateral treaties, and with pluri- or multilateral treaties of the "reciprocating" type. Certain other classes of treaties involve special considerations of the same type as were considered in connexion with articles 19 and 29 and the commentary thereon in the Rapporteur's second report.

79. *Paragraph 3.* The object of this paragraph is largely analytical. It endeavours to state and to distinguish between the different situations that can arise. Some of these may arise with reference to the case either of bilateral or of pluri- or multilateral treaties, others with reference only to the latter, or where at least one of the two treaties involved is of that kind.

80. *Paragraph 4. Case (i) in paragraph 3.* This case gives rise to no difficulty. It envisages the possibility that different groups of States may deal with the same matter in different, and perhaps conflicting ways. But each régime is valid for its own group, so long as no attempt is made to apply it outside. If any illegality exists, it will not be by reason of any conflict between the treaties as such, for none of the parties to either treaty have any obligations under the other treaty.

81. *Paragraph 5. Case (ii) in paragraph 3.* This case also gives rise to no difficulty of principle. The matter really falls under the head of termination of treaties, and is covered by the Rapporteur's second report, in article 13 of part III and the commentary thereon.

82. *Paragraph 6. Case (iii) in paragraph 3.* The case here envisaged (which must be carefully distinguished from case (v) despite its similarities) is that where there are parties to the later treaty who are not also parties to the earlier one; or, if it is a bilateral treaty, where one party to the later treaty is also a party to the earlier, but the other party is not. In short, this case does not, as in case (v), involve the situation in which the parties to the later treaty consist wholly of certain of the parties to the earlier one, without the addition of any others. The present case (case (iii)) has already been the subject of some general discussion in paragraphs 71 to 74 above. It is significant that in private law (in the Anglo-American system at any rate) the fact that a contract may involve one of the parties in a conflict of obligation with a previous contract, is not a ground formally invalidating the later contract, at any rate if the other party did not know of the conflict.[63] In general, however, if A contracts with B, B has no means of knowing what previous contracts A has entered into. He is therefore entitled to insist that A carries out the contract or makes due reparation for not doing so. If A, on account of a previous undertaking, cannot or does not carry out his contract with B, he must pay damages. C, with whom A made the previous contract, can equally insist that his contract be carried out, and that A shall pay damages if he fails to do so. In those cases where, for example, both contracts contemplate the same *res,* say a house which A contracted to sell to C, and subsequently also contracted to sell to B, C may, by obtaining a judicial order for specific performance, secure the transfer of the *res,* and thus prevent its transfer to B, to whom A will have to pay damages. No doubt moreover, a court faced simultaneously with both contracts would give effect to the earlier in date. But matters may not happen that way. Again, in some cases the principle *nemo plus juris transfere potest quam habet* might prevent the contract from being carried out or render it inoperative, but it is difficult to see why, if B is an innocent party in the matter, the contract should be regarded as invalid, or why B should not be entitled to recover damages for its non-performance.

83. In the Rapporteur's opinion, the position is broadly similar under international law in this type of case (it is not of course the only one), except that international law may more definitely than some systems of private law give an actual *priority* to the earlier obligation. But it does not on that account *invalidate* the second, or the treaty containing it, in those cases (which are those now under discussion) where new parties, not parties to the earlier treaty, are involved—at least if these are innocent in the matter. They contrary view, i.e. that there is invalidation, has been taken by a number of writers of weight, a convenient reference to whom will be found in the Harvard Research volume (p. 1025), the authors

[60] International agreements to engage in the slave trade afford another example given by Paul Fauchille, *Traité de droit international public,* 8th ed. (Paris, Rousseau et Cie., 1926), vol. I, part III, p. 300, and Louis-Erasme Le Fur, "Le développement historique du droit international. De l'anarchie internationale à une communauté internationale organisée", *Recueil des cours de l'Académie de droit international,* 1932, III, p. 580.

[61] In pronouncing that treaties possessing an illegal object in the sense above described are "invalid" and "null and void", a certain theoretical difficulty arises, for it may well be that no international tribunal or other international organ is in a position effectively to declare the invalidity of the treaty concerned, and if the parties choose to apply it *inter se,* and can do so without affecting the rights of any third State, they may be able to carry it out. The real point therefore, as a practical matter, is that such a treaty is *unenforceable.* If either party refuses to carry it out, the other will have no legal right to require it to do so, even if thereby the defaulting party in a certain sense takes advantage of its own wrong.

[62] Such as The Hague Conventions of 1899 and 1907.

[63] Sir Hersch Lauterpacht, writing in 1936 ("The Covenant as the 'Higher Law'" in *The British Year Book of International Law,* pp. 54 ff.), thought a case might be made out under English law for invalidating the later contract on grounds of conspiracy. But this clearly assumes knowledge of the earlier contract by *both* parties to the later. That may well not be the case.

of which however do not share that view, and no not predicate more for the earlier obligation than prevalence or priority. This contrary (i.e. the invalidation) view is stated by Oppenheim as follows:

> "[Treaties] are . . . binding upon the contracting parties, who must refrain from acts inconsistent with their treaty obligations. This implies the duty not to conclude treaties inconsistent with the obligations of former treaties. The conclusion of such treaties is an illegal act which cannot produce legal results *beneficial to the law-breaker.*[64] It is incompatible with the unity of the law to recognize and enforce mutually exclusive rules of conduct laid down in a contract *in cases in which such inconsistency is known to both parties.*[65] In view of the relatively small number and publicity of treaties, this rule applies with special force in the international sphere". [*Italics added.*][66]

The two passages italicized, in some sense beg the question (see footnotes 64 and 65), but the real point open to doubt appears in the reference to "the relatively small number and publicity of treaties". While this may have been true (or nearer being true, as regards the question of numbers at any rate) at the date when Oppenheim first wrote, it is certainly not true today. So far from the number of treaties being small, it is very large indeed, if treaties are regarded (as in the present Code) as covering all types of international agreements, exchanges of notes and letters, etc. As to publicity, information about them is often extremely hard to come by. Treaties may find their way but slowly, after periods of months or even years, into the various treaty series, national or international. One State concluding a treaty with another can never be certain of the full extent of the treaty obligations already assumed by that State, or what degree of conflict these may involve. The implication in the passage above quoted from Oppenheim that one State is so to speak "upon notice" of the existing or previous treaty obligations of another, is hardly realistic under modern conditions. Why therefore should States which have innocently and in good faith entered into a treaty, suddenly find themselves deprived of all rights under it (even, *ex hypothesi,* to damages or other reparation[67]) because, upon the discovery of a pre-existing obligation for the other party, of a conflicting character, the invalidity of the later treaty must be predicated? Upon what grounds also could it be maintained that, should the "guilty" State in fact carry out its obligations under the later treaty (even though it thereby puts itself in breach of the earlier), the innocent party could repudiate its own obligations under the treaty? Yet that is what its invalidity would imply. If, on the other hand, the other party was not in fact innocent and knew of the previous treaty and the possible or probable conflict, there is no reason why it should be entitled to any reparation for non-performance; and the paragraph of the draft Code now under discussion provides accordingly.

84. For these reasons, the Rapporteur prefers (for the situation envisaged by this case) the view taken in the Harvard Research volume, which is also that taken by Rousseau who writes:

> ". . . il s'agit plutôt là[68] d'un problème de compatibilité de normes conventionnelles concurrentes que d'un problème de détermination de l'objet même des traités internationaux."[69]

After referring to the rule that a treaty is void if it conflicts with a positive requirement of international law, he continues:

> "Mais ici encore le problème qui se pose est plutôt un problème de contrarieté des normes juridiques, *surtout si ladite règle a une origine conventionnelle."*[70] [*Italics added.*]

The matter is summed up in the Harvard Research volume in paragraph (*c*) of article 22 of the Draft Convention on the Law of Treaties as follows:

> "If a State assumes by a treaty with another State an obligation which is in conflict with an obligation which it has assumed by an earlier treaty with a third State, the obligation assumed by the earlier treaty takes priority over the obligation assumed by the later treaty."[71]

But it is expressly added in the comment that:

> "Paragraph (*c*), however, does not say that a State may not enter into a subsequent treaty with a third State by which it assumes obligations vis-à-vis that State which are in conflict with obligations which it has assumed under a prior treaty with another State. It only says that the obligations assumed under the earlier treaty 'take priority' over those which it has assumed by the later treaty in case there is conflict between them";

and again, more explicitly:

> "It may be repeated that the rule of paragraph (*c*) does not go to the length of pronouncing the treaties or particular stipulations to which it refers to be null and void, as some of the writers quoted above do."[72]

In this connexion, see also paragraph 83 above.

85. The principle of priority, coupled with that of the non-invalidation of the later treaty or obligation, implies that the States concerned must carry out the prior obligation and make due reparation for not carrying out the second—for it is bound by both. It means that an international tribunal, if the matter comes before it, will direct accordingly. In practice, the matter may not come before an international tribunal, and there may be no way of preventing the State concerned from electing to honour the later rather than the earlier obligation. If this occurs, the other party to the later treaty must carry out its own obligations under the treaty, while the other party to the earlier treaty will have a right to damages or other due reparation. This does not mean that international law confers a "right of election", but only that, in the existing State of international organization, it may not be possible to prevent a *power* of election from being in fact exercised. In these circumstances, international law predicates a right to reparation in favour of whichever of the other two parties concerned fails to obtain performance of the obligation, provided that party was itself acting innocently and in good faith.

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[64] Of course this somewhat begs the question. The innocent other party to the second treaty having no knowledge of the earlier is not a law breaker. [*Note by Special Rapporteur.*]

[65] Again—what if it is not? [*Note by the Special Rapporteur.*]

[66] Oppenheim, *op. cit.,* p. 894.

[67] This might be the effect of total nullity *ab initio.*

[68] Speaking of the Covenant of the League of Nations.

[69] Rousseau, *op. cit.,* p. 341.

[70] *Ibid.* It is not quite clear, but it would seem that Professor Rousseau might take this view about a treaty directly conflicting with an imperative rule of international law.

[71] Harvard Law School, *op. cit.,* p. 1024.

[72] *Ibid.,* p. 1026.

86. *The case of conflict with the Charter of the United Nations.* The line taken above is, it is submitted, entirely in accordance with the language of Article 103 of the Charter of the United Nations, which does not pronounce the invalidity of treaties between Member States conflicting with it, but, on the contrary, only that "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, *their obligations under the present Charter shall prevail*" [*italics added*]. This would seem to produce the effect that if, on the strict language of Article 103, it might oblige a Member State to break a treaty with a non-member (if that treaty should involve for the Member State obligations conflicting with its Charter obligations), yet it cannot *release* or absolve the Member State from *liability* in respect of those obligations. If no voluntary release from the obligations in question can be obtained, the Member State will by reason of Article 103 be forced to refuse to carry them out: but this will nonetheless be a breach of the earlier treaty, for which reparation in damages or otherwise will be due to the non-member.

87. *Paragraph 7. Case (iv) in paragraph 3.* Although this case is fundamentally similar in its effects to case (ii), and is indeed a sort of special instance of it, it is preferable in the interests of clarity to distinguish it. Both or all of those concerned in the earlier treaty are parties to the later one, but not the only parties. As in case (ii), no real question of validity or invalidity arises: it is a question of *effects,* and as such need not be further considered here.

88. *Paragraph 8. Case (v) in paragraph 3.* The situation envisaged in this case (which can only occur where the earlier treaty is pluri- or multilateral), is that which arises where a number of the parties to a treaty, being less than the full number, proceed to agree on another treaty, on the same subject, which may be in conflict with the first, or set up a different system or régime. The question then arises how far is it open to such parties to do this, even if it is admitted that the new treaty or régime can only govern and be applied in the relations between the actual parties to it, and cannot in law affect the rights of the remaining parties to the earlier treaty or be applied as against or in the relation with them? A number of weighty authorities[73] have taken the view that it is not permissible to do this in such manner as would impair the obligation of the earlier treaty, or as it has been put, "cause injury to the interests" of its signatories[74] or be "so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose";[75] while in the *Oscar Chinn* case before the Permanent Court of International Justice, two eminent judges, Van Eysinga and Schücking,[76] took the view that in the case of treaties, having not merely a dispositive but a quasi-statutory effect and status, providing a constitution, system or régime for an area or in respect of a given subject,[77] it was not open to any of the parties to act in this manner in any circumstances without the consent of all.[78] Harvard Research accordingly propounded a provision (article 22 (*b*)) reading as follows:

> "Two or more of the States parties to a treaty to which other States are parties may make a later treaty which will supersede the earlier treaty in their relations *inter se,* only if this is not forbidden by the provisions of the earlier treaty and if the later treaty is not so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose."[79]

It will be seen that this provision does not rule out the possibility of some of the parties agreeing on a different system for application *inter se,* and the present Rapporteur propounds in paragraph 8 of this article a substantially similar idea, except that it lays stress more on the simple prevalence or priority of the obligations of the earlier treaty in the relations between the "old" treaty parties and the "new", and also suggests a different form of words for the second exception.

89. There are in fact very strong reasons for permitting a certain amount of latitude in this matter. They may be summed up as follows:

(*a*) Since anything that some of the parties to a treaty do *inter se* under another treaty is clearly *res inter alios acta,* it cannot in law result in any formal diminution of the obligation of these parties under the earlier treaty, or affect juridically the rights or position of the other parties, which remain legally intact and subsisting. This being so, it follows that the parties who enter into the separate treaty are not, merely by reason of that, doing anything illegitimate or unlawful *in se,* and that this separate treaty is not in any way *prima facie* invalid or void.

(*b*) If therefore there is any impairment of the obligation under the earlier treaty, it will be in the factual rather than in the legal sense, and it can of course be maintained, and has been maintained with great force, that in practice such action tends to weaken, and indirectly to injure, the position of the non-participating countries.[80] That this may be so can hardly be denied. Considerations of space preclude the giving of concrete illustrations. But in general terms, it is easy to see that if, say, twenty-five out of thirty parties to a treaty agree to put into force amongst themselves a different régime on the same subject matter, even though they may remain bound by the old régime towards the other five, yet the position of those five can hardly fail to be affected in practice. Again, if under a treaty a number of the parties have certain rights as against another party, and some of them agree under a separate treaty with that party to forego those rights or to modify them in that party's favour, this may well affect in practice the ability of the remaining parties to assert their full rights as against that party, theoretically intact though these still are. However, there is another side to this question: for 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

[73] See those cited by Lauterpacht in *The British Year Book of International Law, 1936,* pp. 60-61.

[74] *Ibid.,* p. 60.

[75] Harvard Law School, *op. cit.,* p. 1016.

[76] Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions,* series A/B, No. 63, at pp. 133-134 and 148.

[77] The question in the *Oscar Chinn* case was that of the status of the General Act of Berlin of 1885 relating to the Congo Basin as affecting that of the later Convention of Saint-Germain-en-Laye of 1919 on the same subject.

[78] For a contrary view, see the note on the *Oscar Chinn* case by "O" in *The British Year Book of International Law, 1935,* pp. 162-164.

[79] Harvard Law School, *op. cit.,* p. 1016.

[80] See the note on the *Oscar Chinn* case by Lauterpacht in *The British Year Book of International Law, 1935,* pp. 164-166.

any rate—the consent of all the States concerned.[81] 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.

(*c*) The whole question of what inconsistency or conflict between two treaties means is a difficult one. Two treaties may be inconsistent in the sense that they set up mutually discordant systems, but so long as these do not have to be applied to or between the same parties, it may be quite possible to apply both. Thus, even though with some difficulty or at some inconvenience, State A may be able to apply one system in regard to State B under treaty X and another in regard to State C under treaty Y. In short, there may be a conflict between the treaties concerned, without this necessarily resulting in any conflict of *obligation* for any of the parties. Something of this kind is in fact precisely what happens under sucessive technical conventions concluded under the auspices of various international organizations and agencies. In such a situation, there are many possible permutations and combinations, shades and degrees. It would be very unwise to postulate the invalidity and nullity of a treaty merely because, on the face of it, it contained provisions that were in themselves incompatible with the provisions of an earlier treaty to which the parties to the later treaty were also parties.

90. For these reasons, and in respect of the kind of treaty here in question (bilateral and other "reciprocating" type treaties—see paragraph 2 of the present article, and paragraph 78 above), the Rapporteur is far from convinced that the invalidity of the later treaty, or of the relevant part of it, need even be predicated. The question of invalidity arises more properly with reference to the type of treaty which forms the subject of article 19. With regard to the question of whether in the present case (case (v)) a prohibition on any separate arrangement contained in the earlier treaty should be a ground of invalidity of the later, the Rapporteur recalls the doubts he expressed on the question of the effect of this particular type of "incapacity" in paragraph 28 of the present commentary, which certainly apply to case (iii). However case (v) differs, in that none of the parties to the later treaty are *additional* parties, and all are bound by the prohibition. The Rapporteur has therefore decided for the time being, to include this ground of invalidity for case (v), and also the other ground mentioned in paragraph 8 of this article, though in somewhat more restricted language than that used in the provision of the Harvard draft quoted in paragraph 88 above. Actually, it would probably only be rarely that a case of this kind would arise with reference to a "reciprocating" type agreement.

[81] In a number of cases States that do not come in initially will do so at a later stage.

Article 19. Legality of the object (conflict with previous treaties—special case of certain multilateral treaties)

91. The Rapporteur, in his second report, drew attention, in connexion with the subject of the termination of treaties, to the existence of certain types of multilateral treaties the character and mode of operation of which differed materially from that of the ordinary treaty, whether bilateral or multilateral, involving a mutual exchange of benefits between the parties, or a reciprocal course of conduct by each towards each, of such a kind that a default by one party would be *a default in that party's relations with some other party,* and could be compensated for by a counter default by that party *towards the defaulting party.* Particularly with reference to articles 19 and 29 in the second report (see especially paragraphs 124-126 of the commentary) it was pointed out that not all multilateral treaties were of this type. There were two other types which operated very differently, because they did not involve a mutual interchange of benefits and performances on an individually reciprocating basis. These treaties involved a more absolute type of obligation so that it was not really possible to speak of the treaty being applied by each party merely in its relations with each of the others. In the case of one class of these treaties however (of which a disarmament convention might be taken as an example), the obligation of each party was dependent on a corresponding performance by *all* the parties; and therefore, in the case of a fundamental breach by one party, the obligation of the other parties would not merely cease towards that particular party, but would be liable to cease altogether and in respect of all the parties. In the other main class of case on the other hand—of which a humanitarian convention such as the Convention on the Prevention and Punishment of the Crime of Genocide might be taken as the type—the obligation of each party was altogether independent of performance by any of the others, and would continue for each party even if defaults by others occurred.

92. The Rapporteur believed that it was the failure to distinguish between these different classes or types of treaties which had been partly responsible for some of the difficulties surrounding the subject of the termination of treaties. The same may be true here. Those authorities which have predicated the invalidity and nullity of treaties in conflict with earlier treaties have, it is suggested, had chiefly in mind certain kinds of treaties in the case of which this result must probably follow—whereas in the case of other kinds it need not necessarily do so.

93. In the case of the treaties dealt with in article 18 hereof, it has been seen that a conflict between treaties did not necessarily lead to a conflict of *obligations,* because one set of provisions could be applied by a party in its relations with one country, and another (perhaps very different) set of obligations could be applied in its relations with another country. Hence the invalidity of the conflicting treaty did not follow. In the case of the two types of treaties dealt with in article 19 the position is different. The nature of the obligation is such that a directly conflicting treaty, if carried out, must it would seem necessarily invoke a breach of the earlier. Thus the complete invalidity of the treaty, to the extent of the conflict at any rate, may reasonably, and probably must, be predicated.

94. ". . . which conflicts directly in a material particular . . .". Only material conflict should rank for present purposes, and only a direct one. If for instance a number

of the parties to a treaty, even a treaty of this kind, agree not to insist, so far as they are concerned, on the performance of it by one another, this may weaken the force of the treaty, and may be inconsistent with the spirit of it, but it is not in direct conflict with the treaty so long as they do not agree actually not to perform the treaty obligations. Since it is in fact always open to parties to a treaty not to insist on performance by other parties, and no specific agreement is needed to give them that faculty, such an agreement can hardly be invalid—or if it is, its invalidity makes no difference and cannot affect the situation. What really occurs in such a case is a renunciation or modification by some of the parties of their rights, or of a part of their rights. This may or may not be undesirable (it does not follow that it always is), but it does not raise the issue of conflict as such.

Article 20. Ethics of the object

95. On the private law analogy of contracts contrary to public policy, order or morals, some international law authorities (for example, Oppenheim[82] and Verdross[83]) have taken the view that treaties not actually contrary to any mandatory rule or prohibition of international law, but having an immoral or unethical object, must be regarded as null and void. Others (such as Rousseau, who regards the matter as "*dépourvue d'intérêt pratique*" and as a "*pure hypothèse d'école*[84]) have pointed to the absence of any decided case in which the invalidity of a treaty on such grounds has been pronounced. There are however dicta of judges of the former Permanent Court of International Justice which suggest that an international tribunal would be entitled to refuse to apply a treaty considered by it to be "contrary to public morality".[85] On the other hand, as Oppenheim admits, it has to "be taken into consideration that the question as to what is immoral is often controversial. An obligation which is considered immoral by some States may not necessarily appear immoral to the contracting parties".[86] In these circumstances the system propounded by the present article seems to the Rapporteur the best. It is difficult to predicate *a priori* the nullity of a treaty that has an immoral or unthetical (but not illegal) object: but it is open to an international tribunal to refuse to apply it.

SECTION C. LEGAL EFFECTS OF LACK OF ESSENTIAL VALIDITY, AND THE MODALITIES OF ITS ESTABLISHMENT

Article 21. Legal effects (classification)

96. This article requires no special comment, but the discussion in paragraphs 13 to 16 above with reference to the provisions of article 6 may be recalled. The final sentence of article 21 makes it clear that the effects of lack of essential validity are not automatic but subject to the procedural requirements propounded in article 23.

Article 22. Effects in specific cases

97. *Paragraph 1.* Again, earlier discussion has elucidated much of this. There is however a good deal of disagreement amongst the authorities (in so far as they consider the matter at all) about the exact effect of lack of essential validity in different cases. Thus Guggenheim, presumably following civil law doctrine, does not ascribe to either error, fraud or duress, the effect of nullifying the treaty *ab initio* with retroactive effect, but only of making it voidable.[87] The common law doctrine agrees as to fraud and duress but regards error as making the contract void *ab initio*.[88] In the Harvard Research volume on the other hand (p. 1148), the latter effect is ascribed to fraud but not to error or duress. It is doubtful whether these and other similar distinctions have the same importance in the international field as they do in the domestic. As regards error, fraud and duress, the common law doctrine is based on the view that in the case of error there is never any true meeting of minds—or if there is (common and identical error) it is in circumstances that deprive it of reality. Hence there is never any contract. In the case of fraud and duress the minds do meet, and therefore there is a contract, but since the meeting was only procured by extraneous and illegitimate factors, the contract is voidable on proof of these.

98. The reasons for predicating unenforceability in certain cases, rather than nullity *stricto sensu* have already been discussed in connexion with articles 17 and 20 (see the end of paragraph 75 above, and paragraph 95). On the whole, unenforceability seems also the correct effect to ascribe to invalidity resulting from conflict with previous treaties, in those cases in which invalidity on that ground occurs.

99. *Paragraph 2.* This attempts to state the actual consequences of nullity *ab initio*, voidability, unenforceability etc., and calls for no special comments, although the system propounded is probably capable of improvement or refinement.

Article 23. Procedure for establishing the claim of lack of essential validity

100. For detailed comment on this article, reference is made *mutatis mutandis* to that contained in the second report on the somewhat similar system propounded in articles 20 and 23 in that report (commentary, paras. 136-140 and 180). The extreme rarity, already referred to in other connexions, with which the question of the essential invalidity of a treaty has been raised on any of the grounds considered in the present report—as contrasted with the very numerous occasions on which claims to *terminate* treaties have been made—might be said to render it doubtful whether any safeguards of the kind proposed in the present article are really necessary. Yet in principle it should not be possible for any party to a treaty simply to *declare* its invalidity unilaterally, and on this subject reference may be made to articles 29, 31 and 32 in the Harvard draft, and the commentary thereon. Otherwise the plea of lack of essential validity might well be made the pretext for what would really be a disguised termination of an unwanted treaty. Indeed it is by no means certain that, in an indirect way, the plea of lack of

[82] Oppenheim, *op. cit.*, p. 896.

[83] Alfred Verdross, "Forbidden Treaties in International Law", *American Journal of International Law*, vol. 31 (1937), pp. 571-577. For comment on the very wide field of what should be regarded as immoral propounded by Verdross, see Rousseau, *op. cit.*, p. 342.

[84] Rousseau, *op. cit.*, pp. 341-342; see also Salvioli in *Recueil des cours de l'Académie de droit international*, 1933, IV, pp. 26-30.

[85] Schücking in the *Oscar Chinn* case (Publications of the Permanent Court of International Justice, *Judgments, Orders and Advisory Opinions*, series A/B, No. 63, p. 150). Anzilotti is said to have expressed a similar view in the *Austro-German Customs Union* case, but the passage is difficult to trace.

[86] Oppenheim, *op. cit.*, pp. 896-897.

[87] Guggenheim, *op. cit.*, pp. 91-93.

[88] See Cheshire and Fifoot, *op. cit.* (footnote 43 above), p. 171; also Anson, *op. cit.* (footnote 38 above), p. 166.

essential validity is not, in a certain sense, quite often put forward, for it has not infrequently happened that the *reason* given for the unilateral *termination* or repudiation of a treaty is precisely some alleged flaw in its origin or manner of procurement. This is not made the formal basis of the act of termination or repudiation (i.e. there is no actual plea of lack of essential validity), but in effect an alleged flaw in validity is advanced as a ground justifying the party concerned in bringing the treaty to an end. It therefore seems to the Rapporteur that if procedural safeguards are necessary in certain cases of unilateral termination of treaties, they should also be instituted where it is sought to avoid a treaty on grounds of lack of essential validity, since the considerations making such safeguards desirable in the one case apply equally, or easily could do so, in the other case as well.