GYÖRGY HARASZTI

Some Fundamental Problems of the Law of Treaties

AKADÉMIAI KIADÓ, BUDAPEST

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The law of treaties has received focal importance in the various circles of researchers of international law, especially after the Vienna Conference of 1969 which first tried to codify this branch of legal science. Of the huge relevant material, the present book has two debated groups of questions for its subject-matter: first it deals with problems of interpretation, then of termination of treaties. Reviewing the various fields, the author pays due consideration to the provisions of the Vienna Convention not yet put into effect, fully recognizing their significance for the development of international law; in so doing, however, he contests in more than one point the views adopted by the Vienna Convention, singling out with a convincing methodical thoroughness the practical deficiencies of certain theoretical solutions proposed by the Convention.

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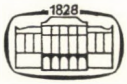

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INTRODUCTION

Ever since the disintegration of primitive societies and the formation of states treaties had a significant regulating role in interstate relations. Not infrequently opinions still arise in the science of international law to suggest that in earlier times mainly customary law had provided the regulating rules of these relations. However, these opinions do not agree with the results of historical research, not at least with those obtained in the field of legal history. Research has explored a large portion of treaty relations which developed in antiquity and the Middle Ages, and it is more than obvious now that states in those remote ages had settled their affairs by means of a system of treaties. These treaties, that were mostly signed when wars were ended, brought under regulation masses of problems of detail, from which it can be stated that treaties were not only primordial interstate regulators but they were also the natural foundation of the norms of customary international law.

Opinions allotting greater importance to international custom are mostly supported by the circumstance that until of late treaties were bilateral, and therefore rules of a universal character, or at least extending to a large group of states, developed through customary law. However, in the second half of the 19th century, and even more in the 20th century, owing to the spread of multilateral treaties and the expansion of their scope of operation, the role of customary law was gradually pushed into the background even in the framing of rules of universal validity. What is more, following the birth of the first socialist state it occurred in quite exceptional cases only that states of opposed social and economic systems should keep to a uniform practice spontaneously, and eventually treaties have become, so to say, the exclusive means of regulating their relations. The significance of treaties is also seen from the fact that only a treaty can ensure the

legal regulation of the coexistence of states of different social and economic systems and it is only by means of treaties that the underlying principles of the notion of coexistence can be defined with a greater precision.

All this amply justified the necessity for jurisprudence to direct more attention to the rules that have come into being in international law in connexion with the most crucial problems of the life of treaties. This was the more necessary because science has so far failed to construct the theoretical system of the law of treaties although the legal norms relating to treaties have developed throughout the centuries and the number of works dealing with the problems of treaties has swollen to an enormous mass during the latter decades.[1]

Recent interest in the law of treaties can be explained by yet another circumstance. Already at its first session the International Law Commission of the United Nations, in 1949, recognized the significance of the law of treaties for the development of international relations and accordingly included it in its codification scheme. During the following twenty years or so a series of draft codifications came to life, when eventually in 1966 the final draft of the International Law Commission was born, to become the foundation of the Vienna Convention of 23 May 1969 codifying the overwhelming portion of the law of treaties. The draft of the International Law Commission, and then the two sessions of the Vienna Conference, in 1968 and 1969, mobilized legions of specialists who partly advanced the shaping of the respective position of their governments, partly gave wider circulation to their opinions in a series of papers. This upswing has not come to an end with the Vienna Convention; on the contrary, it will certainly have a lasting stimulus to further exertion of theorists gradually clarifying the moot questions still left over unsolved in large numbers.

Nevertheless, in a time when both socialist and capitalist scholars show a growing interest in the intricate problems of the law of treaties, the Hungarian literature has failed to reflect this expanding interest adequately. The questions of the law of treaties had been neglected by bourgeois scholarship before the liberation, and the situation has not changed essentially in the socialist literature of international law. The Hungarian specialists of international law

[1] Cf. Lachs, M.: *Umowy wielostronne* (Multipartite treaties). Warsaw, 1958, pp. 7—8.

have rather been attracted by more showy subjects of a greater political actuality.

We do not contest that experts of international law must have a word to say in the solution of the vital problems of international life. There arise questions of world-wide significance whose legal aspects call for immediate response on their part. This, however, is no excuse for the neglect of the theoretical problems emerging at all times and at all places from everyday practice. It is one of the prominent functions of jurisprudence to provide correct guidance for those faced with practical tasks. The specialists of international law cannot be indifferent to this function, and if they want to cope with the task, then of necessity they will have to direct their attention to the problems of treaties.

As a matter of fact treaties account for the complex of problems those practising international law have to confront, so to say, in their daily work.

These considerations induced me to embark upon studies of the law of treaties, and the direct experiences gathered at the two sessions of the Vienna Conference have encouraged me to continue the work. Since, however, completeness in this field could hardly be attained by a single monograph, the present work has been confined to two cardinal problems, viz. the *interpretation* and the *termination* of treaties. The combination of these two themes in one study is justified for several reasons which perhaps need to be explained in a few words.

First of all, treaty interpretation is a key-question, with which field workers of international law are faced every now and then in their routine work. Performance of a treaty, the application of its provisions presupposes a process of exploration of the correct meaning of the treaty. At the same time, the question of interpretation is the most debated one in the whole complex. Nevertheless, topical papers and monographs, which are plenty, have not even provided a clear-cut definition of the relevant principles of international law. We feel a deep sympathy for Lord McNair, this prominent bourgeois specialist, who has owned it plainly that there is no part of the law of treaties which he approaches with more trepidation than the question of interpretation.[2]

[2] Lord McNair: *The Law of Treaties*. Oxford, 1961, p. 364.

Also according to Chang, this question leads into the thicket of the most confused problems of modern international law.[3]

Secondly, in my opinion, clarification of the law of treaties has to be attempted necessarily through an analysis of the question of interpretation, because, on a closer investigation, several intricacies boil down to matters of interpretation. We shall find this in particular in Part Two of the present work dealing with the termination of treaties. But analysis of a number of other fields of problems connected with the law of treaties leads to the same conclusion. Hence the way the basic questions of interpretation are answered will determine somehow the stand the scholar has to take in regard of the other problems of the law of treaties.

Thirdly, in Hungary we have to consider yet another special circumstance justifying the emphasis on treaty interpretation. A few years ago Imre Szabó published an excellent book on the socialist theory of the interpretation of legal norms[4] the general statements of which, although referring to the interpretation of municipal law, may serve as guidance at the examination of treaty interpretation as well. Imre Szabó also indicates in his work that the basic questions of interpretation of treaties call for a special monographic elaboration.

Considerations like these induced me to conduct research in the first place along this line, the results of which I had begun to publish long before the Vienna Conference and, in fact, before the publication of the final draft of the International Law Commission in 1966. Part One of the present work is a revised restatement of the material published in my monograph in Hungarian on the problems of the interpretation of treaties.[5]

The second-mentioned subject, that of the termination of treaties, has been included in this book as it was elaborated in Part Two mainly because, on a closer approach, many of the crucial questions of termination are questions of interpretation. This sphere of problems of

[3] Chang, T.: *The Interpretation of Treaties by Judicial Tribunals*. New York, 1933, p. 19.

[4] Szabó, I.: *A jogszabályok értelmezése* (Interpretation of legal norms). Budapest, 1960, p. 618.

[5] Haraszti, Gy.: *A nemzetközi szerződések értelmezésének alapvető kérdései* (Fundamental problems of the interpretation of treaties). Budapest, 1965, p. 271.

treaty termination in the enormous mass of those of the law of treaties has given rise — next to the interpretation — to most of the disputes, side by side with the question of invalidity. Finally, the inclusion of this second theme appears to be justified also because so far socialist literature of international law has rather neglected it, whereas there are elaborate works available on the problem of the invalidity of treaties.[6]

[6] See among others: Шуршалов, В. М. (Shurshalov, V. M.): *Основания действительности международных договоров* (The foundations of the validity of treaties). Moscow, 1957, p. 231; idem: *Основные вопросы теории международного договора* (Fundamental questions of the theory of treaties). Moscow, 1959, p. 472.

PART ONE

THE INTERPRETATION OF TREATIES

Chapter I

THE NOTION OF INTERPRETATION. THE OBJECTIVES OF THE INTERPRETATION OF TREATIES

A legal rule manifesting itself in whatever form cannot be applied unless its content has been elucidated. This general thesis is valid for the rules of municipal law as well as for those of the Law of Nations. If therefore a treaty has to be introduced into practice,[1] this process has to be preceded in all cases by the interpretation of the text to be applied, and the elucidation of the content of the treaty. An abstract treaty norm cannot be applied to an actual case unless first the content of the norm has been made clear in all its details.

In this question there is complete agreement in socialist legal literature, and the writers on law have fully exposed the reasons which demand the elucidation of the content of the legal norm before its application. "... The first cognition of a legal norm in general takes place in a superficial form, isolated on the whole and in details. The citizens and what is more, even those applying a given legal norm cannot comprehend at once — without an extensive activity of interpretation — the significance of that norm in its entirety or the meaning of its particular provisions, the precise content of its terms or dictates, the sphere of cases governed by it, its relation to other legal norms, and its place within the branch of law or legal system" — writes Imre Szabó. "In the course of the application of law ... a more complete

[1] Throughout this work the notion of treaty has been accepted in its widest sense. A precise definition being not our task, we merely point out that any agreement concluded between subjects of international law, and governed by international law, comes under the notion of treaty, irrespective of the external form of the agreement or the designation given to it [cf. paragraph (1)a of Article 2 of the Vienna Convention of 1969]. For the various designations of treaties see Denys P. Myers: The Names and Scope of Treaties. *The American Journal of International Law*, 1957, No. 3, pp. 574 et seq.

content of the norm may be established, a content which to a certain degree will differ from the sense elucidated at the first cognition. As an outcome of the activity of interpretation, a difference may become manifest between the everyday meaning of certain words and their professional sense, interconnexions may be established between the legal norm in question and other legal norms, the place of the norm in the legal system may be defined, and its social function demonstrated . . ."[2]

The same applies also to treaties. Here, however, many more special reasons may accede to those enumerated above, that thrust into prominence the need for interpretation. In this connexion we would merely touch on the problem of plurilingual treaties, where inevitable smaller or larger differences among the texts may add to the difficulties of interpretation. Furthermore we might refer to the circumstance that the same term can occasionally convey different meanings in the territories of the contracting parties. Here we may even remember that the diplomacy of certain states often intentionally introduces ambiguities into the texts of treaties so as to camouflage the true character of treaties serving imperialist ends. Still whether or not such special causes exist, treaties have always to be interpreted before application in the very same manner as any other legal norm.

Today on the whole both the bourgeois and socialist science of international law agree that *treaty interpretation is part and parcel of the treaty-applying activity* to which recourse has to be had in each case when it comes to carry into effect a treaty. Hence the operation of interpretation cannot be rigidly kept apart from the process of the performance or application of a treaty.[3]

[2] Szabó, I.: *A jogszabályok értelmezése* (Interpretation of legal norms). Budapest, 1960, pp. 49—50.

[3] Imre Szabó lays it down as a statement of general validity that "the interpretation of a legal norm . . . is not only the passive cognition of the legal norm, but part of the law-applying activity" (*Op. cit.*, p. 60). Of the Soviet literature on international law we would refer to И. С. Перетерский (I. S. Peretersky): *Толкование международных договоров* (Interpretation of treaties). Moscow, 1959, p. 17, dealing with the close relationship between the interpretation and application of treaties. In the bourgeois literature, in particular the Draft Convention on the Law of Treaties and the Comments to it prepared by the Research in International Law of the Harvard Law School throws a light on the fact that the interpretation of a treaty is always concomitant of its application (*The Ameri-*

Still we must not forget that in the bourgeois literature the number of those eager to impose limitations on the necessity of treaty interpretation is by no means insignificant and that by asserting the truth of the thesis formulated by Vattel they proclaim that a "clear text" does not need an interpretation. In the 1952 session of the Institut de Droit International in Siena, Guggenheim even put the question whether it was justified at all to use the term "interpretation" when the sense of the wording of the treaty was "completely clear" and whether it would not be more correct to speak in this case of the "application" of a treaty.[4] Later we shall deal in detail with the problems of the interpretation of a "clear text";[5] here it may suffice, in connexion with the problem raised by Guggenheim, to refer to what has already been said, from which it follows that a treaty text that before application would not call for an exposition of the content, an elucidation of the true intentions of the treaty-makers, and reconcilement of these intentions to the other parts of the treaty, does not and cannot even exist. Performance of a treaty unconditionally requires that it should be made clear beforehand whether a provision of it is applicable, according to the intention of the parties to the treaty, to a given situation, or the given circumstances. This cannot be decided unless by way of interpretation.

Still if we admit that for the purpose of the proper application of the provisions of a treaty its interpretation is indispensable, this does by far not imply as if we wanted to attribute some sort of a magic power to interpretation, as is often attempted in bourgeois jurisprudence. There is hardly a bourgeois work dealing with the question of treaty interpretation, that would not refer to the statement of Lord Phillimore which has become known the world over. According to Phillimore, interpretation means "the life of the dead letter".[6] However, this statement is only in so far correct as it indicates

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can Journal of International Law, 1935, Supplement, p. 938), although we are unable to agree with the further relevant conclusions drawn in the draft. Among others also Bentivoglio (Bentivoglio, L. M.: *La funzione interpretativa nell'ordinamento internazionale*. Milano, 1938, p. 13) emphasizes that the purpose of interpretation is the understanding of the legal norm for the purpose of application.

[4] See *Annuaire*, 1952, Vol. 44, tome II, pp. 380—381.

[5] See pp. 91 et seq.

[6] Lord Phillimore: *Commentaries upon International Law*. 3rd ed., London, 1879—1882, Vol. II, p. 95.

the absolute need for interpretation against those who would recognize this need in certain cases only. Yet, by calling the "dead" letter back to "life" through the channel of interpretation Phillimore creates an opportunity to dissociate the sense from the text and the intention of the contracting parties at concluding the treaty, and so throws the gates open to a teleological interpretation of the worst sense of the term.[7] If with Lord Phillimore this tendency does not stand out in its clearness, the popularity of his statement in bourgeois literature can mainly be explained by the opportunity it offers for obscuring the essence of interpretation, and the denial of the necessity of rules of interpretation.

Hence there is a close relationship between interpretation and application of a treaty: its application implies also its interpretation. However, the two operations should also be segregated from each other inasmuch as interpretation has the elucidation of the meaning of the text as its objective, while application implies the specifying of the consequences devolving on the contracting parties, and in certain exceptional cases also to third states, in the given situation.[8]

The close relation between interpretation and application of a treaty is also brought out by international practice. So e.g. treaties generally specify in the same article and in a uniform way means and methods by which disputes arising in connexion with the interpretation and application of the treaty may be settled in a peaceful manner. These provisions rely on everyday practice inasmuch as disputes of interpretation in all cases emerge in connexion with the application of the treaty, or more correctly, disputes in connexion with the application of the treaty, in general, originate from a divergent interpretation of a treaty by the parties. Naturally the

[7] The problem of teleological interpretation is discussed in the chapter dealing with the methods of interpretation (see pp. 112 et seq.).

[8] Cf. the relevant statements of the Harvard Draft, *The American Journal of International Law*, 1935, Supplement, p. 938. — Ludwik Ehrlich [see *Publications of the Permanent Court of International Justice* (hereinafter P.C.I.J.) Ser. A, No. 9, p. 39], in the dissenting opinion attached to the judgement of the Permanent Court of International Justice in the *Factory at Chorzów (Jurisdiction)* case also deals with the notions of the interpretation and application of treaties. Even if he does not conceive the two operations as the different phases of the same process, as regards the definition of the notion of interpretation he comes to conclusions similar to those offered above.

question whether or not this discrepancy in interpretation is due to a *bona fide* or *mala fide* attitude can be left unanswered for the time being.

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From the notions of treaty interpretation and application as a uniform process a further conclusion of great practical importance may be drawn, viz. the dismissal of an abstract interpretation. Notably, if we accept that interpretation always serves the direct application of the treaty, and that the application to any concrete case calls for an interpretation of the provisions of a treaty on the part of those applying it, then it also follows that the organ proceeding to interpretation can define the sense of a given norm of a treaty but for a given case.[9] On the other hand, we should have to keep the systematic scientific processing of the legal material apart from treaty interpretation.

Else, i.e. if we recognized the permissiveness of an abstract interpretation of a treaty, then interpretation would of necessity lay a claim to being normative for each case as may emerge in the future. This, of course, would imply the forfeiture of the nature of an interpretation, and instead interpretation would virtually become equivalent to the creation of a new legal norm. This is evident also to the partisans of an abstract interpretation. So e.g. Lauterpacht discusses the activities of international tribunals directed to this abstract interpretation under the heading "Judicial Legislation",[10] i.e. he himself considers this interpretation a legislative activity.

For this reason only the contracting parties can have recourse to interpretation in this abstract form, and thus only all parties to the treaty jointly. Abstract interpretation often occurs in the text of a treaty defining the sense of certain provisions, mainly of certain

[9] This does by no means imply that the provisions of a treaty could be interpreted in an arbitrary manner, exclusively in dependence on concrete circumstances. This cannot be the case, because such a procedure would throw the gates wide open to grave violations of international legality. All we should like to express is that interpretation is always aimed at applying the provisions of a treaty to a concrete case, and its validity will always be confined to the given case. Cf. Недбайло, П. Е. (Nedbaylo, P. E.): *Применение советских правовых норм* (The application of Soviet legal norms). Moscow, 1960, p. 327.

[10] Lauterpacht, H.: *The Development of International Law by the International Court*. London, 1958, pp. 205—206.

terms, used in the wording. Still such interpretation may be incorporated in a separate instrument. However, for our part we loath to accept provisions of this kind, whether taken up in the text or in a separate instrument signed simultaneously with the treaty, or subsequently, as interpretation proper. Provisions of this category are either norms constituting an integral part of the treaty, or supplements of the treaty, identical in character with other provisions. In such and similar cases the line of partition between interpretation and legislation becomes blurred, i.e. by common agreement the contracting parties may attribute any optional meaning to the provisions of the treaty, they may supplement and amend these at option, nor would they be bound in their activities by any of the principles of international law governing the interpretation of treaties.[11]

We may even add that an abstract interpretation detached from real circumstances would become some sort of a doctrinarian reasoning which according to the pithy remark of Bentivoglio would attribute some sort of a mythical sense to the norms of the treaty.[12]

As regards abstract interpretation, the practice of the international tribunals is not uniform. In general there is a noticeable tendency at the courts to extend their jurisdiction, and even the fact that here the case is one of exercising legislative rather than judicial functions in the strict sense, will fail to impose limitations on these courts. Notwithstanding the practice of the Permanent Court of International Justice and that of the International Court of Justice presents certain contradictions. In a number of instances the Permanent Court of International Justice held that there were no obstacles to an abstract interpretation of treaties. This position was taken in a most explicit form in the judgement passed in the case concerning *German Interests*

[11] This question will be discussed in detail together with authentic interpretation, see pp. 46 et seq.

[12] Bentivoglio, L. M.: *Op. cit.*, p. 23.— It should be noted that notwithstanding his appropriate remark this author does not dismiss abstract interpretation in a clear-cut form. Here he is no doubt influenced by the position taken by the Hague Court and the position overwhelmingly dominating in bourgeois literature on international law. On the other hand, M. Sørensen (*Les sources du droit international.* Copenhague, 1946, p. 215) rejects abstract interpretation in a most decisive manner. Also Ch. de Visscher (*Problèmes d'interprétation judiciaire en droit international public.* Paris, 1963, pp. 27 et seq.) takes a stand against abstract interpretation detached from practical application.

in Polish Upper Silesia. To reinforce its position, the Court referred to Article 14 of the League of Nations Covenant, according to which the Court "shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it". And even if by virtue of numerous clauses the Court has jurisdiction in questions of the interpretation and application of a treaty, this does not, in accordance with the argumentation of the Court, preclude the giving of interpretations unconnected with concrete cases of application. The Court does not even see a reason for denying an abstract interpretation of a treaty, moreover, it considers exactly the giving of an abstract interpretation one of its most important functions.[13]

On the other hand the Permanent Court of International Justice in several instances tried to avoid an interpretation of treaties raised in an abstract form.[14] Still it is beyond doubt that in principle the Court never recognized the impermissiveness of an abstract interpretation of treaties, or its incompatibility with judicial functions.

The new International Court of Justice established after the Second World War also followed its predecessor in this respect. In its advisory opinion on *Conditions of Admission of a State to Membership in the United Nations*, in which the Court construed Article 4 of the Charter, the Court dismissed opinions calling into doubt the legitimacy of an abstract interpretation with the following argumentation:

"It has also been contended that the Court should not deal with a question couched in abstract terms. That is a mere affirmation devoid of any justification. According to Article 96 of the Charter and Article 65 of the Statute, the Court may give an advisory opinion on any legal question, abstract or otherwise."[15]

Still what was particularly striking in the given case was the impermissiveness of an abstract interpretation and its incompatibility with the exercise of judicial functions. As a matter of fact, the General Assembly of the United Nations requested the International Court of Justice to give an advisory opinion as to whether a member of the United Nations was, at passing a resolution in the matter of admission

[13] *P.C.I.J.*, Ser. A, No. 7, pp. 18—19.

[14] H. Lauterpacht refers to a number of cases of this kind in his work quoted above, pp. 79—80.

[15] *International Court of Justice* (hereinafter I.C.J.) *Reports 1948*, p. 61.

of a new member, juridically entitled to make its consent dependent on conditions not expressly provided by Article 4 of the Charter, and in particular whether or not this member could subject its affirmative vote to the simultaneous admission of a third state.[16] In the General Assembly, however, the debate preceding the request for an advisory opinion naturally sprang up in a concrete form inasmuch as certain state members raised objections to the attitude of the Soviet Union when it tied the admission of two former enemy states, viz. Italy and Finland, to membership in the United Nations to the simultaneous admission of other three former satellite states, namely Hungary, Romania and Bulgaria. That is, here the Court was confronted with a formally abstract interpretation of a treaty, although at the same time it was evident that a concrete situation prompted the General Assembly to request an advisory opinion.

In the given case this putting of the question in a hypocritically abstract form distorted the interpretative function of the Court, inasmuch as it offered an opportunity to the majority of the judges to pass over the concrete circumstances on which the questioners relied and to ignore the provisions of the Potsdam Agreement of 1945 and the Paris Peace Treaties of 1947 relating to the question, which would have set the position taken by the Soviet Union in its proper light. Exactly this case is an appropriate example of how the formulation of the question in an abstract manner may not only entitle the agency in charge of interpretation to supplement the provision of the Charter, i.e. to legislation in a vital matter of international law, but at the same time by permitting the disregard of the concrete circumstances, produce false results.[17]

The refusal of the possibility of an abstract interpretation is in international law even more important than in domestic law. As a matter of fact, international law relies on an absolute respect of

[16] For details of the case see: Haraszti, Gy.: *A Nemzetközi Bíróság jog-gyakorlata 1946—1956* (The judicial practice of the International Court of Justice 1946—1956). Budapest, 1958, pp. 178 et seq.

[17] In the given case the judges Krylov and Zoričić in their dissenting opinion appropriately called forth attention to the risks of abstract interpretation (*I.C.J. Reports 1948*, pp. 94 et seq.). At the same time Judge Azevedo (ibid., p. 74) thought that abstract interpretation was preferable for the International Court of Justice, ignoring that by this the Court would transgress its scope of judicial functions.

the sovereignty of states, and if without the unanimous consent of all contracting parties an opportunity were offered for an abstract interpretation, the gates would be thrown open wide for a curtailment of sovereignty.

Although in its recent practice the International Court of Justice has still failed to adopt a principled position against an abstract interpretation of treaties, it appears to be more inclined to search for the concrete facts at issue underlying the request for an advisory opinion formulated in an abstract manner and by keeping in view these, to formulate its opinion on the interpretation of a treaty with reference to these facts.

A tendency of this kind manifested itself already in the advisory opinion of the Court of June 1, 1956, where the Court took a position on the oral hearings of petitioners on matters relating to the Territory of South-West Africa. As a matter of fact, in its advisory opinion the International Court of Justice, without declaring it expressly, formulated its reply to an abstract question with due regard to the concrete circumstances of the case.[18] What was particularly characteristic in this case was the separate opinion which Judge Lauterpacht submitted. Notably, Lauterpacht declared that examining the case he would give a reply to the question put in an abstract form altogether different from the one he had come to after investigating the given concrete circumstances.[19] An essentially similar statement was made by Judge Winiarski in his declaration annexed to the advisory opinion.[20] All these statements conclusively demonstrate the risks of an abstract interpretation.

The procedure of the Court taking into consideration concrete circumstances lurking behind an abstract question was even more striking in the advisory opinion of June 8, 1960, in the dispute on the constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization.[21] The Assembly of the

[18] For details see the work of the present writer quoted above, pp. 58 et seq.

[19] See *I.C.J. Reports 1956*, pp. 43—44.

[20] Ibid., p. 33.

[21] In the given case the dispute centred round the problem whether or not the Maritime Safety Committee was constituted in the proper manner. As regards the composition of the Committee the convention of March 6, 1948, creating the Inter-Governmental Maritime Consultative Organiza-

Organization similarly put the question in an abstract form, inasmuch as it did not refer to the details of a dispute in a concrete case; nor did it indicate in the question addressed to the Court expressly that the provisions of the convention were meant to be interpreted with reference to Liberia and Panama. Nevertheless, the International Court of Justice immediately in the introduction to the advisory opinion pointed out that although the question was put in an abstract form, the questioners still had in mind a concrete case. Consequently the Court would restate the question so that instead of answering the original formulation it would investigate whether or not the Assembly of the Organization had exercised, in not electing Liberia and Panama to the Committee, its electoral power in a manner in accordance with the relevant provisions of the convention.[22] In this case the International Court of Justice refused, justifiedly, to enlarge upon an abstract interpretation. Instead, by restating the question it examined the dispute that emerged in connexion with interpretation, on considerations of a concrete application of the convention.

To reinforce their position, the adherents of abstract interpretation prefer to emphasize that by an abstract formulation of the question the political element may be barred from interpretative activity. This attitude became manifest in the advisory opinion of the Inter-

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tion decreed that the Committee should consist of fourteen members elected by the Assembly, however, eight at least of the fourteen should be elected from among the states disposing of the largest merchant fleet. At the time of the emerging of the dispute the respective merchant fleets of Liberia and Panama were the third and eighth in the world, moreover actually through the use of the so-called flag of convenience, i.e. the recognition of the right to the use of the flag even in the absence of any close relation between the vessel and the state, Liberia occupies the first place. At the election the Assembly of the Inter-Governmental Maritime Consultative Organization did not admit these two states to the membership of the Maritime Safety Committee, an act which the International Court of Justice considered unlawful. For the sake of completeness it should be remembered that Article 5 of the Geneva Convention of 1958 on the High Seas insists on a "genuine link" between the ship and the state of the flag. However, at the same time the Convention recognized the right of all states to fix the conditions on which a state authorized the use of its flag on a ship, and failed to decree sanctions for the case of a violation of the principle of effectivity. For that matter at the settlement of the dispute in question the 1958 Convention was not yet in force.

[22] See *I.C.J. Reports 1960*, pp. 152 et seq.

national Court of Justice of May 28, 1948, already referred to, which dealt with the conditions of admission to membership.[23] Apart from the fact that behind the abstract formulation there is in all cases the concrete dispute which notwithstanding the abstract wording of the question cannot remain concealed to the organ in charge of interpretation, it is obvious that legal disputes between states are always interwoven with political elements, ignorance of which would seriously distort the very problem awaiting solution.[24] This applies also to disputes associated with the interpretation of treaties, where the political character is invariably demonstrable in some degree — a character that no trickery can conjure away altogether. We do not doubt that the overwhelming majority of disputes of interpretation may be included in the notional sphere of the so-called international legal disputes, where the legal element is preponderant. All we call in doubt is that the political element could be fully eliminated by various devices applied in the formulation of the question to be settled.[25]

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If the notion of interpretation has to be made clear in the domain of international law, then we shall have to fix also the thesis that of all sources of international law essentially the most important one, i.e. the treaty, is only open to interpretation.[26] As interpretation takes place in connexion with a precisely formulated legal norm applied to a concrete situation, and as its purpose is to expose the intention of the creator of the norm, it is obvious that an opportunity for this is open only where the legal norm has appeared in a written form. In the field of international law this condition is met only in the case

[23] See *I.C.J. Reports 1948*, p. 61.

[24] For details see Haraszti, Gy.: A nemzetközi bíráskodás (International judicature). *Jogtudományi Közlöny*, 1963, No. 4, pp. 105 et seq.

[25] Cf. Шуршалов, В. М. (Shurshalov, V. M.): *Основные вопросы теории международного договора* (Fundamental questions of the theory of treaties). Moscow, 1959, p. 381. Below we shall deal specially with the interpretation of the United Nations Charter and the political character of the interpretation (pp. 64 et seq.).

[26] For the purpose of this analysis we may ignore the binding resolutions of certain international organizations passed within a narrow sphere only which in certain cases may also qualify as sources of international law.

of treaties.[27] As regards customary law still having a rather significant function in international law, there can be no case of an interpretation proper, as here the first concern of the law-applying organ is to establish the customary norm. The rules international law has formulated for the interpretation of legal norms cannot be applied to the establishment of customary law, and even when the effort aimed at establishing a legal custom shows certain theoretical elements of interpretation, for practical purposes these elements are utterly negligible.

In particular the Italian literature makes an important distinction between the interpretation of a treaty, on the one side, and the establishment of customary law, on the other, and in this context it also observes marked differences of terminology.[28]

For our part we too consider a separation of written and unwritten law necessary when it comes to interpretation in international law, mainly because of the different nature of the operative courses with which these two categories of legal sources are applied. Since

[27] V. M. Shurshalov (*Op. cit.*, pp. 382—383) believes it is necessary to emphasize that not all treaties are open to interpretation. From the sphere of interpretation he would have excluded treaties if their conclusion has been procured by the use of force against one of the parties and so the act of will of this party was not free. However, this statement is partly superfluous, partly not exhaustive enough. As a matter of fact it stands to reason that only a valid treaty can be made subject to interpretation, a treaty brought about by the use of force must, however, be considered null and void. This has been laid down also in Article 52 of the Vienna Convention, which in this respect has merely codified a norm formulated earlier. However, the purposelessness of interpretation applies not only to the case here referred to, but to any other case of the invalidity of a treaty.

[28] According to Italian terminology the term "*interpretazione*" may be used only in connexion with treaties, whereas activity directed to the establishment of customary law is designated as "*rilevazione*". The need for this differentiation has been exposed in a particularly pithy form by R. Quadri (*Diritto internazionale pubblico*, 2nd ed., Palermo, 1956, pp. 40 et seq.). Accordingly, the establishment of international customary law is an intellectual and cognitive phenomenon, whereas the interpretation of written law, i.e. a treaty, is a legal operation. Bentivoglio, in his work quoted above, follows in his wake (pp. 7—9), and so G. Barile (in particular in La rilevazione e l'integrazione del diritto internazionale non scritto e la libertà di apprezzamento del giudice, in Vol. V of *Communicazioni e studi dell'Istituto di diritto internazionale e straniero*, Milano, 1953, pp. 143 et seq.) who in several works exposes his relevant opinion.

interpretation as brought under regulation by international law cannot emerge unless in connexion with treaties, in the following we shall confine ourselves to the interpretation of treaties.

Nevertheless, we have to point out that the activities aimed at interpreting a treaty and establishing a norm of customary law may to some extent become intertwined. A proper interpretation of a treaty can promote the establishment of the existence or non-existence of a norm of customary law. As an example we may refer to the legal dispute between Portugal and India over an alleged right of passage of Portugal through Indian territory in connexion with the former Portuguese colonial enclaves in India. In its for other reasons highly disputable judgement the International Court of Justice held that in respect of armed forces, arms and ammunition, Portugal had no right of passage, i.e. a norm of customary law had not developed. To this conclusion the Court came partly through the interpretation of the British–Portuguese treaty of commerce and extradition of 1878.[29]

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In addition to the elements so far elucidated in connexion with the notion of interpretation, also the purpose of interpretation has to be cleared. Here we discuss the question in broad outlines only, to the extent needed for a definition of the notion of interpretation. Still later, however, we shall expatiate on some more problems associated directly with the purpose of interpretation.

As regards the purpose of interpretation two fundamental points of view are opposing each other, viz. (1) to discover the purpose of interpretation in the elucidation of the common intention of the contracting parties, (2) to explore the content of the contractual norm on the ground of the text of the treaty. It is not merely a difference of underlying theories that contrasts the two points of view. Discrepancies of the purpose of interpretation may have *inter alia* serious repercussions on the methods of interpretation, and also on the establishing of the material which may be resorted to in the process of interpretation.

There are several arguments to be found in the literature on international law, and also in practice, which may be produced in favour of the one or the other point of view concerning the purpose of inter-

[29] See *I.C.J. Reports 1960*, pp. 40 et seq.

pretation. Already Grotius took a position emphasizing the need for the elucidation of the contracting parties' intention: "*Rectae interpretationis mensura est collectio mentis ex signis maxime probabilibus.*"[30] The point of view which exclusively concentrates on the analysis of the meaning conveyed by the text and which ignores the elucidation of the intention of the parties is of a later date. The two tendencies were opposing each other for a long time, and the struggle between them is still going on in the literature on international law of today. The subject-matter of the disputes within the Institut de Droit International, and in particular those at the session of Siena in 1952 offer an excellent survey of the frontlines.[31] Socialist literature on international law in its majority considers the elucidation of the intention of the parties the purpose of interpretation.[32]

For our part we believe that basically the elucidation of the joint intention of the parties at the conclusion of the treaty should be considered the purpose of interpretation. This position is in agreement with the principle of *bona fide* interpretation. The elucidation of that intention cannot, however, imply a degradation of the significance of the text of the treaty. Those in charge of interpretation have to start from the thesis that the intention of the parties is expressed by the text of the treaty. Still this does not imply that we could or should dispense with other means in elucidating the intention proper of the contracting parties.

Already in this connexion it should be made clear that we cannot agree with the tendency making headway in bourgeois literature of international law, which wants to tear away the text of the treaty completely from the intention of the parties, i.e. which wants to instil a life of its own into the text and so enable the content of the treaty to follow in the wake of the fluctuations of the political situation.

[30] Grotius, H.: *De iure belli ac pacis.* Lib. II. cap. XVI, I (Classics, 3, 1925).

[31] See *Annuaire,* 1952, Vol. 44, tome II, pp. 359 et seq.

[32] Of the Soviet literature see in particular Кожевников, Ф. И. (Kozhevnikov, F. I.): *Учебное пособие по международному праву* (Manual of public international law for students). Moscow, 1957, p. 271; Shurshalov, V. M.: *Op. cit.*, p. 375; *Курс международного права* (Course of international law). Ed. by F. I. Kozhevnikov, Moscow, 1966, p. 356; *Курс международного права* (Course of international law). Ed. by V. M. Chikvadze, Moscow, 1968, Vol. IV, p. 201.

We may now proceed to defining the notion of treaty interpretation without a pretence to embracing all elements of interpretative activity. On the ground of what has been set forth above *by the interpretation of a treaty the legal operation is understood which in association with the application of the treaty to an actual case is directed to the elucidation of the intention of the parties at the conclusion of the treaty through the cognition of the text of the treaty and other appropriate materials.*[33]

The interpretation of treaties on this understanding is an institution of international law of vital importance, an institution whose function is to promote peaceful coexistence, international cooperation, to contribute to the realization of the principle *pacta sunt servanda*, and advance the establishment of international legality. The socialist states in their interpretative practice have the achievement of these targets as their principal objective.

[33] In opposition to other opinions in the light of the definition the establishment of the authentic wording of a treaty cannot be considered an act of interpretation, but merely a precondition of interpretation. In the same way we cannot agree with the position represented by Fauchille (Fauchille, P. and Bonfils, H.: *Traité de droit international public*. Paris, 1926, tome I/3, p. 375), which virtually identifies the correction of printer's or typing errors in the text of the treaty with interpretation. As regards the correction of errors, in certain treaties special provisions have been taken up, so in the convention between Germany and Poland of May 15, 1922, on Upper Silesia, and in Article 79 of the Vienna Convention of 1969 itself.

Chapter II

HISTORICAL EVOLUTION OF THE PRINCIPLES OF INTERPRETATION

A cursory glance at the history of the doctrines and the development of the principles of the interpretation of treaties will reveal a rather interesting phenomenon. As regards the interpretation of treaties, the great classics of international law had taken already a definite stand, and some of them discussed the problems involved with a so far unparalleled thoroughness.[1] With the progress of time the interest in the principles of interpretation has abated somewhat, and from the second half of the past century onwards, in particular in the era of imperialism, a concept even began to spread which called into doubt the existence of any principle of interpretation.

During the past few decades a less extremist point of view has arisen in the works of many bourgeois specialists of international law who began to recognize the existence of principles of interpretation. Yet they drew the limits of these principles so narrow that when various draft codifications had to be prepared those responsible for this work were able to agree on a few terse and often meaningless wordings only. A by far more promising picture was presented by the final, 1966, draft of the International Law Commission of the United Nations, where certain socialist experts of international law had a word to say, as well as by the Articles 31 to 33 of the Vienna Convention based on the ILC draft.

Notwithstanding, so far socialist literature on international law has shown a moderate interest only to the problem of the interpretation of treaties, so that there cannot as yet be talk of the establishment of a definite standpoint in the matter of the principles of interpretation. Although socialist literature partly recognizes the existence of

[1] This applies among others to Grotius, and even more to Vattel, as will be made clear later.

certain principles of interpretation, it is still in debt for a precise formulation of these principles and the detailed exposition of their content.

In the present chapter we only have set ourselves the target to outline the opinions of a few prominent classics on the interpretation of treaties, and by this delineate the historical antecedents of the evolution of the modern principles of interpretation. The views of recent writers on the interpretation of treaties will be dealt with — within the necessary scope — at the exposition of the particular problems of interpretation.

The monograph of the excellent Polish specialist Ludwik Ehrlich, presenting a brief survey of the doctrines of Roman lawyers and certain theologians, attributes the foundations of the theory of interpretation to Alberico Gentili.[2] Yet this famous scholar of the 16th century disclosed only very few general statements on the problem of treaty interpretation and this little hardly permits us to speak of some sort of a relevant theory of Gentili, or of a systematic treatment of the problem by him.

Of all the works of Gentili here only *De iure belli libri tres* has to be mentioned in connexion with the problem of interpretation. In Chapter IV of Book II, which he gave the title *De dolo verborum*, Gentili laid down the principle of *bona fide* interpretation, and on the ground of a few concrete mythical and historical examples condemned the interpretation of treaties in bad faith. "*Seculo hoc nostro exprobratum scimus . . . quod non principibus, sed leguleis dignas verborum ac pactorum interpretationes afferrent*" writes Gentili of the methods of Emperor Charles V and King Louis of France by which they interpreted certain terms and conventions artfully and forcedly. At another place of his work Gentili emphasizes that peace treaties have to be interpreted in good faith, these being *bonae fidei* treaties.[3] Here he departs, as he himself points out, from Baldus, whom he holds in great esteem. According to Baldus a peace treaty is a *stricti iuris* act. At the same time Gentili exposes his doctrine with an edge against the treaty-breaking practice of the Catholic princes.

[2] Ehrlich, L.: *Interpretacja traktatów* (Interpretation of treaties). Warsaw, 1957, pp. 26 et seq.

[3] Gentili, A.: *De iure belli libri tres*. Lib. III, cap. XIV (Classics, 9, 1921).

All this sounds undoubtedly correct and the ideas of Gentili meant in this respect too a certain contribution to the development of international law. Still a conclusion as if Gentili had added anything to the interpretation of treaties that could not be retrieved in the works of the Roman lawyers would seem exaggerated. Moreover, we may even venture the statement that *De iure belli* is in this respect not up to the results of the Roman lawyers of antiquity. In fact he did not even try to apply certain generally accepted principles of interpretation to treaties. Naturally this does not detract from the value of Gentili's classic work. As a matter of fact in this work he in general confined himself to the law of war, and therefore the exposition of the theory and principles of the interpretation of treaties was outside the scope of his work.

The picture is an altogether different one as regards Grotius. In Book II of his standard work he devotes a special chapter to the problems of interpretation.[4] In this chapter he systematically treats the theses which he believes to be applicable to the interpretation of treaties on the ground of an analysis of certain concrete cases. The work of Grotius resembles that of Gentili only in so far as in conformity with the practice of his age he takes his examples mostly from mythical and biblical events, and the history of Greece and Rome. In every other respect, unlike Gentili, Grotius wants to give a complete survey of the rules of interpretation of treaties knowingly.

Grotius's ideas are interwoven with elements adopted from Roman law. Notwithstanding the opinion voiced by many as if Grotius's principles of the interpretation of treaties were but replica of theses already known from Roman law cannot be approved.[5] Making use of the teachings of Roman lawyers, the great Dutch scholar was the first to build up, through analysis of particular cases, a system of the rules governing the interpretation of treaties, and even though a large portion of his theses may today appear as somewhat naive, nothing can be detracted from the significance of his initiative.[6]

[4] Grotius, H.: *De iure belli ac pacis*. Lib. II, cap. XVI (Classics, 3, 1925).

[5] Peretersky (*Op. cit.*, p. 142) qualifies the opinion of Ch. Rousseau as if Grotius had transplanted the relevant theses of Roman Law and private law into international law as "inaccurate".

[6] Grotius (Lib. II, cap. XVI, XXXI) expressly protests against an interpretation of the treaties of kings and peoples according to Roman Law. This he holds permissible in exceptional cases only.

The thesis from which Grotius sets out is a statement taken over from Cicero: *In fide quid senseris, non quid dixeris cogitandum.* By this Grotius takes a position in the matter of the objective of interpretation and considers the elucidation of the intention of the parties the primary function of interpretation. In the course of the centuries this thesis of Grotius recurs practically in all works dealing with the problem of interpretation and still today it indicates the principal function of interpretation. This fundamental thesis at the same time relates the ideas of Grotius to the position taken by Gentili, and sets up *bona fide* interpretation as the primary rule.

Grotius fixed the principle of good faith as an absolute and general rule. It is for this reason that he rejects the classification of Roman law which draws a line between *bonae fidei* and *stricti iuris* acts and treaties.[7]

Modern principles of interpretation include a thesis of Grotius saying that if there is no implication which suggests a different conclusion, words are to be understood in their natural sense, although technical terms shall be interpreted in their professional meanings. Still if a word or a phrase has several meanings, conjectures (*coniuncturae*) have to be resorted to for the elucidation of the correct meaning. However, these "conjectures" mostly embrace technical rules whose significance is justifiably doubted by the recent theory of interpretation.

Grotius also deals with the much moot problem of extensive and restrictive interpretation. However, here he sets up rules of a formalistic nature which even in his age would not have advanced the questions of interpretation towards a solution. As a matter of fact, Grotius splits up the promises, i.e. contractual obligations, into favourable (*favorabilia*), odious (*odiosa*) and mixed or median (*mixta aut media*) ones and on the whole formulates the thesis that for favourable acts words or phrases have to be interpreted extensively, for odious acts restrictively. Obviously this rigid definition is inapplicable to prac-

[7] Grotius permits a single exception from this rule. Accordingly "if in any country some acts have a certain common form, in so far as that form is unchanged, the distinction may be understood to be present in the act". [(Grotius, H.: *De iure belli ac pacis.* Lib. II, cap. XVI, XI (Classics, 3, 1925).] Here, as correctly stated by Ehrlich, Grotius sets up a presumption against the necessity of committing a treaty to writing. (See Ehrlich, L.: L'interprétation des traités. *Recueil des Cours*, Vol. 24, p. 17.)

tice, as in fact the classification of an act by the one category or the other can be but arbitrary. In addition Peretersky correctly points out that what for the one party may be "favourable", may be "odious" for the other.[8]

This thesis of Grotius, which sets up a certain presumption as to the will of the contracting parties, has recurred from time to time in writings on international law, influencing the evolution of practice, and traces of it may be discovered even in modern theories. Nevertheless, what is sound in the thesis is no more than the idea that if by the current methods of interpretation the intention of the parties cannot be elucidated, the treaty obligations of the states, as a rule, will have to be interpreted restrictively.[9] In addition, as regards "odious" obligations, modern international law has developed the notion of unequal treaties. Still this notion falls in line with the questions of validity (or invalidity) of a treaty rather than with that of interpretation.

Apart from these fundamental theses the work of Grotius tries to offer the interpretation of certain expressions and appears to be oddly casuistical. So e.g. he interprets the term "ally", and wants to make clear whether only the allies as existing at the time of the conclusion of the alliance may be counted as such, or also those acceding to the alliance subsequently. Similarly, he interprets words or expressions which occur in certain treaties concluded mostly between states of antiquity. These passages of his work are void of an interest for the modern student, and deserve mention only in so far as they too reflect the doctrine of Grotius proclaiming the priority of *bona fide* interpretation.

Naturally the followers of Grotius could not withstand the influence of their great predecessor in the matter of interpretation. This holds in particular for scholars of the school of natural law.[10] Pufendorf, the prominent representative of the pure tendency of natural law, in

[8] Peretersky, I. S.: *Op. cit.*, p. 143.

[9] For a detailed exposition of the problem of the restrictive interpretation see pp. 151 et seq.

[10] It was Grotius who virtually established the school of natural law in the science of international law. Since, however, by the side of natural law he also recognizes the existence of voluntary law (*ius voluntarium*) corresponding to positive law, the positivist school of international law looks also at Grotius as one of its founders.

his large work of eight books, *De iure naturae et gentium*, devotes a voluminous chapter to the question of interpretation,[11] in which he relies mostly on Grotius, developing his doctrine considerably.[12]

Pufendorf emphasizes the importance of the rules of interpretation: *maximopere est necessarium, nosse certas regulas, quibus genuinus eorundem*[13] *sensus eruatur*. As Grotius, he also starts from the Ciceronian thesis, according to which the intention has to be searched when it comes to exploring the sense of the commitments assumed by the parties.[14] The classification of Grotius according to favourable, odious, and mixed treaties may be discovered also in his work. However, he does not confine extensive interpretation to the "favourable" treaties, but in general believes this kind of interpretation to be appropriate for the prevention of the evasion of assumed commitments. On the other hand, Pufendorf allows a wider scope to restrictive interpretation than Grotius, and by this comes closer to the modern concept of an unconditional respect for sovereignty. The numerous rules of interpretation of a technical nature set up in his work and mostly traceable to Grotius can hardly be reconciled to the modern principles of interpretation and must be considered obsolete today.

It is due to Grotius and Pufendorf that general works on international law published after them enlarge more and more on the problem of the interpretation of treaties. However, these works are entirely void of original statements and overwhelmingly recapitulate the teachings of Grotius.

Finally, the great work published by Vattel in the 18th century attacked the problem of the interpretation of treaties with an unprecedented thoroughness. Some of his theses still animate discussions in the theory and practice of international law. Vattel sums up the results of his predecessors, complementing their teachings with partic-

[11] See Pufendorf, S.: *De iure naturae et gentium libri octo*. Lib. V, cap. XII (Classics, 17, 1934).

[12] Pufendorf refers to Grotius as a great authority on interpretation and states: "*in isthac materia . . . subtiliter valde est versatus*" (Lib. V, cap. XII, § I).

[13] Viz. *signorum*, i.e. Pufendorf considers it necessary to be acquainted with the rules serving the elucidation of the sense of the terms incorporated in a treaty.

[14] See above, p. 33.

ular regard to practical exigencies.[15] This made his work valuable and indispensable for international practice in his age and even later.

In his introductory remarks Vattel emphasizes the need for rules of interpretation. In his opinion interpretation would be needed even when the meaning of each expression of the treaty were at once clear. In this case too the provisions worded in general terms would have to be applied properly to all the particular cases widely differing from one another.[16] For the appropriate performance of interpretation rules have to be laid down, adapted to throw light upon what is obscure, decide what is uncertain, and frustrate the designs of a party acting in bad faith. These rules are founded upon reason and authorized by the natural law.[17]

Vattel then sets up five general rules, of which in particular the first has become famous: "... it is not permissible to interpret what has no need of interpretation" writes Vattel,[18] somewhat coming into conflict with his earlier reasoning. He then explains this principle in a sense that the natural meaning of a treaty has to be accepted. This thesis, even now regularly recurring in the judicature of the International Court of Justice, has not contributed to the elucidation of the nature of interpretation, nor to the advancement of interpretation. Still owing to its considerable influence we shall analyze it and subject it to a criticism later.[19]

Vattel takes a firm stand for the discovering of the intention and will of the parties at the conclusion of the treaty. He rejects interpretation leading to an absurdity or rendering the treaty null and void. These questions will always confront those concerned with the theory of interpretation; and the rules set up by Vattel can be ignored in no case.

[15] Vattel, E. de: *Le droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires des Nations et des Souverains.* Livre II, chap. XVII (Classics, 1, 1916).

[16] Vattel with this statement in fact combines the notions of the interpretation and the application of treaties.

[17] "... *des règles, fondées sur la raison et autorisées par la loi naturelle* ..." (Vattel: *Op. cit.*).

[18] "... il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation" (Vattel: *Op. cit.*).

[19] See pp. 91 et seq. Similarly we shall revert to other principles formulated by Vattel later. These principles are partly recapitulations of principles of interpretation formulated by various writers.

Vattel also grapples with the problem of extensive and restrictive interpretation defending the rather artificial tripartite classification of Grotius and Pufendorf against attacks launched by contemporary criticism.[20] Nevertheless by Vattel the significance of the classification has been modified somewhat. First of all he believes that a distinction of favourable, objectionable and mixed provisions is justified only in dubious, debatable cases, i.e. when the intention of the contracting parties cannot be established otherwise. He also turns the Grotian thesis the other way round, when instead of stating that a "favourable" provision must be interpreted extensively he comes to the conclusion that provisions should be considered "favourable" when interpretation is more equitable in the extensive than in the restrictive way. He enriches the Grotian thesis in so far as according to his opinion anything useful for human society should be counted among the favourable, whereas anything hurtful among the objectionable things. After these preliminary remarks on the ground of the tripartite classification Vattel formulates the detailed principles of interpretation, which, however, arouse moderate interest today.

The same holds also for the technical rules of interpretation which Vattel enumerates and which he has taken over almost unchanged from some of his predecessors. Based on these technical rules he tries to solve the cases where a conflict occurs between the contents of two or more treaties. Naturally this attempt cannot produce the desired result, as here we face the problem of the international liability of states rather than one of interpretation.

Vattel deserves credit for the elaboration of the rules of interpretation in their details and then consolidating them in a uniform system. A large portion of these rules is still living. Vattel's work had a great effect on later literature, and also on international practice.[21] Even today a study of the problem of treaty interpretation is inconceivable without making recourse to Vattel's ideas and doctrines. For this reason, in the following discussion we shall revert to Vattel on several occasions.

[20] Vattel himself refers to the opposite standpoint of J. Barbeyrac.

[21] References to Vattel are not rare in the practice of international arbitration of the last century. So in the Aspinwall, Sambiaggio and other cases there are such references. Similarly the Permanent Court of International Justice and the International Court of Justice in their practice on several occasions referred to Vattel.

In general Vattel is considered the last representative of the classics who studied the problems of interpretation. When international relations began to intensify in the 19th century, a new type of treaties appeared, viz. the multilateral treaty with its specific problems, and when after the successful settlement of the Alabama case international arbitration was gradually established in practice, naturally disputes associated with the interpretation of treaties came into prominence. According to an apposite remark of Charles Rousseau, the disputes referred to an international tribunal are in general associated with interpretation.[22] Unfortunately all these developments failed to call due attention to the theoretical problems of interpretation. The works that tried to consolidate the established rules in the second half of the 19th century added but little to the expositions of the great classics, moreover fell behind them.

Among the scholars of the past century dealing with treaty interpretation a prominent position was occupied by Lord Phillimore[23] who in addition to fixing good faith as a basic principle distinguished particular methods of interpretation which in general are adopted by the science of international law. He took a stand against what are called technical rules of interpretation, which stiffen the whole function of interpretation to a critical degree. However, he also took over certain theses from the classics which owing to their extreme rigidity have already forfeited their claim to general recognition. Although he referred to arguments which may be brought forward against the more or less scholastic trichotomy of Grotius and Vattel, he did not altogether reject their classification impracticable in the original form.

By the side of Phillimore many a prominent students tried to clarify the problems associated with interpretation, until by the turn of the century, in the age of imperialism, a change took place in the situation. In the same way as with the advent of the age of imperialism for the interpretation of municipal law the so-called free law school began to prevail, i.e. the school which "mostly on the plea of interpretation gives access to judicial legislation into bourgeois legal life"[24] and which

[22] Rousseau, Ch.: De la compatibilité des normes juridiques contradictoires dans l'ordre international. *Revue générale de droit international public*, 1932, No. 2, p. 191.

[23] Lord Phillimore: *Commentaries upon International Law*. 3rd ed., London, 1879—1882.

[24] Szabó, I.: *Op. cit.*, p. 18.

in the course of this activity tried to discard all kinds of restrictions, so also for the interpretation of treaties the opinion came into power according to which interpretation must be made "free" and should not be squeezed into the Procrustean bed of rules. Often behind this opinion a tendency towards setting aside international legality and guaranteeing the "freedom" of the imperialist state was lurking.

The two tendencies, viz. the one emphasizing the need for rules of interpretation, and the other denying this need, continue unchanged, nor has the struggle between the partisans of the two abated. There is no unanimity either in the socialist camp in this question, and the writings of the socialist specialists of international law represent numerous hues and shades. As regards the general tendency, here it may be said that the position proclaiming the need for rules of interpretation is making headway, and even those denying the existence of rules of interpretation eventually are forced to make allowance for certain "general principles" which they deduct essentially from international practice. This is the case in particular with Oppenheim.[25] That the makers of the drafts for the codification of the law of treaties were forced to deal with the subject is another indication of the need for rules of interpretation. In the course of codification work in international law done under the auspices of the Harvard Law School attempts were made to define these rules, although in a single short article.[26] The Institut de Droit International, this organization of experts enjoying highest authority, for the first time began to deal with the problems of treaty interpretation in 1950, and as the result of a series of sessions in Granada, in 1956, a resolution in two articles was born which, however, did not go any farther than the fairly vague formulation of a few basic principles.[27] The International Law Commission of the United Nations went much farther. As the outcome of protracted debates, in Articles 27 to 29 of the final draft the Commission formulated the rules governing the interpretation of treaties in a by far more detailed manner.[28] Finally, of still greater

[25] Oppenheim, L. and Lauterpacht, H.: *International Law*. 8th ed., London, 1955, Vol. I, pp. 950 et seq.

[26] See *The American Journal of International Law*, 1935, Supplement, p. 937.

[27] See *Annuaire*, 1956, Vol. 46, pp. 438—439.

[28] *Reports of the International Law Commission* on the second part of its seventeenth session, 3 to 28 January, 1966, and on its eighteenth session, 4 May to 19 July, 1966 (hereinafter I.L.C. Reports, 1966), pp. 49—56.

significance has been that the Vienna Convention of 1969 on the law of treaties provides within the limits drawn by the draft for the rules to be followed at interpretation. All this demonstrates that actually the existence of, and the need for, rules of interpretation are being recognized within a by far wider sphere.

Hungarian literature on international law has so far given little recognition to the significance of the interpretation of treaties, or to the importance of the exploration of the established principles of interpretation. Until the first version of Part One of the present work, no Hungarian monograph had dealt with the problem, and papers touching on certain details appeared sporadically. Of these, the study of Károly Nagy on the question of the authentic interpretation of treaties deserves special mention.[29]

As regards Hungarian textbooks, here phenomena corresponding to the general trends in bourgeois discipline of international law come to notice. The works published in the second half of the 19th century at least briefly touch upon the question of interpretation. This applies to the first work on international law published in Hungary, that of István Kiss, as also to those of Apáthy, Tassy and Csarada.[30] In the

[29] Nagy, K.: A nemzetközi szerződések hiteles értelmezése (Authentic interpretation of treaties). *Acta iuridica et politica*, tom. X, fasc. 4, Szeged, 1963.

[30] Kiss, I.: [*Európai nemzetközi jog* (European international law). Eger, 1876] although in a concise form, deals with the question of the interpretation of treaties. Still he fails to discover the difference between a private law contract and a treaty, and therefore mechanically takes over also certain theses wholly meaningless for the interpretation of treaties. Thus he points out that if there is a disagreement on the degree of the right and obligation, then there lays a claim to the lower degree only; on the other hand, if a certain kind of prestation has been stipulated, the average quality should be understood (p. 217). I. Apáthy too tries to apply private law principles, still he sets up, on the pattern of Vattel [*Tételes európai nemzetközi jog* (European positive international law). Budapest, 1888, pp. 215—217] certain theses of international law. P. Tassy in his book of reference [*Az európai nemzetközi jog vezérfonala* (Guide to European international law). Kecskemét, 1887], otherwise not too significant compared to the standards of Hungarian literature on international law of the time, sees fairly clearly the importance of the problem and tries to formulate useful theses on the pattern of those of foreign literature (pp. 92—93). J. Csarada in his textbook also discusses the question of treaty interpretation, however, he already reminds the reader that where-

age of imperialism, in particular between the two world wars, Hungarian literature so to say took no note of the question of treaty interpretation. In the textbook of Irk[31] there are not even traces of the problem, and all what Teghze writes is that the rules applicable in international law are uniform with the rules of interpretation valid for the other branches of law.[32] Nor does László Gajzágó discuss the problem in his rather eclectic "opuscule".[33] The best textbook published on international law in this period, the one written by László Buza, bypasses the question of interpretation. Still the author qualifies the treaty as a legal source analogous with an Act of Parliament in municipal law,[34] and so evidently he considers the rules of the interpretation of statutes applicable also to treaties. Ferenc Faluhelyi deals briefly with the interpretation of treaties, still he only enumerates a few rules mostly traceable to Roman Law which are generally applied at the interpretation of private law contracts. At the same time, he wholly misconceives the essence of the problem when discussing the question of interpretation jointly with that of treaties concluded for the benefit of a third state, the most favoured nation clause, and the clause of general participation.[35]

The first postwar Hungarian textbook on international law when dealing with the problem of interpretation is rather chary of words.[36] According to its authors, as regards the ways and means of interpretation of treaties, the general principles of interpretation are normative. The book ignores the peculiarities of the interpretation of treaties, so that it gives no practical guidance to treaty interpretation.

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as the relevant theses were elaborated in greater detail earlier, modern writers treat the question rather tersely [*A tételes nemzetközi jog rendszere* (System of positive international law). 2nd ed., Budapest, 1910, p. 506].

[31] Irk, A.: *Bevezetés az új nemzetközi jogba* (Introduction into the new international law). 2nd ed., Pécs, 1929.

[32] Teghze, Gy.: *Nemzetközi jog* (International law). Debrecen, 1930, p. 405.

[33] This is the name the author uses in his work: *A háború és béke joga* (The law of war and peace). Budapest, 1942.

[34] Buza, L.: *A nemzetközi jog tankönyve* (Textbook of international law). Budapest, 1935, p. 200.

[35] Faluhelyi, F.: *Államközi jog* (Interstate law). Pécs, 1936, pp. 270—271.

[36] Buza, L. and Hajdu, Gy.: *Nemzetközi jog* (International law). 3rd ed., Budapest, 1961, p. 241.

Chapter III

THE SUBJECTS OF INTERPRETATION

The notion of interpretation of treaties includes activities performed by a number of organs. Consequently works classifying the various kinds of interpretation depart from the subjects of interpretative functions.

If now the classifications of the various authors are reviewed from the point of view of subjects, a fairly variegated picture will present itself. Classifications are mostly autotelic, reflecting the personal ideas of their authors and containing but few statements to be exploitable in practice. In order to provide a practical classification, the differences characterizing the results of the interpretative activities performed by the particular subjects have to be established. These differences may be discovered in the effect of the position taken as the outcome of the interpretative activity. On the other hand, concerning the methods and rules of interpretation there can be no difference according as what organs are responsible for interpretation.

When now the effect of interpretation is taken into consideration, from the point of view of the subjects of interpretation the following classification suggests itself:

1. Interpretation by all contracting parties jointly.
2. Interpretation jointly by two or more, yet not all parties to the treaty.
3. Interpretation by an international judicial or other organ jointly appointed by the contracting parties.
4. Interpretation by an international organization.
5. Unilateral interpretation by one of the parties to the treaty.
6. Doctrinal interpretation.

1. INTERPRETATION BY ALL CONTRACTING PARTIES JOINTLY

The contracting parties who by their unanimous manifestation of will have brought about a treaty, may by a subsequent unanimous joint declaration interpret this treaty at any time. This straightforward thesis is well established for a long time, moreover some of the classics of international law believed that exactly a joint interpretation by the contracting parties was the only possible way of interpretation. This meant the application of the thesis of Roman Law "*eius est interpretari legem, cuius est condere*" to treaties. According to Wolff,[1] nobody can be the interpreter of his own words, and this rule was laid down also by Vattel as the third general principle of interpretation "none of those concerned or of the contracting parties can interpret the instrument or the treaty at his liking."[2]

Even though today the rigid standpoint that a treaty can be interpreted only jointly by the parties creating it, is encountered on rare occasions only, still theory overwhelmingly agrees that only a joint interpretation by the parties can be designated as "authentic interpretation".[3] This is justified in so far as interpretation performed by all parties to the treaty jointly will in all events be binding on all, and that not only in the concrete instance, but in general for any similar situation likely to emerge in the future. However, the sporadically appearing opinion which identifies what is called authentic interpretation simply with the notion of interpretation of binding force is not sound in every respect. This notion is incorrect because as will be seen there may be interpretations of binding force which have not been given directly by the parties, but upon their request or with their consent by certain international organs.

[1] Wolff, Ch.: *Ius naturae methodo scientifica pertractatum*. Lib. VI, §§ 461 to 463 (Classics, 13, 1934).

[2] Vattel, E. de: *Op. cit.*, Livre II, chap. XVII, § 265 (Classics, 1, 1916).

[3] Cf. e.g. Peretersky, I. S.: *Op. cit.*, p. 51.; Ehrlich, L.: *Op. cit.*, p. 36; Faluhelyi, F.: *Államközi jog* (Interstate law). Pécs, 1936, p. 270; Buza, L. and Hajdu, Gy.: *Nemzetközi jog* (International law). 3rd ed., Budapest, 1961, p. 240; *Zarys prawa międzynarodowego publicznego*. Warsaw, 1956, tom. II, p. 109.

Joint interpretation by the parties to a treaty is given by certain authors the designation of diplomatic interpretation,[4] and that on the plea that this sort of interpretation is in general due to the activity of diplomats who have been also the creators of the treaty to which a construction has to be given. However, this designation will not lead us closer to the elucidation of the essence of the interpretation in question, moreover it may be rather misleading, as an interpretative declaration made by the foreign office of a contracting party can also be accepted as diplomatic interpretation. This sort of interpretation comes within the sphere of unilateral interpretation, and by itself is void of the character of an authentic interpretation. For this reason the designation "diplomatic interpretation" should be discarded.

It should be noted that for practical purposes the interpretation offered jointly by the parties involves the least number of problems. As a matter of fact the parties to a treaty may by unanimous consent attribute any meaning to the provisions of the treaty signed by them, nor are the parties tied by whatever rules in the elucidation of the actual meaning of the treaty. The question may be therefore asked whether there is a case of interpretation at all when the contracting parties in conjunction attribute subsequently a definite meaning to the provisions of a treaty or a similar instrument.

In point of fact this problem has sprung up in international law in the wake of certain positions taken in connexion with interpretation of municipal law, since in the national legal systems a similar situation may present itself for what may be called legislative interpretation.[5] However, whereas in municipal law constitutional and other considerations speak for the prevention of the legislative interpretation from being actually torn away from the legal rule to be interpreted, and so from being offered a chance to smuggle new legal norms into the legal system with retroactive force, the same considerations do not manifest themselves with equal weight in international law. In inter-

[4] See Duez, P.: L'interprétation des traités internationaux. *Revue générale de droit international public*, 1925, p. 431.

[5] Cf. Szabó, I.: *Op. cit.*, pp. 461 et seq. Szabó points out that a large section of jurisprudence is of the belief that in municipal law only doctrinal interpretation deserves being called interpretation, since what may be called legislative interpretation can in its content detach itself from the legal rule to be interpreted in an arbitrary manner.

national law the contracting parties may by mutual agreement bring under regulation their legal relations freely and only have to bear in mind that they have to refrain from a violation of the general principles of international law and of the rights of other states. However, this barrier will be present at the conclusion of any treaty. If therefore the properly authorized representatives of the parties by remembering this barrier lay down new provisions in the interpretative agreement, under international law no objections whatever may be raised against this procedure, not even when the parties have covenanted that the agreement reached by them should be considered the interpretation of a provision of an earlier treaty, endowed with retroactive force.[6]

Hence at an interpretation performed jointly by all parties, the parties are not tied by any special rules of interpretation and within the barrier referred to above the parties may even incorporate some sort of a new provision in the interpretative agreement. If the agreement is in fact designated as one of an interpretative nature, then this new provision will have retroactive effect even without a special stipulation.

Since at joint interpretation the parties are not bound to obey relevant rules and principles, considering the definition which we have given earlier, in Chapter I,[7] an interpretative activity in this sense might exceed the notion of interpretation in the strict sense of the term. In the agreement of the parties the interpretative provision does not dissociate itself from the new rule, and the agreement as a whole will appear as a homogeneous total, whose binding force cannot be called into doubt. The practical significance of the question whether or not such a so-called authentic interpretation may be considered interpretation at all, is of a fairly limited nature, and the problem of the rules of interpretation may emerge in association with this kind of interpretation only in the course of the preliminary negotiations of the parties. In practice, in the course of diplomatic negotiations with the purpose to throw a light on the meaning of a treaty, the

[6] We cannot of course give here attention to questions of constitutional law which may emerge in particular states in this connexion. It may even occur that the parties to the treaty represent their agreement purposing the amendment of the treaty as such of an interpretative nature in order to evade their own constitutional provisions.

[7] See p. 29.

parties are wont to refer to various rules of interpretation generally before the birth of the interpretative agreement. In fact the end they have in mind is to convince one another that on the ground of the prevailing rules and principles of interpretation the treaty cannot but have the meaning which the one party or the other attributes to it. Hence, in the course of the preliminary negotiations practically the dispute among the parties in general centres round the way how the rules of interpretation should be applied.[8] However, all this does not preclude that in principle the parties may freely agree on the content of the new interpretative agreement and that the validity of this agreement cannot be made dependent on whether or not the principles and rules referred to have factually been applied correctly. This also means that the parties may perform interpretation by giving prominence to political considerations rather than to legal ones, a circumstance by itself indicating that this so-called authentic interpretation does not always coincide with the notion of interpretation in the strict sense of international law.

Joint interpretation by the parties to a treaty may take place in a variety of forms. Whether or not an interpretative provision incorporated in the text of the treaty may be considered interpretation, is practically a sterile dispute, i.e. wholly useless for practice.[9] Obviously, the procedure called by some direct interpretation does not differ in point of principle from the case when the parties, on the day of the signature of the treaty, give a construction to certain provisions of the treaty in a formally separate instrument, in a so-called additional or final protocol. Since the interpretative character of this latter instrument is in the majority of instances not called into doubt by those who consider authentic interpretation one of the categories, and for that matter the most important category of interpretation, the elementary rules of logic insist on the interpretative provisions taken

[8] We believe here to some extent Peretersky's statement has to be corrected. In his opinion a dispute about authentic interpretation as referred to above is for practical purposes entirely meaningless (*Op. cit.*, p. 53).

[9] Disputes on this question are of frequent recurrence in bourgeois literature, and are apt to turn up also in the works of Soviet writers on international law. So e.g. Peretersky in a determined form denies the nature of interpretation to interpretative provisions incorporated in the text of a treaty (*Op. cit.*, p. 51). On the other hand Shurshalov (*Op. cit.*, pp. 448—449) takes the opposite stand.

up into the text of the treaty being also qualified by them as interpretation.[10]

Several treaties contain peculiar negative provisions of interpretation, when the parties declare that a certain meaning cannot be attributed to the provisions of the treaty. For example, a provision of this kind has been taken up in Article IV of the Antarctic Treaty signed on December 1, 1959, in Washington by twelve countries, including the Soviet Union. In this article it has been stated that nothing contained in the treaty shall be interpreted as (a) a renunciation by any contracting party of previously asserted rights of or claims to territorial sovereignty in Antarctica; (b) a renunciation or diminution by any contracting party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals, or otherwise; (c) prejudicing the position of any contracting party as regards its recognition or non-recognition of any other state's claim or basis of claim to territorial sovereignty in Antarctica. A provision of this kind has to be considered also one of an interpretative nature, its purpose being the delimitation of the meaning of the provisions of the treaty to the exclusion of certain otherwise permissible interpretations. A similar provision, though seemingly formulated in a positive way, has been taken up in Article I, paragraph 1 of the Moscow Treaty of August 5, 1963, on the ban of nuclear weapon tests in the atmosphere, in outer space and under water. According to this provision it is understood that the article in question is without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground. That is, notwithstanding its divergent wording this provision is also meant to prevent a

[10] A characteristic example for the procedure is Article 1 of the Vienna conventions of 1961 on diplomatic relations, and of 1963 on consular relations, and also Article 2 of the Vienna Convention of 1969 on the Law of Treaties, which give a detailed explanation of the terms used in these instruments. Provisions of this kind are rather frequent in treaties, and occur for practical purposes in each case in non-political treaties of a technical character. Interpretative provisions laid down in separate protocols of even date with the treaty itself are also rather frequent. Here we would refer to the Hungarian–Czechoslovak convention on cooperation in customs procedure and assistance in matters of customs, where certain provisions are interpreted in the final protocol of even date.

certain definite meaning from being attributed to the provisions of the treaty.

A frequent form of joint interpretation by all contracting parties is the subsequent conclusion of another treaty with this end in view, and also the exchange of diplomatic notes which is a particularly convenient form for the settlement of a divergence of opinions as may emerge in the course of the application of agreements concluded by the parties.[11] The committing to writing is not indispensably essential for joint interpretation.[12] Joint interpretation may also take place in

[11] As has already been made clear earlier, here the notion of treaty is used in its wide acceptation in international law, i.e. so as to include international agreements in the form of protocols. The same applies also to the exchange of diplomatic notes, i.e. to agreements included in notes of uniform content exchanged by the parties. Both theory and practice consider these a form of manifestation of treaties (cf. *Mezhdunarodnoe pravo*, Moscow, ed. by F. I. Kozhevnikov, 1957, pp. 246—247; Myers, D. P.: The Names and Scope of Treaties. *The American Journal of International Law*, 1957, No. 3, p. 590; see further: the definition in paragraph 1(a) of Article 2 of the Vienna Convention of 1969). Still we have preferred to refer specially to interpretation by the exchange of diplomatic notes in the text, partly because of its extreme frequency, partly because the contractual character of an exchange of notes consisting of instruments of uniform wording is not yet sufficiently established in the general consciousness.

[12] For the so-called authentic interpretation of treaties a provision to the contrary was taken up in Article 3 of the Havana Convention of the American republics signed on 20 February 1928: "The authentic interpretation of treaties, when considered necessary by the contracting parties, shall likewise be in writing." It should be noted that under Article 2 of the Convention the written form is an essential requisite of all treaties. However, in modern international law a thesis conveying such a condition is not established, although in general treaties come into being in written form. Actually international law recognizes the so-called Ihlen principle approved by the Permanent Court of International Justice in the dispute between Denmark and Norway on the legal status of Eastern Greenland, according to which a declaration made by the Minister for Foreign Affairs before the diplomatic representative of a foreign power, in regard to a question falling within his province, is binding upon the country to which the minister belongs (*P.C.I.J.*, Ser. A/B, No. 53, pp. 71—73). Although the Vienna Convention of 1969 contains provisions only governing treaties concluded in writing, still at the same time Article 3 expressly states that this does not affect the legal force of international agreements not in written form. In these circumstances the binding force of an oral interpretative agreement concluded between the contracting parties cannot be contested.

the form of what are called gentlemen's agreements, although this form is resorted to rather in cases when only some and not all of the contracting parties agree on the interpretation of the provisions of a treaty.[13]

Interpretation formulated in the form of a reservation has to be mentioned specially. The majority of works dealing with treaty interpretation ignore it, or represent it as a kind of unilateral interpretation. Interpretative declarations made by anyone of the parties at the signature of the treaty, or at its ratification, or at the accession to it and attaching to certain provisions of the treaty, are valid among the parties, except when on these occasions an objection has been made by a party or some parties to the treaty. A unilateral declaration in this sense has to be considered an interpretation relying on the joint manifestation of will of the parties, because if no one objects to it, the other parties must be regarded as consenting to the interpretation given by the party in question, i.e. the situation will be very much the same as if interpretation had taken place by joint agree-

[13] A transition between the two cases is the reply given by the four powers convening the San Francisco Conference in 1945 to a questionnaire of sub-commission III/1/B in their joint declaration of June 7, 1945, where among others the powers settled certain questions relating to the exercise of the right of veto, hereincluded what was called double veto, i.e. the agreement by which for the qualification of a question as being of a procedural nature the unanimity of the powers was required. Although formally this was not a case of joint interpretation, so that Kelsen was right in so far as he denied the nature of an "authentic interpretation" to this agreement (*The Law of the United Nations*. New York, 1951, p. 253), still it cannot be considered merely the opinion of four members of the United Nations, as Kelsen would have it. In our opinion this declaration is closer to authentic interpretation, because, first, it contains the joint interpretation of the four powers drafting the Charter, secondly, the declaration derived from the powers which were invested with the so-called right of veto. For this reason we are of the opinion that the content of the declaration which was taken notice of by those attending the San Francisco Conference is absolutely binding on the four powers in question, and must at the same time be considered approved by all members of the United Nations. Consequently, the disregard of the position taken in the declaration by the Western powers, e.g. in the Laos dispute, qualifies as an infringement of international law. Cf. Ушаков, Н. А. (Ushakov, N. A.): О нарушении процедуры голосования в Совете безопасности ООН (On the violation of the voting procedure in the Security Council of the United Nations). *Sovietskoe gosudarstvo i pravo*, 1960, No. 1, pp. 89 et seq.

ment. However, a peculiarity of the procedure is that partly it is restricted to multilateral treaties, as a reservation is conceivable only to such treaties, partly it leads us to the next category of interpretation, i.e. to the case when interpretation is given by some of the parties to the treaty, and not by all. As a matter of fact, interpretation incorporated in a reservation is normative only for the relations between the state formulating it and the other parties to the treaty, whereas it does not define the meaning of the passage in question in the relation existing among the other parties. If, on the other hand, one of the parties to the treaty objects to the interpretative reservation, the reservation will not bear on the objecting party. Moreover, the treaty will perhaps not even become effective in the relations between the party making the reservation and the one objecting to it.[14]

In connexion with interpretation by way of an exchange of diplomatic notes the question of the validity of an interpretation in this way before signature may be raised. In our opinion here the rules valid for reservations will have to be applied, i.e. an interpretation taken up in the exchange of notes in the course of negotiations cannot qualify as joint interpretation unless it is repeated at signature, i.e. it is taken up in the treaty itself, or in a separate instrument, or at least referred to at signature. Otherwise it might be doubted whether in the course of subsequent negotiations the contracting parties have maintained their points of view expressed in the exchange of notes. However, the exchange of notes not reiterated at signature is not meaningless, as it may come into consideration as preparatory work

[14] A more detailed analysis of the problem of reservations is, as a matter of course, outside the scope of the present work. In connexion with this question we would refer in Hungarian literature to the monograph of H. Bokor-Szegő: *A nemzetközi szerződésekhez fűzött fenntartások* (Reservations to treaties). Budapest, 1961, where she analyses the legal bearings of reservations in detail, although she does not deal specially with the question of reservations of an interpretative nature. — It should be noted that in the first session of the Vienna Conference in 1968 the Hungarian delegation submitted an amendment, which in the definition of the notion of reservation wanted to refer expressly to reservations of an interpretative character. A great number of delegations taking the floor supported the Hungarian amendment (see *United Nations Conference on the Law of Treaties*. First Session. Official Records, pp. 23 et seq.), however, the Drafting Committee considered this addition superfluous (see ibid., Second Session, p. 346), so that eventually the amendment was not taken up in the final wording.

of the treaty, moreover, constitute a particularly important part of this preparatory work. What is essential is that in this case the wording of the exchange of notes will not in all cases contain an obligatory joint interpretation, and the effect of the exchange of notes will have to be established on a careful analysis of the available material in each case separately.[15]

However, in our opinion the case will be an altogether different one for a separate preliminary exchange of notes where only some of the contracting parties agree on the meaning of certain provisions of the treaty. For this exchange of notes it has to be assumed that the parties in question want to consider its content normative in their mutual relations, however, for certain reasons do not insist on its being taken up in the treaty, perhaps exactly because the given agreement might provoke objections from other signatories. In the relation of the parties concerned such a partial agreement must be considered a supplementary part of the treaty.[16]

2. INTERPRETATION JOINTLY BY TWO OR MORE, YET NOT ALL PARTIES TO THE TREATY

It has already been indicated that a definite group of the contracting parties may come to a separate agreement as regards the meaning of certain provisions of a treaty.[17] This agreement will in the relation of the parties concerned have the nature of an "authentic interpretation",

[15] For details on the question of preparatory work see Chapter IV, pp. 120 et seq.

[16] In point of principle, the problem of interpretation included in a preliminary exchange of notes emerged for the first time in connexion with the Briand—Kellogg Pact signed on 27 August 1928. The significance of the exchange of notes of an interpretative character preceding the signature of the Pact was doubted by Kellogg, then Secretary of State of the United States, in so far as he declared that the exchange of notes could not be considered part of the Pact and it could not even be qualified as a reservation. In this connexion several objections were raised in the literature, without, however, coming to a settlement of the problem of an interpretative exchange of notes before signature. See Wright, Q.: The Interpretation of Multilateral Treaties. *The American Journal of International Law*, 1929, No. 1, p. 94.

[17] See above p. 49.

still it will have no direct binding force on the other signatories. However, dependent on the parties which have agreed on this particular interpretation, it will carry lesser or greater weight, and in the latter case even influence the point of view of the other parties. It has already been mentioned that in connexion with Article 27 of the Charter of the United Nations the four powers convening the San Francisco Conference agreed on the interpretation of this article. An agreement of this type was also the one reached by the great powers on the election of the non-permanent members of the Security Council, which meant a more accurate definition and interpretation of the notion of "equitable geographical distribution" referred to in Article 23 of the Charter.[18] A particular interpretation of this kind was also the joint Franco-German declaration of 9 February 1909, which gave the interpretation of the Act of Algeciras of 1906 signed by thirteen states, among them the Austro-Hungarian Monarchy, in the relation between the two powers, supplemented by special provisions normative for the two states in question.[19]

Special provisions have been taken up in the two customs conventions signed in Brussels, on 8 June 1961, respectively concerning facilities for the importation of goods for display or use at exhibitions, fairs, meetings, or similar events, and on the temporary importation of professional equipment. According to the relevant provisions of the two conventions, any dispute on interpretation which cannot be settled by direct negotiations, must be submitted to the session of the collectivity of the contracting parties, where those attending may by a majority of votes of two thirds bring forward recommendations for the settlement of the dispute. That is, in the given instance, the majority of the contracting parties decides the disputed interpretation without binding force, which means that the conference of all parties to the convention proceed as a commission of conciliation. The Convention on the temporary importation of professional equipment departs from the first convention in so far as its Article 14 autho-

[18] The situation has changed in so far as the General Assembly of the United Nations in its XVIIIth Session has passed a binding resolution on the election of the non-permanent members of the Security Council, so that the relevant provision of the Charter has by this way been interpreted by the international organization itself. For interpretation by an international organization see below, Section 4, p. 61.

[19] Cf. Duez, P.: *Op. cit.*, p. 432.

rizes the parties in the dispute to agree in a sense that the recommendations in question qualify as such as have binding force. In this case the resolution of the conference will have the force of an arbitral award.[20]

3. INTERPRETATION BY AN INTERNATIONAL JUDICIAL OR OTHER ORGAN JOINTLY APPOINTED BY THE CONTRACTING PARTIES

If a dispute arised among the contracting parties as to the meaning of a provision of a treaty, and the direct negotiations of the parties failed to produce a satisfactory result, the parties may by joint agreement authorize an organ already in being, or to be created for the nonce, with a temporary character, to give a construction to the moot provision of the treaty.

Dependent on the nature of the organ called to interpret treaty provisions in general a distinction is made between judicial and non-judicial interpretation. The first group comprises interpretation by international courts, further international arbitral tribunals or by other organs on a footing of equality with arbitration. Interpretative activity by any other international organ comes within the second group.[21] Interpretation by judicial organs upon request of the contracting parties will in each case have a binding force. However, the International Court of Justice will in general interpret a treaty in an advisory manner when an authorized organ of the United Nations, or an international organization[22] endowed with the necessary autho-

[20] The special case here discussed is already a transition to the following section, i.e. interpretation by an international organ jointly appointed by the parties to the dispute. Since, however, this type of international organ is formed by all contracting parties, it seemed to be justified to make here special mention of the case.

[21] According to these two variants of an international interpretation, i.e. an interpretation by the joint agencies of the parties, Rousseau distinguishes "interprétation juridictionelle" and "interprétation exécutive" (*Principes généraux du droit international public*. Paris, 1944, Vol. I, p. 637). Ehrlich uses the same designations (*Op. cit.*, p. 38).

[22] By virtue of Article 96 of the Charter the General Assembly of the United Nations and the Security Council, further other organs of the

rization and by consent of the contracting parties requests the Court to give its opinion. In general interpretation by non-judicial organs will not be binding on the contracting parties.

A principle equally normative for anyone of the categories referred to above is that irrespective of whether a judicial or non-judicial organ takes charge of interpretation, neither of them may proceed unless the parties have reached an agreement to this effect. No international organ may interfere in a dispute between a state and another, or among states, unless by authority received from the parties. In like way as in modern international law relying on the principle of the sovereignty of states, international administration of justice must have as its foundation the agreement of the states concerned to such effect, so international interpretation of a non-judicial character cannot take place unless the organ in question has been invested by the parties jointly with the power to apply or to interpret the treaty.[23]

This principle cannot be eluded in any form, not even when instead of the one party an international organization takes action and requests a judicial interpretation of a treaty in the form of an advisory opinion. This was laid down by the Permanent Court of International Justice in a clear-cut form in connexion with the so-called Eastern Carelian dispute, when the League of Nations wanted to interfere in the dispute between Soviet Russia and Finland on the interpretation of the Treaty of Dorpat of October 14, 1920. The Permanent Court of International Justice in its reply of 23 July, 1923 to a request for an advisory opinion made it clear that on a question concerning the controversy between states it was unable to give even an advisory

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United Nations and specialized agencies authorized by the General Assembly may request the International Court of Justice to give an advisory opinion.

[23] It is another question that under the provisions of Chapter VI of the Charter of the United Nations the Security Council may investigate any dispute which may endanger the maintenance of international peace and security, and recommend appropriate procedures or methods of adjustment to the parties. In the course of performing this function the Security Council may perhaps deal also with disputes on the interpretation of treaties, still this activity will never be treaty interpretation in the strict sense of the term, the Security Council having in mind the interests of international peace and security and may therefore make recommendations independently of the rules of interpretation.

opinion without the consent of the parties concerned.[24] However, the International Court of Justice ignored this principle and gave a definitive reply to a request of the General Assembly of the United Nations for the interpretation of the Paris peace treaties concluded with Hungary, Romania and Bulgaria in 1947, without the consent of the governments of the three states in the first place concerned, moreover against their protest.[25] Naturally the result of this unlawful procedure was that the governments of the three states concerned did not take note of the content of the advisory opinion given in the first phase of the procedure and so this unjustified attempt proved derogatory to the authority of the International Court of Justice. Hence, interpretation by way of an advisory opinion cannot take place unless by consent of the parties. Still this consent may already be given in the treaty itself in connexion with which the problem of interpretation has emerged. This was the case, for instance, with the convention of 13 February, 1946 on the privileges and immunities of the United Nations. Article VIII of the convention declares that when a difference arises between the United Nations and a state member, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the International Court of Justice, and the opinion given by the Court shall be accepted as decisive by the parties. In the present instance the contracting parties from the outset agree to an advisory opinion being requested for. The concrete reason for this provision is that in conformity with Article 34 of the Statute only states may be parties in cases before the International Court of Justice, so the United Nations Organization itself could not be litigant in a procedure before the Court.

Interpretation of treaties is one of the most important functions of the International Court of Justice. It is not by mere chance that Article 36 of the Statute of the Court, in the enumeration of cases in respect of which the state parties to the Statute may by unilateral declaration submit themselves to the jurisdiction of the International Court of Justice, mentions the interpretation of treaties in the first place. In the course of their activities the International Court of Jus-

[24] Hudson, Manley O.: *World Court Reports*. Washington, 1934, Vol. I, pp. 202—206.
[25] *I.C.J. Reports 1950*, p. 71.

tice and its predecessor, the Permanent Court of International Justice, were in practically all cases forced to the interpretation of treaties. However, as has already been mentioned, the Court cannot proceed to the interpretation of a treaty unless by consent of the parties.

For multilateral treaties, Article 63 of the Statute of the International Court of Justice expressly declares that the Court shall notify the non-litigant parties to the treaty, and thus a state so notified has the right to intervene in the proceedings. However, if it uses this right, the construction given by the judgement will be equally binding upon the intervening state. Otherwise, in conformity with Article 59 of the Statute, the judgement has no such force, as it will be binding only "between the parties and in respect of that particular case".[26]

However, as regards multilateral treaties, the tendency manifesting itself in a large number of treaties to invest the International Court of Justice with the function of interpretation in each dispute from the very outset and to permit access to the Court to this end by the unilateral request of anyone of the parties, cannot be approved. Although formally this procedure does not violate the principle according to which a judicial interpretation of a treaty cannot take place unless by consent of the parties concerned, since the contracting parties by signing the treaty have authorized all signatories to have recourse to judicial proceedings actually, however, this procedure so to say forces the states wishing to accede to the treaty to the preliminary acceptance of the interpretative jurisdiction of the court. In addition, an interpretative judgement passed in response to a unilateral request exercises a certain pressure on non-litigant states to adjust their future attitude to the judgement. If also the fact is remembered that the International Court of Justice is overwhelmingly composed of nationals of capitalist states, who cannot and do not even want to

[26] Peretersky correctly points out against P. Chailley that here there is no case of an extraordinary extension of the legal effect of the judgement, as in point of fact the judgement will even so only become binding on the party intervening of its own free will in the litigation (see *Op. cit.*, p. 66). In any case it is obvious that intervening cannot be void of any effect on the party concerned even under international law and that the intervening state by its action assumes a certain voluntary risk.

dissociate themselves from the capitalist approach,[27] it stands to reason that the socialist states, including Hungary, and also the new states recently freed from colonial oppression, are reluctant to accede to treaties which endow the International Court of Justice with this extensive jurisdiction in matters of interpretation, or at least try to exclude the validity of a stipulation to this effect, as far as they are concerned.[28] Among others this was the case at the signature of the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, where the exclusion of an extensive interpretative jurisdiction by the socialist states was in the form of a reservation attached to the treaty. The reservations to the Genocide Convention provided the occasion for the advisory opinion of the International Court of Justice of 28 May 1951, which considerably contributed to the clarification of the problem of reservations. Against the provision contained in Article 22 of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others signed in New York on 21 March 1950, which permitted the unilateral submission of disputes in connexion with the interpretation of the convention by anyone of the contracting parties to the International Court of Justice, on the part of Hungary the Presidential Council made a reservation based on the reason that the jurisdiction of the International Court of Justice had to rely exclusively on the voluntary submission of all parties concerned. Among other things, mention may be made of the reservations of Hungary to Article 33 of the Geneva convention on road transport of 19 Sep-

[27] Even a bourgeois specialist of international law, like Sørensen, is forced to recognize that the "social conceptions" of the judge will influence him to a by no means insignificant degree in his taking position in matters referred to him. Sørensen specially emphasizes that the social background of the judge will have repercussions also on the interpretation of treaties (Principes du droit international public. *Recueil des Cours*, Vol. 101, p. 13).

[28] The mistrust of the socialist states of the International Court of Justice was confirmed also by the initial practice of the Court. Here we have in mind in particular the judgement of the Court in the Corfu Channel case between the United Kingdom and Albania, and the advisory opinion of the Court on the interpretation of the peace treaties with Hungary, Romania and Bulgaria. This mistrust was even intensified by later judgements of the Court in certain problems emerged in connexion with colonial rule. For details see Haraszti, Gy.: A nemzetközi bíráskodás kérdése (The question of international jurisdiction). *Jogtudományi Közlöny*, 1963, No. 4, pp. 193 et seq.

tember 1949, and to Article 14 of the European convention on traffic signs of 13 December 1957, intended to exclude the unilateral submission of the disputes on interpretation or application of these conventions to the International Court of Justice or to arbitration, as the case may be.[29] Similarly the Hungarian reservation to Article 22 of the Convention signed in New York on 21 December 1965 on the elimination of all forms of racial discrimination precludes unilateral access to the International Court of Justice.

The interpretation of treaties accounts also for a large portion of the activities of the international arbitral tribunals. Convention I adopted by the Hague Peace Conferences of 1899 and then of 1907 also emphasized that in matters of the interpretation and application of treaties the contracting parties in the first place agreed that arbitration was the most efficacious and most equitable means of settling disputes.[30] Accordingly, a whole series of treaties incorporate a provision, according to which disputes arising in connexion with the interpretation of a treaty have to be submitted to arbitration. In the notion of arbitral tribunals we also include international organs, usually called commissions or committees, which apply the rules of international law and which by a majority of votes may pass resolutions binding on the parties.

An organ of this category is, for instance, the conciliation commission mentioned in Article 35 of the Hungarian Peace Treaty of 1947, composed of one representative of each party to the dispute, whereas the third member is appointed by the Secretary-General of the United Nations, if the parties have failed to agree on the person of the third

[29] In view of the stand taken by socialist states, which has received the approval of the majority of the developing countries, most of the recent general multilateral treaties do not contain any more a general provision on the submission of disputes on interpretation to the International Court of Justice. In general, optional protocols attached to the treaty make it possible for the signatories of the protocol to recognize the so-called compulsory jurisdiction of the Court for disputes arising out of the interpretation or application of the treaty. This method has been adopted for the Geneva Convention of 1958 on the law of the sea, the Vienna Convention of 1961 on diplomatic relations, the Vienna Convention of 1963 on consular relations.

[30] See Article 16 of Convention I adopted by the First Hague Peace Conference and Article 38 of Convention I adopted by the Second Hague Peace Conference.

member.[31] A similar organ is the one mentioned in Article 40 of the same peace treaty. Similar provisions for the settlement of disputes have e.g. been taken up in Article 35 of the State Treaty with Austria. The commission of conciliation referred to in Article 45 of the Danube Convention of Belgrade of 18 August 1948 composed of each a member delegated by the contracting parties and the President of the Danube Commission, or a third member delegated by that Commission itself, and passing resolutions binding on the parties, is virtually also a judicial organ. Notwithstanding its designation it has to pass its decisions on the ground of legal rules.

Occasionally provisions may be taken up in treaties, according to which the parties have to submit their disputes on the interpretation of the treaty, remained unsettled after direct negotiations, to a person or organ to be determined subsequently. This person or organ, whose decisions are binding on the parties, must also be considered an arbitral tribunal that has to proceed in conformity with the rules of international law, even when the treaty is void of an express provision to this effect. A disposition of this category may be found, for instance, in the Geneva Convention of 1952 to facilitate the importation of commercial samples and advertising material.[32]

While the international courts and tribunals pass their resolutions in a form binding upon the parties and by applying the rules of inter-

[31] In conformity with the peace treaty first the commission is formed only of the representatives of the parties of an equal number, and its function is in fact conciliation. If, however, no agreement is reached within three months reckoned from the submission of the dispute to the commission, a third member has to be invited on the commission which will now be transformed into an arbitral tribunal. This was how the commentary on the Hungarian peace treaty published in 1947 interpreted the provision [*A párizsi magyar békeszerződés és magyarázata* (The Hungarian Peace Treaty of Paris and its commentary). Budapest, 1947, p. 50].

[32] Article VIII of the Convention provides as follows:

1. Any dispute between any two or more Contracting Parties concerning the interpretation or application of the present Convention shall so far as possible be settled by negotiation between them.

2. Any dispute which is not settled by negotiation shall be referred to a person or body agreed between the Contracting Parties in dispute, provided that if they are unable to reach agreement, any of these Contracting Parties may request the President of the International Court of Justice to nominate an arbitrator.

3. The decision of any person or body appointed under paragraph 2 of this article shall be binding on the Contracting Parties concerned.

national law, the non-judicial organs in the course of their procedure are not in all circumstances obliged to apply the rules of international law, neither is their standpoint in general authoritative for the parties.[33] This is the situation as far as the various conciliation commissions are concerned, which submit their resolutions passed by a majority of votes or unanimously to the states calling them to life. However, the states are not bound by the resolutions of the commission.[34]

There are conventions which expressly combine interpretation by way of conciliation and judicature. A provision of this kind has been taken up among others in the Convention on Establishment signed on 13 December 1955 within the framework of the Council of Europe by a large number of European capitalist states. In conformity with Article 24 of the convention, a permanent committee has to be set up whose function is to reconcile the parties whenever a dispute arises on the interpretation of certain provisions of the convention. On the other hand Article 31 of the convention declares with general validity that for want of any other way of a peaceful settlement all disputes in connexion with interpretation have to be referred to the International Court of Justice.

It has already been made clear earlier that in view of concrete experiences the socialist states try to eliminate the interpretative jurisdiction of the International Court of Justice in their treaties with capitalist states. The same holds also for such tribunals of arbitration where for want of an agreement of the parties the umpire is appointed by an international organ.

In the mutual relations of the socialist countries, which rely on the principle of socialist internationalism, the most straightforward method to settle disputes on interpretation is to have recourse to

[33] If the parties authorize an international judicial body to settle a matter on the ground of equity (*ex aequo et bono*), by this authority its activity will cease to be administration of justice in the strict sense of the term, since it is exactly the function of international judicial bodies to determine the rules of international law governing the given case and to apply these rules to this case. This holds also for the provision in paragraph 2 of Article 38 of the Statute of the International Court of Justice, a provision which so far has not been applied in practice.

[34] The resolution of the 1961 Salzburg Session of the Institut de Droit International also essentially defines the notion of conciliation on the ground of these principles (see *Archiv des Völkerrechts*, Band 10, Heft 1, pp. 96 et seq.).

direct negotiations.[35] Nevertheless cases may occur where problems of interpretation of a certain complexity will be referred by the socialist states to a joint organ set up by them for decision. However, instances of this kind are exceptional, as in the new type of relations developed in the socialist world proceedings of this kind may in general be dispensed with.

4. INTERPRETATION BY AN INTERNATIONAL ORGANIZATION

International organizations may figure in a number of respects as subjects of the interpretation of treaties. For treaties where one of the contracting parties is an international organization[36] this party, which by the way will appear in the given relation as subject of international law, is for the interpretation of the treaty endowed with the same rights as is any other state in connexion with its treaties. We shall therefore not enlarge on this contingency. Similarly, the case when upon request of the contracting parties an international organization interprets the treaty, has not to be dealt with separately. Here the international organization will exercise the functions of a commission of conciliation or of an arbitral tribunal, i.e. all that has been set forth in the preceding section will hold here too.

However, the question of rights of international organizations when it comes to interpret their own constitutions calls for a separate discussion. These instruments are in general treaties signed by the states creating the international organization, which, however, the organizations will have to apply in the course of their activities, i.e. they will have to interpret them at the same time. It is for this reason that the particular problems which are likely to emerge here have to be made subject to a special analysis.

[35] By this the direct contact between the central organs concerned and diplomatic negotiations are understood. Express reference to this is in Article 13 of the Soviet–Hungarian Convention of December 20, 1962 on social welfare.

[36] Here e.g. the so-called headquarters agreements, the agreements between the United Nations and specialized agencies, the agreements to be concluded by the United Nations in accordance with Article 43 of the Charter etc. should be remembered. These qualify as treaties beyond dispute (cf. Article 3 of the Vienna Convention).

The most convenient method suggesting itself for the discussion of the problem is to scrutinize the relevant competence of the United Nations, this most important of all international organizations. With the necessary changes, the conclusions here come to will be holding for the other international organizations too.

In the practice of the United Nations the interpretation of the Charter by its organs is of everyday occurrence. The General Assembly and the Security Council, as also the Economic and Social Council, the Trusteeship Council, and the Secretariat, moreover even the subsidiary organs of the United Nations, in the course of their activities, of necessity, interpret the Charter. This straightforward fact had been recorded by Committee IV/2 of the San Francisco Conference drafting the Charter of the United Nations in its report, when it stated that "each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of any body which operates under an instrument defining its functions and powers".[37] Therefore the Committee thought it was not even necessary to take up relevant provisions in the Charter.[38]

Hence the particular organs of the United Nations can interpret the Charter only for their own use. Still a distinction has to be made as regards certain interpretative resolutions, namely resolutions interpreting the Charter unanimously approved by the General

[37] See *U.N.C.I.O.*, Vol. XIII, p. 709.

[38] The constitutions of certain specialized agencies have express rules for the interpretation of their provisions, and in this case they invest one of the organs of the Organization with the exclusive power of interpretation. This is the case e.g. with the International Monetary Fund, the International Bank for Reconstruction and Development, and the International Finance Corporation, where the supreme executive organs are invested with the exclusive right of interpretation in the event of a dispute between the Organization and anyone of its members, or between a member and another. The interpretative decision is passed by the executive directors and the member state dissatisfied with it may lodge an appeal with the Board of Governors, whose decision is final. The procedure similarly to the structure of these three specialized agencies, owing to the composition of the organs referred to, runs counter the principle of the equality of states and guarantees far-reaching privileges for the great powers in matters of interpretation against the smaller countries. (Cf. Erwin P. Hexner: Interpretation by Public International Organizations of their Basic Instruments. *The American Journal of International Law*, 1959, No. 2, pp. 341 et seq.)

Assembly. The General Assembly is the organ of the United Nations where all member states are represented, and where each member state is invested with an equal right of voting. Obviously a unanimous resolution of the General Assembly will carry greater weight than one passed by a simple or qualified majority of votes, and if these unanimous resolutions are tied up with the interpretation of the Charter, they have to be considered the generally accepted interpretation of the Charter, and so such of binding force.[39] Even though the Charter itself does not distinguish among the various categories of resolutions of the General Assembly as regards their legal effect, and even though it is remembered that Article 10 of the Charter endows the General Assembly only with the competence of making recommendations, it can hardly be doubted that unanimous interpretative resolutions will become similar in many respects to the so-called authentic interpretations of treaties.

Still in one respect there is an important difference between a unanimous interpretative resolution of the General Assembly and the interpretation of a treaty by the collective of the parties to it. As a matter of fact, in Articles 108 and 109 the Charter decrees a special procedure for the amendment of its provisions. If therefore the interpretative resolution went beyond pure interpretation and contained a certain amendment of the original provisions of the Charter,[40]

[39] Тункин, Г. И. (Tunkin, G. I.) [Вопросы теории международного права (Problems of the theory of international law). Moscow, 1962, pp. 128—129] analyzing the material of the San Francisco Conference and the practice of the United Nations, comes to the same conclusion. Усачев, И. Г. (Usatchev, I. G.) [Богданов, О. В., Ядерное разоружение (Bogdanov, O. V., Nuclear disarmament). *Sovietskoe gosudarstvo i pravo*, 1962, No. 5, p. 143] who in the question of the validity of unanimous resolutions of the General Assembly in matters of the interpretation of the Charter, takes a similar stand, quotes as an example the resolution of the General Assembly of the United Nations on universal and complete disarmament, which he considers the interpretation of Articles 11 and 26 of the Charter. Although it may be argued whether this example is in fact suitable for confirming the thesis in question, or whether the General Assembly passed a resolution which was the progressive development of the idea of disarmament rather than mere interpretation, and which so pointed beyond the provisions of the Charter, still, in our opinion, the soundness of the basic thesis cannot be doubted.

[40] As has been seen (pp. 44—46) in the event of the so-called authentic interpretation the line drawn between the interpretation of a treaty and its amendment or supplementation becomes anyhow blurred.

for the coming into operation of such a resolution the procedure of ratification as defined by the Charter would be needed.[41]

A special case is the unanimous interpretation of the Charter by the five great powers in matters relating to certain questions. Cases of this kind are mainly interpretative resolutions on the exercise of the so-called right of veto. As has already been made clear, such unanimous standpoints are in certain cases normative for all member states.[42]

Except for the cases here discussed, interpretations of the Charter by different organs of the United Nations are void of such general effect. Obviously the various organs, in no subordination to one another, may interpret the very same provisions of the Charter differently. Such discrepancies in interpretation may of course be responsible for confusion in the operations of the Organization. In such and similar instances, further in cases when an organ of the United Nations fails to come to a definite conclusion regarding the correct meaning of a provision, the idea of having recourse to the International Court of Justice and of requesting it for an advisory opinion may suggest itself. The General Assembly by resolution No. 171(II) of 14 November 1947 expressly invited the organs of the United Nations and the specialized agencies to refer any disputes arising on the interpretation of the Charter or the constitutions of the particular agencies to the International Court of Justice.

However, the interpretation of the Charter by the International Court of Justice in the form of an advisory opinion is apt to bring up a problem of considerable gravity. Although by virtue of para-

[41] However, it should be noted that in the event of a unanimous agreement of all contracting parties the problem of the procedure for amendments does not arise in practice. Article 26 of the League of Nations Covenant contained provisions very similar to those of the United Nations Charter for amendments, still Article 16 of the Covenant on the sanctions to be applied against aggressors was by subsequently approved interpretative resolutions completely divested of its essence, without the problem of an amendment having been raised at all. Here mention may be made of Resolution No. 4 approved by the second session of the General Assembly of the League of Nations which authorized the particular member states to judge for themselves whether the conditions for the application of Article 16 were present (cf. Schücking, W. and Wehberg, H.: *Die Satzung des Völkerbundes*. 2nd ed., Berlin, 1924, p. 618).

[42] See Note 13 above.

graph 2(a) of Article 36 of the Statute the jurisdiction of the International Court of Justice in general extends to the interpretation of treaties and so also of the Charter of the United Nations, this coming within the notional scope of treaties, nevertheless in a number of instances it may be questionable whether, and to what extent if at all, the International Court of Justice may embark on an interpretation of the Charter. Before answering this question it should be remembered that the Charter as the fundamental instrument of modern international relations, the international charter laying down the principles of peaceful coexistence and providing the organizational framework for this coexistence, is a special, *sui generis* treaty, whose interpretation is in a number of cases apt to draw those in charge of interpretation into grave political disputes, and virtually amounts to taking a definite stand in these disputes. The interpretation of the provisions of the Charter with their numerous *lacunae* often call for an exposition of the consequences following from the principle of peaceful coexistence, which exceeds the sphere of the legal questions referred to in Article 96 of the Charter. Although it stands to reason that political elements are essential in all treaties, and therefore the standpoint that, for the purpose of interpretation, distinguishes treaties of a political and a legal character, cannot be approved, still as regards the Charter, this quasi-universal treaty of greatest importance, an exception should be made by recognizing that in many instances its judicial interpretation is impossible without a transgression of the jurisdiction of the International Court of Justice. The enforcement of this point of view is often necessary mainly in order to preserve the authority of the International Court of Justice, because as a matter of course the states concerned would exploit the position taken by the Court for the support of their political ends.[43]

The dispute here outlined was brought up in a particularly keen form when the General Assembly requested the International Court of Justice for an advisory opinion on the provisions of Article 4 of the Charter bringing under regulation the admission of members to the

[43] G. I. Morozov in his book [Организация обвединенных наций (The United Nations Organization). Moscow, 1962, p. 206] dealing with the United Nations too, although partly with a different argumentation, takes a stand against the submission of disputes of a political nature arising in connexion with the interpretation of the Charter to the International Court of Justice.

United Nations. The Court refused to recognize that the interpretation of Article 4 was primarily a political question, although the question that had to be replied was whether a member of the United Nations which has been called upon to pronounce itself by its vote on the admission of a state to membership in the United Nations, was juridically entitled to make its consent to the admission dependent on conditions not expressly provided by Article 4 of the Charter, and in particular whether this member could subject its affirmative vote to the condition that together with that state other states should be admitted to membership in the United Nations. And yet it was obvious that when it was a question of the resolutions of the Security Council, this typically political organ primarily responsible for peace and security, and when an opinion had to be pronounced as to the position to be taken by the members of the Security Council in the matter of the composition of the United Nations, it was not the legal considerations where the pros and cons had to be weighed exclusively or in the first place. In fact the political considerations were decisive when the members of the Security Council had to take a position in the question. It was for this reason that Article 65 of the Statute granted the Court the right to deny an advisory opinion.[44] The International Court of Justice thought it could bypass the problem when it referred to the abstract formulation of the question submitted to it for an advisory opinion, which according to the Court deprived it of its political character. However, at the same time it was evident to everybody that the Court wanted to settle a political dispute of a definite kind.[45]

The same problem which arose in connexion with several advisory opinions, re-emerged in a keen form in association with the advisory opinion of the International Court of Justice of 20 July 1962, when the Court took a stand in the matter of the qualification of the expenses of the operations of the armed forces of the United Nations in Congo and in the Near East.[46] Although the Court in its advisory

[44] Article 65 of the Statute: "The Court may give an advisory opinion on any legal question . . ."

[45] *I.C.J. Reports 1948*, p. 61. — For details of the problem see the work of the present author *A Nemzetközi Bíróság joggyakorlata 1946—1956* (Judicial practice of the International Court of Justice). Budapest, 1958, pp. 256 et seq.

[46] In the given instance the question was whether the expenditures were governed by paragraph 2 of Article 17 of the Charter, i.e. whether there

opinion passed by nine votes against five recognized that the interpretation of the Charter in general had a more or less political significance, still its unchanged position taken in the matter was that the interpretation of a provision of a treaty was an essentially judicial task, and consequently could not be of a political character.[47] Nevertheless we believe that the more correct position was that taken by Judge Koretsky, saying: "First and foremost we have there a political question, the question of financial policy in peace-keeping matters and, connected with it, a question of the powers and responsibilities of the principal organs of the United Nations, the political essence of which can hardly be denied."[48] Accordingly Judge Koretsky concluded that the Court ought to avoid giving an advisory opinion, and this the more because otherwise the advisory opinion was liable to be used as an instrument of political struggle.

By way of summing up we are impelled to the conclusion that the International Court of Justice is not an organ absolutely suitable for the interpretation of the Charter of the United Nations, although there are provisions in the Charter, where political considerations are not predominant to a critical degree, so that these provisions cannot be withdrawn from the interpretative functions of the Court.[49] How-

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was a case of expenditures that had to be borne by the members as apportioned by the General Assembly. In its advisory opinion open to criticism the Court replied to the question in the affirmative.

[47] *I.C.J. Reports 1962*, p. 155.

[48] Ibid., p. 254.

[49] The present author cannot accept the view according to which the advisory opinions of the International Court of Justice in disputes on the interpretation of the Charter were merely expert advices and could not be considered interpretations. This is the opinion which F. I. Kozhevnikov [*Международное право* (International law). Moscow, 1957, p. 272] and V. M. Shurshalov (*Op. cit.*, p. 454) have adopted. Both give as a reason for this opinion that if the International Court of Justice could interpret the Charter, the Court would occupy a position above all other principal organs of the United Nations. Therefore in their opinion the Charter of the United Nations cannot become the subject of interpretation by the Court at all. However, this opinion unjustifiably combines the notion of interpretation with its binding force, although in the overwhelming majority of cases the interpretation of a treaty will be void of an absolute binding force. This is the case, for instance, with unilateral interpretations, whose interpretative character cannot be called into doubt. The International Court of Justice upon request of bodies properly authorized may

ever, even in such instances the thesis will hold that the interpretation of the International Court of Justice cannot have a universally binding force, in the same way as the interpretations of any other organ of the United Nations are also void of a general effect.[50]

5. UNILATERAL INTERPRETATION BY ONE OF THE PARTIES TO THE TREATY

Unilateral interpretation is undoubtedly the form of interpreting treaties to which recourse is had most frequently. Here interpretation is performed by one of the parties without applying to the other party or parties for consent. Since earlier it has been made clear that the application of a treaty in each case calls for the elucidation of the meaning of its provisions, it is evident that the contracting parties intent on carrying into effect the treaty will at all times and in all places have to resort to interpretation. In the overwhelming majority of cases this interpretative activity will not even manifest itself in a self-contained form. Interpretation will coalesce with application namely in cases when the provisions of a treaty are relatively clear-cut and the correct elucidation of their meaning does not require any particular effort, and at the same time the relations among the contracting parties are satisfactory. Problems will come to the fore when in the course of the interpretative function the states are confronted by more or less obscure texts whose interpretation is liable to provoke serious disputes.

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interpret the Charter, in cases where the proper conditions are given, and in the course of this activity the Court is bound by the relevant rules of interpretation.

[50] E. Hambro [Pollux (the pen-name of Hambro): The Interpretation of the Charter. *The British Year Book of International Law*, 1946, p. 63] dealing with the interpretation of the Charter recommends a number of procedural methods for interpretation. So e.g. he suggests the appointment of a committee of jurists, as has often been the case in the practice of the League of Nations. Still he had to admit that this would open a wide scope for smuggling in "politically desirable" solutions. Obviously this proposal does not serve the advancement of a correct interpretation of the Charter and once approved it would provide a chance for the misinterpretation of the provisions of the Charter for the benefit of certain states.

In connexion with unilateral interpretation two questions first of all will have to be answered: who within the state is authorized to undertake interpretation, and to what rules should recourse be had for this function. To these questions the only straightforward reply is that the designation of the subjects of unilateral interpretation does not come within the scope of international law, as this is a task of municipal law.[51] Consequently, unilateral interpretation ought to remain outside the scope of investigation of the present work. Since, however, in general the specialists of other legal disciplines do not study this problem, and since its solution is by no means indifferent for the purpose of international law, it appears to be justified to deal with it briefly.

Within the particular contracting states[52] the interpretation of treaties is in charge of the organs whose function embraces the performance of the treaties.[53] Naturally, interpretation by certain organs of the state, so in the first place by the foreign office, or the foreign trade department, or the department of justice, or any other department named in the statute promulgating the treaty will weigh more than interpretation by other organs, moreover by virtue of the national law of the state may have a binding force also on all other authorities.

According to certain opinions, unilateral interpretation by those who have drafted the treaty is of greater authenticity than that by others, inasmuch as the drafters have taken part in the preliminary negotiations and are therefore more qualified for making statements

[51] Ch. Ch. Hyde (*International Law Chiefly as Interpreted and Applied by the United States*. Boston, 1947, Vol. II, p. 1455) justly points out that the process by which the contracting parties effect performance to the provisions of a treaty, is primarily a matter of domestic concern. This applies of course also to the interpretation of a treaty. Lord McNair is of the same opinion (*The Law of Treaties*. Oxford, 1961, p. 345).

[52] Since the overwhelming majority of treaties are signed exclusively by states, and international organizations figure only rarely among the contracting parties, in the following there will in general be talk of states only in connexion with treaties. Still the statements made here will with certain necessary modifications apply also to international organizations.

[53] Since these organs proceed as official agencies of the state, in the literature it is usual to speak of "official interpretation" in this connexion. (See e.g. Ehrlich, L.: *Op. cit.*, p. 55.) This designation indicates the difference between interpretation by state organs and doctrinal interpretation, which is also called "non-official interpretation". (See p. 77.)

on the meaning of the treaty. The same standpoint manifests itself also for the interpretation of municipal legal rules.[54] However, this problem is partly fused with another significant problem, namely that of to what extent preparatory work may be taken into consideration at the interpretation of a treaty. We shall therefore revert to the problem at the discussion of the question concerning preparatory work.[55] However, we would remark already in this connexion that there is not a single state whose legal norms would endow with interpretative competence the persons who have taken part in the drafting of a treaty, and unless these persons are entrusted with functions authorizing them to the application of treaties, their opinion on the meaning of a treaty comes within the category of doctrinal interpretation, or may perhaps come into consideration as expert's opinion.

A problem deserving special study is the interpretation of a treaty by the domestic judiciary. As a matter of fact, under the national law of a number of states the judiciary cannot interpret a treaty, and when the correct meaning of the provisions of a treaty has to be established the court will have to apply to the foreign office or the department of justice, whose opinion will then have binding force on the judiciary.

Bourgeois jurisprudence has made attempts to formulate a relevant theory. Majority opinion tends to conclude that in countries where in conformity with the provisions of the constitution international law is part of the law of the land, the right of interpretation is vested automatically in the judiciary of the state in question. According to this theory, the thesis prevails in the countries of Anglo-Saxon law, in France, in the Federal Republic of Germany, and in all other states where by virtue of the provisions of the constitution, or by legal custom a regularly concluded treaty becomes part of the law of the land.[56]

[54] So e.g. the French professor Maurice Duverger in connexion with the interpretation of the French constitution emphasizes that interpretation of the constitution by its drafters has greater authority, these persons being most qualified for an accurate elucidation of the meaning of the text they had drafted. (L'article 16 et ses limites. Le Monde, May 5, 1961, p. 4.)

[55] See pp. 120 et seq.

[56] Cf. paragraph 2 of Article 6 of the constitution of the United States, Article 25 of the Basic Law (Grundgesetz) of the Federal Republic of Germany, Article 26 of the French constitution of 1946 since repealed, and Article 55 of the French constitution of 1958 now in force. In English

However, the actual situation is not at all places in harmony with this thesis. In the United Kingdom the governments have on several occasions contested the right of the courts of law to interpret treaties.[57] In France already under the Constitution of 1946 the principle prevailed in the practice of the *Conseil d'État* that a treaty was an "*acte de gouvernement*", and as such it could be interpreted only by the government. On the other hand the courts of law in their practice formulated the principle that treaties exclusively affecting private interests could be interpreted also by the courts, whereas treaties directly or indirectly concerning the interests of the contracting states came within the exclusive competence of the governmental authorities.[58] We may dispense with analysing the absurdities of this system, as it is obvious that the distinction is wholly arbitrary. In fact in cases heard by the courts of a capitalist state in the first place private interests are concerned, still at the same time a treaty will in all cases, indirectly though, have a bearing on the interests of the contracting state.[59] In the United States, too, the influence manifests itself of the organs of the executive power on the interpretation of treaties by the judiciary, viz. although judicial practice starts from the assumption "that interpretation by the organs of the political power does not bind the courts when it is a case of the rights of private persons", still at the same time it recognizes that the position taken by the political organs will also in this case "carry considerable weight".[60]

In capitalist states where the constitution is void of provisions incorporating international law in the law of the land as part of it, the right of interpreting treaties is withdrawn from the sphere of jurisdiction of the courts with an even greater emphasis. This trend is in

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law the thesis formulated by W. Blackstone holds: "The law of Nations is adopted in its full by the law of England and . . . it is held to be a part of the law of the land" (*Commentaries on the Laws of England*, IV. chap. 5).

[57] Cf. Lord McNair: *The Law of Treaties*, Oxford, 1961, pp. 355—358.

[58] For details see Frangulis, A.-F.: *Théorie et pratique des traités internationaux*. Paris, no year, pp. 110—112; Stassinopoulos: Remarques sur la jurisprudence française relative à l'interprétation des traités internationaux. *Revue générale de droit international public*, 1969, No. 1, pp. 5 et seq.

[59] For a detailed criticism of the French practice see Mestre, A.: Les traités et le droit interne. *Recueil des Cours*, Vol. 38, pp. 288 et seq.

[60] See Hostie, J.: Contribution de la Cour Suprême des États Unis au développement du droit des gens. *Recueil des Cours*, Vol. 69, p. 279.

agreement with the general tendency presenting itself in the age of imperialism, when the competence of the executive power is extended more and more to the prejudice of the competence of the legislative power and the judiciary.[61]

In socialist states the question of the interpretation of treaties emerges in an altogether different form. In the socialist world there is no rivalry, and in principle there cannot even be, among the various state organs constituting part of the uniform state organization, i.e. organs which proceed within the competence allocated to them by law. Therefore here in general the principle will prevail that when the rights and obligations of the litigants have been defined by a treaty in force, or when the provisions of a treaty have a bearing on the respective position of the parties to a suit, the proceeding court will have to apply the treaty, and consequently interpret it. If a treaty is validly concluded, then all state organs will have to apply it, as else the thesis of *pacta sunt servanda* could not hold its own, and therefore the state which under international law is responsible also for the activities of its judiciary would be liable to a charge of the violation of international law.

All this does not of course prevent the courts of law from asking the competent government organs for the correct meaning of the provisions of a treaty. This may be needed whenever in the opinion of the court the wording of the treaty is not clear enough and there is no other evidence on which the court could rely for the elucidation of the correct meaning. There may be cases where the correct meaning cannot be established unless by taking into consideration the preparatory work, in particular the proceedings at the conference agreeing on the definite wording of the treaty. Exactly for this reason the acquaintance with the standpoint of the competent governmental organ as to the correct meaning of a treaty might be of extreme use

[61] A special situation has been created by Article 177 of the Rome Treaty of 1957 calling into life the European Economic Community and Article 150 of the treaty relating to the European Atomic Energy Community. If questions regarding the interpretation of these treaties emerge before a court of one of the signatory states, the problem may be submitted by that court to the Court of Justice of the Communities for preliminary decision. This procedure is obligatory whenever the problem emerges before a municipal court whose decisions are not subject to appeal within the state itself.

for the court of law; nevertheless, this standpoint is not binding on the court.

This opinion is reflected in Article 18 of Decree 5/1959. (V. 6.) I. M. of the Hungarian Minister of Justice on the implementation of the Hungarian–Romanian treaty of 7 October 1958 on legal assistance in civil, family and criminal matters. As a matter of fact, according to paragraph (1) of this article "in each case when there are doubts as to the possibility of granting of the legal assistance applied for, the authorities have to ask the Minister of Justice or the Chief Prosecutor, as the case may be, for his opinion". Accordingly, the authorities concerned, in the first place the courts of law, will determine whether there are doubts as to obeying a request for legal assistance. On the other hand, the introductory decree does not declare the obligatory force of the position taken by the Minister of Justice or the Chief Prosecutor. However, it stands to reason that the court will in general adopt the opinion of the Minister of Justice as the authority more conversant with the antecedents of the treaty, unless there are cogent reasons for taking a different position.[62] A similar provision has been taken up in Article 7 of Decree 2/1967. (X. 27.) I. M. of the Minister of Justice on the promulgation of the Hungarian–Austrian Treaty of 9 April 1965 on the regulation of the administration of wills, according to which "in each case when there are doubts concerning the application of the treaty, the court of law or notary public proceeding in the case has to apply to the Minister of Justice for his standpoint".

An interesting example of the freedom of the judiciary of interpretation has been quoted by László Réczei. In a concrete case when the correct meaning of a provision of the terms of delivery of goods constituting an appendix to the Hungarian–Czechoslovak commercial treaty was argued, each of the litigants presented the interpretation

[62] Naturally the situation will be an altogether different one when the Minister responsible for the performance of the treaty issues an executive decree where attempt is made closely to define certain provisions of the treaty by keeping in view concrete cases. Among the numerous examples here the decree 4/1961 (IV. 22.) of the Hungarian Minister of Labour on the performance of the Hungarian-Polish convention on cooperation in social policy should be mentioned. Article 1 of the decree defines the meaning of domicile and permanent domicile for the purposes of the convention. Provisions of this kind are of course binding on the courts of law.

of their respective ministry of foreign trade. The arbitral tribunal of the Hungarian Chamber of Commerce setting aside the departmental interpretations established the meaning of the provision of the treaty in question.[63]

In Soviet jurisprudence, too, the opinion prevails that the Soviet judiciary is not limited in the interpretation of a treaty and that in general it is not bound to any other organ for the correct meaning of a treaty.[64]

It should be noted that not even in states where the courts have to apply to one of the government departments for the interpretation of a treaty, can the courts be deprived completely of the right to interpret a treaty, in the same way as none of the state organs in charge of the application of a treaty can be completely deprived of this right. As a matter of fact, the provision that the judiciary has to apply to other organs of the state for the interpretation of a treaty will hold only for sharp disputes in connexion with the establishment of the correct meaning of treaty provisions, whereas a simple elucidation of the meaning of a treaty which will in all cases be needed when it comes to apply it, will obviously remain within the competence of the court. Hence, interpretation in the wider sense of the term will in any case come within the competence of the court until the state introduces legislation which permits any application of a treaty exclusively through a specified government organ. However, as far as is known, measures of this kind have never been taken, and not even the notorious decree of 1823 of the King of Prussia went so far.[65]

[63] See Réczei, L.: *Nemzetközi magánjog* (International private law). 2nd ed., Budapest, 1959, p. 47.

[64] Peretersky, I. S. (*Op. cit.*, pp. 43—44) takes a stand in this sense. Although Shurshalov entertains different views, in so far as according to him "Soviet courts of law in general do not undertake the interpretation of treaties" (*Op. cit.*, p. 451) so that this function devolves on the Soviet Government, the Ministry of Foreign Affairs and the Ministry of Foreign Trade of the Soviet Union, still he fails to quote Soviet statutory provisions or concrete examples from the field in support of his statement.

[65] The decree in question made it obligatory for Prussian judges to apply to the foreign office for its opinion whenever there was a dispute between litigants on the validity or meaning of a treaty. The opinion of the foreign office was binding on the judiciary. The decree was modified in 1843 in a sense that the judiciary was not bound by the opinion of the foreign office (cf. Liszt, F. and Fleischmann, M.: *Das Völkerrecht*. Berlin, 1925, p. 261, note 7).

For that matter, a measure of this kind would be equal to withdrawing any legal dispute associated with a treaty from the jurisdiction of the courts which in certain cases might even raise the question of a denial of justice.

Certain writers on international law ask the question, how the judge has to proceed at the interpretation of treaties, i.e. whether or not the provisions of international law governing the interpretation of treaties, or those of municipal law on the interpretation of legal norms have to be applied.[66] Apparently a certain complexity has been introduced here by the circumstance that in general the judge has to apply municipal law, and since the rules of international customary law relating to the interpretation of treaties could not by the process of transformation become part of municipal law, according to certain western authors the judge has to advance to the elucidation of the correct meaning of a treaty through the application of the rules of interpretation of municipal law.[67]

This opinion, too, is deriving from the theory of Montesquieu proclaiming the so-called separation of powers, and so it cannot even be proposed in this form in the practice of the socialist states. Incidentally, we cannot but come to the conclusion that at the interpretation of a treaty the judge will have to apply the relevant rules of international law. As a matter of fact, it cannot be contested that the generally recognized rules of international customary law are binding on the states. If therefore an organ of a state fails to apply these rules,

[66] The question which may be put in connexion with unilateral interpretation, judicial as well as of any other kind, emerges in this form only with writers who recognize that international law has rules of its own for the interpretation of treaties, which are not identical with the norms of interpretation of municipal laws. Since for our part we adopt this opinion, we have to deal with the problem so emerging.

[67] This opinion which among other things implies the significant practical consequence of barring the judge from giving consideration to the "*travaux préparatoires*", was fairly wide-spread formerly. So e.g. this was what E. Bartin (*Principes de droit international privé selon la loi et la jurisprudence françaises*. Paris, 1930, Vol. I, p. 98) and several other writers held. Recently this opinion has been thrust to the background. Naturally the problem will not emerge in literature in respect of the states mentioned above, where under the provisions of the constitution or norms of customary law international law is part of the law of the land. Here the international customary rules of treaty interpretation also constitute part of municipal law.

an act establishing the international liability of the state in question has been committed. And yet each organ of a state will have to refrain from committing an act infringing international law, and for want of a rule of municipal law expressly to the contrary, for which there is no example in the legislation of a state, the court will have to interpret a treaty in conformity with the rules of international law.[68]

To sum up, once again it should be emphasized that interpretation by a court or any other organ of a contracting state cannot of course have binding force on the other contracting parties. Here there is a case of a unilateral act of one of the contracting states, which has no direct bearing on the other participants of the treaty. Nevertheless interpretation by one of the contracting states cannot be wholly indifferent for the purpose of the elucidation of the correct meaning of a treaty inasmuch as from this interpretation we may infer the intentions of the state in question at the conclusion of the treaty. In practice the state will bring forward protests in cases where, in their opinion, certain provisions of a treaty are incorrectly interpreted by one of the contracting parties, even though their direct interests have not been violated. Such a protest is not lodged because the rule formulated by Oppenheim (that for want of a protest the position taken in a unilateral interpretation by one party were for future applications of the treaty binding on the other contracting parties) holds valid in international law,[69] but rather because according to the principles of interpretation the subsequent attitude of the parties may be consequential for the elucidation of the joint intention of the parties at the conclusion of the treaty. Hence a protest against a unilateral interpretation from the outset wants to give an expression to the belief that the action of the other state is not in agreement with the intention leading the protesting state at the conclusion of the treaty.

[68] It is for this reason that the distinction of P. Duez (*Op. cit.*, p. 441) appears to be somewhat constrained. According to Duez the problem is decided by the procedure by which international law becomes part of municipal law. If the judge proceeds as the opinion of Duez wants him to proceed, and consequently relies, for instance, exclusively on the debate of the legislature at interpretation, whereas he ignores the documentary matter of the international conference adopting the treaty, he might pass a resolution distorting the meaning of the treaty and entailing the international liability of his country.

[69] See Oppenheim, L.: *International Law*. 8th ed., Vol. I, pp. 954—955

However, this protest will be void of a direct legal effect, and may rather appear as a precautionary act on the part of the state intent to influence the organs responsible for the interpretation of treaties for future purposes.[70]

6. DOCTRINAL INTERPRETATION

This category comprises interpretations by scholars and in general by private persons. Therefore in legal literature several writers speak of non-official rather than doctrinal interpretation.[71]

By its nature doctrinal interpretation can have no binding force. Nevertheless doctrinal interpretation may have a certain function in the same way as in general the position taken by scholars has a definite significance in international law. According to paragraph 1(d) of Article 38 of the Statute of the International Court of Justice, the teachings of the most highly qualified publicists of the various nations may be applied by the Court as subsidiary means for the determination of rules of law. Similarly, for the elucidation of the correct meaning of a treaty, the well-founded standpoint of writers on international law may also come into consideration. The stand taken by these writers may influence the attitude of a state, as also the decisions of international judicial organs. That is, doctrinal interpretation will acquire a certain significance as soon as a state wants to exploit it for its own ends or for reinforcing its own position.

[70] McNair, whose ultimate conclusion in the given question is fairly close to the position we have taken, quotes an interesting example from British diplomatic and judicial practice to demonstrate that a protest against unilateral interpretation is of political rather than of legal significance. (L'application et l'interprétation des traités d'après la jurisprudence britannique. *Recueil des Cours*, Vol. 43, p. 277.) In his later work (*The Law of Treaties*. pp. 346 et seq.) McNair quotes concrete cases to demonstrate that even for want of a protest Anglo-American practice will refuse to recognize the binding force of an interpretation by a municipal court on the other contracting state.

[71] So e.g. Peretersky, I. S.: *Op. cit.*, p. 71. — On the other hand there are authors who would have confined doctrinal interpretation exclusively to that pronounced by theoreticians. Although this attitude to the question is more in agreement with the designation of this kind of interpretation, still as there is no demonstrable difference between the effects of the interpretation of a treaty by scholars and that by other non-official persons, the distinction is void of any practical issue.

The weight of a doctrinal interpretation is determined by the authority the person giving this interpretation enjoys, and also by the profundity of his argumentation. In the same way as at a dispute arisen about a rule of international law, the opinion of the one or the other scholar versed in international law will be accepted only if it correctly reflects the existing rules of international law, so– as regards the interpretation of a treaty – the doctrinal interpretation will not carry weight unless it determines the meaning of a provision of a treaty correctly and by using — the proper means. This will be the case only when the author of a doctrinal interpretation accepts as normative to their full extent the principles and rules established for the interpretation of treaties.

Practice tends to show that states interested in disputes on the interpretation of treaties readily have recourse to the opinion of certain prominent specialists of international law to buttress up their own standpoint. If on such occasions those learned in international law form their opinion so to say as counsel, then of course "doctrinal" interpretation of this kind will forfeit much of its authority.[72]

[72] As examples may serve the counsel's opinions which both the Hungarian and Romanian governments obtained on the interpretation of Article 250 of the Trianon Peace Treaty of 1920 from persons versed in international law of otherwise great name. Those giving the counsel's opinions interpreted the treaty in a way suiting the interests of those commissioning them. The opinions were then issued by the two governments in the form of books without any reference to their involvement in the publication.

Chapter IV

THE METHODS OF TREATY INTERPRETATION

The interpretation of any written text can be achieved by application of certain procedures. The procedures that may be reasonably followed for the elucidation of the meaning of a text are called the methods of interpretation.

The methods of interpretation to be applied to treaties do not differ in principle from those established for the interpretation of any other text. However, as far as treaties are concerned, these methods are to be applied with certain qualifications only, by keeping in mind certain specific principles, and within definite limits given by the peculiarities of treaties. These specific principles and limits are defined by international law. Even if for methodological investigations we may depart from the general statements of the theory of interpretation, and on this understanding accept the problem of the methods of treaty interpretation as one whose elaboration comes exclusively within the sphere of theory, the scope and limitations within which the possible methods are to be applied will have to be qualified already as practical concerns which may be, and actually have been, brought under regulation by international law. Obviously, the essence of the grammatical or historical methods will be revealed by the theory of interpretation, and it is this theory that provides these methods for the scholars of international law and those responsible for the application of treaties. Still for the solution of specific problems arising from the exploitation of these methods for the interpretation of treaties, e.g. of the question how the grammatical method has to be applied to the interpretation of plurilingual texts, or when recourse is had to the historical method, to what extent what is called preparatory work may be taken into consideration, exclusively the rules of international law will provide the necessary guidance.[1]

[1] Part of the Soviet literature on international law identifies the methods of interpretation of treaties with the rules of interpretation (so e.g. Pere-

No hierarchical order can be established for the various methods of treaty interpretation. It is the function of the interpreter to reveal the correct meaning of a text by a combined exploitation of all possible methods.[2] Which of the several methods should be resorted to is a question that can be answered only in the knowledge of the concrete situation and the given circumstances. Nor can the treaties be distinguished by their types or forms of manifestation in a sense that to some type or form one particular method has to be applied, whereas to some other type or form again another particular method will be appropriate.[3]

As regards enumeration and classification of the methods of interpretation, there are several opinions in literature. What today may be called the classical quadripartite classification distinguishes grammatical, logical, methodological and historical methods of interpretation.[4] This classification still predominates in the theory of interpretation. Nevertheless certain attempts are being made at a breakthrough of the traditional framework, still the suggested modern concepts of classification have found but little response.

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tersky, I. S.: *Op. cit.*, pp. 73 et seq.). In our opinion, this point of view, which eventually leads to a position denying the existence of norms of interpretation, is incorrect for the very reason because it ignores the difference between the general theoretical statements relating to the method and the rules governing the application of the method within a definite scope.

[2] H. Waldock in his commentary attached to the final draft of the International Law Commission also emphasizes that a hierarchical order is out of the question "for the application of the various elements of interpretation", the process of interpretation constituting an integral whole, and the application of the means of interpretation being "a single combined operation". (*I.L.C. Reports, 1966*, p. 51.) However, at the same time he declares this principle only for Article 27 of the Draft (i.e. Article 31 of the *Vienna Convention*), whereas he subjects Article 28 to Article 27 and by this assigns a subordinate place to the historical method for the interpretation of treaties. This problem will be discussed in detail later in this chapter, still we should like to note already in this connexion that in the course of interpretation recourse should be had to all methods, hereincluded also the historical, for the elucidation of the true intentions of the parties.

[3] I. S. Peretersky holds the same opinion (*Op. cit.*, p. 83).

[4] For the first exposition of this see Savigny, F. C. von: *System des heutigen Römischen Rechts*. Berlin, 1840, Vol. I, p. 213.

As regards socialist literature, here the book on the theory of state and law edited by N.G. Aleksandrov may be mentioned, which distinguishes philological, methodological and political interpretation.[5] However, this classification has provoked serious criticisms.[6] A Hungarian textbook of international law expressly speaks only of grammatical and logical interpretation. Since, however, it mentions the so-called preparatory work as to which recourse may be had, this Hungarian textbook in fact recognizes also the justification of the historical method.[7]

Several attempts have been made also in the bourgeois literature on international law to classify the various methods of interpretation. Among these merely as an example the position taken by Quincy Wright should be mentioned. He draws a line between historical and doctrinal interpretation. However, in the latter category he would have grammatical and logical interpretation included. At the same time, without sufficient reason, he combines the problem of the methods of interpretation with that of the subject of interpretation, to which the designation "doctrinal interpretation" seems to refer.[8] Kelsen contracts grammatical and logical interpretation into a single method,[9] and he had several followers.[10] On the other hand Kelsen considers restrictive and extensive interpretation two separate methods of interpretation. The classification of Cavaré is built upon the

[5] *Основы теории государства и права* (Fundamental theory of state and law). Ed. by N. G. Aleksandrov, Moscow, 1960, pp. 337—338.

[6] The review of this book by Nedbaylo, Bersheda and Nazarenko (*Sovietskoe gosudarstvo i pravo*. 1961, No. 3, p. 142) points out that the authors of the work have eliminated logical and historical interpretation. At the same time it objects to the presentation of political interpretation as a self-contained method of interpretation. This objection is fully justified, as political and legal considerations can never be kept rigidly apart for the interpretation of treaties. On the other hand, it has to be remembered that the acceptance of political considerations as solely authoritative would, similarly to teleological interpretation, lead to grave risks of international legality.

[7] Buza, L. and Hajdu, Gy.: *Nemzetközi jog* (International law). 3rd ed., Budapest, 1961, p. 240.

[8] Wright, Q.: The Interpretation of Multilateral Treaties. *The American Journal of International Law*, 1929, No. 1, p. 96.

[9] Kelsen, H.: *Principles of International Law*. New York, 1952, p. 321.

[10] So e.g. S. Neri consistently uses the term "interpretazione logico-letterale" (*Op. cit.*, pp. 58 et seq.).

unjustified conjunction of the methods and purpose of intepretation. He distinguishes subjective, exegetic and objective methods. According to Cavaré, the subjective method has as its end the elucidation of the intention of the parties, in contrast to the other two methods. A classification of this type is inapplicable in practice, if only because according to what has been stated above the end of interpretation is in each case the elucidation of the intention of the parties so that this has to be made the goal also of the application of the exegetic method. Incidentally the latter designation has been meant by Cavaré, in the same way as by Kelsen, to combine the grammatical methods. By objective method Cavaré essentially means teleological interpretation, whereas with him the subjective is overwhelmingly identical with the historical method.[11]

As regards the classification of the methods of interpretation of treaties for our part we shall set out from the traditional posltion, however, in our opinion the peculiarities of international law and practical exigencies demand a certain modification and supplementation of the general classification as set up by the theory of interpretation. In our opinion one has to accept the posltion taken by a number of authors of international law, viz. that as regards the methods, two large categories have to be distinguished and as far as classification is concerned, it has to set out from the relevant material used at interpretation. Accordingly methods relying on the direct analysis of the text of the treaty, and methods making use of material outside the text of the treaty may be distinguished. The first group includes grammatical and logical interpretation, the second the historical, practical (usual) and methodological interpretation. The teleological method, which has won a large number of partisans during the latter decades, forms a transition between the two categories.[12]

[11] Cf. Cavaré, L.: *Le droit international public positif*. 3rd ed. Paris, 1962, Vol. II, pp. 111 et seq.

[12] In our opinion, the teleological method has not been accepted as a special method of treaty interpretation. However, in view of its popularity in bourgeois literature and the risks implied in it we have to deal with the question separately. Nor do we accept restrictive and extensive interpretation as a special method, although its qualification as a method of interpretation occurs also in the socialist literature of international law (e.g. Shurshalov, V. M.: *Op. cit.*, p. 409). Restrictive and extensive interpretation is a problem of the outcome of interpretation rather than one of the methods of interpretation (cf. Szabó, I.: *Op. cit.*, pp. 239 et seq.).

1. GRAMMATICAL INTERPRETATION

Of the methods of interpretation relying on the analysis of the text of a treaty in both socialist and bourgeois jurisprudence in general the grammatical method is discussed in the first place. This is justified, first, because recourse to this method is indispensable in any case, and, secondly, because the study of this method permits the settlement of certain vital fundamental principles developed in connexion with the interpretation of treaties.

By grammatical interpretation the method of treaty interpretation is understood which tries to approach the meaning of the text through the sense of the words used, and through the grammatical patterns applied. Since here is a case not only of purely grammatical interpretation, but also at the same time of the semantic, moreover in the opinion of several authors, of the etymological analysis of the text, many suggested other designations for the grammatical interpretation. So the above-mentioned Soviet work on the theory of state and law speaks of philological interpretation,[13] Peretersky of linguistic interpretation (словесное толкование).[14] Since, however, neither of these designations characterize the full process of interpretation in question, it appears to be more convenient to retain the earlier though inaccurate, yet widespread designation. In any event it should be emphasized that grammatical interpretation can in no case be identical with a literal interpretation which in the majority of cases will involve distortion rather than elucidation of the correct meaning.

Recourse to grammatical interpretation will be had, as a matter of course, in each case a treaty has to be interpreted, the first task being the elucidation of the correct meaning of the words used in the treaty. This principle was laid down in the advisory opinion of the International Court of Justice of March 3, 1950, dealing with the competence of the General Assembly for the admission of states in the United Nations. The International Court of Justice held: "... the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavour to give effect to them

[13] *Основы теории государства и права* (Fundamental theory of state and law). Ed. by N. G. Aleksandrov, Moscow, 1960, p. 337.
[14] Peretersky, I. S.: *Op. cit.*, p. 84.

in their natural and ordinary meaning in the context in which they occur."[15]

In addition to defining the primordial function of the grammatical method, the passage here quoted also gives guidance for the concrete application of the method, when it states that the words used must be taken "in their natural and ordinary meaning". This thesis is in agreement with the teaching of Marxism that in its essence a language is capable of expressing thought with accuracy.[16] Reference to the natural and ordinary meaning is very frequent in international life in both diplomatic and judicial practice. As regards the latter, here in particular the judicature of the Permanent Court of International Justice and the International Court of Justice of the United Nations should be mentioned.[17] Yet, even before, the Permanent Court of Arbitration gave expression in a pithy form to the importance of an understanding of the words in their ordinary meaning, when in its well-known award in the North Atlantic Coast Fisheries case made it clear in a dispute on the interpretation of the term "bay" that the negotiators of the treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of "bays"; they most probably thought that everybody would know what a bay was. In this popular sense the term must be interpreted in the treaty.[18] The normative character of "ordinary meaning" has been accepted as starting point of interpretation also by Article 31 of the Vienna Convention of 1969, and the commentary by Waldock on the final draft of the International Law Commission emphasizes the consideration

[15] *I.C.J. Reports 1950*, p. 8.

[16] In bourgeois literature too some quote this argument to defend their opinion voicing the need for an acceptance of the words in their natural and ordinary meaning. For instance, Ch. de Visscher in his *Remarques sur l'interprétation dite textuelle des traités internationaux* expressly refers to this (*Varia iuris gentium*, Leyden, 1959, p. 385).

[17] From the practice of the Permanent Court of International Justice and the International Court of Justice of the United Nations here only a few judgements and advisory opinions are being quoted where this principle finds expression with special emphasis, so in the case of the Polish postal service in Danzig, the night work of women, the controversy on the interpretation of Article 4 of the United Nations Charter, the case of the Anglo-Iranian Oil Company, the Ambatielos case. In these the need for a consideration of the natural and ordinary meaning has been vigorously emphasized.

[18] Scott, J. B.: *The Hague Court Reports*. New York, 1916, p. 187.

of the ordinary meaning of the terms used as the very essence of the textual approach.[19]

The acceptance of the words in their natural and ordinary meaning at the same time means the discard of etymological analysis. If words have to be interpreted according to their meaning of current use, then evidently research work directed to the exploration of the origin and the original meaning of the words will be thrust to the background. This principle was laid down already by Grotius when he stated that "words are to be understood in their natural sense, not according to the grammatical sense which comes from derivation, but according to current usage".[20] The same thesis was formulated also by Vattel: "Dans l'interprétation des Traités ... on ne peut ... s'écarter du sens propre que l'usage attribue aux termes." He then states "... les recherches étymologiques & grammaticales, pour découvrir le vrai sens d'un mot, ... ne formeraient qu'une vaine théorie, aussi inutile que destituée de preuves."[21]

Since, however, the "ordinary meaning" will not always offer itself on its own accord, and opinions as to the usual meaning of a certain word may diverge, for the elucidation and the establishment of the ordinary meaning recourse may be had to a variety of auxiliary means. Thus it is of rather frequent occurrence that in the course of a dispute the parties try to establish the natural meaning of words by consulting explanatory dictionaries.[22]

[19] *I.L.C. Reports 1966*, p. 52.

[20] Grotius, H.: *De iure belli ac pacis*. Lib. II, cap. XVII (Classics, 3, 1925). The translation "grammatical interpretation" is not quite accurate, as Grotius speaks of "grammatical sense" (*proprietas grammatica*) by which he understands a meaning resulting from etymological analysis rather than conventional usage.

[21] Vattel, E. de: *Le droit des gens ou principes de la loi naturelle*. Livre II, Chap. XVII. §§ 271, 272 (Classics, 1, 1916).

[22] So e.g. the award of April 7, 1875, in the dispute between Chile and Peru consulted the very authoritative Webster's Dictionary for the meaning of a disputed word of the treaty (the English verb "to charge") although it is in everyday use. In the controversy on the composition of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization the United Kingdom argued before the International Court of Justice with the definitions of the Shorter Oxford Dictionary and H. C. Wyld's The Universal Dictionary of the English Language to interpret the word "election" (I.C.J. Pleadings, *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organiza-*

However, the ordinary meaning will not be normative for all terms. There are professional terms which have no everyday meaning at all, or, if taken over from the current usage, their professional meaning departs from everyday use. If their use in the professional sense can be established, then these terms will have to be understood in their professional meaning. This is expressly permitted by paragraph (4) of Article 31 of the Vienna Convention which agrees to a special meaning being given to a term, if it can be established that the parties have so intended. The same applies also to the legal terms. Since by nature treaties are legal instruments, obviously there will be a large number of legal terms in them, and since the drafters of treaties are mostly persons learned in law, it has to be assumed that they have intended to use the legal terms occurring in them in their specific legal sense. On the part of the socialist states undoubtedly an endeavour manifests itself, similarly to national legislation,[23] to do away with the unjustified use of legal terms incomprehensible for the masses also in treaties. However, certain legal terms will be needed also by the socialist states in their treaties. In addition, it has to be remembered that in a large portion of treaties by the side of socialist states also capitalist countries are participants, and at shaping the text bourgeois diplomats and jurists will mostly adhere to their accustomed "professional style", which, of course, will result in an overabundant use of legal terms. As a matter of course, for their interpretation the generally recognized professional meaning has to be regarded as normative.

The problem will become one of yet greater complexity when it is the case of the interpretation of legal terms which have no uniform meaning in the countries participating in the treaty. For this emergency the various authors have worked out a variety of theories, which partly consider the legal notion of the state entering into a commitment under the treaty normative,[24] partly adapt themselves to the

tion, pp. 237—238). In the frontier dispute case between Honduras and Nicaragua before the International Court of Justice the *ad hoc* judge Urrutia Holguin in his dissenting opinion (*I.C.J. Reports 1960*, p. 233) tried to interpret the word "compensar" by consulting the dictionary of the Spanish Academy.

[23] On endeavours for an unambiguity of legislation in socialist countries, see Szabó, I.: *Op. cit.*, pp. 129 et seq.

[24] Rivier, A.: *Lehrbuch des Völkerrechts*. Stuttgart, 1889, p. 333.

legal system insisting on fewer obligations,[25] partly demand the definition of a new meaning departing from those generally accepted by the states concerned.[26] However, all these are mostly arbitrarily formulated rules, not confirmed by international practice, so that no particular significance can be attributed to them. In our opinion grammatical interpretation in such and similar cases does not provide a means for the establishment of the correct meaning, therefore recourse must be had to other methods for the elucidation of the meaning of the treaty and the intention of the parties. In such cases a correct solution may be found mostly by applying the logical and the historical methods.

The problem will even gain in gravity when the representatives of mutually opposing ideologies attribute different meanings to the very same term. Obviously, grammatical interpretation will come to grief even more than in the earlier case, and only with the combined application of all available methods may then attempts be made to expose the meaning parties had in mind at concluding the treaty.[27]

A generally accepted rule to be observed when grammatical interpretation is applied, is what follows from the thesis of *bona fide* interpretation, viz. that the words have to be examined integrated into the context, i.e. the sentences surrounding them, and not one by one separated from it. Although the study of the context already points towards logical interpretation, the principle in question is

[25] Quadri, R.: *Diritto internationale pubblico*. 2nd ed., Palermo, 1956, p. 146.

[26] I. S. Peretersky (*Op. cit.*, pp. 94 et seq.) in general averse to the formulation of definite rules of treaty interpretation, distinguishes five classes and tries to work out detailed rules for each of these.

[27] So in the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the United Nations in the debate on the report the contributors to the debate pointed out that in the various parts of the world different meanings are attached to the term "democracy", a fact anyhow sufficiently known. (See *Revue des Nations Unies*, 1961, No. 2, p. 6.) Correctly, this means that Marxism understands by democracy something different from what the bourgeois world understands by it. Democracy as defined by Marxism is possible today only under the conditions of socialism, however, bourgeois usage also applies the term "democracy" to the bourgeois notion of democracy. If a term of this sort occurs in a treaty in which both socialist and capitalist countries participate, recourse will have to be had to all available methods of interpretation to elucidate the true intentions of the parties.

nevertheless considered here one more closely adhering to grammatical interpretation, a corrective of a too rigid grammatical interpretation. It is for this reason that the principle is mentioned here.

The passage quoted above from the advisory opinion of the International Court of Justice of March 3, 1950, also speaks of the natural and ordinary meaning of provisions "studied in their context". However, the importance of the consideration of the context has been emphasized by the International Court of Justice on a number of other occasions too. This opinion has found a pregnant expression in the advisory opinion pronounced on the composition of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, where the Court held that "the word obtains its meaning from the context",[28] then it went into further details to explain this position. This statement means the continuation of the practice established by the Permanent Court of International Justice. The Permanent Court in its advisory opinion on the labour conditions in agriculture decidedly gave expression to the opinion that "its meaning (viz. of a term) is not to be determined merely upon particular phrases" because through an analysis of the terms used in a treaty in this way "(a term) may be interpreted in more than one sense".[29] The same standpoint has been laid down in a number of arbitral awards.

Article 31 of the Vienna Convention defines the notion of the context in a sense wider than the usual. As a matter of fact according to the Vienna Convention the notion of context in addition to the wording including the preamble and the annexes implies (a) any agreement relating to the treaty which was made by all parties in connexion with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. This definition of the notion of a context, as was pointed out in the debates at the Vienna conference, is partly too extensive, partly, in particular as regards paragraph (b) rather obscure.[30] The reason of this extension has in our opinion to be sought for in the tendency manifesting itself in the Convention possibly to thrust to the back-

[28] *I.C.J. Reports 1960*, p. 158.
[29] *P.C.I.J.*, Ser. B, Nos 2—3, p. 23.
[30] See the remarks of the Romanian delegate J. Voicu (*United Nations Conference on the Law of Treaties*. First Session. Official records, p. 169).

ground the historical method, and so the Convention necessarily had to qualify certain documents which otherwise may come into consideration as forming part of the preparatory work of the treaty in the process of interpretation as belonging to the context.[31]

In a like way, it is a generally accepted principle that by the ordinary meaning of the words the meaning that prevailed at the time when the treaty was concluded has to be understood. If therefore in the course of time a change has taken place in the current meaning of a word, for which there are many examples, for the interpretation of the provisions of the treaty the starting point should be the original meaning, original in the above sense, as only this can suit the intention of the parties. This rule has found expression in a judgement of the International Court of Justice on the rights of nationals of the United States of America in Morocco.[32]

In connexion with grammatical interpretation the question may emerge, whether there is a rule in international law, according to which in the course of interpretation significance has to be attached to each word and term. This would be equal to denying as if in treaties there were mere flowers of speech, which in the language of diplomacy are called *clauses de style.*

In the literature of international law the majority opinion is inclined to the view that the occurrence of meaningless words in the text of a treaty cannot be presumed. Judicial practice, too, mostly supports this opinion. The International Court of Justice for the first time referred to this question in the case of the Anglo-Iranian Oil Company, when the United Kingdom and Iran were opposing each other, without, however, giving a clear-cut reply to it. In connexion with the interpretation of a unilateral declaration made by Iran the United Kingdom argued before the Court that "a legal text should be interpreted in such a way that a reason and a meaning can be attributed to every word in the text".[33] The International Court of Justice held that this principle could not be applied to unilateral declarations, where it could be assumed that the state making the declaration *ex abundanti cautela* also used terms which may seem to

[31] All that has been set forth above mainly applies to the material under (b), whereas material under (a) comes rather within the scope of methodological interpretation (see below pp. 145 et seq.).

[32] *I.C.J. Reports 1952,* p. 189.

[33] *I.C.J. Reports 1952,* p. 105.

have been superfluous. However, here the Court did not yet take a clear-cut stand in the question whether or not the principle submitted by the United Kingdom could be applied to the interpretation of treaties. "It may be said", held the Court, "that this principle should be applied when interpreting the text of a treaty." This permissive formulation, however, did not allow of establishing whether the Court considered the rule living for the interpretation of treaties. Only the advisory opinion given at the request of the Inter-Governmental Maritime Consultative Organization threw a light on the position taken by the International Court of Justice. Here the Court declared that one of the argued meanings would deprive certain words of the text of their significance. An interpretation leading to such a result could not be accepted by the Court.[34]

The same opinion was reflected earlier in a judgement passed by the Permanent Court of Arbitration in the award in the North Atlantic Coast Fisheries case, which declared: ". . . it is a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose".[35] Similar standpoints occur in a number of international arbitral awards.[36]

As regards the merit of the question, in our opinion the agency responsible for the interpretation of a treaty has to set out from the principle that the contracting parties have carefully considered what they would have to be taken up in the treaty, so that the inclusion of redundant or meaningless provisions cannot be presumed. Hence the interpreter of the treaty will have to try to attribute a proper meaning to each term and to each sentence, i.e. he cannot set out from the assumption as if merely for the sake of a flowery style redundant expressions had been included. The opposite point of view, i.e. the endowment of the agency responsible for the interpretation with the authority at its discretion to qualify the particular passages of a treaty as significant or redundant would throw open the gates

[34] *I.C.J. Reports 1960*, p. 166.
[35] Scott, J. B.: *The Hague Court Reports*, p. 186.
[36] So e.g. in the Kummerow case (*Reports of International Arbitral Awards*. United Nations, Vol. X, pp. 394—395) and in the Aspinwall case (Moore, J. B.: *History and Digest of the International Arbitrations to which the United States has been a Party*. Vol. 4, p. 3621).

to arbitrary interpretation, and the undermining of the principle of *pacta sunt servanda*. However, this thesis cannot mean as if whenever the parties have, *ex abundanti cautela*, resorted to repetitions, or have at the time used several synonyms to express the same notion for fear that somebody might discover a difference of meanings in them, and so owing to the omission of the one term or the other the effect of the provision in question might be modified, in all circumstances efforts had to be made artificially to demonstrate differences in meaning among the particular terms and in this way modify the effects of the treaty in a manner conflicting with the intention of the parties. In our opinion so far international law has not formulated a rigid rule of this type, nor would it be desirable ever to formulate such a rule.

By the side of these rules of detail grammatical interpretation throws out a fundamental problem of principle, namely whether in certain cases those in charge of interpretation and application of a treaty had to confine themselves solely to a grammatical interpretation, or whether in all cases recourse could be had to all available means for the elucidation of the correct meaning of the text of a treaty. The question is, whether or not the standpoint of the International Court of Justice set forth in its advisory opinion of 3 March 1950 in a decisive form is acceptable, and whether or not this standpoint is in fact rooted in modern international law. In this advisory opinion the Court declared: "If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter. If, on the other hand, the words in their natural and ordinary meaning are ambiguous or lead to an unreasonable result, then, and then only, must the Court, by resort to other methods of interpretation, seek to ascertain what the parties really did mean when they used these words. . . . When the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning, it may not interpret the words by seeking to give them some other meaning."[37]

This principle is in fact the same as Vattel formulated some two hundred years ago: ". . . il n'est pas permis d'interpréter ce qui n'a besoin d'interprétation. Quand un Acte est conçu en termes clairs & précis, quand le sens en est manifeste & ne conduit à rien d'absurde;

[37] *I.C.J. Reports 1950*, p. 8.

on n'a aucune raison de se retuser au sens que cet Acte présente naturellement."[38]

This definition of Vattel, attractive as it is, had a strong effect on the science and practice of international law. Theorists and judgements often referred, and are still referring, to this principle of Vattel. So, e.g., according to Rivier, wherever the sense is clearly manifest from the text, no other sense should be sought for.[39] The thesis had by no means few partisans in the debate in the Institut de Droit International on the interpretation of treaties in the fifties, moreover Ripert downright declared that interpretation might become an abuse whenever the text is perfectly clear.[40] In socialist literature on international law there are also followers of this idea. So in a Polish textbook on international law published in 1956 Kłafkowski wrote that anything clearly derivable from the text should not be made subject to interpretation.[41]

The statements of Vattel created an even greater stir in judicial practice. The courts of several countries and the various international tribunals often refer in their judgements to the principle quoted above. In The Franciska case well known from English judicial practice, Dr. Lushington, the Judge of the Admiralty Court, as early as 1855 laid down the thesis that for the interpretation of a treaty first the text had to be examined, and if the meaning was clear, the judge was not at liberty to go further.[42] On the pattern of this judgement the courts of other states, too, often referred to Vattel's thesis, which was given expression in a whole series of awards of international arbitral tribunals.

The Permanent Court of International Justice in its advisory opinion on the interpretation of the Treaty of Lausanne of 1923, denied to examine matters other than the text of the treaty, since in its opinion the disputed Article 3 of the Treaty was "in itself sufficiently clear".[43] In the Lotus case the Permanent Court of International Justice recall-

[38] Vattel, E. de: *Op. cit.*, Livre II, chap. XVII. § 263 (Classics, 1, 1916).
[39] Rivier, A.: *Op. cit.*, p. 33.
[40] *Annuaire*, 1956, Vol. 46, p. 324.
[41] Kłafkowski, A.: *Zarys prawa międzynarodowego publicznego* (An outline of international public law). Warsaw, 1956, Vol. II, p. 110.
[42] See Lord McNair: *The Law of Treaties*. Oxford, 1961, p. 371.
[43] *P.C.I.J.*, Ser. B, No. 12, p. 22.

ing its earlier positions stated that "there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself".[44] A similar position was taken in an advisory opinion on the jurisdiction of the European Commission of the Danube,[45] on the interpretation of the Statute of the Memel Territory,[46] and in several other judgements and advisory opinions. The practice was continued by the International Court of Justice, in a still more rigid form. Even before its advisory opinion of 3 March 1950, where the principle was expounded in a most detailed form, the Court had recourse to Vattel's principle in its advisory opinion of 28 May 1948 interpreting Article 4 of the Charter,[47] and then subsequently in its advisory opinion on the interpretation of the Paris Peace Treaties.[48]

Still notwithstanding the extensive recognition of the thesis in international judicial practice, numerous objections have been brought forward to it, and in our opinion the weight of the counter-arguments renders the value of the alleged rule rather doubtful.

In any event it has to be recognized as correct that for the interpretation of a treaty those responsible for it have to proceed from the natural meaning of the text in the first place. However, neither Vattel's thesis, nor the principle as formulated in judicial practice offers much more to the agency called upon to interpret a treaty. On the other hand, it is a decided shortcoming of the principle in question that it accepts as established exactly what has to be demonstrated, namely the meaning of the text. One has to remember that in general each party in a dispute will insist that the "clear meaning" of the words reinforces its position. Consequently, a reference to a clear meaning will hardly help decide the dispute on interpretation in full swing between the parties.

The risk implied in a reference to the natural meaning of the words is also demonstrated by the practice of the International Court of Justice. In the advisory opinion concerning the interpretation of Article 4 of the Charter the Court based its position on the "natural

[44] *P.C.I.J.*, Ser. A, No. 10, p. 16.
[45] *P.C.I.J.*, Ser. B, No. 14, p. 28. Nevertheless with this advisory opinion the Court, as will be pointed out subsequently, broke through the principle proclaimed by it.
[46] *P.C.I.J.*, Ser. A/B, No. 47, p. 249.
[47] *I.C.J. Reports 1948*, p. 63.
[48] *I.C.J. Reports 1950*, p. 227.

meaning" of the words. At the same time six out of the fifteen judges, i.e. forty per cent, came to the opposite understanding, and in addition two of the majority of nine in their separate opinions adopted in some respects the standpoint of the minority, so that the clear text, clear according to the Court's opinion, was in its entirety approved by a minority of the judges. In fact a reference to the "clear meaning" of the text is by itself extremely enticing, yet at the same time not too convincing an argumentation. This is proved e.g. also by the so-called Asylum case, when in the opinion of the Court it was "inconceivable" that the Havana Convention should have a certain meaning attributed to it, whereas on the other hand, according to Judge Read, it was exactly the restrictive interpretation of the majority of the Court which was "inconceivable".[49]

Cases when in fact the unambiguity of the text is so much beyond doubt as to make any further investigation unnecessary, are extremely rare. Such was, however, the case with the legal dispute on which the advisory opinion of the International Court of Justice of 3 March 1950 relied, when the Court had to give an opinion on the legal effect of the recommendations of the Security Council.[50] However, here there was a case of an artificially provoked dispute, when it was argued whether a word occurring in the text of the treaty should be accepted in its ordinary everyday meaning, or in the contrary meaning i.e. in a positive or a negative sense.[51] Still even in such cases, when indeed it appears to be the straightforward course to close down the dispute with an appeal to the common sense and to the ordinary meaning of the words, in international practice recourse is had to other methods of interpretation to back up the evidently only solid standpoint.

[49] *I.C.J. Reports 1950*, pp. 284, 322.

[50] In the case in question it was argued whether the provision of Article 4 of the Charter, according to which the General Assembly decides on the admission of new members in the United Nations on the recommendation of the Security Council, could be construed so as to imply that the General Assembly could decide on the admission of members without a recommendation of the Security Council. According to the argument brought forward to support this construction the notion of recommendation might as well imply the want of recommendation, i.e. negative recommendation.

[51] It should be noted that even at this extreme case there were two judges who professed an opinion running counter the position taken by the Court, i.e. even here they attributed an opposite meaning to the moot term.

And in fact, in the case referred to above the International Court of Justice considered it necessary to reinforce its position otherwise based on the natural and ordinary meaning of the words by invoking other provisions of the Charter and, in particular, by referring to the whole structure of the Charter, i.e. by having recourse to the logical method of interpretation, although it dismissed motions to consider *travaux préparatoires*.[52]

In the course of taking positions on a variety of cases the International Court of Justice sets certain limitations to the resort to the principle of interpretation discussed. Accordingly, the rule can be applied so far only as it does not lead to unreasonable results.[53] This thesis may be discovered already in the works of Grotius, then later in those of Vattel.[54] Still the thesis is by far not the reassuring supplement which in all events will prevent the rule in question from being used for the distortion of the actual intention of the parties. For that matter the notion of "unreasonable result" is not beyond dispute in all cases. So e.g. in a dissenting opinion to the second advisory opinion of the International Court of Justice on the interpretation of the Paris Peace Treaties, Judge Read argued in favour of a commission of arbitration of two members on the plea that the position, according to which the commission of arbitration could not be formed unless both parties had appointed their member, would lead to an unreasonable result.[55] On the contrary, it would be by far more justified to state that it was exactly the opposing position which would lead to an unreasonable result, i.e. when the commission of arbitration would be formed of the members appointed by the one party only and a "third member".[56]

[52] *I.C.J. Reports 1950*, pp. 8—9.
[53] *I.C.J. Reports 1950*, pp. 244—245.
[54] Grotius, H.: *Op. cit.*, II. XVI. VI; Vattel, E. de: *Op. cit.*, II. XVII. §282.
[55] *I.C.J. Reports 1950*, pp. 244—245.
[56] In the given instance the debate centred round the question whether to decide disputes arising from the peace treaties of 1947 a commission of two members could act instead of one of three members as provided by the treaties, if the one party failed to appoint its member on the commission. Since the Secretary-General of the United Nations is authorized to appoint the third member only, such an appointment cannot take place unless the first two members have been appointed by the parties to the dispute.

On this understanding Vattel's thesis has to be rejected in general as unsuitable to pilot those in charge of interpretation between mutually conflicting opinions. In addition, the thesis also involves the risk that those interpreting a treaty will, prompted by their subjective standpoint, accept the one interpretation or the other as clear. Consequently, we shall be forced to the conclusion that whenever there is a dispute as to the correct meaning of the text of a treaty, this cannot be settled by referring simply to the "natural, clear meaning", but recourse will have to be had to all available methods of interpretation.[57]

Still in this connexion the question may be asked, what in fact should be understood by "correct meaning". There is but one possible answer to the question, viz. that the correct meaning of a treaty is defined by the intention of the parties. If therefore a dispute arises as to the establishment of the meaning of a treaty, the dispute cannot in general be settled by a more or less arbitrary reference to the natural or ordinary meaning of the words, but the intention of the parties has to be explored. In opposition to the ostensibly "clear" meaning of the words in each case the intention of the parties, the meaning intended by them will be normative.[58]

This opinion which is making a steady headway in the science of international law, although its spread within a yet wider sphere is obstructed by the authority of the International Court of Justice, implies the rejection of the attractive, yet erroneous and misleading

[57] J. Voicu (*De l'interprétation authentique des traités internationaux*. Paris, 1968, pp. 149—150) correctly pointed out that it would be an abortive attempt to draw a line between terms clear by themselves and such which call for an interpretation, and by way of example he refers to the notion of "sugar", which obviously must be included in the natural notions of a clear meaning; nevertheless in the International Sugar Convention the parties considered it necessary to define the meaning of "sugar".

[58] In English literature, so by McNair and Lauterpacht, often cases taken from civil law are described which in general exemplify the insufficiency of a reference to the clear meaning. In a will the testator bequeathed his whole estate to "mother". The term is by itself obviously clear, since however it was established that in the family circle the deceased's wife was always referred to as "mother" and therefore the intention of the testator was evidently directed to settle his estate on his wife, the widow of the testator came into the inheritance and not his mother.

thesis of *in claris non fit interpretatio.* In the period between the two world wars Anzilotti repudiated Vattel's thesis in a particularly keen form. He declared: "But I do not see how it is possible to say that an article of a convention is clear until the subject and aim of the convention have been ascertained, for the article only assumes its true import in this convention and in relation thereto. Only when it is known what the Contracting Parties intended to do, and the aim they had in view, is it possible to say either that the natural meaning of the terms used in a particular article corresponds with the real intention of the Parties, or that the natural meaning of the term used falls short of, or goes further than such intention."[59]

Even if we cannot agree with Anzilotti's formulation in every respect, his statement, according to which the true import of the text of a treaty cannot be established without an exact knowledge of the intention of the parties, is undoubtedly correct. The allegation as if the opinion of Anzilotti were leading into a *cul-de-sac* since the intention of the parties cannot be discovered unless by way of the words used to express it, merely purposes the blurring of clarity.[60] In our opinion, the establishment of the intention of the parties is the true function of interpretation, however, in certain cases, and in particular when the text of a treaty is *prima facie* clear, the establishment of the intention will require less efforts. As has already been made clear, the application of a treaty will in each case presuppose a preliminary interpretation of the provisions of the treaty. Hence, before the application of the provisions that may be considered sufficiently clear, the organ in charge of application may satisfy itself with fewer investigations, unless there is a dispute between the parties in respect of the given provisions. In such and similar cases, in general, no recourse is had to preparatory work at all. However, some sort of an interpretative activity will have to be performed even in this case. On the other hand, if either party contests the meaning of an otherwise clear term, examination will have to extend to a wider sphere and in this case recourse will have to be had to all possibilities

[59] D. Anzilotti (*P.C.I.J.*, Ser. A/B, No. 50, p. 383) expounded this view in his dissenting opinion attached to the advisory opinion of the Permanent Court of International Justice on the night work of women.

[60] This is the position taken e.g. by S. Neri (*Sull'interpretazione dei trattati nel diritto internazionale*, pp. 104—105), who otherwise tries to justify Vattel's thesis throughout his book.

offering themselves for the elucidation of the true intention of the parties. Therefore the conclusion that can be drawn from Vattel's thesis is that a "clear" text will, in general, need simpler interpretation. Thus it is also for this reason of utmost importance that at the drawing up of a treaty the parties to it apply the greatest possible care.

On this understanding the conclusion will suggest itself that, in general, the text of any treaty has to be interpreted by a combined application of all available methods, and that whether or not a certain provision of a treaty is sufficiently clear in a concrete case can only be established as an outcome of such a complex interpretation. Hence, in the course of interpretation we can never depart from the assumption of the clarity of the text. The fact that a text is really clear can be ascertained only from the results of a process of interpretation, if the *prima facie* clear meaning coincides with the meaning we have received as a result of the process of interpretation.[61]

As in the science of international law,[62] a certain progress may be observed also in international judicial practice, which finds expression

[61] By a somewhat different way H. Lauterpacht comes to the same conclusion in his Hague lectures on *travaux préparatoires* (Les travaux préparatoires et l'interprétation des traités. *Recueil des Cours*, Vol. 48, p. 790).

[62] Of those of the literature of international law who reject the opinion that would have interpretatory activities restricted, in addition to those already quoted, in the first place the Soviet writers on international law ought to be mentioned, so e.g. both Peretersky and Shurshalov, i.e. those who have investigated the problem of the interpretation of treaties with thoroughness in the Soviet literature. Yet also in the bourgeois literature the number of those adopting the point of view here set forth is increasing. This was in particular the case in the debates in the Institut de Droit International, where mainly Lauterpacht, Hyde, Hambro and Jessup took a stand against opinions which would have interpretation restricted. Actually the principal partisans of Vattel's thesis are the Italians, so e.g. Neri and Bentivoglio, who in their monographs on the interpretation of treaties reject the position taken by their compatriot Anzilotti. In the debates in the Institut Beckett, Ripert and Alfaro adhered most keenly to Vattel's formula, whereas McNair tried to take an intermediary position between the two schools. The resolution eventually adopted, however, bypasses the problem and avoids taking a definite stand in the question, obviously for want of an agreement (*Annuaire*, 1956, Vol. 56, p. 339). Even if, therefore, a remarkable progress may be recorded in the question now discussed in the science of international law, for the time being the statement of Tammelo, that "the plain terms rule as the supreme canon of treaty interpretation has been discredited by most international legal

in an opposition to the thesis *in claris non fit interpretatio.* The awards of the various international arbitral tribunals increasingly consider the elucidation of the intention of the contracting parties through other means than sticking to the words of the text the principal function of those responsible for interpretation.[63]

Even the practice of the two international courts of a permanent character shows some sort of a progress towards resorting to other methods of interpretation in the event of a "clear text". Already in the later judicature of the Permanent Court of International Justice a tendency manifested itself that, notwithstanding the insistence on Vattel's thesis, the Court was not satisfied with relying for its decisions solely on the "clear meaning" of the text, and on several occasions the Court simultaneously with emphasizing Vattel's principle maintained that the application of other methods, mainly the examination of *travaux préparatoires* yielded the same results as the "clear" text of the treaty. This was particularly striking in the advisory opinion on the jurisdiction of the European Commission of the Danube. The Court, after stating that "preparatory work should not be used for the purpose of changing the plain meaning of a text", declared that Article 6 of the Danube Convention of Paris of 1921 bringing under regulation the jurisdiction of the European Commission of the Danube admitted of one interpretation only. Then the Court proceeded to analysing in all its details the historical background of the conclusion of the convention, and also the preparatory work associated with the disputed provision. All this the Court did merely to declare that the records of the preparation of the convention "do not . . . furnish anything calculated to overrule the construction indicated by the actual terms of Article 6".[64]

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scholars" (Treaty Interpretation and Considerations of Justice. *Revue belge de droit international*, 1969, No. 1, p. 81), must be considered exaggerated.

[63] Here reference is made *inter alia* to the statements made in the Island of Timor case determined by the Permanent Court of International Justice (see Scott, J. B.: *Op. cit.*, p. 312), to the award in the Ottoman Debt Arbitration (*Annual Digest of Public International Law Cases*, 1925—1926, p. 360) and to the Chevreau case, where the arbitrator interpreted the *compromis* so as to suit the intention of the parties and not the text (*The American Journal of International Law*, 1933, No. 1, p. 176).

[64] *P.C.I.J.*, Ser. B, No. 14, p. 31.

Strictly speaking this action of the Court meant the waiver of its principled position. Notably, if the Court in the course of its examination has recourse also to other methods and states that the application of these methods has failed to support one of the two meanings argued by the parties, and then supplementing this statement adds that the meaning is otherwise so clear as to make the application of other methods, e.g. the examination of the *travaux préparatoires*, unnecessary, then it may justifiably be presumed that the recourse to other methods has considerably contributed to the Court's finding the one of the two meanings clear. That is, the Court does not consider the "clear text" sufficient for the elucidation of the correct meaning, but it regards a check by applying other methods as necessary, and only when by this way it has come to a definite result, dares declare a definite meaning of the text to be clear. Hence the Court without openly avowing it, applies the concept formulated above in practice. That is, in reality it does not start out from the clear character of the text, but arrives at the "clear" meaning of the text through the application of other methods. However, at the same time, in its formulation it adheres to its earlier position.

In the first phase of its activities the International Court of Justice had failed to follow in the wake of its predecessor and, as shown by the above examples, in the beginning the Court was wholly averse to having recourse to other methods of interpretation in cases when it thought that the text of a treaty was sufficiently clear. However, it was unable to maintain this position for too long, and in a judgement passed in 1952 in a dispute on the rights of United States nationals in Morocco between France and the United States of America, the Court held that a certain meaning attributed to the text of the Act of Algeciras by the one party was not even sustained by the preparatory work of the 1906 conference. However, at the same time the Court considered the meaning of the passage in question sufficiently clear.[65] By this judgement the Court returned to the position adopted by its predecessor, the Permanent Court of International Justice, an act which amounted to the break-through of Vattel's thesis.

The International Court of Justice resorted to a similar course in another judgement passed at about the same time. In the first phase of the Ambatielos case, in a judgement establishing its own jurisdic-

[65] *I.C.J. Reports 1952,* pp. 198 and 209.

tion, to substantiate the standpoint it had taken, the Court argued that the records of the negotiations preceding the conclusion of the Anglo-Greek Treaty did not support the interpretation of the text as given by Counsel for the British government. At the same time the International Court of Justice also added that the text was otherwise clear, so that an examination of the preparatory work was unnecessary.[66]

With the advance of years the procedure here outlined gained in frequency in the judicature of the International Court of Justice. In a later position taken by the Court it handled the thesis *in claris non fit interpretatio* with ease. Although in its advisory opinion on the Inter-Governmental Maritime Consultative Organization the Court thought it necessary to lay down the classical thesis, still when it came to interpret the term "elected", a word whose ordinary meaning would at the first glance give little cause to dispute, the Court shrank back from the rigid application of the principle and stated that the meaning of the word in the convention calling to life the Inter-Governmental Maritime Consultative Organization could not be determined in isolation by recourse to its usual or common meaning and attaching that meaning to the word where used in the article. As a matter of fact, the word obtains its meaning from the context in which it is used — said the Court — and if the context requires the application of a certain meaning, then this meaning had to be applied.[67] That is, in the present instance, the Court set aside Vattel's principle for the sake of applying the logical method of interpretation.

On the strength of what has been set forth above the statement may be made that the thesis of the exclusive application of the clear meaning is proclaimed by the International Court of Justice mostly in words; in practice, however, it seeks to find a whole set of excuses against the acceptance of this principle. Whereas part of the scholars of international law in the course of a study of the essence of interpretative activities have reached a stage where they have repudiated the classical thesis of Vattel, the partisans of the old doctrine have also been forced, though by another way, through the exigencies of practice to which they yielded in a rather pragmatic manner, to open the gates to a freer assertion of the methods of interpretation. This

[66] *I.C.J. Reports 1952,* p. 45.
[67] *I.C.J. Reports 1960,* p. 158.

progress is highly significant for the very reason because it liberates interpretation from the Procrustean bed into which it has been forced by the recognition of Vattel's principle.

Nevertheless the struggle aimed at the fullest possible enforcement of the intention of the parties in the course of interpretation, has not come to a rest with the Vienna Convention, as the Convention itself rests in principle on Vattel's thesis. At the same time, however, the Convention adopts the concessions which the Hague Court too was obliged to accept in its practice, moreover in certain respects it even goes beyond them.

As has already been pointed out earlier, Article 31 of the Vienna Convention at defining the rules of interpretation makes the ordinary meaning of the text the starting point of interpretation by adding that for interpretation good faith is normative and that the ordinary meaning of a treaty shall be established in the light of the object and purpose of the treaty. Here the Convention makes a slight concession to the position taken by Anzilotti as outlined above. In addition, in like way as has already been indicated, Article 31 expands the notion of context, inasmuch as it permits a joint application of the grammatical and other methods of interpretation,[68] moreover the Convention agrees to the taking into account, apart from the context, any subsequent conduct of the parties and any relevant rules of international law applicable in the relations between the parties, i.e. to the application of practical and methodological interpretation. In respect of these, the Convention establishes no hierarchical order whatever, a circumstance expressly pointed out in Waldock's commentary.[69]

On the other hand, Article 32 of the Convention turning back to Vattel's thesis permits a recourse to so-called preparatory work within extremely narrow limits only in so far as it qualifies preparatory work as a subsidiary means of interpretation and agrees to its application for the establishment of the meaning of a provision of the treaty only when after interpretation in accordance with Article 31 the meaning of the text is still ambiguous or obscure, or if interpretation leads to a result which is manifestly absurd or unreasonable. Nevertheless the Convention, in accordance with the practice of the Hague Court, recognizes even in want of any of the mentioned conditions, a re-

[68] See above p. 88.
[69] See Note 2.

course to preparatory work with a view to reinforcing the meaning determined in compliance with Article 31.

Finally, paragraph 4 of Article 31 of the Convention offers still another opportunity for breaking through the principle *in claris non fit interpretatio* when it declares that a special meaning shall be given to a term when it has been established that the parties so intended. Above mention has already been made of this provision in connexion with the determination of the meaning of technical terms occurring in a treaty. However, in our opinion this provision cannot be restricted to technical terms. The Convention itself sets up this thesis in a generalized form, without any limitation; but whether or not the intention of the parties has been directed to giving a special meaning to certain terms can only be established by having recourse to all available methods of interpretation, in particular to the historical method. By invoking this provision in certain instances guarantees may be offered to the assertion of the actual intention of the parties in the course of interpretation once the Convention has become effective. The opposers of the historical method discovered at once the potentialities which this provision implied for the enforcement of the actual intention of the parties and immediately after the publication of the draft convention they began to launch attacks against the provision. In particular the position taken by Bernhardt was characteristic of this tendency. He believed to have discovered a "dangerous provision" in paragraph 4 of Article 27 of the Draft, which in his opinion could reverse the whole systematic order in the articles governing interpretation and even in the event of a completely clear text permitted the departure from the ordinary meaning.[70]

This opinion, however, strongly exaggerates the significance of the provision referred to above, and the position which wants to discover a "modest concession" in paragraph 4 of Article 31 is closer to reality.[71] Incidentally, by driving back the historical method one will call into doubt the very value of the concession referred to earlier, which the Convention has made to the considerations declared by Anzilotti,

[70] Bernhardt, R.: Interpretation and Implied (Tacit) Modification of Treaties. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1967, p. 501.

[71] See M. S. McDougal's remark in the first session of the Vienna Conference (*United Nations Conference on the Law of Treaties*. First Session. Official records, p. 167).

since without resorting to the historical method the purposes the parties to a treaty have set to themselves can hardly be defined. Hence, the integration of Vattel's principle into the Convention will, even when all concessions the Convention is forced to make for the elucidation of the intention of the parties are respected, retard, to a critical degree, the achievement of the proper goal of interpretative activities.

2. LOGICAL INTERPRETATION

Already in the discussion of what is called grammatical interpretation it has been made clear that single words cannot be interpreted in isolation from the context. In fact words can be interpreted only integrated into their context.[72] With this generally accepted thesis of international practice we have stepped out of the notional sphere of grammatical interpretation in the strict sense of the term and have set out on the path leading to logical interpretation.

As regards the notion of logical interpretation, this is still a moot point among the students of the theory of law. An analysis of the various schools of thought would exceed the scope of the present work.[73] Therefore, we shall confine ourselves to stating that in the matter of treaties logical interpretation can be but the elucidation of the meaning of a definite provision of the treaty by means of certain principles of logic, confronting the treaty provision with other norms. Such norms will have to be sought for in the first place in the actually given treaty, for a treaty must be considered an organic whole whose different provisions are logically supplementing one another. Hence in respect of treaties logical interpretation means an analysis of the treaty as a whole, and to determine the correct meaning of a particular provision in all cases the entire content of the treaty will have to be considered in a way that within the range of possibility a proper harmony is being brought about among the various provisions.

As an example of logical interpretation the dissenting opinion of Judge Zoričić may serve. He attached this dissenting opinion to the advisory opinion of the International Court of Justice on the condi-

[72] Cf. paragraph 1, Article 31 of the Vienna Convention.

[73] It may suffice to refer to the relevant passages of the work of Imre Szabó (*Op. cit.*, pp. 146 et seq.) who throws a keen light on the various opinions subjecting them to proper criticism.

tions of admission of a state to membership in the United Nations. In support of the statement that Article 4 of the Charter of the United Nations fails to enumerate exhaustively the conditions of admission to the United Nations, i.e. in order to interpret Article 4, Judge Zoričić invoked the provisions of Article 24 of the Charter. In accordance with Article 24 of the Charter the Members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security". The Security Council would be unable to meet its obligations under this Article, if when recommending a state for admission to membership in the United Nations it could not take account of such political considerations which are not enumerated expressly in Article 4 of the Charter.[74] Hence in the given case this argumentation wants to expose the correct meaning of Article 4 by considering provisions of Article 24 of an altogether different nature.

International judicial practice has been long and consistently emphasizing the need for a logical interpretation. In an advisory opinion on the conditions of labour in agriculture the Permanent Court of International Justice states clearly that "the Treaty must be read as a whole and that its meaning is not to be determined merely upon particular phrases ... detached from the context".[75] The same Court in its judgement in the case of the Free Zones of Upper Savoy and the District of Gex also emphasized that the treaty[76] forms a complete whole, and no provision of it could be interpreted without regard to the others.[77] This principle runs through a whole set of judicial decisions, and in its opinion on reservations attached to the Convention on Genocide the International Court of Justice declares that "the relations which exist between the provisions of the Convention, *inter se* ... furnish elements of interpretation".[78]

The thesis now discussed has met general approval in the literature on international law. The socialist monographs on the interpretation of treaties agree on the application of the logical method on this understanding, and bourgeois jurists too refer to the thesis, which insists on the examination of a treaty as an integral whole, as a gener-

[74] *I.C.J. Reports 1948*, p. 102.
[75] *P.C.I.J.*, Ser. B, Nos 2—3, p. 23.
[76] In the given case the question was about the Versailles Peace Treaty.
[77] *P.C.I.J.*, Ser. A/B, No. 46, p. 140.
[78] *I.C.J. Reports 1951*, p. 23.

ally recognized rule of interpretation of treaties. In this connexion we would particularly refer to the position taken by Lord McNair, who in his standard work dealing with the law of treaties qualifies this thesis as a fundamental principle of interpretation and emphasizes that when construing a treaty it is not the proper course "to focus attention upon any of its provisions in isolation". McNair adds to this that when in the course of interpretation a treaty has to be examined as an integral whole this may mean that logical interpretation must not necessarily cover the complete treaty. It may suffice if it extends to a self-contained part of it, or even to a single article, when the meaning of the moot provision will have to be elucidated on the ground of this examination.[79] Naturally this process also comes within the notion of logical interpretation.

The examination of a treaty as an integral whole also implies that for the elucidation of the content of its provisions a uniform importance will have to be attached to each part of the treaty. Here we have to take a stand against the opinion shared by several western writers on international law which tries to curtail the significance of the preamble of a treaty, or eliminate it altogether, on the plea that a preamble is but an empty flower of speech, which defines no obligation whatever for the parties. Against this opinion we have to point out that though it is true that a preamble to a treaty mostly did not expressly state obligations binding upon the parties it is exactly the introductory part of a treaty in which the parties bring into relief the intentions guiding them and the purpose to be achieved with the treaty, i.e. something which for the interpretation of the provisions of the treaty might occasionally be of a decisive importance. Paragraph 2 of Article 31 of the Vienna Convention expressly declares that the preamble and annexes to a treaty are part and parcel of the context.[80]

The function of the preamble of a treaty was emphasized by Basdevant, former president of the International Court of Justice, in a

[79] Lord McNair: *The Law of Treaties*. p. 381. — A. N. Talalaev in his review on this work specially emphasizes the correctness of the thesis [Новый труд по международному договорному праву (New work on the law of treaties). *Sovietskoe gosudarstvo i pravo*, 1962, No. 11, p. 153].

[80] Already in the previous section, discussing grammatical interpretation, we have pointed out that the Vienna Convention extends the notion of the context and draws within its sphere also instruments not constituting part of the treaty. For details see p. 88 above.

series of lectures given at the Hague in 1926, where he laid stress exactly on the function of the preamble at interpretation.[81] A typical example for this significance of the preamble is the so-called Martens clause, which has been taken up in the introductory part of the Hague Convention No. IV of 1907. This clause declares that: "Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience." Then the following paragraph of the preamble adds that in particular Articles 1 and 2 of the Regulations should be understood in this sense. It is due to this clause that provisions of the Hague Convention forbidding the use of certain weapons can be construed so as to imply weapons irreconcilable to the laws of humanity, yet unknown at the time of the signature of the Convention, such as in the first place nuclear and thermonuclear weapons.[82] The binding nature of the preamble, and the significance of this part of the treaty for purposes of interpretation have been emphasized by Fitzmaurice in his study on the practice of the International Court of Justice.[83]

In the practice of the International Court of Justice there are several cases where the judgement lays stress on the compulsory character of the content of the preamble, or refers to the preamble of a treaty. Here mention may be made of the judgement in the dispute on the rights of nationals of the United States of America in Morocco,[84] or from more recent practice, of the judgement determining the frontier dispute between Belgium and the Netherlands.[85]

[81] Basdevant, J.: La conclusion et la rédaction des traités et des instruments diplomatiques autres que les traités. *Recueil des Cours*, Vol. 15, p. 571.

[82] For details see the paper "On the Problem of Prohibited Weapons" of this author. (*Questions of International Law 1962*, Budapest, 1962, pp. 41 et seq.)

[83] Fitzmaurice, G.: The Law and Procedure of the International Court of Justice 1951—1954: Treaty Interpretation and Other Treaty Points. *The British Year Book of International Law 1957*, p. 229.

[84] *I.C.J. Reports 1952*, p. 184.

[85] *I.C.J. Reports 1959*, p. 221.

Logical interpretation, which insists on keeping the treaty as a whole before the eyes, naturally raises the question, what should happen when a certain term occurs several times in the treaty, i.e. does logical interpretation imply that in such and similar cases strictly the same meaning should be attributed to the term in each part of the treaty, or whether the interpreter may depart from this meaning, and notwithstanding the fact that he examines the treaty as an integral whole interpret the term in question differently dependent on the part of the treaty where it occurs.

This question too may be answered properly only by elucidating the intention of the parties. It is for this reason that in conformity with the principle developed in international practice the interpreter has to start from the thesis that the parties to the treaty have intended to use uniform terms in a uniform meaning throughout the treaty. However, this assumption may be defeated when from some other evidences, e.g. the *travaux préparatoires* or some provision of the treaty, the contrary may be inferred. So e.g. the English text of the United Nations Charter in the second paragraph of Article 37 and in Article 42 indifferently uses the word "action", however, from the context it is evident that whereas in Article 37 the term merely means a recommendation, i.e. under Article 37 the Security Council may put forward recommendations only for the settlement of an international dispute referred to it,[86] in Article 42 the term "action" is understood to mean military coercive measures to which the Security Council may have recourse against the aggressor. The Charter uses the term "action" in this sense at several places,[87] therefore the meaning of the term according to Article 37 is exceptional only. However, it should be remembered that in general the presumption is that uniform terms used in the same treaty stand for a uniform meaning, as in fact in the overwhelming majority of cases the parties consistently attribute a uniform meaning to a certain term of expression within the same treaty.

It is a case of rather rare occurrence when the various provisions of one and the same treaty are conflicting with one another. In this case too the contradiction cannot be removed unless the actual intention of the parties has been established. To this end recourse may be

[86] For the interpretation of Article 37 of the Charter see Kelsen, H.: *The Law of the United Nations*, New York, 1951, p. 382.
[87] So e.g. in Articles 45 and 48.

had to any and all methods of interpretation. However, for a special case of a conflict of meaning, international law has set up a specific rule of interpretation, viz. for the event of a difference between the text of a treaty for the delimitation of boundaries and the map attached to it. In conformity with the established rule in the case the text has to be considered normative as against the map.[88] In conformity with this rule Article 28 of the Treaty of Trianon declared: "In case of differences between the text and the map, the text will prevail."[89]

Western literature of international law tries to formulate various rules of detail for the case where there is a discrepancy between the particular provisions of a treaty. Most of these rules may be traced back to Grotius, who for his part refers to Cicero when formulating his rules. According to Grotius, whenever a contradiction has to be removed it should be remembered that "a command prevails over a permission". At the same time he states that "an agreement which forbids outweighs a clause which orders". According to Grotius, of the provisions of equal strength "that should be given preference which is most specific and approaches most closely the subject at hand". In general Grotius puts the specific provisions before the general ones. As regards prohibitions, he holds that those holding out sanctions should be preferred to such as do not imply sanctions; and prohibitions precede such as threaten with milder sanctions only. "Then, that provision should prevail which has either the more honourable or the more expedient reasons."[90] A large portion of these principles have found their way through Vattel into the works of recent bourgeois writers.[91]

[88] Cf. Oppenheim, L. and Lauterpacht, H.: *International Law*. 8th ed., Vol. I, 1955, p. 532.

[89] A few years ago an American scholar of international law, G. Weissberg, with reference to the recent practice of the International Court of Justice, tried to call into doubt the general validity of this principle. However, his relevant argumentation is hardly conclusive. (Cf. Maps as Evidence in International Boundary Disputes: A Reappraisal. *The American Journal of International Law*, 1963, No. 4, pp. 780 et seq.)

[90] Grotius, H.: *Op. cit.*, II. XVI. XXIX (Classics 3, 1925).

[91] So e.g. P. Fauchille adopts a large portion of these principles (Fauchille, P. and Bonfils, H.: *Traité de droit international public*. Paris, 1921, Vol. I, p. 376). In Soviet literature the work of Shurshalov also contains the principle of interpretation based on a distinction of prohibitive, dispositive and permissive rules (*Op. cit.*, pp. 396—397).

There is no need for an explanation going into details to make it clear that some of these principles, e.g. those establishing a hierarchical order of the prohibitive, dispositive and permissive rules or trying, by reference to the punitive sanctions, to set up this hierarchical order, are not suited — owing to their extreme rigidity and their exaggerated emphasis on formal criteria — to solve practical problems of interpretation. On the other hand, other rules, e.g. such as distinguish provisions on the ground of the nature of the motives, would throw open the gates to an arbitrary weighing of the pros and cons, a policy that could hardly be reconciled to the principle *pacta sunt servanda*. Therefore in international practice these principles have never been able to strike root. As for the thesis giving priority to specific provisions to the prejudice of provisions of a general nature, it is a principle of formal logic, which, in general, has to be enforced in the interpretation of treaties, but whose rigid application to all cases is not feasible. Consequently it qualifies rather as a technical rule of judicial procedure having the nature of a presumption.[92]

The situation is somewhat similar as regards the principles of formal logic which in the given instance might ease the function of those in charge of interpretation, still cannot be accepted as principles of law. Here merely the principles *a contrario*, *a fortiori*, *a minori ad maius*, etc. should be remembered. These principles are often applied when it comes to interpreting a treaty. However, they may serve as guidance in certain cases only for the elucidation of the real intention of the parties, whereas their applicability in each case depends on the circumstances of the case.

To the principle *a contrario*, which in Anglo-American judicial practice is applied rather in its form of *expressio unius est exclusio alterius*, judicial practice had recourse with predilection whenever it came to clarifying the meaning of a treaty. Obviously there is much truth in the thesis and McNair appropriately remarks that it would as well find a place in the logic of the nursery.[93] As a classical example the advocates of the thesis are wont to quote the judgement of the Permanent Court of International Justice in the Wimbledon case. In this judgement the Court interpreting Articles 380 and 381 of the Treaty of Versailles on the status of the Kiel Canal held that since

[92] For details see Chapter VII, pp. 191 et seq.
[93] Lord McNair: *Op. cit.*, p. 399.

these articles enumerate the causes by virtue of which Germany may exclude certain vessels from the use of the canal, on the ground of an *a contrario* reasoning it follows that the use of the canal could not be prevented for any other reason.[94]

The International Court of Justice of the United Nations essentially relied on this principle in its advisory opinion on the conditions of the admission of state members in the United Nations of 28 May 1948. In this advisory opinion in an otherwise rather contestable manner the Court came to the conclusion that in Article 4 the conditions of admission in the United Nations are exhaustively enumerated, and consequently ruling any other condition had been precluded. That is, the Court did not *expressis verbis* refer to the principle *a contrario*, still it built up its argumentation strictly speaking on this principle.[95]

There are many examples for the application of the principle *a contrario* in international arbitration and international adjudication. It may suffice, however, to refer to one of the judgements in the Lusitania case, where in the dispute between the United States of America and Germany the arbitrator qualified the thesis *expressio unius est exclusio alterius* as a rule of both law and logic.[96] It is true though that in the North Atlantic Coast Fisheries case the arbitral award rejected the application of the *a contrario* rule,[97] still this attitude was taken not on grounds of principle, but rather as an outcome of the weighing of the circumstances of the case, so that no general conclusions can be drawn here. On the contrary, here the argumentation is in full agreement with our standpoint set forth above, according to which the principles of logic in question have to be applied with caution, and with due regard to the specific circumstances of the case.

[94] *P.C.I.J.*, Ser. A, No. 1, pp. 23—24.

[95] *I.C.J. Reports 1948*, p. 62. — It is for this reason that we are unable to agree with H. Lauterpacht (*Annuaire*, 1952, Vol. 44, tome I, p. 219) who refers exactly to this case in support of the statement that the International Court of Justice does not apply the rule of *a contrario*. It is not calling the rule by its name but rather its actual application that is decisive when its application in judicial practice is the question.

[96] *Reports of International Arbitral Awards*. United Nations, Vol. XII, p. 111.

[97] See Scott, J. B.: *Hague Court Reports*, p. 165.

3. TELEOLOGICAL INTERPRETATION

It has already been pointed out that the methods of interpretation may be grouped in two classes according as interpretation relies on the text of a treaty or has recourse to material other than the text in the elucidation of the correct meaning. A transition between the two groups is teleological interpretation, which in its original meaning accepts the purpose of the treaty as normative when it comes to interpreting the particular provisions of it.

However, if teleological interpretation is accepted in this sense, then virtually it will be very close to logical interpretation, and will in fact constitute a variant of it.[98] As a matter of fact, the purpose of a treaty may be gathered from the provisions of the treaty. If e.g. it is intended to apply the teleological method to the interpretation of the provisions of the Charter of the United Nations, then the passage to be interpreted would have to be confronted with the statements of Article 1 defining the purposes of the United Nations, a process which ultimately leads back to logical interpretation. In treaties, which in a separate article of the operative provisions do not enumerate the targets set by the parties (and the overwhelming majority of treaties belong to this class), the purpose is in general defined in the preamble. To this all applies that earlier has been set forth on the application of the preamble to the interpretation of the treaty. If the preamble contains no references to the purpose of the treaty, then the targets set by the parties may possibly be gathered from the text of the treaty as a whole. Strictly speaking, this case constitutes the transition to the second group of the methods of interpretation inasmuch as here the interpreters try to establish on the basis of the text of the treaty the target to be achieved which should serve as a guide to interpretation, still here the desired end will be reached by starting out from the spirit of the treaty as a whole rather than from the particular provisions of the text.[99]

[98] It is in this sense that paragraph 1, Article 31 of the Vienna Convention declares that a treaty should be interpreted with regard to its purpose.

[99] In the event the interpreter elucidates the targets set by the parties on the grounds of *travaux préparatoires*, he will have arrived at the point where historical interpretation begins. This will be discussed in the next section.

It should be noted, however, that the end the parties have before them cannot always be discovered accurately, moreover cases may occur when the parties were not led by a common end at all at concluding the treaty. In this case recourse to teleological interpretation is out of the question.

The notion of teleological interpretation as outlined so far would not by itself call for treating it as a special method. If nevertheless this is done, then the reason is that recent bourgeois theory departs from this notion of teleological interpretation and professes that for an interpretation the starting point should be the "general purpose" of the treaty, or of the institution created by it. In the course of interpretation, exclusively this general purpose should be asserted, and for the sake of this purpose the treaty may even be modified by way of interpretation if according to the opinion of the partisans of the tendency in question the circumstances demand such a modification.

As has been stated by the most ardent advocate of a teleological interpretation of this type, Judge Alvarez, "certains traités, une fois créés, acquièrent une vie propre et se développent conformément non pas à la volonté de leurs auteurs mais aux conditions changeantes de la vie sociale et internationale". He illustrates this thesis with the statement that treaties are similar to vessels leaving the wharves, which ply the oceans without maintaining any relations to the shipyards where they have been built.[100] He comes then as regards the interpretation of treaties to the conclusion that it is the spirit that has to be considered rather than the text, since "la lettre tue, l'esprit vivifie". Finally, on the ground of what has been set forth, he formulates the thesis that "les dispositions, même claires, d'un traité doivent rester sans effets ou recevoir une interprétation appropriée quand, en raison des modifications survenues dans la vie internationale, leur application conduirait à des injustices manifestes ou à des résultats contraires aux fins de l'institution dont il s'agit". If even then there has remained doubt as regards the function of the interpreter, he tries to dispel it by openly declaring that the text of a treaty may be modified, when necessary by way of interpretation, and this he expressly applies also to the Charter of the United

[100] Alvarez, A.: *Le droit international nouveau dans ses rapports avec la vie actuelle des peuples.* Paris, 1959, p. 498.

Nations.[101] In like way Alvarez states that by way of interpretation the jurisdiction of international organizations may be extended to rights which their constitutions have not conferred on them.

These statements of Alvarez throw a strong light on the essence of the teleological interpretation of treaties now so fashionable in the bourgeois science of international law. This method of interpretation gives the organ in charge of interpretation a full scope for arbitrarily putting an evasive construction on a treaty now become onerous for one or another party, for the evasion of the intention of the *bona fide* party at concluding the treaty, and for a unilateral modification of the treaty. As regards the international organizations, teleological interpretation offers them a chance to extend their derivative and limited international personality at their option, independently of the will of the states creating them, to rise to a position equal to that of states, or even to one above them, so to say to the position of a superstate.

Alvarez repeatedly gave voice to his opinions set forth in his voluminous theoretical work also in the course of his activities as judge of the International Court of Justice. Already in his separate opinion to the advisory opinion of the International Court of Justice on the admission of new members, dated 28 May 1948, although for the time being in a cursory way only, he emphasized that international institutions were living a life of their own, and were developing, not in accordance with the views of those who created them, but in accordance with the requirements of international life.[102] Expressly referring to the interpretation of treaties he set forth this doctrine in connexion with the advisory opinion of the Court of 3 March 1950, when he openly professed that the interpretation of a treaty must not remain immutable, but had to be modified whenever there was a change in the matter brought under regulation by the treaty. A new theory of interpretation was needed, he declared, a theory which would authorize the modification of a treaty by way of interpretation, this modification being "the natural consequence of the dynamism of international life".[103] And the ends for which treaties had to be modified remained withheld for a not too long time. In the concrete case the efforts of Alvarez were directed to eliminate the principle of the

[101] Ibid., p. 499.
[102] *I.C.J. Reports 1948*, p. 68.
[103] *I.C.J. Reports 1950*, pp. 18—19.

agreement of the great powers, at least when it came to admit new members into the United Nations. That is, his idea was to bypass the Security Council in the procedure of the admission of new members. It was for this end that he wanted to carry into practice his new theory, which already at this first practical trial revealed itself as a tool of the tendencies directed to a gross violation of the United Nations Charter. Alvarez used the very same opinions to advance the interests of the British monopoly in the case of the Anglo-Iranian Oil Company, and with his well-known argumentation he tried to demonstrate that in the given case the jurisdiction of the International Court of Justice extended to both the examination of the case and its determination, although from the text of the Iranian submission it was evident that the opposite was meant.

Naturally Alvarez does not stand alone with his opinions, although it should be noted that of the students of international law of standing he went furthest on the path of the teleological interpretation of treaties. It was Alvarez who called the complete elimination of international legality by way of interpretation one of the essential traits of the "new international law", and granted so to say unrestricted freedom to those in charge of interpretation for the modification of the provisions of the treaty. By the side of Alvarez, for his role in international judicial practice Azevedo, in like way former member of the International Court of Justice, excelled with the position taken in favour of teleological interpretation.[104]

In addition to the two Latin American international lawyers, several scholars of the bourgeois science of international law adopted the idea of teleological interpretation. However, most of them did not follow Alvarez or Azevedo to the extremes and did not accept the possibility of unlimited modification of treaties by way of interpretation. What they wanted was rather to exploit teleological interpretation with a view to precluding recourse to what is called preparatory work.[105] To some extent the idea of teleological inter-

[104] See in particular his declaration for the teleological interpretation of the United Nations Charter (" . . . that is why the interpretation of the San Francisco instruments will always have to present a teleological character") in like way for narrowing down the competence of the Security Council (*I.C.J. Reports 1950*, p. 23).

[105] Even certain American scholars of international law, who otherwise do not shrink back from proclaiming retrograde opinions, dissociate them-

pretation has made headway in the Harvard draft too, which among others also emphasizes the need for a consideration of the general purpose of the treaty, however, at the same time recognizes the use of the preparatory work for the purpose of interpretation.

In the socialist literature of international law the notion of teleological interpretation as defined above is in general rejected. Socialist theory of law too agrees with this attitude. Imre Szabó points out that the purpose of a legal rule can be taken into consideration only as a historical purpose, i.e. a purpose which is not independent of the will of the legislator,[106] or in other words at interpretation the purpose which has led the legislator, or transposed to the plane of international law, the parties concluding the treaty, cannot be ignored. The socialist theory of international law absolutely rejects the idea by a pretext of interpretation to adapt a treaty to the changed conditions and so to modify the treaty itself. According to the socialist idea of law, whenever a treaty has ceased to suit the changed circumstances the treaty may be adapted to the changed conditions either by concluding a new treaty or by modifying it by the mutual agreement of the parties, yet never by a unilateral interpretation.[107]

The International Court of Justice in its practice in general rejects the new type of teleological interpretation, and declines to assume legislative rights in international law. In the advisory opinion concerning the Hungarian, Romanian and Bulgarian peace treaties the

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selves from the teaching of Alvarez in so far as they call his "new international law" a house of cards and consider the practical application of this teaching impossible. This is the position taken e.g. by W. Samore: The New International Law of Alejandro Alvarez. *The American Journal of International Law*, 1958, No. 1, p. 54. Similarly H. J. Schlochauer (*Archiv des Völkerrechts*, 9th Year, No. 1, p. 119) calls the notions of Alvarez on interpretation unreasonable in his review of the last work of Alvarez.

[106] Szabó, I.: *Op. cit.*, p. 105.

[107] Cf. Peretersky, I. S.: *Op. cit.*, p. 26. — Although Manfred Lachs on a single occasion pointed out in the Sixth Commission of the United Nations General Assembly that the interpretation of treaties could not become a mechanical function, but must be conceived a meritorious process which applied the law to the exigencies of life (*U.N. Doc.A/C.6/SR. 669*, p. 11), in our opinion, he wanted by this to emphasize the difficulties of interpretation and the need for an interpretation carefully taking into consideration all circumstances rather than throwing open the gates to an arbitrary modification of treaties.

Court laid down this point of view in a clear-cut form and made the statement henceforth so frequently quoted in judicial practice that "It is the duty of the Court to interpret the Treaties, not to revise them".[108] It was on the same understanding that the Court rejected the teleological method of interpretation in its second judgement pronounced in the case of South West Africa.[109] Nevertheless even before the advisory opinion on the interpretation of the peace treaties in another advisory opinion on the reparation for injuries suffered in the service of the United Nations the Court partly adopted the teleological method of interpretation when it endowed the United Nations with authority which neither the Charter nor the generally recognized principles of international law would grant, namely it recognized the right of the Organization to bring an international claim against the responsible government with a view to obtaining the reparation due in respect of the damage caused to an agent of the United Nations in the performance of his duties. Here if partly only the Court deduced this interpretation of the Charter from the general purpose of the United Nations, i.e. strictly speaking the Court applied the teleological method of interpretation. Alvarez noticed at once that here in fact the jurisdiction of the international organization had been extended in a sense for which he had recommended the resort to the teleological method of interpretation, and referred to the advisory opinion of the Court as an example justifying his own position. Undoubtedly in this instance the Court went beyond the reasonable limits, although it overwhelmingly operated with the principle of the effectiveness of the treaties, i.e. a fundamental principle of interpretation.[110] However, in this connexion it should be remembered that apart from this single case the majority of the International Court of Justice rejected the idea of teleological interpretation.

4. HISTORICAL INTERPRETATION

With the discussion of historical interpretation we have entered the sphere of the second group of the methods of interpretation. What is characteristic of this group is that lawyers and statesmen applying

[108] *I.C.J. Reports 1950*, p. 229.
[109] *I.C.J. Reports 1966*, p. 48.
[110] For details of this problem see pp. 171 et seq.

these methods have recourse to material outside the text of a treaty for the elucidation of the correct meaning of the treaty.

If teleological interpretation, which as has been shown, detaches the treaty from the intention of the parties making it and attributes some sort of an autonomous life to the instrument conveying the will of the parties, is rejected, then necessarily the standpoint will have to be taken that the primary objective of interpretation is the revealing of the intention of the contracting parties. However, in our opinion, for the detection of the intention of the parties the mere examination of the text or its repeated analysis are inadequate means. If we want to leave behind the methods of "*Begriffsjurisprudenz*" of the worst sense of the term,[111] which in interpretation would lead to a hopeless deadlock, then there is no other course than stepping out of the magic circle created by the much advocated text fetishism and look for material of effective help elsewhere. And here the first steps would no doubt lead back to the past, i.e. to the circumstances in which the treaty was born.[112] The elucidation of the intention and the correct meaning of the treaty insists on a study of the historical conditions associated with the conclusion of the treaty, of the available historical material, and its proper exploitation. This is what exactly the application of the historical method amounts to. As a matter of fact, by the historical method the clearing up of the meaning of the treaty is understood by having recourse to the circumstances at the time of the treaty-making and to the written material associated with it.

Hence as a primary element of the historical interpretation the actual historical circumstances at the time of treaty-making and the

[111] Cf. the relevant discussions of H. Lauterpacht (*Annuaire*, 1950, Vol. 43, tome I, p. 397).

[112] The relevant statement of Elihu Root, former Secretary of State of the United States, is rather noteworthy: "Treaties cannot be usefully interpreted with the microscope and the dissecting knife, as if they were criminal indictments. Treaties are steps in the life and the development of great nations . . . Long contests between the representatives of nations enter into the choice and arrangement of the words of a treaty. If you would be sure of what a treaty means . . . learn out of what conflicting public policies the words of the treaty had their birth; what arguments were made for one side or the other, what concessions were yielded in the making of a treaty." (Quoted by Hyde, Ch. Ch.: *International Law Chiefly as Interpreted and Applied by the United States*. Boston, 1947, Vol. II, pp. 1471—1472.)

position taken by the parties may serve. However, it should be remembered that although this method of historical interpretation may produce results of vital importance, still it has to be handled with caution. As a matter of fact, the question is how to establish the motives prompting the parties to the conclusion of the treaty, and in the majority of cases the investigation of the historical circumstances will lead but to statements of a general nature, which more often than not fail to offer a basis for a correct interpretation of certain moot provisions of a treaty. However, it should be remembered that for the interpretation of the underlying principles of a treaty the historical background may serve as guidance. When e.g. after the conclusion of the Paris treaties of 1954 by which the Western powers took a decisive step towards the rearmament of the Federal Republic of Germany, the Soviet Union denounced the Soviet–British treaty of alliance, cooperation and mutual assistance of 26 May 1942 and the Soviet–French treaty of alliance and mutual assistance of 10 December 1944 by notes addressed to the two Western governments, she reminded them that the two treaties were concluded at a time when the Soviet Union, the United Kingdom and France were engaged in a life-and-death struggle against the common foe of the peoples of Europe, viz. German militarism.[113] In addition to certain express provisions of the two treaties it could be established from the circumstances at the time of their making that their purpose was the joining of forces of the Soviet Union and the two Western powers to prevent a renewal of German agression. The provisions of the Paris treaties allowing the rearmament of the Federal Republic of Germany and her inclusion into the North Atlantic system were conflicting with this fundamental idea. It was for this reason that the Soviet Union denounced the treaties which under the given circumstances, owing to the attitude of the United Kingdom and France, contrary to their treaty obligations, could not anymore fulfil their object.

Hence the political situation prevailing at the time the treaty was negotiated and the actual position of the parties to a treaty may lead

[113] See the notes of the Soviet Government to the French and British Governments in which it explains the position it has taken and warns these governments that in the event of a ratification of the Paris treaties it would be forced to denounce its treaties with the United Kingdom and France, in the appendix to *Novoe Vremya*, 1954, Nos 51 and 52.

to conclusions of extreme importance. However, as regards questions of detail, or the meaning of certain concrete provisions, the political situation or the position of the parties will hardly serve as an unambiguous guidance. It is exactly for this reason that in the overwhelming majority of cases recourse will have to be had to the second element of historical interpretation, viz. the actual intention of the contracting parties, and accordingly the correct meaning of the text of the treaty will have to be elucidated from the so-called *travaux préparatoires* accumulated before the signature of the treaty.

Of the many problems associated with the interpretation of a treaty resort to the preparatory work of the treaty is perhaps the mootest. In tackling the problem additional difficulties may even be introduced by the circumstance that preparatory work is of an extremely heterogeneous character, i.e. it is composed of a variety of elements which for the discovery of the actual intentions of the parties to the treaty cannot be of equal value.

The notion of preparatory work includes any material laid down in writing which issues from the period preceding the actual conclusion of the treaty. Without a pretence to exhaustiveness, the notion includes the exchange of diplomatic correspondence before the signature of the treaty, further any drafts submitted by the one or the other of the parties before an agreement has been reached on the definitive wording, and finally the oral negotiations carried on before the signature and mostly laid down in minutes.[114] For multilateral conventions adopted at international conferences the various committee and other reports constitute a particularly important part of the preparatory work. In these reports the definitive opinions arrived at in the committees of the conferences are laid down, which may constitute a valuable contribution to the correct interpretation of the

[114] It may appear superfluous to mention that not all oral discussions can be considered *travaux préparatoires* without exception. So the remark of McNair that a telephone conversation between two committee secretaries during the preliminary negotiations cannot come within the notion of *travaux préparatoires* is undoubtedly correct. (*Annuaire*, 1952, Vol. 44, tome II, p. 389.) Yet this does not mean as if the oral discussions of the delegates representing their states had to be excluded from the *travaux préparatoires*, and so also from the material to which recourse could be had for interpretation. What is certain is that greatest caution has to be applied at sifting the material of oral negotiations.

treaty.[115] Similarly the commentaries supplementing the draft convention may be of significance. These commentaries may be of considerable help for the interpretation of conventions elaborated by the International Law Commission of the United Nations, and then adopted by the states concerned in international conferences.[116] It is the case of material which owes its existence to the joint activities of the parties to the treaty, or even of material which had been compiled by the one party to the treaty only, and then disclosed to the other party thus affording it an opportunity to make its comments on it.[117]

It is for this reason that we are unable to agree with those writers on international law, according to whom records made by anyone of the parties between the signature of the treaty and its ratification come also within the notional sphere of preparatory work, provided this material throws a light on the intention of the party in question. It is true though that the process of creating a treaty comes to an end with the last act only, in many cases therefore with ratification, or the exchange of the instruments of ratification, or their deposition, still the inclusion of material dating to a period following upon signature in the notional sphere of preparatory work must be rejected. As a matter of fact, here there is a case of material compiled by the one party only, of which the others perhaps may not even have ob-

[115] As an example here reference may be made to the report of commission I/2 of the San Francisco Conference on the withdrawal of members from the United Nations Organization. The Charter itself does not speak of the right of withdrawal, however, the committee report expressly recognizes this right of the member states. [Cf. Крылов, С. Б. (Krylov, S. B.): *Материалы к истории Организации Объединенных Наций* (Materials to the history of the United Nations Organization). Moscow—Leningrad, 1949, p. 112.] If therefore on interpreting Chapter II of the Charter conclusions have to be drawn as to the relevant intentions of the contracting parties, in the first place the committee report has to be taken into consideration.

[116] The very thorough commentaries to the Geneva Conventions of 1958 on the law of the sea, the Vienna Conventions of 1961 on diplomatic relations, of 1963 on consular relations, and the Vienna Convention of 1969 codifying the law of treaties extend considerable assistance to the interpretation of these treaties.

[117] The Vienna Convention itself does not specify what has to be considered part of the preparatory work, and Waldock's commentary expressly denies taking a stand in this matter (*I.L.C. Reports 1966*, p. 54).

tained knowledge and in respect of which they could not declare their opinion. Thus it would be wholly inappropriate to have the material of the debates in the legislature of the one party before the ratification of the treaty included in the preparatory work. Incidentally all that has been brought up in a parliamentary debate will reflect the opinion of some of the members of a body authorizing the head of the state to ratify the treaty rather than that of the ratifying body. The case will be that of the subsequent conduct of the parties rather than preparatory work, which, however, in certain circumstances may be used for the interpretation of the treaty. Naturally the situation will be an altogether different one when the one party makes certain statements in the instrument of ratification on its position adopted to the interpretation of certain provisions of the treaty. However, this will already be a case of reservations made to the treaty, which notionally are outside the sphere of preparatory work, and also outside interpretation itself. Strictly speaking this is a case of acceptance of the treaty with certain modifications added by the party concerned.[118]

In our opinion what has to be emphasized is that the notion of *travaux préparatoires* embraces only material which in the one way or the other may throw light on the joint intention of the parties, i.e. material which owes its existence to the joint activities of the parties or at least to their agreement.

The thesis that reference to the preparatory work may be made in relation to parties which did not take part in the treaty negotiations, or which acceded to the treaty subsequently, does not defeat our notion of preparatory work. In such and similar cases the preparatory work will provide information only of the intention of the original contracting parties and it is obvious that this intention will be normative also for the subsequently acceding parties. If the preparatory work has been published, and this is in general the case with open

[118] In the debate in the Institut de Droit International among others Ruegger emphatically expressed his opinion that the notion of *travaux préparatoires* could not be restricted to documentary matter dating back to before the signature of the treaty (*Annuaire*, 1956, Vol. 46, p. 343).— Although in his work on the doctrine of treaties V. M. Shurshalov (*Op. cit.*, p. 438) seems to agree with what we have set forth above, nevertheless in an exemplificative enumeration of the content of preparatory work he mentions the material of the debates in parliamentary committees.

multilateral conventions debated on, and approved by, an international conference, then it is the duty of the acceding party, following from the principle of good faith, before entering into any commitments under the treaty carefully to take note of the content of these commitments. Therefore it has to be assumed that the accession to a treaty at the same time implies the approval of the intentions of the original parties.[119] It is out of the question therefore to apply the principle *pacta tertiis nec nocent nec prosunt* to such preparatory work, because the acceding state can accept the treaty only on the condition of taking into account the intentions of the original parties to the treaty.[120]

This is the position that has to be taken also for the simple reason that otherwise a treaty would have to be interpreted differently for the different parties. Here e.g. the United Nations Charter should be remembered. In drafting this instrument fifty states took part, and the original signatories numbered fifty one. Actually the number of member states of the United Nations is 132. An altogether absurd situation would have to be faced, could recourse to the records of the San Francisco Conference be had only for the interpretation of the Charter in respect of the original signatories. Therefore we believe that the statement of the Permanent Court of International Justice in the dispute on the jurisdiction of the International Commission of the River Oder is not in agreement with the principles of international law. Here the Court held that the preparatory work could not be invoked in respect of the states which did not take part in the operations of the conference preparing the Treaty of Versailles.[121]

[119] The Vienna Convention does not take a position in this question either. However, from the Waldock commentary it is evident that the International Law Commission adopted the standpoint set forth above, moreover it appears as if the Commission did not intend to distinguish between published and unpublished preparatory work (*I.L.C. Reports 1966*, p. 54).

[120] In this question McNair adopted the opposite standpoint (*Op. cit.*, p. 420).

[121] See the order of the Permanent Court of International Justice of August 20, 1929 (*P.C.I.J.*, Ser. A, No. 23, p. 42). Since in this way in respect of certain litigant states the preparatory work had to be ignored, the Court for sake of the uniformity of judgement completely ignored the preparatory work in question. — In our opinion the position taken by the Court is justified in respect of the unpublished or secret parts of

This, of course, does not mean as if all the documents coming within the notional sphere of preparatory work could be effectively used for the elucidation of the correct meaning of any controversial passage of the treaty. The notion of *travaux préparatoires* embraces also such material which would not contribute to the clarification of the meaning intended by the parties. In particular, the preparatory work of multilateral treaties may amount to an enormous mass. There may be even documents of conflicting contents included in it, and often in the very same question the same delegate may change his opinion and take a stand of a sudden, defeating his earlier position. In such and similar cases the cause of the change must be sought for in talks in the backstage, which often will carry greater weight than lengthy disquisitions in the committee meetings or in the plenary session.

For this reason recourse to *travaux préparatoires* for the purpose of treaty interpretation demands considerable efforts and requires a profound study of the circumstances. What is most essential is that the interpreter selects the passages actually reflecting the intentions of the parties out of the preparatory work which, in general, is swollen to a huge mass. This is the principle those in charge of interpretation have to bear in mind, and it is on this understanding that they have to sift preparatory work.[122]

A natural supplementation of the principle here discussed is the previous thesis, that even in the event of a harmony of intentions only

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the preparatory work only. In this case states which did not take part in the preliminary negotiations or acceded to the treaty subsequently only cannot become acquainted with the preparatory work and therefore no recourse can be had to this preparatory work against them, unless it has been disclosed to them separately. In such an exceptional case the by no means desirable situation might be brought about that the interpretation of the very same treaty will not be uniform for all parties to it.

[122] It is exactly because preparatory work reflecting the intentions of the parties is highly significant for the interpretation of a treaty that the states lay stress on the positions taken by them, among others also in respect of the interpretation of a given provision, being fixed at the vote taken on the draft treaty in the conference in the form of an explanation of vote. When e.g. the Vienna Conference voted Article 41 of the convention of 1963 bringing under regulation consular relations, the socialist states immediately after the vote declared that the term "judicial authority" in the text implied in addition to the courts of law also the organs of the prosecution.

the material may come into consideration which has contributed to the shaping of the definitive wording of the treaty.[123] If a harmony of intentions can be brought between the parties, still, owing to supervening circumstances, the parties eventually agree upon another text, then only the preparatory work underlying the text actually agreed upon may be used for the interpretation of the passage in question.[124]

Even with these limitations there will remain a wide range of documentary matter which may as preparatory work come into consideration for the elucidation of the correct meaning of a treaty. A natural consequence is that the documents to which recourse may be had are not of uniform value, as some may carry greater weight than others. For instance, it stands to reason that statements included in the motivation of the rapporteur of the draft treaty debated on in the plenary session of a conference will in general throw a more direct light on the correct meaning of the text of the treaty than declarations made by certain delegates at the conferences. The same applies also to the commentaries of the drafts worked out by the International Law Commission. So e.g. Article 4 of the Convention on consular relations does not speak of the rights of the receiving state in respect of the change of the seat of the consulate or of the consular district. However, at the same time the commentary attached to the text submitted by the International Law Commission and worked out by J. Žourek, rapporteur of the question, provides information of how the provisions of this article have to be construed for this purpose. And, since from the debates of the Vienna Conference of 1963 adopting the convention it does not appear that the participants of the conference had rejected the idea expressed in the commentary, the position there outlined is so to say a supplement of the convention, without, however, constituting part of it. Consequently, for the interpretation of Article 4 the commentary, which beyond doubt comes within the scope of the preparatory work, cannot be ignored.

[123] Cf. Neri, S.: *Op. cit.*, p. 263.

[124] In the period following upon the First World War it was in this sense e.g. the Hungarian–Czechoslovak mixed arbitral tribunal took position in the Bacsák case, when a certain exchange of notes before the Treaty of Trianon was set aside, because it was in no relation to the definitive text of the peace treaty. (*Recueil des décisions des tribunaux arbitraux mixtes institués par les traités de paix.* Paris, 1930, Vol. 9, p. 417.)

Still the debate on preparatory work has been extended not only to the notional elements but also, and even in a greater extent, to the conditions of the resort to the *travaux préparatoires*. While the number of the extremists rejecting the *travaux préparatoires* altogether is not too great, the more numerous are those who would have relegated preparatory work to a secondary role at the interpretation of a treaty. They try to achieve this end by restricting recourse to material outside the text for the purpose of interpretation to cases when the text of the treaty is by itself not clear enough.

This question has been tackled above with reference to all methods of interpretation when on discussing grammatical interpretation the thesis *in claris non fit interpretatio* has been analysed and discarded. Still here we have to reconsider it in connexion with preparatory work, because the question mainly emerges in connexion with historical interpretation, and also because the idea here criticized had greatly influenced the judicature of the Permanent Court of International Justice, as it has, indeed, the International Court of Justice as well.

The opinion of the Permanent Court of International Justice relying on Vattel's thesis that for a "clear" text no recourse could be had to preparatory work for the interpretation of a treaty, found expression in a number of decisions. Earlier mention has already been made of the Lotus case, further of the advisory opinion on the jurisdiction of the European Commission of the Danube, where the Court with reference to the "clear meaning" of the text declined resort to the preparatory work.[125]

However, at the same time, it has been pointed out that a considerable improvement was seen in the subsequent argumentations of the Permanent Court of International Justice inasmuch as by laying down the thesis unchanged the Court held that the examination of the preparatory work led to the very same result as the text of the treaty qualified as "clear". Essentially this meant the waiver of the earlier principle.[126]

In the first phase of its operation the International Court of Justice took an extremely rigid stand against recourse to preparatory work. At the beginning this Court merely adopted the policy of its predecessor and wholly disinclined to be engrossed in the examination of the

[125] See pp. 92—93 above.
[126] For details see pp. 99—100 above.

travaux préparatoires. Lauterpacht was perhaps right to some extent when he gave expression to his opinion as if this position taken by the Court had been justified by the fear from the enormous mass of preparatory work associated with drafting the Charter of the United Nations, as especially in the initial phase the General Assembly of the United Nations requested the Court more than once to give an advisory opinion in matters connected with the interpretation of certain provisions of the Charter.[127] Certainly it was beyond doubt that the International Court of Justice defined its uncompromising attitude in a particularly rigid form in its advisory opinions of 28 May 1948 on the conditions of admission of a state to membership in the United Nations and of 3 March 1950 on the competence of the General Assembly for the admission of a state to the United Nations.[128]

This policy asserted itself in the judicature of the International Court of Justice throughout until 1951, the year when the Court gave its advisory opinion on the reservations to the Convention on Genocide.[129] In this matter the Court made expressly use of the preparatory work to the convention and in its opinion there was reference also to the commentaries to the different drafts of the convention, and to the material of the debates in the Sixth Committee of the General Assembly.[130] With this advisory opinion a remarkable change took place in the policy of the Court inasmuch as from this date onwards the Court had more ample recourse to *travaux préparatoires*, and instead of a sterile analysis of the text it made more and more efforts to detect the intention of the parties. A little afterwards, in 1952, in the Morocco dispute between France and the United States and in the Ambatielos case the Court, following in the wake of the Permanent Court of International Justice, tried to reinforce the meaning of texts

[127] The material only of the San Francisco Conference of 1945 formulating the final text of the Charter was published in twenty-two volumes. In addition the *travaux préparatoires* embraced also the material of the conference at Dumbarton Oaks in 1944. Yet a number of other conferences had also a by no means insignificant influence on the final elaboration of the Charter, so in particular the Yalta Conference, and an enormous mass of diplomatic correspondence.

[128] *I.C.J. Reports 1948*, p. 63, and ibid. 1950, p. 9 (see p. 91 above).

[129] For details see the work *A Nemzetközi Bíróság joggyakorlata 1946—1956* (The judicial practice of the International Court of Justice 1946—1956) of this author, pp. 136 et seq.

[130] *I.C.J. Reports 1951*, pp. 22 et seq.

considered clear by referring to the preparatory work. By this the International Court of Justice practically abandoned its former rigid policy in the same way as its predecessor somewhat earlier.[131]

In more recent judgements and advisory opinions of the Court, reference is made to preparatory work at a rising frequency. Among others the *travaux préparatoires* is referred to in the judgement of 26 May 1959 determining a legal dispute between Israel and Bulgaria, in connexion with which a commentator made the surprising statement that "the Court paid little attention to the text itself", and preferred to make its decision by relying on the preparatory work.[132] Also the judgement determining the frontier dispute between Belgium and the Netherlands may be mentioned,[133] further the advisory opinion of 8 June 1960 given upon request of the Inter-Governmental Maritime Consultative Organization. In this advisory opinion the Court went back to the historical antecedents of the moot article of the Constitution of the Organization in fair detail, and in particular referred to the debate on the draft and the report of the drafting committee.[134] In its judgement of 24 July 1964, establishing its jurisdiction in the Barcelona Traction, Light and Power Co. Ltd case, the Court for the interpretation of Article 27 of its Statute examined the historical situation at the time of drafting the Statute, in particular the intentions of the states drafting it, and only then did it subject the text of the Statute to a scrutiny, merely to reinforce its position taken with special regard to the historical circumstances.[135] A similar position was taken in the judgement of 18 July 1966 in the South-West Africa case.[136]

The guardedness of the two international Courts of a permanent nature in the resort to preparatory work is less noticeable in the practice of international arbitral tribunals. Although in connexion with *ad hoc* tribunals there can be hardly talk of an established practice, still it remains a fact that the majority of these tribunals regularly

[131] For details see pp. 100—101 above.
[132] Shachor-Landau, M.: The Judgment of the International Court of Justice in the Aerial Incident Case between Israel and Bulgaria. *Archiv des Völkerrechts*, Vol. 8, No. 3, p. 283.
[133] *I.C.J. Reports 1959*, pp. 209 et seq.
[134] *I.C.J. Reports 1960*, pp. 161 et seq.
[135] *I.C.J. Reports 1964*, pp. 31 et seq.
[136] *I.C.J. Reports 1966*, p. 23.

had recourse to available preparatory work for the elucidation of the meaning of treaties. This holds in particular for the arbitral tribunals operating within the Permanent Court of Arbitration, and even more for the mixed tribunals formed by the treaties signed in the environments of Paris terminating the First World War.[137]

Diplomatic practice, too, testifies to the extensive recourse to preparatory work for the interpretation of treaties. It may safely be said that there is hardly a dispute on interpretation where at least one of the parties would not try to back up its position by making use of an element or other of the *travaux préparatoires*. Both the socialist and the capitalist states have recourse to this means when it comes to determining a dispute. As regards the practice of the socialist states, it may suffice to quote a single case from the material of the more recent years. When it was argued in the United Nations whether the member states could be held to contribute to the expenses of the armed forces of the United Nations in the Near East and in the Congo, i.e. whether these costs come within the purview of those referred to in Article 17 of the Charter, the Soviet Union in her memorandum substantiating her negative attitude made reference to the records of the San Francisco Conference. The Soviet memorandum demonstrated that Committee II/1 of the Conference dismissed an Australian

[137] An analysis going into details of the extensive judicial practice appears to be superfluous. Above reference has already been made to the more liberal practice of the arbitral tribunals. As concerns the recourse to preparatory work, here we refer to examples taken at random from the practice of the Permanent Court of Arbitration, so the celebrated case of the North Atlantic Coast Fisheries, the Island of Timor case, where the award relied almost exclusively on *travaux préparatoires*, the Japanese House Tax case, etc. (See the texts in J. B. Scott: *The Hague Court Reports*, in two volumes, New York, 1916—1932.) From the extensive practice of the mixed arbitral tribunals a particularly large number of decisions may be quoted, which mainly rely on *travaux préparatoires*. There are also decisions which against the apparently clear meaning of the text give priority to the meaning derived from preparatory work, as this reflects the true intention of the parties. Among the latter, mention may be made of the Polyxène Plessa case (*Annual Digest of Public International Law Cases* 1927—1928, pp. 437—438), which was discussed by the Greco—Turkish mixed arbitral tribunal. A detailed analysis of the relevant practice of the mixed arbitral tribunals may be read in Lauterpacht's "Les travaux préparatoires et l'interprétation des traités", a lecture delivered at the Hague (*Recueil des Cours*, Vol. 48, pp. 756 et seq.).

proposal relating to sanctions to be applied to members defaulting in making financial contributions under Article 19 of the Charter. According to the proposal, sanctions could have been applied even in the event when a state was defaulting in making payment of its share of the expenses incurred in connexion with practical actions for the maintenance of peace. Since the committee of the Conference rejected the proposal, it at the same time gave expression of its opinion that the expenses in question could not come within the notion of expenses as defined by Article 17 of the Charter. That is, in this way the preparatory work among others provided an argument for the Soviet Union to back up her position.[138]

International practice has thus widely approved the principle that for establishing the meaning of a treaty recourse may be had to preparatory work. What is more, it considers it one of the most vital instruments of interpretation. However, in a large section of judicial practice such tendencies still emerge which would have the exploitation of preparatory work made dependent on the obscure nature of the text.

This judicial practice influenced the majority of the International Law Commission of the United Nations when it took up a provision in Article 27 of the 1966 draft, according to which preparatory work could be allowed a supplementary function only at the interpretation of treaties. Accordingly, at the interpretation of a treaty recourse cannot be had to the preparatory work unless after the exploitation of other methods of interpretation the text still remained ambiguous or obscure, or interpretation led to a manifestly absurd or unreasonable result. The same provision has then been taken up in Article 32 of the Vienna Convention.[139]

After this survey of practice, it seems well worth to analyse the position theory has taken as regards the applicability of *travaux préparatoires* to the interpretation of treaties and to laying down a definite standpoint in the matter.

There is a rather narrow circle of theorists only which completely discards preparatory work as a means of the interpretation of treaties.

[138] For the text of the Soviet memorandum see *Mezhdunarodnaya Zhizn*, 1962, No. 5, pp. 156 et seq.

[139] For the relevant provisions of the Vienna Convention and their certain break-through in the convention see pp. 102 et seq. above.

As has already been pointed out, this tendency appears among the followers of the Anglo–American school of law, although not exclusively there. Of the earlier British and American scholars, mention may be made of Wheaton and Field, who base their rejection of preparatory work on the reasoning that such material merges with the text of the treaty, i.e. the treaty, so to say, absorbs, swallows up the material preceding its birth, which consequently will cease to exist. Since with the making of the treaty only its text survives, no reference can be allowed to preparatory work.[140] This is the so-called theory of merger, which incidentally turns up also in more recent literature of international law. So according to the English jurist Fachiri "it is the final text of the treaty which embodies the intention of the parties and it is the text alone that is ratified".[141] Fachiri refers also to the general principles of law as such as in his opinion do not allow of taking into account the *travaux préparatoires*.[142]

The theory of merger, however, suffers from a fundamental error. The partisans of the theory seem to forget that material preceding the birth of a treaty must be exploited in the course of interpretation merely in order to elucidate the joint intention of the parties finding an expression in the text of the definitive treaty. The purpose of a recourse to preparatory work is not to invalidate the text of the treaty, but rather to reinforce and assert the intentions of the parties. There is no question of exploiting all that may be discovered in the preparatory work for the interpretation of a treaty. If this were the case, interpretation would certainly lead to absurd results. Here the question is merely to trace, on the ground of the preparatory work, the development of the will and the common intentions of the parties, and by keeping a track of this process, elucidate the true meaning of the text on which the parties have eventually agreed. We agree with Lauterpacht in so far as the principle of merger "is in fact a warning to caution in all cases when for interpretation recourse is had to *travaux préparatoires*".[143]

[140] See Wheaton, H.: *Elements of International Law*. 8th (US) ed., 1866; Field, D. D.: *Outlines of an International Code*. 2nd ed., New York, 1876, p. 118.

[141] Fachiri, A. P.: Interpretation of Treaties. *The American Journal of International Law*, 1929, No. 4, p. 746.

[142] Ibid., p. 747.

[143] Lauterpacht, H.: *Op. cit.*, p. 781. We cannot, however, follow Lauterpacht when he tries to construct cases where the theory of merger prevails

Among the recent absolute opponents of a resort to the preparatory work the followers of the teleological method of interpretation occupy a special position. It has already been made clear earlier that the proclaimers of the teleological method of interpretation detach the treaty not only from its past, the antecedents of its birth, but expressly also from the intention of the parties. As one of the apostles of this teaching, Azevedo, in his separate opinion attached to the advisory opinion of the International Court of Justice on the Competence of the General Assembly for the admission of new members to the United Nations stated "... (according to those who are in favour of using them) the value of *travaux préparatoires* is based, for purposes of interpretation, on the *voluntas legislatoris*, to which no great importance is attached today".[144] We have already pointed out the thoroughly reactionary nature of this idea, implying the treading under foot of state sovereignty and international legality. Consequently we believe we may here dispense with enlarging on the untenableness of the teleological method of treaty interpretation and the injustice of the hostile attitude taken against *travaux préparatoires*.

Among the arguments of the opposers of a recourse to preparatory work there figures the allegation that if there is talk of the intention of the parties at all, only the intention of the organ can be normative that has strictly speaking created the treaty. And for treaties subject to ratification, this could be only the ratifying authority, whose intention cannot be explored on the ground of preparatory work.[145]

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in its entirety. In our opinion the theory of merger is for the reasons put forward in principle incorrect. There is no need for explaining in this laboured manner the necessity of a careful examination of *travaux préparatoires*, and the justification of the thesis that only certain elements of the preparatory work, i.e. the elements throwing light on the intentions of the parties at treaty-making may, and have to, be used for interpreting the treaty.

[144] *I.C.J. Reports 1950*, p. 23.

[145] Cf. e.g. Fachiri, A. P.: Interpretation of Treaties. *The American Journal of International Law*, 1929, p. 746. — Incidentally Fachiri draws the last consequences from his position taken in the rejection of *travaux préparatoires*, and in connexion with an advisory opinion of the Permanent Court of International Justice he comes to the conclusion that against the text for the purpose of interpretation no reference can be made even to conditions jointly laid down by the parties in the course of negotiations (ibid., p. 750).

This argument, however, rests on extremely weak foundations. As a matter of fact, the persons negotiating a treaty in general proceed by full powers conferred on them by the organ authorized to ratify this treaty. It must therefore be presumed that they give expression to the will of this organ and in their report submitted to it expose the meaning of the treaty in the way understood by them. In general, the organ in charge of ratification decides on the ground of this report whether or not the meaning attributed to the treaty by those negotiating it is in agreement with its own intentions, and only when this agreement is present ratification will take place. This is valid even more for the exchange of diplomatic notes preceding the making of a treaty. Obviously, the organ in charge of ratification is bound by the meaning of the treaty which has taken shape in the course of the negotiations and which may be established from the preparatory work. As a matter of fact, no changes can be made as regards this meaning. It is on this understanding that the award in the North Atlantic Coast Fisheries case refers to the intentions of the negotiators of the treaty in question.[146] In the same way, the International Court of Justice in its advisory opinion given on request of the Inter-Governmental Maritime Consultative Organization repeatedly refers to the ideas of the drafters of the treaty.[147] For the very same reason in international practice sometimes the correct meaning of a treaty was exposed by gaining information from the persons who took part in the preliminary negotiations. Although, as a matter of course, recourse to this expedient will be had in exceptional cases, in certain arbitral procedures the persons negotiating the treaty were heard as well,[148] and to this act no objections could be raised on grounds of principle.[149]

[146] See Scott, J. B.: *The Hague Court Reports*, pp. 163, 181 and 187.
[147] *I.C.J. Reports 1960*, pp. 160 and 162.
[148] See the arbitral procedure in the case of the islands in the river Saint Croix and in the Passamaquoddy Bay between the United States and the United Kingdom (Moore, J. B.: *International Adjudications*. New York, 1929, Modern Series, Vol. I, pp. 63 et seq.)
[149] This is not in conflict with the advisory opinion of the Permanent Court of International Justice in the Jaworzina frontier dispute. In this advisory opinion the Court held that "the opinion of the authors of a document cannot be endowed with a decisive value when that opinion has been formulated after the drafting of that document and conflicts with the opinion which they expressed at that time". (Hudson, M. O.: *World Court Reports*. Vol. I, p. 273.) This position does not preclude the

The number of those opposing recourse to the preparatory work for practical reasons is by no means small. To support their position they emphasize that the bulk of the material is heterogeneous and often contradictory by nature, a contention which, however, cannot be considered a conclusive argument against the use of *travaux préparatoires*. Similarly to Lauterpacht's statement quoted before, this statement again warns to caution and indicates the necessity of yet greater efforts. However, all this cannot provide reason why a highly important material that might throw light on the true intentions of the parties should be rejected, merely on the plea of the difficulties lying in the nature of the work. For that matter, some of the representatives of this principle showing an inclination to British pragmatism have already adopted one or the other argument of the teleological theory. For example, according to W. E. Beckett, preparatory work cannot be taken into consideration for the purpose of interpretation, because with the rolling by of the years fewer and fewer retain in their memories the antecedents of a treaty which therefore tends, so to say, to start a life of its own.[150] The Swiss Huber even adds a similar argument that the idea of the will of the parties cannot hang like a cloud over the text of a treaty.[151]

Considerations of principle and practice merge in the arguments of those who fear lest an examination of the preparatory work should involve the interpreter "in a process of quasi-legislative activity".[152] According to the adopters of this standpoint, the interpreter might

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hearing of the opinion of the negotiators and its being taken into consideration. It only grants priority to the opinion expressed by the very same persons at the conclusion of the treaty. This is quite natural, as in fact the elucidation of the true meaning of a treaty is directed to clarifying the intentions of the parties at the conclusion of the treaty. It is for this reason that on points of principle S. Neri's standpoint (*Op. cit.*, p. 228), which assigns the subsequent hearing of the persons making the treaty to the sphere of practical interpretation relying on the subsequent conduct of the parties, is wrong.

[150] *Annuaire*, 1950, Vol. 43, tome I, p. 444.

[151] *Annuaire*, 1952, Vol. 44, tome I, p. 199. — In addition, it should be mentioned that H. Huber, notwithstanding his argumentation, does not preclude a recourse to preparatory work in all circumstances.

[152] See e.g. Shachor-Landau, M.: The Judgment of the International Court of Justice in the Aerial Incident Case between Israel and Bulgaria. *Archiv des Völkerrechts*, Vol. 8, No. 3, pp. 281—282.

find himself in a quandary had he so to say guess the intention of the creators of a treaty. However, the arguments quoted here are rather flimsy: the persons in charge of interpretation cannot embark on any guesswork, and even less on legislative functions, their task being restricted to establishing whether or not the evidence available confirms a certain argued meaning of the text of the treaty.

Yet, even those who in its full extent reject a possible recourse to the preparatory work for the purpose of interpretation are aware of the fact that in a way or another they have to lend a certain elasticity to their principled position and provide for expedients to handle certain contingencies. They usually find this expedient by arbitrarily withdrawing certain materials from the sphere of *travaux préparatoires*, and use these for the purpose of interpretation whenever a chance offers itself. For example, according to Huber, committee reports at international conferences convened for treaty-making cannot be considered preparatory work. Similarly Huber would have all such historical documents excluded from the notion of preparatory work which are apt to shed light on the process of integrating a treaty into the proper framework. However, all this is but an arbitrary statement. In fact, these documents are not parts of the text of the treaty, and so these may be qualified as preparatory work only. The only sound core in the position of Huber is that as has already been made clear some parts of the preparatory work carry greater weight than others. Still, on principle, not a single item can be suppressed in the preparatory work which might provide a correct meaning of the text.

Beside extreme negation there are opinions which recognize the applicability of *travaux préparatoires*, even though within very narrow limits. For example, according to Wright, practice extensively uses preparatory work for the interpretation of bilateral treaties, on the other hand, for the interpretation of multilateral law-making treaties this is possible only if the part of the preparatory work in question has been guised in the form of reservations attached to the treaty.[153] As regards the practical value of the distinction between law-making and other treaties, this will be discussed at another place in this book. However, it has to be mentioned here that interpretation should take place on uniform principles, irrespective of whether it is a case

[153] Wright, Q.: The Interpretation of Multilateral Treaties. *The American Journal of International Law*, 1929, No. 1, pp. 102 et seq.

of a law-making or other treaty.[154] Nor can the principles of interpretation be distinguished according as a bilateral or a multilateral treaty has to be interpreted. If preparatory work lends itself readily for throwing light on the intentions of the parties, then it should be resorted to for the purpose of interpretation. This will hold for both bilateral and multilateral treaties. The only true gist of Wright's doctrine set forth above is that the fewer the number of the original negotiating parties, the easier it will be to segregate in the preparatory work the passages which can help the interpreter to come to a correct solution. However, the difficulties emerging with multilateral treaties will merely prompt to increased efforts and greater caution in the course of interpretation, but never constitute an obstacle to a consideration of the preparatory work. Incidentally, in this respect international practice is uniform, as in a large number of cases preparatory work was resorted to even for multilateral treaties such as the Hague Conventions of 1899 and 1907, or the Act of Algeciras of 1906, or of late the United Nations Charter.

The principle extensively resorted to in the practice of the International Court of Justice that use of preparatory work for the interpretation of a treaty is justified only when the text is not sufficiently clear, has already been discussed in all its details, and it has also been pointed out above that in more recent practice the Court itself has practically been forced to give up this principle. Still there is no doubt that in the literature of international law the position taken by the Court has found noteworthy response. This view is thus intended to limit the recourse to preparatory work to a small fraction of the cases. Among the followers of this doctrine we find, in addition to those already mentioned, Lord McNair,[155] Rolando Quadri,[156] Josef L. Kunz,[157] Charles de Visscher[158] and many other authorities of international law.

[154] See pp. 223 et seq.

[155] McNair, A. D.: L'application et l'interprétation des traités d'après la jurisprudence britannique. *Recueil des Cours*, Vol. 43, p. 267.

[156] Quadri, R.: *Diritto internazionale pubblico*. 2nd ed., Palermo, 1956, p. 145.

[157] Kunz, J. L.: Sanctions in International Law. *The American Journal of International Law*, 1960, No. 2, p. 333.

[158] Visscher, Ch. de: *Théories et réalités en droit international public*. Paris, 1953, p. 306.

Finally, the third of theoretical positions taken in the matter, a position to which we adhere for our part, announces in essence that for the elucidation of the correct meaning of a treaty any means suitable for the purpose may be used. Let here the statement of Ph. M. Brown be cited "... it would seem logical, equitable, and inevitable that in order to ascertain the clear intent of the parties ... recourse should be had to all extrinsic evidence which may aid the interpreter".[159] Naturally, for interpretation we have to set out from the text of the treaty, still in each controversial case we have to make sure whether or not the "clear" text in fact expresses the intention of the parties correctly. This cannot be done unless by having recourse to extrinsic means. Of these means the one of greatest practical importance is the preparatory work, which even according to McNair, though not a staunch adherent of resort to *travaux préparatoires*, was invoked by one or both of the parties in almost all cases of treaty interpretation.[160] Close to the truth is the statement by Lauterpacht, according to which an ounce of evidence giving expression to the intentions of the parties is worth more than a ton of logical deduction. In our opinion the use of material coming within the scope of *travaux préparatoires* as defined above can be limited in no way, and the only consideration of a recourse to it can be whether or not the concrete material permits a conjecture as to the intentions of the parties. This does not mean as if the application of a treaty were in all cases accompanied by the troublesome perusal of the complete preparatory work. This is not the case, still it is beyond doubt that if in connexion with the application of a treaty a dispute arises between the parties as to the meaning of certain provisions of a treaty, then the dispute can be settled only by making recourse to all available means of interpretation. It is for this reason that none of the parties can be barred from invoking the preparatory work in support of its position. In our opinion the other party cannot refuse taking into consideration the preparatory work on the plea that the text is anyhow clear, as in this case the dispute would at once be marshalled into a *cul de sac*. Consequently, the other party will have to examine the preparatory work and by way of comparison with the text of the treaty, expose the correct meaning. However, to this it should be added that the

[159] Brown, Ph. M.: The Interpretation of Treaties. *The American Journal of International Law*, 1929, No. 4, p. 822.
[160] Lord McNair: *The Law of Treaties*, p. 412.

burden of proof will devolve on the party which against the text invokes the preparatory work in order to disclose the true intentions of the parties. Naturally, the preparatory work cannot be used for a modification of the text of the treaty; it can only be used to establish the intentions of the parties at the point of time when the treaty was concluded. To end, it should be remembered that the idea of the preparatory work is not a panacea curing all troubles, a recourse to which will provide an absolute guidance for a settlement of disputes at the interpretation of treaties. Still, in a number of instances, recourse to the preparatory work may contribute appreciably to the ascertainment of the correct meaning.

5. PRACTICAL INTERPRETATION

It has been made clear in the previous section that correct interpretation makes it necessary to go beyond the text of the treaty and to establish the intention of the contracting parties by taking into account extrinsic material as well. So far we have dealt with extrinsic evidence derived from times preceding the making of the treaty; still, obviously, the interpreters cannot confine themselves to the so-called historical material. Therefore, in the following we shall proceed to examining to what extent material accumulated in the period following upon the conclusion of the treaty might advance the interpretation of the treaty.

A study of the problem raised here will ultimately boil down to an analysis of the conduct of the contracting parties in the period following upon the conclusion of the treaty. As a matter of fact, in the process of interpretation the conduct the parties show at the subsequent enforcement of the treaty may provide useful information. Their attitude will also betray how they themselves have interpreted the particular provisions of the treaty, how they have understood their commitments under the treaty in the period between its conclusion and the emergence of the dispute.

The method of interpretation that relies on the subsequent conduct of the parties following upon the conclusion of the treaty has received the designation of practical interpretation.[161]

[161] Although the designation is somewhat ambiguous, still it appears to be more to the point than the designation "customary interpretation"

Undoubtedly, practical interpretation is a simpler and easier method of exposing the intention of the parties than is historical interpretation which largely relies on preparatory work. As a matter of fact, for practical interpretation recourse may be had to the unambiguous conduct shown at the application of the treaty as opposed to the manifold and often contradictory statements included in *travaux préparatoires*. For this reason both diplomatic and judicial practice are willing to resort to the practical method of interpretation, although its sphere of application is by far more limited than that of the use of *travaux préparatoires*.

Both the Permanent Court of International Justice and the International Court of Justice made use of practical interpretation in a series of cases, although mainly within the limits set by their position taken in respect of the exploitation of extrinsic material (which has been made subject to criticism above), i.e. in cases when the text itself was not sufficiently clear. The Permanent Court of International Justice already at the very outset of its activities in an advisory opinion of 12 August 1922 given on the competence of the International Labour Organization in regard to agricultural labour made it clear that "the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty".[162] The Permanent Court of International Justice confirmed this notion in a number of cases submitted to it. The new International Court of Justice organized after the Second World War already in the first case determined by it, which was the Corfu Channel Case between the United Kingdom and Albania, found a way for the application of practical interpretation, when the two litigants argued whether or not the agreement of the parties on the submission of the case to the Court extended to the assessment of the amount of the British claim. Here the Court held that "the *subsequent attitude* (italics by author) of the Parties shows that it was not their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation".[163] In the advisory opinion on the

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which is even notionally incorrect, as here we have a case of an interpretation relying on a practice not yet become customary law.

[162] *P.C.I.J.*, Ser. B, Nos 2—3, p. 40.

[163] *I.C.J. Reports 1949*, p. 25. It is an altogether different question that in the given instance the Court has come to an incorrect meaning by

competence of the General Assembly for the admission of new members to the United Nations the International Court of Justice in its opinion partly relied on the practice followed by the various organs of the United Nations.[164] Should we want to continue the enumeration of cases, we might refer, e.g. to the advisory opinion on the status of South-West Africa,[165] the judgement passed on the jurisdiction of the International Court of Justice in the Ambatielos case,[166] the judgement determining the frontier dispute between Belgium and the Netherlands,[167] the advisory opinion on the construction to be given to paragraph 2 of Article 17 of the Charter,[168] the judgement given in the case of the temple of Préah Vihéar,[169] and several other decisions.

Hence, in the practice of the two international courts of a permanent character we find plenty of cases where interpretation consistently relied on the subsequent conduct of the parties. However, sometimes one or another of the arbitral tribunals, much in the same way as with *travaux préparatoires*, tends to surpass the international courts in this respect as well; in several of their awards they were prepared, for the interpretation of a treaty, to have recourse to the subsequent conduct of the parties unconditionally, i.e. without paying heed to the "clear" meaning of the text. May it suffice here to quote the award in the Russian Indemnity case where it was stated that "l'exécution des engagements est, entre Etats comme entre particuliers, le plus sûr commentaire du sens de ces engagements".[170]

We believe we may dispense with supplementing these examples by others taken from diplomatic practice, since on the grounds of what has been set forth so far, the statement suggests itself that practical interpretation is a method that has been often and effectively re-

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means of practical interpretation, for from subsequent facts it has drawn conclusions for which these have not provided an adequate ground. For details see the author's work *A Nemzetközi Bíróság joggyakorlata 1946—1956* (The judicial practice of the International Court of Justice 1946—1956). Budapest, 1958, p. 151.

[164] *I.C.J. Reports 1950*, p. 9.
[165] *I.C.J. Reports 1950*, pp. 135—136.
[166] *I.C.J. Reports 1952*, pp. 42—43.
[167] *I.C.J. Reports 1959*, p. 229.
[168] *I.C.J. Reports 1962*, pp. 172 et seq.
[169] *I.C.J. Reports 1962*, pp. 32 et seq.
[170] Scott, J. B.: *The Hague Court Reports*, p. 535.

sorted to. This is recognized also by the Vienna Convention whose paragraph 3 of Article 31 referred to above orders that, together with the context, subsequent practice in the application of the treaty should be taken into account, provided it establishes the agreement of the parties regarding the interpretation of the treaty. That is, the Vienna Convention does not preclude the application of practical interpretation even for an otherwise "clear" text and does not attribute a "supplementary" character to this method of interpretation.[171] Nevertheless practical interpretation also raises certain problems of principle which will have to be cleared shortly.

First of all it has to be pointed out that in general only concordant practice of the parties, or at least practice adopted by the one party and tacitly taken note of by the other(s), may serve as a ground for the method of interpretation here discussed. However, such tacit consent to a practice cannot be presumed, and can only be taken for granted when, according to conclusive data, the other party had acquired knowledge of the practice followed by the one party, and its agencies had lodged no protest against it.

However, cases may occur where practical interpretation relies exclusively on the subsequent conduct of the one party without investigating whether or not the other party has given its consent. Although the majority of writers dealing with the problem of interpretation of treaties denies this possibility, practice seems partly to defeat their contention. For example, the International Court of Justice in the Ambatielos case referred to above based its judgement establishing its jurisdiction mainly on the conduct of the United Kingdom at the ratification of the treaty, namely on the text of the British instrument of ratification.[172] However, in the given case the

[171] According to a recently published paper, this provision of the Vienna Convention is the most striking innovation among the rules of interpretation taken up in the convention. (Jacobs, F. G.: Varieties of Approach to Treaty Interpretation: With Special Reference to the Draft Convention on the Law of Treaties before the Vienna Diplomatic Conference. *The International and Comparative Law Quarterly*, 1969, No. 2, p. 327.) However, in our opinion the case is a departure from the practice followed by the Hague Court in a certain question rather than an innovation, which to some extent undoubtedly helps interpretation perform its true function, i.e. the prevalence of the intentions of the parties.

[172] *I.C.J. Reports 1952*, p. 43. — It is true though that the Court refers also to the Greek instrument of ratification. However, its principal argu-

practice followed by the one party gave occasion to the interpretation of the treaty in a sense running counter the position taken by this party. We are of the opinion that the practice followed by one of the parties, but not recognized by the others may provide by itself an occasion only for an interpretation to the prejudice of the given party.

Since apart from the exception discussed above practical interpretation relies on the concordant attitude of the parties, or at least on the express act by the one party and tacitly consented to by the other, strictly speaking the question may be raised whether here we have a case of one of the methods of interpretation, or whether the problem as such comes within the scope of authentic interpretation. A reply to this question is of importance also because as has been seen so-called authentic interpretation does not in all cases qualify as interpretation proper, since by recourse to authentic interpretation the parties may freely dispose of the content of a treaty and even may modify it. In our opinion, the question in word has to be answered in the negative.

There is a fundamental difference between authentic and practical interpretation. In the event of authentic interpretation we have a case of an express agreement of properly authorized organs of the parties disposing of the fate of the treaty, which agreement settles the problem of the meaning to be attributed to the treaty unconditionally, irrespective of what the actual intention of the parties was when they concluded the treaty. In the case of practical interpretation, as a rule, conclusion to the meaning attributed by the contracting parties to provisions of the treaty must be drawn from the practice followed by the organs of a lower rank appointed for the enforcement of the treaty. The conduct of such organs will allow of no conclusion as to a tacit agreement of the parties in the course of the interpretation of the treaty. The practical consequence of this position is that recourse to

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ment is the text of the British instrument with no regard to the Greek instrument of ratification. This is evident from the following statement of the reasons given for the judgement: "When the Government of the United Kingdom speaks of the Treaty in its own instrument of ratification, as being 'word for word as follows' and includes the Declaration in the text that follows, it is not possible for the Court to hold that the Declaration is not included in the Treaty." In the given instance the controversy was about whether or not the British–Greek declaration of the same date as the treaty constituted part of the treaty.

the concordant practice of the parties may be had for the interpretation of the given provision of the treaty only in so far as it reflects the intention of the parties *at the conclusion of the treaty*. International judicial practice has indeed drawn this conclusion from the rule defined above. So when in the matter of the frontier dispute between Turkey and Iraq a controversy arose as to the interpretation of the Treaty of Lausanne, the Permanent Court of International Justice held that the organ in charge of interpretation might have recourse to facts subsequent to the conclusion of the treaty only in so far as they were calculated "to throw light on the intention of the Parties at the time of the conclusion of that Treaty".[173] If this were not the case, then any difference between interpretation and modification of a treaty might be blurred, which in the absence of a proper agreement of the parties may lead to critical consequences.

A consistent assertion of this position is of particular importance for multilateral treaties, where obviously the practice followed by one or another group of the parties may easily induce those in charge of interpretation to draw conclusions of general validity.

In order to prevent from fading away the line between practical interpretation and modification of a treaty, the literature on international law and partly also judicial practice have emphasized repeatedly that for the method of interpretation here discussed only the practice developed in the period directly following upon the conclusion of a treaty may be taken into consideration. Referring to the North Atlantic Coast Fisheries case and certain judgements and advisory opinions of the Permanent Court of International Justice, Hyde maintained that the interpreters cannot consider an attitude that manifests itself after a considerable lapse of time following the conclusion of a treaty.[174] Of the monographists of the interpretation of treaties Neri too has adopted the opinion here set forth.[175] For our part we believe that this opinion is wholly logical, for if the parties begin to develop a certain practice long after the conclusion of a treaty, justifiable doubts may arise as to whether the practice reflects the intention of the parties at the conclusion of the treaty, or there is a case of the modification of the treaty present.

[173] *P.C.I.J.*, Ser. B, No. 12, p. 24.
[174] Hyde, Ch. Ch.: *International Law Chiefly as Interpreted and Applied by the United States*. Vol. II, pp. 1475 and 1476.
[175] Neri, S.: *Op. cit.*, pp. 282—283.

Strictly speaking, this will not mean as if a practice taking shape shortly after the conclusion of a treaty might not involve a modification of the treaty. As an example here the practice developed in respect of Article 27 of the Charter of the United Nations may be quoted. As is known, Article 27 of the Charter defines the order of voting within the Security Council and on matters other than such of procedure considers the "concurring votes" of the permanent members the condition of a valid decision. That is, this provision demands that for the validity of a decision each of the five permanent members casts his vote for the motion. Neither does the material of the San Francisco Conference offer a basis for an interpretation to the contrary. Nevertheless, as early as 1946, i.e. scarcely a year after the coming into force of the Charter, an opinion turned up in the Security Council that an abstention of one or another of the permanent members from voting should not prevent a valid decision from being taken. In the session of 18 April 1947 of the Security Council the representative of the United States of America called this procedure expressly one of the instances of practical construction.[176] However, as was pointed out by the Soviet representative in the Security Council on another occasion, this practice purposed the modification of the Charter.[177] Hence, here we have not a case of practical interpretation, but at most of a modification of the treaty disguised in the form of interpretation, justified only by practical considerations, and making possible the elusion of the provisions of the Charter concerning the procedure to be followed for its amendments.

From what has been made clear above it follows that in our opinion in certain exceptional cases, when from a subsequently established practice unarguable conclusions may be drawn on the ground of the circumstances present that this practice reflects the concurrent intention of the properly authorized organs of the parties, practical interpretation will forfeit its character of a method of interpretation, and come within the scope of authentic interpretation, i.e. it will become questionable whether we shall have here at all a case of interpretation or rather one of a modification of a treaty.[178]

[176] *Repertoire of the Practice of the Security Council 1946—1951*. New York, 1954, p. 174.

[177] Ibid.

[178] Cf. what has been set forth in connexion with authentic interpretation, pp. 44 et seq. above.

The arbitral award of 22 December 1963 determining the controversy between the United States and France on the interpretation of the convention on air transport already expressly stated that the conduct of the parties may serve not only as a means of interpretation, but "also as something more: that is, as a possible source of subsequent modification".[179] This statement is correct beyond doubt, although in our opinion the arbitral tribunal went too far when from the practice followed by certain administrative bodies it drew conclusions implying the modification of a treaty. The recognition of the modifying effect of administrative practice is apt to evoke grave problems of constitutional law, as it may give rise to a curtailment of the competence of governmental organs authorized to conclude treaties, moreover even that of the legislature.[180]

6. METHODOLOGICAL INTERPRETATION

In the sphere of methods available for the interpretation of treaties methodological interpretation will take us farthest from the text of the treaty to be examined. In general, methodological interpretation is the one that studies the text integrated into the totality of the legal system, in the context of other legal rules relating to the question, in order to elucidate the true content of a given legal norm. However, this definition cannot be invariably applied to the interpretation of treaties, as there can be no talk of a uniform system of international law. As a matter of fact, by the side of the relatively narrow sphere of universal and quasi-universal rules, international law incorporates a vast number of norms of particular character, which find expression overwhelmingly in bilateral treaties and in a smaller number in multilateral treaties. Consequently, no uniform system of international law could develop integrated into which the treaty to be investigated may be studied. If, therefore, the notion of methodological interpretation had to be applied to the interpretation of treaties, then no other thing could be understood by this than the elucidation of the correct meaning of the treaty, the exposition of the intention of the parties by making inferences from other treaties or recourse to principles of

[179] *International Legal Materials*, 1964, No. 4, p. 713.

[180] Cf. Cot, J.-P.: La conduite subséquente des parties à un traité. *Revue générale de droit international public*, 1966, p. 665.

international law of general validity. That is, whereas in historical and practical interpretation for the elucidation of the true meaning recourse is had to extrinsic material which is associated in a way or other with the treaty, more precisely with its origin or application, in the methodological interpretation those resorting to it dissociate themselves completely from the treaty in question and go back to the material of other treaties, or to other legal rules of general validity.[181]

Hence, the first possibility offering itself for the methodological interpretation of a treaty is the confronting of the treaty in question with other treaties. However, here we have to face the problem of which treaties can be resorted to for interpretation.

The most straightforward course appears to be the one that takes into consideration treaties concluded by the same parties as the treaty to be interpreted. Obviously, it has to be assumed that the same parties wish to ensure a harmony of their various contractual obligations, and therefore such meaning has to be attributed to their various treaties which does not disrupt this harmony.

In the literature of international law the positions taken in this question are fairly uniform. For instance, the standard work of Oppenheim–Lauterpacht states the following: "Previous treaties between the same parties ... may be referred to for the purpose of clarifying the meaning of a provision."[182] Earlier Rivier took the same

[181] The Vienna Convention does not deal expressly with the problem of methodological interpretation, however, paragraph 3/c of Article 31 declares that in the course of interpretation, together with the context, also the rules of international law applicable in the relations between the parties shall be taken into account. In our opinion this provision equally applies to the general principles and rules of international law and to the legal rules taken up in treaties concluded by the parties. This is suggested by the fact that whereas in the 1964 draft of the International Law Commission there was reference to general rules of international law, in the final draft of 1966 the adjective "general" was omitted, and Waldock, the rapporteur of the subject, raised a protest even against the restricting of the provision to rules of customary law. The meaning proposed by this author is suggested also by the remarks of Jiménez de Aréchaga in the 1966 session of the International Law Commission. (See *Yearbook*, 1966, Vol. I, pp. 210 and 219—220.) Earlier reference has already been made to the circumstance that the provision in paragraph 2/a of Article 31 of the Vienna Convention also comes within the scope of methodological interpretation (see note 31).

[182] Oppenheim, L. and Lauterpacht, H.: *International Law*. 8th ed., 1955, Vol. I, p. 954.

stand, as according to him for the purpose of interpretation previous treaties on the same subject had to be taken into consideration.[183] In socialist literature Peretersky writes on the subject as follows: "Other treaties concluded by the same parties may in many cases be efficiently used for clarifying the meaning of a treaty. This may be resorted to in particular when a new treaty, meant as its development or supplementation, is connected with an earlier one."[184]

To this we have to add only that for the purpose of interpretation not only the provisions of earlier treaties, but even those of treaties concluded subsequently by the same parties may be taken into consideration. In point of fact, at concluding such treaties the parties must have had in mind their earlier treaties and therefore valid conclusions may be drawn from the provisions of subsequent treaties as to how the parties have construed their earlier treaties. Although in this way we have approached the method of practical interpretation discussed in the foregoing section, still in our opinion the proper policy is to relegate this case into the sphere of methodological interpretation. In fact, the case here is not one connected with the parties' conduct in relation to the enforcement of the treaty, but one of an act by which the parties have purposed something altogether different, still by means of which in certain cases we may indirectly conjecture how the parties understood the provisions of the earlier treaty. Naturally, practice will overwhelmingly resort to earlier treaties, still there may emerge also cases when reference is made to subsequently concluded treaties. Incidentally, in his dissenting opinion to the award in the North Atlantic Coast Fisheries case, Drago emphasized that a treaty might very safely be interpreted by having recourse to the provisions of similar treaties concluded for the same subject *subsequently*.[185]

According to what has been set forth so far, methodological interpretation presupposes the joint examination or comparison of two or more treaties concluded by the same parties. This does not, however, mean as if by applying some sort of a rigid rule the same meaning had to be attributed without exception to the same terms used in the various treaties. As has already been made clear in connexion with logical interpretation, the same terms even when used in the same

[183] Rivier, A.: *Lehrbuch des Völkerrechts*. Stuttgart, 1889, p. 333.
[184] Peretersky, I. S.: *Op. cit.*, p. 123.
[185] Scott, J. B.: *The Hague Court Reports*, p. 204.

treaty may have different meanings. This will hold even more in respect of uniform terms used in different treaties. Still, dependent on the circumstances of the case, even in the course of methodological interpretation reference may be made to the meaning of identical terms embodied in other treaties, and the incidentally rebuttable presumption *prima facie* is here too in favour of attributing a uniform meaning to uniform terms.

The handbook of Oppenheim and Lauterpacht in the passage quoted earlier declares further that for the interpretation of a treaty recourse may also be had to treaties concluded by one of the parties to the treaty and third parties. However, in our opinion this thesis goes beyond the generally accepted rules of interpretation and is incorrect also on points of principle. It is incorrect, because the purpose of interpretation is the elucidation of the common intentions of the parties at the conclusion of a treaty, and this purpose, as a rule, cannot be achieved by having recourse to a treaty concluded by one of the parties with a third party.

Recourse to a treaty signed with a third party may be had for the purpose of interpretation in exceptional cases only, namely in cases when there is a close relationship among certain treaties, even when the contracting parties are not the same. As examples may serve the treaties of friendship, cooperation and mutual assistance concluded between states of the socialist community and constituting a uniform system. The relation between these treaties is so close indeed that notwithstanding some differences in their formulation, for the interpretation of their provisions any of these treaties may be referred to. That is to say, in an exceptional case, for the interpretation of the treaty concluded between two states, recourse may be had to a treaty concluded by the one party with a third party, moreover to a treaty concluded by two other states. However, here a possibility of the extension of methodological interpretation has to be sought for in the total uniformity of the properly conceived interests of the states belonging to the socialist community, and in the new type of relations among these states relying on socialist internationalism. Consequently, it would be premature to accept this extension of methodological interpretation as a general rule of modern international law.[186]

[186] There is nothing in the way for the purpose of interpretation to refer also to other treaties concluded among the socialist states and relying on uniform principles yet constituting a less close system than the treaties

For the interpretation of treaties, special consideration will have to be attached to certain treaties. In the period between the two world wars such a special position was assigned to the League of Nations Covenant by virtue of its Article 20. Actually the United Nations Charter enjoys a special rank among the treaties. Article 103 of the Charter, namely, declares that in the event of a conflict between the obligations of the members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. It is to be presumed in view of this provision that in the treaties concluded by the state members of the United Nations after they had become members, these states wanted to respect the provisions of the Charter. Hence treaties concluded by member states of the United Nations must be construed with due regard to the provisions of the Charter.

The Charter of the United Nations has codified the generally recognized principles of modern international law, and therefore it is justified to assign a special position to the Charter with respect to other treaties. As regards interpretation, this privileged position is in a fair agreement with the rule of general validity, normative for methodological interpretation, according to which in the course of interpretation the general principles of international law have to be taken into account. As a matter of fact, treaties have to be interpreted within the range of possibility in a way that they do not come into conflict with the generally recognized principles of international law. In the same way as with the United Nations Charter here too it has to be presumed that the parties when concluding the treaty wanted to take into consideration the general principles of law binding on all states, and so also on them, and that it was not their intention to infringe their valid international obligations by concluding the treaty. If, therefore, the text of the treaty and all given circumstances do not preclude an interpretation on this understanding, in the course of

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of friendship, cooperation and mutual assistance. A situation of this kind may arise in respect of conventions on judicial assistance or consular conventions, where, however, greater caution has to be applied, as notwithstanding the large number of identical provisions there are appreciable differences of content in these agreements. With the continued development of legal relations of a new type among the socialist countries and the growth of the regularity of these relations the possibility for methodological interpretation in respect of these countries will no doubt extend.

methodological interpretation the general principles of international law have to be taken into consideration.[187] This thesis is reflected in the judgement of the International Court of Justice of 27 November 1957 establishing its jurisdiction in the controversy between Portugal and India. In this judgement the Court laid down as a rule of interpretation that a text emanating from the government of a state must be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it.[188]

If there is a patent conflict between the text of a treaty and the provisions of another treaty or the general principles of international law, then, as a matter of course, this conflict cannot be remedied by interpretation; therefore, in this case the problem of the validity of the treaty and the international responsibility of the given state is being brought up. Certain bearings of this problem, which are associated with the problem of the termination of a treaty, will be investigated in Part Two of this study.[189]

Some authors prefer to discuss the question to what extent the municipal law of a given state may be considered for the interpretation of a treaty in conjunction with methodological interpretation. However, in our opinion, neither this question is one coming within the province of methodological interpretation, since as regards treaties this method permits the taking into account of the rules of international law exclusively. Municipal law introduced by a state subsequently to the conclusion of a treaty may perhaps, dependent on the actual situation, be taken into consideration in connexion with practical interpretation for the elucidation of the true meaning of the treaty.

[187] We cannot agree with Peretersky (*Op. cit.*, p. 124), when he declares that an even by him permitted recourse to principles of international law recognized by the parties for the purpose of interpretation does not come within the scope of methodological interpretation. If as a matter of fact by methodological interpretation the method is understood in the course of which the provision in question is examined in juxtaposition to other legal norms, then it will be patent that in methodological interpretation the rules of treaty law and of customary law may be, and even have to be, taken into consideration on an equal footing.

[188] *I.C.J. Reports 1957*, p. 142.

[189] See below pp. 301 et seq.

Chapter V

EXTENSIVE AND RESTRICTIVE INTERPRETATION

A most argued item of the anyhow highy intricate set of problems raised by the interpretation of treaties is indicated by the very title of the present chapter. Whether there can be talk at all of an extensive or restrictive interpretation of treaties is in itself a much debated question. Those adopting a negative position in the matter quote strong arguments to buttress up their opinion; and those who otherwise speak in favour of the justification of an extensive and restrictive interpretation do not agree where a place should be found for such an interpretation within the whole complex of problems. A large number of those learned in international law see in extensive and restrictive interpretation a method of the interpretation of treaties, whereas others deny this opinion without, however, offering an adequate place and a clear definition of the notion. Nor has socialist literature of international law adopted a uniform stand in this respect; and so far it has failed to settle several problems associated with extensive and restrictive interpretation in an unambiguous form.

If now the essence of the notion has to be approached, again examination should be started from the thesis so often referred to above, viz. that the purpose of interpretation of treaties is the elucidation of the intention of the contracting parties at the time the treaty was concluded. It follows that this intention has to become fully known. In such a knowledge a treaty cannot be applied by way of interpretation beyond the limits intended by the parties, nor can the effect of a treaty be limited by some sort of an arbitrarily restrictive interpretation to a narrower sphere. It is on this understanding that those rejecting the notion of extensive and restrictive interpretation altogether are right; that is, in the case of treaties an interpretation extending or restricting the intention of the parties is out of the question.[1]

[1] Exactly for this reason the provision included in Article 47 of the Vienna Convention of 1961 on diplomatic relations and in Article 72 of

Nevertheless, as soon as we try to take a step further from this position, which position is otherwise of vital importance for the maintenance of international legality, then we shall become aware of the faultiness of the opinion, so wide-spread in the topical literature of international law, which tends to see a method in extensive and restrictive interpretation. In fact, if we set out from the principle that interpretation helps us to establish the intention of the parties, then obviously this goal cannot be achieved by either extending or restricting the text of the treaty. That is, neither extension nor restriction of the text can be applied as a method. When interpreting a treaty, we may, and even have to, apply the methods revealing the true intention of the parties, i. e. the methods analyzed in Chapter IV. On the other hand, an extensive or restrictive meaning can be lent to the treaty

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the Vienna Convention of 1963 on consular relations speaking of the "restrictive application" of the convention and establishing a certain rule for this case, is in principle incorrect. The provision in question provoked an animated debate already in the International Law Commission, in particular in the discussion of the draft on consular relations, where some of the members of the Commission, in the first place G. I. Tunkin and R. Ago, took a stand against the incorporation of provisions of this sort in the convention. Tunkin pointed out that the provisions of the convention should be applied correctly, i.e. the question of a restrictive or extensive application could not even be raised; a restrictive application would imply the modification of the provisions of the convention. Similarly Ago too called forth attention to the circumstance that a restrictive application would in many cases be erroneous. Obviously both remarks referred to the case when the true meaning of the convention could be clarified by having recourse to the available methods of interpretation, when any restrictive or extensive interpretation would be out of question. The International Law Commission under the effect of the arguments adduced deleted the provision in question in the convention on consular relations (for the debate see *Annuaire de la Commission du droit international 1960*, Vol. I, pp. 158 et seq., further the *Annuaire de la Commission du droit international 1961*, Vol. I, pp. 173 et seq.). In the Vienna Conference of 1963 the delegation of the Federal Republic of Germany proposed the restoration of the original wording and although many comments pointed out the error implied in this position, the majority of the conference, on the pattern of the Convention of 1961, modified the text submitted by the International Law Commission, so that eventually a provision for the case of "restrictive application" was taken up in the Convention of 1963 (see *UN.Doc. A/Conf.25/SR.20*, pp. 6–8).

as an outcome of interpreting activity carried out by means of the applicable methods.[2]

Hence, in our opinion, the extensive or restrictive treaty interpretation is an outcome of the interpreters' activity applying the various methods; so it is namely in relation to the meaning obtained by the grammatical method. Logical, historical, practical or methodological interpretations may intensify this *prima facie* meaning, in which case this meaning profounder and more accurate as related to the one obtained by means of grammatical interpretation may be either more extensive or narrower. On this understanding, then, a distinction can be made between extensive and restrictive interpretations.[3]

[2] In the Hungarian literature on theory of law a conclusion of this nature has been reached by Imre Szabó in his study of the interpretation of the rules of municipal law (see *Op. cit.*, pp. 239 et seq.). In the Soviet literature on international law the works discussing in detail the problem of the interpretation of treaties mostly set out from the well-known thesis of the work of S. A. Golunsky and M. S. Strogovich [*Теория государства и права* (Theory of state and law). Moscow, 1940, p. 265] on the theory of law, according to which at the interpretation of a rule of Soviet law the principal objective is the adequate application of the legal rule itself rather than its extension or restriction which would mean the violation of the legal norm. It is for this reason that both Peretersky and Shurshalov essentially deny the possibility of an extensive or restrictive interpretation. I. S. Peretersky in his work (*Op. cit.*, pp. 100 et seq.) touches on the problem of an extensive and restrictive interpretation in a cursory manner only in the chapter dealing with the grammatical method of interpretation. V. M. Shurshalov (*Op. cit.*, pp. 428 et seq.), who in general also emphasizes the inadmissibility of restrictive or extensive interpretations, nevertheless in exceptional cases recognizes the justification of their application, in particular that of a restrictive interpretation, discusses the problem of extensive and restrictive interpretation in a separate subsection of the chapter dealing with the methods of interpretation.

[3] D. Anzilotti conceives the notion of the extensive and restrictive interpretation essentially in a similar meaning in his dissenting opinion to the advisory opinion of the Permanent Court of International Justice on the night work of women, although he fails to express his idea in a wholly unambiguous form (*P.C.I.J.*, Ser. A/B, No. 50, p. 383). According to Anzilotti, it can be established only after the intention of the parties has been clarified whether or not they wanted to use the particular terms of the treaty in a narrower or wider meaning than the ordinary one, and he distinguishes accordingly between a restrictive and extensive interpretation. In view of the position we have taken, we cannot wholly adopt the thesis in this formulation, although we agree with the idea that an extensive or restrictive interpretation should be considered the outcome of the interpretative activity concerning the intention of the parties.

An example or two may serve as an illustration of what has been set forth above. Earlier mention has been made of the standpoint adopted by the socialist states to the provision of Article 41 of the Convention of 1963 on consular relations. The provision requires the decision of the "judicial authority" for certain measures to be applied against a consular officer. If the term is interpreted by means of the historical method, then from the records of the conference it will be clear that at least as far as the socialist states are concerned, yet even in respect of other states, e. g. France, the term "judicial authority" implies also the organs of the prosecution.[4] Hence as compared to the meaning obtained by means of the grammatical interpretation, the result of interpretation will obviously be an extensive one. At the same time, from the material of the discussions of the Vienna conference it is evident that the provisions regulating the personal inviolability of consular officers cannot be applied to the consular couriers who are entitled to an inviolability of a wider sphere. Consequently, here the result of interpretation will be a restrictive one in respect of the provision in question.[5]

It follows from what has been set forth above that international law in general cannot incorporate rules in respect of extensive and restrictive interpretation in the sense specified above. As a matter of fact, if the notion of extensive and restrictive interpretation implied no more than to indicate what results, as compared to the more primitive examination, are obtainable by a more detailed analysis of the intention of the parties, then in this connexion no chance whatever will offer itself for a legal regulation of any kind. In this case neither the science of international law would have to deal separately with the problem of extensive and restrictive interpretation.

However, the question is by no means so simple as that, and therefore international law does not observe complete silence in the matter of extensive and restrictive interpretation. The true intention of the parties at the conclusion of the treaty cannot in all cases be elucidated

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In the Italian literature on international law, Neri takes a similar position. In his opinion extensive and restrictive interpretation is "the consequence of the application of certain criteria of interpretation rather than a criterion of interpretation" (*Op. cit.*, p. 294).

[4] *UN.Doc.A/Conf.25/C.2/SR.23*, pp. 4 et seq; *A/Conf.25/C.2/SR.25*, pp. 2 et seq.

[5] *A/Conf.25/C.2./SR.22*, pp. 5 et seq.

completely and unambiguously with the methods of interpretation analyzed in the previous chapter. There are cases, in a by no means small number, when we are unable to discover the true intention of the parties, and by applying the various methods of interpretation two or even more equally reasonable results, partly extensive, partly restrictive in their character, may suggest themselves. This outcome is naturally not unthinkable, as here we have a case of the cognition of the intention of contracting states, and not of the exploration of exact laws of nature. This is in particular a possible outcome because, as has already been made clear, international law does not constitute a uniform, self-contained system like municipal law. Obviously, the contracting parties have been led by some sort of an intention at the conclusion of a treaty, still this intention cannot in all cases be brought to light in a reassuring manner in respect of all provisions of the treaty in question. However, in cases when interpretative activity produces two or even more equally reasonable results, the rules of international law have to provide guidance for the interpreter to choose the proper result of interpretation. Rules of this kind have indeed become established in international practice, and in the following these rules will be analyzed for the understanding of the problem of extensive and restrictive interpretation.

First of all, the statement may be made that in the latter case, i.e. when by applying the various methods the true intention of the parties cannot be established, a restrictive interpretation will have to be resorted to.[6] This is justified by the circumstance that treaties in general impose certain limitations on the sovereignty of the states, limitations which the parties voluntarily accept. It is exactly for this reason therefore that these limitations will have to remain within the limits fixed by the treaty.[7] If these limits cannot be established in a clear-cut manner, then the presumption will prevail that the

[6] An arbitral award expresses this thesis in a way that if the precise meaning of a treaty cannot be established by any means, then interpretation has to be in favour of the party which pledges itself by the stipulation (Georges Pinson Case, see *Annual Digest of Public International Law Cases*, 1927—28, p. 427).

[7] The reasoning of Judge Read is obviously inconclusive. He tried to demonstrate that a declaration made by a state was the exercise of state sovereignty, and not its limitation, so that a restrictive interpretation was out of the question (*I.C.J. Reports 1952*, p. 143). Although in the given case Read spoke of the unilateral declaration of the state by which

state party to the treaty wanted to restrict its sovereignty to the least possible degree, i.e. only a restrictive interpretation of the obligations under the treaty is permissible.[8] Incidentally, the states when negotiating on the conclusion of a treaty in all events set out from the assumption that in case of a controversy interpretation will be a restrictive one.[9]

Literature of international law in general confines the problem of the restrictive and extensive interpretation to a narrower sphere than we have done above, and usually is keeping in view the case only where the application of the various methods of interpretation will fail to produce an unambiguous result.[10]

Socialist literature of international law, if it recognized the possibility of an extensive or restrictive interpretation at all, takes a stand in favour of the absolute priority of a restrictive interpretation. So Shurshalov, who admits both extensive and restrictive interpretation in exceptional cases only, holds that restrictive interpretation has still better chances of application.[11]

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it submitted itself to the jurisdiction of the International Court of Justice, his thesis was obviously applicable also to treaties. Read is right in so far as the right of a state to conclude treaties emanates from its sovereignty, and by concluding the treaty it, in fact, exercises its sovereignty, however, the result of the declaration or of the conclusion of the treaty implied a restriction of the sovereignty. It is for this reason why a restrictive interpretation is justified.

[8] Ehrlich, L. (*Op. cit.*, p. 69) formulates the thesis in a way that if there is no conclusive evidence available to the effect that by the intention of the parties the treaty has to be applicable to a given fact at issue, the treaty cannot be applied to this fact lest an obligation should be imposed on one party at least which this party may not have been inclined to accept. Even though Ehrlich does not refer expressly to the sovereignty of states, his argumentation relies essentially on the principle of the respect for state sovereignty.

[9] Cf. Fitzmaurice's similar argumentation in the debate at the Institut de Droit International (*Annuaire*, 1952, Vol. 44, tome II, p. 395).

[10] The Vienna Convention does not touch on the problem of the restrictive and extensive interpretation, however, the commentary to the draft of the International Law Commission takes an apparently negative position to restrictive interpretation, although this negative position can be inferred only from the remarks to the judgement of the Permanent Court of International Justice in the Mavrommatis case in connexion with the interpretation of multilingual treaties (*Yearbook*, 1966, Vol. II, pp. 225—226).

[11] See *Op. cit.*, p. 432. However, Shurshalov in conformity with his opinion referred to earlier attributes minimal significance to the restrictive or extensive interpretation of treaties.

On the other hand, in the bourgeois literature, in particular at present, there is a large number of writers who are absolute opponents of restrictive interpretation. However, bourgeois scholars of international law, who would have restrictive interpretation discarded in all circumstances, do not conceal their opinion holding the sovereignty of states an obsolete notion. So Lauterpacht, who develops this theory with greatest erudition and thoroughness in his report to the Institut de Droit International asks the question whether the rule of restrictive interpretation deserves to be termed properly established at all. An often quoted principle, yet rarely applied, if at all, is not entitled to this qualification. This principle — continues Lauterpacht — is unfounded altogether unless somebody considers the notions of sovereignty and presumed freedom of action the critical element and starting point of interpretation.[12] The partisans of a teleological interpretation go even further: with them the problem of a restrictive interpretation does not even emerge, as in point of fact in their opinion a modification of a treaty by way of interpretation is not only permissive, but even necessary.[13] At the same time they would have the notion of sovereignty considerably restricted.[14]

Although certain bourgeois scholars of international law recognize the possibility of a restrictive interpretation, still at the same time they would confine its application within an extremely narrow sphere. So according to Huber, restrictive interpretation is mainly justified when it is the case of a treaty imposed by one party upon the other.[15] However, for the socialist science of international law this standpoint is unacceptable. According to the socialist doctrine, in such and similar cases there cannot be talk of a treaty at all, to which the validity of the principle *pacta sunt servanda* extends. If it is the case of a treaty brought about by the threat or use of force, in conformity with the generally accepted principles of international law the treaty is null and void. This thesis has received recognition also in Article 52 of the Vienna Convention. Even if a definite case of coercion cannot be established, nevertheless we have to confront at least one of the cases of unequal treaties. Unequal treaties are in conflict with the peremp-

[12] See *Annuaire*, 1950, Vol. 43, tome I, pp. 406—407.
[13] Cf. Alvarez, A.: *Le droit international nouveau*. Paris, 1959, p. 499.
[14] *Ibid.*, pp. 474 et seq.
[15] *Annuaire*, 1952, Vol. 44, tome I, p. 201.

tory principles of international law, so that there are no legal obligations for their performance.[16] In these circumstances international law can set up no rules whatever for the interpretation of such treaties. Huber has formulated his thesis rather in defence of unequal treaties, presumably in the hope that with the acceptance of restrictive interpretation he might repel the attacks of those proclaiming the absolute voidness of unequal treaties.

Bourquin in principle recognizes the possibility of a restrictive interpretation of treaties, however, he too would have this sort of interpretation confined to certain treaties. In his opinion, at the choice between extensive and restrictive interpretation, among others, the object of the treaty and the circumstances of its conclusion will have to be taken into consideration.[17] As regards the latter, viz. the taking into consideration of the circumstances of conclusion, this is but the application of the historical method, which as has been seen may lead to the establishment of both an extensive and restrictive meaning. Since, however, the problem of interpretation here discussed will emerge exactly when by applying the various methods of interpretation the intention of the parties cannot be elucidated, a re-appraisal of the circumstances at the conclusion of the treaty will come to grief, and fail to advance a settlement of the problem. On the other hand, as regards the taking into consideration of the object of a treaty for the purpose of the applicability of an extensive or restrictive interpretation, in our opinion, this would be wholly arbitrary, void of any ground in the principles and rules of international law. Whatever the object of a treaty may be, if the intention of the parties as to the extent of the obligations under the treaty cannot be explored by means of the available methods of interpretation, then the assumption will hold that the obligations cannot extend beyond the limits which might be established without doubt. However attractive the example

[16] Cf. *Международное право* (International law). Ed. by F. I. Kozhevnikov, Moscow, 1957, p. 243; Шуршалов, В. М. (Shurshalov, V. M.): Юридическое содержание принципа pacta sunt servanda и его реализация в международных отношениях (The legal content of the principle *pacta sunt servanda* and its realization in international reations). *Советский ежегодник международного права 1958* (Soviet yearbook of international law 1958), p. 153. For the voidness of a treaty conflicting with peremptory rules of international law see Article 53 of the *Vienna Convention*.

[17] *Annuaire*, 1952, Vol. 44, tome II, p. 397.

brought forward by Bourquin may appear, namely that the Red Cross conventions have to be interpreted in an extensive manner, the thesis cannot be accepted, as by this obligations could be imposed on the states which they did not intend to assume. It is a generally known fact that at the negotiations of the Geneva conventions of 1949 on the protection of the victims of war the socialist states wanted to have most extensive rights guaranteed for protected persons, and if they could not boast of complete success, the main obstacles were set up by certain Western powers. However, socialist theory of interpretation cannot accept theses incidentally, not even adopted by international practice, which although extremely attractive and high-sounding, at the same time may imply the infringement of the sovereignty of the states.[18]

Charles de Visscher reckons with realities more seriously in his noteworthy work. Although to his heart's content he too is not in favour of a restrictive interpretation, which he considers a consequence of individualism still prevailing in international relations, nevertheless he recognizes that, notwithstanding a rejection by part of the theoreticians, restrictive interpretation prevails in practice within a fairly extensive sphere, at least when there are actual doubts as to the meaning of a provision of a treaty, or when other elements of interpretation are wanting.[19]

In fact, international judicial practice applies restrictive interpretation within rather wide spheres. Owing to the nature of their function, the various international tribunals deal with extensive or restrictive interpretation only in the narrower sense of the term, i.e. in cases when recourse to the various methods of interpretation fails to produce an unambiguous result. In such cases judicial practice mostly takes position in favour of a restrictive interpretation.

The Permanent Court of International Justice already in its first judgement determining the Wimbledon case clearly defined its relevant position. In this case where the question centred round the interpretation of provisions of the Versailles Peace Treaty relating to the Kiel Canal and considerably restricting the sovereign rights of Germany in this waterway, the Court held that the latter fact, i.e. the limitation

[18] At the same time Bourquin refers to the commercial treaties as examples of the application of a restrictive interpretation.

[19] Visscher, Ch. de: *Théories et réalités en droit international public*. Paris, 1953, p. 304.

imposed on the rights of a state was by itself an adequate reason for the application of a restrictive interpretation. At the same time the Court adds in its judgement that a restrictive interpretation can only extend to the point where it comes into conflict with the "clear text".[20] However, in our opinion, on this occasion the Court gave expression to a correct idea, yet in a wrong formulation. Correctly, in our view, the statement of the Court should be understood so as if as the outcome of interpretative activity the text had become clear, a restrictive interpretation were out of the question. Since a treaty in a way or another usually imposes limitations on the sovereignty of a state, a limitation conforming to the intention of the parties and permitted by international law cannot be construed in either an extensive or restrictive manner, once the intention of the parties at the conclusion of the treaty has been elucidated.[21]

In its judgement on the territorial jurisdiction of the International Commission of the River Oder the Permanent Court of International Justice clearly defined its position. This is substantially in agreement with the meaning we attributed to the argumentation of the Court in the judgement in the Wimbledon case: "Nor can the Court, on the other hand, accept the Polish Government's contention that, the text being doubtful, the solution should be adopted which imposes the least restriction on the freedom of states. This argument, though sound in itself, must be employed only with the greatest caution. To rely upon it, it is not sufficient that the purely grammatical analysis of a text should not lead to definite results; there are many other methods of interpretation, in particular, reference is properly had to the principles underlying the matter to which the text refers; it will be only when in spite of all pertinent considerations, the intention of the Parties still remains doubtful, that that interpretation should be adopted which is most favourable to the freedom of States."[22]

[20] *P.C.I.J.*, Ser. A, No. 1, p. 24.

[21] It is an altogether different question not dealt with here, whether in the given instance the Permanent Court of International Justice came from the correct principle also to proper conclusions. We believe this was not the case, because it allowed itself to be influenced in prejudice to the young Soviet state. For details see: Полянский, Н. Н. (Polyansky, N. N.): *Международный Суд* (The International Court of Justice), Moscow, 1951, pp. 25—26.

[22] *P.C.I.J.*, Ser. A, No. 23, p. 26. — In view of what has been set forth above we cannot accept the opinion which would use the position taken

In its advisory opinion on the Polish postal service in Danzig the Court though did not take a stand in the matter whether an extensive or a restrictive interpretation should be given preference, still it again made it clear that a case of the application of a restrictive or extensive interpretation would present itself only when the "ordinary" methods of interpretation failed to produce a result.[23] In this position the notion of "ordinary method" has to be disapproved. As a matter of fact, this definition is apt to create the impression as if restrictive or extensive interpretation were some sort of an extraordinary method of interpretation. Already on the preceding pages we have pointed out that extensive or restrictive interpretation cannot be considered a method of interpretation. As regards the extraordinary character, it will be seen that in a restrictive interpretation in the narrower sense of the term all that is "extraordinary" is that it finds application to cases when the methods of interpretation fail to produce a result, i.e. they do not permit an exploration of the real intention ot the parties. It is for such cases that the relevant rules of international law provide for the application of a restrictive interpretation.

Finally still another statement will be quoted from the practice of the Permanent Court of International Justice. This has been pronounced in the order made in the case of the Free Zones of Upper Savoy and the District of Gex on 6 December 1930. In this order the Court declared that "in case of doubt a limitation of sovereignty must be construed restrictively".[24] This position is in agreement with the earlier, i.e. recourse to a restrictive interpretation cannot be had unless after the exhaustion of all available methods of interpretation there still remain doubts as to the intention of the parties.

In the practice of the International Court of Justice of the United Nations so far a restrictive interpretation of treaties did not prevail to the extent it had prevailed in that of the predecessor of this Court. Before the International Court of Justice the problem of a restrictive interpretation emerged in particular in connexion with treaties estab-

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by the Permanent Court of International Justice as an argument against restrictive interpretation (see in this connexion the advisory opinion of the arbitral tribunal on the interpretation of the air transport agreement between the United States and Italy. *Revue générale de droit international public*, 1968, No. 2, p. 477).

[23] *P.C.I.J.*, Ser. B, No. 11, p. 39.

[24] *P.C.I.J.*, Ser. A, No. 24, p. 12.

lishing the jurisdiction of the Court, or the declarations of acceptance of the jurisdiction of the Court as specified in paragraph 2 of Article 36 of the Statute. Since submission to the jurisdiction of the Court evidently implies a limitation of the sovereignty of the state, in view of the fact that general international law does not impose an obligation upon States to recognize the compulsory jurisdiction of the Court, in case of doubt, i.e. when by applying the various methods of interpretation the intention of the state making the declaration cannot be clarified, submission must be given a restrictive construction. In international adjudication the otherwise highly dubious principle of *boni iudicis est ampliare iurisdictionem* cannot be made good.[25] So far the International Court of Justice as regards its jurisdiction essentially applied the principle of restrictive interpretation only in the Anglo-Iranian Oil Company case, when a restrictive construction was given to the Iranian unilateral declaration of submission, although the Court did not expressly refer to the principle.[26] In its advisory opinion in the matter of Judgments of the Administrative Tribunal of the International Labour Organization, upon complaints made against UNESCO by its officials, the International Court of Justice made mention of the arguments derived from the sovereignty of states, which may be adduced in favour of a restrictive interpretation of the jurisdiction of organs of international adjudication, still it did not take a position on the merits of this problem, since in the given case there was no procedure under international law in the strict meaning of the term in respect of the Administrative Tribunal.[27] Certain arbitral awards vigorously insist on a restrictive interpretation of the jurisdiction of international tribunals. So in particular in the practice of the mixed arbitral tribunals organized after the First World War, on several occasions reference was made to this principle. Here only an award of the Greco-Bulgarian mixed arbitral tribunal will be quoted which stated that the

[25] Cf. the statement of the Indian *ad hoc* judge M. C. Chagla in his dissenting opinion attached to the judgement establishing the jurisdiction of the International Court of Justice in the dispute between Portugal and India, where reference is made by Chagla to the difference between the jurisdiction of international and municipal judicial organs. (*I.C.J. Reports 1957*, p. 180.)

[26] *I.C.J. Reports 1952*, pp. 104—105.

[27] *I.C.J. Reports 1956*, p. 97.

arbitral tribunals created by the peace treaties were judicial organs of an extraordinary character and that this fact obliged the tribunals to special reservedness in matters of jurisdiction.[28]

Hence, in the case of doubt, i.e. when the various methods of interpretation fail to produce an unambiguous result, a restrictive interpretation in the narrower sense of the term will help those in charge of interpretation to come to a satisfactory solution, although there will be no guarantee at all whether or not the result so achieved will be in complete agreement with the intention of the parties at the conclusion of the treaty. The principle of restrictive interpretation is of a general nature, i.e. no exhaustive enumeration can be compiled of provisions of treaties, in respect of which this principle has to be applied. Neri makes an attempt to compile a catalogue of the cases, still he ends the list with the statement that recourse to a restrictive interpretation may be had in respect of contractual stipulations which impose limitations on the sovereignty of states. Since practically all treaties to a certain degree restrict the sovereignty of the parties, or at least of one of them, Neri comes to the same conclusion as we have come to, i.e. in reality he considers restrictive interpretation one being of a general character.[29]

If in the previous discussion a stand has been taken in favour of a restrictive interpretation of treaties in the event of doubts, i.e. in case of a failure to expose the intention of the parties, then at the same time this has meant that the possibility of extensive interpretation has in general to be discarded. If, therefore, the intention of the parties cannot be established in an unambiguous manner by means of the available methods of interpretation, decision has to be taken in favour of restrictive, and not extensive interpretation. As has already been made clear, here there is complete agreement in

[28] Sarropoulos v. Bulgarian State. See *Annual Digest of Public International Law Cases 1927—1928*, p. 425.

[29] Strictly speaking, there is some sort of a relationship between the position adopted by Neri and the thesis proposed by Grotius, then later expanded by Vattel, according to whom a distinction should be made between favourable, odious and mixed transactions, and correspondingly a restrictive or extensive interpretation should be applied (see above Chapter II, p. 33). However, this classification is arbitrary and cannot be used in practice. Cf. Grotius, H.: *De iure belli ac pacis*. Lib. II. cap. XVI. X. XII (Classics, 3, 1925); Vattel, E. de: *Le droit des gens*, II. XVII. §§ 300—309 (Classics, 1, 1916).

socialist literature on international law.[30] However, manifestations in this sense either are not rare among bourgeois scholars of international law.[31] This standpoint, as a matter of course, results from the principle of the respect for the sovereignty of states which constitutes one of the foundations of international law. In this sense the position taken in favour of restrictive interpretation precludes the recognition of an extensive interpretation.

Also from judicial practice the conclusion may be drawn that an extensive interpretation of a treaty cannot be recognized. It would be futile to search for cases of an express application of an extensive interpretation in the practice of either the Permanent Court of International Justice or the International Court of Justice. Although the

[30] See among others Shurshalov, V. M.: *Op. cit.*, p. 431; Kłafkowski, A.: *Zarys prawa międzynarodowego publicznego* (An outline of international public law). Vol. II, p. 110. — Shurshalov permits rare exceptions from under the rule; so as regards the prohibition of nuclear weapons he states that by way of an extensive interpretation these may be made subject to the provisions of the Geneva Protocol of 1925. In his opinion there is a case of extensive interpretation because in 1925 the intention of the parties might not have extended to a ban of the nuclear weapons unknown at that time. However, the argumentation is inconclusive in so far as if the parties wanted to ban certain specified weapons in 1925, then an extension against the will of the parties would be impermissible. However, the 1925 Protocol prohibits the use of asphyxiating, poisonous and other similar gases, further of any liquids, materials or similar devices. This means that the prohibition extends to the use of any weapons whose effect is the same as that of the gases mentioned above. And for that matter the prohibition is valid also in respect of weapons of the future, at that time still unknown. In fact, weapons already known at that time might have been enumerated in the 1925 Protocol. If, therefore, it can be established that the effect of nuclear weapons is partially uniform with that of poisonous gases, then the provisions of the 1925 Protocol must be applied also to nuclear weapons without a restrictive interpretation in the strict sense, i.e. merely by establishing the intention of the parties. Incidentally the so-called Martens clause in the Preamble of the Hague Convention of 1907 codifying the laws and customs of war also indicates that the intention of the parties was directed not only to weapons known at that time, but also to others to be invented in the future. For details see Haraszti, Gy.: On the Problem of Prohibited Weapons. *Questions of International Law*, 1962, pp. 41—54.

[31] Cf. Neri, S.: *Op. cit.*, p. 298; in general L. Ehrlich too rejected the possibility of an extensive interpretation in his Hague lectures in 1928, although he did not take a quite definite stand in the matter (*Op. cit.*, pp. 69 and 92).

International Court of Justice, as has already been mentioned, has made attempts to extend its own jurisdiction and therefore in this respect does not apply the restrictive interpretation, it tries to achieve this result without the express application of an extensive interpretation. So e.g. in the Corfu Channel case between the United Kingdom and Albania the Court based its jurisdiction in respect of the determination of the amount of damages on the subsequent conduct of the parties rather than on an extensive interpretation of their agreement, i.e. it considered the relevant intention of the parties explorable.[32] In the cases providing the subject-matter of a number of advisory opinions, where the right of the Court to express an opinion was contested, such as e.g. the matter of the conditions of admission of a state to membership in the United Nations, the interpretation of the peace treaties, or certain expenses of the United Nations, the Court established its jurisdiction by other means. However, it should be noted that in these cases the question centred round the exercise of the discretionary powers of the Court rather than the interpretation of the provisions of the Charter or the Statute, since it was not challenged that the Court was free to deny giving an advisory opinion and since here the dispute was on the expediency of the enforcement of this right.[33]

In the practice of the two Hague Courts, the Jaworzina case is perhaps the only one where there is a faint allusion to the possibility of an extensive interpretation. In this advisory opinion the Permanent Court of International Justice made it clear that a certain provision of a treaty which served equity "must not be interpreted in too rigid a manner".[34]

As a matter of course, there are also partisans of an extensive interpretation in the bourgeois literature. Apáthy, one of the first who in Hungary tried to cultivate international law, in his textbook made mention of both restrictive and extensive interpretation, still in the following he did not waste a word more on restrictive interpretation, dealing only with extensive interpretation, though briefly

[32] *I.C.J. Reports 1949*, p. 23. See also p. 139 above.
[33] See *I.C.J. Reports 1948*, pp. 61—62; *I.C.J. Reports 1950*, pp. 70 et seq.; *I.C.J. Reports 1962*, pp. 155—156.
[34] See Hudson, M. O.: *World Court Reports*, Washington, 1934, Vol. I, p. 275.

enough. However, his statement that a treaty can be extended also to other relations, provided that the agreement does not refer expressly to the relation brought under regulation by the treaty, is as for its formulation extremely vague, touching already on the problem of analogy and not on that of extensive interpretation.[35] More modern writers of international law, namely those who proclaim the "obsoletion" of sovereignty, mostly take a stand for an extensive interpretation. Of the long list of authors let only Lauterpacht and Charles Cheney Hyde be mentioned,[36] the latter mainly because with his attitude he was able to influence to a certain extent the judicature of the Supreme Court of the United States of America. In several judgements this Court expressly took the position that treaties had to be interpreted extensively. So e.g. in Jordan v. Tashiro the Supreme Court of the United States held that "where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred". In Nielsen v. Johnson the Supreme Court expressly declared that a narrow and restricted interpretation was "not consonant with the principles which are controlling in the interpretation of treaties".[37]

However, these theses in favour of an extensive interpretation cannot be considered normative because they do not agree with the generally accepted principles of international law on the interpretation of treaties, nor with established international practice. Therefore, in connexion with treaties, extensive interpretation will, in general, be out of the question.

The so-called rule of effectiveness so often referred to in international practice has to be distinguished from extensive interpretation. According to this rule, treaties have to be interpreted so that they become effective in practice. This means that if by means of the method of interpretation two possible results have been reached, the one of which guarantees the effectiveness of the treaty, whereas the other

[35] Apáthy, I.: *Tételes európai nemzetközi jog* (European positive international law). Budapest, 1888, pp. 216—217.

[36] Cf. Hyde, Ch. Ch.: *International Law Chiefly as Interpreted and Applied by the United States*. Vol. II, pp. 1468 et seq.

[37] Quoted by Hyde, Ch. Ch.: The Interpretation of Treaties by the Supreme Court of the United States. *The American Journal of International Law*, 1929, No. 4, pp. 825 et seq.

invalidates it, i.e. precludes its practical prevalence, the former result has to be accepted as correct. This position has to be taken, because presumably the intention of the parties has been directed to some sort of a sensible goal, and obviously the parties to the treaty have endeavoured to bring about an agreement which was apt to prevail in practice and which was actually enforceable. In the same way as possibly a certain meaning has to be attributed to each word in the treaty,[38] so within the range of possibility the meaning of the treaty as a whole has to be safeguarded. For that matter, an interpretation of treaties on this understanding is also a demand of one of the principles of international law, viz. the principle of performance in good faith, which has been laid down in paragraph 2 of Article 2 of the United Nations Charter for the performance of obligations under the Charter, and which, as defined by the Preamble and Article 1, also serves as a general guiding principle of the conduct of states, and at the same time as one of the fundamental rules also of the interpretation of treaties.[39]

The ancient maxim *ut res magis valeat quam pereat* relies on sober considerations and on the presumable intention of the parties. While for the restrictive or extensive interpretation in the narrower sense of the term the case has been one where, by means of the applicable methods of interpretation, the intention of the parties cannot be explored even indirectly, and where several different reasonable meanings may be attributed to the text of the treaty each of which may possibly suit the intention of the parties, the situation is an altogether different one when it comes to application of the rule of effectiveness. Here, by applying the various methods of interpretation, the intention of the parties may be inferred indirectly, and this on the understanding that the intention of the parties must have been necessarily

[38] See pp. 89 et seq. above.

[39] The Vienna Convention and its underlying draft do not contain express provisions on the rule of effectiveness. However, the commentary of the International Law Commission notes that the principle *ut res magis valeat quam pereat* is implied in Article 27 of the draft, namely in the provision that a treaty has to be interpreted in good faith and in the light of the object and purpose of the treaty (*Yearbook*, 1966, Vol. II, p. 219). In our opinion it would have been desirable to insert this principle in a clear-cut form in the Convention, by drawing the limits of the effectiveness of the principle.

directed to a sensible goal, i.e. to the creation of a treaty whose meaning is within the range of practical effectivity. Hence there will be a vital difference between the principle of extensive interpretation of treaties and the rule of effectiveness. Whereas for the former there is nothing to go by for establishing the real intention of the parties and so this intention might as well have been directed to a narrower result, in consequence of which the respect for state sovereignty would insist on a rejection of extensive interpretation, the application of the rule of effectiveness is justified exactly because the intention of the parties could have been directed to one result only, namely to the one which would permit the effectiveness of the treaty or a certain provision of the treaty.[40]

What has been expounded above enables us to recognize, parallel with the need for restrictive interpretation, also the possibility of the application of the rule of effectiveness. We are unable to agree with Lauterpacht, according to whom the two principles, viz. that of restrictive interpretation and the rule of effectiveness, mutually preclude each other.[41] A restrictive interpretation cannot lead to an absurd result, i.e. it cannot render ineffective the treaty or a provision of it.

The rule of effectiveness which has been formulated already by Vattel with a remarkable precision,[42] prevails within a wide sphere of international jurisprudence. The Permanent Court of International Justice referred in a whole series of cases to this principle,[43] and

[40] It is difficult to understand the position taken by V. D. Degan (*L'interprétation des accords en droit international*. The Hague, 1963, p. 102), according to which the application of the rule of effectiveness relies not on the intention of the parties but on the text of the treaty.

[41] See *Annuaire*, 1950, Vol. 43, tome I, p. 412.

[42] "L'interprétation qui rendrait un Acte nul et sans effet, ne peut donc être admise . . . Il faut l'interpréter de manière, qu'il puisse avoir son effet, qu'il ne se trouve pas vain et illusoire" (Vattel, E. de: *Op. cit.*, II, XVII. § 283).

[43] See e.g. the advisory opinions in the case of the German settlers in Poland, on the acquisition of Polish nationality, the exchange of Greek and Turkish populations, the competence of the ILO to regulate incidentally the personal work of the employer, the judgements in the cases of the Factory at Chorzów, the Jurisdiction of the European Commission of the Danube, the Free Zones of Upper Savoy and the District of Gex, etc.

defined it in a particularly clear-cut form in its advisory opinion on the acquisition of Polish nationality by declaring that "an interpretation which would deprive the . . . Treaty of a great part of its value is inadmissible".[44]

The International Court of Justice already in the first case referred to it, viz. the Corfu Channel case, based its decision, among other things, on the rule of effectiveness, resorting also to this rule in order to justify its jurisdiction in the matter of the amount of compensation. The special agreement by which the United Kingdom and Albania referred the case to the International Court of Justice put the questions, whether Albania was responsible under international law for the loss occurred to British men-of-war in the Corfu Channel owing to the explosion of mines, and whether Albania was liable to damages. However, what remained contestable was whether with the second question the parties had authorized the Court to determine the amount of damages as well. The latter question was answered by the International Court of Justice in the affirmative and in this connexion it made the following statement:

"It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement (i.e. the second question on the liability of Albania for damages — the author) should be de void of purport or effect."[45]

This finding of the judgment of the Court undoubtedly deserves special mention, as it qualifies the rule of effectiveness as a generally accepted rule of interpretation, which conforms to established international practice. However, at the same time it is highly contestable whether in the concrete case the reference to the principle was justified at all. As a matter of fact, the establishment of the liability for damages would be justified also if the parties did not want to entrust the proceeding court with the determination of the amount of damages. The Court by establishing the existence or non-existence of a liability for damages may appreciably advance the definitive settlement of

[44] *P.C.I.J.*, Ser. B, No. 7, pp. 16—17. An almost identical wording had been taken also in the advisory opinion on the exchange of Greek and Turkish populations (*P.C.I.J.*, Ser. B, No. 10, p. 25).

[45] *I.C.J. Reports 1949*, p. 25. The Court based its decision partly on the subsequent conduct of the parties (see p. 139 above).

the legal dispute between the parties, and the decision made in the case could in no circumstances be considered one void of purport merely because it did not extend to all questions of the legal dispute.

It is exactly this judgement which makes it clear that the rule of effectiveness cannot mean as if *complete* effectiveness to a treaty ought to be safeguarded in excess of the intention of the parties. It is not certain whether the parties want to endow a treaty under any circumstances with absolute effectiveness going beyond what they may have had in mind. This was recognized also by the International Court of Justice in its advisory opinion on the interpretation of the peace treaties with Hungary, Romania and Bulgaria. When certain quarters wanted to attribute a meaning to the relevant provisions of the Paris peace treaties of 1947 that these guaranteed a settlement of disputes between the parties by way of arbitration in all circumstances,[46] the International Court of Justice was averse to such an extreme interpretation and drew the limits of the prevalence of the rule of effectiveness in a clear-cut manner:

"The principle of interpretation expressed in the maxim: *Ut res magis valeat quam pereat*, often referred to as a rule of effectiveness, cannot justify the Court in attributing to the provisions for the settlement of disputes in the Peace Treaties a meaning which . . . would be contrary to their letter and spirit."[47]

In agreement with the rational position adopted by the Court we may come to the conclusion that greatest caution has to be applied at the enforcement of the rule of effectiveness. Undoubtedly a provision of a treaty cannot be interpreted so as to preclude its practical effectiveness from the very outset, still it would be an error of the same kind, or even a greater one, if effectiveness were safeguarded absolutely and to its full extent even contrary to the intention of the parties.[48]

[46] The gist of the problem was whether in the case, when one of the parties failed to appoint its representative on the Commission as specified by the peace treaties, the Secretary-General of the United Nations was authorized to appoint the third member upon request of the other party; i.e. whether a third member could be appointed, if no second member had been appointed.

[47] *I.C.J. Reports 1950*, p. 229.

[48] The principle was expressed by Lauterpacht in an illustrative form: " . . . no principle of effectiveness can properly endeavour to give legal efficacy to clauses or instruments which were not intended to produce

There may be cases when the parties themselves want to guarantee but a certain limited effectiveness to a provision of the treaty, and in the supervention of certain circumstances even reckon with the ineffectiveness of this provision. In this case the guarantee of full effectiveness would amount to an infringement of sovereignty, a contingency which has to be precluded. Hence, the organ in charge of interpretation has to refrain from smuggling its own intention in the place of the original will of the parties by thrusting into prominence the consideration of effectiveness.

Allied to the rule of effectiveness, and strictly speaking a specific case of its application, is the establishment of implied powers. The notion of implied powers struck root in the first place in American jurisprudence which began to apply it with predilection when interpreting municipal law, and later had recourse to it also in cases of treaty interpretation. In relation of treaties this notion signifies that if a treaty guarantees certain rights expressly, however, for the exercise of these rights the grant of other rights not referred to in the treaty is indispensable, then these latter rights must be considered implied in the expressly granted rights. When e.g. the Charter endows the United Nations with a variety of rights, it makes no mention of the United Nations' international personality, nor of whether the Organization as a subject of international law may make good these rights against a state infringing them on the international plane. Since, however, an effective exercise of these rights is guaranteed only if the United Nations may take action against the infringing state not only before the competent authorities of this state and if it is neither under a compulsion to have the member states of the United Nations vindicate the rights of the United Nations in their own name through international channels, but may make good its claims for and on its own behalf on the international plane, then the international personality of the United Nations and the right to make good its claims resulting from this personality to the proper extent must be considered implied in the express provisions of the Charter.[49]

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such results" (Restrictive interpretation and the principle of effectiveness in the interpretation of treaties. *British Year Book of International Law 1949*, p. 74).

[49] For details see Haraszti, Gy.: Du problème de la personnalité internationale. *Annales Univ. Sci. Budapestinensis de Rolando Eötvös nom.* Sectio iuridica, tom. II, pp. 37—65.

However, extreme caution has to be applied also at establishing implied powers. In particular it should be borne in mind that only such rights may be regarded as implied in the sphere of rights expressly guaranteed by a treaty, without which the rights thus granted cannot be exercised at all, or can only be exercised at the expense of sacrifices wholly disproportionate to the end to be achieved. It is for this reason that we cannot fully agree with the advisory opinion of the International Court of Justice on Reparations for Injuries suffered in the service of the United Nations. In this advisory opinion the Court, in agreement with what has been set forth above, came to the conclusion that the functions of the United Nations defined by the Charter could not be performed effectively unless the Organization had a certain international personality,[50] which implied that the United Nations as an Organization has the capacity to bring an international claim with a view to obtaining the reparation due in respect of the damage caused to the United Nations through an injury committed against one of its agents. It is about the limit which in our opinion can justifiably be reached by having recourse to the principle of implied powers. However, we cannot follow the lead of the International Court of Justice when on the same reasoning it also holds that the United Nations as an Organization has the capacity to bring an international claim with a view to obtaining the reparation due to its agent or to persons entitled through him for the injury suffered by the agent in the performance of his duties, i.e. to extend diplomatic protection to these persons. In its advisory opinion the International Court of Justice held that the Charter did not endow the United Nations expressly with such rights, still it considered these rights indispensable for the performance of its functions by the Organization.[51] However, the argumentation of the Court relies on erroneous premises. Damages for losses suffered by an individual in the service of the United Nations may be claimed by that person's own state through international channels, i.e. by the state whose national the person in question is. No consideration whatever makes the guarantee of this diplomatic protection by the United Nations indispensable. Obviously this is unnecessary for both the reassurance of the agent

[50] *I.C.J. Reports 1949*, pp. 179—180.
[51] Ibid., pp. 182—183.

acting on behalf of the United Nations and the safeguard of the independence of the United Nations. Therefore, in this respect no such right can be derived from the Charter; the less so because in this way the rights generally attributed to the states under international customary law would suffer damage.[52] This advisory opinion at the same time warns to utmost moderation at drawing the limits of implied powers.

[52] For details see Haraszti, Gy.: *A Nemzetközi Bíróság joggyakorlata 1946—1956* (The judicial practice of the International Court of Justice 1946—1956), p. 98.

Chapter VI

INTERPRETATION OF PLURILINGUAL TEXTS

A special problem apparently almost of a technical nature, yet too real in its merits arising in connexion with treaty interpretation is that of interpretation of treaties drawn up in several languages. So far we have departed from the assumption that the text of the treaty has been determined beyond doubt, and that the only difficulty to be overcome lies in the fact that a given authentic text may have several meanings. In many instances, however, the text from which interpretation has to depart is presented in several versions differing from one another inasmuch as they are drawn up in various languages, yet being equally authentic.

Generally speaking, the problem of interpretation of treaties drawn up in several languages is one considered of a relatively recent origin; as a matter of fact, it was first thrown up in the period following upon the First World War. In earlier times, treaties were formulated generally in a single language, namely in the language of diplomacy which first was Latin, then French. In the most important one of the peace treaties terminating the First World War, i.e. the Treaty of Versailles, by the side of French also English made its appearance as a language ranking with the French. Subsequently also other languages, primarily Russian, Spanish and Chinese, came to the fore,[1] and a custom to formulate bilateral treaties in the languages of both contracting parties, when both texts were equally authentic, began to prevail.[2]

[1] The official text of the United Nations Charter has been made out in Chinese, French, Russian, English and Spanish versions. These languages are the official languages of the United Nations. Treaties drawn up within the United Nations, or under its auspices, are in general made out in five authentic versions.

[2] This is also the practice followed by the socialist states in their mutual relations, although cases occur where in addition a version in a third

Nevertheless it would be a mistake to share the general belief, according to which plurilingual texts of treaties can be dated back to a few decades only. Although in a relatively small number, polyglottal treaty texts appeared in the latter centuries. McNair quotes in his work, a valuable source of earlier British diplomatic practice, a case from the year 1836, when the legal advisers of the British government took a position in the matter of the interpretation of a treaty concluded between the United Kingdom and Mexico. What was of interest at that time was that the treaty was formulated in two equally authentic texts, the one in English and the other in Spanish. The treaty was written down in columns, with the English and the Spanish texts side by side. However, differently from modern practice, each of the parties signed only the text made out in its own language. It appears from the law officer's opinion that at that time, i.e. in 1836, there were several treaties in the archives of the British Foreign Office which were made out in several languages, when the texts of all languages were accepted as authentic.[3] Even though in the 20th century the problem of plurilingual treaties received a greater impetus, the question itself had been recognized a long time before. It is beyond doubt, however, that the science of international law has not dealt with the problem of plurilingual treaties until quite recently, and

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language used in the course of the negotiations is prepared of the text of the treaty. This was the case, e.g., with the convention signed in 1967 between the Hungarian People's Republic and the Democratic Republic of Viet Nam on cooperation in sanitary matters. The convention was made in Hungarian, Viet-Namese and French. Of these the Hungarian and Viet-Namese versions are equally authentic, whereas the French version is of an "explanatory nature" only. The authentic texts of multilateral treaties of the socialist states are in general drawn up in either Russian or the languages of some of the parties concerned. So e.g. the Charter of the Council of Mutual Economic Assistance is made out in Russian; at the same time the Russian, Polish, Czech and German versions of the Warsaw Treaty are authentic. It also occurs that the authentic text is made out in Russian and in the language of the depositary state. So e.g. the authentic text of the convention concluded between the member states of the Council of Mutual Economic Assistance in Berlin on 5 July, 1962 governing cooperation and mutual assistance in matters of customs, has been made out in Russian and German (the depositary of the convention being the German Democratic Republic).

[3] Lord McNair: *The Law of Treaties*. Oxford, 1961, pp. 432—433.

that the problem has by far not been worked out in all its details. Nor have in international practice sufficiently definite rules crystallized in respect of the interpretation of plurilingual treaties, so that any attempt at solving the problem will have to confront a large number of difficulties. Nevertheless, it may be recorded as a remarkable progress that the Vienna Convention of 1969 deals with the problem of the interpretation of plurilingual treaties in a separate article, although the provisions of the treaty fail to offer a wholly satisfactory solution of all questions that are apt to emerge in connexion with such treaties.

First of all, by way of introduction, a principle has to be defined, which in the great majority of the works dealing with the interpretation of treaties is not adequately set forth in connexion with the interpretation of plurilingual treaty texts. In our opinion for the interpretation of plurilingual treaties also the general principles and methods of interpretation are valid. This means that for plurilingual treaties too the first task of the interpreter is to elucidate the intention of the parties at the conclusion of the treaty by having recourse to the available methods of interpretation. The special problems of the plurilingual text will crop up only when there are discrepancies between the versions of the text formulated in various languages, and when by applying the available methods of interpretation, hereincluded the methods relying on the utilization of extratextual material, no unambiguous conclusions can be drawn as to the real intention of the subjects of international law making the treaty.[4] Hence in the following only this latter contingency will be discussed.

[4] A similar stand has been taken by the Vienna Convention too, apart from its position thrusting the historical method to the background which has been analyzed in detail in the previous chapters. As a matter of fact, paragraph 4 of Article 33 of the Vienna Convention provides only for the procedure to be followed in the event "when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove". Therefore, according to the Convention, the special rules established for the interpretation of plurilingual texts will prevail only when by applying the general principles and methods of interpretation the true meaning cannot be disclosed. The idea is expressed with even greater clarity in Waldock's commentary, where he declares that "the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties".

Of the possible examples simplest is when the authentic text has been drawn up in several languages though, but the treaty provides that in case of doubt one definite text shall prevail. Provisions of this sort are of not too frequent occurrence, still there is a fair number of cases on record in international practice. A case of this type is the Peace Treaty of Trianon of 1920 concluding the First World War for Hungary, which has been written in French, English and Italian. However, in case of discrepancies only the French text will be normative, except, however, Sections I and XIII where the French and English texts are of equal force.[5] From more recent Hungarian diplomatic practice mention may be made of the Hungarian–Iraqi convention of 11 October 1961 on cooperation in broadcasting, television, cinema, dramatic art and news service, where Article 10 provides that the Hungarian, Arabic and English texts are equally authentic, still in case of doubt the English text will prevail. Of the equally authentic Hungarian, Mongolian and Russian texts of the Hungarian–Mongolian consular convention of 10 July 1963, according to the provision of Article 25, in case of conflicting meanings the Russian text will hold. Yet do these provisions imply that in case of doubt, i.e. when by having recourse to the various methods of interpretation the intention of the parties at the conclusion of the treaty cannot be elucidated, *solely* the prevailing text should be consulted, and all other authentic texts are qualified as non-existent? In our opinion a provision of this type cannot have this significance, nor can it be presumed, as has been rightly pointed out by Lauterpacht, that in case of doubt all other authentic versions formulated by the side of the text designated as normative merely served to satisfy the national vanity of the contracting parties concerned.[6] There is no doubt that the preferable text is of greater importance. Still in the event of discrepancies it will have to be first established whether there is or is not a common meaning corresponding to all authentic texts. If there is such a common

[5] The two latter parts incorporate the Covenant of the League of Nations and the provisions governing the International Labour Organization, in the same wording as taken up in the Peace Treaty of Versailles. Since the English and French versions of this treaty are of equal value, as regards these sections an exception had to be made in the Treaty of Trianon.

[6] See the remarks of Lauterpacht to Case No. 235 in the 1929—1930 volume of the *Annual Digest of Public International Law Cases* (p. 371).

meaning, then in our opinion this will prevail. On the other hand, if no such meaning can be discovered, the meaning relying on the preferable text has to be accepted.[7]

No position was taken in this question in Waldock's commentary to the draft of the Vienna Convention, although reference had been made to the problem. The draft in paragraph 1 of Article 29 merely stated that if the treaty attributed a preferable significance to one of the texts, this text would prevail, however, it failed to make it clear whether this provision would have to be applied immediately on the establishment of a discrepancy, or only when there was no chance of finding a common meaning. The International Law Commission, as stated in the commentary, deliberately omitted to take up

[7] According to L. Ehrlich, even in this latter case it can be demonstrated that the intention of the parties is reflected by another authentic text and not by the preferred version (*Op. cit.*, pp. 52—63 and 99). He quotes as an example Annex IV following upon paragraph 2 of Article 190 of the Treaty of Saint Germain, whose wording is wholly uniform with that of Appendix IV following upon Article 174 of the Treaty of Trianon. There is a difference between the English and French versions of this Annex, as the term "like" in paragraph 2(b) occurs only in the English version, but not in the French. On the other hand, paragraph 2(a) of both versions include this word. The omission of the adjective "like" would render the obligations imposed on the defeated countries by far graver. Ehrlich points out that the text in question was taken over from the Versailles Treaty and inserted in the Treaty of Saint Germain (and as a matter of course also in the Treaty of Trianon). However, as regards the Versailles Treaty both the English and the French versions equally prevail, so that there, by way of interpretation, the true meaning can be established without difficulty and accordingly the adjective "like" is to be understood implied in the text. Consequently the true meaning of the Treaty of Saint Germain (and so also of the Treaty of Trianon) has to be established on the ground of the English version.—The conclusion Ehrlich has drawn is undoubtedly correct, still in our opinion no far-reaching general conclusions may be drawn from this case. In the given instance obviously an error has interloped, i.e. at preparing the definitive instrument in the one text by oversight a word was omitted, and then the same error was repeated also in other treaties. Strictly speaking the case is one of the correction of a faulty text rather than one of interpretation (cf. Article 79 of the *Vienna Convention*). In such and similar cases obviously a departure from the version prevailing at a dispute is permissible, in the same way as also for unilingual treaties obvious errors may be corrected. Such a correction does not, however, come within the notion of interpretation.

the relevant provision in the draft convention.[8] On the other hand the Vienna conference thought it was necessary to bring under regulation the question, and accordingly took up a provision in paragraph 4 of Article 33 of the Convention, according to which the preferable text had to be given prevalence in all circumstances, and when such a particular text was available, not even in a case of divergence in the versions of different languages could recourse be had to the various methods of interpretation for the elucidation of the intention of the parties. This is nothing else than an exaggerated application of the above-criticized principle *in claris non fit interpretatio* to a case where the preferable text is "clear", although a difference of meaning between it and other authentic versions occurs. At the same time, this doctrine deprives, as it does, the equally authentic versions other than the preferable text of all their significance. In our opinion, this amendment approved by the Vienna conference modifies the cautiously formulated text of the International Law Commission to the prejudice of the latter and puts up new barriers to the prevalence of the intention of the parties.

However, in the overwhelming majority of cases plurilingual treaties are void of any guidance that, by preferring one of the versions, would name this as normative; i.e. those in charge of applying and interpreting the treaty will be confronted with texts different in languages, yet equal of authenticity.[9] For this emergency the scholars of international law suggest a number of solutions, which may be divided, by and large, into three main groups. The first group is proposed by writers who would have the adequate common meaning elucidated on the ground of an analysis of all texts. The second group is represented by the partisans of opinions that would consider one of the texts exclusively prevalent, whereas the third group consists of writers who admit the validity of texts differing in language for the different parties to the treaty.

The adherents of the first group of opinions would have a common meaning established for versions of different languages, i.e. a meaning

[8] *Yearbook*, 1966, Vol. II, p. 224.

[9] The equal authoritativeness of versions authenticated in two or more languages is pronounced as a rule of general validity also by paragraph 1 of Article 33 of the *Vienna Convention*. This thesis is broken through in exceptional cases only by the exceptional force of the version preferred by the provisions of the treaty or the agreement of the parties.

to match all texts. Therefore, according to this doctrine, all versions of the text should be used in conjunction for the purpose of interpretation, and the meaning should be accepted as correct which is in harmony with all versions. This position has been given expression in the Harvard Draft, which in paragraph (b) of Article 19 reads as follows: "When the text of a treaty is embodied in versions in different languages, and when it is not stipulated that the version in one of the languages shall prevail, the treaty is to be interpreted with a view to giving to corresponding provisions in the different languages a common meaning which will effect the general purpose which the treaty is intended to serve."[10] The 1966 draft of the International Law Commission, in its Article 29, similarly considers the meaning best reconciling the versions in different languages normative. This text has been taken up in Article 33 of the Vienna Convention with the addition that regard should be had to the object and purpose of the treaty. The need for establishing a common meaning is recognized among others by Verdross,[11] Shurshalov[12] and Rosenne,[13] and with slight corrections by Suzanne Bastid.[14] In international judicial practice this principle found expression in the judgement of the Permanent Court of International Justice of 30 August, 1924, in the Mavrommatis Palestine Concessions case, where the point in question was the construction to be given to the English and French versions of the Palestinian Mandate. The Court held that "where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties".[15]

In our opinion the position taken by the Court sets out from correct premises, inasmuch as it relies on the equality, the equal force of the versions in different languages. It should be accepted as basic principle

[10] See *The American Journal of International Law*, 1935, Supplement, p. 971.

[11] *Annuaire*, 1950, Vol. 43, tome I, p. 456.

[12] Shurshalov, V. M.: *Op. cit.*, p. 434.

[13] Rosenne, S.: United Nations Treaty Practice. *Recueil des Cours*, Vol. 86, p. 383.

[14] Cf. Kiss, A.-Ch.: *Répertoire de la pratique française en matière de droit international public*. Paris, 1962, tome I, pp. 466—467.

[15] *P.C.I.J.*, Ser. A, No. 2, p. 19.

that in general the versions in different languages are wholly equal and none of them should be preferred to the prejudice of the others. If the versions in different languages agree on a certain meaning, then this common meaning should be accepted as correct and such as is in harmony with the intention of the parties.

Still even if we acknowledge this position as an essentially correct one, we have to add at once that the principle as defined above is inadequate by itself for the solution of problems of interpretation really hard to tackle. As a matter of fact difficulties of the true sense of the word will arise when the several versions will fail to offer facilities for the elucidation of a meaning which may be brought into harmony with each version in respect of the debated passage of the text. Obviously in such and similar cases the only expedient is to give priority to a meaning derived from one of the many versions. This solution is preferred by those adhering to the second group of opinions.

In point of fact, in the present case the situation is somewhat similar to the one when it was impossible to expose the correct meaning of a treaty formulated in a single language even after recourse had been had to all available methods of interpretation. As has been explained in the previous chapter, in such cases a restrictive interpretation had to be resorted to, and a similar procedure offers itself also in the present instance. Of the many possible solutions offered by the various writers on the problem the one has to be chosen which best agrees with the principle of respect for the sovereignty of states. This is the narrowest meaning, i.e. the one which imposes least obligation on the parties, and therefore fewest restrictions on state sovereignty. Hence, the correct meaning of the provisions of the treaty as incorporated in the different versions has to be established according to a restrictive interpretation. Incidentally, reference to this expedient was made by the Permanent Court of International Justice already in its judgement in the Mavrommatis case as quoted above, however, still in a way that the meaning of the various versions had to be established by relying on the meaning of narrowest content, yet which could still be established jointly for all versions. On the other hand, the solution here discussed is valid for the case when such a "common core" cannot be made out from the meanings of the various versions.

In literature dealing with the interpretation of treaties in connection with plurilingual texts often the question of the so-called original

or basic text emerges. As a matter of fact, it is of frequent occurrence that in the preparatory talks preceding the conclusion of a treaty, the parties only rely on one single draft formulated in one language, or on more, though not all, language variants of the accepted authentic text. According to certain opinions, in this case differences resulting from the various versions have to be settled by having recourse to the basic text, i.e. the one on which the parties relied during negotiations. This doctrine is to some extent supported by the judgement in the Mavrommatis case too. As a matter of fact, in this judgement the Court overcame the difficulty owing to a divergence of the English and French texts not only on the ground of the argument set forth above by accepting the English text of a narrower meaning, but also by making reference to the circumstance that the original text of the mandate was the English.[16] Similarly, in its advisory opinion on the Exchange of Greek and Turkish Populations for the interpretation of the Treaty of Lausanne the Court relied on the French text, this Laving been the language in which the Treaty had been drawn up.[17] Some of the treaties formulated in several authentic versions for differences expressly mark out the versions as prevailing in which the treaty was originally formulated. So according to Article XXVII of the Hague Protocol of 1955 amending the Warsaw Convention of 1929 for the Unification of Certain Rules Relating to International Transportation by Air, in the event of a divergence the French text shall prevail, i.e. the text in which the convention was drawn up.

Several authors of those analyzing the problems of the interpretation of treaties object to the recourse to the basic text in the first place. This is e.g. the position Peretersky adopted, when he declared that this acceptance of the basic text would violate the principle of the equality of the various versions, and believed that none of the versions must be considered being the translation of another.[18] Waldock's commentary does not absolutely reject the principle of the priority of the basic text, nor does it put it as a rule of general validity, observing that "much might depend on the circumstances of each case and the evidence of the intention of the parties".

[16] Ibid.
[17] *P.C.I.J.*, Ser. B, No. 10, p. 18.
[18] Peretersky, I. S.: *Op. cit.*, p. 135.

In our opinion the problem of the so-called basic text has to be approximated in an altogether different manner. The principle of the equality of the authentic versions is beyond dispute, and where the treaty itself stipulates that all versions should be considered equally authentic, no version can be given priority arbitrarily to the prejudice of all others. However, at the same time it has been made clear at the outset that the special problem of plurilingual texts will emerge only where the application of the available methods of interpretation have failed to produce a satisfactory result. Still when the problem of the so-called basic text is examined, strictly speaking an attempt is made at the application of the historical method of interpretation to the plurilingual text. The express purpose of the examination of the basic text is to establish the common intention of the parties. If it can be ascertained that the negotiating parties had a single text only before them, then presumably this text will solely reflect the actual intention of the parties,[19] and the subsequent translation of the original text into other languages will contribute little to the discovery of the common intention of the parties at the conclusion of the treaty.

Hence recourse to the basic text means nothing else than the exposition of the correct meaning of the treaty, i.e. the elucidation of the intention of the parties by means of the historical method of interpretation. If the problem is studied from this aspect, then necessarily all arguments brought up against the so-called basic text will collapse. However, this doctrine marshals the possible recourse to the basic text into the proper channel. Namely, merely the fact that the treaty has been drawn up in a definite language, does not guarantee a priority for this version. If, as a matter of fact, in the negotiations preceding the conclusion of a treaty, the representatives

[19] A similar opinion was given expression in a decision of the Civil Court of Strasbourg. In this case the question was the interpretation of a provision of the Versailles Peace Treaty, and the French court set out from the English version instead of the French, because "The examination of the English text, the language in which the chapter involving these rights of property was drafted in the course of the preparatory discussions, provides an invaluable guide to the intentions of the draftsmen of the Treaty of Versailles." (Audiffren-Singrun v. Liquidation Morlang, Binger et Société Atlas, *Annual Digest of Public International Law Cases 1927—1928*, pp. 428—429.) From the formulation of the decision it appears that the Strasbourg court also considered recourse to the text made out in the language of the original draft essentially one of the cases of the application of the historical method.

of the parties had versions in several languages before them, and in the course of the negotiations various languages have been used, obviously an equal significance has to be attributed to the versions eventually agreed upon, as the participants of the negotiations have evidently concluded the treaty on the ground of a joint consideration of the various versions. For example, the original draft of the Vienna Convention of 1963 on consular relations was in French, whereas the definitive and authentic text of the convention was made out in the five official languages of the United Nations. It would be wholly unjustified to grant any sort of priority to the French text, when the English, Russian and Spanish versions were also at the disposal of the delegates for the debates. Nevertheless, it does not appear to be justified to consult the equally authentic Chinese version in the event of possible differences at the interpretation of the treaty. As a matter of fact, by a violation of international law the Chinese People's Republic was precluded from attending the Vienna conference. On the other hand, the delegates of the Chiang Kai-shek clique did not even use their mother tongue in the debates, and versions in Chinese were not made of the drafts during the conference. Under such circumstances the subsequently compiled Chinese version must be considered but a translation of the four other versions, which could hardly be consulted if it came to throw a light on the true intention of the parties.

It also follows from what has been set forth that we cannot accept the opinion pronounced by Hambro, according to which at the interpretation of the United Nations Charter a distinction should be made between the so-called working languages and the official languages of the United Nations. According to Hambro, the former will from the outset carry greater weight than the latter.[20] However, this opinion is unacceptable, as even if it is true that certain documents are made out in the working languages only,[21] the five official languages of the United Nations otherwise enjoy equal rights in the debates, and if in the negotiations preceding the conclusion of the treaty all the five languages had in fact been used, then the working languages would

[20] Hambro, E.: The Interpretation of the Charter. *The British Year Book of International Law*, 1946, p. 79.

[21] In his article Hambro speaks of two working languages only, viz. the French and the English, because in the first period of the United Nations, and so also in the San Francisco conference, only these qualified as working languages.

permit conclusions as to the actual intention of the parties to the treaty not any safer than those offered by the other official languages.

What is evident from the position we have taken here is that a definite version of a plurilingual text can have a priority over any other version in exceptional cases only, when the generally available methods of interpretation have failed to produce a satisfactory result and no common meaning can be derived from the different versions at disposal. It is on this account that the various doctrines which by setting aside the principle of the equality of texts would have the one version or the other accepted as the one underlying an interpretation without any conclusive reason, have to be rejected. By way of example, we would refer to the position taken by Bentivoglio, according to whom in the course of interpretation the text having the "greater operative value" has to be chosen.[22] Apart from the fact that this definition is by itself extremely vague and uncertain, the opinion of Bentivoglio obviously amounts to an extreme case of extensive interpretation which might be apt to result in a gross violation of state sovereignty. This explains also why this opinion could not prevail in international practice.[23]

At the classification of the doctrines on the interpretation of plurilingual texts of treaties a third group has been set up above of the opinions that believe that versions in different languages may prevail for the different parties. Oppenheim has expressly adopted the position that if the treaty has been concluded in two languages and if there is a discrepancy between the two texts, unless the contrary is expressly provided each party to the treaty will be bound only by the text made out in its own language. At the same time, according to Oppenheim, the one party cannot claim the benefit of the text made out in the language of the other party.[24] Strictly speaking this doctrine drifts away from the principle that treaties rely on the

[22] Bentivoglio, L. M.: *Op. cit.*, p. 132.

[23] Bentivoglio was obviously inspired by the principle *ut res magis valeat quam pereat*. Since, however, this principle merely wants to prevent a treaty from becoming devoid of effect, Bentivoglio's doctrine, on the ground of the "operative value" of the solutions, opens a wide scope for the arbitrariness of the interpreter and consequently puts up obstacles exactly to the effectiveness of the provision taken up in the treaty.

[24] Oppenheim, L. and Lauterpacht, H.: *International Law*. 8th ed., London, 1955, Vol. I, p. 956.

agreement of will of the parties, and consequently does not even make an attempt to elucidate the intention of the parties at the conclusion of the treaty. This doctrine also starts from an opinion by no means in agreement with actual practice as if in the course of the negotiations preceding the conclusion of the treaty each of the parties attended only to the version of the draft made in its own language and agreed with the other party by relying exclusively on this version. But apart from all this, an interpretation on this understanding, the outcome of which would amount to the rights and duties of the contracting parties drifting away from one another, and also perhaps the equilibrium between them becoming upset, puts enormous practical difficulties in the way of the performance of the treaty. Therefore Oppenheim's opinion, erroneous on theoretical as well as practical grounds, has in all events be discarded.[25]

[25] This doctrine partly prevailed in the Treaty of Brest-Litovsk signed on 3 March, 1918. In conformity with Article XIII of the treaty in the relations between Soviet-Russia and the individual states forming the Central Powers, the Russian version and that in the language of the given state had to be considered authentic. So in the relations between Soviet-Russia and the Austro-Hungarian Monarchy the Russian, German and Hungarian versions prevailed.

Chapter VII

PRINCIPLES OF INTERPRETATION OF A TECHNICAL NATURE

We have already made it clear that a set of principles of a technical nature has been established which under certain circumstances may, for want of another basis, be resorted to as subsidiary means of elucidating the provisions taken up in the treaty. The legal nature of these technical principles is strongly discussed. There are writers who qualify these as full-value rules of international law, while others wholly deny their significance, and on principle call into doubt their applicability in the course of interpretation.

In our opinion these principles occasionally applied in international practice cannot be considered norms of international law, and consequently their application is not obligatory.[1] In reality, they are overwhelmingly presumptions relying on practical experience by means of which in certain cases conclusions may be drawn as to the presumable intention of the parties at the conclusion of the treaty; nevertheless, their application will not be expedient in all cases. Even though the present work cannot go into details of these technical principles, still it appears to be necessary to analyze some of them in a concise form, primarily the ones that have been referred to in the foregoing discussions.

Incidentally it should be noted that it is not always a simple matter to draw a line between the general principles of interpretation and the principles of a technical nature. In this respect the standpoints adopted by various writers are highly divergent. It may suffice to emphasize that the rules applying to the interpretation of plurilingual treaties discussed in the previous chapter are often qualified as ones of a technical nature, although these are, as pointed out above, only

[1] The Vienna Convention appears to be in agreement with this opinion. The Convention has not taken up these principles in its provisions.

too much of a fundamental character, and touch upon the vital points of the interpretation of contemporary treaties. In fact, these rules are applied to the interpretation of almost all modern treaties and their application is obligatory.

Among the principles of a technical nature often reference will be encountered to the principle *contra proferentem*, according to which a provision of a treaty should be construed to the prejudice of the party that had drafted the text in question and proposed its inclusion in the treaty. As most of the principles of a technical nature, this too can be traced back to Vattel, who again owes his thesis to Roman Law. Vattel formulated the rule as follows: "Si celui qui pouvait & devait s'expliquer nettement & pleinement, ne l'a pas fait; tant pis pour lui: Il ne peut être reçu à apporter subséquemment des restrictions, qu'il n'a pas exprimées."[2]

In reality the principle *contra proferentem* has a bearing upon the notion of historical interpretation, inasmuch as it examines certain circumstances of the conclusion of the treaty and attaches definite consequences to them. Whereas, however, recourse to historical interpretation is had to clarify the true intention of the parties by making use of some material dating back to before the conclusion of the treaty, in the case of *contra proferentem* this endeavour is replaced by a fiction that has nothing to do with the true intention of the parties. From the fact that the relevant part of a treaty has been drafted by one of the parties, those who apply this principle draw the conclusion that fault of the party in question, i.e. the ambiguous formulation, has to be prejudicial to this party. In point of fact here we have rather some sort of a sanction inflicted on the party responsible for wilful negligence or carelessness at the making of the treaty, irrespective of the true intention of the parties. It is just because of its sanctioning character that actual recourse is relatively rarely taken to the principle *contra proferentem* in the course of treaty interpretation. Strictly speaking, the objection may rightly be raised against the principle on the ground that the drafting of a treaty is in most of the cases not the exclusive work of one of the parties, so that eventually all parties will be responsible for the formulation. The

[2] Vattel, E. de: *Op. cit.*, II. XVII. § 264 (Classics, 1, 1916). The thesis of Roman Law quoted by Vattel reads: Pactionem obscuram iis nocere, in quorum fuit potestate legem apertius conscribere.

application of the principle will become particularly inconvenient to treaties in whose formulation a large number of contracting parties has taken part, and where the significance of an initiative will become blurred the more because the original wording has to pass through a whole set of retorts until it will be adopted definitively. Here e.g. the United Nations Charter should be remembered, or the multilateral treaties brought about within the United Nations, or under their auspices.[3]

According to certain writers, the principle *contra proferentem* is closely related to a restrictive interpretation, being some sort of a variant of it.[4] In our opinion, this doctrine does not hold water, because as has been set forth above,[5] a restrictive interpretation in the narrower sense of the term tries to construe the provisions of a treaty in favour of the obligor, whereas recourse to the principle *contra proferentem* will not necessarily be had for the benefit of the obligor. In fact the text might as well have been proposed by the latter, and in this case the principle in question will be applied to the prejudice of the obligor.[6] Consequently, in our opinion, the application of the principle *contra proferentem* has to be distinguished from restrictive interpretation.

As has already been mentioned, reference is relatively often made to the principle *contra proferentem* in disputes on interpretation. On the other hand, rather few cases of the actual application of the

[3] The application of the principle *contra proferentem* would be particularly difficult, and in a number of cases even impossible, to multilateral treaties whose draft has been worked out by the International Law Commission of the United Nations, or another similar expert body, since in these cases a large part of the text has been taken up in the treaty at the initiative of persons acting independently of their countries, and not at that of any definite state. And in point of fact, the drafts of modern multilateral treaties are mainly results of the work of such and similar bodies. The fact that these drafts are in general examined and adopted by conferences formed of the representatives of the states does not alter the situation, inasmuch as part of the draft is usually taken up in the final convention unchanged or with slight stylistic modifications.

[4] See e.g. H. Lauterpacht in *Annuaire*, 1950, Vol. 43, tome I, p. 407; Rousseau, Ch.: *Principes généraux du droit international public*. Paris, 1944, Vol. II, p. 745.

[5] See pp. 155—156.

[6] See what is said below in connection with the Brazilian Loans case.

principle are on record. This is true in particular of international judicial practice, where in addition to considerations referred to earlier also a justified reluctance of the courts to the application of rules of an extremely technical nature may be observed. To our knowledge, in the practice of the Hague Court on a single occasion only was the principle *contra proferentem* invoked, namely in the judgement in the Brazilian Loans case. In this judgement the Permanent Court of International Justice referred to the principle as a familiar rule for the construction of instruments that had to be applied when the meaning was ambiguous. However, in view of the special circumstances of the case this reference was not of full value.[7] Incidentally, this case too defeats the opinion as if the application of the principle *contra proferentem* were related to restrictive interpretation. As a matter of fact, what exactly happened in the given case was that the Permanent Court of International Justice, by invoking the principle *contra proferentem*, established the debt of Brazil on par with gold, a decision which in fact meant the extension of the obligation rather than its restriction.

References to the principle *contra proferentem* may be found sporadically in the awards of international arbitral tribunals. As an example, the award of one of the German–Romanian arbitral tribunals may be mentioned, which in connection with the interpretation of the Annex to Articles 297 and 298 of the Peace Treaty of Versailles stipulated that "ambiguous clauses must in case of doubt be interpreted against the party responsible for their drafting".[8] Similar references were made in the Sambiaggio case[9] quoted above in another connection, and in the well-known Lusitania case, which

[7] *P.C.I.J.*, Ser. A, No. 20/21, p. 114. The authentic French text of the judgement makes mention of "règle bien connue d'interprétation". It should be noted, however, that in the given instance what was disputed was not even a treaty, but the prospectus of a loan floated by the Brazilian government, i.e. a unilateral act for which the Brazilian government was held liable. However, in the given case there was no opposing party whose responsibility for drafting the instrument could also have been raised.

[8] Goldenberg and Sons case; see *Annual Digest of Public International Law Cases*, 1927—1928, p. 544.

[9] Ralston, J. A.: *Venezuelan Arbitrations of 1903*. Washington, 1904, p. 689.

was heard by an American–German Mixed Claims Commission in 1923.[10]

All this, however, indicates that the technical principle *contra proferentem* is nothing else than a subsidiary presumption whose actual application has to be restricted to certain cases only. It was in conformity with what has been said above that the arbitral award in the dispute between Germany and the Governing Commission of the Saar Territory on the pensions of officials who had worked there tried to restrict the application of the principle to a narrower sphere when it declared: "The rule that in case of doubt the text of a treaty is to be interpreted against the party which drafted it can only be applied when ... one of the parties handed a prepared text to the other party for signature."[11] It was a situation of this sort which the arbitral award in general accepted as existing in respect of the Treaty of Versailles. However, at the same time the arbitrator, as regards the actual question, established that the agreement of Baden-Baden prevailing in the given instance was the subject of lengthy negotiations, and in this case for the purpose of the application of the principle *contra proferentem* the arbitrator in our opinion correctly held that it was irrelevant which of the parties had drafted the final text.

Another principle of interpretation of a technical nature emerges in connection with the well-known thesis *generalia specialibus non derogant*. According to this principle proclaimed already by Grotius,[12] at the interpretation of treaties the proper course is to guarantee priority to the specific provisions against the provisions of a general nature of the treaty, or in other words, the existence of a specific provision will withdraw a question governed by it from under the effect of the general provisions of the treaty. This principle starts from the logical assumption that if the parties inserted in the treaty a specific provision to govern a certain question, then they intended to settle this question definitively in this way, which circumstance cannot be affected by provisions of a wider or more general character in

[10] Mixed Claims Commission. United States and Germany. Opinion in the Lusitania Case. *The American Journal of International Law*, 1924, p. 373. The claims commission applied the principle in question by referring among others to Vattel.

[11] *Reports of International Arbitral Awards*. Vol. III, p. 1564.

[12] Grotius, H.: *De iure belli ac pacis*. Lib. II, Cap. XVI, XXIX (Classics, 3, 1925).

whose respect the specific provision constitutes a sort of exception. Although this thesis seems to be by itself evident, still its rigid application to all cases would be neither welcome nor desirable. As a matter of fact, the application of the logical method of interpretation calls for an examination of the text of a treaty in its entirety, and in the course of such examinations it may often become necessary to clear up the meaning of a specific provision by relying on the general provisions. In the majority of cases the specific provisions do not conflict with the general provisions: they rather lend greater precision to them, or possibly modify them. It is, indeed, the recourse to the general provisions which helps to expose the correct meaning of the specific provisions. Therefore in the majority of cases the specific provisions will not have to be opposed to the general provisions, moreover to establish the correct meaning of the text rather a comparison will have to be drawn up between the two. And if in some cases the technical rule in question may be resorted to as a presumption, in the majority of cases it will certainly fail to provide a guidance; therefore it cannot qualify as a generally prevailing rule of interpretation.[13]

In international judicial practice the principle proclaiming the priority of *specialia* is encountered also on relatively rare occasions only. The Permanent Court of International Justice took recourse to the principle in a judgement pronounced in the Serbian Loans case, and on clarifying the true meaning of the text of a bond it qualified the thesis as an elementary principle of interpretation. In this judgement the Court held that "the special words, according to elementary principles of interpretation, control the general expressions".[14] At the same time the Court stated that the instrument in question had to be examined as a whole, a procedure which called for taking into consideration the general provisions too.[15]

[13] Naturally the problem of an application of the principle *generalia specialibus non derogant* will emerge only where both the general and specific provisions deal with the same subject-matter. For details see Fitzmaurice, G.: The Law and Procedure of the International Court of Justice 1951—4: Treaty Interpretation and other Treaty Points. *The British Year Book of International Law*, 1957, pp. 236 et seq.

[14] *P.C.I.J.*, Ser. A, No. 20/21, p. 30.

[15] In the given instance the problem of interpretation itself did not cause sizable difficulties and the Court could have settled it without making reference to the principle detailed above. As a matter of fact,

Finally yet another principle of a technical nature invoked by a number of authors, a principle which also may be traced back to Grotius, has to be mentioned.[16] According to this principle, the provision "which permits should yield to that which orders". On the other hand, "a clause in an agreement which forbids outweighs a clause which orders". This thesis establishes a hierarchical order between the various provisions of a treaty in a sense that the force of a provision is determined by its content or the way of its formulation. Grotius even went further in specifying the rule inasmuch as within the prohibitive provisions he established a further gradation according as a prohibition associated with a penalty should be given preference over those which lack a penalty. Furthermore a prohibition which threatens a greater penalty should have the preference over that which threatens a lesser penalty. Similar ideas occur also with Vattel, who in certain respects even expands the rule.[17] Among the classics, mention ought to be made of Pufendorf too, who again specifies the principle of Grotius and presents its antecedents in Roman Law.[18] A number of modern authors of international law also adopt the rule, so e.g. among the bourgeois scholars of international law Bonfils and Fauchille, both enjoying a high reputation.[19] In socialist literature Shurshalov discussed this rule among the principles of interpretation.[20]

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in the bonds at certain places merely "francs" were named as the currency, whereas at others reference was made to "gold francs", and on this account and also with reference to certain antecedents some wanted to conclude that the term "gold franc" also denoted the ordinary franc. However, it was obvious that the term "gold franc" as expressly taken up in the wording of the bond could not be vitiated by the mere fact that at other places the nearer designation was omitted. It is an altogether different question, outside the scope of this work, whether in view of the other bearings of the case it was correct to give judgement against the defendant in terms of gold francs.

[16] Grotius, H.: *Op. cit.*, II, Cap. XVI, XXIX. (Classics, 3, 1925).

[17] Vattel, E. de: *Op. cit.*, Livre II, chap. XVII. §§ 312—314, § 321. (Classics, 1, 1916).

[18] Pufendorf, S.: *De iure naturae et gentium.* Lib. V. Cap. XII. § XXIII. (Classics, 17, 1934).

[19] Bonfils, H. and Fauchille, P.: *Manuel de droit international public.* 7th ed., Paris, 1914, pp. 571. Later also Fauchille set up the thesis in his handbook of international law, which has rather formally been handled as the 8th edition of Bonfils' work. (*Traité de droit international public.* Paris, 1926, tome I, troisième partie, p. 376.)

[20] Shurshalov, V. M.: *Op. cit.*, pp. 396—397.

Recourse to this thesis has been had rather sporadically in international practice. This is by no means surprising. As a matter of fact, the thesis sets up its rather rigid categories on considerations which are associated with the formal sides of a treaty rather than with its essence. Whether the content of a treaty is formulated in a permissive ordering, or prohibitive form is in many instances a matter of choice and overwhelmingly dependent on the discretion of the parties. As a matter of fact, the same content of a treaty may be laid down in several formulations. When the parties agree on the proper form, undoubtedly they have in mind a number of considerations of expediency. However, among these considerations there is never, and cannot even be, an implied one that would permit the establishing of some sort of a hierarchical order of the particular provisions. For want of data to the contrary, it has to be assumed that the parties wanted to lend effect to each provision of the treaty, and if a conflict is noticed between the various provisions, only an analysis of all available circumstances, and not mere reliance on the formulas of drafting, will help establish the one that the parties wanted to enforce in the first place.

The enumeration of principles of a technical nature may still be continued. Authors dealing with the theory of treaties usually quote a number of theses of a technical character, which however are void of any greater practical significance. It is for this reason that a detailed analysis of these theses may be dispensed with in this connection.

Chapter VIII

ON THE NATURE OF THE RULES OF INTERPRETATION

In the foregoing chapters we made an attempt at analyzing the main problems of treaty interpretation, emphasizing the necessity of resorting to certain definite rules of international law in the process of treaty construction. We have also specified the legal rules which, in our opinion, have to prevail at interpretation. We feel that exposing of these rules and the essence of the process of interpretation has enabled us to take a definite stand in the questions of the existence and character of the rules of interpretation. On concluding Part One of this book we would like to restate the position we have taken on the subject in a more clear-cut form. In this connection we propose to sum up the arguments brought forward by those who deny the existence of rules of interpretation.

The doctrines which deny that any rules of interpretation have developed at all within the framework of international law may be divided into two categories, viz.

(1) the category of those who from the very outset decline any rule of treaty interpretation and proclaim the complete freedom of the interpreter; and

(2) that of the adherents of the doctrine which merely denies the existence of *specific* rules of international law concerning interpretation; the scholars belonging to this category either point out that for the interpretation of treaties virtually the principles of Roman Law still prevail, or in respect of interpretation identify the treaties with the municipal statutes or the civil law contracts, maintaining that the principles of interpretation as defined by municipal law have to be applied also to treaties. The partisans of this doctrine negate the complete freedom of the interpreter of the treaty, but profess at the same time that international law puts up no special barriers to interpretation and any barriers have to be looked for in the scope of other branches of law.

As for the structure and foundations of the position of those wholly denying the existence of rules of interpretation, i.e. the writers belonging to the first category, essential divergences of opinions may be recorded.

The tendency at the extreme end, whose best known representative is Lawrence, on principle considers the formulation of rules of interpretation something unimaginable, and wants to discover the causes of this in the nature of international law. In this respect Lawrence states the following in his handbook on international law:

"But since states have no common superior to adjust their differences and declare with authority the real meaning and force of their international documents, it is clear that no rules of interpretation can be laid down which are binding in the sense that the rules followed by a court of law in construing a will or a lease are binding on the parties concerned."[1]

However, the argumentation of Lawrence is directed, strictly speaking, against international law as a whole rather than against the rules of interpretation themselves. If the existence of law really depended on the existence of a superior power that could enforce the observance of legal rules, then international law could not be qualified as law at all. There is no need to refute here this nihilistic opinion, first proclaimed by J. Austin; as a matter of fact, nowadays it hardly finds support even in the camp of bourgeois jurisprudence. The socialist science of international law unanimously maintains that true international law can no longer exist than sovereign states of equal rights face one another. If therefore the existence of some sort of a superstate is no precondition of international law, but on the contrary, the emergence of such a state would entail the collapse of international law, then the existence of rules of interpretation is refuted by the argumentation of Lawrence no more than the existence of other rules of international law.[2]

Within the camp of those denying the existence of rules of interpretation of treaties another tendency sets out from the well-known

[1] Lawrence, T. J.: *The Principles of International Law*. 4th ed., London, 1911, p. 326.

[2] Lawrence met the same fate as many other writers who on the ground of a variety of arguments called into doubt the existence of rules of interpretation, i.e. when denying the existence of such rules, he himself was forced to set up certain rules of interpretation.

idea of Savigny. According to Savigny, interpretation is, in general, an art, and like any other art it cannot be learned and mastered by way of some rules.[3] Among others, Basdevant gave expression to this opinion in the course of debates in the Institut de Droit International on the formulation of rules of treaty interpretation.[4] Relying on this argument, he considered the limitation of the judge's right of interpretation expressly dangerous.[5] This opinion emerged among scholars of international law even before Basdevant and also after him.

The allusion to the "art" of interpretation cannot by itself convince anybody of the impossibility of formulating certain rules of interpretation of treaties. The point of view as if the function of interpretation by nature could not tolerate positive legal regulation, can be accepted in no event. However, it is an altogether different question how far this regulation can go, to what details it may extend without involving the risk of distorting the function of interpretation. The interpretation of a treaty cannot become a purely mechanical function: this is the conclusion which has to be drawn from the point of view adopted by the representatives of the tendency here outlined.

The opinion proclaiming the "art" of interpretation is a manifestation in international law of the same voluntaristic doctrine which also as regards municipal legal rules wants to grant complete freedom to the judge to safeguard the interests of the ruling classes at any time. However, contrary to this opinion even Jessup had to admit that legal rules to govern interpretation could be introduced even when interpretation was considered an art.[6] And in fact, a mere playing with words and the enshrouding of interpretative activity in a mystic haze will fall short of explaining why international law cannot subject this activity to the domination of certain rules.[7]

Charles de Visscher comes to about the same conclusion in his paper, noteworthy in its conciseness. He points out that whereas the

[3] Savigny, F. C. von: *System des heutigen Römischen Rechts*. Berlin, 1840, Vol. I, p. 211.

[4] *Annuaire*, 1956, Vol. 46, p. 322.

[5] Ibid. p. 336.

[6] Ibid. p. 329. — A similar opinion is held by E. Hambro: according to him in art there are rules in like way as in legal questions (ibid., p. 328).

[7] It should be noted that E. de Vattel (*Op. cit.*, Livre II, chap. XVII. § 262) too speaks of the art of interpretation (l'art de l'interprétation), although he sees no obstacles whatever to setting up highly detailed rules of interpretation.

rules of interpretation of private law contracts have in the course of time been thrust to the background, no such development may be recorded in international law and here the rules of interpretation might render useful service. In his opinion it is exactly the correct application of the rules of interpretation which raises the interpretation of treaties to the level of art.[8] However, in a later monograph of his Charles de Visscher would have the rules of interpretation of a legal nature confined to a narrow sphere.[9] And, indeed, an appropriate confrontation of the various rules of interpretation and the selection of the rule that can be effectively applied to the actual case are by no means easy tasks for the interpreter, demanding a high degree of concentration and also a thorough knowledge of all circumstances associated with the treaty.

Another group of jurists calling into doubt the existence of rules of interpretation of treaties to substantiate their position point out that the practical utility of rules so far worked out is highly doubtful. So Lauterpacht, who as a rapporteur of the question at the Institut de Droit International had elaborated certain principles of interpretation,[10] mainly at the outset emphasized the practical inapplicability, moreover the dangerous character of such rules. He exposed this opinion with particular keenness in the lectures he gave at the Hague in 1934, when he emphasized that the rules of interpretation hamper rather than advance the work of those interpreting the treaties.[11] Moreover, he also levelled the accusation against the "conventional" rules of interpretation that by ignoring the intention of the parties they were apt to become the cause of injustices.[12] The position taken by Lauterpacht in the debate at the Institut de Droit International was less rigid. He modified his opinion in a sense that it was better to dispose of fewer rules than of too many.[13] However,

[8] Visscher, Ch. de: Remarques sur l'interprétation textuelle des traités internationaux. *Varia Juris Gentium*. Leyden, 1959, pp. 389—390.

[9] Visscher, Ch. de: *Problèmes d'interprétation judicaire en droit international public*. Paris, 1963, pp. 50—51.

[10] See *Annuaire*, 1954, Vol. 45, tome I, pp. 225—226.

[11] Lauterpacht, H.: Les travaux préparatoires et l'interprétation des traités. *Recueil des Cours*, Vol. 48, pp. 713—714.

[12] Here Lauterpacht applies the statements of the English judge Cockburn on the rules of interpretation of municipal law to the rules of interpretation of treaties.

[13] *Annuaire*, 1950, Vol. 43, tome I, p. 366.

at the same time, he was forced to recognize that in international practice, in the first place in international judicature, a consistent application of certain principles was noticeable. On the other hand, he did not modify the idea, well founded anyway, according to which technical rules going into details were useless and even dangerous.[14] In his last great work written a few years before his death, a substantially enlarged and revised edition of an earlier work published in 1934, Lauterpacht wrote as regards treaties of "established canons of construction — which themselves partake of the nature of customary law".[15]

The several positions taken by Lauterpacht, one of the greatest authorities of the bourgeois science of international law of the latter period, though certainly not the most progressive representative of this science, demonstrate in an interesting manner the changes that have taken place in the minds of many outstanding an expert of the theory of treaty interpretation. At the beginning, Lauterpacht rigidly denied the existence of rules of interpretation; but later he was gradually drawing off from this opinion, only to arrive eventually at the recognition of certain rules of interpretation of the nature of customary law.

The Harvard draft too doubts the practical utility of rules of interpretation, and at the same time takes the field for the freedom of valuation on the part of the interpreter. "In most instances, therefore, interpretation involves *giving* a meaning to a text — not just any meaning which appeals to the interpreter, to be sure, but a meaning which, in the light of the text under consideration and of all the concomitant circumstances of the particular case at hand, appears in his considered judgement to be one which is logical, reasonable, and most likely to accord with and to effectuate the larger general purpose which the parties desired the treaty to serve."[16] This doctrine is at the same time a transition to teleological treaty interpretation, i.e. a method which deprives interpretation of its proper function, and on the pretext of interpretation throws the door open to an arbitrary revision of treaties.

[14] *Annuaire*, 1952, Vol. 44, tome II, p. 360.

[15] Lauterpacht, H.: *The Development of International Law by the International Court*. London, 1958, p. 27.

[16] *The American Journal of International Law*, Supplement, 1935, p. 946.

Among others Hostie in his lectures at the Hague speaks of the formulation of abstract rules of interpretation as an undertaking yielding little profit only.[17]

In the bourgeois literature another group of scholars denies the existence of specific rules of interpretation because, in their opinion, any endeavour to establish such rules will boil down, in the final analysis, to simple rules of evidence. Among the partisans of this doctrine mention may be made of Hambro, whose opinion is anyway not free from ambiguities. Although Hambro speaks of rules of interpretation, still he adds that these are evidentiary rules rather than rules of interpretation. At the same time he recognizes a single fundamental rule of interpretation, and defines this rule as the one according to which the prevalence of the principle of *pacta sunt servanda* has to be guaranteed in the course of interpretation.[18] Kraus' position is partly connected with the doctrine in question. In his opinion a line should be drawn between the principles of interpretation and the evidentiary rules. In the latter he includes e.g. the principle *in dubio mitius*. At the same time Kraus does not qualify the rules of interpretation as legal rules, and wants to discover only axioms in them relying on practical experience.[19]

Among the most combative deniers of the existence of rules of interpretation mention must be made of Charles Cheney Hyde, according to whom a criterion of the value of a judge as interpreter of treaties is his capacity to free himself from the influence of any alleged rule that would divert him from the recognition of the intention of the parties. Hyde makes Vattel in the first place responsible for this tendency of diversion,[20] who with his famous thesis that it is not permissible to interpret what has no need of interpretation in fact caused a by no means little turmoil in the interpretation of treaties. Hyde in his manual of international law calls into doubt even the practical value of all sorts of rules of construction on the plea that the parties

[17] Hostie, J.: Contribution de la Cour Suprême des Etats-Unis au développement du droit des gens. *Recueil des Cours*, Vol. 69, pp. 274—275.

[18] Hambro, E.: The Interpretation of the Charter. *The British Year Book of International Law*, 1946, pp. 66—67. However, Hambro was inclined to making further concessions, recognizing in general the existence of, and need for, rules of treaty interpretation.

[19] *Annuaire*, 1950, Vol. 43, tome I, pp. 445—446.

[20] *Annuaire*, 1952, Vol. 44, tome I, p. 203.

may use the terms occurring in the treaty in any sense they choose and that those charged with the task of interpretation may consider all evidence for the exploration of the proper meaning of a term.[21]

Often the existence of rules of interpretation is denied on the grounds that the interpretation of treaties in like way as the estimation of evidence in legal proceedings defies being squeezed into rigid rules. A representative of this opinion is the Chinese Yü, who in his monograph published in the United States mainly tries to expound the doctrines of Hyde.[22]

Related to this opinion is the view according to which the rules of interpretation are nothing else than norms of logic. The most prominent representative of this opinion is Anzilotti, who on the spot undertakes to enumerate nine such norms at random, remarking in a cursory way that the list might still be continued. At the same time he defines such principles as e.g. *in dubio pro reo*, or its counterpart in international law, that a meaning in favour of the obligor should be attributed to the provisions of the treaty, a thesis which cannot be derived merely with the aid of logic.[23]

In Soviet literature on international law a position partly denying the existence of rules of interpretation has been taken by Peretersky. Notionally he does not exclude the possibility of setting up rules to govern interpretation. According to Peretersky, rules of interpretation cannot have a binding force if not laid down in an international convention.[24] At the time Peretersky wrote these lines, in 1951, only initial steps were taken for a codification of the law of treaties. However, if interpretation can be brought under regulation by an international convention, then there are no obstacles of principle to international customary law developing general rules governing this sphere. In the previous chapters we have tried to explore exactly these rules, taking naturally into consideration also the provisions concerning treaty interpretation as contained in the Vienna Convention on the law of treaties, adopted in 1969 but not yet in force.

[21] Hyde, Ch. Ch.: *International Law Chiefly as Interpreted and Applied by the United States*. Boston, 1947, Vol. II, p. 1498.

[22] Yü, T. C.: *The Interpretation of Treaties*. New York, 1927, p. 28.

[23] Anzilotti, D.: *Lehrbuch des Völkerrechts*. Berlin—Leipzig, 1929, Bd. I, p. 82.

[24] Peretersky, I. S.: *Op. cit.*, p. 73.

But even though Peretersky denies the binding force of rules of interpretation not laid down in an international convention, he does not call into doubt the significance of rules of interpretation developed by science and practice, and is prepared to recognize their usefulness in practical interpretative activities. According to his opinion, these rules of interpretation "may arm the conscientious scholar with good technical methods for clearing the meaning of a treaty and guard him against errors inasmuch as these rules may direct his attention to such aspects of the problem which otherwise would remain unnoticed".[25] And like many others denying the existence of rules of interpretation, Peretersky too cannot resist the temptation to lay down in his work — written in a classical pithiness — a few rules himself. So e.g. he sets up fairly detailed rules for the interpretation of legal terms used in treaties, and apparently attributes a binding force to them.

Peretersky therefore partly follows in the wake of those denying the existence of rules of interpretation, partly, however, he represents in essence a transition to the opinion emphasizing the need for rules of interpretation, in so far as to some extent, so to say under exceptional circumstances, he recognizes the existence of obligatory rules of interpretation, emphasizing at the same time the utility of not absolutely binding rules, too.

As a matter of course, the science of international law is not lacking in doctrines opposing those enumerated before. The partisans of these doctrines recognize the existence of rules of interpretation and even consider such rules absolutely necessary. Also within this sphere several main trends can be distinguished.

Closest to the position set forth above, and occupying, so to say, a mid-position between the two doctrines, the one denying and the other recognizing the existence of rules of interpretation, are those who refuse to discover in these rules of interpretation absolutely obligatory norms, and regard them merely as implying certain guiding principles or instructions, assisting the interpreter in his function. Here mention may be made e.g. of Frangulis, who although in his monograph dealing with the law of treaties doubts the existence of rules of interpretation, still he adds that it would be exaggerated to state that such rules are wanting altogether. At the same time he

[25] Ibid., p. 83.

calls these rules "certains principes généraux du droit, certaines pratiques consacrées par l'usage", which might extend assistance at the determination of actual problems of interpretation.[26] In fact, the position taken by Frangulis is not of a too logical structure, still his efforts have to be appreciated as a search for a transition between complete denial and the opinion recognizing the existence of obligatory rules of interpretation. Basdevant in his remarks quoted above also attributes the character of directives to the rules of interpretation. In Strupp's Dictionary of International Law Verdross denies the existence of "codified principles", however, he admits that international practice has accepted certain principles for the interpretation of treaties.[27] The Institut de Droit International was forced to adopt an essentially similar position by way of compromise in its session of Granada in 1956, when to close down a dispute continued for many years a rather meagre resolution was passed. The resolution which wanted to satisfy all tendencies, set up a few principles which those in charge of the interpretation of treaties may regard as guidance ("pourraient s'inspirer des principes suivants").[28]

An internationally recognized expert of problems associated with the interpretation of treaties, Ludwik Ehrlich, declares that the rules of interpretation, to which he himself has made additions, consist overwhelmingly in presumptions that may be rebutted by producing evidence to the contrary.[29] Shurshalov in his monograph analyzing the fundamental problems of treaties, where he discusses also the problem of interpretation extensively, sets up fairly detailed rules, often of a wholly technical nature. However, he calls into doubt the normative character of most of these rules and qualifies them as mere usages or only as principles recommended by jurisprudence.[30] Incidentally, Shurshalov somewhat arbitrarily sets up nine principles of interpretation, which are partly of a general, partly expressly of a technical nature.

[26] Frangulis, A.-F.: *Théorie et pratique des traités internationaux*. Paris, no year, p. 107.

[27] Verdross, A.: Interpretationsregeln im Völkerrecht. In: *Wörterbuch des Völkerrechts und der Diplomatie*. Berlin, 1925, Vol. II, p. 663.

[28] *Annuaire*, 1956, Vol. 46, p. 348.

[29] Ehrlich, L.: *Op. cit.*, p. 78.

[30] Шуршалов, В. М. (Shurshalov, V. M.): *Основания действительности международных договоров* (Fundamental problems of the theory of treaties). Moscow, 1959, p. 402.

However, the doctrines referred to lastly are at the same time also such as lay stress on a few rules in the framework set up by them, and recognize the obligatory character of these rules. Ehrlich emphasizes the principle *pacta sunt servanda* and that of good faith as rules which are absolutely binding in the process of interpretation. Similarly Frangulis qualifies the principle of good faith as an absolutely general and always binding rule. Shurshalov attributes a normative character to one only of the nine principles he set up, namely to the one according to which interpretation must be in harmony with the general principles of international law. In his opinion, the obligatory character of this principle may be derived from the provisions of the United Nations Charter, whereas the authority and value of the other eight rely on practice and the statements of science. Charles de Visscher recognizes two binding principles, viz. the principle of *bona fide* interpretation, and, secondly, the rule according to which the treaty should be interpreted in accordance with the ordinary meaning of the terms used in it, with due regard to the context, and by keeping in mind the object and purpose of the treaty.

Actually, the writers classed with the latter group — who reject the doctrines denying the existence of rules of interpretation but would admit the obligatory character of the principles resorted to for the interpretation of treaties partly only — represent a transition to the doctrine which decidedly holds the opinion that international law brings under regulation the interpretation of treaties in the same way as other aspects of international relations.

This category includes, in addition to the classics of international law discussed in Chapter II, also many of the modern scholars of international law.

In the wake of the classics it is Lord Phillimore who opens the list of those adhering to this tendency, and defines his position as follows: "... but what is meant by the term 'interpretation'? The meaning which any party may choose to affix? or a meaning governed by settled rules and fixed principles, originally deduced from right reason and rational equity, and subsequently formed into laws? Clearly the latter."[31]

[31] Lord Phillimore: *International Law*. 3rd ed., London, 1883, Vol. II, p. 95.

Let it suffice here to name a few of recent writers adhering to this doctrine. First of all mention should be made of Huber, former president of the Permanent Court of International Justice, according to whom the more the court has to rely for the purpose of interpretation on the disputed text, the more it will be in need for rules, which shield it against a charge of arbitrary interpretation.[32] Of course, all that Huber states for the courts also applies to other organs in charge of interpretation, i.e. in general for treaty interpretation, no matter who performs it. At the same time Huber warns against the application of too simplified and slightly brutal rules (règles simplistes et un peu brutales.)

The present British judge and the former American judge of the International Court of Justice, respectively, Fitzmaurice and Jessup, also take a stand for the need for rules of interpretation. In particular Fitzmaurice identifies himself consistently and decidedly with the opinions in favour of rules of interpretation, moreover he considers it necessary to set up a hierarchical order of these rules.[33] In Jessup's opinion the principle *pacta sunt servanda* would be jeopardized if international law failed to indicate, among other things, how a treaty should be interpreted during its effective life. For this reason he holds that international law should have to bring under regulation the interpretation of treaties in the same way as it has to provide as to when a treaty becomes binding and how it can be terminated.[34] At the same time he correctly calls attention to the risks of excessive formalism that can possibly manifest itself at interpretation.[35] Beckett also concludes to the need for rules governing the interpretation of treaties. In the same way as all municipal legal systems contain rules of interpretation, so also international law has to dispose of rules governing the interpretation of treaties. Incidentally, according to Beckett, such rules are needed for the same reason as requires properly substantiated judgements from the court, i.e. to eliminate the risk of an arbitrary or subjective administration of justice. In order to improve the effectiveness of the rules of interpretation, he also thinks it necessary that a sequence of application should be set up for the various rules.[36]

[32] *Annuaire*, 1952, Vol. 44, tome I, p. 200.
[33] *Annuaire*, 1952, Vol. 44, tome II, pp. 370—371.
[34] Jessup, Ph. C.: *A Modern Law of Nations*. New York, 1948, p. 125.
[35] Ibid., p. 138.
[36] *Annuaire*, 1950, Vol. 43, tome I, pp. 435 et seq.

Also McDougal advocates the necessity of establishing rules of interpretation, as well as of a "systematic, disciplined employment of all relevant rules". At the same time he warns against exaggerations and resolutely rejects the idea of a hierarchical order of the various rules as emphasized by Beckett and Fitzmaurice.[37] McDougal's compatriot, Schechter, follows partly in his wake.[38]

Similarly, Quadri takes a decided stand for the existence of rules of treaty interpretation, moreover he believes that every legal system must necessarily contain rules for the interpretation of its written sources of law. In his opinion, questions inevitably emerging in connection with interpretation can and must be regulated by the legal system itself.[39]

Finally, the International Law Commission in its draft on the law of treaties of 1966 took a stand for obligatory rules of interpretation and in Articles 27 to 29 tried to lay down such rules. To be sure, the commentary to the draft emphasized the difficulties of the task of formulating these rules, still at the same time it indicated that the interpretation of treaties according to law is essential if the principle *pacta sunt servanda* is to have any real meaning.[40] The articles of the draft of the International Law Commission here mentioned were taken up in the Vienna Convention of 1969, constituting, with slight modifications, Articles 31 to 33, which the conference adopted unanimously. Even if actually the convention cannot be considered effective international law, still by this act the overwhelming majority of the states of the world has given expression to an opinion that international law contains obligatory rules for the interpretation of treaties, which may and even have to be defined and developed, so as to incorporate them in written international law.

After this brief survey and analysis of the opinions of a few eminent representatives of the different hues and shades developed within the various doctrines,[41] we may now perhaps better armed join issue in the animated debate and proceed to the exposition of our point of view.

[37] McDougal, M. S.: *The Interpretation of Agreements and World Public Order*. New Haven—London, 1967, pp. 116 et seq.

[38] Schechter, O.: *Interpretation of Ambiguous Documents by International Administrative Tribunals*. London, 1964, pp. 110 et seq.

[39] Quadri, R.: *Diritto internazionale pubblico*. Palermo, 1956, p. 141.

[40] *Yearbook*, 1966, Vol. II, p. 219.

[41] As a matter of course, there are many opinions concerning the problem of interpretation of treaties, as almost all general works (textbooks

In our opinion, the question whether or not international law has established rules for the interpretation of treaties cannot be answered merely on theoretical reasoning. What theoretical reasoning can adequately answer is whether notionally it is possible at all to set up rules for interpretation, and if so, whether it is desirable to set up such rules.

As Imre Szabó makes it clear, socialist legal literature agrees, by and large, on the question that certain aspects of interpretation can be brought under regulation by positive law.[42] This thesis, which Szabó lays down for the interpretation of socialist legal rules, is valid also for international law. The opinion of certain representatives of bourgeois jurisprudence, reviewed earlier in this chapter, who would have that interpretative activity notionally defy a subjection to legal regulation, cannot hold its own. In spite of the vain endeavour of certain writers wishing to raise interpretation to the level of an "art", and enshroud it in some sort of a mystic haze, it is beyond doubt that within certain limits this activity can also be governed by positive rules, which are binding upon those in charge of interpretation. Positive international law may bring under regulation the question who is entitled to interpret the provisions of treaties, and with what legal effect. Positive international law can also specify the material which may be taken into consideration by the interpreter for the purpose of interpretation, i.e. decide to what extent valuation has to be restricted exclusively to the text, or to what extent material outside the text of the treaty may be considered. In addition, positive international law can to some extent set up rules for what Szabó calls "the result of interpretation", i.e. for restrictive and extensive interpretation. Finally, international law can formulate rules which the interpreting organ has to keep to constantly in the course of the performance of its functions: it can define certain general comprehensive principles which serve as guidance of interpretative activity, such as the principle of *bona fide* interpretation, further the principle of inter-

or manuals) on international law necessarily deal with the problem. In addition, the monographs on the law of treaties, to be sure, also discuss the highly important problem of interpretation. Here we have undertaken merely to offer a short review of the most characteristic doctrines, and within the different tendencies we could mention the most typical representatives only.

[42] Szabó, I.: *Op. cit.*, p. 34.

pretation in harmony with the general principles of international law, and all theses resulting from them, and it can also define certain rules to guide the interpreter in respect of certain questions of detail.

These are in our opinion the potentialities of international law at the regulation of problems associated with the interpretation of treaties. We believe that international law has to make use of these potentialities within certain limits. If international law lays a claim to become a comprehensive legal system governing the relations between its subjects, then it has to define the general principles and rules, according to which interpretation and application of treaties, this most important source of international law, have to take place. In this highly important matter international law has to offer certain rules, for it has to prevent elucidation of the content of the fundamental legal source and the enforcement of its provisions from being dependent on the arbitrariness of the organs interpreting and applying international law.

Furthermore the definition of rules governing the interpretation of treaties is desirable also for the convenience of treaty-making. Undoubtedly it is welcome for the parties concluding a treaty to be acquainted with certain rules of interpretation at the very outset, for in this case they may act in the knowledge of such rules at the drafting of the text of the treaty.

However, this reasoning amounts to hardly more than making it clear that laying down rules of international law of an obligatory nature for treaty interpretation is possible, and also desirable. On the other hand, with a view to establishing whether or not international law has such rules, international practice will have to be reviewed. The material of the two sessions of the Vienna Conference already casts a strong light on this practice, and as has already been pointed out, the position taken by the various states on this question is clearly reflected by Articles 31 to 33 of the Convention on the Law of Treaties. However, since the Vienna Convention is on the whole not yet effective, conclusions reflecting the actual situation can be drawn only on the ground of an examination of the practice of states, international organizations and international judicial organs. We have attempted such an examination in the previous chapters within the scope of the present work. In the following we should like to add a few remarks to what has been set forth on international judicial practice so far.

In the course of an analysis of the existence of rules of interpretation, parallel to diplomatic practice, the decisions of international tribunals carry weight. This is the case not because of international administration of justice having a particularly wide scope of action in international relations. As is commonly known, the contrary of this is true. In point of fact, compulsory international judicature has not as yet been introduced, and its introduction is not timely. In any case it has to be left to the discretion of the particular states to decide which disputes should be submitted to international judicial organs for settlement. This thesis will hold its own also in disputes of a so-called legal nature.[43] Still it is in international judicial practice where the established principles of international law are reflected with greatest clarity and competency. Even if, owing to various reasons the international courts do not inspire enough confidence that a wide range of states could refer to them their disputes with satisfaction, in the majority of cases the actual existence of the legal principles consistently fixed by the international judicial organs could hardly be called into doubt. The fault lies mostly in the application of the otherwise correct legal principles and legal rules to a concrete case. It is therefore a by no means rare occurrence that the socialist states too for a correct solution of moot international questions refer to the decisions of principle made by the various international judicial organs, in the first place, as a matter of course, by the Permanent Court of International Justice and the International Court of Justice in connection with the determination of various legal disputes.[44]

[43] For details see by the present author: *A Nemzetközi Bíróság joggyakorlata 1946—1956* (The judicial practice of the International Court of Justice 1946—1956), pp. 219 et seq.

[44] For the purpose of a correct valuation it has to be pointed out, however, that in general the international judicial organs are less capable of noticing the changes in the development of international relations, as also those taking place in international law, further the decay of legal norms becoming obsolete owing to these changes. In these cases it is not even possible to accept the declarations of principle of the international courts and tribunals. Here we have in mind, first of all, the changes that have taken place in the wake of the disintegration of the colonial system of the age of imperialism, the repercussions of which even international judicature has to take into consideration. The International Court of Justice has made it clear in several judgements, so in particular in the dispute between France and the United States on the rights of American nationals in Morocco, in the case of the alleged Portuguese right of passage over

In general the international tribunals do not make express statements as to the existence of rules of interpretation. Even international arbitral awards taking a position of principle in this matter, or expressly restating the rules of international law governing the interpretation of treaties and considered existent by the tribunal, are of rare occurrence.[45] The international judicial organ of greatest authority, viz. the International Court of Justice of the United Nations, and its predecessor between the two world wars, the Permanent Court of International Justice, have never made such statements. However, in the practice of the international judicial organs the same rules and principles of interpretation come up to pass over the decisions with a certain consistency. This suggests that international judicial practice considers these rules and principles part of international law and the states too regularly refer to them in their disputes emerging in connection with treaty interpretations. These principles and rules are applied also by the international organizations when it comes to interpreting a treaty.

Still there are certain writers who doubt whether international tribunals have laid down such principles and rules of interpretation at all.[46] However, this opinion is defeated even by a cursory survey of judicial practice.[47]

Indian territory, further in the South West Africa (Namibia) cases, that it is unable to get over its class limits and to draw adequately the legal consequences of the changes that have taken place in international relations. For details see Haraszti, Gy.: A nemzetközi bíráskodás (International judicature). *Jogtudományi Közlöny*, 1963, No. 4, pp. 194 et seq.

[45] Among the exceptions mention has to be made of the Georges Pinson case, where the president of the French–Mexican Mixed Claims Commission, J. Verzijl (*Annual Digest of Public International Law Cases 1927—1928*. London, 1931, pp. 426—427), the well-known Dutch international lawyer, summed up what he thought to be the most important general rules of interpretation in five points.

[46] So even Manley O. Hudson (*The Permanent Court of International Justice, 1920—1942*. New York, 1943, p. 643) who by the way was most thoroughly acquainted with the activities of the Permanent Court of International Justice and from 1936 served as a judge on this Court, remarked that the Permanent Court of International Justice "has formulated no rigid rules" of interpretation.

[47] The indefensibility of the statement will become particularly striking when the extracts selected by E. Hambro (*The Case Law of the International Court*. Leyden, 1952, Vol. I; 1960, Vol. II; 1966, Vols. IV-A and IV-B; 1968, Vols. V-a and V-B) of the decisions of the Permanent Court of

It is beyond doubt that the international courts of a permanent character, viz. the Permanent Court of International Justice and the International Court of Justice, have considered the rules of interpretation laid down by them part of international law and so by implication have taken a position in favour of the existence of rules of interpretation. In this statement, however, the question whether or not the rules so laid down are correct in each case, has been ignored.[48] At the same time, it has to be emphasized that, as has been pointed out in the previous chapters, the International Court of Justice does not always apply each rule laid down by it in a fully consistent manner, and what is more there are cases on record that in the same decision in which the Court has declared a rule of interpretation it has made light of it.[49]

The two courts beyond any shadow of doubt considered the principles consistently applied to the interpretation of treaties rules of international law. Both have repeatedly given expression to their opinion that the question is one of the *rules* of treaty interpretation, which the court is *bound* to apply. In the recent practice of the International Court of Justice the terms appear with still greater clarity. Yet, it is not this what is most essential, but that the Court consistently applies certain principles of interpretation and so to say in each case it expressly states that it has to apply them.[50] In its advisory

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International Justice and of the International Court of Justice are reviewed. Even without a thorough examination it will be evident that the Court consistently pronounced the same principles and rules whenever it came to interpret a treaty.

[48] In the practice of the International Court of Justice and in that of its predecessor, concerning the question of interpretation as well as some other fields, theses will appear too which cannot be considered part of general international law. This problem has already been discussed in connexion with certain concrete rules.

[49] H. Lauterpacht too pointed this out in his report. (*Annuaire*, 1950, Vol. 43, tome I, p. 371.)

[50] According to the correct statement of Sir G. Fitzmaurice (The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points. *The British Year Book of International Law*, 1951, p. 6) it is indispensable that the International Court of Justice, which repeatedly has to perform interpretative functions, builds up a coherent system of principles of interpretation. To this we have to add that the Court cannot formulate these principles arbitrarily: it has to take them from existing international practice.

opinion on the Polish Postal Service in Danzig the Permanent Court of International Justice in respect of a rule of interpretation applied the expression "cardinal principle of interpretation".[51] In the judgement determining the Brazilian Loans case reference is made to a "familiar rule for the construction of instruments".[52] In the advisory opinion on the German Minority Schools in Upper Silesia the Court speaks of the effect of interpretation "in accordance with the rules of law".[53]

The International Court of Justice follows in the wake of its predecessor. In the decisions of the Court there is recurring reference to the "consistent practice" followed in respect of interpretation.[54] In the practice of later years mention may be made of the dispute between Portugal and India, which emerged with a claim to a right of passage over Indian territory in connection with the at that time still existing Portuguese colonies in India. In the first judgement deciding on its jurisdiction the International Court of Justice also speaks of "rule of interpretation".[55] Similarly in the judgement deciding on the jurisdiction in the Temple of Preah Vihear case the International Court of Justice speaks of "normal canons of interpretation".[56] The list could be continued, but the examples taken at random are enough to show that in international judicial practice established principles and rules of interpretation are consistently applied.[57]

On this understanding the conclusion suggests itself that within certain limitations it is possible and even necessary to formulate rules to govern treaty interpretation and that international law has been up to this function. In international customary law, principles and rules have developed which have to be applied at treaty interpretation.

[51] *P.C.I.J.*, Ser. B, No. 11, p. 39.
[52] *P.C.I.J.*, Ser. A, Nos 20—21, p. 114.
[53] *P.C.I.J.*, Ser. A/B, No. 40, p. 19.
[54] A statement of this sort was made e.g. in the advisory opinion on the Conditions of Admission of a State to Membership in the United Nations (*C.I.J. Reports 1947—1948*, p. 63).
[55] *I.C.J. Reports 1957*, p. 142.
[56] *I.C.J. Reports 1961*, p. 32.
[57] In the separate or dissenting opinions attached to the judgements and advisory opinions by the judges who do not agree with the reasons or the operative part of the ruling of the Court often reference is made to rules of interpretation. Such reference is to be found e.g. in the dissenting opinion of Klaestad attached to the advisory opinion on the Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization. (*I.C.J. Reports 1960*, p. 175.)

At the same time, we believe that international practice has also developed principles of a technical nature whose application as far as experience shows may in a given case advance the successful performance of interpretative activity. The taking into account of these principles of a technical nature may be useful, still at the present state of international law their application cannot be considered obligatory. It should be emphasized in this connection that a multiplication of such technical principles, let alone their obligatory application, would be an unwelcome development. The interpretation of treaties, even though it is not considered an art, is a function of extreme complexity implying a high degree of responsibility, which cannot be mechanized by setting up trivial rules of details. To the same extent as certain general theses and rules of fundamental importance have to be laid down for a successful performance of the function of interpretation, so the revival of the scholastic theses of the hermeneutics of yore would be wholly undesirable in international law.

As regards the principles of a technical nature, in our view for the majority of them the opinion of Ehrlich will hold, namely the opinion he generally professed for the rules of interpretation. As has been mentioned above, Ehrlich thinks that rules of interpretation are only presumptions which may be rebutted by evidence to the contrary.[58] We have already made it clear that in this formulation we are unable to adopt this thesis, although we agree that the overwhelming majority of the principles of a technical nature may be considered presumptions offering a certain convenience and guidance at interpretation in the absence of other means. When e.g. in the literature dealing with treaty interpretation the principle is laid down that in the event of a conflict the special provisions of a treaty have priority before provisions of a general nature,[59] then this thesis is but a practical guidance for the interpreter drawn from accumulated experience and then generalized, which may possess the force of a presumption, yet, dependent on the circumstances of the case, may be rebutted and set aside after weighing other material available for the purpose.

On the preceding pages we have already taken essentially a position also against the doctrine of the second above-mentioned tendency denying the existence of rules of treaty interpretation. As we have

[58] Ehrlich, L.: *Op. cit.*, p. 78.
[59] See pp. 191—192 above.

said, this tendency does not negate the rules of interpretation absolutely, it only refuses to believe that international law incorporates specific relevant principles and rules. According to one version of this tendency for the interpretation of treaties the rules of Roman Law are still valid, whereas the other version maintains that the rules of modern municipal law are applied to the interpretation of treaties.

The problem of the application of the rules of Roman Law to treaty interpretation is not of recent date. Already Grotius took a negative stand in the matter: "I shall not, however, admit the rule, which has been adopted by some writers, that the contracts of kings and peoples ought to be interpreted according to Roman Law so far as possible."[60] Notwithstanding there are references in the literature of international law as if Grotius and his followers had but applied the general rules of interpretation of Roman Law to the interpretation of treaties.[61]

Jenks, who also shares the view that rules of interpretation in earlier works are mostly of Roman origin, and mere transcriptions of Roman rules, in an interesting form explains that part of the rules of interpretation of Roman Law may be traced back to Greek Law, moreover similar rules may be discovered even in other legal systems of Antiquity, e.g. in Chinese, Hindoo, or Jewish law.[62]

Among the representatives of the doctrine of a Roman origin of the rules of treaty interpretation, a special position has to be assigned to Anzilotti. He believes, as we already mentioned, that there are no generally valid, obligatory rules of interpretation. On the other hand, the literature applies the rules of Roman Law to treaty interpretation, although the standpoint of the literature does not prevail in this respect. Hence Anzilotti takes a position of complete denial and attributes a scientific significance only to the rules of interpretation of Roman Law in the sphere of international law.[63]

In connection with the doctrines here reviewed it has to be pointed out that, as a matter of course, Roman Law does not, and cannot

[60] Grotius, H.: *Op. cit.*, Lib. II. cap. XVI. XXXI. (Classics 3, 1925).

[61] This statement may be found among others also in the manual of Oppenheim and Lauterpacht (*International Law*. 8th ed., London, 1955, Vol. I, p. 951) which on the whole considers such application correct, in so far as those rules of Roman Law are expressive of common sense.

[62] Jenks, C. W.: *The Common Law of Mankind*. London, 1958, pp. 146—147.

[63] Anzilotti, D.: *Lehrbuch des Völkerrechts*. Bd. I. Berlin—Leipzig, 1929, p. 81.

even, offer a reply to a number of questions concerning treaty interpretation in our days, and also that it fails particularly to answer such questions which are specifically confronting us in treaty interpretation. Consequently, the statement that the problem of treaty interpretation can be solved nowadays by having recourse to the rules of interpretation of Roman Law would imply the risk of a complete disregard of international practice. Yet it has to be recognized that certain principles of logic which of necessity have to be taken into consideration at interpretative activities of any sort, and which already Roman jurisprudence had laid down, will as a matter of course have to be applied also to the interpretation of treaties. In addition, there are certain rules of interpretation of a technical nature which international practice has taken over from Roman Law.[64]

The existence of specific rules of interpretation of treaties is denied also by the doctrine, according to which in international relations the rules and principles of interpretation of municipal law prevail. Some of the writers do not even go into the details of this thesis, whereas others try to give a definite form to it, and in the course of this operation identify the treaty with the municipal statute or the civil law contract. Accordingly, they want to apply the rules of municipal law established for the interpretation of statutes or of civil law contracts also to treaties in their entirety.

As a matter of course, the normative theory of law, which proclaims the principle of the unity of the legal system, also denies the existence of specific rules for the interpretation of treaties. According to the normativists, the general rules of interpretation are applicable also to treaties. For example, Kelsen brings forward the following statement: "The principles concerning legal interpretation in general apply also to the interpretation of treaties. There are no principles concerning the interpretation of treaties different from those concerning the interpretation of other legal instruments."[65]

Still it is not only among the partisans of normativism that holders of this doctrine can be met with. Already Wheaton proclaimed the

[64] A. Rivier, who would in general have the rules of Roman Law applied to the interpretation of treaties, among others refers also to the principle *contra proferentem* (*Lehrbuch des Völkerrechts*, Stuttgart, 1889, p. 333). This rule of a technical nature appears already among the Roman Law principles of interpretation.

[65] Kelsen, H.: *Principles of International Law*. New York, 1952, p. 321.

application of the principles of interpretation of municipal law to treaties,[66] without, however, indicating where these principles had to be looked for. This opinion also turns up in the Hungarian textbook of international law edited by Gyula Hajdu.[67] Obviously, this latter doctrine does not consider interpretation a problem of positive law at all, but conceives it as an exclusive problem of the theory of law and would apply identical principles in respect of any legal instrument.

This doctrine affords no practical assistance whatever to those interpreting treaties. By merely stating that the general principles of law are valid also for the interpretation of treaties the doctrine fails to specify the sources from which these principles of law may be taken. Obviously, only the general principles prevailing in municipal law will come into consideration. However, under actual circumstances the rules of interpretation of the municipal law of the particular states are for the most part divergent, moreover, within the same legal system other rules may possibly be applied to the constitution than to other legal rules.[68]

The removal of this remark to some extent was purposed by the resolution passed by the Seventh International Conference of the American States in 1933. As a matter of fact, Article 1 of the resolution declares: "In general, the rules governing the interpretation of domestic law are applicable to the interpretation of international conventions in so far as said rules are common to the legal system of the parties to the controversy."[69] Accordingly, only the rules of the municipal law of the parties to the controversy find application, and only in so far as these rules are common to all.

As has already been mentioned, certain writers dealing with the interpretation of treaties go even further in narrowing down the sphere of the rules, and want to apply the rules of municipal law valid for the

[66] Wheaton, H.: *Elements of International Law*. Boston, 1866, § 287. Wheaton at the same time refers to Grotius, Vattel and Rutherforth, as such as expounded the rules of interpretation in detail.

[67] Buza, L. and Hajdu, Gy.: *Nemzetközi jog* (International law). 3rd ed., Budapest, 1961, p. 240: "For the interpretation of treaties international law has no express provisions. As regards ways and means of interpretation, the general principles of interpretation of law prevail."

[68] Cf. Ehrlich, L.: *Op. cit.*, p. 76.

[69] *The American Journal of International Law*, 1933, Supplement, p. 1225.

interpretation of statutes or of civil law contracts also to the interpretation of treaties.

A group of scholars of international law tries to bring into prominence the similarity between a treaty and a municipal statute and in this way substantiate the justification of the application to treaties of the principles and rules of municipal law concerning the interpretation of statutes. Among these Scelle may be mentioned. In his opinion a treaty implies obligations binding upon all subjects of law of the states taking part in the conclusion of the treaty, in the same way as a statute. At the same time, he emphasizes that he has never discovered a treaty that could be compared to a civil law contract. Consequently, he concludes that the rules valid for the interpretation of statutes have to be applied also to treaties.[70]

This principle of interpretation has far reaching consequences, which will become conspicuous once the translation of the principle into practice is examined. In the French judicial practice, in so far as the courts of law consider themselves authorized to interpret a treaty at all,[71] the application of this principle has brought about that in the course of interpretation the courts have no regard to the intention of the contracting parties, but consider the treaty part of French law, and interpret it integrated into this legal system.[72]

The science of international law and also judicial practice overwhelmingly take a stand against this doctrine.[73] At the same time

[70] *Annuaire*, 1952, Vol. 44, tome II, p. 397.

[71] For this question see p. 71 above.

[72] A. Mestre in his study "Les traités et le droit interne" (*Recueil des Cours*, Vol. 38, pp. 300 to 302) amply quotes French judicial practice and mentions also the exceptions from under this rule in respect of certain treaties.

[73] From international judicial practice we refer merely by way of example to the decisions of the mixed arbitral tribunals created after the First World War. So e.g. one of these mixed arbitral tribunals in Heim & Chamant vs German Government expressly held that an identification of a treaty with a municipal statute was erroneous, a treaty being a contractual act. Even if a treaty had the force of law, this did not mean that uniform rules of interpretation were applicable to both a treaty and a municipal statute. (*Annual Digest of Public International Law Cases, 1919—1922.* Case No. 268.) — Among the representatives of the science of international law, in particular Sir G. Fitzmaurice (*Annuaire*, 1952, Vol. 44, tome II, p. 374) took a decided stand against the establishment of an analogy between treaty and municipal statute, by emphasizing that

there is a relatively large number of partisans of the opinion which would have the rules valid for the interpretation of civil law contracts applied also to treaty interpretation. Among the adherents of this doctrine, mention has to be made of Lauterpacht, who in particular in his earlier works argued that the legal nature of a private law contract and an international law treaty was essentially the same.[74] The similarity of a treaty and a civil law contract was emphasized also by Fachiri.[75] According to Spiropoulos, a treaty is a veritable contract. Accordingly, he would have the rules of the interpretation of civil law contracts applied to treaties, although on the understanding that these may be regarded as general principles of law.[76] Rivier, who as has been mentioned above, took a stand for the application of the rules of interpretation of Roman Law, stated that in general *mutatis mutandis* the principles of interpretation of civil law were applicable also to treaties.[77]

For our part we believe that none of these two doctrines can bring us closer to the solution of the problem of the principles and rules of treaty interpretation. Identification with either the statute or the civil law contract will not enable us to take into account the peculiarities of the treaty. It is for this reason that treaty interpretation calls for the application of specific rules and principles. At the same time, we also recognize certain common traits in the interpretation of treaties on the one part, and municipal legal rules and civil law contracts, on the other.

These common traits manifest themselves in the first place between treaties and civil law contracts in so far as both are legal transactions implying the declaration of will of the parties, and relying on the

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unlike municipal statutes, at the interpretation of treaties the intention of the parties carried decisive weight.

[74] Lauterpacht, H.: *Private Law Sources and Analogies of International Law*. London, 1927, p. 156. It should be noted that at the same time Lauterpacht points out a certain difference between a private law contract and a treaty, and in this connexion refers to the legal consequences of duress at the conclusion of a treaty or a contract and to the effects of the *rebus sic stantibus* clause.

[75] Fachiri, A. P.: Interpretation of Treaties. *The American Journal of International Law*, 1929, No. 4, p. 747.

[76] Spiropoulos, J.: *Traité théorique et pratique du droit international*. Paris, 1933, p. 252.

[77] Rivier, A.: *Op. cit.*, p. 332.

agreement of will, on the *consensus* of the parties. Consequently, when it comes to interpreting either a treaty or a civil law contract the elucidation of the intention of the parties at the conclusion of the treaty or contract, as the case may be, will be decisive. This principle is equally valid for the interpretation of both a treaty and a civil law contract. In like way, international law resorts for the interpretation of treaties as presumptions to certain technical rules which have developed in the domestic system of law in connexion with the interpretation of legal transactions. However, Peretersky aptly remarks that it would be in vain to look for some sort of a short, all-embracing formula for the solution of the problem, to what extent rules established for the interpretation of civil law contracts are applicable to the interpretation of treaties.[78]

Even though certain similarities may be discovered between a treaty and a civil law contract, the differences between the two must not be ignored, as these will have a bearing on interpretation too. A civil law contract comes into being within the framework of a given legal system, whose rules are binding on the contracting parties. The contracting parties may act only within the boundaries drawn by the peremptory rules of the legal order, and this circumstance will of necessity influence the interpretation of the legal transaction brought about by them in a decisive manner. On the other hand, there can be a question of a universal international legal order equally binding on all states only within a narrow sphere of rules which moreover are overwhelmingly not of peremptory character. Obviously in such circumstances the interpretation of treaties will in many respects differ from that of civil law transactions.

The difference between interpretation of municipal legal rules and that of treaties is still greater. As has already been mentioned, what is characteristic of treaties is, in contradistinction to municipal law, their consensual character, which decisively determines the purpose of interpretation. Still in this respect interpretation will naturally be influenced by the fact that municipal law constitutes a uniform system integrated into which the interpretation of the particular legal rules has to be performed. Potentialities in this sense offer themselves for treaties within by far narrower spheres. There can be no talk of a uniform system of this kind in international law, so e.g. in interna-

[78] Peretersky, I. S.: *Op. cit.*, p. 15.

tional law the so-called methodological interpretation has not got as wide a scope assigned to it as in municipal law.

As a final conclusion it has to be laid down in this respect too that "certain general aspects of the *theory* of interpretation ... are valid also for treaties and for international law in the same way as they are valid for the interpretation of any legal rule".[79] However, as regards the concrete principles and rules of interpretation, we have to take a stand for the autonomy of international law. In view of its special nature, international law can take over some of the rules of interpretation of municipal law in exceptional cases only, and even these rules will become binding only because of their application by international practice. That is, in this case certain principles of interpretation of the municipal legal systems will, owing to their application in interstate practice, turn into international rules. For the purpose of our examinations it is meaningless to examine which are the principles of interpretation of municipal law that may be considered binding for the purpose of interpretation of treaties. What is worth while to clarify are the principles which international practice has established for the interpretation of treaties, and once these principles have been brought into relief we may perhaps proceed to establish whether or not these principles are applied also in municipal law. This problem has significance for our purposes merely because once we have realized that there is a case of a principle of interpretation resorted to also by municipal law, for an intensification of this principle and for the correct solution of problems likely to emerge at application, it will be justified to examine how the principle in question has so far been applied in municipal law. Incidentally we are in complete agreement with the statement of Ehrlich that a study of the rules of interpretation of municipal law comes within the province of comparative law rather than of the science of international law.[80]

So far we have taken a stand for the existence of rules of international law relating to the interpretation of treaties. However, some who on the whole take a similar position bring forward opinions, accord-

[79] Szabó, I.: *Op. cit.*, pp. 90—91. (Italics by author.) Szabó includes the notion, function, results and methods of interpretation in the general elements. As far as it goes, this is correct, however, it should be noted once more that e.g. as regards the results of interpretation, international law has specific rules too (see p. 155 above).

[80] Ehrlich, L.: *Op. cit.*, p. 11.

ing to which a certain hierarchical order of the rules of interpretation has to be established. Accordingly, an accurate precedence of rules would have to be created; i.e. a rule can only be resorted to, if to the other rules in order of precedence before it unsuccessful recourse had been had for the elucidation of the meaning of the treaty. This doctrine has been adopted among others by Fitzmaurice who, as has already been mentioned earlier, has set up in his analysis of the practice followed by the International Court of Justice certain fundamental principles of interpretation and defined which of the principles has in the event of a conflict priority over another.[81] In like way Beckett is also in favour of a hierarchical order of rules, although as he states actually it would be extremely difficult to establish such an order. In his opinion, international law still has much to do in this respect.[82] In fact, Beckett, strictly speaking, recognizes the need for the establishment of a precedence of rules of interpretation *de lege ferenda* only. Although P. Guggenheim is not an adherent of rigid rules of interpretation, nevertheless he believes that a certain hierarchy may be set up in the rules of interpretation.[83] A manifestation of this doctrine is also the opinion extensively discussed earlier in this work that first of all the text of the treaty has to be examined, and when on the ground of the text, by establishing the "ordinary and natural meaning" of the words interpretation can take place, then no recourse should be had to extrinsic material. In international judicial practice here again the Georges Pinson case may be mentioned, where the judgement presumed a certain hierarchical order of the rules of interpretation.[84]

The problem of a precedence of rules of interpretation was raised a very long time ago. Obviously, Vattel too was aware of the problem stating, after defining the rules of interpretation, at the end of Chapter XVII of Book II, that all rules enumerated in that chapter had to be applied in conjunction with one another. In his opinion these rules mutually complete and limit one another.[85]

[81] Fitzmaurice, Sir G.: *Op. cit.*, p. 9.
[82] *Annuaire*, 1950, Vol. 43, tome I, pp. 436 et seq.
[83] *Annuaire*, 1956, Vol. 46, p. 327.
[84] *Annual Digest of Public International Law Cases 1927—1928*, p. 426.
[85] "Toutes les règles contenues dans ce chapitre doivent se combiner ensemble, et l'interprétation se faire de manière qu'elle s'accommode à toutes, selon qu'elles sont applicables au cas. Lorsque ces règles parais-

In our opinion the idea of an absolute hierarchical order of the rules of interpretation cannot be accepted. If we set out from the thesis that the true purpose of interpretation is the elucidation of the intention of the parties at the conclusion of the treaty, then we shall have to come to realize that any rule and principle of interpretation may be resorted to in order to achieve the object, moreover as far as possible these rules and principles should in fact be applied in the course of interpretation.[86] Nevertheless, experience has shown that in a concrete case not all of the rules and principles of interpretation can be applied to the purpose with satisfactory results. The interpreter of the treaty has to select out of the mass of rules and principles the ones which may be applied to the given case and which lead to the elucidation of the actual intention of the parties. If there is an inkling of truth in the statement which may be traced back to Vattel, that interpretation is an "art", then this property of the operation of interpretation will certainly manifest itself in the fact that the interpreter will have to sift the available principles and rules with extreme skill and competence in order to find those which suit the actual situation best. This is not the case as if among the rules of interpretation any system were absent, or as if there were among them all sorts of rules diametrically opposing one another, as sometimes suggested, but merely because in the given instance a rule may lend itself readily for the achievement of the object of interpretation, i.e. the elucidation of the intention of the parties, whereas another would not.

For our part, we should prefer to speak of the *science* of interpretation, rather than of the *art* of interpretation, because the primary task of the interpreter is to become acquainted with the rules and methods of interpretation, and also because he will have to take his bearings in the intricate network of circumstances associated with

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sent se croiser, elles se balancent et se limitent réciproquement, suivant leur force et leur importance, et selon qu'elles appartiennent plus particulièrement au cas dont il est question."

[86] This idea appears also in the commentary to the draft of the International Law Commission, at least as regards the rules included in Article 27 of the draft, when interpretation is called "a single combined operation". (*Yearbook*, 1966, Vol. II, p. 219.) However, owing to the historical method being pushed into the background in Article 28 of the draft, and accordingly in Article 32 of the Vienna Convention, a certain hierarchical order has nevertheless been established by assigning the historical method to the "supplementary means of interpretation".

the making of the treaty. Rather than artistic genius, it is a thorough knowledge of facts and materials and a mastery of the rules of interpretation as reflected by international practice that is needed for good interpretation. Naturally, all this will not suffice, in like way as for a good judge it is not sufficient to be acquainted merely with the provisions of the law, still it is beyond doubt that both knowledge of facts and mastery of rules are indispensable for a correct interpretation.[87]

Hence in a concrete case the principles and rules of interpretation to be applied will have to be selected with due regard to all circumstances. However, in this connexion we would emphasize that the rules of interpretation are uniform for all types of treaties, and that we cannot approve the widespread doctrine which also from the viewpoint of interpretation wants to distinguish law-making and other treaties, setting up different rules and principles for these two categories.

As regards the divergent rules of interpretation to be applied to these two categories of treaties, not one of the advocates of the doctrine has reached the stage where he could have enumerated the rules applicable in his opinion to law-making or to other treaties. However, essentially this distinction manifests itself in the circumstance that, according to the adherents of the thesis, for law-making treaties no recourse can be had to the so-called *travaux préparatoires* for the purpose of interpretation, nor can the principle *contra proferentem* be resorted to for the establishment of the meaning of the treaty.[88]

[87] It appears to be proper to remind of the famous definition of Richelieu, who describes diplomacy as follows: "une science qui n'a jamais cessé d'être un art."

[88] Among the monographers of the interpretation of treaties in particular M. Jokl (*De l'interprétation des traités normatifs par la doctrine et la jurisprudence internationale*. Paris, 1935, p. 180) emphasizes the need for this distinction. She goes furthest in the elaboration of alleged special rules relating to law-making treaties. According to Jokl, at the interpretation of law-making treaties the interests of the community of states prevail, and not the intention of the parties.—Among the representatives of the teleological school in the first place Alvarez emphasizes that the interpretation of law-making treaties is governed by special rules. In his opinion, the interpreter has to keep before his eyes the "general purpose" of the treaty and take into consideration the "changing conditions of life of the peoples". A. Alvarez (*Annuaire*, 1952, Vol. 44, tome II, p. 366) exposed his doctrine in the separate and dissenting opinions attached to

Earlier we have already discussed the problem of preparatory work in detail,[89] and have demonstrated that a study of *travaux préparatoires* is one of the means of vital importance for the elucidation of the intention of the parties at treaty-making. The elimination of this means at the interpretation of law-making treaties can be proclaimed only by those who would have the meaning of the treaty detached from the intention of the parties. The problem of the application of the technical principle *contra proferentem* is of a by far smaller significance. Undoubtedly the principle will have fewer chance of application in the event of multilateral treaties than when it comes to interpreting bilateral treaties. However, this has nothing to do with the content or character of a treaty. It is rather the number of contracting parties and the circumstances of drafting that have a word to say.

Both the Vienna Convention and international judicial practice appear to confirm our opinion, according to which in view of principles and rules to be applied no distinction can be made between law-

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the decisions of the International Court of Justice, and as far as the problem of law-making treaties is concerned, in particular in the debate in the Institut de Droit International. According to Q. Wright (The Interpretation of Multilateral Treaties. *The American Journal of International Law*, 1929, No. 1, p. 101) recourse to the preparatory work for the interpretation of law-making treaties would in general lead to an interpretation contrary to the intention of the contracting parties and put obstacles in the way of an effective enforcement of the convention. At the same time, however, he points out that there is not a sharp line between the two categories of treaties. — According to Paul de la Pradelle (*Annuaire*, 1956, Vol. 46, p. 325), as far as multilateral treaties of an institutional character are concerned, i.e. treaties in which he includes in the first place treaties calling to life international organizations and in general the so-called law-making treaties, the intention of the parties has no decisive role. These treaties define the order of international competences and segregate these from the will of the parties. In many cases there is not even a common will of the parties. This doctrine, which in point of fact blurs the notion of a law-making treaty, eventually approximates the point of view represented by Alvarez. — On the other hand, A. Favre (L'interprétation objectiviste des traités internationaux. *Schweizerisches Jahrbuch für internationales Recht*. Bd. XVII, 1960, pp. 86 et seq.) believes that in the case of law-making treaties the chances of a "subjectivist" interpretation are far better than with other treaties, for which the international judge will prefer in general to adopt an "objectivist" interpretation.

[89] See pp. 120 et seq. above.

making and other treaties. The Vienna Convention, in its articles on interpretation, draws no line between law-making and other treaties, so that its provisions are equally valid for all types of treaties.[90] Not a single judgement or advisory opinion of the Permanent Court of International Justice or of the International Court of Justice refers in connexion with the interpretation of the provisions of a treaty to a given rule as such as has been resorted to because of a law-making or another treaty. As regards e.g. preparatory work, within the limits drawn by it, the International Court of Justice takes it into consideration equally for both categories of treaties. It may suffice to quote two cases taken at random from the practice of the Court. So e.g. the International Court of Justice in the judgement determining the frontier dispute between Belgium and the Netherlands refers to the preparatory work of the treaty and the intention of the parties bringing about it.[91] This is the case also with the advisory opinion given by the Court on the legal question arisen in connexion with the constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization.[92] It is beyond doubt that for those distinguishing between law-making and other treaties the one fixing the frontier between Belgium and the Netherlands is typically a treaty of the first, whereas the Convention for the Establishment of the Inter-Governmental Maritime Consultative Organization comes within the scope of the second category of treaties.

As regards the application of the principle *contra proferentem*, there is no express reference to it in the practice of the Permanent Court of International Justice and the International Court of Justice. Although in the first case heard by the Permanent Court of International Justice, the so-called Wimbledon case, France pleaded that to law-making treaties the principle *contra proferentem* could not be applied,[93] the Court by-passed this argumentation in its judgement.

[90] Waldock's commentary to the draft convention (*Yearbook 1966*, Vol. II, p. 219) does not take such an unambiguous stand on this question, as he believes that the character of a treaty might affect the applicability of a particular principle or method of interpretation. However, he adds that for the purpose of formulating the general rules of interpretation the International Law Commission did not consider it necessary to make such a distinction.

[91] *I.C.J. Reports 1954*, pp. 257 et seq.

[92] *I.C.J. Reports 1960*, pp. 160 et seq.

[93] *P.C.I.J.*, Ser. C, No. 3, Vol. I, pp. 172 et seq.

Nevertheless, on other reasons it gave judgement for France and the other applicants.[94] In arbitral awards where there is reference to the technical rule *contra proferentem*, nothing to the effect has been said as if the special character of the treaty had called for the application of the principle.

Hence, according to what has been set forth above, for the purpose of interpretation the distinction between law-making and other treaties has to be rejected. For our part, we are for the principle of the uniformity of the rules of interpretation, in a sense that these rules are equally valid for all categories of treaties. However, in this connexion the question may be asked whether it is necessary at all to draw a distinction between law-making and other treaties. The question seems to be justified the more because in the literature on international law controversial opinions turn up. Part of the writers on international law, with a fair number of Hungarian writers among them, emphasize with conviction the need for a distinction between law-making and other treaties. This doctrine may be discovered in several Hungarian works, and so also in the Hungarian textbook on international law edited by Gyula Hajdu.[95] At the same time in foreign literature the opinion is making headway which rejects this classification of treaties.[96]

[94] Judge Schücking in his dissenting opinion attached to the judgement refers to the principle *obscuritas pacti nocet ei qui apertius loqui potuit*, a principle which ought to have prevailed in the case in question. Hudson, Manley O.: *World Court Reports*. Washington, 1934, Vol. I, p. 187.

[95] Buza, L. and Hajdu, Gy.: *Nemzetközi jog* (International law). 3rd ed., Budapest, 1961, p. 227.

[96] Of the Soviet literature, we would refer to G. I. Tunkin's excellent theoretical work [*Теория международного права* (Theory of international law). Moscow, 1970, pp. 102 et seq.]. Of the monographs dealing with the law of treaties, mention may be made of the often quoted work of V. M. Shurshalov (pp. 117—118). As regards bourgeois literature of international law, Lauterpacht in his report to the Institut de Droit International doubts the justification of a distinction between law-making and other treaties (*Annuaire*, 1950, Vol. 43, tome I, pp. 374—375). Incidentally Lauterpacht for a long time back already had attributed only a relative value to this distinction of treaties (*Private Law Sources and Analogies of International Law*, p. 157); H. Kelsen (*Principles of International Law*. New York, 1952, pp. 319—320) determinedly rejects this distinction pleading that the essential function of any treaty is to make law, that is to say, to create a legal norm, the only difference being that whereas the so-called law-making treaties are treaties

The adherents of the distinction in general quote a number of practical arguments in favour of the classification, in the first place the differences manifesting themselves in interpretation. This argument has been refuted above. On the other hand, as regards the alleged difference between law-making and other treaties, concerning their binding force, here an uncompromising negative attitude has to be taken. This doctrine mainly propagated by Scelle and Alvarez, and some of their followers, want to discover in the law-making treaty a veritable international legislative act binding upon all states irrespective of whether or not a state has formally become a party to the treaty, i.e. whether or not it has signed and if necessary ratified the treaty, or acceded to it subsequently. This untenable doctrine, constituting a gross violation of the fundamentals of international law, by a distortion of the notion of law-making treaty wants to force even by law the will of the stronger states on the weaker states without their consent. Although we have spoken of distortion, yet even this reminds of how often an uncalled-for classification will not remain wholly innocuous, but may become a real danger and a tool for the enforcement of an imperialist doctrine of law. As for the binding force, there is no difference whatever between a law-making and another treaty. Both are equally binding on the contracting parties, yet only on them, and in no case on third states. We adhere to this thesis also against the arguments forthcoming from the opposite side, that only a law-making

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creating general norms, the others are creating individual norms. According to M. Sibert (*Traité de droit international public*. Paris, 1952, Vol. II, p. 188), there is an ostensible difference only between law-making and other treaties. Hambro in his paper on the interpretation of the United Nations Charter comes to the conclusion that as shown by experience there is no great utility in dividing treaties into law-making treaties and contract treaties (Cf. Pollux: The Interpretation of the Charter. *The British Year Book of International Law*, 1946, p. 70). Ph. Jessup (*A Modern Law of Nations*. New York, 1948, p. 139) too believes that the segregation of the two categories is unjustified and specially emphasizes that for the purpose of the establishment of rules of interpretation this segregation is of no significance. R. Quadri also rejects the idea of a distinction of law-making and other treaties (Cf. *Diritto internazionale pubblico*, 2nd ed., Palermo, 1956, p. 100). G. Dahm in his large manual of international law (*Völkerrecht*, Stuttgart, 1961, Bd. III, pp. 9—10) emphasizes that the same legal rules are normative for both categories of treaties, so that a differentiation is unjustified.

treaty contains legal norms. In point of fact both categories of treaties incorporate legal norms, notably a legal norm for a single case, or such as to be enforced repeatedly in the future. That is, either category of treaties will create a legal norm, their binding force being the same, and it is exactly this circumstance which first of all justifies the removal of this distinction.

We should be led astray from the subject-matter of this work, if we were absorbed in the refutation of the arguments adduced by the adherents of a differentiation of law-making and other treaties for the practical justification of their point of view. All we should like to add is that in international practice there is no difference between the two categories as regards the need for ratification, the applicability of the clause *rebus sic stantibus*, and the effect of war on treaties either.[97] If the consequences of war are examined, another classification will suggest itself, namely a classification distinguishing between bilateral and multilateral treaties. This classification is in fact of practical importance, as its impact will in many respects prevail throughout the life of the treaty, although for the purpose of interpretation even this distinction is of a little significance only. However, the differentiation between bilateral and multilateral treaties does not coincide with the differentiation of law-making and other treaties.[98]

Accordingly, on the ground of what has been set forth above, the conclusion will be inevitable that a division of treaties into law-making and other treaties is unnecessary, moreover in given instances it may even prove harmful, as it may promote the spread of doctrines extending the scope of treaties to the prejudice of state sovereignty. For the purpose of the problem of interpretation this classification has no significance, and cannot even have any. International practice has taken a stand in favour of uniformity of treaty interpretation, and this means that treaties are irrespective of their object, content and contracting parties, governed by the same rules and principles of interpretation.

[97] These considerations are mentioned here merely because the adherents of a distinction of the two categories of treaties, in addition to the arguments already quoted, want to discover certain differences between law-making and other treaties mainly in these relations.

[98] As regards the problems associated with the differentiation of bilateral and multilateral treaties we would like to refer to the work of Manfred Lachs: *Umowy wielostronne* (Multipartite treaties). Warsaw, 1958.

PART TWO

THE TERMINATION OF TREATIES

Chapter I

DELIMITATION AND DIVISION OF THE SUBJECT

Part Two of the present work deals with problems associated with the termination of treaties. In the introduction it has already been expounded why of the enormous matter of the law of treaties exactly this part has been singled out and chosen, beside the question of interpretation, for the subject of this work. For this reason here we would limit ourselves to invoke, merely to emphasize the significance of the subject, a statement made in a German work at the beginning of the last century, according to which "the temporal duration of treaties is exactly the most important problem which by the side of the basic principle of the discipline as a whole may be thrown out in the scope of international law."[1] Even though a statement like this in a work otherwise of little significance may appear exaggerated, still it is a good indication of the primordial importance of the set of problems now to be discussed in the scope of the law of treaties.

When discussions have been confined to the problems involved in the termination of treaties, this has been done, from the very outset, with the intention to segregate them from problems of the invalidity of treaties, hereincluded the problem of both void and voidable treaties. Similarly we exclude the questions of amendment and modification of treaties, as also the problem of their revision, these being questions of a partial variation of the provisions of a treaty, and not of its complete termination.

Even so we have no possibility to deal with all cases of the termination of treaties within the scope of this work. We primarily think here of the effects of the extinction of a State and the birth of a new State on the life of a treaty. This problem has been bypassed here, because the succession of States is a separate institution of international law,

[1] Dresch, F.: *Über die Dauer der Völkerverträge*. Landshut, 1808, p. 5.

and therefore the effects of State succession on treaties, hereincluded the termination of certain treaties owing to the extinction of the international personality of either contracting party, has to be discussed within the framework of the institution of State succession.[2] Anyway, also reasons of convenience suggest this restriction of the subject, for changes that come to pass in the life of treaties owing to State succession cannot be dealt with unless a whole set of problems associated with the extinction of a State is touched upon.

Another set of problems which similarly has been left outside the domain of investigations is the effect of wars on treaties, or more closely circumscribed, the problem of the extent to which war terminates treaties. The omission of this problem appears to be justified, because modern international law is based on the prohibition of war, moreover on the general prohibition of force, and consequently the otherwise fairly vague provisions of former international law, which defined the effects of at that time still lawful wars on treaties, cannot retain their validity unchanged. On the other hand, a collective action instituted by the United Nations against an aggressor State does not qualify as war. As a matter of fact, any such action is a joint manifestation of a new type of the international community, to which not all rules of earlier international law can be applied. In these circumstances we think that the effect of war on treaties cannot be discussed here, unless the whole system of modern international law built upon the principle of the prohibition of force is made subject to investigation, and also the potentialities open for the United Nations are examined. However, such a preliminary study would necessarily involve the tackling of all possible consequences of the use of unlawful force, which obviously would have to be made the subject-matter of a self-contained monograph.

It seems partly such and similar considerations must have led the International Law Commission, when it eliminated these two problems from the draft convention. The introduction to the draft even alludes

[2] The literature on international law deals with this problem in general in connexion with State succession. C. G. Fenwick expressly points out that the question of the fate of a treaty when the international personality of one of the contracting parties becomes extinct belongs rather to the law of international succession than to the law of treaty obligations (*International Law*. 4th ed., New York, 1965, p. 543).

to this circumstance.[3] Still at the same time we cannot agree with the International Law Commission, omitting in the draft the analysis of the execution of the provisions of the treaty as one of the cases of its termination.

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The literature on international law classifies the cases of the termination of treaties from various points of view. Various methods of classification are resorted to by the various authors, which often result in a far-fetched categorization lacking all solid fundamental principles.[4]

A certain classification of the causes of the termination of treaties, mainly for a better survey of the problem, is considered desirable also by the author of the present book. Still such a classification will have to reflect differences also in the underlying principles. On this understanding only two large groups of causes may be distinguished, viz. a distinction according as the termination relies on the joint will of the parties, or on the rules of international law. The first category includes the cases when the termination of the treaty has been foreseen by the agreement of the parties either contained in the treaty itself, or made outside it, irrespective of whether or not it is a case of termination supervening automatically, or by a legal declaration of one of the parties. For this reason termination of a treaty by way of denunciation is included in this category, since the possibility of denunciation rests on the previous agreement of the parties to the treaty. The second category includes the cases of an *ex lege* termination in like way irrespective of whether or not the treaty is terminated automatically, or by a unilateral manifestation of will of the party authorized to it. The most essential difference between the two categories lies in that any problems emerging in connexion with the termination of a treaty have to be settled in the former case by exploring, in the first place, the intention of the contracting parties, and in the latter, by searching for the relevant rules of international law.

[3] *Yearbook*, 1966, Vol. II, pp. 176—177.

[4] Since these classifications do not contribute to the settlement of the problems of principle associated with the termination of treaties, we believe we may dispense with enlarging on the individual classifications of the cases of termination of treaties drawn up by the various authors.

Below a schematic layout of the division is offered, which in the following will be applied to a systematization of the cases of the termination of treaties.

I. Termination of a treaty in conformity with the joint will of the contracting parties

(1) The supervention of an event as defined by the treaty
  (a) expiry of the period fixed for the duration of the treaty,
  (b) operation of a resolutory condition
(2) Denunciation
(3) Express agreement of the parties on the termination of the treaty
(4) Tacit agreement (conclusion of a new treaty incompatible with an earlier)

II. Termination of a treaty by operation of law[5]

(1) Execution
(2) Breach of treaty
(3) Change of circumstances
(4) Supervening impossibility of performance

In the following section the problems associated with the termination of treaties will be discussed in detail by keeping in view this classification.

[5] Naturally this category would also include the case of the termination of a treaty owing to the extinction of the international personality of either State, or to war. Since, however, both cases have been excluded from the scope of the present book for reasons made clear above, they have not been taken up in this classification either.

Chapter II

TERMINATION OF A TREATY OWING TO THE SUPERVENTION OF AN EVENT DEFINED BY THE TREATY

1. EXPIRY OF THE PERIOD FIXED FOR THE DURATION OF THE TREATY

As has been stated earlier in the section on the classification of the causes of the termination of treaties, one of the categories includes the cases of a termination of a treaty in conformity with the joint will of the parties. Within this category the case of most frequent occurrence, and the one raising the fewest legal problems, is the case of the expiry of the period foreseen by the contracting parties in the wording of the treaty itself.

Even if not in all treaties, yet in the vast majority of them some sort of a provision has been embodied relating to the duration of the treaty. The term of the expiry may be fixed in a number of forms, still what is essential is that the termination of the treaty is tied to a definite day. Any problem that may emerge here must be settled by an interpretation of the provision in question on the ground of the rules valid for the interpretation of treaties.

The term of expiry may be determined by the contracting parties either by fixing the duration of the treaty in terms of calendar years, or by specifying the calendar day of the termination of the treaty.[1] When the duration of the treaty is given in calendar years, the period for which the treaty is to remain in force is in general reckoned from the day of the treaty's entry into force. Still the parties may dispose

[1] So e.g. according to Article 10 the Soviet–Hungarian Convention on Copyright "has been concluded for three years; the Convention comes into force on the 1st January, 1968". On the other hand, Article 37 of the International Agreement on Olive Oil of 1955 provides that "This Agreement shall remain in force until 30 September 1960". The variety of the formulae used by the contracting parties is well illustrated by a compilation of the Secretariat of the United Nations: *Handbook of Final Clauses* (ST/Leg/6), pp. 54—58.

differently, although this would be rather unusual.[2] The operation of the treaty comes to an end with the expiry of the last day.[3]

However, international practice shows that at least as far as treaties of importance are concerned a definition of the expiry in an above-mentioned "pure" form is of relatively rare occurrence. In general the indication of the expiry of the duration of a treaty is combined with its automatic continuance for a definite or indefinite period. So e.g. the duration of the Warsaw Treaty is of twenty years, still the Treaty will remain in force for another period of ten years for such contracting parties as have not declared their intention of denouncing the Treaty at least a year before its original expiration. Repeated extension is provided by Article XIV of the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention has been concluded for a period of ten years, on the understanding that it should run for additional periods of five years each in respect of the parties not making use of their right of withdrawal. The Convention between Hungary and the Soviet Union on judicial assistance in civil, family and criminal law matters of 1958 remains in force for an indefinite period after the expiry of the originally foreseen period of ten years. The Convention guarantees the right of denunciation to the contracting parties to be made good at any time after the expiry

[2] So e.g. Article 42 of the International Sugar Agreement of 1953 partly detaches the starting date established for the calculation of the five-year period of the validity of the Convention from the date of its entry into force.

[3] H. Waldock in his commentary submitted to the International Law Commission states that a treaty will expire at midnight on the date fixed by the treaty. (*Yearbook*, 1963, Vol. II, p. 62.) According to E. Castrén this cannot be made a rule, for if a treaty was said to terminate e.g. on the 31st December, then the thesis taken up in the draft will hold, but if it was specified in the treaty that the final date was the 1st January, the treaty will become ineffective with the beginning of this day. (*Yearbook*, 1963, Vol. I, p. 94.) The dispute is mostly of an academic nature, still in our opinion here the position adopted by Waldock is the correct one. On the other hand Castrén is right that this as well as the majority of problems associated with treaties eventually develop into problems of interpretation. Since here there is not a case of a peremptory rule, the proper meaning of the provision has to be established by exploring the intention of the parties. Still when an intention to the contrary cannot be discovered, Waldock's thesis will hold.

of the period of ten years by giving one year's notice of their intention to denounce the Convention.[4]

However, as regards the treaties here referred to, except for those coming within the first group, i.e. such as may be renewed once for a term definite, the question may be asked with right, whether here it is a case of treaties of definite duration at all.[5] By a closer investigation of the question the conclusion will be come to that as for their nature these treaties do not differ from those which have been concluded for a term indefinite from the very outset, and that the clause providing for continuance is in reality equivalent to a specific regulation of the right of denunciation.[6] This will be even more striking if the relevant provisions are placed in juxtaposition to the treaties concluded for a term indefinite and granting the right of denunciation or withdrawal only on certain dates. So e.g. in conformity with Article 14 of the Supplementary Convention on the abolition of slavery, the slave trade, and institutions and practices similar to slavery of 1956, the application of this Convention containing no provision regarding its duration is divided into consecutive periods of three years each. The significance of this provision of the convention lies in the fact that notice of withdrawal may be given for the end of each period of three years. Nobody would regard this convention as one concluded for a term definite. However, it should be remembered that as for the provisions governing duration there is no essential difference between

[4] H. Waldock's draft of 1963 wholly unjustifiably contained a provision according to which for want of a disposition on the period of the continuance of a treaty, this further period would be the same as that of the period prescribed for the initial duration of the treaty. (*Yearbook*, 1963, Vol. II, p. 61.) Such a rule has never developed in international practice. Nor is there any need for it, because in general treaties contain provisions regarding the period of the continuance of it, and this by naming a definite period, or by stating the conversion of the treaty to one concluded for a term indefinite. In conformity with present day practice this will take place also in the rare cases when the treaty contains no provisions on the period of the continuance. The provision referred to has been omitted in the final draft.

[5] Cf. Giraud, E.: Modification et terminaison des traités collectifs. *Annuaire*, 1961, Vol. 49, tome I, pp. 42—44.

[6] Treaties providing for a single extension are virtually agreements signed for an extended period of time, i.e. for a term being the total of the two terms. Here the right of denunciation is granted on a single occasion only, i.e. on the expiry of the first term. See below, p. 249.

this convention and the one on genocide. Hence, as regards the treaties embodying the provisions outlined above, inevitably the conclusion will be come to that they will forfeit their validity not owing to the expiry of the duration, but because of denunciation or withdrawal, i.e. they will qualify as treaties concluded by an express regulation of the right of denunciation or withdrawal for a term indefinite.

In connexion with the set of problems just discussed the question may be asked, what would happen if the parties to a treaty not providing for automatic continuance, and concluded for a period definite, continued to execute it without expressly renewing it. It was Vattel who called forth attention to the undecided character of the question. Still fundamentally he recognized the possibility of a continuance of a treaty by tacit agreement.[7] According to Hall there is no obstacle whatever to a tacit renewal of a treaty provided that the intention of the parties to this end is shown unmistakably.[8] This position has become predominant in literature. However, the Harvard draft on the law of treaties shows a certain scepticism to the practicability of the rule and gives preference to the rule tying the continuance of a treaty after its expiry to an express agreement.[9] Obviously, it is this source the American author Gould made reference to, without giving reasons for his statement. According to this author the mere continued execution of a treaty does not amount to its renewal by tacit agreement. Nor could a case of a breach of treaty laid to the charge of the party which subsequently ceased to execute the treaty without any previous notice.[10]

In our opinion for a settlement of the problem the thesis should be taken as a starting-point that in international law in general and in the law of treaties in particular legal consequences have to be attributed to the tacit conduct of the parties. This thesis has its justification in the circumstance that the subjects of international law are, in the first place, states, and here the assumption as if they did not weight the consequences and significance of their acts cannot be admitted. In the same way as in the Legal Status of Eastern Greenland

[7] Vattel, E. de: *Op. cit.*, Livre II, Chap. XIII, § 199 (Classics, 1, 1916).
[8] Hall, W. E.: *International Law*. 6th ed., 1909, p. 352.
[9] Draft Convention on the Law of Treaties. *The American Journal of International Law*, 1935, Supplement, No. 4, p. 1169.
[10] Gould, W. L.: *An Introduction to International Law*. New York, 1957, p. 337.

case the Permanent Court of International Justice held that a state had to be fully aware of the consequences of a statement made by its official representatives,[11] so also the states have to reckon with the consequences of their tacit attitude. If therefore the contracting parties continue to execute the treaty by tacit agreement, this attitude cannot in general be qualified as a procedure void of any obligations. It has to be regarded as a continuance of the treaty unless it can be established from the given circumstances beyond doubt that the intention of the parties has not been directed to a renewal of the treaty.

2. RESOLUTORY CONDITION

A treaty must not necessarily define its expiry by giving the calendar date. It may also provide that the validity of the treaty ceases with the supervention or non-supervention of some sort of a predetermined future event. As a matter of course, for a resolutory condition, at least the date of the supervention of the event must be uncertain, else there would be only a case of a special definition of the date of expiry, whereas as for its termination the treaty would be one coming within the scope of the previous section.

There is a great variety of resolutory conditions embodied in treaties. It will suffice to quote here two examples only, viz. the Warsaw Treaty, whose Article 11 declares that when the European collective security system will be established and to this end a general European collective security treaty will be concluded, the Warsaw Treaty will cease to have effect with the coming into force of the general European treaty. A resolutory condition, although formulated in the opposite sense, has been incorporated in the Convention of 27 May 1957, concluded between Hungary and the Soviet Union on the legal status of the Soviet troops temporarily stationed in Hungary. Article 19 of this convention declares that the convention will continue in force until Soviet military formations will be stationed in the territory of the Hungarian People's Republic. The difference between the two wordings is that whereas in the first instance the expiry of the effect of the treaty is tied to the supervention of a certain event, in the second instance the convention declares the dependence of its effect on the

[11] *P.C.I.J.*, Ser. A/B, No. 53, p. 71.

continuation of a given situation. Still essentially in both instances the treaties terminate on the operation of a resolutory condition.

Special mention has to be made of the specific resolutory conditions embodied in multilateral treaties. In general, the entry into force of multilateral treaties is made dependent on the deposition of the instrument of ratification by a specified number of contracting parties. Rather rarely though still provisions have been taken up in treaties declaring that if for the one reason or the other the number of the parties to the treaty shall fall below the specified lowest number, the treaty will cease to have effect for all parties to it. A resolutory condition of this nature is embodied e.g. in Article IX of the Convention of 1953 on the political rights of women, according to which the convention shall cease to be in force as from the date when the denunciation which reduces the number of parties to less than six becomes effective.

The problem of this resolutory condition had to be raised specially mainly because in some opinions the minimum number specified for the coming into force of a treaty is, even in an absence of a special stipulation to this end, a condition of the continuation in force of the treaty too, i.e. a reduction of the number of the parties would *eo ipso* entail the termination of the treaty. Article 55 of the Vienna Convention decidedly rejects this position, and does so, in our opinion, rightly. For even though the contracting parties did not intend the coming into force of a treaty unless the participation of a definite number of parties to it had been guaranteed, no conclusion can be drawn from this fact as to their intention to bring about the termination of the treaty already in operation in the event of a fall in the number of the parties to it. If this had been their intention, a provision to such effect could have been embodied in the treaty. Still if this had not been done, the presumption remains that the parties did not intend to attach such a consequence to the fall of the number of parties to the treaty.[12]

[12] M. Lachs' opinion that an exception should be allowed from under the general rule if the number of the parties to a multilateral treaty falls to two (*Yearbook*, 1963, Vol. I, p. 95) does not appear to be wholly justified. In support of his point of view he refers to the fact that in this case a multilateral treaty would change over to a bilateral treaty. Lachs quotes as an example the European Convention on Road Traffic of 1949, for the entry into force of which the ratification by three signatories was

The operation of the resolutory condition and with it the termination of the treaty are in general established by the parties themselves. However, there may be cases when the treaty itself stipulates a special procedure for the establishment of the supervention of the resolutory condition. So in conformity with Article 8 of the Treaty of Mutual Guarantee, known as the Rhineland Pact, constituting the

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required, and so originally the convention was meant to be a multilateral one, consequently a reduction of the number of the parties to two should cause the termination of the instrument. We are of the opinion that if the rule embodied in Article 55 of the Vienna Convention is accepted, i.e. if no significance in the period following upon its coming into force is attributed to the number of the parties specified in a treaty as necessary for its coming into force, then it would be of little importance whether there are two or three parties to the treaty. This fact by itself would not affect the character of the treaty in any vital manner. At the same time there is still a possibility of other States acceding to the treaty, so that the number of the parties would again rise. This would not be the case if, owing to a drop of the number of the parties to two, the treaty would have to be considered terminated.

E. Giraud considered it necessary to mention that a multipartite treaty ceased to exist even failing a special provision if the number of the parties dropped to a single one. A more detailed explanation would be superfluous, since it is a notional element of each contract, and so also of an international contract, that there should be two parties at least to it. What sounds rather strange is that according to Giraud there are nevertheless certain treaties which would continue in force for one single party as well (*Op. cit.*, pp. 63—64). In his opinion this could be the case with international labour conventions or with conventions on the protection of human rights. Theoretically he substantiates his position by conceiving that the undertaking of the obligation of a State is such as is binding on it with respect to the international community and at the same time to States becoming subsequently parties to the convention. Still this motivation is by no means conclusive, first because there is no such organized international community with respect to which any actual undertaking of an obligation would be possible, and which as a subject of international law could require the execution of the convention by the contracting party; and secondly because in conformity to present-day international law states not yet parties to the convention cannot present a claim against a state in no legal relation to them. What should be done if further states declared their intention to accede to a treaty the number of parties to which has fallen to one, is an altogether different question. In our opinion, although no example can be quoted here from practice, a treaty which owing to such a fall in the number of contracting parties has terminated cannot, failing a provision of the treaty itself to the contrary, be revived through new accessions.

most important part of the Locarno Treaties, the Pact ceases to have effect if the League of Nations ensures sufficient protection to the contracting parties. However, the fact of the existence of such a guarantee had to be established by the Council of the League of Nations by a two-thirds majority of votes upon request of any of the contracting parties. The Pact would then become inoperative on the expiration of a period of one year from such decision. The inclusion of this provision in the treaty could be explained by the dependence of the operation of the resolutory condition on subjective political considerations and the exploitation of the treaty against the Soviet Union.

At the operation of the resolutory condition it may be argued whether the termination of the effect of a treaty takes place *ex tunc*, or only *ex nunc*. Even Anzilotti believes that the recognition of the *ex tunc* effect is justified, though with limitations, and considers this doctrine fairly widespread.[13] Notwithstanding that, in our opinion, unless the treaty provides otherwise, a termination of the treaty can take place only *ex nunc*, and during the term running from the conclusion of the treaty until the operation of the resolutory condition the treaty must be considered as having validly existed. This position is confirmed by the fact that a resolutory condition does not affect the validity of a treaty and merely defines the effect of an up-to-that-time validly existed treaty in the temporal order. If the parties intend to liquidate the treaty relation between them in the event of the operation of the resolutory condition with retroactive effect, by this accepting the necessarily concomitant complications, then this can be done only by virtue of an express provision of the treaty. However, in many cases this method would be wholly unimaginable. So e.g. it would be impossible to declare the Warsaw Treaty ineffective with retroactive force in the event of the conclusion of a European treaty on collective security.

In our opinion a resolutory condition will have validity only in the event of an express stipulation of the treaty. Radoikovitch takes the opposite position in so far as he admits the possibility of a tacit resolutory condition.[14] It is our impression as if Radoikovitch had been influenced by the opinion which has been formulated in connexion with

[13] Anzilotti, D.: *Cours de droit international*. Paris, 1929, Vol. I, p. 447.
[14] Radoikovitch, M. M.: *La révision des traités et le Pacte de la Société des Nations*. Paris, 1930, p. 36.

the *rebus sic stantibus* clause, still fairly widespread, and which discovers a tacit resolutory condition in this clause. Since this position appears to be unacceptable even as far as the principle of *rebus sic stantibus* is concerned, it being a fiction torn away from reality,[15] the less can it be admitted in other instances. For that matter, even the scruples of Radojković in connexion with the tacit resolutory conditions are on the whole the same as brought forward against the *rebus sic stantibus* clause, namely that a condition of this type introduces a certain degree of arbitrariness into the treaty inasmuch as in general the State itself will decide whether or not the circumstances defined by the condition have supervened.

In the practice of the United States of America on several occasions reference was made to the specific ends for which the treaty has been concluded and in so far as these ends have been achieved, the termination of the treaty has been established. So e.g. at the time of the First World War the United States and certain allied powers concluded treaties on the mutual recruitment of their nationals for military service. Secretary of State Hughes, in 1924, i.e. at a time following upon the end of the First World War declared that "the conditions which called forth the Conventions were temporary in character and have ceased to exist".[16] This case which at first hearing appears to be the application of a tacit resolutory condition is but one of the instances of the application of the *rebus sic stantibus* clause. The reason why the Secretary of State was looking for a different motivation may perhaps lie in the fact that the United States on several occasions took a position against the clause, and so he thought to be more convenient to shroud his position in a certain obscurity.[17]

As a rare example of treaties concluded for a definite, yet uncertain term, Rousseau quotes the armistice agreements which last till the conclusion of peace, and therefore considers the peace treaty a tacit resolutory condition.[18] For several reasons we are unable to adopt

[15] For this see below, p. 372.

[16] Hackworth, G. H.: *Digest of International Law*. Washington, 1943, Vol. V, p. 302.

[17] When the *rebus sic stantibus* clause will be discussed, we shall demonstrate that even in the practice of the United States the clause has been expressly invoked on several occasions (see pp. 341—345).

[18] Rousseau, Ch.: *Principes généraux du droit international public*. Paris, 1944, tome I, p. 526.

this position. In our opinion compared to the armistice agreement the peace treaty is an agreement concluded by the same parties, and incompatible with the content of the earlier agreement, since whereas the armistice agreement maintains the state of war, the peace treaty terminates it. Consequently, an armistice agreement will cease to be in force not owing to an implied tacit resolutory condition, but in consequence of a subsequent treaty relating to the same subject-matter concluded by identical parties. Yet not even the statement can be approved as if the armistice agreement were a treaty signed for a definite term, for as confirmed by practice, an armistice is not necessarily followed by a peace treaty. This was the case e.g. with Germany, where however the state of war came to an end, though in a different manner. At the same time the unconditional surrender replacing an armistice agreement in certain respects still has a legal significance.

Chapter III

DENUNCIATION

Denunciation is the normal method of the unilateral termination of a treaty. In the discussion of this question we still shall remain within the limits of the cases of termination relying on the common will of the parties to the treaty. As a matter of fact, in accordance with the general rule a case of denunciation may arise only in conformity with the express provisions of the treaty, or in accordance with the intention of the parties.

Denunciation is a unilateral declaration of a party to a treaty, which in respect of the party making the declaration purposes the termination of the treaty, in harmony with the intention of the contracting parties expressed in the treaty or established by way of interpretation.[1] Hence the possibility of denunciation will in all cases rely on the agreement of the contracting parties to such end.

1. GENERAL RULES IN CONNEXION WITH THE EXERCISE OF THE RIGHT OF DENUNCIATION

There are several categories of treaty provisions governing denunciation, which differ mainly by the date fixed for making the declaration of denunciation and accordingly by the establishment of the day of the termination of the treaty.

[1] For a definition of the notion of denunciation there is no reason whatever why a distinction often occurring in the literature should be made between declarations of denunciation of bilateral treaties and withdrawal from multipartite treaties (see e.g. Guggenheim, P.: *Staatsverträge*. Geneva, 1942, p. 2). As a matter of fact, as for their nature, the two declarations are uniform, and therefore the present discussions indifferently apply to both. If for the one reason or the other special rules are valid for the withdrawal from a multipartite treaty, this will be noted at the respective place.

1. The simplest formula permits the denunciation of the treaty at any optional time. Within this category, however, several sub-categories may be distinguished dependent on whether the treaty ceases to be in force immediately, or after the lapse of a certain time, or only if a certain additional condition has been fulfilled within this period of time. An example for the first case is contained in the Articles of Agreement of 27 December 1945 of the International Bank for Reconstruction and Development. According to Article VI of this Agreement any member state may declare at any time to the Bank in writing its intention of withdrawal, and withdrawal will become effective on the date such notice is received. The second sub-category differs merely by the day of coming into effect of the denunciation. Here there is a certain notice term. As an example, the convention concluded by certain socialist countries[2] in Prague, on 19 November 1965 on the customs clearance of international goods transports by motorized public vehicles may be mentioned. In conformity with Article 19, any party to the convention may withdraw from it by giving notice of withdrawal to the depositary of the convention, and the withdrawal will take effect six months after the receipt of the notice by the depositary. There are no limitations whatever in the convention as to the day on which withdrawal has to be declared. Finally, as an example for the third case Article 1 of the League of Nations' Covenant may be quoted, which also granted the right of withdrawal to the members at any time, however, with the proviso that withdrawal would come into effect only after two years' notice, and even then dependent on the member in question having fulfilled all its international obligations to this date, hereincluded all its obligations under the Covenant.[3] Similarly provides Article XV of the Convention on

[2] The convention was concluded by the Bulgarian People's Republic, the Czechoslovak Socialist Republic, the German Democratic Republic, the Hungarian People's Republic, the People's Republic of Poland, and the Union of Soviet Socialist Republics.

[3] The provisions of the Covenant went too far when for the coming into force of the withdrawal they insisted on all international obligations of the state in question being fulfilled. To establish whether or not at a given date a state has fulfilled all its international obligations seems to be almost impossible, so that the relevant provisions of the Covenant were lacking in earnestness. In fact, it would have been sufficient if the Covenant had demanded only the fulfilment of the obligations under it for the coming into force of the withdrawal.

multilateral settlement of accounts in transferable roubles, and on the organization of the Bank of International Economic Cooperation concluded in Moscow in 1963 by the member states of the Council of Mutual Economic Assistance. This Article grants the right of withdrawal by giving six months' notice dependent on whether or not the party concerned has within this term met all its obligations resulting from the convention.

2. As for the second category limitations have been imposed on the right of denunciation in so far as the treaty cannot be terminated in this way within a certain initial period. This period is reckoned from either the date of the treaty's coming into force, or the day on which the state making use of its right of denunciation has become a party to it. That is, the clause in question wants to ensure the undisturbed operation of a treaty for a definite initial period, but after the expiry of this period there are no more restrictions on the right of denunciation. Accordingly, after the expiry of the initial period specified in the treaty, from the viewpoint of denunciation, the treaty will come under the same consideration as those in the first category, and then too the same sub-categories be distinguished for both. The category here discussed is preferably resorted to in the case of treaties bringing about international organizations, for whose development an initial undisturbed period of "running in" is highly desirable, and a premature withdrawal of one or another state could be prejudicial. As against to this, the counter-argument that the expiry of such a smooth initial period void of denunciation or withdrawal might induce the states to avail themselves of their right of withdrawal or denunciation carries little weight. It was on this plea that at the creation of the League of Nations France opposed the incorporation of a provision to this effect in the Covenant.[4] In our opinion only the state will have recourse to the right of denunciation which by taking into consideration its interests has anyhow decided to do so, and merely the expiry of the period of the ban of denunciation will not prompt such a state to cease to be a party to the treaty. As an example of the clause here the Convention of 6 March 1948 on the constitution of the Inter-Governmental Maritime Consultative Organization may be mentioned. In conformity with Article 59 of the Convention any party

[4] See Tobin, H. J.: *The Termination of Multipartite Treaties.* New York, 1933, p. 202.

to it may withdraw from the Convention after the lapse of one year from the date of its coming into force, by a period of twelve months' notice. Similarly Article XII of the Convention signed at Geneva on 7 November 1952, to facilitate the importation of commercial samples and advertising material, provides that the Convention can be denounced only after it has been in force for three years, and denunciation shall take effect six months after the receipt by the Secretary-General of the United Nations of the notification of denunciation. In the two cases quoted above the period of ban on denunciation is reckoned from the date of coming into force of the treaty, whereas Article 19 of the Constitution of the Food and Agriculture Organization of the United Nations reckons the term from the day on which the state in question accepted the Constitution. Accordingly, any member may give notice of withdrawal from the Organization after the expiry of a membership term of four years, and such notice shall take effect one year after the date of its communication.

3. A third category of denunciation clauses permits the periodic termination of a treaty. Accordingly, the treaty itself decrees that on the expiry of definite periods of equal or unequal length the parties may have recourse to their right to withdraw from, or denounce, the treaty. Earlier mention has already been made of the Geneva Convention of 1956 on the abolition of slavery, the slave trade and institutions and practices similar to slavery. In conformity with Article 14, the Convention may be denounced by periods of three years, on giving notice to that effect six months before the expiry of each three years' period. Denunciation will take effect on the expiry of the period. In the international labour conventions in general a right of denunciation by periods of ten years is stipulated. The Convention of 1948 on the Prevention and Punishment of the Crime of Genocide permits recourse to the right of denunciation for the first time after the lapse of ten years, and then by consecutive periods of five years each.[5]

[5] Usually the first period is longer, and the following periods are shorter. The reason is that during the initial period it might be difficult to form a proper judgement of the usefulness of the treaty, so that a term of grace of some length should be allowed before a contracting party may denounce it. Rarely though also the reverse may occur, when the initial period, at the end of which the treaty may be denounced, is shorter, and all the subsequent periods are longer. This type of treaties can be exemplified by the veterinary conventions of Geneva of 1935, which the contract-

Provided that the periods specified for the denunciation of a treaty are not unreasonably long this formula has remarkable advantages. The advantages are mainly the following. First of all, a treaty may be terminated by way of denunciation at relatively frequent intervals, still at the same time the fixation of the periods ensures a greater stability of the treaty, and in particular prevents rash and inconsiderate action from being taken merely owing to a hasty overvaluation of the significance of certain events. A case of this type was the withdrawal of Indonesia from the United Nations, and then her return, because of the election of Malaysia on the Security Council. In all likelihood Indonesia would have never taken this step at all, had the Charter granted a periodic right of withdrawal to the member states.

4. Finally, as the last category of clauses of denunciation, the one granting the right of denunciation on a single occasion only during the currency of the period fixed for the duration of the treaty ought to be mentioned. In this case the parties to the treaty may withdraw from it on the expiry of a definite period reckoned from the entering into force of the treaty. Here the Warsaw Treaty should be mentioned which on the expiry of nineteen years permits withdrawal from it on giving one year's notice. If no such withdrawal takes place, the Treaty remains in force for another ten years. This construction of the Treaty in reality from the very outset creates a treaty of a validity of thirty years, which during its running can be denounced on a single occasion only, for the end of the twentieth year.[6]

In connexion with any of the clauses of denunciation special restrictive provisions may prevail dependent on the agreement of the parties. Accordingly, under certain circumstances, contrary to the general regulation, either no recourse at all can be had to denuncia-

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ing parties could for the first time denounce at the end of the second year following upon their coming into force, thereafter at the end of periods of four years each.

[6] Among the clauses of denunciation there are such as make denunciation dependent on the supervention of certain events. So e.g. Article 44 of the International Sugar Convention of 1953 as amended by the protocol of 1956 authorizes a state finding the adjudication of an exports quota prejudicial to its interests to withdraw from the convention. However, a provision of this nature may rather be considered a case of the application of the principle of *rebus sic stantibus*, and incidentally one for which the convention has provided from the very outset. For more details of the problem see p. 374.

tion or its effect will be altered. So e.g. the Geneva Conventions of 1949 on the protection of the victims of war, which in general may be denounced at any time on giving one year's notice, embody a provision that the withdrawal of a state engaged in an armed conflict cannot become effective before the conclusion of peace, and in no case before action directed to the release and repatriation of the persons protected by the conventions has been completed. This provision wants to guarantee that the conventions which have a practical application exactly in the event of armed conflicts, should not be terminated during such conflicts. Consequently the notification of denunciation will possibly be effective only on the expiry of a period appreciably longer than the one year's term foreseen by the conventions.

International law does not bring under regulation the question of who is entitled to denounce a treaty, in like way as there are no provisions as to who is entitled to conclude a treaty. Both questions should be settled by the municipal law of the individual states concerned. In general, municipal law embodies provisions on the conclusion of treaties, still often there are no instructions as to the exercise of the right of denunciation. This is the case also with Hungarian law. Articles 30 and 35 of the Constitution as amended in 1972 assign the right of concluding treaties to the competence of the Presidential Council of the People's Republic as well as of the Council of Ministers. However, no provisions have been taken up in the Constitution on the right of denunciation. Unlike the Hungarian Constitution Article 49 of the Constitution of the Soviet Union on defining the competence of the Presidium of the Supreme Soviet makes special mention of the denunciation of treaties. Again, there are no provisions in the Constitution of the United States of America on the right of denunciation. It merely assigns the conclusion of treaties to the competence of the President of the United States, who may exercise this right with the consent of the Senate given by a two thirds' vote.

When the domestic law of a state fails to give definite guidance as to the organ of the state authorized to denounce a treaty, the only conclusion which one may come to is that the right of denunciation is vested in the same organ as the right to conclude a treaty.

For want of provisions to the contrary, the competence of concluding a treaty at the same time implies the right of denouncing it. In the majority of cases this rule holds in international practice, and so in Hungary too in general the Presidential Council decides on the

denunciation of treaties. The denunciation of the Warsaw Treaty at the time of the counter-revolution of 1956 took place in violation of this principle, and therefore the denunciation had to be considered unlawful among others for this reason. In the practice of the United States the President announces the denunciation of a treaty. However, the presidents on several occasions did so without the preliminary consent of the Senate, which otherwise the Constitution decrees for the conclusion of treaties.[7] According to the Department of State it has occurred several times in the United States of America that by Act of Congress certain treaty provisions were abrogated without taking action at the same time for the international abrogation of the treaty by way of denunciation by the President.[8] Such an unlawful procedure making impossible the execution of a treaty in the territory of the state in question does not affect the validity of the treaty, still it entails the responsibility of the state on the international plane.

Article 67 of the Vienna Convention deals with the problem just reviewed only in so far as it defines the state organs which do not have to produce full powers in case of denouncing a treaty. In this respect the provisions of the Convention are very much the same as those of Article 7 dealing with the authority for the procedure of the conclusion of a treaty. Whereas, however, Article 46 of the Convention contains provisions as to the extent a state may for the establishment of the invalidity of a treaty invoke the fact that its internal rules regarding competence to conclude treaties have been violated, no such rules have been taken up in the Convention in respect of denunciation. Obviously the International Law Commission then in charge of preparing the draft convention must have thought that a case of the invalidation of the denunciation of a treaty on the plea of the violation of a provision of internal law was unlikely in practice. Still

[7] Since it is outside the scope of the present investigations, here merely mention is made of the practice that has developed contrary to the spirit of the Constitution in the United States of America, where the overwhelming majority of international agreements (according to American experts more than ninety per cent) are qualified as "executive agreements" and not as "treaties", and are therefore withdrawn from under the control of the Senate.

[8] The Law of Treaties as Applied by the Government of the United States of America, Washington, 1950 (stereotyped publication of the Department of State), pp. 170—171.

there are exceptions to this assumption, as the example of the Warsaw Treaty may serve as a warning how critically the unlawful denunciation of a treaty by an organ of the state lacking authority may violate the interests of the very state. If in the case of the Warsaw Treaty the problem had not emerged for other reasons, this circumstance cannot be construed so as to justify the neglect of this question at the codification of the law of treaties. In our opinion the correct solution must be identical with that to be applied for the conclusion of treaties, i.e. to accept the provisions of domestic law as normative at the establishment of the competence of the organ making the relevant declaration.

A declaration made in violation of essential provisions of competence of internal law should be considered, in general, null and void, whether it was intended for the conclusion of a treaty or for its denunciation. This point of view is in harmony with the position usnally adopted in diplomatic practice, and in international judicature, although here it should be noted that positions defeating this principle may also be encountered.[9] The science of international law itself discusses the problem only in connexion with the conclusion of treaties, and here too this point of view has to be considered predominant. The partisans of this position are among others Oppenheim,[10] Rousseau,[11] in the Soviet literature Shurshalov[12] and Tunkin.[13] Formerly the drafts of the International Law Commis-

[9] A correct point of view concerning the effects of provisions on competence of municipal law in respect to the validity of a treaty was reflected, in our opinion, by the arbitral award of President Grover Cleveland of the United States in the frontier dispute between Costa Rica and Nicaragua in 1888 (Moore, J. B.: *International Arbitrations*. Vol. II, p. 1946), further by the award in the Georges Pinson case (*Reports of International Arbitral Awards*. Vol. V, p. 406). We have no knowledge of a judicial decision dealing with the validity of a declaration of denunciation in this respect.

[10] Oppenheim, L. and Lauterpacht, H.: *International Law*. 8th ed., London, 1955, Vol. I, p. 887 et seq.

[11] Rousseau, Ch.: *Droit international public*. Paris, 1953, p. 33.

[12] Шуршалов, В. М. (Shurshalov, V. M.): *Основания действительности международных договоров* (Foundations of the validity of treaties). Moscow, 1957, p. 224.

[13] See Право договоров на XV сессии Комиссии международного права ООН (The law of treaties in the XVth session of the International Law Commission of the U.N.). *Sovietskoe gosudarstvo i pravo*, 1964, No. 2, p. 85.

sion also set out from this point of view,[14] however, the last draft and in the wake of it, the Convention to some extent depart from this position, and regard as valid a treaty concluded in violation of the essential provisions of the internal law concerning the treaty-making power, unless the violation of internal law was manifest. The end before the drafters of the Convention was to facilitate the procedure to be followed at the conclusion of treaties and to improve the safety of international communication. However, a number of theoretical and practical objections can be raised against this attitude. The provision will fail to achieve the intended end, since the "manifest" nature of the unconstitutionality of a treaty is by itself rather problematic and may give occasion to grave disputes. The provision itself must be considered objectionable also on principle, because the appointment of the agencies holding power to make legal declarations binding upon the state in question comes within the internal jurisdiction of the state and international law has to respect the relevant statutory provisions of the state.

On the ground of what has been set forth so far the conclusion appears to be justified that the denunciation of a treaty cannot be considered valid unless it has been made by the state organ authorized to this effect in conformity with the relevant constitutional provisions. If, on the other hand, there are no provisions to this effect in the constitution, those relating to the conclusion of treaties must be considered normative.

Denunciation is a unilateral declaration addressed to the other contracting party, for which no formalities have been introduced by international law. The declaration must be considered made at the moment of its receipt by the addressee, i.e. the notice term, if any, must be reckoned from this moment.[15]

In the event of a multipartite treaty, in conformity with the provisions of the treaty, the declaration of denunciation has to be addressed in general to the depositary, who then notifies the parties. If the treaty is silent on the moment of the denunciation becoming effective, a case not infrequent in practice, the question may be asked whether denunciation should be considered accomplished on the day of the receipt of the respective declaration by the depositary, or whether the

[14] See *Yearbook*, 1951, Vol. II, p. 73.

[15] Cf. Kiss, A.-Ch.: *Répertoire de la pratique française en matière de droit international public*. Paris, 1962, tome I, pp. 372—373.

arrival of the respective communication of the depositary at the contracting party should be decisive for this purpose. The raising of this question is by no means the offspring of purely abstract reasoning, as in interstate practice it is of frequent occurrence that an extended period of time lapses between the two dates, mainly owing to a cumbrous red-tape procedure of the depositary.

There are two conflicting opinions here. According to the one, the depositary must be considered the agent of the contracting parties, and so the conclusion is obvious that the denunciation forwarded to the depositary will have to be considered as accomplished with its receipt in respect of the party for which it was intended. On the other hand, the other opinion calls into doubt the function of the depositary of an agent of the parties, and considers him merely an administrator of the treaty, whose appointment merely purposes the simplification of the making of various declarations and statements during the life of the treaty. The partisans of this opinion believe it would be unjust if the consequences of a possible default or negligence of the depositary appointed merely for reasons of technical advantages would afflict the parties to the treaty directly. Consequently they emphasize that the direct executors of the treaty are the parties themselves, and for the supervention of the effect of the denunciation only the moment can be decisive at which the parties obtained knowledge of the denunciation.

There is an inkling of truth in both reasonings. Still both positions have their drawbacks. When the first opinion holds, the party serving the notice will be freed of any obligations under the treaty at the moment the denunciation has been received by the depositary, unless a period of notice has been stipulated in the treaty. On the other hand, the other parties would consider themselves bound by the treaty for a sufficiently long time until the notification of the depositary has been received. They would act accordingly and would be at a disadvantage in respect of the party denouncing the treaty. Although the second opinion eliminates this disadvantage, it shifts the consequences of the depositary's default upon the party denouncing the treaty, at the same time it creates an uncertainty as regards the date of the termination of the treaty, as in respect of the various contracting states denunciation would become accomplished at different moments, namely on the day of the receipt of the notification by the parties to the treaty.

In international practice the first position prevailed.[16] This is also reflected by the treaties containing an express provision on the supervention of the effect of denunciation. The treaties perused by us almost without exception express this position. There is no exception on record as regards treaties come into being under the auspices of the League of Nations or the United Nations. In each case the receipt of the notice of denunciation by the Secretary-General is considered decisive. It is for this reason that the provision taken up in Article 78 of the Vienna Convention appears to be somewhat unjustified. Accordingly any notification made in connexion with the Convention, hereincluded the notification of denunciation,[17] shall be deemed to have been made only on receipt of the notification of the depositary by the parties concerned, i.e. to have a legal effect in respect of them. This provision runs counter actual practice and in our opinion is apt to create a situation fraught with complexities as regards the actual termination of the Convention. It should be noted that the Convention breaks through the principle embodied by Article 78 as regards the coming into force of the Convention. Article 16 considers the deposit of the instrument of ratification or accession with the depositary normative for the coming into force of the treaty. However, the same considerations which at the coming into force justify this point of view are normative also for the effect of a notice of denunciation.

The direct effect of denunciation is the termination of the treaty for the party having recourse to denunciation. Denunciation will, as a matter of course, put an end to the existence of a bilateral treaty. Still in respect of multipartite treaties the rule will hold in general that the withdrawal of one contracting party does not affect the position of the others, so that these will remain parties to the treaty. Nevertheless in a number of multipartite treaties provisions have been incorporated which qualify a definite number of denunciations as a resolutory condition, so that the treaty will be terminated also for the other contracting parties. Here in the opinion of the parties the targets set by the treaty cannot be achieved unless with the participation

[16] Cf. *I.C.J. Reports 1957*, p. 146.

[17] Although Article 78 does not expressly mention the declaration of denunciation, still from the commentary to Article 63 of the Draft it is evident that the effect of the article here quoted extends also to such declarations.

of a certain number of parties in the treaty. Mention has already been made of the Convention on the Political Rights of Women.[18] Owing to its heterogeneous structure, here reference will be made to Article XV of the Moscow Convention of 1963 on the multilateral settlements in transferable roubles and the Constitution of the Bank of International Economic Cooperation: according to this provision, the Convention will lapse when two thirds of the parties denounce it. However, by way of exception, the case may occur that the withdrawal of a single party from a treaty will make it cease to be of interest for the other parties and consequently it will have to be terminated in respect of all parties. A termination on this ground may take place in the event of an express provision to such effect taken up in the treaty.[19] This applies in particular to treaties of alliance or to international agreements on the limitation of armaments. In the latter instance the security of the remaining parties to the treaty would be jeopardized if the one party withdrawing from it had a free hand for unrestricted armament, whereas the others remained to be bound by the limitations imposed by the treaty. A provision to such effect was Article XXIII of the Washington Treaty of 1922 for the Limitation of Naval Armament. This article declared that the denunciation by a single contracting party would terminate the treaty in respect of all contracting parties.[20] Similar provisions may be discovered in international conventions of an economic nature, in particular in such on certain raw materials.[21]

[18] See above, p. 240.

[19] When there is no provision of this sense included in the treaty, there may be a case of the application of the *rebus sic stantibus* clause (also see p. 410).

[20] Incidentally the same article enjoined on all contracting parties to meet in conference within one year of the date on which a notice of termination has taken effect.

[21] M. Bartoš raised a rather peculiar question on the denunciation of multipartite treaties in the International Law Commission. In his opinion it is rather problematic whether when from a multipartite treaty providing for periodical denunciation several parties withdraw at the end of a predetermined period, the remaining parties may withdraw even after the expiry of that period if there was no chance to take the necessary measures within the specified period, or have to wait for the next period to make this declaration (see *Yearbook*, 1963, Vol. I, p. 96). The question of Bartoš sounds rather bookish, as the situation he has outlined does not present itself unexpectedly and, in general, the parties are informed

As has already been made clear earlier, a denunciation is a unilateral declaration not tied to acceptance. Here as a further problem that of the revocation of the declaration emerges. The question is essentially one of whether a denunciation becoming effective after the expiration of a certain period reckoned from its accomplishment may be revoked unilaterally before its becoming effective, or whether to such revocation the agreement of the other party or parties is required. In practice the problem comes up rather rarely, so that it would be difficult to demonstrate an established customary rule. Article 68 of the Vienna Convention took a stand in favour of unilateral revocation, stipulating that a notification or instrument provided for in Articles 65 or 67 may be revoked at any time before it takes effect. However, in our opinion, the principle of good faith would demand that a denunciation once declared should not be revoked unless the other party to the treaty has given its consent. As a matter of fact, this party has already taken into account that after the expiry of a definite period the treaty would be terminated in conformity with the declaration made by the other party, and may even have taken the action in its judgement required to meet the situation after termination. The same applies also to multipartite treaties, although here the arguments brought forward in support of our position are by no means as weighty as in the former case. Here the treaty in general continues in force, and relations under the treaty will come to an end only in respect of the denouncing party.

The principle now defined also finds an expression in some of the recent treaties signed by Hungary. So e.g. Article 15 of the convention of April 27, 1966, with Czechoslovakia on air traffic declares that "the convention shall cease to have effect on the expiry of one year reckoned from the day on which the other Contracting Party has received

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beforehand of an intended mass-exodus of their partners. Still, however, when a case as here described occurs, the contracting states may terminate the treaty at any time by a common agreement, and in the event of an agreement the parties are not bound by the specified terms. On the other hand, when so such agreement can be reached, the provisions of the treaty have to be applied. Finally, it should be noted that although a case of the nature here mentioned is not likely to occur, still there are conventions, such as e.g. the Convention of 1902 on the Sugar Union, which for such a contingency offer a chance of extraordinary denunciation to the remaining parties to the convention.

the notice of denunciation, provided the notice of denunciation has not been revoked before the expiry of the aforementioned period *by mutual agreement*". A similar provision has been taken up in Article 20 of the convention Hungary signed with Romania on 13 May 1969 on civil air transports. In treaties, however, provisions of this kind on the revocation of denunciation may be discovered only sporadically.

The position here taken has been verified by an example taken from the practice of the United States of America. In 1915 the United States denounced the consular convention of 1878 with Italy. Somewhat later the United States declared that the denunciation was limited to Article XIII of the convention, a declaration which was equivalent to the partial revocation of the denunciation. In a note transmitted to the United States Italy agreed to the declaration, however, for her part she denounced the convention wholly. Yet, subsequently Italy too revoked the denunciation, to which then the Secretary of State of the United States notified the agreement of this country.[22]

In international judicial practice we are not aware of any instance which may be quoted for the revocation of a denunciation once made. On the other hand, a French court, the Commercial Tribunal of Marseilles, taking cognizance of a case referred to it had to decide whether the French–German convention of legal assistance of 1927 was in operation, although France denounced it in 1934, then subsequently, in a few months, revoked the denunciation. The court held that the convention was still in force, failing, however, to make mention of the consent of the other party to the revocation of the denunciation, and preferring rather to base its decision on the principle of the indefeasibility of the acts of the executive power.[23] Still even though this principle might be normative for a French forum in respect of measures taken by the organs of its own state, it cannot establish the international validity of the acts in question.

If the denouncing state makes the revocation of the denunciation dependent on a condition implying a certain modification of the treaty, then we shall in fact have a case of an offer for the conclusion of a

[22] See Hackworth, G. H.: *Digest of International Law*. Washington, 1943, Vol. V, p. 314.

[23] Lackwerke Hugo Leussen v. Ravel, see *Annual Digest and Reports of Public International Law Cases 1933—1934*, Case No. 189.

new treaty, for whose validity, it stands to reason, the consent, i.e. a declaration of acceptance of the other party is required.[24]

Finally, the question of the case of an unlawful denunciation has to be discussed: what if a party to the treaty denounces it, although nothing has been implied in the treaty to authorize this party to do so, or else at the notification of the denunciation this party departs from the relevant provisions of the treaty. There is but a single reply to the question; a denunciation of this kind cannot be considered having a legal effect, so that it does not terminate the treaty.

In the International Law Commission de Luna expressed the opinion that the unlawful denunciation by one party might, notwithstanding the protest of the others, bring about the termination of the treaty and as example he referred to the Treaty of Brest-Litovsk.[25] Both the thesis and the reference to this example are wholly mistaken. A treaty is not terminated by an unlawful denunciation, but possibly by the acknowledgement of the act by the other party, or by the abrogation of the treaty by this party in view of the illegal act. On the other hand, if the party in question insists on the continuance of the treaty, whereas the party having recourse to unlawful denunciation notwithstanding fails to perform its obligations under it, the international responsibility of this latter party will set in with all its consequences following from such delinquency, still the termination of the treaty cannot be established without the consent of the other party even in this case. For that matter, the parties are bound to settle the dispute on the lawfulness of the denunciation by making use of the peaceful means available for them under the provisions of international law.

As regards the reference to the Treaty of Brest-Litovsk, no conclusions can be drawn from it to the thesis formulated by de Luna. The Treaty of Brest-Litovsk was forced on Soviet Russia by the Central Powers, in the first place by Germany, under duress.[26] For this reason the Treaty of Brest-Litovsk cannot be considered one validly brought about under international law. Soviet Russia declared the

[24] The United States of America denounced her Treaty of Friendship with Spain signed in 1902, then again made the withdrawal of the denunciation dependent on certain conditions (abrogation of certain articles, etc.). For details see Hackworth, G. H.: *Op. cit.*, pp. 316—317.

[25] *Yearbook*, 1963, Vol. I, p. 98.

[26] Cf. Lenin, V. I.: *Works*, Vol. 28 (In Hungarian). Budapest, 1952, p. 340.

treaty null and void, as soon as such a step was permitted by the actual circumstances, i.e. after 11 November, 1918, the day on which the armistice was signed between the Allied Powers and Germany. Consequently, here we have not a case of denunciation of a treaty, but of the declaration of the nullity of a treaty signed under duress. Still, for the sake of historical truth, it should be noted that the abrogation of the Treaty of Brest-Litovsk was expressly recognized by the states formerly constituting the Central Powers in the peace treaties signed in the environments of Paris (so e.g. in Article 116 of the Versailles Treaty, in Article 72 of the Treaty of Trianon).

2. DENUNCIATION IN THE EVENT OF A SILENCE OF THE TREATY

Earlier the thesis has been set up that the possibility of a denunciation of a treaty in each case relies on the agreement of the parties to this end. This agreement may expressly be laid down in the provisions of the treaty, or for want of a relevant provision established by an interpretation of the treaty. However, when the treaty is silent on denunciation, and the intention of the parties at the conclusion of the treaty in the matter of denunciation cannot be established even by interpretation, a problem will confront us which calls for a thorough investigation. Such an investigation has to be instituted separately for treaties concluded for a certain period of time and for treaties not making any provision for their termination.

Treaties concluded for a certain period of time will throw out but few problems. As a matter of fact, in treaties of this category the parties have given expression to their intention to maintain the treaty for the period laid down in it, and if an intention to agree to a denunciation of the treaty before the expiry of the period cannot be established beyond doubt, from the stipulation of a fixed period of time the conclusion appears to be justified that the parties did not intend to agree to a unilateral denunciation before time. This conclusion is confirmed by the fact that in treaties concluded for a definite term provisions agreeing to a premature denunciation have been taken up sporadically only. On this understanding the statement may be made that generally a treaty concluded for a fixed period of time cannot be

terminated by way of denunciation before the specified date of expiry.[27] Consequently, the denunciation of the Warsaw Treaty at the time of the counter-revolution of 1956 was in violation of the rules of international law.[28]

The question of treaties signed for a term indefinite is one of by far greater complexity. Naturally here too the statement will hold that the parties to the treaty may of their own free will decide whether or not unilateral denunciation of the treaty should be authorized for any of the parties. If the treaty is silent on this point, so by applying the various methods of interpretation an attempt should be made at establishing the intention of the parties at the conclusion of the treaty.

A relatively straightforward solution will offer itself for treaties concluded for an unfixed period of time which although do not explicitly preclude the possibility of denunciation still at least in other terms refer to an intention of the parties to such end. In this case the unilateral denunciation of a treaty concluded for an indefinite term must be considered precluded.

This rule has to be applied among others to treaties occurring in international practice where the contracting parties emphasize the "perpetual" character of them. Treaties of this category were usual in days bygone, still even though not in too large numbers some of them have been concluded in recent days. During the past centuries almost all treaties of momentous importance emphasized their perpetual character, so e.g. the Peace of Westphalia of 1648, the Treaty of Utrecht of 1713, the Act of Vienna of 1815 and the Treaty of the Holy Alliance which declared the creation of "eternal peace" with the restoration of the former feudal order and its maintenance as its purpose. In recent times the Hungarian–Yugoslav Treaty of Friendship of baneful memory has to be mentioned. The instrument signed on 12 December 1940 in Belgrade in Article 1 declared that "permanent peace and eternal friendship shall exist" between the two countries.

Actually none of the treaties here mentioned was in force for a period longer than a few decades. The Hungarian–Yugoslav Treaty of Friendship was turned into a scrap of paper in a few months, after

[27] The specified date of expiry delimits the original duration of the treaty, without any potential automatic extension of the term.

[28] As has been mentioned, the denunciation also violated the Constitution, and for this reason too was void of validity.

Fascist-Hungary launched its onslaught against Yugoslavia. Pashukanis has correctly pointed out that perpetual treaties started from the foolish assumption as if historical processes could be stopped by some sort of legal formalities. In reality, however, no such treaty could be quoted as would have preserved its perpetual significance throughout the course of history.[29] Incidentally, in the science of international law, in addition to the eminent Soviet scholar many other authorities have called forth attention to the inacceptability of the notion of a perpetual treaty.[30] Still, for the purpose of the present problem, the statement may be made that treaties where the parties to it have given expression to their intention of a permanent maintenance of it cannot be denounced by a unilateral act of one of the parties.[31]

The situation is much the same with a treaty concluded for an indefinite period which declares that its provisions will remain in force until abrogated by a subsequent treaty of the parties. A provision of this nature has been taken up in the agreement between India and Pakistan of 1960 on the use of the waters of the Indus river. Denunciation of a treaty including a stipulation of this type by a contracting party must be considered running counter the intention of the parties. Consequently it cannot be recognized as legitimate.

Finally it is patent that the intention of the parties is necessarily directed to the preclusion of the right of denunciation in the event of treaties which lay down generally recognized peremptory norms of international law and which expound these norms in the mutual relations of the contracting parties. As an example of a treaty purposing the elimination of the threat and use of force, and the respect of the inviolability of the frontiers, the treaty signed between the Soviet Union and the Federal Republic of Germany on 12 August 1970 may

[29] Пашуканис, Е. Б. (Pashukanis, E. B.): *Очерки по международному праву* (Studies in international law). Moscow, 1935, p. 160.

[30] So e.g. according to M. Bartoš, the notion of perpetual treaty is conflicting with history and the reality of social conditions; according to H. W. Briggs the notion itself violates the juristic mind (see *Yearbook*, 1963, Vol. I, pp. 98—99). On the other hand, the position taken by J. G. Castel is less convincing. He, on the ground of the Anglo-Saxon concept of law, considers an eternal treaty quite normal (International Law Chiefly as Interpreted and Applied in Canada, Toronto, 1965, p. 920).

[31] Naturally this is not meant to anticipate the possibility of the termination of a treaty by pleading an essential change of circumstances. The question will be discussed below in greater detail.

be mentioned. In this instance, too, denunciation must be considered precluded.

In the overwhelming majority of instances, however, there are no express provisions in treaties from which the intention of the parties concerning the preclusion of denunciation would appear. Still, from this circumstance no conclusions can be drawn to either the permissibility of denunciation or its preclusion. Hence, in such instances the intention of the parties has to be made clear by other means, i.e. here we are confronted with a problem of interpretation, to which the methods and rules set forth in Part One of this work have to be applied.

It is by having recourse to the historical method of interpretation, i.e. to an analysis of the *travaux préparatoires*, that as regards the Conventions of Geneva of 1958 on the Law of the Sea the intention of the contracting parties to preclude denunciation must be considered established. From the records of the Geneva Conference of 1958 it is evident that the conference by a majority vote rejected a proposal of taking up a provision guaranteeing the right of denunciation in the conventions. Here the legitimate conclusion is that the intention of the parties was directed to the preclusion of the right of denunciation. Still the study of the *travaux préparatoires* may lead to a conclusion in the opposite sense. For example, from the materials of the San Francisco Conference of 1945 it may be established that the Charter of the United Nations, another instrument that fails to settle the question of withdrawal, wanted to guarantee the right of denunciation for the contracting parties.[32]

Still, if the question here discussed has been qualified as one of interpretation, then again we shall have to investigate what the situation would be when neither the express provisions of the treaty, nor an analysis by applying the various methods of interpretation threw a light on the intention of the parties in the matter of the denunciation of a treaty concluded for a term indefinite. Obviously, situations may often arise where the relevant joint intention of the parties cannot be established, mainly because there was no such intention at the conclusion of the treaty. Still there may be a case of inadequacy of means for a reassuring elucidation of the intention of the parties.

The relevant Article 53 of the final draft of the International Law Commission departed from the principle that if the treaty contained

[32] For the withdrawal from the United Nations see more on pp. 263 et seq.

no provision regarding its termination, i.e. that it was concluded for an indefinite period, and was silent on its denunciation or withdrawal from it, it could not be terminated by way of denouncing it unless an intention of the parties to the contrary had been established. Even though the formulation was by no means a fortunate one,[33] still it was beyond doubt that the draft relied on the intention of the parties as regards the existence or non-existence of the right of denunciation. So far the position taken by the International Law Commission must be accepted as the legitimate one. Still, we have to disagree with the International Law Commission when for cases where the intention of the parties cannot be established it lays down the preclusion of denunciation of the treaty as a rigid rule.

In our opinion, this position conflicts with points of principle and is not in agreement with international practice so far predominant. Here again we have to face a problem of interpretation, and when the intention of the parties cannot be elucidated by applying the available methods of interpretation, recourse will have to be had to the general rules of interpretation of international law. As has been made clear in Part One of the present work,[34] in this and similar instances the safeguard of the sovereignty of the states requires the application of a restrictive interpretation, i.e. the sense has to be given priority which imposes the least limitations on the sovereignty of the contracting states. And what is obvious here is that a treaty precluding denunciation and concluded for an indefinite period, i.e. in principle for "eternity", amounts to a far-reaching restriction of state sovereignty and means a burden to the state by far greater than a treaty guaranteeing the right of denunciation. Hence, if no conclusions whatever can be drawn from the treaty as to the intention of the parties, the right of denunciation will have to be recognized as following from the principle of international law demanding respect for state sovereignty. It is with this limitation that the declaration of the Ottoman government of 5 December 1914 replying to the protests against the denunciation of the Capitulations could be accepted. In this declaration

[33] As a matter of fact, in principle, the appropriate course would be to declare that for a settlement of the question the intention of the parties is decisive, and if this cannot be established, recourse may be had to some general thesis. The draft states the rule in the reverse order.

[34] See above, p. 155.

the Ottoman government pronounced the thesis that a treaty not containing any provision regarding its duration could be denounced by anyone of the parties and at any time.[35]

Naturally, the recognition of the right of denunciation in respect of treaties concluded without having fixed their period of duration will hold only for treaties which have not been terminated owing to execution.[36] That is, treaties whose objective is the enforcement of a territorial arrangement and which for their nature cease to be in force with the execution of their provisions, cannot be denounced. This category includes treaties establishing a boundary and treaties involving the cession of territory.

The same principle has to be applied also to peace treaties which, in general, contain also provisions on territorial settlement and the fixation of frontiers, which provisions are, in fact, of fundamental importance just in the treaties of this category. Apart from this, the fundamental objective of a peace treaty is the termination of a state of war between the contracting parties, which immediately on the entry into force of the treaty takes place. A treaty, however, whose principal provision has been executed cannot be denounced for the other provisions. In respect of a peace treaty this thesis will hold the more as here the denunciation of the treaty would amount to the renewal of the state of war, which in the system of modern international law would be impermissible.

Hence the thesis set forth cannot be considered an exception from under the general rule expounded above. Still the same conclusion would be reached if the problem were approached from the side of the intention of the parties. As a matter of fact, no special arguments have to be advanced to prove that in treaties concerning territorial settlement, which have to be executed immediately, the intention of the parties could not have been directed to the creation of a temporary situation. Here, as the parties have had in mind a definitive settlement of the problem, a right of denunciation is out of the question. In fact, a denunciation would in this case mean the unilateral annulment of a settlement already in being. The abrogation of a peace treaty

[35] Quoted by Hill, C.: The Doctrine of "*rebus sic stantibus*" in International Law. *The University of Missouri Studies*, Vol. IX, 1934, No. 3, p. 27.

[36] For the termination of treaties owing to execution see below, pp. 307 et seq.

by one of the parties to it would bring about a still graver situation. Consequently, here the presumption must be that the intention of the parties could not have been directed to such a contingency.

In our opinion, the rule set by us for the denunciation of treaties concluded for an indefinite period has to be applied also to the so-called treaties of codification. If for treaties of this category the intention of the parties to preclude the right of denunciation can be established, as is the case with the above-mentioned Geneva conventions on the Law of the Sea, a unilateral denunciation is out of the question. In other cases, however, in our opinion, denunciation is by far not irreconcilable to the nature of a codification.[37] In support of this statement the Hague conventions of 1899 and 1907 may be quoted, which, although mostly of the nature of codification, recognize the parties' right to denounce the conventions. In the course of the application of a convention of codification, the contracting parties may easily come to the conclusion that such a convention, which can never be restricted to a mere codification of actually prevailing customary rules, but has to contribute to the progressive development of international law,[38] has failed to respond to their original ideas in some of its provisions that have had the development of the customary rules as their objective. In such and similar cases a right of denunciation must be recognized (unless an intention to the contrary of the parties at the time of the conclusion of the treaty can be established) and, as a consequence of denunciation, the state before the coming into force of the convention will be restored for the party having recourse to denunciation, i.e. the international customary law will be normative for this party.[39]

[37] Certain authors, so e.g. O. Nippold, want to preclude denunciation for the so-called normative treaties, provided the treaty does not stipulate otherwise. (*Der völkerrechtliche Vertrag, seine Stellung im Rechtssystem und seine Bedeutung für das internationale Recht*. Bern, 1894, p. 245.) If a classification of treaties recognizing such a category, of which in this case the treaties of codification would constitute a sub-division, were accepted as correct, then what has been said above of the treaties of codification will be even more justified for the entirety of the normative treaties.

[38] The development and codification of international law as referred to in Article 13 of the Charter in our opinion constitute a close unity and the two operations cannot be segregated from each other.

[39] This customary law had to be applied even after the conclusion of the convention of codification in respect of states which had not become parties to it. If therefore a state denounces the convention, the rules of

In this respect the Vienna Conference mitigated the draft of the International Law Commission, without, however, adopting the position of principle expounded above in full. Article 56 of the Vienna Convention in point of fact recognizes the right of denunciation or withdrawal if such a right may be implied by the nature of the treaty. However, apart from a few exceptions mentioned above, the right of denunciation or withdrawal may be inferred from the character of all other treaties. Nevertheless, the Vienna Convention might have preferably used a permissive formula instead of a prohibitory wording, i.e. it might have recognized the right of denunciation or withdrawal also in respect of treaties of an indefinite period of duration as a general rule, and precluded this right inasmuch as the intention of the parties were directed to preclusion, or if the right of denunciation could not be reconciled to the nature of the treaty. A formulation on these lines would no doubt have forestalled many of the disputes emerging in connexion with the denunciation of treaties concluded for an indefinite period.[40]

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customary law will be normative for this state not only in respect of the non-signatories but also of the contracting parties. For this reason, we cannot accept the statement of C. W. Jenks, according to whom the ancient English principle of law saying that the repeal of an act revives the rule of customary law valid before its enactment is not applied in international law. (*Annuaire*, 1961, tome I, p. 252.) Here the case is not one of the revival of an inoperative rule, but of the restoration of an operative rule in the relation of states, among which the rule of customary law has been temporarily superseded by a treaty.

[40] Interest may be attached to the dispute that arose between Senegal and the UN Secretary-General in connection with the fact that Senegal, with its note of 9 June 1971 addressed to the UN Secretary-General, denounced two of the conventions adopted by the 1958 Geneva Conference on the Law of the Sea, to wit, the convention on the territorial sea and the contiguous zone, and the other, on fishing.

Referring to Article 56 of the Vienna Convention, the Secretary-General refused to accept the possibility of denunciation of conventions concluded for an indefinite period without any provision concerning denunciation, while Senegal sticking to its original standpoint put forward a number of legal arguments in support of it (cf. the correspondence sent by the Secretary-General to all states members under No. C. N. 186. 1971. Treaties-13). Although, as has been expounded before, in connection with the 1958 Geneva Conventions on the Law of the Sea we are of the opinion that, as it appears from the *travaux préparatoires*, the parties' intention had been aimed at precluding the possibility of denunciation, we can

Contrary to the principle expounded above, according to which for the denunciation of treaties concluded for an indefinite period the intention of the parties is decisive, there are many who in the literature of international law represent the opinion that a treaty of indefinite duration cannot be denounced unless the treaty expressly permitted it. That is, the partisans of this opinion depart from the position made clear above not only by dismissing a restrictive interpretation, if the intention of the parties cannot be established, but also by banning an inquiry into the intention of the parties for want of an express provision of the treaty. Here the holders of this opinion come into conflict with the Vienna Convention itself. In support of their opinion these authors in general refer to the principle of *pacta sunt servanda*. It is their belief that the recognition of the right of unilateral denunciation would undermine this principle of international law. This argument finds an expression in the Harvard draft of the law of treaties too, which with reference to this argument in Article 34 does not distinguish between treaties concluded for definite and indefinite periods, and as a general rule formulates the thesis that a treaty may be denounced only when such denunciation is provided for in the treaty or consented to by all other parties.[41]

Notwithstanding its attractiveness, this argumentation is misleading. When we began to investigate the problem of the denunciation of treaties, it was made clear that in this respect international law imposed no restrictions on the autonomy of the parties, i.e. the question would have to be settled by elucidating the intention of the parties which often fails to find a clear expression in the treaty itself. If the right of denunciation of a treaty were recognized in conformity with an inexplicit, yet ascertainable intention, why should this recognition be taken as an injury to the principle of *pacta sunt servanda?* We think exactly the opposite opinion would be injurious to this principle, inasmuch as the provisions of a treaty can be applied only within the limits drawn by the intention of the parties. If therefore, notwith-

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accept Senegal's argumentation inasmuch as Article 56 of the Vienna Convention cannot be regarded as a mere codification of the valid customary rule, and therefore in the absence of the intention to the contrary of the parties, for the present, the possibility of denunciation of a treaty concluded for indefinite period has to be, in general, accepted.

[41] *The American Journal of International Law*. Supplement, 1935, p. 1173.

standing the intention of the parties at the conclusion of the treaty, we should refuse to recognize the right of denunciation, we would maintain the treaty in an arbitrary way. Hence the principle of *pacta sunt servanda* postulates the recognition of the right of denunciation of the treaty.[42]

Nor has the principle been infringed if the intention of the parties at the conclusion of the treaty cannot be elucidated and by applying the general principles of interpretation, a restrictive interpretation is accepted. Even here we do not depart from the ascertainable intention of the parties, since, however, this intention cannot be elucidated, one of the two alternatives is chosen, that which is in harmony with the principle of respect for sovereignty. For that matter, it is hardly probable that this procedure would be more of a departure from the implied intention of the parties than the choice of the contrary. Moreover, if it is remembered that the omission of the provisions governing denunciation is not infrequently due to negligence or inexperience on the part of the persons entrusted with the making of a treaty,[43] then it becomes evident that the opinion exposed above, rather than the opposite one, relies on the actual intention of the parties.

As far as the essence of the opinion here set forth is concerned, this found an expression in the Havana Convention on Treaties of 20 February 1928. In Article 17 this Convention recognized the right to denounce a treaty which failed to stipulate the right of denunciation, provided, however, that the denouncing party has complied with all obligations covenanted in the treaty. Nevertheless, this statement, which was obviously formulated under the influence of Article 1 of the League of Nations Covenant on the withdrawal from this organization, cannot be considered a general rule of international law. As a matter of fact, the right of denunciation of a treaty is usually independent of the performance of the obligations under the treaty.[44]

[42] H. Waldock too pointed out that there was some tendency to confuse the question of the right to denounce a treaty with the question of the observance of the rule of *pacta sunt servanda* (*Yearbook*, 1963, Vol. II, p. 67).

[43] It may be that this statement will shock the international lawyers who lack direct diplomatic practice. Still those who have acquired diplomatic practice will no doubt agree with the statement.

[44] It is an altogether different question that the party denouncing a treaty will not be relieved of the obligations imposed on it by the treaty,

Those who refuse to recognize the right of denunciation, are often prompted by practical considerations to seek a loop-hole in order to mitigate the rigidity of the rule they have set. Characteristic is Nippold's argumentation who precludes for a wide category of treaties the right of denunciation,[45] but exempts from under the rule the treaties which dispose of their possible revision. According to Nippold, if a treaty foresees a possible revision, but no amendment can be brought about owing to want of agreement of the parties, a right of denunciation will accrue even for treaties for which otherwise he does not recognize the legitimacy of a unilateral denunciation.[46] In his opinion the stipulation of revision implies the stipulation of the right of denunciation. This argumentation, however, appears to be rather far-fetched. No more than contained by it can be construed into a clause of revision. A provision foreseeing the possibility of the revision of a treaty in general does not imply more than the offering of procedural facilities for amending or updating the treaty. So e.g. Article 46 of the Danube Convention of Belgrade defines the number of contracting parties upon whose request a procedure for revision may be instituted, and also specifies the ways a conference for revision has to be convened. Nevertheless, no conclusion to the legality of denunciation could be drawn from the mere fact that the contracting parties have failed to agree on an amendment of the convention, if this right had not been the legal due of the parties otherwise. No party can lay a claim to the amendment of a treaty; at best it may hope that the other parties will acknowledge its argumentation and amend certain provisions of the treaty. But a frustration of such expectations can by no means entitle the party to the treaty to any claims it is not otherwise entitled to.

The legal acrobatics of Nippold may have influenced Gros in the International Law Commission seventy years later, when taking a position against the right of denunciation in general, he also tried to mitigate his rigid attitude. Gros chose, in an originative yet wholly arbitrary manner, to insert a fictitious *pactum de negotiando* in each

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but not yet fulfilled. Denunciation cannot relieve one of the consequences of a breach of treaty, still among these consequences the forfeiture of the right of denunciation does not figure.

[45] See Note 37.

[46] Nippold, O.: *Op. cit.*, pp. 245—246.

treaty concluded for an indefinite period, i.e. to declare that the parties to a treaty of this type were bound to enter into negotiations for an amendment of the treaty on the appeal of anyone of the contracting parties, and would be causing a breach of treaty did they fail to comply with this obligation.[47] It follows from this the statement what Gros did not pronounce expressly that the party violated in its rights by this breach of treaty may have recourse to a termination of the treaty. However, this fiction is void of any foundation. If there are no provisions whatever in the treaty itself on the revision of the treaty, no state can be forced to enter into negotiations for an amendment of the treaty against its will. Still, if obligation to enter into negotiations could provide a chance for denunciation, it would perhaps be the simplest procedure for a state to begin negotiations and reject any wishes for an amendment in the course of them. In this case the state in question would have met the obligation stated by Gros formally, without, however, carrying through the slightest change on the treaty, so that the exercise of the right of denunciation would become impossible. Obviously, an obligation to carry on negotiations to a satisfactory conclusion could not be established, as an obligation of this nature would constitute a grave injury to the sovereignty of the state. As held by the International Court of Justice in its advisory opinion on the International Status of South-West Africa, no party can impose its terms on the other party,[48] so that an amendment of a treaty can only be brought about as a result of the consent of all parties, although the formation of such a consent is wholly uncertain. Hence, neither this fiction can be accepted as practicable for the solution of the problem.

A by no means less intricate proposition was advanced in the International Law Commission by Waldock, who a few years ago wanted to preclude the possibility of a denunciation of a treaty concluded for an indefinite period and void of a provision defining the right of denunciation, unconditionally, with no heed to the intention of the parties. He was forced to integrate a whole set of arbitrarily selected exceptions into Article 17 of the 1963 draft, which relied on the principle outlined above, merely for the preservation of the rule and to formulate still further exceptions from under the former ones. So e.g.

[47] *Yearbook*, 1963, Vol. I, p. 106.
[48] *I.C.J. Reports 1950*, p. 139.

from under the general rule precluding the right of denunciation he suggested an exception in respect of treaties of alliance and of military cooperation. On the other hand, he exempted from this exception the special agreements concluded under Article 43 of the United Nations Charter.[49] Arbitrariness is particularly patent in this latter instance, as here Waldock took a position in respect of treaties which to this date have never been concluded, so that he had to resort to surmises only as to their potential content. A whole network of such and similar theses made the rule inapplicable, a circumstance which again demonstrated the impracticability of the artificial formulation of rules of international law blind to the exigencies of life. As correctly stated by a Soviet handbook on international law, the principles and rules of international law cannot be enforced actually unless they correctly reflect the objective laws of social evolution.[50]

The problem of the constitutional documents of international organizations deserves separate treatment.[51] Treaties creating international organizations, or defining normative rules for such organizations, in general, contain provisions on the withdrawal from them, i.e. they expressly recognize the right of denunciation of the treaty. Nevertheless, exceptions may occur even with organizations of considerable importance. So no provisions on withdrawal have been taken up in the United Nations Charter or the Constitution of the World Health Organization. Among the organizations confined to a narrower sphere of countries the European Economic Community should be referred to, where in the Treaty of Rome of 1957 governing it no mention is made of a right of withdrawal. The situation is very much the same with the Charter of the Council of Mutual Economic Assistance.

In our opinion, the general rule formulated above should hold also for the international organizations, inasmuch as, for want of an intention of the parties to the contrary, the right of withdrawal has to be recognized. Moreover, here considerations of respect for state sovereignty will bring out even more the prevalence of this rule. While

[49] *Yearbook*, 1963, Vol. II, p. 64.

[50] *Курс международного права* (A treatise on international law). Ed. by V. M. Chikvadze. Moscow, 1967, Vol. I, p. 14.

[51] According to Article 5 the Vienna Convention applies also to the constituent instruments of international organizations, however, only in so far as no special rule has been formulated by the organization as regards the given question.

a treaty in general unites the contracting parties for the regulation of a definite question, international organizations serve as a forum for an extensive cooperation of states. A cooperation of this nature can rely but on the free will of the states. It would amount to a critical restriction of sovereignty if a state could be forced to participate in an international organization at a time when this state considers further cooperation with that organization conflicting with its interests. Yet, even the international organization in question would have to face a prejudicial situation, would certain states be forced to continue their membership in the organization against their will. Obviously such states would simply be dragging on cooperation, and obstruct the activities of the organization. Nor can an endeavour for universality justify such a forced cooperation, as this would lead to sham universality only, and not to a genuine one.

In the San Francisco Conference the delegates of both the Soviet Union and the United States gave expression to their opinion that in an organization of sovereign states obviously each state had the right to withdraw from the organization, moreover the Soviet delegate declared that the right of withdrawal was exactly a manifestation of state sovereignty.[52] According to the delegate of the Ukraine, the right of withdrawal was essential for the safeguard of sovereignty.[53]

As is known, the Charter of the United Nations is silent on withdrawal. In all likelihood the reason was that the drafters of the Charter thought that the incorporation of an express provision on withdrawal might act as an incentive to withdrawal. Obviously, here the example of the League of Nations was before the eyes of the founders of the Organization. Article 1 of the League of Nations Covenant authorized a withdrawal from the organization on a two-years' notice. Undoubtedly the membership of the League of Nations was strongly fluctuating between the two world wars. Still it is hardly probable that the wording of the Covenant was the principal cause of fluctuation. The cause should be sought for rather in the Versailles–Washington system and in the headway fascism was making at that time.

Nevertheless from the documentary matter of the San Francisco Conference the irrefutable conclusion may be drawn that the states

[52] *U.N.C.I.O.*, Vol. I, p. 619. — For the position taken by the United States of America see *U.N.C.I.O.*, Vol. VII, p. 265.
[53] Ibid., Vol. VII, pp. 263—264.

calling to life the United Nations Organization wanted to guarantee the right of withdrawal from the organization to its members. Committee I/2 of the Conference, which drafted the provisions of the Charter governing membership, in a commentary to the text made the following statement:

"... The Committee deems that the highest duty of the nations which will become members is to continue their cooperation within the Organization for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its cooperation in the Organization."[54]

Commission I of the San Francisco Conference which examined the draft of the Committee, in the report submitted to the plenary session of the Conference pointed out that the want of a provision governing withdrawal was not prejudicial to the right of withdrawal, which "each state possesses on the basis of the principle of the sovereign equality of members".[55]

To this it should be added that Gromyko in the name of the Soviet Union raised objections to the formulation of the commentary of the Committee, which might be construed so as to imply some sort of a limitation of the right of withdrawal, and emphasized this would be an infringement of the principles of democracy and sovereignty.[56]

In this matter widely divergent theories have been advanced.[57] Nor has the single case of withdrawal in the practice of the United

[54] *U.N.C.I.O.*, Vol. VI, p. 249.

[55] Ibid.

[56] See Крылов, С. Б. (Krylov, S. B.): Материали к истории ООН (Materials to the history of the United Nations). Moscow, 1949, Vol. I, pp. 112—113.

[57] So e.g. H. Kelsen in his great commentary on the Charter attributes no legal importance to the report of the Committee. (*The Law of the United Nations*. New York, 1951, p. 127.) On the other hand, F. Dehousse considers the report an "integral part" of the legal order of the United Nations and attributes to it a legal force which it would have, had it been taken up in the wording of the Charter itself. (Le droit de retrait aux Nations Unies. *Revue belge de droit international*, 1965, No. 1, p. 38.) Incidentally the problem has a considerable literature already, both theories having their adherents, and there are even writers who would recognize the right of denunciation within narrow limits only.

Nations contributed to a full clearing up of the problem. In a letter of 20 January 1965, the foreign minister of Indonesia informed the Secretary-General of the withdrawal of his country from the world organization giving as reason the election of Malaysia on the Security Council. In his confirmation of the receipt of the notification the Secretary-General took no definite position in the matter. In point of fact, this is not even the duty of the Secretary-General, as questions of membership come within the competence of the General Assembly and the Security Council. However, these two principal organs of the United Nations did not discuss the matter, and only two countries, the United Kingdom and Italy, took exception to the step of Indonesia declaring that the reason advanced by Indonesia did not meet the condition specified by Committee I/2 in its commentary to the draft. However, there was no doubt that in the following period the United Nations ceased to consider Indonesia their member, which was also expressed by the removal of the Indonesian flag.[58]

From the Indonesian affair, beyond doubt, the unconditional recognition of the right of withdrawal may be concluded. On the other hand, when on 19 September 1966 Indonesia declared her intention to cooperate again with the United Nations, the Organization, by bypassing the procedure of admission laid down in the Charter recognized the membership of Indonesia. The Secretary-General gave expression to his opinion that in fact Indonesia did not even withdraw from the Organization, she merely ceased to cooperate with it, a circumstance which permitted the simplified procedure. However, this point of view of the Secretary-General is by no means convincing, and must rather be considered a diplomatic device which by thrusting legal considerations to the background was meant to pave the way for Indonesia for a return to the United Nations. Consequently, no legal conclusions may be drawn from the position taken by the Secretary-General, the less so because by the removal of the flag of Indonesia and even more by the omission of Indonesia at the distribution of the burdens devolving on the members from the annual budget of the Organization, the United Nations gave a decided expression to the recognition of Indonesia's withdrawal.

[58] For details see Schwelb, E.: Withdrawal from the United Nations: The Indonesian Intermezzo. *The American Journal of International Law*, 1967, pp. 665 et seq.

Hence, from the Indonesian affair at least an indirect conclusion may be drawn to the unrestricted recognition of the right of withdrawal, and by no means the conclusion drawn by Schwelb can be admitted, according to which members are entitled to a right of withdrawal under exceptional circumstances only.[59]

The World Health Organization is another comprehensive international organization whose Constitution is silent on withdrawal. Although in the conference establishing the Organization a declarative statement was made without opposition which in the event of an amendment of the Constitution recognized the right of the members to withdraw,[60] nevertheless, from this statement no general conclusion could be drawn as regards the right of withdrawal.

When in 1949 the Soviet Union declared her withdrawal from the World Health Organization, the Director-General referring to the fact that there were no relevant provisions on withdrawal in the Constitution refused to take note of the Soviet declaration. On the other hand, the chairman of the Executive Board merely expressed his regret over the Soviet step, without any protest.[61] The World Health Assembly as the supreme organ of the Organization similarly expressed its regret, but did not protest, nor did it give expression to an opinion as if withdrawal from the Organization were out of the question.[62]

On 20 May 1950 Hungary informed the World Health Organization of her withdrawal. In connexion with this announcement the Health Assembly in its resolution merely expressed that it would at any time welcome with pleasure if Hungary resumed her cooperation with the Organization, and considered any further action undesirable.[63] Here too no protest was sounded, yet on the other hand no express acknowledgement was given to the withdrawal.

Hence, apart from the Director-General, who according to Article 31 of the Constitution is merely the chief technical and administrative officer of the Organization, no other organ called into doubt the lawfulness of the two withdrawals, although no express acknowledgement was given to the declarations. The procedure was very much the same when other states withdrew from the Organization. Consequently,

[59] Ibid., p. 671.
[60] *Official Records of the WHO*, No. 2, p. 74.
[61] Ibid., No. 17, p. 52.
[62] Ibid., No. 17, p. 53.
[63] Ibid., No. 28, p. 72.

the World Health Organization not even at a time when the cold war was at its height, saw a possibility to brandmark the procedure of the socialist states as unlawful, an attitude which justified the conclusion that notwithstanding the silence of the Constitution on withdrawal, it was considered permissible. The fact that the Organization did not strike off the withdrawn members on the list, but registered them merely as "non-active members" did not alter the case. However, this procedure did not rely on the Constitution, as this instrument does not recognize such a category of members.[64] For that matter the lawfulness of withdrawal may be concluded also from the fact that the United States on entering the Organization expressly reserved her right to withdraw on the condition of a one-year notice term. The Health Assembly took note of this, an indication that it did not consider this reservation one conflicting with the Constitution, else not even the Assembly would have been authorized to accept it.

Finally the statement may be made that as far as international organizations are concerned the thesis set forth above will hold too on the understanding that here the principle of respect for state sovereignty postulates even more the recognition of the right of withdrawal than for other treaties.

The case of the denunciation of treaties concluded for an indefinite period, owing to the silence of the treaties on denunciation, will throw out yet another problem, viz. that of the period of notice. If the lawfulness of denunciation has been recognized, it will be obvious that a certain period must be allowed to pass between the notification of denunciation, and the termination of the treaty. The question here is

[64] Nor does the resolution passed on the occasion of the return of the socialist states take a clear stand in the matter, as it speaks of the possibility of the states in question to resume the exercise of their rights and the performance of their obligations (*Official Records of the WHO*, No. 71, pp. 19—20). Incidentally, at the meeting of the Economic and Social Council of the United Nations of 8 July 1955 the Soviet Union announced that it "has entered the World Health Organization", an announcement which refers to a temporary termination of membership. Also the problem of the financial contributions was settled by way of a compromise, as for the period elapsed meanwhile the Organization demanded a token payment being 5 per cent of the contributions. The Soviet Union accepted this by declaring that by this payment it would clear its arrears of the year 1948, due before her withdrawal and also pay for the documentary matter received from the Organization meanwhile (*Official Records*, No. 68, p. 66).

one of the length of the period of notice. In point of fact there is no definite rule of customary law on which we could rely, and even if we accepted Valade's statement that it would be useful to establish the period of notice by way of customary rule,[65] this can be considered but a simple desire, whose translation into reality is for the time being out of the question.

Hence, under actual circumstances no uniform period of notice can be established which would already be normative for all types of treaties. We believe that an obligation to insert a reasonable period of notice between the notification of denunciation and the actual termination of the treaty follows from the principles of international law, in the first place from a *bona fide* exercise of rights. However, this period of notice varies for each type of treaty. An adaptation of the period of notice to the nature of the treaty was demonstrated by the agreement reached at the denunciation of the commercial treaty in force between the United States and Belgium concerning the territory of the so-called Belgian Congo. Since there were no provisions in the treaty on denunciation and on a notice term, the Government of the United States of America in its note of 13 December 1920 proposed the application of a period of notice which is customarily provided for in treaties of a similar nature, expressly stating the conditions of a denunciation. Accordingly, the United States proposed the adoption of a one year's period of notice.[66]

The draft of the International Law Commission, and accordingly the Vienna Convention, adopted a one-year period of notice uniformly for cases where the lawfulness of the denunciation of treaties concluded for an indefinite period without specifying the right of denunciation has been recognized by them. According to the commentary of the International Law Commission, the termination clauses taken up in treaties, in a number of cases, stipulate a shorter period of notice, mostly six months, still the protection of the interests of the other parties to the treaty demands the insertion of not less than twelve months' notice. In our opinion, for certain categories of treaties a period of one year is excessive, still it is beyond doubt that in a codification of the law of treaties it would be difficult to specify periods

[65] Valade, A.: *Sanctions de la violation des traités*. Paris, 1936, p. 23.
[66] Hackworth, G. H.: *Digest of International Law*. Washington, 1943, Vol. V, p. 318.

of notice differentiated by categories of treaties. However, even if recognizing this, it has to be made clear that — since the provision mentioned does not represent the codification of an accepted customary rule — the period of notice adopted by the Vienna Convention cannot as yet be considered an effective rule of international law.

What has been set forth on the right of denunciation of treaties will hold even more for unilateral declarations of binding force. Here too the intention of the party making the declaration will be decisive, still the fact of a unilateral undertaking by itself speaks for the reservation of the right of revocation by the party making the declaration. The problem emerged in a concrete form in connexion with the declaration made by Paraguay on the recognition of the so-called compulsory jurisdiction of the Permanent Court of International Justice. Paraguay by notification addressed to the Secretary-General of the League of Nations on 27 May 1938 withdrew her declaration made in 1933. Six states made reservations in connexion with this notification, whereas no comments were made by the other states. Consequently the Permanent Court of International Justice continued to name in its Yearbooks Paraguay among the states which had accepted the Optional Clause, and mentioned the fact of withdrawal in a note only. A reference of this type was taken up even in the Yearbook of 1960/1961.[67] It was only the Yearbook of 1961/1962 that omitted Paraguay without any comment from the above-mentioned enumeration of states, thus recognizing the actual situation, according to which the withdrawal terminated the obligation of Paraguay relying on her unilateral declaration.

[67] *Cour Internationale de Justice, Annuaire* 1960—1961, p. 209.

Chapter IV

TERMINATION OF A TREATY BY THE EXPRESS AGREEMENT OF THE PARTIES

It is a rule following from the principle of the autonomy of the will that a treaty which comes into being by the agreement of the parties, relying on the *mutuus consensus* of the parties, may be terminated by a joint agreement of the parties, by *mutuus dissensus*.[1] Referring to Roman Law, Laghi too designated this thesis as a natural rule: "*Nihil tam naturale est, quam quidquid eo modo dissolvi quo colligatum est.*"[2] In the event of the consent of all parties, a treaty may be terminated by this way, irrespective of the provisions it contained on termination. Yet, this apparently straightforward rule may be applied with limitations only in the field of international relations.

The enforcement of the rule may be restricted namely by the rights of third states. Nor does the principle *pacta tertiis nec prosunt nec nocent* hold its own in international law unconditionally, at least as far as the term *nec prosunt* is concerned. There are treaties from which third states may directly derive rights, and a termination of such treaties without the consent of such third states by the original contracting parties would violate the rights of the third states. Consequently, the contracting parties cannot touch on treaties creating rights for third states unless the rights of the latter have been reserved. Hence a complete termination of such treaties is precluded, and all

[1] In principle, it is perhaps not quite appropriate to speak of *mutuus dissensus*, as in fact there is a *consensus* even in this case for the termination of the treaty. Only such agreement may give rise for the termination of a treaty. Still we believe that the pregnant expression formulated by Fauchille and Anzilotti, notwithstanding its inaccuracy aptly indicates the cause of the termination of the treaty, namely that, as regards the substantial provisions of the treaty, the mutual consensus of the parties has been broken.

[2] Laghi, F.: *Teoria dei trattati internazionali*. Parma, 1882, p. 349.

the parties to it can do is to carry through amendments on it, which do not act on the rights of third states. For example, can it be imagined that the original contracting parties or their successors should simply terminate the Constantinople treaty of 1888, which guaranteed the freedom of navigation in the Suez Canal to all states? This question has to be answered in the negative, just as the question would whether the Belgrade Convention of 1948 might be regarded as lawfully terminated, with the contracting parties departing from the principle of the freedom of navigation on the Danube.[3]

Beyond this, McNair would have the exception from under the general rule extended also to treaties which though do not directly originate rights to third states, still are subservient to the general interests of a large number of states, e.g. to the general interests of the European countries. As an example he mentions the Treaty signed at the Vienna Congress on 20 March 1815 which declared the permanent neutrality of Switzerland. According to him, this agreement "forms

[3] Of course, this limitation does not apply to the case where the contracting parties have expressly reserved the right of revocation with respect to the rights of third states. The earlier drafts of the International Law Commission contained provisions in agreement with the above. On the other hand, Article 33 of the final draft and Article 37 of the Vienna Convention recognize the limitation of the right of revocation when it is established that the right of a third state was intended not to be revocable or subject to modification. If this latter variant, which in fact is prejudicial to the rights of third states, entered into force, the legal position so far developed would be changed.

The draft of the American Law Institute also restricts the principle set forth above, when it states that if an international agreement confers a right upon a state not a party to the agreement, the consent of such a state is required for the termination of the right, if either

(a) the agreement provides for the acceptance of the right and it has been accepted, or

(b) the state has changed its position in reliance upon the continuing existence of the right, and its termination would be a substantial detriment to the state. (The American Law Institute. Restatement of the Law. The Foreign Relations Law of the United States. Proposed Official Draft, 3 May 1962, p. 580.) In this form actual practice does not appear to support this thesis, so that it must be taken as a position *de lege ferenda*. However, the complicated limitation of the rule and its being tied to conditions hard to establish in concrete cases would lead to frictions among the states, and therefore the acceptance of this rule is by no means desirable.

a part of the public law of Europe" and is of universal validity.[4] It follows from this circumstance therefore that neither such treaties can be terminated by a mere agreement of the contracting parties.[5]

In our opinion this point of view would have excessively far-reaching consequences. Although it is beyond doubt that for the security of Europe the agreement declaring the permanent neutrality of Switzerland is of extreme importance, and therefore general interest attaches to its maintenance, still the point of view that for this reason the treaty could be terminated only by universal agreement of the states cannot be admitted. No such direct rights originated from the Vienna Treaty for third states as from the Treaty of Constantinople or the Belgrade Convention. Consequently, a termination of the Treaty would not violate the guaranteed rights of third states, so that on the ground of international law the consent of these states would not be required for a termination.[6] This opinion of ours seems to be endorsed by international practice, since when in 1926, in Paris, the United Kingdom, France, Belgium and the Netherlands signed the treaty on the termination of the neutrality of Belgium, the sphere of participants was restricted to the parties to the London Treaty of 1839 and their successors.[7]

As regards treaties of a general character, i.e. treaties declaring general principles of international law, and so of interest for all states, which therefore have to be open to all states for accession,[8] again

[4] Lord McNair: Treaties Producing Effects *"erga omnes"*. *Scritti di diritto internazionale in onore di Tomaso Perassi*. Milan, 1957, Vol. II, pp. 23—24.

[5] Lord McNair: *The Law of Treaties*. Oxford, 1961, p. 260.

[6] Neither the provisions of the peace treaties of 1919—1920 regarding the neutrality of Switzerland, nor the resolutions of the League of Nations on the subject can bring about a change here. It is an altogether different question that the abrogation of the agreement of 1815 would gravely affect international peace and security and the Security Council could examine it rightfully.

[7] The four signatories invited Germany, Austria, Hungary and the Soviet Union as the successors of the other states taking part in the treaty of 1839 to accede to the new treaty. Incidentally, the treaty of 1926 never came into force. Still this does not affect the conclusions drawn from the signature.

[8] It is a different question that under the pressure of the Western powers the International Law Commission cancelled this principle in the already completed draft, for in this way certain socialist countries (the

the question may be asked, whether for a termination of the treaty the agreement of certain non-participating states is not required. The case is here one of states which, although participating in drawing up and adopting the treaty, still for want of a signature, ratification, or accession — for the time being — cannot be considered contracting parties.

The question was raised also in the International Law Commission, and there the earlier draft of Waldock laid down the rule in respect of treaties adopted at an international conference or by an international organization that for a certain period from their adoption[9] for the termination the agreement of two thirds of all the states which drew up the treaty was required, hereincluded, however, all states which meanwhile have become parties to it. Those approving this provision pleaded that by this way the first parties to the treaty could be prevented from prematurely agreeing upon its termination and so frustrate its continuation and its becoming one of general validity. In the Sixth Commission of the General Assembly of the United Nations there were also members who adopted the same position, moreover the delegate of Australia, going far beyond the original idea of the drafter, wanted to maintain for the termination of the treaty the necessity of the agreement for twenty-five years of the states which did not yet become parties to it.[10]

German Democratic Republic, the People's Republic of China, the Korean People's Democratic Republic, and the Democratic Republic of Viet-Nam) could be excluded from the treaties. For this reason the efforts of the socialist and certain non-aligned states in the Vienna Conference to have the principles relating to treaties of a general character incorporated in the convention were abortive. Apart from certain exceptions (e.g. the Nuclear Test Ban Treaty of 1963, the Non-Proliferation Treaty of 1968, the Outer Space Treaty of 1967, the Treaty of 1968 on the Assistance to and Return of Astronauts, the Hague Convention of 1970 for the Suppression of Unlawful Seizure of Aircraft) general treaties are mostly open only to states members of the United Nations or of any of the specialized agencies or of the International Atomic Energy Agency or parties to the Statute of the International Court of Justice, or to any other state expressly invited by the General Assembly of the United Nations to become a party to the treaty. This enumeration has been formulated with an edge aimed at the socialist states mentioned above.

[9] The number of years was left open in the draft, however, the commentary wanted to guarantee the enforcement of the provision in question for about ten years.

[10] *UN. Doc. A/CN.4/175*, p. 11.

We believe that this provision which eventually has not been taken up in the final wording of the draft, partly purposed to solve a made-up problem which has not emerged in practice, partly was not in agreement with the principles of modern international law. There is no case on record where the first parties to a treaty of a general character would have terminated it so to say by a *coup d'état*. Nor is it likely that a case of this kind would occur in the future. Anyhow, the at present almost general provision, which makes the entering into force of a general multilateral treaty dependent on its ratification by a greater number of signatories, affords a safeguard against any such attempt. General treaties which come into force by the deposit of the instrument of ratification by two or a few states are of relatively rare occurrence at present, although undoubtedly there are still some. Obviously, before the coming into force of a treaty there can be no talk of parties to the treaty, nor of the termination of a treaty not yet in force, by some of the states. For treaties which come into force only when the instruments of ratification have been deposited by twenty-two,[11] or thirty-five signatories,[12] a conspiracy of this kind directed against the treaty cannot in fact be feared.

Yet, as has already been made clear, a provision that would permit intervention in the operation of a treaty by states having taken part in drawing up but not becoming parties to it could not be reconciled to the actual principles of international law. Such a provision would be faulty also on grounds of principle. The force of a treaty extends only to states which have become parties to it; hence what third states may aspire to is at most to accede to the treaty, provided it is one of a general character, whereas in respect of other treaties they have this right only in so far as it has been granted by the treaty expressly. Even so, such rights can no longer exist than the treaty itself.[13] If the parties to the treaty terminate it, the right of accession too will lapse, as a matter of course, automatically.

[11] Such a provision has been taken up in the Geneva Conventions on the Law of the Sea of 1958, in the Vienna Conventions of 1961 on diplomatic relations and of 1963 on consular relations.

[12] For an example see the two Covenants on Human Rights which the General Assembly of the United Nations adopted on 16 December 1966, further the Vienna Convention of 1969 on the law of treaties.

[13] A treaty may set a time limit for accessions. However, a provision of this kind is unusual in general treaties. General treaties as a rule specify

The legal position of states authorized to accession but not parties to a treaty was made subject to a study also by the International Court of Justice in an advisory opinion in respect of the formulation of reservations to a treaty. In its advisory opinion on Reservations to the Convention on Genocide the Court held that the right to become a party to the convention does not express any very clear notion, and since a state authorized to accession, yet actually not making use of this right, could not derive any rights for itself from the convention, the objection of such state to a reservation could have no legal effect, not even if it had participated in the preparation of the convention.[14] In our opinion, this statement should be considered one of general validity for rights associated with treaties, so that neither such state can protest against the termination of the treaty. In this respect the position is the same as regards a signatory state which, however, has not so far ratified the treaty. Even if in the opinion of the International Court of Justice such a state enjoys a "provisional status" as far as the convention is concerned, in the opinion of the same Court this status "may decrease in value and importance after the Convention enters into force".[15] From this opinion it is obvious that before the ratification the declarations of the signatory state are of a provisional character only, and are void of any effect on the treaty itself. Hence, a state in such a situation cannot directly interfere in the life of the treaty, and cannot obstruct measures taken by common agreement of all parties to a treaty already in operation in connexion with this treaty. If a signatory state in fact attributes great value to its becoming actual party to the treaty and taking part in its life, there are no obstacles whatever to accelerating the procedure of ratification by respecting the formalities decreed by its own constitution and by this way ward off any risks that might arise from the measures taken by the parties to the treaty. However, it should be emphasized that international practice does not appear to have confirmed the soundness of such a contingency.[16]

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a term for the signature; after the expiry of this term there still remains an opportunity for accession.

[14] *I.C.J. Reports 1951*, p. 28.

[15] Ibid.

[16] The problem emerges in a somewhat different form in relation to states which have already ratified the treaty, or have acceded to it, under the provisions of the treaty, however, a certain period must be allowed to

So far we have come to the conclusion that the principle accepted as starting-point, i.e. that the parties to a treaty may terminate it by mutual agreement at any time, may be made subject to limitations in exceptional cases only in a sense that for its termination occasionally the consent of third states might be required. However, as far as general multilateral treaties are concerned, problems of the opposite sign may also emerge, namely the problem whether for the termination of a treaty uniting a large number of participants the consent of all parties would be required in each case.[17]

In the debates of the International Law Commission, statements were sounded that the termination of a treaty could not be made dependent on the agreement of all parties to it. According to Bartoš, the insistence on the agreement of all parties to the termination of a multipartite treaty would be a retrograde step apt to throw obstacles into the path of the development of international law.[18] Amado too believed that in modern times a single state should not frustrate the will of hundred other states.[19]

This extreme, and in this form less practical presentation of the question is no doubt captivating and may even convince a superficial student of the necessity of the recognition of a majority decision. However, this position is diametrically opposed to one of the funda-

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pass between these acts and the coming into force of the treaty in respect of the state in question. Such a state has already assumed an international obligation for the coming into force of the treaty, and so has become directly interested in the operation of the treaty. Although, as far as experience shows, nor has such a state to fear the termination of the treaty so to say by a *coup d'état*, still on a Dutch proposal in Article 54 of the Vienna Convention with general validity, i.e. for all kinds of multipartite treaties (*Doc. A/Conf.39/C.1.L.313*) an amendment has been taken up saying that the parties to the treaty, i.e. the states in respect of which the treaty has already come into force, have to consult the states now mentioned before they decide on the termination of the treaty, still the final decision continues to lie with the parties to the treaty. This on point of principle unobjectionable provision cannot as yet be considered an effective rule of international law.

[17] If the treaty itself authorizes the parties to pass a resolution decreeing the termination of the treaty by a majority vote, then the problem must be considered settled from the very outset. However, a provision of this kind occurs in exceptional cases only, mainly in treaties on certain international organizations.

[18] *Yearbook*, 1963, Vol. I, p. 242.

[19] Ibid., p. 114.

mental principles of modern international law, viz. the sovereign equality of the states, laid down as one of the principles of the United Nations in paragraph 1 of Article 2 of the Charter, and it would imply that the majority might create binding rules for the minority in international relations. This doctrine is in conflict with the whole system of modern international law, and its application to the law of treaties would entail dangerous consequences. For this reason the draft of the Commission, and on its pattern the Vienna Convention, starting from the principle of respect for state sovereignty, insisted on the agreement of all contracting parties for the termination of the treaty in the case here discussed. The same position was taken earlier by the Secretary-General of the United Nations in the analysis of a concrete question.[20]

Still even when this position is accepted it has to be remembered that, for certain important treaties of a political nature, this principle was not applied to the full in the past. The great powers taking part in the European Concert, developed in the wake of the Congress of Vienna, on several occasions amended and terminated among themselves treaties of a decisive influence on the fate of Europe, with validity to all contracting parties, by ignoring the agreement of their partners in the treaty. The partners tricked out of their rights were forced to give their subsequent consent to the changes, but often the powers did not even bother much of this formality. This was the case with several resolutions of the Vienna Congress which were set aside without consulting the other contracting parties previously. The tendency to amend or terminate treaties without the agreement of all parties was particularly marked on the part of the great powers in the peace treaties terminating the First World War, and during the period between the two world wars. In the Paris Peace Conference the absence of Soviet Russia gave cause to a certain embarrassment when it came

[20] The Memorandum of the Secretary-General on the validity of the minorities treaties lays down in principle that for the lawful termination of a treaty the agreement of all parties is required, although the Memorandum also mentions a practice to the contrary (*UN. Doc. E/CN.4/367*, p. 31). The subject-matter of the Memorandum was the study of the question whether the minorities treaties concluded after the First World War continued to be in force after the Second World War. The Secretary-General bases his negative position on the *rebus sic stantibus* clause (see below, p. 358).

to terminating or to amending some of the earlier treaties. A memorandum submitted by the United Kingdom thought to overcome the difficulties by considering Soviet Russia non-existent.[21] The Versailles Treaty e.g. annulled the London Treaty of 1839 on the neutrality of Belgium, although not all parties to this treaty took part in the Versailles Treaty.[22] Still even provisions of the treaties made in the Paris Peace Conference were subsequently set aside by resolution of some of the contracting parties only, so e.g. Article 429 of the Versailles Treaty on the occupation of the Rhineland by agreement of the United Kingdom, France, Italy, Belgium and Germany of 1929. Lachs mentions a similar procedure in the case of the Statute of Tangier.[23] Examples of this kind may be quoted also from the period following upon the Second World War, when the provisions of the Peace Treaty with Italy on Trieste were abrogated by the London agreement of a few states arbitrarily qualified as directly interested.

On the analysis of a number of similar practical examples Tobin came to the conclusion that for the abrogation of treaties constituting the "public law of Europe" the consent of all contracting parties was not required. Here a distinction must be drawn according to the importance of the one state and the other, and to the extent of their interest attaching to the settlement of the question. In his opinion there was no general rule concerning the necessity of a unanimous consent to the amendment or the termination of a treaty.[24]

In modern international law the opinion here set forth can by no means be considered properly founded, as obviously it cannot be reconciled to one of the cardinal principles of international law, viz. the sovereign equality of states. This principle does not tolerate that the great powers should dispose of the rights of smaller states without their consent. In like way it could not be tolerated that certain parties to a treaty arbitrarily came to the conclusion that the interest of their partners in the treaty is lesser than theirs, and on this ground postu-

[21] Miller, D. H.: *My Diary at the Conference of Paris.* New York, 1924, Vol. V, p. 33.

[22] Efforts to correct this have already been mentioned above (see p. 282).

[23] Lachs, M.: *A többoldalú nemzetközi szerződések* (The multipartite treaties). Budapest, 1962, pp. 241—242.

[24] Tobin, H. J.: *The Termination of Multipartite Treaties.* New York, 1933, pp. 244 et seq.

lated the right to ignore the rights originating to the partners in question from the treaty.[25] All parties to the treaty must be considered interested in the treaty as a whole, and for the abrogation of any provision of the treaty the agreement of all parties to it is required. The conclusion to which Tobin came purposed the elevation of the practice of the imperialist powers to the status of a rule of international law, notwithstanding the circumstance that these powers were themselves fully aware of the legal unfoundedness of their procedure, a fact which the above-mentioned British memorandum also confirmed. This theory would inevitably lead even to the recognition of the "legality" of the Munich Pact of 1938, when four great powers of that time set aside Articles 81 and 82 of the Versailles Treaty without consulting the primarily interested Czechoslovakia and a large number of other states taking part in the making of the peace treaty. The socialist states consistently insisted on the unlawfulness of this imperialist practice and repeatedly protested against such and similar violations of law.

Naturally, all this is not meant to give expression to an opinion as if all the measures by which a narrower circle of states had in the past abrogated treaties by ignoring the rights of certain contracting parties, were to be considered invalid without exception and the earlier treaties were effective unchanged. In the first place, the principle of the sovereign equality of states lacked a decided formulation in earlier international law, or at least did not prevail in practice in a consistent form, secondly, the slighted partners in the treaty sooner or later were forced to recognize accomplished facts. So far the fact remains that in earlier international law of the capitalist states an actual situation originally brought about in an unlawful way sooner or later became mostly clad in the guise of lawfulness, which today could hardly be called into doubt on the ground of modern international law.

However, it has to be remembered that the abrogation of a treaty, or certain provisions of it, by some of the parties to it cannot be considered invalid in each case even today. If the example of Trieste is

[25] In the International Law Commission, A. de Luna expressed the opinion that if certain provisions of a multipartite treaty affected only some of the parties, the presumption must be admitted that the directly interested parties could amend such provisions by a subsequent agreement without consulting the other contracting parties (*Yearbook*, 1964, Vol. I, p. 128).

made subject to an analysis, it will be found that the subsequent regulation of the status of Trieste and the setting aside of the relevant provisions of the peace treaty with Italy were recognized among others by the Soviet Union, with reservations though, nor did other countries protest against the new settlement. Under these circumstances the validity of the new regulation of the Territory of Trieste could not be called into doubt with the motivation that a whole series of states taking part in the peace treaty had been omitted in the new agreement. Nobody would now think of protesting against the resolution of the General Assembly of the League of Nations of 18 April 1946 which abrogated the Covenant and dissolved the whole organization, with the motivation that certain members of the League of Nations did not attend this meeting of the General Assembly. This resolution was acknowledged tacitly at least by all former members of the League of Nations. In addition it must be remembered that the resolution sanctioned a situation brought about many years before. The subsequent consent of the states not initiated into the termination of a treaty or at least the tacit acknowledgement of the situation so created, remedies the deficiencies and precludes the possibility of contesting the validity of termination.

For the principle of the agreement of the parties to a treaty there is no difference even as regards treaties adopted in an international organization. Even if the preparation and the drawing up of a treaty have taken place within an international organization, and the wording of the treaty has been adopted by an organ of this organization, say the General Assembly of the United Nations, this will not alter the fact that after the coming into force of the treaty in the first place the states parties to the treaty will be interested in it, hence only these can decide the termination of the treaty.[26] A statement that in the given instance the treaty has been "adopted" by a body of the international organization will but express that the organization has defined the wording of the treaty, whereas real life only has been given to it by the special express manifestation of will of the states by which these states through signature and ratification, or through accession, have become real parties to the treaty. Since the states in question decree the coming into force of the treaty inde-

[26] This is in agreement with Article 5 of the Vienna Convention referred to earlier in this work (see p. 272, note 51).

pendently of the international organization, the opinion of Waldock does not appear justified. Waldock, by quoting among others the Convention on the Political Rights of Women as an example, maintained the position that the organization has an interest in a treaty of this kind, so that its termination should be a matter for the organization.[27]

It is basically wrong to oppose the interests of the international organization drawing up the treaty to those of the members of the organization and the contracting parties. It would be even worse to conclude from this opposition that the international organization drawing up the treaty could by a majority decision, possibly without the consent of the states parties to the treaty, terminate it. In an extreme case this thesis might even say that states which have not become parties to a treaty could decide among themselves on its termination. Nor can it be reconciled to the principles of the law of treaties to say that the states parties to a treaty cannot terminate it unless they have the consent of the states which so far have kept aloof of the treaty.

Consequently, we are of the opinion that from the point of view of international law it is indifferent for the purpose of the termination of a treaty whether this treaty has been brought about within an international organization or outside it. In either case the thesis will hold that unless the treaty provides otherwise it can be terminated only by the consent of all contracting parties, and apart from the exception analyzed above this consent in itself will be sufficient.

There are no rules of international law defining the form of the termination of a treaty. Moreover it is unusual in international law to prescribe formalities, in particular in the scope of the law of treaties, where the consent of the parties manifesting itself in any manner will generally produce the desired legal effect. In principle an oral commitment will also suffice, still in international practice this is of rare occurrence.

In the case of a bilateral treaty the form of a termination by way of mutual consent is not even brought up. At most the question may be asked whether an appeal addressed by the one party to the other purposing the termination of the treaty will suffice in the event of the silence of the other party, or in other words whether in this case silence

[27] *Yearbook*, 1963, Vol. II, p. 71.

implies consent. The question is rather academic, as in general notifications of this kind are not left without a reply. However, there may be a delay in the reply, and in this case on the principle that international law, as a rule, does not tie down the states in matters of formality, after the lapse of a reasonable period of time, on the ground of a *bona fide* procedure, silence may be accepted as consent. No definite rules have been established in international law as regards the reasonable period of time. Nor do we believe that the one-year period appearing in the earlier draft of Waldock[28] could be considered a rule of present-day international law. In our opinion a period of one year is too long, and even the most perfunctory transaction of affairs will not justify it. On the other hand, under actual conditions each case has to be considered separately, and for each case the legal consequences of silence have to be assessed also separately.

For both bilateral and multilateral treaties termination by mutual agreement in general takes place by concluding a new treaty, which expressly supersedes the earlier.[29] In the opinion of certain states, the new treaty abrogating the earlier in order to achieve this objective will have to be clad in the form of the earlier treaty, or will at least have to be of "equal weight". This opinion takes also into consideration the concrete designation of the international agreement, and does not recognize the termination of a treaty by way of an agreement in a simplified form. This opinion was on several occasions sounded in the practice of the United States of America.[30] In this connexion Fitzmaurice correctly remarks that a rule of this kind is unknown in international law and at most the municipal law of certain states may postulate it. In this case the state in question will have to observe its domestic law in selecting the form of the new agreement, still a

[28] Ibid., p. 70.

[29] Certain treaties, instead of naming earlier treaties superseded by them, or even in addition, for the sake of safety incorporate a general provision according to which provisions of former conventions relating to the matters dealt with in the treaty in question shall be considered as abrogated (see e.g. Article 11 of the Convention of St. Germain relating to the liquor traffic in Africa, of 10 September 1919).

[30] This opinion was expressed by the Department of State also officially on several occasions, irrespective of whether the new treaty superseded or simply amended the earlier. See *The Law of Treaties as Applied by the Government of the United States of America*. Department of State, Washington, 31 March 1950, p. 172 (stereotyped edition).

disregard of these provisions, which cannot be considered essential from the point of view of the manifestation of the will of the state and of the acceptance of obligations, will be of no consequence under international law. International law does not establish a hierarchical order for the form of international agreements, and attributes equal force to the various kinds of international agreements. If therefore a treaty concluded in a solemn form is by the agreement of the parties superseded by an agreement of a simplified form, there can be no doubt that the earlier treaty will become ineffective even in this case, if the subsequent agreement expressly provides in this sense.

Chapter V

CONCLUSION OF A NEW TREATY INCOMPATIBLE WITH AN EARLIER

In the foregoing chapter the question of the extinction of a treaty owing to the express consent of the parties was analyzed. When we emphasized the necessity that the termination of the treaty by the tacit agreement of the parties should be made subject to special investigation, we did so because one of the forms such agreements manifest themselves in, for practical purposes perhaps the only one that may come into consideration, raises special problems to which what has been set forth above can offer no satisfactory reply. Here we have in mind the case when the parties conclude a new treaty for the subject-matter brought under regulation by the earlier treaty without expressly providing for the fate of it. In this case the relation of the two treaties has to be defined, and it has to be decided whether or not the new treaty abrogates the earlier. Yet even greater complexities will be introduced in the situation, when the spheres of the parties to the two treaties are not overlapping, i.e. when not all parties to the earlier participate in the new treaty, or in the new treaty states take part which have not been signatories to the earlier.

If the new treaty is silent on its relation to the earlier, then here too the general guiding principle will hold, which may be traced through the entire scope of the law of treaties, viz. that the intention of the parties has to be considered decisive (i.e. the intention the parties had in mind at the conclusion of the new treaty has to be established). If it is beyond doubt that the intention of the parties was directed to the abrogation of the earlier treaty, then this treaty will cease to have effect. An intention of this kind has also to be established when owing to the irreconcilability of provisions governing the same subject the two treaties cannot be applied in conjunction with each other. This is the principle from which also Article 59 of the Vienna Convention sets out, without, however, attributing the termination

of the earlier treaty in the second case too to the intention of the parties to such end. On the other hand, if there is not a case of the kind analyzed before, and the intention of the parties to terminate the earlier treaty cannot be established, then the later treaty will be superimposed on the earlier and supplement it. Here again we are confronted with a problem of interpretation, like in many other instances when a decision has to be made as to the validity or termination of a treaty. If it has been established that by the side of the new treaty the earlier too remains in force, the later treaty will have an effect on the earlier in so far as at the interpretation of the earlier the provisions of the later have to be considered.[1] If certain provisions of the two treaties defy a reconciliation even by way of interpretation, the relevant provisions of the later treaty have to be applied.[2]

Although we have started from the assumption that of treaties governing the same matter, yet inapplicable in conjunction with each other, the latter treaty will abrogate the earlier, we cannot make light of the particular problem that emerges when the later treaty fails to provide for matters brought under regulation earlier. In this case it may be argued whether or not the provisions of the earlier treaty not affected by the later will remain in force. As a matter of fact, the case may occur that owing to the conclusion of the later treaty only certain provisions of the earlier have become ineffective, so that in reality there is simply a case of the amendment of the earlier treaty, consequently the complete termination of the earlier treaty cannot be established. However, it would be preposterous to believe that this point of view can prevail in a mechanical manner. As a matter of fact, if the later treaty has brought under regulation the *essence* of the matter governed by the earlier treaty in a manner departing from the earlier regulation, not even the provisions of the earlier treaty reconcilable to those of the later can be applied. In point of fact, in our opinion in the event of a silence of the later treaty, and if an intention of the parties to the contrary cannot be established, it has to be assumed that with the later regulation of the essence of the matter the parties intended to abrogate the earlier treaty wholesale,

[1] On this problem see what has been said on the methodological interpretation in Part One of the present work, pp. 145 et seq.

[2] This principle finds expression in Article 30 of the Vienna Convention.

and did not intend to maintain certain provisions of minor importance of the earlier treaty in force.[3]

The position here set forth finds expression also in diplomatic practice. By way of example we should like to refer to the dispute between the United States and Egypt in connexion with the Montreux Convention of 1937. Here it was argued whether the convention set aside the Treaty of the United States and Turkey of 1830 in its entirety notwithstanding the circumstance that certain provisions of the latter would be applicable also by the side of the later convention. In the dispute the Department of State pleaded that if the substance of the provisions of the earlier treaty has been superseded by the Montreux Convention, then this treaty must be considered completely wiped out, even though certain provisions of it could be reconciled to the later convention.[4]

Certain treaties expressly state that they do not affect the provisions of other treaties actually in force. By this the parties want to give a clear-cut expression to their opinion that they do not consider the new treaty irreconcilable to the provisions of earlier treaties, and that their intention has not been to abrogate earlier treaties. In this respect the provision here referred to forestalls any disputes that might arise in connexion with the interpretation of the intention of

[3] Obviously, when in a later treaty it has been stated expressly that it supersedes the earlier one bringing under regulation the same matter, not even the provisions of the earlier treaty not incorporated in the later can be recognized as being in force. Notwithstanding the Supreme Court of the United States of America in a dispute referred to it considered the treaty with Japan of 1857 granting extraterritorial privileges to the United States in this country partially valid, although a subsequent convention of 1858 incorporated the earlier treaty declaring it at the same time abrogated. The Supreme Court held that the provisions of the earlier treaty not included in the later remained in force. (See Aufricht, H.: Supersession of Treaties in International Law. *Cornell Law Quarterly*, 1951—52, Vol. XXXVII, pp. 661—662.) This position is unfounded and by taking it the Court was guided by the objective to extend the rights and privileges of the United States of America arising out of the regime of the Capitulations, that is to maintain them also for cases to which the convention of 1858, contrary to the one signed a year before, did not extend them.

[4] Hackworth, G. H.: *Digest of International Law*. Washington, 1943, Vol. V, p. 306. — Egypt, which at the signature of the Treaty of 1830 was a vassal state of the Ottoman Empire, has for the purpose of the Treaty become the successor of the Ottoman Empire.

the parties. A provision of this kind may be found in the exchange of letters attached to the Hungarian–Austrian treaty on judicial assistance in civil matters, and in Article 17 of the Hungarian–Austrian treaty on the estates of deceased persons.

Unfortunately, we cannot agree with those who at the appraisal of the relation between a later and an earlier treaty propose to take into consideration an alleged hierarchical order of the different kinds of treaties. Houlard referring to Scelle's theory on the hierarchical order of domestic legal rules makes distinctions among treaties with regard to the problem now investigated.[5] However, such a distinction is void of any foundations in international practice, nor does theory recognize differences of rank among the various kinds of treaties, as in all of them the will of subjects of international law finds an expression. This applies also to the categories of law-making and other treaties, where there is no difference from the point of view of the relation between the later and the earlier treaty.[6]

There is no difference of rank either among treaties signed "for eternity", or declared unchangeable, and other treaties. According to Kelsen, when the parties to such treaties sign a new treaty conflicting with the earlier, the earlier treaty will be valid, i.e. here the principle of *lex prior derogat posteriori* will prevail.[7] However, in our opinion not even a treaty "for eternity", or one declared unchangeable can be understood in a way as if all parties to it had been bound hand and foot in a sense of preventing them from setting aside the treaty by a new one, be it by tacit agreement. The contracting parties cannot forgo their right to modify a treaty by common agreement, with binding force. Such a waiver cannot prevent a new treaty from being concluded. Hence not even a treaty containing a provision of this kind can be considered an agreement of higher order from the very outset precluding the conclusion of a later treaty conflicting with it.

There are sporadic opinions in the literature of international law as if for want of an express provision a later treaty concluded for

[5] Houlard, M.: *La nature juridique des traités internationaux et son application aux théories de la nullité, de la caducité et de la révision des traités*. Bordeaux, 1936, pp. 105—106.

[6] For the justification of this distinction see Part One, pp. 223 et seq.

[7] Kelsen, H.: Conflicts between obligations under the Charter of the United Nations and obligations under other international agreements. *University of Pittsburgh Law Review*, 1948—49, p. 285.

a definite period of time did not set aside an earlier treaty signed for an indefinite period.[8] This opinion is not confirmed by the rules of international law at all. There is no reason why the contracting parties could not replace a treaty concluded for an indefinite period by one signed for a definite period and why this replacement could not take place by tacit agreement, in result of the conclusion of a new treaty. Here too the question is decided by the intention of the parties, and this will serve as guidance when it comes to decide whether on the lapse of the treaty concluded for a shorter period the earlier signed for an indefinite period should revive. Still, in our opinion, such a revival can only be allowed in exceptional cases, when the intention of the parties to this end can be established beyond doubt. A conclusive presumption as if the parties wanted to suspend the operation of the treaty concluded for an indefinite period only for the period of duration of the later treaty must be deemed non-existent. Moreover, on the contrary, the absence of a hierarchical order of treaties points to the fact that by signing the later treaty the parties wanted to bring about the definitive termination of the earlier.

Yet, on considerations of a possible hierarchical order among treaties, we have to specially examine those two particularly important treaties one of which was intended to become the fundamental instrument of the interwar period, and the other after the Second World War. Both the Covenant of the League of Nations and the Charter of the United Nations, for the performance of this exceptional function, include special provisions governing their relations to other treaties. It is a case therefore of such exceptional treaties as have been intended to become the foundation of the international legal order as a whole, and consequently have to be assigned a special prominent position.

Article 20 of the Covenant of the League of Nations contained the following provision:

"The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which

[8] See D. Anzilotti's argumentation in his separate opinion to the judgement of the Permanent Court of International Justice in the Electricity Company of Sofia case (*P.C.I.J.*, Ser. A/B, No. 77, p. 93). Although Anzilotti took a position in connexion with unilateral declarations on the acceptance of the Optional Clause, owing to its policy-making nature his argumentation in like way applies also to treaties.

are inconsistent with the terms thereof, and solemnly undertake they will not hereafter enter into any engagements inconsistent with the terms thereof.

In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligations inconsistent with the terms of the Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations."

There is nothing in this provision which for reasons of a binding force would raise it above all other treaties. As a matter of fact, as regards the earlier treaties between a member of the League and another, Article 20 of the Covenant conforms to the general principle of international law referred to earlier in this work, when it states that earlier treaties which cannot be reconciled to the Covenant become abrogated. As an example McNair quotes the treaty of neutrality of two states which became members of the League of Nations. The treaty of neutrality might have barred the participation in sanctions provided by Article 16 against aggressors.[9] On the other hand, Article 20 does not provide for the abrogation of a treaty between a state member of the League of Nations and a non-member. This could not even have been decreed by the Covenant without the violation of generally accepted principles of international law. As regards a treaty concluded by a state before becoming member of the League of Nations with another non-member state, whose provisions cannot be reconciled to obligations deriving on state members from the Covenant, Article 20 merely obliges the state in question to take action for the dissolution of the treaty. Still the state in question may do so only within the limitations laid down in the earlier treaty, or in conformity with the general rules of international law. If on this understanding there is no chance for a termination of the treaty, in the given case the relevant provision of Article 20 of the Covenant cannot be enforced.[10]

[9] Lord McNair: La terminaison et la dissolution des traités. *Recueil des Cours*, Vol. 22, p. 514.

[10] A. Goellner does not distinguish treaties signed by member states from those signed by a member state and a non-member state. Consequently, he comes to the general conclusion that the Covenant has not abrogated earlier treaties conflicting with it (*Pré-caducité, caducité et désuétude en matière de droit international public*. Paris, 1939, p. 38). However, in our opinion this position cannot be reconciled to the express provisions of the Covenant.

No other conclusion can be drawn from Article 103 of the Charter of the United Nations, which provides as follows: "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."

The wording of this article already contains no reference whatever to termination of treaties irreconcilable to the Charter, nor does it make distinction between treaties concluded by a state member and another state member, or a state member and a non-member state, or between earlier and later treaties. However, in our opinion, this provision too can only be applied to treaties between a state member and another. Still here the statement that obligations under the Charter have priority is not sufficient. As a matter of fact, in conformity with the general principle of international law, as restated before, the termination of the earlier obligation and in some cases, as specified above, of the whole treaty conflicting with the Charter ought to be established, whereas later treaties conflicting with the Charter cannot become valid as these run counter a peremptory principle of international law.[11] The provision of Article 103 of the Charter cannot extend to a treaty concluded between a state member of the United Nations and a non-member state, still a state member concluding with a non-member state a treaty conflicting with the Charter will be responsible to the other members of the United Nations for breach of treaty under international law. Unfortunately, the doctrine attributing absolute effect to the Charter of the United Nations, i.e. accepting its provisions as binding on third states, cannot be adopted, because it could not be reconciled to the principle of respect for state sovereignty. On the other hand, it is an altogether different case when the treaty in question conflicts with provisions of the Charter of the United Nations which are at the same time universal peremptory rules of international law. If this is the case, the new treaty is null and void. However, here there is not a case of a conflict of two treaties, but one of a conflict of a treaty with the generally binding principles of international law of a peremptory char-

[11] In the following we shall analyze this opinion in general. (See p. 424 below.)

acter — principles which are binding on all states irrespective of their being incorporated in the Charter.[12]

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In this chapter the question has been discussed to what extent a later treaty concluded by all parties to the earlier terminates the latter. However, the study of the Covenant of the League of Nations and the Charter of the United Nations has partly led us to the problem of the extent to which a later treaty affects an earlier, if only some of the signatories of the earlier have become parties to the later treaty.

The principle on which this investigation rests is the one emphasized above, namely that for the termination of a treaty in operation the consent of all parties is required; at the same time, there are no obstacles, normally, to the conclusion of such a separate treaty; but this later treaty can never infringe upon the rights of the other states participating in the earlier treaty. Hence in the relations of the states concluding the later treaty only this will have effect, while the earlier treaty will become ineffective. On the other hand, the relations between the parties to the later treaty and the participants of the earlier treaty, further those existing among the latter group of states will be governed by the earlier treaty in the future too. Express provisions in this sense have been taken up e.g. in the conventions adopted by the second Hague Peace Conference superseding those of the first Hague Peace Conference governing the same matters. Article 18 of the Convention on Treaties adopted by the Sixth International American Conference in 1928 in a generalized form declares the principle

[12] According to McNair, the Charter limits the treaty-making capacity of the state members with general validity and therefore future treaties conflicting with the Charter qualify as invalid (*The Law of Treaties*. Oxford, 1961, p. 218). We are unable to adopt this opinion because notwithstanding McNair's protest this would mean as if the Charter of the United Nations had general binding force also on non-member states. For this reason we cannot consider a treaty concluded by a state member of the United Nations with a non-member conflicting with the Charter invalid unless it is a case of the violation of a peremptory principle of international law laid down in the Charter. It is an altogether different question whether or not the voidness of a subsequently concluded treaty should be established with the motivation that the non-member state ought to have known of the incompatibility of the treaty with the Charter. For this question see Note 23 below.

that of the states participating in a treaty some may bring under regulation their relations by separate treaties.

For the simplification of the legal situation, where there are no legal obstacles and where such a regulation may appear desirable otherwise, a later treaty may oblige the contracting parties to terminate the earlier treaty. This is decreed among others by Article 80 of the Chicago Convention on International Civil Aviation of 1944, which enjoins on each contracting state to give notice of denunciation of the Paris Convention relating to the Regulation of Aerial Navigation of 1919 or the Havana Convention on Commercial Aviation of 1928, if it is a party to either. Naturally, the same article declares that in the relations between contracting states the Chicago Convention automatically supersedes the Paris and Havana Conventions. The labour conventions adopted within the International Labour Organization contribute even more to the clarification of the situation. As a matter of fact, by virtue of the resolution of the International Labour Conference of 1946, in each of the labour conventions a provision has to be taken up according to which the ratification by a state of a possible new convention wholly or partially superseding the earlier amounts to the denunciation of this earlier convention with immediate effect. This provision precludes the possibility of the same state being bound by the earlier treaty in respect of some of the states, whereas its relations to others would be governed by the later treaty.

Still if in the course of the foregoing discussion the statement has been advanced that *as a rule* there are no obstacles to the conclusion of such a treaty within a narrower circle, it also follows that this possibility is not unconditional. Obviously, the conclusion of a treaty by some of the parties to an earlier treaty is permitted, if this treaty expressly decrees so.[13] On the other hand, the conclusion of a new treaty restricted to a narrower circle of former contracting parties is not permitted if the earlier treaty expressly vetoes the conclusion of such a treaty.[14] This is the case also when the later treaty cannot be

[13] Among others such a provision may be found in the Geneva Conventions of 1949 on the protection of the victims of war (see Article 6 of the three conventions relating to wounded and sick persons, further to prisoners of war and Article 7 of the convention on the protection of civilian persons).

[14] The provisions of the Geneva Conventions of 1949 here quoted at the same time contain limitations concerning the signature of treaties in

reconciled to the essence of the earlier.[15] In our opinion, this thesis follows from the generally recognized principle of international law which decrees the *bona fide* performance of obligations. Consequently, some of the participants of an earlier treaty cannot come to agreement in a later treaty upon provisions which are irreconcilable to the essence of the earlier treaty and which therefore would act in bar of its performance. So e.g. it is not possible for some of the parties to a treaty bringing under regulation the status of an international waterway to conclude a separate treaty in respect of their particular section of the waterway containing provisions departing from those of the earlier treaty, since the purpose of the earlier treaty was to establish a uniform status for the waterway as a whole, and a separate agreement would frustrate the achievement of this end.[16]

But even though we agreed that a later treaty signed by some of the parties to an earlier in contravention of a prohibition of the latter, or which is irreconcilable with the substance of it, would amount to a violation of international law, we have not yet stated whether such a treaty is void, or merely involves the international responsibility of the contracting parties in respect of the other participants of the earlier treaty. The question has not yet been sufficiently cleared in the literature on international law, and in international practice there are only very few instances on record where a dispute would have arisen on the question. However, the problem is by far not merely of an academic nature, and on one occasion at least it came up even

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so far as they prohibit the conclusion of special agreements which impair the position of the protected persons, or impose restrictions on their rights.

[15] According to Article 41 of the Vienna Convention, a subsequent treaty concluded by some of the parties to an earlier treaty cannot obstruct the effective execution of the object and purpose of the earlier treaty.

[16] Naturally, the principle here laid down cannot prevent states situated along an international waterway from declaring an earlier treaty relying on colonial exploitation ineffective and to bring under regulation the international status of the river on the generally recognized principle of international law concerning the free disposal of their natural resources. This was the case with the River Niger where the riparian states substituted the rules of the Niamey Convention for the conventions of the former colonial powers. At the signature of the Danube Convention of Belgrade in 1948 this was not the case. As has been demonstrated by the delegates of the socialist states the 1921 Danube Act of Paris had actually expired earlier, so that there was no obstacle to signing a new convention.

before the International Court of Justice, although the Court tried to evade the issue.[17]

In our opinion a solution of the problem has to be approached from the peremptory norms of international law. Yet not in a sense as if a later treaty conflicting with an earlier by itself infringed upon one or the other of the peremptory norms of international law, although by way of exception a situation of this kind might also present itself. This e.g. would be the case if two or more state members of the United Nations in contravention of the general prohibition of the use of force laid down in the Charter of the United Nations concluded an alliance with aggression as its end. Here the nullity of the treaty would follow from the general principle of international law, according to which a treaty conflicting with a peremptory norm of general international law is void.[18] Still among the peremptory norms of international law there is the principle of *pacta sunt servanda*, and therefore if some of the parties to a given treaty with the exclusion of the others concluded a new treaty which would render impossible the performance of the earlier, obviously the signatories of the later treaty committed an act preventing the principle of *pacta sunt servanda* from being enforced. International law cannot recognize the validity of such a treaty, therefore this treaty would have to be considered null and void.[19] Still the reasoning of Schücking in his separate opinion to the judgement of the Permanent Court of International Justice in the Oscar Chinn case would lead to the same conclusion. Analyzing the relation between the Congo Act of Berlin of 1885 and the Convention of St. Germain of 1919, Schücking argued that the signatories of the Congo Act desired beyond doubt to make it absolutely impossible for some of their number to deprive them of their vested rights by signing a particular convention. Consequently, he considered the later convention null and void, since it exceeded the limits which the states

[17] Here we have in mind the Oscar Chinn case, where the problem of the validity of the various international conventions on the Congo Basin emerged. (See *P.C.I.J.*, Ser. A/B, No. 63.)

[18] For this see Article 53 of the Vienna Convention.

[19] International law still owes a more elaborate answer to the question when an invalid treaty has to be considered null and void and when voidable. Still we believe that in the event of a treaty conflicting with a peremptory norm of general international law, nullity will have to be established. This is what Article 53 of the Vienna Convention too declares.

formulating the Berlin Act had drawn up for themselves for the future.[20]

However, the case will be a different one if a party or more to the earlier treaty concluded with a third state a treaty which would render impossible the performance of the earlier. For the sake of simplicity let us suppose that of *A* and *B* states parties to a treaty *B* concluded with *C* a treaty running counter its obligations under the earlier treaty. By the later treaty *B* in any case violates its international obligations in respect to *A* under the earlier treaty, and on this ground its international responsibility will arise. We are unable to adopt Kelsen's opinion as if the conclusion of a treaty conflicting with an earlier were unlawful only if in the earlier treaty the state in question had undertaken not to sign a new treaty contradicting the earlier.[21] In our opinion by its undertaking under the treaty a state at the same time undertakes not to conclude with another subject of international law an agreement which would frustrate the performance of the earlier. However, the violation of the law can be established only in respect of *B*, whereas *C* has not committed any international delinquency by concluding the treaty. Under these circumstances declaring the later treaty null and void would safeguard exclusively the interests of *A*, yet at the same time it would be injurious to *C*. In view of this contingency sporadically developed international practice recognizes the validity of both treaties,[22] although obviously *B* can perform only one of the treaties. Consequently, the international responsibility of *B* may be established in respect of either *A* or *C* dependent on in respect of which of either *B* fails to meet its obligations. Hence in conformity with the rules of international law *B* owes full reparation to one of the two contracting parties.[23]

[20] *P.C.I.J.*, Ser. A/B, No. 63, pp. 148—149.

[21] Kelsen, H.: *Op. cit.*, p. 287.

[22] See e.g. the judgement of the former Central American Court of Justice: *Anales de la Corte de Justicia Centroamericana*, Vol. V, Nos 14—16, pp. 149—150.

[23] In principle the question may be asked whether or not *C* was acquainted with the earlier obligations of *B*. If so, it may be argued that *C* knowingly contributed to *B*'s evading the principle of *pacta sunt servanda*, so that the nullity of the subsequently signed treaty should hold. We believe this conclusion would be justified, still so far there is no established international practice in this sense.

In general the literature on international law comes to this latter conclusion, moreover, it tends to apply this thesis also to the case reviewed above, viz. when in the later treaty there are no participants which would not have been signatories to the earlier. This is the course Kelsen takes too, when on the fundamental structure of the legal norm he builds up his argumentation according to which the norm merely annexes a sanction to a certain conduct, without prohibiting the conduct itself. Since in this case in general there can be no logical conflict between the legal norms, but merely a teleological one, Kelsen considers both treaties valid, seeing the sanction in the liability for damages.[24] However, he fails to investigate whether or not the international legal order contained a general rule which would attach the consequence of nullity to such a subsequently signed treaty. In our opinion on consideration of what has been made clear above, whenever the parties to a subsequent treaty have by the conclusion of this treaty violated their obligations deriving from the principle of *pacta sunt servanda*, the nullity of the subsequent treaty has to be derived from the violation of a peremptory norm of international law.

In the International Law Commission Waldock rejecting the position taken by the earlier draft of Lauterpacht which started from the principle of the nullity of a later treaty conflicting with the earlier,[25] drew no line between the two cases analyzed here and in general recognized the validity of both treaties.[26] The problem has been brought under regulation in a similar manner also by the final draft approved by the International Law Commission, and the Vienna Convention relying on this draft. Both drafts and the Vienna Convention include at the same time the thesis on the nullity of a treaty conflicting with the peremptory norms of international law.

[24] Kelsen, H.: *El contrato y el tratado*. Mexico, 1943, p. 99.
[25] *U.N. Doc. A/CN. 4/63*, Article 16.
[26] *Yearbook*, 1963, Vol. II, p. 72.

Chapter VI

EXECUTION

So far the cases of the termination of a treaty have been reviewed where termination relies on the consent of the parties to the treaty. In the following the cases will be analyzed where termination is decreed by the rules of international law, or where these rules permit the abrogation of a treaty by the unilateral declaration of any one of the parties in cases specified by these rules.

In this category execution has to be mentioned first, as one of the most straightforward manners of the termination of a treaty, where owing to the fulfilment of the obligations under the treaty it has ceased to have an object. Obviously, execution terminates a treaty for good. Still in the literature on international law many disagree with this opinion. Neither the draft of the International Law Commission, nor the Vienna Convention makes mention of execution as one of the ways of terminating a treaty. On the other hand, in the Havana Convention of 1928, which brings under regulation the law of treaties in relations existing among the American states, in Article 14 on the termination of treaties fulfilment of the stipulated obligation is mentioned in the first place as a fact in consequence of which a treaty ceases to be effective.

When now execution is analyzed in its effect of terminating a treaty, first of all it will be discovered that execution brings about this consequence only for specific categories of treaties. For treaties which for the future decree general rules of conduct, execution will, as a matter of course, fail to terminate a treaty. For instance, conventions having as their object the safeguard of human rights, lay down rules of conduct to be observed by the states in general and, as a matter of course, here the problem of a termination by execution cannot even emerge. Still the same may be said also in connexion with bilateral treaties of minor importance. So e.g. it stands to reason that neither bilateral

conventions on veterinary service or plant protection will cease owing to execution, as these conventions in general define repetitive obligations for the parties. A number of other examples may be quoted here. On the other hand, it is obvious that a treaty implying the cession of territory will cease with execution, as with the consummation of the cession and the performance of any other prestations and counter-prestations, if any, the obligations of the parties have been exhausted.

Hence, as a general rule, the statement may be made that a treaty implying a single obligation, or obligations to be discharged in a specified number, will terminate with the execution once completed, while in the case of a treaty implying obligations repeating in an indefinite number the fact of execution cannot result in termination.

In an analysis of the case of a termination of a treaty owing to execution it should be remembered that a terminated treaty retains a certain significance in so far as it attests the title to the prestations performed and may serve as guidance at the settlement of some international dispute that may ensue. However, this does not alter the fact that the treaty has become extinct with execution. Hence, in such and similar cases the treaty will have a significance as a historical fact only. Vedovato draws a line with a remarkable precision between "*vita giuridica*" and "*vita storica*" of treaties, stating that the latter has significance in connexion with terminated treaties.[1]

The partisans of the opinion that execution has no effect on the existence of a treaty try to support their position by exaggerated formalistic arguments. This is in particular demonstrated by the argumentation of Hofbauer, according to whom it follows from the nature of a treaty that by execution it cannot cease to exist. What ceases is the obligation, which, however, becomes detached from the treaty, so that the extinction of the obligation will not affect the existence of the treaty. Relying on Merkl's "*Stufenbau*" theory, Hofbauer makes it clear that a valid rule of international law cannot be displaced unless by a norm of identical or higher order. Hence, a treaty cannot be terminated unless by the provision of another treaty, or by a rule of customary law. Since in the course of the performance of a treaty no norm of even or higher rank will come into being, the execution of

[1] Vedovato, G.: La estinzione dei trattati. In: Rodolico—Vedovato—Cataluccio: *Corso di storia dei trattati e politica internazionale.* Parte speciale, Firenze, 1941 (lecture notes), p. 41.

a treaty manifesting itself in a simple act of application or at most by creating a norm of lower order, a so-called executive convention (convention exécutive), the conditions for the termination of the treaty are absent.[2] However, this argumentation is wrong logically too, in the first place because it automatically transfers the rules of municipal law to the sphere of international law and sets out from the assumption as if a treaty could exclusively only be displaced by a new legal rule, an assumption which obviously is in conflict with the actual situation. Under these circumstances a thesis built upon erroneous premises cannot be true.[3]

The doctrine that a treaty once performed may be considered terminated at the same time serves stability in international relations. If an executed treaty, e.g. a treaty establishing a boundary which has already been executed, remained in force, the path might be opened to the application of the *rebus sic stantibus* clause,[4] moreover a war could even render such a treaty ineffective. In one of his papers McNair mentioned that at the outbreak of the First World War in France it has been suggested that by the declaration of war the frontiers laid down in the Treaty of Frankfort in 1871 automatically ceased to be effective.[5] This, however, meant a misinterpretation of the rules of international law, nor had the French government adopted this point of view.

[2] Hofbauer, K.: L'exécution, cause d'extinction du traité international. *Revue de Droit International*, Vol. XX, 1937, pp. 93 et seq.

[3] No wonder that after this logical somersault Hofbauer tried to reinforce his position by quoting an absurd example. Accordingly, state *A* orders a man-of-war from state *B*. Delivery and payment take place in conformity with the agreement. At a later time the man-of-war pays a visit to a port of state *B*, where it is retained on the pretext that it forms property of state *B*, and that it has been seized by state *A* by force. The case is referred to the Permanent Court of International Justice, where according to Hofbauer the action of state *A* ought to be dismissed, because with the extinction of the treaty state *A* would have no proprietary rights in the vessel. Hofbauer concludes that through misinterpretation of the character of the treaty can it be assumed that execution terminates a treaty. A commentary on this example, we believe, may be dispensed with.

[4] For more details see p. 395 below.

[5] Lord McNair: The Functions and Differing Legal Character of Treaties. *The British Year Book of International Law*, 1930, p. 103.

Chapter VII

TERMINATION OF A TREATY AS A CONSEQUENCE OF ITS BREACH

A condition of the validity of a treaty, following from the principle of the equality of states, is that the parties should be in a position of an equality of rights, i.e. that virtually an equilibrium should be guaranteed between the obligations individually falling on the parties. However, this equilibrium has to be guaranteed for the whole period of the operation of a treaty, and not only at the moment of its conclusion. If a party to the treaty fails to meet its obligations under it, this equilibrium will be upset, and among other means of redress the right of the injured party to terminate the treaty has also to be recognized.[1] The principle of *pacta sunt servanda* is binding on the one party only as long as the other party considers it binding on itself.

The right of the party injured by a breach to terminate the treaty was recognized by the overwhelming majority of the theorists of international law of old. Already Grotius stated: "If one party has violated a treaty of alliance, the other will be able to withdraw from it."[2] In general, this opinion gained recognition among the classics of international law. Here we may quote Vattel, according to whom the party injured by a breach of treaty "is unquestionably justified in doing so (viz. to revoke its own promises), since its own promises were made only on condition that the other State would carry out on its part the stipulations of the treaty".[3] Modern literature on international law has remained faithful to this principle, as can be shown by a few examples. According to Lauterpacht, in case of the violation of a treaty by one of the contracting parties it is within the discretion

[1] Since here the breach of treaty is of interest only in its relation to the termination of the treaty, naturally we shall bypass here other possible remedies, such as the demand of reparation, recourse to reprisals, etc.
[2] Grotius, H.: *De iure belli ac pacis*. Lib. II. cap. XV, XV (Classics, 3, 1925).
[3] Vattel, E. de: *Op. cit.*, II, XIII. § 200 (Classics, 1, 1916).

of the other party to cancel it on this ground.[4] In the event of a bilateral treaty Verdross recognizes the right of the injured party either to insist on the performance of the treaty or to withdraw from it, at its option.[5] Similarly Kelsen allows a right of choice to the injured party: he may decide for either the maintenance of the treaty by taking the measures provided by general international law in case of an international delict, or the cancellation of the treaty.[6] Guggenheim too regards as generally recognized the right of the states to withdraw from a bipartite treaty in the event of a violation by the other party.[7] Fenwick in his work formulates this thesis in an almost identical wording.[8] O'Connell also recognizes the right of the injured party to avoid the treaty in the event of a breach, adding, however, that in a given case probably much depends on the nature of the treaty.[9] The socialist literature on the whole comes to similar conclusions. According to a Soviet textbook of international law, the injured party may withdraw from the treaty in the event of a violation of it by the other party.[10] The same doctrine finds expression in a Soviet textbook published somewhat earlier.[11] Similarly Genovski recognizes the right of the injured party to terminate the treaty.[12]

The same doctrine has been expressed in Article 57 of the Draft of the International Law Commission and subsequently in Article 60 of the Vienna Convention, both recognizing the right of one of the parties to a bilateral treaty to terminate it in the event of a breach of the treaty by the other party.[13]

[4] Oppenheim, L. and Lauterpacht, H.: *International Law*. 8th ed., London, 1955, Vol. I, p. 947.

[5] Verdross, A.: *Völkerrecht*. 3rd ed., Vienna, 1955, pp. 152—153.

[6] Kelsen, H.: *Principles of International Law*. New York, 1952, p. 358.

[7] Guggenheim, P.: *Traité de droit international public*. Genève, 1953, tome I, p. 117.

[8] Fenwick, C. G.: *International Law*. 4th ed., New York, 1965, p. 543.

[9] O'Connell, D. P.: *International Law*. London, Vol. I, p. 285.

[10] *Курс международного права* (Course of international law). Ed. by F. I. Kozhevnikov, 2nd, revised ed., Moscow, 1966, p. 358.

[11] *Международное право* (International law). Ed. by D. B. Levin and G. P. Kalyuzhnaya, Moscow, 1964, p. 93.

[12] Геновски, М. (Genovski, M.): *Основи на международното право* (The foundations of international law). Sofia, 1966, p. 301.

[13] The draft and the Convention allow a choice between termination and suspension of the treaty; the study of the latter is outside the scope of the present work.

In the literature on international law there are some who would not recognize the right of the injured party to terminate the treaty in the event of its breach by the other party. So Rousseau, even though not in a definitive form, seems to doubt the existence of such a rule. "On devrait, semble-t-il, admettre", he wrote, "qu'à moins de règle contraire acceptée par les Etats, l'inexécution ne met pas fin au traité."[14] In the following discussion he refers to the uncertain practice of the states, and to the protests made in connexion with the termination of a treaty owing to a non-performance by the other party. However, Rousseau fails to mention that even though such protests are by no means of rare occurrence in diplomatic practice, in such instances it is not the principle that states will call in question, i.e. that a treaty may be terminated in the event of its breach, but in general they will deny the fact of a breach of the treaty, and in exceptional cases dispute whether the breach was grave enough to form the basis of the termination of the treaty.

Hoijer too is somewhat vague in expounding his opinion denying the injured party's right to a unilateral cancellation of a treaty. Carrying on an argument with Bluntschli, he calls into doubt the right of the party injured by a breach to terminate the treaty, as a recognition of such a right would eventually lead to arbitrariness.[15] Still this is an argument by which a large number of rules of international law could be contested. Obviously, in a decentralized legal system like international law governing on the first place the relations of sovereign states, there is a by far greater risk of an abuse of rights and of the abuse remaining without sanction than in the domestic law of the states. Yet, this cannot serve as an excuse for the demolition of the foundations of a legal system on the plea of a fight against abuses. In the following passages even Hoijer is wavering when in contradiction to his initial rigid negative attitude to the thesis he is compelled to recognize the right to abrogate the treaty as an *ultima ratio* in the event of an obvious and repeated violation of the treaty by the other party. On the whole, the argumentation of Hoijer bears the stamp of cloudiness and uncertainty.

[14] Rousseau, Ch.: *Principes généraux du droit international public*. Paris, 1944, tome I, pp. 539 et seq.

[15] Hoijer, C.: *Les traités internationaux*. Paris, 1928, tome II, pp. 500 et seq.

Among the moderate opposers of the right to abrogate the treaty mention should be made of Romano, who believes that whether or not a breach of a treaty vests a right of termination in the injured party is a problem of interpretation.[16] In our opinion this doctrine cannot be approved as in the event of a breach the injured party is entitled by the objective rule of international law to have recourse to sanctions, and not on the ground of the consent of the parties to the treaty to such effect. We believe this is a peremptory rule of international law, which being the direct outcome of the principle of *pacta sunt servanda* cannot be precluded even by a mutual agreement of the parties.

The practice followed by the various states also seems to support the thesis that a breach of treaty entitles the injured party to abrogate the treaty. Even though there are disputes, as has been shown above, these in general result from a divergent appraisal of the actual circumstances. It will suffice to quote an instance or two of unilateral termination of a treaty on the ground of a breach by the other party. A well-known example from the past is the action of the United States of America by which through legislative channels the treaties in force with France were abrogated on 7 July 1798. As stated by the Act "the treaties concluded between the United States and France have been repeatedly violated on the part of the French government and the just claims of the United States for reparation of the injuries so committed have been refused". Consequently the Congress declared that the United States were freed and exonerated from the stipulations of these treaties.[17] On the part of the United States reference was made in a number of official declarations to the principle here discussed. So e.g. Acting Attorney General Biddle at the suspension of the International Load Line Convention of 1930 stated that it was a "well-established international practice that violation of a treaty by one contracting party renders the treaty voidable at the option of another contracting party injured by the violation".[18]

[16] Romano, S.: *Corso di diritto internazionale*. 4th ed., Milan, 1939, p. 277.

[17] Moore, J. B.: *A Digest of International Law*. Washington, 1906, Vol. V, p. 356.

[18] Hackworth, G. H.: *Digest of International Law*. Washington, 1943, Vol. V, p. 345. For more details of the case see below, pp. 343 et seq.

From the practice of the Soviet Union the abrogation of the British–Soviet Treaty of Alliance and Mutual Assistance of 1942, and the similar Franco-Soviet Treaty of 1944 on 7 May 1955 is a well-known example. Both treaties were terminated on the ground that with the Paris treaties of 1954 agreeing to the re-armament of the Federal Republic of Germany both the United Kingdom and France had gravely violated their obligations under the treaties signed with the Soviet Union.[19] Finally, another well-known example may be quoted from 1956, when after the British–French–Israeli aggression Egypt abrogated her treaty signed with the United Kingdom in 1954 on the plea of its grave violation by the British partner.

Diplomatic practice offers also examples of the abuse of the right to abrogate a treaty by the one party on an alleged plea of the default of the other party. A memorable case was the withdrawal of Germany from the Locarno Treaties on 7 March 1936 on the plea that the Franco-Soviet Treaty of Mutual Assistance of 1935 meant a violation of the Locarno Treaties. This withdrawal was obviously merely a pretext for a re-militarization of the Rhineland by Germany.

Nor does judicial practice call into doubt the right of a state to abrogate a treaty unilaterally in the event of its violation by the other party. In the dispute between the Netherlands and Belgium before the Permanent Court of International Justice on diversion of water from the river Meuse, Belgium pleaded that the Netherlands had violated the treaty in force between them and had therefore forfeited her rights based on the treaty. The Court did not contest this argumentation, still because it did not establish a case of a violation of rights refused to enter into its examination. At the same time, Judge Anzilotti in a dissenting opinion emphasized that the principle underlying the submission presented by Belgium must be applied in international relations.[20] The arbitral award passed in the Tacna-Arica case between Chile and Peru also confirmed the right of the party injured by a grave breach of treaty to abrogate it. However, the President of the United States acting as arbitrator in the case refused to recognize such a breach of treaty in this instance.[21] In judgements pro-

[19] The case has been discussed in Part One of the present work in connexion with historical interpretation (p. 119).

[20] *P.C.I.J.*, Ser. A/B, No. 70, p. 50.

[21] See *American Journal of International Law*, 1925, pp. 393 et seq.

nounced by municipal courts of different states also frequent reference is made to the principle here analyzed.[22]

In the following, we have to review briefly the question of the theoretical ground on which the right of a unilateral termination of a treaty by the injured party relies. According to Waldock it is a rule of good sense which may be discovered also in municipal law.[23] Undoubtedly, the statement is correct. Since, however, the rules of international law cannot be built upon the pure ground of natural law and often analogy taken from municipal law may lead to a slippery terrain, a more solid ground must be sought for to built the thesis on. Nor does the doctrine of *inadimplenti non est adimplendum* offer a proper answer to the question. Here partly mere reference is made to a principle taken from Roman Law, partly the principle by itself would justify the suspension of performance, but not the termination of the treaty. Waldock and others at the same time want to discover in the abrogation of the treaty reprisals for the violation of rights under the treaty by the other party. Nor is this doctrine wholly satisfactory, as in our opinion the termination by the injured party of a treaty violated by the other party cannot be considered a reprisal: it is merely a consequence following from disregard of the principle *pacta sunt servanda*. In addition, it should be remembered that in general the application of reprisals terminates any claims that may be laid by the party applying the reprisals to the defaulting state, whereas the party abrogating the treaty may make good its right to a reparation even after the termination of the treaty. Finally, according to

[22] As regards the initial judicial practice of the United States, we would refer to Ware v. Hylton, where the court held that "it is part of the law of nations that if a treaty be violated by one party, it is at the option of the other party, if innocent, to declare, in consequence of the breach that the treaty is void". (3 U.S. Dallas [1796], 261.) In Charlton v. Kelly the Supreme Court of the United States in connexion with an alleged violation of the American–Italian Treaty of Extradition by Italy held that the United States would have had the right to denounce the treaty as no longer obligatory on this ground; since, however, the United States failed to do so, the automatic lapse of the treaty could not be invoked (229 U.S. [1913], 447). Very much the same position was taken by the Swiss Federal Court in a judgement passed in 1923 when the Court held that the non-performance of a treaty entitled the other party to abrogate it, still voidance did not supervene *ipso facto*. (Hackworth, G. H.: *Digest of International Law*. Vol. V, p. 347.)

[23] *Yearbook*, 1963, Vol. II, p. 73.

a doctrine established for ages and proclaimed even today, the right to abrogate the treaty qualifies as an implied condition at the conclusion of a treaty. However, a radical error of this theory is that it relies on a fiction not reckoning with true life, and for the very reason it cannot offer a satisfactory explanation.[24] In our opinion, the right to abrogate the treaty, as has already been indicated, follows from the principle of the equality of states, and is a necessary supplement to the principle of *pacta sunt servanda*. If a party fails to fulfil its obligations under the treaty, then the principle of *pacta sunt servanda* will become inapplicable, and consequently the other party will of necessity be relieved of the obligations which derived on it from this principle. In international law this is the more inevitable, as here unlike in municipal law no organized public power exists which could force the states to an unconditional performance of the treaties. Consequently, owing to the withdrawal of a given treaty from under the effects of the principle of *pacta sunt servanda*, the party violated in its rights may choose between a suspension of the operation of the treaty or its definitive termination at its option. At the same time, the injured party may, as a matter of course, make good against the other party its claims which are in general the due of the injured party in the event of a violation of the rules of international law.

So far the rule has been defined for the event of the violation of a bilateral treaty by either contracting party. The question will become of a somewhat greater complexity when multilateral treaties are concerned. A proper answer to the question will be even more difficult to offer, because of the sparseness of international practice and the insufficiency of the guidance this practice provides.

Obviously, the statement may be brought forward that the violation of a multilateral treaty by a single party will in general react only on the treaty position of the infringing party, so that the treaty can be terminated only in respect of this party. However, in this connexion the question should be raised, which of the parties is entitled to terminate the treaty in its relations to the defaulting party. In our opinion, in the present system of international law, by the side of the party directly and particularly affected by the violation of the treaty,

[24] For this opinion see Grotius, H.: *De iure belli ac pacis*. Lib. II, cap. XV, XV (Classics, 3, 1925); Laghi, F.: *Teoria dei trattati internazionali*. Parma, 1882, p. 369; Perlowski, M.: *Les causes d'extinction des obligations internationales contractuelles*. Vevey, 1928, p. 37.

any other state may have recourse to this right. The contractual ties will cease to exist in the relations of the defaulting party to all states which have made good their right of termination. In addition to the directly injured state the right of termination of the treaty by all other parties is justified by the circumstance that the maintenance of an equilibrium of obligations of all the parties to the treaty lies in the interest of all. Hence, the violation of the principle of *pacta sunt servanda* in relation to one of the parties will become the common cause of all other parties, and none of the states can be obliged to maintain its treaty relations to the party violating the treaty. On the other hand, treaty relations of the party breaching the treaty will continue in force in respect of the parties not abrogating the treaty.

On the whole, the 1963 draft submitted by Waldock to the International Law Commission relied on this principle with the addition that besides the recognition of the right of abrogation of a treaty in respect of a defaulting party the draft also recognized the right of the other parties to suspend the application of the treaty in their relations to the defaulting party; moreover the draft afforded an opportunity to restrict termination or suspension, as the case may be, only to the provision of the treaty which has been broken.

The 1963 session of the International Law Commission amended the provisions of the draft of Waldock, which in our opinion were in harmony with the prevailing legal doctrine in a far-reaching manner. The amendments agreed upon in this session were eventually adopted also by the Vienna Conference. As a matter of fact, Article 60 of the Vienna Convention for a multilateral treaty permits the termination of the treaty in relation to the defaulting party only by unanimous agreement of all other parties when, as a matter of course, this terminates treaty relations between the defaulting party and all other parties. However, the totality of the parties to the treaty may by unanimous agreement content themselves with a suspension of the operation of the treaty in their relations to the defaulting party, instead of a termination of the treaty. In addition, any party to the treaty may in the presence of specified conditions suspend the operation of the treaty in the relations between itself and the defaulting party, still under the Convention it is not entitled to a termination of the treaty.[25] However, this provision restricting the right of the

[25] The Vienna Conference rejected by an overwhelming majority a Venezuelan amendment which for the breach of a multilateral treaty

individual parties to a multilateral treaty of a termination of this treaty cannot as yet be considered an effective rule of international law.

As has already been made clear the termination of a multilateral treaty in relation to the party violating it does not in general affect the relations of the other parties to one another. Among these parties the treaty will continue in force unchanged. Yet, the validity of this thesis has to be qualified with the restrictive phrase "in general", as treaties may come into being where the default of one of the parties and the exclusion of this party from the totality of the contracting parties deprive the treaty as a whole of its reasons for existence. This is the case e.g. with the treaties on the limitation of armament which in the event of a violation by a power of importance obviously cannot continue in force for the others. As a matter of fact, the transgression of the limitations of armament by a state disposing of substantial means would constitute an imminent danger to the other signatories. In general, treaties of this type attribute a general effect even to its regular denunciation by one of the states, and in this case the treaty is declared terminated in its relations to all contracting parties.[26]

Nevertheless, as regards the right of terminating a multilateral treaty in the event of its violation by any one of the parties to it, the thesis advanced above cannot be applied to the constituent instruments of international organizations. As a matter of fact, if a state member of an international organization has violated an obligation defined by the constituent instrument of the organization, this act cannot be construed so as to authorize each member of the organization to deliberate whether or not it wishes to terminate its treaty relation to the defaulting member, as such a right would be apt to call forth an unsolvable confusion within the organization itself. For this reason, only the specially authorized organ of the organization will have the right to draw the conclusion from such an infringement. For an emergency of this type, the constituent instruments of the international organizations provide, when they define the cases of an

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wanted to guarantee the right to terminate the treaty to each state in its relations to the defaulting party (*United Nations Conference on the Law of Treaties*. First session. Official records, pp. 352—353 and 359).

[26] See e.g. Article XXIII of the *Washington Naval Treaty of 1922*. This has already been discussed in connexion with an analysis of the problem of denunciation of treaties (p. 256).

expulsion of a member, an act equal to the termination of the treaty in relation to this member. Normally, the constituent instruments of the international organizations restrict the right of expulsion to the gravest cases of a breach of the treaty.[27]

The question whether the thesis here set forth in connexion with multilateral treaties is also valid for the so-called general treaties affecting the totality of states requires a special investigation. In the International Law Commission Tunkin gave expression to his opinion that general treaties could not be terminated in relation to the defaulting party.[28] Verdross at the same place emphasized that, in general, multilateral treaties could be suspended only in their operation, but not abrogated.[29] Unfortunately, we are unable to agree with these opinions. As a matter of fact, in the event of a violation of the treaty the states remaining loyal to the treaty cannot be forced to continue their relations under the treaty with the defaulting party. Furthermore, as has already been pointed out earlier,[30] a number of general treaties include provisions permitting the abrogation of the treaty by way of a simple denunciation, consequently the right to abrogate the treaty has to be recognized the more in the event of a breach of the treaty. In our opinion this holds also for treaties of a codifying character, although here abrogation may have a limited importance only. In point of fact, even if we recognize the right to abrogate the treaty, — a right which in our opinion has to be recognized — the only consequence of the abrogation will be that in the relations between the defaulting party and the states abrogating the treaty the rules of international customary law valid before the treaty will have to be applied. Consequently, in a number of instances the abrogation of the treaty will become meaningless for the innocent parties and even prejudicial to them, still these states only will be in a position to weigh the pros and cons of their action, and since a breach never terminates the treaty automatically, but only in consequence of a declaration of will of the injured parties, they will no doubt make their decisions with due consideration to their interests.

[27] As regards the constituent instruments of international organizations see Article 5 of the Vienna Convention quoted on several occasions.
[28] *Yearbook*, 1963, Vol. I, p. 122.
[29] Ibid.
[30] See p. 266.

On the other hand, the thesis brought forward by Tunkin should be accepted for general treaties of an exceptional character, i.e. treaties which set up international legal norms of a peremptory nature. If the rule incorporated in the treaty constitutes a rule of international law from which the parties cannot contract out, this will act in bar of a unilateral termination of the treaty. However, it should be emphasized that if the peremptory norm is of an earlier date than the treaty defining it, there is no obstacle in the way to a unilateral termination of the treaty in the event of a violation. Here again we would refer to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which also recognizes the right of the contracting parties to withdraw from it. If the lawfulness of withdrawal is recognized in this relation, then recognition of the right to abrogate the convention cannot be denied in the event of a breach of treaty either. As a matter of course, this is not tantamount to a recognition of the lawfulness of genocide in the event of a denunciation or abrogation of the convention, inasmuch as genocide was banned even before the conclusion of the convention, independently of it, and its prohibition is in force also for states which have not become parties to the convention.

The thesis here set forth for treaties creating peremptory norms is not defeated by the controversies which arose in connexion with the Briand—Kellogg Pact of 1928. When this Pact for the first time in history banned war as an instrument of national policy, it also introduced a new rule of international law of a peremptory character. In connexion with the conclusion of the Pact, the United States in a diplomatic note defined the position that violation of a multilateral anti-war treaty by one party would release the other parties from their obligations to the treaty-breaking state.[31] This construction was approved by all states, as it was also given expression in the preamble to the Pact, which declared that the party seeking hereafter the promotion of its national interests by resort to war should be denied the benefits furnished by the treaty. Still, here it is not said that the other contracting parties may abrogate the treaty incorporating a peremptory norm of international law but only that each state is entitled to have recourse to self-defence against the aggressor. The prohibition laid down in the Pact to resort to war as an instrument of national

[31] For the wording of the note, see Hackworth, G. H.: *Digest of International Law*. Vol. V, p. 345.

policy subsists unchanged, whereas the attitude of the state exercising the right of self-defence is outside the scope of this definition.

A problem of greatest complexity in connexion with the abrogation of a treaty is to establish the nature of breach which entitles the innocent party to have recourse to the right to abrogate the treaty, or more accurately, whether any breach of treaty may suffice for the abrogation of the treaty or only a breach of special gravity will constitute a lawful title for the exercise of this right.

A large number of writers on international law do not classify the various types of breaches. These authors in the wake of Grotius and Vattel, according to whom each provision of a treaty has the force of condition, so that the breach of any provision may entail the termination of the treaty, consider the abrogation of a treaty legitimate for any breach. Their principal argument for this position is that the recognition of the right to abrogate a treaty cannot be made dependent on the gravity of the breach, because only the injured party can assess the gravity of the violation of the treaty, — a circumstance which might encourage to an abuse of rights.

Argumentations of this nature are rather frequent in international law. In the following discussion it will be seen that the opponents of the *rebus sic stantibus* clause also argue with the potential abuse of rights. Apart from the law of treaties, similar anxieties may be encountered also in other spheres of international law. There is no doubt that those apprehensive of a possible abuse of rights are in many respects on the right side. Still the question arises whether fear of abuse of rights can provide reason sufficient enough to call into doubt the existence of a whole set of institutions in international law at one time, and at another to proclaim the most extreme solution of a question, only in order to prevent possible abuses, like in the present case. In international law, which in the first place has as its function the regulation of the interrelations of sovereign states, and consequently as a rule cannot accept compulsory jurisdiction and centralized employment of force, the risk of an abuse of rights is beyond doubt imminent. Nevertheless, this risk cannot serve as a pretext for degrading international law to some sort of a primitive legal system which can but recognize solutions going into extremes. But the opinion here analyzed which would attach the right of a unilateral abrogation of a treaty even to the slightest breaches, is conflicting also with a cardinal principle of international law, viz. the principle

of a *bona fide* exercise of rights. Although earlier we have not considered the right of abrogation attaching to a breach of treaty a reprisal, we are unable to approve the opinion that wants to discover a sanction graver than a reprisal in the right of abrogation. As for a reprisal it is a generally accepted opinion that retaliation has to be proportionate to the wrong done, the right to abrogate a treaty cannot attach to a breach of treaty of any degree. In our opinion, the note of the German Government of 10 January 1925 defined a correct principle of general validity when by protesting against the postponement of the evacuation of the Cologne Zone beyond the term laid down in the Treaty of Versailles pointed out that there could be no obvious disproportion between an omission of the performance of certain provisions of a treaty and the consequences attaching to this omission.

Summing up, we have to come to the conclusion that only a grave breach of a treaty provides a title for a unilateral abrogation of it. As for the assessment of the gravity of the breach, departure has to be made from the object and purpose of the treaty. A breach frustrating the realization of the object or purpose of a treaty, or throwing essential difficulties in the way of its realization, will qualify as grave enough to entitle the innocent party to abrogate the treaty. Whether or not this is the case, does not depend merely on a subjective appraisal, but it may be evaluated objectively, from which it follows that in the event of a disagreement of the parties, recourse may be had to all means that international law recognizes for a peaceful settlement of disputes.[32]

On the whole, the point of view of science and practice agrees in so far as a termination of the treaty will supervene only in the event of a declaration of will of the injured party to such end. Still there are scholars who plead that the termination of a treaty attaches automatically to the fact of a breach. This point of view was represented in the

[32] Both the draft of the International Law Commission and Article 60 of the Vienna Convention distinguish particular categories of a breach of treaty, and recognize a right of termination only for a material breach. Similarly to what has been set forth above, both the draft and the Convention connect the notion of a material breach with the object and purpose of the treaty and qualify as a material breach, first, the repudiation of the treaty as a whole, and, secondly, the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

Hungarian literature by Aladár Goellner,[33] in the German literature by von Westarp.[34] Moreover, it was reflected by official statements of certain politicians.[35] For our part, we are unable to agree with such statements. Established international practice finding an expression also in the decisions of the courts of various states[36] consistently adheres to the position that in the event of a breach a treaty will not forfeit its validity unless a declaration to such effect is made by the injured party. For that matter, if this did not hold, the injured party might incur grave consequences. As a matter of fact, the termination of the treaty might involve yet further disadvantages for the injured party, whereas the defaulting party might avail itself of the opportunity to rid itself of a now onerous treaty. Among others, the Soviet Government acted in agreement with the thesis set forth here when in a note of 29 January 1967 it stated that notwithstanding their repeated violation by the Western powers the provisions of the Potsdam Agreements were still binding on the parties to them.

The party injured by a breach of treaty has to make its declaration concerning the abrogation of the treaty within a reasonable period of time from the act of the defaulting party becoming known to it. Although there is no established practice as to what may be considered a reasonable period, still from the principle of good faith it follows that in the exercise of rights no party can keep the other in suspense for a protracted period of time. In the International Law Commission de Luna suggested a term of five to ten years, on the expiry of which a treaty could not be anymore terminated on the plea of a breach.[37] Yet, in our opinion a term of this length is wholly inacceptable, as it would leave the other party in an uncertainty for an unreasonably long time. International law has no rule of general validity in this respect, and cannot even have one, as at the establishment of the period also the peculiarities of the particular treaties will have to be

[33] Goellner, A.: *Pré-caducité, caducité et désuétude en matière de droit international public*. Paris, 1939, p. 27.

[34] Westarp, G. von: Die clausula rebus sic stantibus im heutigen Völkerrecht. *Juristische Wochenschrift*, 1934, Nr. 4, p. 202.

[35] So e.g. according to a statement made by Tao Tshu, deputy minister of information of the People's Republic of China, the bombing of Hanoi has definitively buried the Geneva Conventions of 1954 (see *Le Monde*, July 24 and 25, 1966, p. 1).

[36] The judgements quoted in Note 22 take a position also in this question.

[37] *Yearbook*, 1963, Vol. I, p. 121.

considered. From the principle of good faith the rule usually accepted in municipal law, and valid also in the field of international law, follows that performance made by a party in the knowledge of a breach of treaty annuls the right of a unilateral termination of the treaty. In this case, not even a previous protest against the breach of treaty will reserve the right to abrogate the treaty.[38]

A problem throwing out a number of difficulties and debated on extensively is whether a breach authorizes the injured party only to abrogate the treaty as a whole, or whether there still may be a chance for setting aside certain parts only of the treaty.[39] Undoubtedly, recent evolution of law, by relying on certain earlier examples, tends towards a recognition of the separability of treaty provisions in exceptional cases, i.e. in the presence of certain conditions of the invalidity or termination of certain parts only of the treaty. However, this can be of exceptional occurrence only, and only when the different parts of the treaty are separated from each other, none of them is conditioned by the other, i.e. there are no obstacles in the way to their separate application, nor was the shaping of the treaty-making will of the parties influenced by the consolidation of the particular parts into a single treaty. In general, only in the joint existence of these conditions can be recognized the right of the party injured by the breach to split up the treaty into its isolated parts. If international law would beyond this agree to the invalidation of the one provision of the treaty or the other by the injured party at its option, then the law would either create obligations which cannot be performed, or provide an opportunity for a unilateral amendment of the treaty, an act that could not be reconciled to the principle of a respect for state sovereignty. It is for this reason that we cannot approve the provision of Article 44 of the Vienna Convention,[40] which for a breach of treaty

[38] For the latter statement see Anzilotti, D.: *Cours de droit international.* Paris, 1929, Vol. I, p. 466.

[39] As a matter of course, the question of the separability of treaty provisions emerges not only, and not in the first place in connexion with a breach, but much rather in connexion with the invalidity of treaties. For this reason, we cannot enlarge on an analysis of the problem at this place. Here we touch the problem only to the extent needed for the establishment of the legal consequences of a breach.

[40] Article 44 of the *Vienna Convention* declares as a general rule that if a partial invalidation or termination of a treaty may take place at all, this can be only with respect to those clauses where:

in general authorizes the party entitled to abrogate the treaty to terminate the whole treaty or only particular clauses of it at its option.[41]

On the other hand, there are no obstacles whatever to the termination of any other treaty between the injured party and the defaulting party in addition to the violated treaty, provided that the former treaty is closely related to the latter, and would, with this latter treaty

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(a) the said clauses are separable from the remainder of the treaty with regard to their application;

(b) it appears from the treaty or is otherwise established that acceptance of those clauses was not an essential basis of the consent of the other party or parties to be bound by the treaty as a whole; and

(c) continued performance of the remainder of the treaty would not be unjust.

Still from the wording of paragraph 2 of the same Article the conclusion has to be drawn that for the abrogation owing to the breach of the treaty by one of the parties this limitation does not hold. [See the amendment submitted by the delegation of Hungary to the First Session of the Vienna Conference (*A/Conf.39/C.1/L.246*), and the introductory statement of the same delegation (*U.N. Conference on the Law of Treaties*. First Session, Official Records, p. 229).]

[41] According to a draft of the American Law Institute, there is no obstacle whatever to the termination by the injured party of certain separable parts of the treaty only, including the violated obligations, and no particular conditions have to be present for such a partial termination. However, it is our impression as if the authors of this draft tried to propose this thesis merely to support an action taken by the Western powers in a definite case. This is clearly indicated by the example quoted to illustrate the thesis. According to the fact at issue, states *A*, *B*, *C* and *D* agreed on the military occupation of state *E*. For the purpose of the military occupation the four parties divided up state *E* into as many zones by maintaining the economic unity of this latter state. An exception was made with the capital which although it lied in the zone of occupation of state *D* was subjected to the joint administration by the four states. From the example it is obvious that the authors had in mind the situation of Germany and Berlin after 1945. In the following the authors tried to demonstrate that in the event of a "breach of the treaty" by state *D* the states *A*, *B* and *C* were free to abrogate the economic provisions associated with the military occupation; on the other hand, they were entitled to maintain the provisions governing the occupation and communication of the capital unchanged (see *Restatement of the Law. The Foreign Relations Law of the United States*. The American Law Institute. Proposed Official Draft, 3 May 1962, p. 589). However, this rather naive attempt is just good enough to demonstrate the absurdity of the thesis.

set aside, become meaningless. Obviously, a treaty supplementing an earlier treaty will become void with the abrogation of the latter. On the other hand, if the injured party in response to the breach of treaty wanted to terminate other treaties in force with the defaulting state, this it could do only on the plea of reprisals. Whether or not these measures were justified could be determined only on the ground of the rules applying to reprisals, but never under the law of treaties.

Chapter VIII

TERMINATION OF A TREATY OWING TO A CHANGE OF CIRCUMSTANCES

Among the causes bringing about a termination of treaties a fundamental change of circumstances from the time of the conclusion of the treaty occupies a special position. The so-called *clausula rebus sic stantibus* is one of the mootest principles of international law, on the validity of which the keenest struggle has been going on for centuries. The opponents of the doctrine either challenge the existence of it, or attribute the role of the grave-digger of international law to it. It was therefore a noteworthy development when the International Law Commission of the United Nations, recognizing the justification of this principle in modern international law, tried to define in its draft articles on the law of treaties the effects of the change of circumstances on the operation of treaties and so formulate the modern notion of the doctrine of *rebus sic stantibus*. It was not without reason when in the course of the debate a member of the International Law Commission emphasized the particular significance of the clause from the point of view of the newly liberated Asiatic and African states.[1] In the wake of the draft of the International Law Commission, Article 62 of the Vienna Convention also recognized that a change in the circumstances existing at the conclusion of a treaty may have an effect on the treaty. In the following it will be examined what position the clause occupies in present-day international law and how its content may be applied to treaties.

[1] See A. H. Tabibi's contribution to the debate, *Yearbook*, 1963, Vol. I, p. 139.

1. THE HISTORICAL FORMATION OF THE *REBUS SIC STANTIBUS* DOCTRINE

The *rebus sic stantibus* clause which wants to recognize the effect of a change of the circumstances existing at the conclusion of a treaty on the operation of this treaty, enabling the parties to terminate it, has its origin in the scope of civil law. The opinion brought forward by a number of authors, as if the practice of the Greek city-states, or Roman Law had recognized this doctrine, does not appear to be properly founded.[2] Still in all likelihood Nussbaum is right when tracing the origin of the principle back to Canon Law.[3] Undoubtedly, Thomas Aquinas in his *Summa Theologica* mentions the clause. Accordingly, a party is exempted from the observance of the treaty if the initial conditions affecting the persons or the object of the treaty have changed.[4] An exposition of the doctrine going into details was given by the glossators, and in particular the post-glossators.

It was through the agency of the latter that the clause found its way from private law to the sphere of international relations. Gentili was the first to take a decisive stand for the *rebus sic stantibus* clause in his work *De iure belli libri tres* by formulating the doctrine that an exemption from the performance of a treaty must be established for the event when "the condition of affairs is changed, if the change

[2] Without a closer explanation E. van Bogaert wants to trace back the origin of the clause to the Greeks. However, attempts to discover a sound foundation for this opinion have so far proved abortive. (See van Bogaert, E.: Le sens de la clause "rebus sic stantibus" dans le droit des gens actuel. *Revue générale de droit international public*, 1966, No. 1, p. 51.) As regards the Roman origin of the clause, there are faint allusions to the idea in Seneca: "alioqui quicquid mutatur, libertatem facit de integro consulendi, et meam fidem liberat" (Seneca: *De beneficiis*. IV. XXXV. 2. quoted by Gentili in De iure belli libri tres, III. XIV.). Then again Africanus spoke of the effects of a change of circumstances on the contracts ("tacite enim inesse haec conventio stipulationi videtur: si in eadem causa maneat", Dig. XLVI. 3), still in Roman Law there is no systematic theory of the subject, and the change of circumstances may have led to definite solutions suggested by equity at most (cf. Cattand, M.: La clause "rebus sic stantibus" du droit privé au droit international, Paris, 1929, p. 29).

[3] Nussbaum, A.: *Geschichte des Völkerrechts in gedrängter Darstellung*. München—Berlin, 1960, pp. 74 and 124.

[4] *Summa Theologica* II, 2. 9. 110: si sint mutatae conditiones personarum et negotiorum.

could not have been foreseen".[5] With reference to general opinion Gentili considered the *rebus sic stantibus* clause implied in each treaty. He mentioned Baldus and Alciati as ones responsible for the foundation of the doctrine. Similarly to Gentili, Suarez too adopted the view that the *clausula rebus sic stantibus* had to be applied to treaties.

Unlike Gentili and Suarez, the "father" of the science of international law, Hugo Grotius, did not attribute a particular significance to the clause and recognized its relevance within an extremely limited scope only. In Book Two of his great work he wrote: "The question is also commonly raised, whether promises contain in themselves the tacit condition 'if matters remain in their present state'. To this question a negative answer must be given, unless it is perfectly clear that the present state of affairs was included in that sole reason of which we made mention."[6] Thus, in the opinion of Grotius, the problem of the application of the clause was virtually one of interpretation, and accordingly he discussed the question in the chapter on the interpretation of treaties. However, he greatly restricted the possibility of application of the clause. Nussbaum was perfectly right when he called this a sophisticated attitude alien to reality.[7]

Pufendorf, the prominent representative of the post-Grotian school of natural law, followed the same way, when he dealt with the *rebus sic stantibus* clause in the chapter *De interpretatione* of his work. Moreover, he repeated the statements of Grotius almost verbatim, taking perhaps an even more negative attitude to the clause, which in general he believed should be rejected.[8]

The positivist tendency following upon Grotius was still more decisive in denying the applicability of the doctrine. Here in particular the compatriot of Grotius, Bynkershoek, should be mentioned, according to whom the *clausula rebus sic stantibus* was but one of the cloaks of treachery (*ruptae fidei velamentum*), and anybody who applied it could hardly save himself from Machiavellianism.[9]

[5] Gentili, A.: *De iure belli libri tres*. Lib. III, cap. XIV (Classics, 9, 1921).
[6] Grotius, H.: *De iure belli ac pacis*. Lib. XII, cap. XVI, XXV, 2 (Classics, 3, 1925).
[7] Nussbaum, A.: *Op. cit.*, p. 124.
[8] Pufendorf, S.: *De iure naturae et gentium libri octo*. Lib. V, cap. XII, § XX (Classics, 17, 1934).
[9] Bynkershoek, C. van: *Quaestionum iuris publici libri duo*. Lib. II, cap. X (Classics, 14, 1930).

Nor did Christian Wolff who in the sphere of international law tried to separate natural law from positive law but was unable to fully accomplish his plan, and who therefore used to be rated among the partisans of the tendency standing midway between the two schools, consider a change of circumstances a ground for terminating a treaty.[10]

Among the classics of international law Vattel was a convinced defender of the clause. He was perhaps influenced by Spinoza, who in his last and incomplete work pointed out that "since everybody bound himself for the future only on the stipulation of the presence of the actual conditions, with a change of these conditions also the relations originating from the situation would undergo a change".[11] Vattel started from the theory of implied condition and asked the question whether each treaty included the restriction that it would retain its validity only until the circumstances remained unchanged. In his reply Vattel stated that if the treaty had been concluded in view and because of the existing circumstances then with the change of these circumstances in the meanwhile the treaty would of necessity fall.[12] The point of view of Vattel formulated in this peremptory manner had a considerable influence on the science of international law, and even today Vattel's doctrine has a number of followers.[13]

[10] Wolff, Ch.: *Ius gentium methodo scientifica pertractatum*, cap. IV (Classics, 13, 1934).

[11] Spinoza: *Tractatus politicus* (in Hungarian). Budapest, no year, p. 27.

[12] Vattel, E. de: *Le droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains*. Liv. II, chap. XVII, § 296 (Classics, 1, 1916.): "S'il est certain et manifeste que la considération de l'état présent des choses est entrée dans la raison qui a donné lieu à la promesse; que la promesse a été faite en considération, en conséquence de cet état des choses; elle dépend de la conservation des choses dans le même état. Cela est évident, puisque la promesse n'a été faite que sur cette supposition. Lors donc que l'état des choses essentiel à la promesse, et sans lequel elle n'eût certainement pas été faite, vient à changer; la promesse tombe avec son fondement."

[13] Even while recognizing the great influence of E. de Vattel we have to consider the statement of van Bogaert attributing the formulation of the theory of tacit condition to Vattel exaggerated (see *Op. cit.*, p. 52). As has been seen, already Gentili wants to have the clause implied in the treaty. After him Grotius expressly sets out from the theory of tacit condition, although he restricts the application of the clause to a narrow sphere. Still not even his position can be regarded as original, as the theory appeared in the works of Thomas Aquinas, then in those of the glossators and mainly of Bartholus, even though not in its bearing on treaties.

Anyhow the views of Vattel on international law were in agreement with those of the science of civil law of his age. In general, the contemporary codifications recognized the *rebus sic stantibus* clause in respect to private law contracts, so e.g. the Bayrisches Landrecht of 1756, according to which any obligation tacitly implied this stipulation, and would cease to be valid with a change in the situation, provided, however, that the change could not be attributed to a fault of the debtor, or easily foreseen, and had it been foreseen, the party or parties would not have entered into the obligation.[14] The Prussian Code of the end of the 18th century somewhat restricted the applicability of the clause, inasmuch as it attributed to an unforeseen change of circumstances an effect permitting the termination of a contract only in case the change had frustrated the accomplishment of the final object of the contract as expressed by the contracting parties or following from the nature of the transaction.[15] On the other hand, the momentous codifications of 19th-century civil law wholly rejected the *clausula rebus sic stantibus*, which thus was ousted from the sphere of civil law, although began to become established in the practice of international law.

The fact that after Vattel all writers of international law dealing with the law of treaties of necessity took a position in the question of the *rebus sic stantibus* clause partly doubting, partly recognizing the justification of the clause, must be attributed to the influence of Vattel. There is no doubt, however, that actually an overwhelming majority of the writers on international law recognize the justification of the doctrine.[16]

[14] *Bayrisches Landrecht*, IV, 15, § 12.

[15] *Allgemeines Landrecht* (1794), I, 5, § 378.

[16] All the same, the statement of J. P. Bullington that P. Fiore is the only European writer who unconditionally rejects the clause is exaggerated (International Treaties and the Clause "rebus sic stantibus". *University of Pennsylvania Law Review*, 1927—1928, Vol. 76, p. 154). The statement of Bullington testifies to his want of an adequate versatility in the relevant literature. Of the summary works, it may suffice perhaps to mention those of Liszt, Huber, Triepel and Kelsen, as also among the authors of monographs there are some beside those recognizing the clause who reject the teaching proclaiming an effect of a change of circumstances on treaties. Among the latter e.g. the German Bruno Schmidt is a decided denier of the clause. Still all this does not alter the fact that the recognition of a direct effect of a change of circumstances on treaties is making headway in the literature on international law. Here we do not intend to deal

Yet it is also partly due to the influence of Vattel's work that mainly from the 19th century onwards reference to a change of circumstances as a possible cause of terminating a treaty has become of frequent occurrence in diplomatic practice. Also in international adjudication the problem of the clause has emerged. In the following, a few cases will be discussed in illustration of the headway the doctrine was making.[17]

One of the oldest historical examples of the application of the clause dates back to the 16th century, a period by far preceding the publication of Vattel's work. This was the age when Gentili first formulated the doctrine of the application of the clause to treaties. It was by no means accidental that exactly in the second home of Gentili, viz. England, a reference to the clause emerged in a dispute between Queen Elizabeth I and the Netherlands. Queen Elizabeth asserting the termination of a treaty argued that each treaty implied the *rebus sic stantibus* clause and that its application was justified in the actual case. According to contemporary sources, the Dutch recognized the claims of Queen Elizabeth, allegedly because they did not want "to provoke such a powerful ruler".[18] This case is quoted rather as a matter of curiosity, merely to illustrate that a reference to change of circumstances was not unknown in international practice centuries ago. However, the example itself does not betray much of how the parties concerned thought of the law. Yet, what may be taken for granted is that at the beginning the Dutch merely contested the applicability

separately with the opinions of the various authors and the divergences between them, still in the following discussions we shall find room to outline the more important standpoints.

[17] Unfortunately, it is not at all easy to become acquainted with international practice in this field, and here perhaps even more than elsewhere the research worker is likely to stumble upon grave difficulties. As a matter of fact, the materials of diplomatic correspondence relating to the problems here cropping up are mostly preserved in the archives of the foreign offices inaccessible to research (see a similar remark of Lipartiti, C.: *La clausola "rebus sic stantibus" nel diritto internazionale*. Milan, 1939, p. 128). This is the reason why in the majority of scientific works invariably the same cases antiquated somewhat today are quoted. Even though unable to ignore these examples altogether, we shall try to base our opinion on the analysis of a few cases that have come to light from more recent practice.

[18] For details see Bauer, R.: *Der Satz "pacta sunt servanda" im heutigen Völkerrecht*. Marburg, 1934, p. 19.

of the clause to the actual case, but not the validity of the underlying idea, which even at that time did not appear to be something extraordinary.

A detailed discussion of two 18th-century examples may be dispensed with. The one case was when King Frederick II of Prussia in the treaty of neutrality concluded with the town of Breslau in 1741 expressly took up the provision that the treaty would be valid only as long as the situation existing at its conclusion would remain unchanged. After a few months the king on the plea of a change in the actual situation put an end to the treaty and occupied the town. The case was noteworthy merely because the treaty expressly contained the *rebus sic stantibus* clause, which is of rather rare occurrence. However, for that matter this was a typical case of the abuse of the clause.

The opponent of King Frederick II, Maria Theresa, also invoked the clause, when on the occasion of the Treaty of Aix-la-Chapelle in 1748 she wanted to have the territorial settlement of the Treaty of Worms prejudicial for her invalidated because of a change of circumstances.[19]

Finally, let us quote one more example from the early 19th century, viz. the so-called Lusatia case. In the Prague Treaty of 1635 the Emperor ceded both Lusatias to Saxony, however, he reserved certain rights for himself, so e.g. he stipulated that on the emergence of certain conditions these territories would revert to him or his successors. Saxony contested the validity of these stipulations, referring to a change of circumstances. According to the Saxon position, among others, the old Holy Roman Empire ceased to exist in 1806, the German states became sovereign, Saxony joined the Confederation of the Rhine, etc. The dispute was settled by a compromise in 1845.

2. THE *REBUS SIC STANTIBUS* CLAUSE IN THE DIPLOMATIC PRACTICE OF THE LAST HUNDRED YEARS

With these historical examples we simply wanted to demonstrate that making reference to a change of circumstances as a cause for terminating a treaty was considered lawful, and even though abuses were not infrequent when it came to apply the clause to an actual case,

[19] For the details of the case see Dresch, F.: *Über die Dauer der Völkerverträge.* Landshut, 1808, p. 193.

the rule itself was alive, its existence was not called into doubt, and only the legality of its concrete application was contested. However, for the disclosure of the content of the clause, more important results can be obtained from certain cases selected from the diplomatic practice of the past hundred years.

Of the events of the second half of the 19th century undoubtedly the so-called Pontus case was the most noteworthy. Even today ample reference is made to the case whenever the effects of a change of circumstances on treaties are examined. In particular the opposers of the clause prefer to quote the case, mainly because at that time it called forth the protest of the powers and apparently led to the reinforcement of the position of those denying the effects of a change of circumstances on a treaty.

In 1870 Russia availing herself of the situation created by the Franco-Prussian War in diplomatic notes announced that she no longer regarded as binding upon herself the provisions of the Treaty of 1856 on the neutralization of the Black Sea and the prohibition of the building of fortifications on its shores. The so-called Gortchakoff circular the Russian foreign minister sent to the foreign representations of Russia in the matter rather emphasized the violation of certain provisions of the treaty of 1856 by some of the powers and Russia's being prevented from exercising her sovereign rights. Nevertheless, the letter Gortchakoff addressed the next day to Brunnow, Russian ambassador in London, in the first place referred to a change of circumstances as the principal argument. This point of view was also reflected by the diplomatic notes referred to above, by which the Russian foreign representations informed the states concerned of the lapse of the relevant provisions of the treaty. The notes motivated the abrogation of certain provisions of the treaty mostly by a reference to "changes which in the course of time gradually took place in the international situation", and consequently qualified the clauses in question as such as had forfeited their validity. The announcement was followed by a general outcry and protest of the powers, although in their replies the governments concerned hurried to make it clear that on principle they did not call into doubt the effect of the progress of time on the operation of treaties.[20] In view of the repre-

[20] The note of Count Beust, then Minister of Foreign Affairs of the Austro-Hungarian Monarchy, dated 7 November 1870 is particularly

sentations of the powers Russia was forced to agree to a conference being convened by the interested states[21] in London, in 1871, to discuss the question.

In the Conference Russia set forth her arguments in detail and pointed out the changes owing to which in her opinion the critical clauses lost their validity. Among others the Russian delegate pointed out that whereas in 1856 Russia was in a state of war with the United Kingdom, France, and Turkey, actually she maintained friendly relations to all participants of the conference. Furthermore since the Congress of Paris of 1856 the two Danubian principalities were united to become Romania, a new Black Sea state, and the development of military engineering and armaments increased the threat to the Russian littoral. In addition Russia brought forward arguments of another nature in support of her position. So she referred to the violation of the clauses of the treaty she proposed to repeal by certain powers through passage of the Straits by warships contrary to the provisions of the treaty.[22] Nevertheless, this last-mentioned argument was rather pushed into the background, the more so since cases of this nature, insignificant anyway, occurred only sporadically.[23]

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characteristic. Here he states: "nous n'avons jamais prétendu que les transactions internationales fussent à l'abri des temps et qu'elles dussent être maintenues intactes à tout jamais." The note of the Monarchy merely puts the application of the principle to a concrete case in issue. (See Kaufmann, E.: *Das Wesen des Völkerrechts und die clausula rebus sic stanti bus.* Tübingen, 1911, p. 15.) Even British Foreign Secretary Earl Granville in his letter to the British ambassador in St. Petersburg objected only to the way Russia acted, expressing his opinion that Russia should have proposed to examine, whether or not certain provisions of the treaty had become too onerous for Russia, owing to a change of circumstances. According to B. Pouritch, Britain by this recognized the clause as one of the motives of the termination of a treaty (*De la clause "rebus sic stantibus" en droit international public*. Paris, 1918, p. 100).

[21] The conference was attended by the United Kingdom, the Austro-Hungarian Monarchy, the North German Confederation (meanwhile changed to German Empire), Italy, Russia, Turkey, then in a later phase of the conference also France took part.

[22] See *British and Foreign State Papers*, Vol. 61, pp. 1196 and 1200.

[23] In addition to the change of circumstances the states in general advance other arguments to support their intention to terminate a treaty, and in many cases invoke a breach of treaty by the other party. This, however, does not diminish the strength of a reference to a change of

It should be noted that also the arguments based on a change of circumstances by Russia had been anything but firmly established. As a matter of fact, the changes referred to were of a nature void of any appreciable effects on the situation of Russia. The birth of Romania could hardly have had repercussions on the position of Russia as a great power. A reference to friendly relations to the other powers was also bare of any foundations, as it was exactly by the Treaty of 1856 that friendly relations were brought about. Consequently, this argument could not be adduced as a reason for the termination of the treaty or some of its clauses. Although the statement of the delegate of France pointing out that he did not find any sound reason for a modification of the provisions of the Treaty of 1856,[24] contained reference to the fact that no change of fundamental nature had occurred, no debate sprang up in the conference in this matter, unfortunately enough for the evolution of international law.

In the declaration of the London Conference adopted on the proposal of the British Foreign Secretary, Earl Granville, and forming an annex to the minutes of the conference, the Powers recognized that "c'est un principe essentiel du droit des gens qu'aucune d'elles ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale".

For a long time this thesis was considered a rejection of the *rebus sic stantibus* clause and the opponents of the clause defining their position consistently built upon this declaration. However, this view hardly had a proper foundation. First of all, it should be considered that the declaration does not even imply a disavowal of the thesis that a change of circumstances may have an effect on the operation of the provisions of a treaty. It merely intends to bring under regulation the procedure of terminating a treaty by declaring that the party that wishes to abrogate the treaty has to act in agreement with all the other parties. In addition, the statement may be made that in international practice the principle that a change of circumstances may provide a ground for terminating a treaty, wholly or partially prevailed consistently in a full series of instances. What is more the London Con-

circumstances. Cf. Crandall, S. B.: *Treaties, their Making and Enforcement*. Washington, 1916, p. 442.

[24] *British and Foreign State Papers*, Vol. 61, p. 1220.

ference, by making clear its position regarding the principle, recognized the annulment of the articles of the Treaty of Paris considered by Russia prejudicial to her interests, i.e. eventually the Russian standpoint based on the clause came out victorious, as the other states were disinclined to examine whether circumstances had really undergone a fundamental change during the past fifteen years. In point of fact, the procedure followed in London merely served the safeguard of the prestige of the powers and by far not purposed the rejection of the clause. It was true, however, that when the resolution of the conference emphasized the need of an amicable agreement, it was silent on the question what should happen if there was no chance for such an agreement. This is also an indication of the fact that the London Conference did not strive for the formulation of a rule of general validity, but contented itself to settle an actual controversy by throwing into relief a defective thesis with no prejudice to the prestige of the parties. Renault, the famous French writer on international law, called the London Conference a diplomatic comedy.[25] The embarrassment of the powers and the inconsistency of their action are partly explained by the circumstance that this was the first case in history that reference was made by a great power to the *rebus sic stantibus* clause in public, and that the question thrown out in this manner was discussed at an international conference.

In this connexion a statement made by Bismarck, at that time Chancellor of Germany, may be quoted to confirm that the position taken by the London Conference did not mean the rejection of the clause. Soon after the conference Bismarck repeatedly gave expression to his opinion that a change of circumstances puts an end to a treaty. He did not think it was necessary to contest the position taken by the London Conference, in whose formation German diplomacy had an active part under the guidance of Bismarck. Even though the terminology used by Bismarck is open to criticism, we have to agree with the underlying idea. Naturally this does not amount to an agreement with the practical application of the doctrine by Germany. It was exactly the German Reich that systematically abused the plea of a change of circumstances.[26]

[25] Renault, L.: *Question d'Orient*, cours de doctorat. Paris, 1913—1914, p. 27.

[26] Bismarck gave expression to his opinion clearly in his famous address to the Reichstag on 6 February 1888: "Keine Großmacht kann auf die

A situation very much the same as in 1871 presented itself sixty years afterwards before the League of Nations. When Germany with reference to a fundamental change of circumstances on 16 March 1935 in defiance of the prohibition of Part V of the Versailles Treaty announced the re-introduction of general conscription and an increase of its effectives, the Council of the League of Nations on a joint proposal of the United Kingdom, France and Italy in a resolution of 16 April 1935 verbatim repeated the declaration of the London Conference.[27] A scene similar to this took place when in 1936 Germany re-militarized the Rhineland. Still as regards the resolutions of the Council of the League of Nations the same may be said as of the London declaration: the resolutions neither created new rules of international law, nor expressly condemned the clause. Moreover, not even mention was made of it, and all the Council did was to set up limitations to its application. Yet, not even these limitations could prevent the relevant clauses of the Treaty of Versailles from ceasing to be effective. Finally, there was yet another similarity between the situation in 1870 and that in 1935 and 1936, namely that in the same way as in the Euxine case so also in connexion with the Versailles Treaty no such fundamental change of circumstances took place as would have justified the application of the clause. In point of fact in all three instances there was a change in the power relations, which however by itself could not serve as a title to the application of the clause.

The London declaration is reflected also by Article 10 of the Convention on Treaties signed by the American states in Havana, on

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Dauer in Widerspruch mit den Interessen ihres eigenen Volkes an dem Wortlaut irgend eines Vertrages kleben, sie ist schließlich verpflichtet ganz offen zu erklären: Die Zeiten haben sich geändert, ich kann das nicht mehr." What has to be disapproved here is the imperialist colouring of the reasoning and the reservation of a reference to a change of circumstances exclusively for the great powers. This of course cannot be accepted, however, the underlying idea, that a change of times has an effect on the validity of a treaty, is beyond doubt proper. Bismarck in his reminiscences expressly takes a position in favour of the clause: "Die clausula rebus sic stantibus wird bei Staatsverträgen, die Leistungen bedingen, stillschweigend angenommen." (Bismarck, O.: *Gedanken und Erinnerungen*, Bd. 2, p. 258.)

[27] For the session and resolution of the Council see *League of Nations, Official Journal*, 1935, No. 5, pp. 550 to 564.

20 February 1928.[28] However, Article 15 of the same Convention expressly recognizes the possibility of declaring the caducity of a treaty if the causes which originated this treaty have disappeared.[29] We have to agree with an Italian writer, according to whom reference to "the causes which originated the treaty" cannot be considered being to the point,[30] still it is beyond doubt that Article 15 permits the application of the *rebus sic stantibus* clause within certain limitations.

The following examples taken from diplomatic practice also tend to confirm the right of the parties to terminate treaties owing to certain changes of circumstances.

Scarcely a few years after the settlement of the Euxine affair, Russia again invoked a change of circumstances when in 1886 she declared Article 59 of the Berlin Treaty of 1878 making of Batum a free port ineffective. According to the Ukaze of the Tsar invalidating this article of the Berlin Treaty "the circumstances which existed at the time of the acceptance of the provision in question had since changed fundamentally".[31] According to the Russian point of view this change consisted in the fact that Batum had lost its role of an advanced market in the transit trade transacted with Persia via Russia, and at the same time the people of Batum began to feel the customs frontier round the town as a heavy burden. In addition, Russia advanced as a further argument that the Berlin Treaty simply recorded the unilateral declaration of the Tsar on the creation of a free port, and a unilateral declaration could be modified at the option of its maker. Obviously, this last argument was wholly unfounded, inasmuch as the declaration made by Russia became by its incorporation in the Treaty an obligation that could not be denounced arbitrarily. Hence only the part of the argument based on the fundamental

[28] "No State can relieve itself of the obligations of a treaty or modify its stipulations except by the agreement, secured through peaceful means, of the other contracting parties." *The American Journal of International Law*, Supplement, Vol. 22, 1928, p. 139.

[29] "The caducity of a treaty may also be declared when it is permanent and of non-continuous application, on condition that the causes which originated it have disappeared and when it may logically be deduced that they will not reappear in the future." Ibid., p. 140.

[30] Fusco, G. S.: *La clausola "rebus sic stantibus" nel diritto internazionale*. Napoli, 1936, p. 60.

[31] See Pouritch, B.: *De la clause "rebus sic stantibus" en droit international public*. Paris, 1918, p. 113.

change of circumstances could be considered. In fact, the only protesting power, viz. the United Kingdom, restricted her protest to the second part of the Russian argumentation, whereas no mention was made of the reference to a change of circumstances. For that matter, eventually the controversy was settled in the same way as fifteen years ealier the Euxine affair, viz. that notwithstanding the British protest the interested parties took note of the invalidation of Article 59 of the Berlin Treaty by Russia. Here too reference to a change of circumstances ultimately brought about the caducity of a provision of a treaty.

Russia defined her position in the matter of the clause in a clear-cut form also in the First Peace Conference of the Hague, in 1899. The Russian delegation emphasized that any convention adopted by the Conference could restrict the freedom of action of the parties only as long as circumstances remained unchanged. On the other hand, if these circumstances underwent a change, also the rights and obligations deriving from a convention would have to be modified.[32] The Russian position was confirmed by the fact that eight years afterwards in the Second Peace Conference of the Hague in 1907 the conventions of 1899 were revised. There can be little doubt that time has passed since by many of the provisions of the 1907 conventions.

In this eclectic enumeration the case where the Austro-Hungarian Monarchy was the prime actor by declaring the lapse of a treaty provision on the plea of a change of circumstances could hardly be omitted. By a proclamation dated 7 October 1908 Francis Joseph I subjected Bosnia and Hercegovina "to the suzerainty of the Hungarian crown".[33] This annexion contrary to the provisions of the Berlin Treaty of 1878 was based by the note of the Monarchy on the radical change that had taken place in the situation during the past thirty years. According to the point of view expressed in the diplomatic note, this terri-

[32] "Ces traités lient la liberté d'action des parties tant que restent invariables les conditions pratiques dans lesquelles ils se sont produits. Ces conditions venant à changer, les droits et les obligations découlant de ces traités changent aussi nécessairement." (*Conférence internationale de la paix, La Haye, 18 mai—29 juillet 1899*. La Haye, Ministère des Affaires Etrangères. Annexes au rapport de la convention pour le règlement pacifique des conflits internationaux. Annexe A, Documents émanés de la délégation russe, pp. 161—162.)

[33] See *Archives diplomatiques*, 1908, I, pp. 109, 278 et seq.

tory — owing to the changed situation — needed self-government and a constitutional system. After an initial protest, the European powers took note of the reference to the clause even in this case, although here its application was by no means convincing. As a matter of fact, in the case of Bosnia and Hercegovina there could hardly be a question of a fundamental change of the concrete circumstances constituting a basis of the agreement as they existed at the time the treaty was concluded. Naturally during the past thirty years the political situation of the world underwent considerable changes, still as far as the annexed territory was concerned no such changes took place as would have provided a basis for the abrogation of the provisions of the treaty. In addition, the obvious purpose of the annexation was the accomplishment of imperialist conquest rather than the grant of autonomy and the establishment of a constitutional system. This was the reason why in the beginning all signatories, hereincluded Germany, at that time in close alliance with the Monarchy, spoke of a breach of treaty.[34] Even at that time no dispute of principle developed on the question whether or not a change of circumstances may be invoked at all, so that this affair too tended to confirm that the powers do not contest the *rebus sic stantibus* clause as an institution of international law, and merely call into doubt its concrete applicability.

Passing by a number of cases having lost interest, we should like to refer to two instances of the practice of the United States of America, which were of major significance because in the International Law Commission, and also in the Sixth (Legal) Committee of the General Assembly of the United Nations, the United States put up the keenest opposition to the opinion recognizing the effect of a change of circumstances on the life of treaties. What is more, the only serious protest against the provisions of the draft of the International Law Commission regarding the recognition of the effects of a change of circumstances was sounded by the United States.[35]

[34] Cf. Schesmer, B.: *Die Lehre von der clausula rebus sic stantibus und das heutige Völkerrecht*. Marburg, 1934, pp. 24—25.

[35] The states in their comments on the draft of the International Law Commission in general did not protest against the provision establishing the effect of a change of circumstances on treaties, moreover the majority of comments did not even touch on the subject. On the other hand, the United States doubted the existence of a norm of international law according to which a fundamental change of circumstances had an effect on the validity of a treaty, moreover thought that "in the absence of

The first, rather vague reference to the clause was made in connexion with the Clayton-Bulwer Treaty concluded between the United States and the United Kingdom on the construction of a canal between the Atlantic Ocean and the Pacific in 1850, of which the United States wanted to rid themselves at all costs. Therefore Secretary of State Blaine in his instructions to the United States minister in London, in the year 1881, called into doubt the effectiveness of the treaty on the plea that thirty years had lapsed since the treaty was concluded and that at the time of its conclusion "exceptional and extraordinary conditions" prevailed, which have long since ceased to exist and can never be reproduced. The Secretary of State, among others, referred to the fact that during the past thirty years the Pacific coast of the United States could record a remarkable development.[36] His successor, Secretary of State Frelinghuysen similarly called into doubt the effectiveness of the 1850 treaty, although he did not refer to a change of circumstances in such a clear-cut form.[37] Similarly to his action in the Euxine Affair, the British Foreign Secretary Granville again protested against the treaty being declared inoperative, and for the time being the question was allowed to stand over. Then in 1896 in a memorandum to the President of the United States the then Secretary of State Olney revised the position taken by his predecessors and recognized the validity of the treaty; at the same time, however, he began to make preparations for the conclusion of a new treaty. This new treaty, called the Hay—Pauncefote Treaty, that paid already due heed to the interests of the United States, was signed in 1901.[38]

The case here discussed is noteworthy, because it was the first instance that the United States invoked the change of circumstances as a cause of the lapse of a treaty, and even when later the United

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accepted law, it seems highly questionable whether this concept is capable of codification". (*UN. Doc. A/CN.4/175.* February 23, 1965, p. 189.) In the Vienna Conference in order to prevent the risk of being isolated the United States gave up their earlier rigid refusal, still they tried to confine the application of the clause to as narrow limits as possible. (See the contribution of the head of the United States delegation, *United Nations Conference on the Law of Treaties*, First Session, Official Records, p. 367.)

[36] *Foreign Relations of the United States*, 1881, p. 554.

[37] Ibid., 1882, p. 271.

[38] For a detailed history of the case see Moore, J. B.: *A Digest of International Law*. Washington, 1906, Vol. III, pp. 189 et seq.

States made concessions, this she did when there were good prospects for a new, more favourable treaty.

In the case to be discussed next, the United States went further and on the plea of a change of circumstances suspended the operation of an international convention. In the course of the Second World War, still before the United States entered the war, on 9 August 1941 President Franklin D. Roosevelt suspended the operation of the International Load Line Convention of 5 July 1930 on the load-line of ships in the territorial waters of the United States by declaring that "under approved principles of international law it has become, by reason of such changed conditions, the right of the United States of America" to take this action.[39] The suspension of the operation of the convention was explained by the necessity of an increased exploitation of tankers for which partly the growth of the domestic needs of the United States, partly the lease of tankers to the United Kingdom were responsible. Under such circumstances the safety regulations limiting the freight capacity of vessels for conditions of peace, could not be maintained any longer. The proclamation of the President, to justify the measure, expressly referred to a change of conditions in the meantime, pointing out that the convention was drawn up in times of peace and on the assumption of peaceful trading conditions. On the other hand, at the time of its suspension, of the thirty-six contracting parties ten were belligerents and sixteen were under foreign military occupation. Whereas the objective of the convention was to improve the safety of life and property at sea, according to the proclamation the annihilation of life and property became the objective of several of the contracting parties. The measure was preceded by an extensive examination of the potentialities offered by the legal situation and on the whole the presidential proclamation relied on the opinion of Acting Attorney General Biddle. This opinion considered the clause *rebus sic stantibus* a well-established principle of international law and stated that a treaty ceases to be binding when the basic conditions upon which it was founded have essentially changed. According to this opinion the suspension of the convention in such circumstances is the unquestioned right of a party adversely affected by such a change.[40] What is note-

[39] Hackworth, G. H.: *Digest of International Law*. Washington, 1943, Vol. V, pp. 355—356.

[40] See: *Opinions of the Attorney General of the United States*, Vol. 40, No. 24.

worthy is that the proclamation of the United States started from the idea of a unilateral action and in this way obviously ignored the point of view expressed in the London Protocol of 1871 which emphasized the need for an agreement of the contracting parties.

Briggs, the well-known American international jurist, strongly criticized the opinion of the Acting Attorney General and the action of the President of the United States. Then to contest the acceptance and application of the clause by the United States of America he hazarded the remark that the suspension of the convention was based rather on a state of emergency.[41] This position is, however, for several reasons untenable. First, it may be questioned whether international law, by the side of the *rebus sic stantibus* clause and supervening impossibility of performance, recognizes emergency as a factor justifying the termination or the suspension of the operation of a treaty at all. In view of diplomatic and judicial practice, the reply to the question is rather a negative one. Besides, in our opinion, by the side of the two notions, i.e. the clause and supervening impossibility referred to above, a self-contained formulation of the notion of emergency in the law of treaties is not even justified. This is obviously in agreement with the position taken by the International Law Commission, whose draft does not recognize the termination of a treaty on the plea of emergency. Yet, even if somebody admitted the significance of emergency in the law of treaties, to the given instance the notion of emergency would hardly be applicable, since the measure in question was taken before the United States entered the war, i.e. at a time when the situation was not menacing for the United States to an extent that the omission of this measure would have jeopardized her vital interests. Finally, it should be pointed out that in the opinion of Acting Attorney General Biddle the term "*rebus sic stantibus*" appeared, a term which even in cases of an express reference to a change of circumstances is quoted

[41] Briggs, H. W.: The Attorney General invokes *rebus sic stantibus*. *The American Journal of International Law*, 1942, p. 94. Later in the International Law Commission too Briggs called into doubt the existence of the clause, and in his reply to the questionary issued by the Institut de Droit International he stated that the clause "is more a disputed political ground for invoking release from treaty obligations than a legal ground", and added that the Institut "may find more important and rewarding problems to study" (*Annuaire*, 1967, Vol. 52, tome I, p. 374).

on rare occasions only, and that the presidential proclamation itself based the measure on a change of conditions.

In the Balkan wars preceding the First World War reference was made repeatedly to the *rebus sic stantibus* clause. A case permitting the drawing of conclusions of general validity will be discussed below.

A secret annex to the treaty of friendship and alliance signed by Serbia and Bulgaria in 1912 contained provisions on the partition between themselves of territories to be recovered from Turkey, on principles defined in the same annex. However, when the allied Balkan states, meanwhile joined by Greece and Montenegro, ended the first Balkan war victoriously and proceeded to the distribution of the gain, the Austro-Hungarian Monarchy intervened and demanded the creation of an independent Albania. So the claims of Serbia to an access to the Adriatic were frustrated. Hence, as compared to the situation at the signature of the treaty, there was an essential change. The complete satisfaction of the claims of Serbia was made impossible by the intervention of one of the great powers, and at the same time by occupying Adrianople Bulgaria achieved a conquest of territory greater than foreseen by the treaty. A further change in the situation was that the recovered territories had to be distributed among four states, instead of the original two.

Under these circumstances Serbia pleaded the lapse of the original treaty and insisted on the conclusion of a new treaty. To support her position Serbia had recourse to the usual dual argumentation, viz. she referred to a radical change in the situation since the birth of the original treaty, and also as a supplementary argument she alleged a violation of the provisions of the treaty immediately before the outbreak of the war, and then in a more critical manner during the war itself. This argumentation was brought forward by the Serbian Prime Minister Pashitch in the Diet, and on this were based the notes addressed to Bulgaria on 9 March 1913, and then later on 25 May 1913.[42]

The crisis so brought about was eventually settled by the arms. The second Balkan war ended with the defeat of Bulgaria, and the Bucharest Treaty of 1913 carried through the territorial redistribution to the detriment of the losing party.

The case is noteworthy in so far as the reference to a change of circumstances purposed the change of a frontier line drawn and fore-

[42] For details see Pouritch, B.: *Op. cit.*, pp. 147 et seq.

seen by a treaty. Here, however, a peaceful enforcement of the clause was frustrated, exactly for the reason that recourse to it was had to make good territorial claims. This example too confirms the opinion that in order to preserve international peace and security the application of the clause to treaties establishing boundaries between states is out of the question, even when the otherwise essential conditions are present. Therefore the International Law Commission took the correct position, finding an expression also in Article 62 of the Vienna Convention, when it stated that in the case of treaties establishing a boundary a change of circumstances cannot be invoked.[43]

The *rebus sic stantibus* clause had a significant function in the disputes on a series of treaties, the so-called capitulations, between the imperialist powers and states relegated by these treaties to an unequal position. The latter emphatically invoked the change of conditions as a ground for the termination of a treaty. In particular the dispute in connexion with the Chinese capitulations calls forth attention.

The victory of the Great October Socialist Revolution at the same time meant the decline of the capitulatory regime. In point of fact Turkey soon after the outbreak of the First World War, with effect as from 1 October 1914 tried to abolish the capitulations. The abolition of the capitulations was proclaimed also by the Turkish Statute of 23 February 1915,[44] but after the war by the Treaty of Sèvres the Allied Powers restored their earlier privileges. Afterwards Soviet Russia in agreement with the principles proclaimed by her in the treaty of 21 March 1921 on the invalidation of unequal treaties renounced her privileges in respect of Turkey, so that this country could enforce its claim with greater success against the Allied Powers in the peace conference of Lausanne in 1923.

The abolition of the capitulatory regime was not so simple in China, where the imperialist powers were not confronted by a strong national government, like in Turkey. Although Soviet support here too had a word to say in so far as the Soviet state renounced its rights under the capitulations in respect of China, still China had to continue a struggle of some length for the general abolition of the capitulations, and was not completely successful until after the Second World War.

[43] For details see pp. 393 et seq.

[44] For details see Rechid, A.: La condition des étrangers dans la République de Turquie. *Recueil des Cours*, Vol. 46, pp. 180 et seq.

The struggle that was waged at the same time for the termination of foreign concessions and commercial privileges was continued to a large extent with legal means, and here a change of circumstances was invoked not as the last ground for the abolition of the capitulations. The change of circumstances as a ground for the abolition of the capitulations was invoked in a particularly vigorous way in the legal dispute between China and Belgium.

When in 1926 China unilaterally abrogated her treaty signed with Belgium in 1865, the arguments for this step were mainly based on the *rebus sic stantibus* clause. According to the note the Chinese Ministry for Foreign Affairs addressed to the Belgian minister on 16 April 1926, since the conclusion of the treaty in both countries political, social and commercial conditions had changed to an extent that the earlier treaty could not be maintained anymore and a new treaty had to be brought about between the two states. The Chinese note repeated this conclusion in a generalized form too, stating that since in human society conditions and circumstances were changing continually, obviously there was no treaty which could remain acceptable for all times without a change.[45] In its declaration of 6 November 1926 the Chinese government with yet greater emphasis laid down the principle that "to endeavour to preserve them (sc. old treaties) in the face of radically changed conditions and against the progress of modern international thought and life is to forget history and its teachings".[46]

Chinese jurisprudence too backed the point of view of the government. Wang Tchung-hui dealing with the Sino-Belgian dispute pointed out that the regime established for aliens reflected the past and became —owing to a change of social, economic and political conditions— inapplicable. Earlier there was a small number of aliens in China only, in the so-called treaty-ports. However, the situation since changed radically. Earlier the capitulatory regime, by applying to aliens their own law and not Chinese law wholly different from Western legal systems, helped to advance friendly relations between Chinese nationals and aliens living in China; subsequently the effects of the capitula-

[45] *Statement of the Chinese Government and other official documents relating to the negotiation for the termination of the Sino-Belgian treaty of amity, commerce and navigation of November 2, 1865.* Publication of the Ministry for Foreign Affairs, Peking, 1926, p. 7.

[46] Ibid., p. 5.

tions turned the other way round and the differences in the legal position became a source of continual frictions.[47]

M. T. Z. Tyan in his work published already before the Sino-Belgian dispute referred to the decisive changes that took place in the conditions and as regards capitulations made it clear that China "is entitled to the protection of the doctrine of *rebus sic stantibus*".[48]

The capitulatory regime is today a thing of the past. Still the Sino-Belgian dispute was going on for an extended period of time. Belgium first lodged a protest against the unilateral abrogation of the treaty. Then she wanted to enlist the assistance of the Permanent Court of International Justice for the safeguard of her alleged rights. Eventually Belgium thought it was better to come to terms with China and by terminating the earlier treaty bring under regulation the relations between the two countries in a new treaty. Belgium did not contest the legitimacy of invoking the change of circumstances, she merely called into doubt the applicability of the clause to the actual case and the lawfulness of the procedure followed by China. On the other hand, the conclusion of a new treaty demonstrated that in the final issue Belgium had to make concessions. Hence the Sino-Belgian dispute bore testimony to the fact that the *rebus sic stantibus* clause has a significant function also in the international practice of states far away from Europe.

Similarly, by invoking the essential change of circumstances as a ground, the Chinese government, among others, wanted to abrogate the Sino-Spanish Treaty of 1864.[49] After the analysis of the developments in connexion with the termination of the Sino-Belgian Treaty we believe we may dispense with enlarging on this and similar other legal controversies which eventually all ended with the termination of capitulations and other treaties of a similar nature.

Further, we think it necessary to quote one or two examples of the European practice during the period between the two world wars in demonstration of reference to the change of circumstances becoming more and more general; in fact, states which earlier denied the validity of this clause now have recourse to it.

[47] Quoted by Tseng Yu-hao: *The Termination of Unequal Treaties in International Law*. Shanghai, 1931, p. 68.

[48] Tyan, M. T. Z.: *The Legal Obligations Arising out of Treaty Relations between China and Other States*. Shanghai, 1917, pp. 209—210.

[49] Cf. Tseng Yu-hao: *Op. cit.*, pp. 94 et seq.

In the practice of the Northern states in 1924 Norway invoked a change of circumstances in order to abrogate the treaty concluded between Norway and Sweden in 1907 on the occasion of the dissolution of the union of the two countries. The treaty guaranteed the territorial integrity of Norway. In the treaty of 1907 Norway undertook not to cede parts of her territory to another state. On the other hand, the United Kingdom, France, Germany and Russia guaranteed the territorial integrity of Norway. Norway wanted to rid herself of the treaty creating a special situation for her, among others on the plea of a change of circumstances. Still Norway in the first place referred to the Covenant of the League of Nations which in Article 10 contained provisions guaranteeing the territorial integrity of the member states,[50] and pleaded that the special guarantee was in disagreement with this provision of the Covenant. Since, however, at that time the Soviet Union was not member of the League of Nations, so that the effect of the provisions of the Covenant did not extend to her, in respect of the Soviet Union the Treaty of 1907 could not be terminated on the ground indicated by Norway. For the very reason, therefore, the Norwegian note also referred to a material change of circumstances brought about by the World War, the Versailles Treaty and the Great October Socialist Revolution, which necessitated the termination of the treaty. The interested powers without any objection admitted the Norwegian position and agreed to the termination of the treaty.[51]

The circumstance which from the point of view of international law lends special significance to the case is that here recourse had been had to the treaty-terminating effect of a change of circumstances in connexion with a treaty in general opinion signed for a definite period. As a matter of fact, the treaty in question was concluded for a period of ten years in 1907, on the condition that if no notice had been served by either party it would run for subsequent periods of ten years.

[50] Article 10 of the League of Nations Covenant: "The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled."

[51] Cf. Schuchmann, M.: *Die Lehre von der Clausula Rebus Sic Stantibus und ihr Verhältnis zu Art. XIX des Völkerbundspaktes.* Giessen, 1936, pp. 36—37.

The first period of ten years following upon the coming into force of the treaty expired in 1918, when in conformity with the above provision the period of its validity was extended till 1928. However, meanwhile, in 1924, the treaty was abrogated by Norway. This is another case which speaks for the opinion that the application of the *rebus sic stantibus* clause is not restricted to treaties signed for an indefinite period and void of provisions on the right of terminating the treaty by way of notice.

In the same period also the French Chamber of Deputies took a stand for the application of the *rebus sic stantibus* clause by a resolution making a stir on the occasion. The resolution was passed on 12 December 1932 in connexion with the settlement of debts by France to the United States of America originating from the time of the First World War. When owing to the world economic crisis, then to the so-called Hoover moratorium, and the consequential new regulation of German reparations payments in Lausanne in July 1932 the solvency of France deteriorated appreciably, the Chamber of Deputies, by rejecting the government's proposal submitted before the maturity of the next payment by France to the United States, declared that in conformity with the recognized principle of international law treaties had to be executed "*rebus sic stantibus*". Since, however, the settlement in the matter of war debts relied on the agreement on German reparations payments, and on the initiative of the United States Government German reparations payments were suspended, the convention on war debts ceased to be enforceable.[52] Although the note the French Government addressed to the United States Government on 15 December 1932 somewhat watered down the tone of the resolution of the Chamber of Deputies, still reference to a change of circumstances and the emphasis on a need for a new settlement could be discovered in this note too.[53]

[52] From the resolution of the Chamber: " . . . en vertu d'un principe reconnu du droit international public, les traités et conventions doivent être exécutés 'rebus sic stantibus'. . . La Chambre déclare que les circonstances déterminantes ayant été intégralement modifiées et devant le demeurer sous peine de voir s'aggraver la situation mondiale, les accords intervenus sur les dettes ont perdu leur force exécutoire . . ." (Kiss, A.-Ch.: *Répertoire de la pratique française en matière de droit international public*. Paris, 1962, tome I, p. 386.)

[53] In the course of the debate, the speakers of the French social democratic party pleaded that it would be an abuse of rights if the United States

In the first days following upon the outbreak of the Second World War, on 10 September 1939, the French Government referring to a change of circumstances notified the Secretary-General of the League of Nations of its decision not to consider its acceptance of the so-called compulsory jurisdiction of the Permanent Court of International Justice according to paragraph 2 of Article 36 of the Statute valid for disputes arising in connexion with events occurring during the war.[54] Similar declarations were made by the United Kingdom and a number of members of the Commonwealth.[55] These declarations differ for two reasons from the above-discussed references to a change of circumstances. First, in these instances reference to a change of circumstances was made in connexion with unilateral declarations, and not treaties. However, this difference is not of particular significance, since these declarations included the international undertakings of the states making them towards all other states which by making similar declarations acceded to the so-called Optional Clause and the declarations could not have been otherwise withdrawn or modified unilaterally before their date of expiry. Secondly, there was a difference in the effect of the declarations, as the states making them did not set aside their earlier declarations accepting the com-

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insisted on payments being made under the circumstances. In this connexion a German writer came to the conclusion that in the event of an essential change of circumstances the obliged party could argue that the provisions included in the treaty had lost their binding force, but at its option it could argue also from the beneficiary's position that the latter would be open to a charge of an abuse of rights if under the given circumstances it applied the provisions which still appeared to bring under regulation the new situation. (Voss, F.: *Rechtsmißbrauch im Völkerrecht*. Die Theorie der Gegenstandsbedingtheit der Rechtsnormen und das Verhältnis des Rechtsmißbrauchs zur clausula rebus sic stantibus. Münster, 1940, p. 145.) This reasoning is unacceptable, for apart from the fact that in international law the notion of an abuse of rights is still in flux, and in international relations abuse may be invoked on very exceptional occasions only, it is exactly the function of the clause to help the party concerned in the special case of a change of circumstances to achieve the termination of a treaty on its own initiative. If this party is of the opinion that there is no need for action, then in international relations it cannot invoke an abuse of rights by the other party merely on the ground of a change of circumstances, because this party wants to make good its rights according to the principle *pacta sunt servanda*.

[54] *League of Nations, Official Journal*, 1939, p. 409.

[55] Ibid., pp. 407 to 410.

pulsory jurisdiction of the Permanent Court of International Justice, but merely limited the extension of this jurisdiction. However, also here it should be remembered that the difference between a complete abrogation and limitation was one of principle only, as in practice there was no difference at all. As a matter of fact, it would have been hardly imaginable that in the course of a world war disputes independently of the war should arise between belligerents and neutrals, let alone what was evident already at the beginning of the war, viz. that the Permanent Court of International Justice would hardly be in the position to perform its judicial functions for any length of time.

In the interwar period there is yet another question which deserves a closer study, namely the Soviet attitude to the doctrine of the effect of a change of circumstances on the validity of a treaty.

In the practice of the Soviet State a fundamental change of the circumstances existing at the time of the conclusion of a treaty was invoked already at the initial stage. The Soviet memorandum submitted to the Genoa Conference on 20 April 1922 made it clear that the Revolution of 1917 completely destroyed the earlier economic, social and political relations, substituting a new social order for the old one. By this the civil obligations which were the constituent elements of the economic relations of the former social order were smashed. Analyzing this memorandum, Korovin pointed out that the Soviet argumentation was an extension of the principle of *rebus sic stantibus*, yet at the same time its limitation to a single fact, namely the social revolution.[56] Somewhat later in its note of 2 April 1924, the Soviet Government declared that, in addition to the secret treaties to be considered ineffective, in view of subsequent changes of international circumstances all other treaties concluded before the October Revolution would have to be made subject to a scrutiny seriatim by state and treaty on the ground of the *rebus sic stantibus* clause.[57] Here we have an express reference to the clause.

Korovin gave expression to his opinion already earlier in his well-known work dealing with the international law of the period of transition. There he too restricted the applicability of the clause to the case of the social revolution. Otherwise, mainly for practical considerations,

[56] Korovin, E. A.: Soviet Treaties and International Law. *The American Journal of International Law*, 1928, p. 763.

[57] See Fauchille, P.: *Traité de droit international public*. Paris, 1926, tome 1, partie 3, p. 388.

he opposed the recognition of the general applicability of the *rebus sic stantibus* clause. So e.g. he pointed out that there was no international forum that could settle disputes arising between contracting parties without the consent of the parties. Still he stated there was a single exception, namely the application of the clause was justified in his opinion when the existing legal order was superseded by a legal order as for quality and principle of a higher standard. This applies to the social revolutions of the present period, when the international law of the period of transition superseded the international law of the bourgeois democracies. According to the example of Korovin, "it would be as unjust to demand from Russia the performance of the secret treaties or the payment of interests on loans advanced for the suppression of the revolution, as would be to ask from a republican government replacing the former monarchy for the princess's hand and her dowry".[58] Korovin even added that it would have been absurd on the part of Soviet Russia to demand from Hungary the performance of the obligations undertaken by the Hungarian Republic of Soviets. Finally, Korovin summed up the legal significance of the *rebus sic stantibus* clause that this was merely a "slight correction in connexion with the great revolution".[59]

The argumentation of Korovin simplifies the problem of the clause in an exaggerated form, and in addition ignores widespread international practice. This is borne out by the circumstance that from diplomatic practice he quotes three arbitrarily selected cases only. He offers no theoretical explanation for the limitation of the application of the clause exclusively to the case of a social revolution. On the other hand, the practical difficulties brought forward as an argument partly manifest themselves even in the case of a social revolution. Recent Soviet literature regards Korovin's reasoning as unsatisfactory.[60]

[58] Коровин, Е. А. (Korovin, E. A.): *Международное право переходного времени* (International law of the period of transition). Moscow, 1924, p. 109. — It should be noted that Korovin's example is not quite consistently referred to, as the substitution of a republic for a monarchy does not necessarily imply a social revolution. Nevertheless in his opinion reference to the clause cannot be considered precluded.

[59] Ibid., p. 110.

[60] See e.g. Шуршалов, В. М. (Shurshalov, V. M.): *Основания действительности международных договоров* (Foundations of the validity of treaties). Moscow, 1957, p. 105. According to the author, Korovin failed

Another prominent Soviet expert of international law of the same period, Pashukanis, took no definite stand in the question of the clause. He merely mentioned that the theory of the *rebus sic stantibus* clause was advanced only to bring into harmony the undisputed historical facts bearing testimony to the precariousness of treaties with the legal doctrine.[61] Nevertheless, from the tone of the relevant section of his work it was obvious that within certain limits Pashukanis recognized the necessity of the clause.

Almost at the same time as Korovin's work Ladizhensky published his paper in which in opposition to Korovin he considered the *rebus sic stantibus* clause concomitant of any legal regulation, and mentioned the treaty-terminating effect of a material change of circumstances among the most fundamental legal principles.[62] However, the opinion of Ladizhensky stayed rather isolated in the Soviet literature of the time.

Later a marked retrocession can be observed among the Soviet writers on international law as regards the clause. Their argumentation mainly concentrated on the circumstance that in their opinion the clause was incompatible with the principle of *pacta sunt servanda*. Undoubtedly, the fact that in the diplomatic practice of imperialist states cases of an abusive reference to the change of circumstances merely for the sake to get rid of treaties becoming inconvenient for them were by no means few in number, added considerably to the distrust shown to the clause. A point of view of this sort appeared in a textbook published in 1947,[63] and then again in a textbook on international law published in 1951.[64]

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to clarify the essence of the problem, and did not by far demonstrate the true theoretical and practical significance of the clause in international relations.

[61] Пашуканис, Е. Б. (Pashukanis, E. B.): *Очерки по международному праву* (Outlines of international law). Moscow, 1935, p. 160.

[62] Ладыженский, А. М. (Ladizhensky, A. M.): Оговорка изменившихся обстоятельств (clausula rebus sic stantibus) в советском праве (The clause of changed circumstances [clausula rebus sic stantibus] in Soviet law). *Pravo i zhizn'*, 1925, Nos 2—3, p. 12.

[63] Кожевников, Ф. И. (Kozhevnikov, F. I.): *Международное право* (International law). Moscow, 1947, p. 407.

[64] *Международное право* (International law). Ed. by F. I. Kozhevnikov, Moscow, 1951, pp. 419—420.

However, the complete rejection of the clause could not be of a long duration, and recently in the Soviet literature on international law the opinion prevails that a reference to a change of circumstances as a method of terminating treaties must be recognized within a definite sphere. There are still considerable traces of a certain guardedness in respect of the clause, which, however, cannot be considered wholly unjustified, as an exaggerated application of the clause might be responsible for the undermining of one of the fundamental principles of international law, namely the obligation of respect for treaties. At least the abuses of some states referred to earlier may serve as a warning in this connexion.

This approach appears, though in a rather vaguely defined form, in the 1957 edition of a textbook edited by Kozhevnikov,[65] and the same is expressed in textbooks issued in 1964 and 1966.[66] A more definite stand has been taken in favour of the clause in a textbook edited by Levin and Kalyuzhnaya, published in 1964. Here the possibility of a unilateral termination of a treaty has been recognized expressly in the event of a change of the circumstances from the conclusion of the treaty.[67] What may be emphatically objected to is that all of the textbooks settle the problem in a sentence or two without throwing a light on the essence of it.[68]

On the other hand, Shurshalov in his work on the validity of treaties deals with greater detail with the *rebus sic stantibus* clause.[69] Shurshalov recognizes the justification of the clause and states that the clause permits "the cleansing of international law of obsolete legal rules which have outlived themselves and which do not suit the new conditions".[70] It appears to be somewhat arbitrary, however, when

[65] *Международное право* (International law). Ed. by F. I. Kozhevnikov, Moscow, 1957, pp. 275—276.

[66] *Международное право* (International law). Ed. by F. I. Kozhevnikov, Moscow, 1964, p. 354; *Курс международного права* (Course of international law). 2nd, revised ed. of prec. Moscow, 1966, p. 362.

[67] *Международное право* (International law). Ed. by D. B. Levin and G. P. Kalyuzhnaya, Moscow, 1964, p. 93.

[68] V. I. Lisovsky in his handbook on international law is rather wavering in taking a definite position. Ostensibly he inclines to recognizing a modification or termination of a treaty in case of a change of circumstances only by common agreement of the parties [*Международное право*, (International law). Moscow, 1961, pp. 301—302].

[69] Шуршалов, В. М. (Shurshalov, V. M.): *Op. cit.*, pp. 94 et seq.

[70] Ibid., p. 129.

the author restricts the practical application of the clause to peoples fighting for their national independence and independent statehood, and to states which are members of aggressive blocs and are desirous to withdraw from them. Still he adds that, rarely though, there may occur other cases too of the application of the clause in international life. However, he fails to describe these cases. In many respects the reasoning of Shurshalov is remarkable, although his attempt to restrict the application of the clause to predetermined cases remains evidently unsuccessful. The change of circumstances beyond a certain degree will entail the termination of all treaties; and here an exception may be made in respect of certain categories of treaties at most, as has been done with treaties establishing a boundary. An attempt directed at an exhaustive enumeration of cases where the clause can be applied, would obviously undertake to accomplish something absurd. Nevertheless, the remarks of Shurshalov correctly draw attention to the circumstance that as compared to the principle of *pacta sunt servanda* the clause can be applied only exceptionally and even so with utmost caution.

A further advance towards the recognition of the significance of the clause is represented by the position taken by the new Soviet handbook of international law. Although this work of six volumes (five of which have already been published) mostly repeats Shurshalov's opinions analyzed above, it extends the cases of application as defined in his mentioned book, adding that neither in other cases the termination of a treaty can be precluded with regard to radical changes of the circumstances.[71] The nature of international customary law of the principle implied in the clause has been definitively stated by F. N. Kovalev.[72]

The headway the clause is making in the Soviet literature on international law has had some influence on Soviet diplomatic practice. In more recent practice again at least indirect reference has been made to the effect of a change of circumstances on the operation of treaties. Such a reference may be discovered in the statement made by the Soviet Government by which it terminated the Soviet–Japanese non-

[71] *Курс международного права* (Course of international law). Ed. by V. M. Chikvadze, Moscow, 1967, Vol. II, p. 279.

[72] Ковалев, Ф. Н. (Kovalev, F. N.): Коренное изменение обстоятельств (Fundamental change of circumstances). *Sovietskoe gosudarstvo i pravo*, 1970, No. 3, p. 70.

aggression treaty in 1945.[73] The Soviet note to the United States, the United Kingdom and France of 27 November 1958, in addition to protesting against the repeated violations by the Western powers of the agreements on the status of Berlin, mentions that at their time the agreements corresponded to the historical circumstances and the interests of all parties concerned, however, exactly owing to the rearmament of Western Germany by the Western Powers the agreements had become somewhat outdated and that the Soviet Union could not be expected to behave as if she had taken no notice of the changes.[74] Hence, Soviet argumentation in the first place refers to the breach of treaty by the other parties, although in addition, and in part for its consequence, refers to the changes that have taken place in the circumstances.

In the diplomatic practice after the Second World War cases occurred when the parties wanted to abrogate a treaty by an express reference to the *rebus sic stantibus* clause. In the following a few striking examples will be quoted.

The dispute on the British–Egyptian Treaty of 1936 coming up before the Security Council in 1947 is generally known. Egypt contested the validity of this treaty and the Egyptian prime minister, Nokrashy Pasha, in a letter addressed to the Secretary-General of the United Nations stated that the presence of British troops under the Treaty of 1936 on Egyptian territory was offending and unlawful.[75] In this letter the argumentation of Egypt is still uncertain, obscure and built on generalities. However, in the debate before the Security Council Egypt clearly referred to the changes which had occurred in the circumstances since the treaty was signed. In the debate before the Security Council in August and September 1947 the Egyptian premier declared that at that time the treaty was negotiated under circumstances that did not exist anymore and that it was exactly the purpose of the treaty to meet the then existing specific circumstances. Hence the treaty was "obsolete" and "has outlived its purpose".

All this is but reference to the *rebus sic stantibus* clause. However, the Egyptian premier thought he had better not call the clause by its

[73] Quoted by F. N. Kovalev (*Op. cit.*, p. 69).
[74] See *Neue Zeit*, 1958, No. 49, pp. 43—44.
[75] See *U.N. Doc. S/140.*

name, presumably because in the past the British Foreign Office was highly responsive to the clause's being invoked by other countries. And in fact, Sir Alexander Cadogan, the British representative in the Security Council, pointed out that the Egyptian argumentation would appear to be an appeal to the doctrine *rebus sic stantibus*. Yet not even Sir Alexander did go as far as to call into doubt the applicability of the clause on points of principle. All he did was to state that "the extent to which treaties can be held invalid on *rebus sic stantibus* grounds, otherwise than by agreement between the parties themselves, is certainly very limited as well as being controversial".[76] In addition, he doubted the significance of the change of circumstances which had taken place in the meantime, another evidence of his recognition of the clause in principle.

It was also noteworthy in the debate that Gromyko representing the Soviet Union on the Council emphasized, in support of the Egyptian point of view, that since 1936 the circumstances in fact underwent a material change, thus obviously attributing a treaty-terminating effect to a change of the circumstances of this extent.[77]

If in this debate Egypt failed to achieve a satisfactory result, this was not because, as Briggs stated, Egypt had no legal case.[78] The reason of the failure was partly that at that time monarchic Egypt did not dare to, nor could, show determination against the imperialist powers, partly that the machinery of the United Nations was wielded completely by these powers. However, after the revolutionary changes in Egypt the United Kingdom was obviously forced to terminate the treaty of 1936 and to sign a new one in 1954. Then the British–French–Israeli aggression in 1956 swept away even this treaty, so that the Egyptian point of view was eventually victorious.

Another principal organ of the United Nations, the Secretariat, went much farther in the enforcement of the clause. As a matter of fact, in its expert opinion in the matter of the validity of the system of the minorities treaties concluded after the First World War, the Secretariat, by calling the clause by its name, stated that owing to

[76] *Security Council, Official Records*, No. 70, p. 1173.
[77] *Security Council, Official Records*, No. 80, p. 2110.
[78] Briggs, H. W.: Rebus sic Stantibus before the Security Council: The Anglo-Egyptian Question. *The American Journal of International Law*, 1949, p. 768.

essential changes of the circumstances these treaties had forfeited their validity.[79]

Feinberg in his paper dealing with the opinion of the Secretariat pointed out that against the general view the drafters of the opinion attributed an automatic effect to the change of circumstances. In fact, none of the contracting parties referred to a material change of circumstances or declared the invalidation of the treaty concerned pursuant to these changes.[80] This remark is in fact properly substantiated: the expert opinion of the Secretariat of the United Nations ignored the fact that in general the effect of the clause does not supervene by itself with the change of circumstances, but only on the ground of a declaration of anyone of the parties in this sense. As for the merits of the case, we think the opinion of the Secretariat was sound enough, although its motivation was defective and inconclusive. As a matter of fact, it was evident from the attitude of the states concerned that owing to a change of circumstances they ceased to consider the minorities treaties being in force, a circumstance amply confirmed by the adoption of the United Nations Charter by the various states interested in the matter, the conclusion of the Paris peace treaties in 1947, and other decisive acts. If therefore the attitude of any of the contracting parties clearly indicated that this party considered the given treaty ineffective owing to the fundamental change of circumstances, with no objection on the part of the other parties, there was no need for an express declaration of the termination of the treaty. In all events the position taken by the Secretariat brought into prominence that in our days for experts of international law the treaty-terminating effect of a fundamental change of circumstances could hardly be contested.

Nor can we overlook the Danube Conference convened in Belgrade in 1948, where the Western powers invoked the 1921 Paris Convention against the conclusion of the new Danube Convention. According to their point of view the Paris Convention was still in force and consequently without the agreement of all parties to this convention no new convention could be concluded. The representatives of the socialist states refuted this point of view by quoting a variety of arguments,

[79] See *U.N. Doc. E/CN.4/367*, p. 36.

[80] See Feinberg, N.: The legal validity of the undertakings concerning minorities and the clausula rebus sic stantibus. *Studies in Law, Scripta Hierosolymitana*, Vol. V, 1958, pp. 116—118.

among which the change of circumstances in the meanwhile was accorded an essential role.[81] First of all the Hungarian delegate pointed out that "the circumstances in which the treaties[82] were concluded had undergone a radical change both from the economic and political aspects". For this reason the makers of the peace treaties decided to convene an international conference to elaborate a new convention.[83] The Soviet representative, Vishinsky, also referred to a change of circumstances and in the closing session he pointed out that "the Danube was not anymore what it used to be 100, 50, or even 25 years before. The riparian states too were not anymore what they used to be. The conditions of life, life itself on the Danube were not what they were in the past; the needs and objectives of the Danubian peoples were not the same as in bygone days".[84] In view of all this, according to Vishinsky, a new Danube Convention was needed. Nevertheless, Vishinsky's reasoning by a change of circumstances lost weight somehow by the side of other arguments he brought up to demonstrate the termination of the 1921 Convention, probably owing to the fact that at that time, as indicated above, the significance of the clause was strongly obscured in Soviet jurisprudence.

We believe that no further description of the copious material of the diplomatic practice is needed to demonstrate that the doctrine of the clause in its modern acceptance is a living reality in the everyday business of foreign offices. Only one more example from latest practice will be quoted to supplement what has been set forth so far.

On 11 March 1966 France addressed a memorandum to the member states of the North Atlantic Treaty Organization in which she pointed out that "the circumstances actually predominant in the world differed fundamentally from those existing in 1949 and the next few years". The French Government wanted to discover these changes in the "alteration of dangers that menaced the Western world, in partic-

[81] The socialist states in addition mainly urged that it was the western powers themselves that abrogated the Paris Convention of 1921, when without asking the other parties for their consent they modified the essential provisions of the convention by the Sinaia Agreement of 1938 and the Bucharest Agreement of 1939.

[82] Here the Hungarian delegate referred to the Treaty of Paris of 1856 and the Paris Convention of 1921.

[83] *Дунайская Конференция* (Danube conference). Belgrade, 1948; *Сборник документов* (Collection of documents). Belgrade, 1949, p. 63.

[84] Ibid., p. 265.

ular in Europe", in the improvement of the economic situation of the European states, in the nuclear armament of France, in the "nuclear equilibrium" between the Soviet Union and the United States, and in the fact that Europe had ceased to be "in the focal point of international crises". Although the French memorandum did not contest the existence of the North Atlantic Treaty of 4 April 1949, still called in question the bi- and multipartite treaties attaching to the former and creating the military organization of the member states, and stated that the Organization "ceased to be equal to what the French Government thought was desirable". Consequently, the French Government declared that in the future it did not want to take part in the work of the Organization.[85] This the French Government did irrespective of its undertakings laid down in the treaties referred to above.

What is still worth while to remark is that although the French memorandum thought it was desirable to modify the provisions in question by way of negotiations and mutual agreement, still since according to the French Government there was every indication that any attempt to this end was doomed to failure, France preferred to draw unilaterally the consequences suggested by the situation.

Finally it should be added that in the memorandum forwarded to the governments of the United States and Canada the French Government pointed out that the separate treaties concluded with these countries[86] did not anymore suit the actual conditions, therefore the French Government considered it necessary to restore the full sovereignty of France in respect of these treaties.

The French declarations here quoted clearly indicate that France by referring to a change of circumstances invalidated a whole set of bi- and multipartite treaties implying France's participation in the military organization of NATO.[87] In their replies to the memorandum

[85] *Archiv der Gegenwart*, 1966, pp. 12 384—12 385.

[86] The French memorandum refers to agreements concerning the use of certain airfields, military depots, oil pipelines and other structures in France, constructed for the integrated military organization of NATO, which had been concluded between France and the two countries mentioned.

[87] The fact that some of the arguments brought forward in the French memorandum are highly questionable does not alter the situation. So e.g. even in 1949 there was obviously no threat to the safety of the Western

the member states of the North Atlantic Treaty Organization did not contest in principle the possibility of a reference to a change of circumstances; they rather emphasized that these changes were not of a nature justifying the steps announced by France and that a continued maintenance of the military organization was necessary. This example also confirms that general opinion recognizes the termination of a treaty on the ground of a change of circumstances and any protest against such a termination rather implies differences in the valuation of the facts, i.e. the supervening changes.[88]

3. EXAMPLES TAKEN FROM JUDICIAL PRACTICE

After this survey of the diplomatic practice let us cast a glance also at the judicial practice. Here the reviewer will be struck by the fact that in the practice of the international courts and arbitral tribunals reference to a change of circumstances as a treaty-terminating cause is of rather rare occurrence. The reason, however, lies rather in the circumstance that the states are reluctant in general to refer their disputes on matters of a more or less delicate nature to an international judicial organ. On the other hand, it is beyond doubt that there is no judgement pronounced by an international judicial organ which in principle would dismiss the *rebus sic stantibus* clause and doubt its justification in international relations.

Before the Permanent Court of International Justice two cases were heard where the parties particularly pleaded on the ground of the *rebus sic stantibus* clause. Unfortunately, the decisions of the Court betray little of what was the idea of this international forum of the problem of the clause.

The first case was a dispute between the United Kingdom and France on the nationality decrees issued in Tunis and Morocco. The United Kingdom advanced the argument that on the ground of the capitulatory agreements Britain concluded with these two states at an earlier

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world in Europe, in the same way as there is no threat to it at present. However, it is beyond doubt that the French government had many other arguments available to substantiate its action.

[88] Although the action of the French government was obviously based on the fundamental change of circumstances, several authors in their legal appraisal of it wholly ignored this and analyzed the question merely

date the nationality decrees issued in these countries when they were French protectorates did not hold for British nationals. To this France retorted that capitulations had forfeited their validity; at the same time France also emphasized that questions of nationality exclusively came within the domestic jurisdiction of a state. The case was referred to the Permanent Court of International Justice for an advisory opinion by virtue of a resolution of the Council of the League of Nations. In the course of the procedure in an oral hearing before the Court the French representative pleaded that the treaties invoked by the United Kingdom "have lapsed by virtue of the principle known as the *clausula rebus sic stantibus*, because the establishment of a legal and judicial régime in conformity with French legislation has created a new situation which deprives the capitulatory régime of its *raison d'être*".[89]

Hence France referred expressly to the *rebus sic stantibus* clause. Since, however, the problem the Court had to settle in the first place was whether or not the controversial question of nationality was coming exclusively within the domestic jurisdiction of a state, it did not even deal with the relevant passage of the French argument. According to the advisory opinion, in the given case there could be no question of the enforcement of exclusive domestic jurisdiction. Since, however, subsequently the two states agreed on the merits of the dispute, later on the Permanent Court of International Justice was not anymore in the position to take in this case a stand on the matter of the clause.

Somewhat more light was thrown on the position of the Permanent Court of International Justice in the case of the free zones of Upper Savoy and Gex, although here too the Court refrained from taking a definite stand. In this case the dispute between France and Switzerland arose about the question whether the treaties concluded at the end of the Napoleonic wars were still in force. According to these treaties, for the benefit of the Canton of Geneva free zones were

on the ground whether or not the agreements in question stipulated a right of denunciation. Naturally, this approach was responsible for a misapprehension of the problem. See e.g. Zorgbibe, C.: L'alliance atlantique: esquisse d'un bilan. *Revue générale de droit international public*, 1969, No. 3, p. 626.

[89] *P.C.I.J.*, Ser. B, No. 4, p. 29.

established in French and Sardian territories.[90] France based her argument, according to which the treaty provisions relating to free zones had lapsed, mainly on Article 435 of the Treaty of Versailles. This Article relied on the statement that the provisions applying to the free zones of Upper Savoy and Gex were no longer consistent with existing conditions. From this in the quoted article of the Versailles Treaty the conclusion was drawn that France and Switzerland should agree on the future legal status of these territories. The Court dismissed the French argumentation on the ground that since Switzerland was not a signatory of the Versailles Treaty, the provisions of the treaty could not be applied to her.

However, in addition to an express reference to the Versailles Treaty France also urged that since 1814 there emerged material changes in the circumstances and so the obligations of the earlier treaty could not hold for her. This French argumentation was to a certain extent supported by the article of the Versailles Treaty referred to above, which although it was void of any binding force on Switzerland nevertheless expressed the joint opinion of the large number of signatories of the Versailles Treaty, namely that the provisions objected to by France ceased to be in agreement with the situation established after the First World War.

Paul-Boncour pleading for France before the Court left no doubt as regards the French position in the matter. According to him the provision of Article 435 of the Treaty of Versailles was but a special application of " . . . une règle générale de la clause rebus sic stantibus, clause que l'on peut considérer comme une règle générale et constante du droit international public . . ."[91]

The changes on which France relied on terminating the validity of the provisions in question were partly of a political, partly of an economic nature. France referred to the consolidation of the position of the Canton of Geneva within the Helvetian Confederation,[92] and also to the considerably reduced significance of the free zones for the economy of Geneva, among others brought about by industrialization, the development of motorized transport and other circumstances.[93]

[90] The Sardian territory in question was annexed by France by virtue of the Treaty of Turin of 1860.
[91] *P.C.I.J.*, Ser. C, No. 17-I, Vol. I, p. 88.
[92] The Canton of Geneva joined the Swiss Confederation only in 1815.
[93] *P.C.I.J.*, Ser. C, No. 17-I, Vol. II, pp. 616 et seq.

The Swiss counter-argumentation was also noteworthy. The Swiss representative in the oral hearing did not doubt the justification of the clause, still he argued that the clause could not be applied in respect of territorial rights.[94]

The Permanent Court of International Justice in the judgement of 7 June 1932 did not really commit itself on the *rebus sic stantibus* clause; its judgement only held that although certain changes had taken place during the period of more than a century, these changes had no bearing on the whole body of circumstances the contracting parties had in mind at the time the free zones were created. As a matter of fact, it was evident from the judgement that in the opinion of the Court the geographical situation of the Canton of Geneva was what in the first place served as an underlying reason for the provisions in question.

For want of material changes it became unnecessary for the Court "to consider any of the questions of principle which arise in connexion with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the method by which effect can be given to the theory if recognized, and the question whether it would apply to treaties establishing right such as that which Switzerland derived from the treaties of 1815 and 1816".[95]

Hence, the judgement took no definite policy-making stand in the matter of the clause; nevertheless, from the reasoning of the Court the conclusion suggests itself that this forum in general approved the principle, according to which a fundamental change of the circumstances after the conclusion of the treaty permitted the abrogation of it. Obviously, it would have been easier for the Court to declare that a change of circumstances authorized neither party to abrogate a treaty rather than to enter into the investigation of the intricate question as to the extent the circumstances the parties had in mind had changed following the conclusion of the treaty. The Court pre-

[94] Ibid., Vol. I, p. 254. — As regards territorial arrangements we have already made it clear that the clause cannot in fact be applied to treaty provisions of this category, still this has been understood strictly for treaties establishing boundaries. We shall revert to the problem subsequently, see pp. 393 et seq.

[95] *P.C.I.J.*, Ser. A/B, No. 46, p. 158.

ferred to declare that during a period of more than a century for the purpose of the treaty no substantial changes had taken place rather than to reject the much debated *rebus sic stantibus* clause on points of principle. Hence, it is obvious that in the members of the Court, or at least in the majority of them, the conviction of the justification of the clause was well established. On the other hand, the Permanent Court of International Justice was self-consistent in so far as it took no position for the clause merely on grounds of principle, only to advance the evolution of international law, since the stand for the clause would not anyhow have influenced the decision of the Court.[96]

The position taken by the representative of Switzerland has already been indicated earlier in the discussion of the case. The attitude of the Swiss representative is of particular interest, because neither he — whose task was, among others, to prevent the clause from being enforced — launched a frontal attack against it. All he did was to contest its applicability to territorial rights. For our part we have already made it clear that, over and above certain theoretical considerations, no recourse can be had to the clause in respect of treaties establishing boundaries[97] because, as taught by history, territorial modifications of great consequence can never be realized in a peaceful way.[98] Consequently, in our opinion the position of the International Law Commission, relying on practical considerations rather than considerations of principle, by which it declared the clause inapplicable to boundary treaties, was the correct one. However, this position cannot be extended to all kinds of rights somehow associated with

[96] The International Court of Justice of the United Nations too has remained faithful to this doctrine, a doctrine perhaps regrettable for the evolution of international law, still beyond doubt in agreement with the fundamental functions of the Court. Only by way of example we mention here the first judgement in the Corfu Channel case of 25 March 1948, where the International Court of Justice failed to take a stand in the rather interesting question of international law, whether the Security Council may in an obligatory form direct the states to submit an actual dispute to the International Court of Justice. Since the Court established its jurisdiction in the concrete case on other grounds, it did not enlarge on this problem, although the position taken up by the Court would have helped to clear the question. For more details see Haraszti, Gy.: *A Nemzetközi Bíróság joggyakorlata 1946—1956* (Judicial Practice of the International Court of Justice 1946—1956). Budapest, 1958, pp. 224—225.

[97] See p. 346.

[98] For details see pp. 393 et seq.

the territory of a state. If earlier any attempt directed at a modification of a frontier in general served as *casus belli*, this cannot by far be stated of territorial rights of minor importance. Here, therefore, no further exceptions can be admitted. The judgement itself too rather admits the conclusion that the Permanent Court of International Justice, which failed to state its view also regarding this argument, did not consider the Swiss position properly founded.[99]

Of the international judicial organs of a permanent character, besides the Hague Court mention has to be made of the Central American Court of Justice, which had a life of ten years. In 1916 this Court dealt with the effects of a change of circumstances on a treaty in a frontier dispute between Costa Rica and Nicaragua referred to it. We feel persuaded to refer to the judgement of this Court merely because it seems to reinforce our opinion on certain limitations of the clause. As a matter of fact, the Court held that the so-called Cañas-Jérez treaty establishing the boundary between the two states "has wholly preserved its binding force up to the present . . . owing to the very nature of its stipulations, which are permanent in character . . ."[100] This Court too refused to apply the clause to a boundary treaty. And although a reference to the "permanent character" of some provisions of a treaty is by itself not convincing, we think that the termination of a treaty by execution, further the considerations of international peace and security justify the exclusion of boundary treaties from treaties governed by the clause.

In the practice of international arbitration there is more frequent reference to the *rebus sic stantibus* clause, and although there can be no talk of a uniformity of judicature in international arbitration, it is worth while mentioning that in the majority of instances the international arbitral tribunals take a positive stand for the clause. How-

[99] Even in other cases heard by the Hague Court cursory reference was made by the parties to a change of circumstances after the conclusion of a treaty. However, the Court did not consider it necessary to deal with the problem in its merits (see e.g. the dispute on diversion of water from the River Meuse, or the case of the German settlers in Poland). In its advisory opinion on the night work of women, the Court in its interpretation of the convention denied giving consideration to a change of circumstances, this, however, being rather a case of rejection in regard of the teleological interpretation.

[100] Hackworth, G. H.: *Digest of International Law*. Washington, 1943, Vol. V, p. 298.

ever, in international arbitral awards the *rebus sic stantibus* clause often appears commingled with supervening impossibility of performance, *force majeure*, etc. Similar phenomena appear also in the practice of the municipal courts of the various states. Here we refer briefly to a few decisions only.

The *rebus sic stantibus* clause appears merged with *force majeure* in an award of the Permanent Court of Arbitration in the so-called Russian Indemnity case in 1912. The case was that of the enforcement of Article 5 of the Treaty of Constantinople of 1879 settling problems emerged in connexion with the Russo-Turkish War of 1877/1878. In this treaty Turkey undertook to make good any damages Russian subjects and institutions sustained in Turkey during the war. The dispute arose mainly in respect of insignificant arrears and moratory interests. In the dispute Turkey had recourse among others to partly the clause, partly *force majeure*. Although the tribunal on other grounds dismissed the Russian claim, still at the same time it stated that "international law must adapt itself to political necessities"[101] and did not preclude the lapse of the treaty, if performance had been prejudicial to the state to a critical degree. However, the tribunal in view of the comparatively small sums involved in the dispute did not consider such a risk present.

Express reference to the effect on a treaty of a change of circumstances was made in the dispute between the Barcs—Pakrác Railway Co. and Yugoslavia, which was decided by an arbitral tribunal appointed by the Council of the League of Nations by award of 17 January 1934. Under the Peace Treaty of Trianon almost the whole length of the Barcs—Pakrác Railway fell on Yugoslav territory, with only one terminal on Hungarian territory, so that Hungary was partly interested in the case. The Barcs—Pakrác Railway Co. which obtained a concession to construct this line in the past century, soon afterwards transferred the right of operation to the Südbahn-Gesellschaft (Southern Railway) against an appropriate share of the profit. On the other hand, under the Rome agreement of 1923 the lines of the Southern Railway were taken over by the states in whose territory they ran. On this plea, the Barcs—Pakrác Railway Co. claimed from the Yugoslav State the profit share formerly paid by the Southern Rail-

[101] Scott, J. B.: *The Hague Court Reports*. New York, 1916, pp. 317—318.

way. Under Article 304 of the Treaty of Trianon,[102] the case was referred to a tribunal of arbitration. In the award, the tribunal held that the original contract between the Barcs—Pakrác Railway Co. and the Südbahn-Gesellschaft could not be applied unchanged, because since the signature of the contract of operation events unforeseen by the parties took place, which had an appreciable effect on the economic order of Central Europe and substantially modified the solvency of the states concerned. Consequently, the tribunal fixed the sums to be paid by Yugoslavia to the railway company, and settled other moot questions of the legal relations between the parties.[103]

This case is worth mentioning for several reasons, although here recourse to the clause was not had in connexion with a treaty. As a matter of fact, neither the concession granted by the Hungarian state to the railway company, nor its contract with the Südbahn-Gesellschaft could be considered treaties. Still the case has been analyzed here partly because the dispute had direct bearings on Hungary, partly because the case was one where an international arbitral tribunal exposed its position regarding the *rebus sic stantibus* clause most clearly, by indicating the changes with utmost accuracy, even when in the award the clause was not referred to by its name. Anyhow the general reasoning of the tribunal was of a nature allowing its application also to treaties.

A peculiarity of the award was that the tribunal did not establish the termination of the treaty but modified the content of the legal relations existing between the parties. However, this was done with reference to Article 304 of the Treaty of Trianon, as under this article it was the express duty of the arbitral tribunal to act in the manner it did.

[102] Article 304 (paragraphs 1 and 2): "With the object of ensuring regular utilization of the railroads of the former Austro-Hungarian Monarchy owned by private companies, which, as a result of the stipulations of the present treaty, will be situated in the territory of several States, the administrative and technical reorganization of the said lines shall be regulated in each instance by an agreement between the owning company and the States territorially concerned."

"Any differences on which agreement is not reached, including questions relating to the interpretation of contracts concerning the expropriation of the lines, shall be submitted to arbitrators designated by the Council of the League of Nations."

[103] The award has been reprinted in *Reports of International Arbitral Awards*, Vol. III, pp. 1571 et seq.

Finally a few cases of significance will be analyzed of the practice of municipal courts.

As early as 1882 the Swiss Bundesgericht dealt with the effect of a change of circumstances on treaties in a dispute that had arisen between two member states of the federation, viz. the Cantons of Lucerne and Aargau in connexion with the Convention of 1830. This convention concluded when Switzerland was still a union of confederated states, between two subjects of international law, granted a right of taxation of a nature of servitude to a community of Aargau in the territory of Lucerne. Since the Canton of Lucerne wanted to abrogate this convention unilaterally by pleading a change of circumstances, the Federal Court investigated whether or not the conditions for the application of the clause were present and came to the conclusion that the convention in question could be terminated unilaterally only if its continuance were irreconcilable to the essentials of life of the obligor state, or changes took place in such circumstances which had been — in conformity with the manifest intention of the parties — tacit preconditions for the existence of the convention. Since in the opinion of the court no such conditions were present, the action was dismissed.[104] Hence, the Bundesgericht clearly took a stand for the *rebus sic stantibus* clause and made a noteworthy attempt at defining the character of changes which had an effect on the operation of a treaty. At the same time, the court judged the question of a change of circumstances by the same standard as the supervening impossibility of performance and the termination of a treaty pursuant to this impossibility.

After the lapse of some fifty years, the Bundesgericht again dealt with the problem of the clause. True, its judgement in the dispute between the Cantons of Thurgau and St Gall in 1928 did not expressly discuss the applicability of the clause, still it held that if there was a possibility for its application, the interested party had to exercise its right of terminating the treaty within a certain defined interval from the moment the change was perceived. If the party failed to invoke a change of circumstances for a longer period of time (in the given instance for several decades), then it cannot do so subsequently without violating the principle of *bona fides* normative also in the mutual relations of states.[105]

[104] *Arrêts du Tribunal Fédéral Suisse*. 1882, Vol. VIII, pp. 52 et seq.
[105] See Hill, C.: The Doctrine of "rebus sic stantibus" in International Law. *The University of Missouri Studies*, Vol. IX, No. 3, 1934, p. 20.

The Staatsgerichtshof of the federal Weimar Republic, in a judgement pronounced in a dispute between two members of the Federation, viz. Bremen and Prussia, in 1925 expressly held that the *rebus sic stantibus* clause was recognized in international law within a wide sphere. According to the Court "a termination or modification of treaties ... owing to a radical change of circumstances underlying the treaties is legally possible".[106]

From the practice of the Egyptian Mixed Courts which ceased to exist not long ago, the dispute between Rothschild and Sons and the Egyptian government was of some notoriety. Here the Egyptian government endeavoured to bring forward reasons for the termination of certain payments, referring to the cessation of Egypt's satellite relations to Turkey. Here too the court recognized the validity of the clause, however, it held that "The clause *rebus sic stantibus* in international law applies only to contracts and obligations of an indefinite duration, and not to those which have a specific fixed and limited duration".[107] However, the soundness of this statement is highly contestable,[108] and in this connexion reference to the judgement has been made merely to demonstrate that the validity in international law of the *clausula rebus sic stantibus* has been recognized by various courts and tribunals, even when attempts have been made to restrict as far as possible the scope of its application. It is worth noting that in the present instance the court called the clause by its name, although in international practice, as has already been mentioned, there is a certain guardedness in this respect.

From French practice the fairly well known case of Bertacco v. Bancel & Scholtus deserves mention. Here the French court held that the sanctions applied by virtue of the resolution of the League of Nations against Italy in connexion with her aggression against Ethio-

[106] Entscheidungen des Reichsgerichts in Zivilsachen, 112, Anhang pp. 21 et seq. — The dispute between the two parties arose about an agreement for the exchange of territories which imposed certain restrictions on Bremen. On the plea of changes that took place in the meantime, in particular of the Versailles Treaty, Bremen wanted to invoke a release from these obligations, still the Staatsgerichtshof did not admit the arguments advanced by Bremen, and held that for the treaty in question the changes were not fundamental to the extent justifying abrogation of the disputed provisions.

[107] *Annual Digest of Public International Law Cases, 1925—1926*, p. 22.

[108] For more details see pp. 398 et seq.

pia implied the suspension of the operation of the Hague Convention of 17 July 1905 on civil procedure in respect of Italy. According to the judgement, here the *rebus sic stantibus* clause was applied as a resolutory condition.[109] The judgement itself, to whose reasoning certain objections may be brought forward, operates with the fiction of a tacit clause. At the same time it appropriately reflects the position of French judicature which considers recourse to the *rebus sic stantibus* clause for the termination or suspension of the operation of a treaty as natural, calling the clause by its name quite straightforward.

4. THE LEGAL NATURE OF THE CLAUSE

After this selection of cases from diplomatic and judicial practice, an attempt may appear appropriate to draw certain general conclusions as to how and when a change of circumstances may react on the life of treaties. A random survey of these cases will lead to the hardly contestable conclusion that apart from rare instances the states in general do not call into doubt the existence of the *rebus sic stantibus* clause as one of the institutions of international law, so that the position taken by the International Law Commission and Article 62 of the Vienna Convention which by drawing the limits of the application of this institution at the same time intend to integrate it into the codified body of international law, are in agreement with the actual legal situation. An integration of the clause into codified international law is desirable the more because while international practice agrees by and large on the existence and justification of the clause, the situation is by far not so reassuring as to the conditions of a recourse to the change of circumstances and the manner a treaty may be abrogated by invoking the clause. Before reverting to these questions, however, the opinions formed on the legal foundations of the clause will be reviewed.

There are several conflicting opinions current on the legal character of the clause. The earliest one, that may be traced back to Thomas Aquinas,[110] wants to discover in the clause a tacit condition the con-

[109] Cf. Rousseau, Ch.: Le conflit italo-éthiopien. *Revue générale de droit international public*, 1937, p. 303.

[110] References to earlier views are not meant to create the belief as if these views do not turn up within a wide sphere in both theory and

tracting parties have in mind whenever they conclude a treaty although do not expressly insert in the wording of the relevant instrument. For the matter, the term "clause" seems to refer to this implied stipulation. Accordingly the *clausula rebus sic stantibus* must, owing to the existing yet inexplicit intention of the parties, be considered tacitly implied in each treaty. This notion reflected in the literature, and also in some of the judicial decisions, obviously relies on a fiction, which has nothing to do with reality and which merely serves the purpose for the sake of appearance to attach the clause to the will of the parties.

The opinion that converts the problem as a whole into one of treaty interpretation is but a mitigated variant of the former.[111] Since, however, in general the statement may be advanced that when concluding a treaty the parties usually do not make clear their opinion of the clause and therefore by way of interpretation the relevant intention of the parties can be very rarely established, the partisans of the point

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practice even today. The draft of the American Law Institute (*Restatement of the Law. The Foreign Relations Law of the United States.* Proposed Official Draft. May 3, 1962. § 156) expressly sets out from the notion of implied condition and accordingly construes the treaty-terminating effect of a change of circumstances. Among the writers on international law we would mention McNair, this excellent student of the law of treaties, who in his Hague lectures proclaimed the same doctrine (Recueil des Cours, Vol. 22, p. 476). A similar opinion has been adopted by C. G. Fenwick (International Law, 4th edition, New York, 1965, p. 545). Among the monographs dealing with the *rebus sic stantibus* clause e.g. the one of B. Pouritch: *De la clause "rebus sic stantibus" en droit international public* (Paris, 1918, p. 71) took a stand for the doctrine of implied condition.

[111] An example for this view is among others D. Anzilotti's *Cours de droit international* (Paris, 1929, Vol. I, p. 462). Paul-Boncour pleading before the Permanent Court of International Justice in the Free Zones Case also made it clear that he referred to the *rebus sic stantibus* clause merely as one of the elements of the interpretation of the written text. (*P.C.I.J.*, Ser. C, No. 2. 17-I, Vol. I, p. 284.) Similarly, P. Chailley also considers the clause a rule of interpretation (*La nature juridique des traités internationaux selon le droit contemporain.* Paris, 1932, p. 130). What is in every respect surprising is when S. Romano wants to discover in the clause "una *semplice* questione di interpretazione di volontà". (*Corso di diritto internazionale.* 3rd ed., Milano, 1939, p. 276. — Italics by the author.) In recent literature O. J. Lissitzyn goes deepest into an exposition of the interpretation theory (Treaties and Changed Circumstances. *American Journal of International Law*, 1967, No. 4, pp. 895 et seq.).

of view here discussed in practice turn the process the other way round, viz. they depart from the assumption that the parties intended to apply the clause. That is, here a simple presumption is put forward which, however, may by way of interpretation be rebutted. The partisans of this theory stubbornly protest against a charge of resorting to a fiction, on which in the last resort their procedure still relies when for practical purposes they presume in advance an intention directed towards the application of the clause. On the other hand, if one or the other adherent of the doctrine, such as e.g. Ténékidès, comes to the conclusion that the intention of the parties directed towards the stipulation of the clause cannot be established unless their "express or tacit will has actually manifested itself",[112] then this by itself inconsistent definition for practical purposes precludes the possibility of an application of the clause and comes into conflict with international practice. To find a way out of this *cul-de-sac*, Ténékidès gives expression to an ingenuous desire that the contracting parties should expressly provide in the treaty for the application of the clause.[113] Of course, this would settle the problem, but at the same time it would be apt to introduce extreme difficulties into the making of treaties. Consequently, only to salvage this interpretation theory, one would be hard put to it to recommend a remedy worse than the disease itself.[114]

This doctrine is radically opposed by another, a more recent one, which wants to discover an objective rule of international law in the clause, and accordingly recognizes the freedom of the contracting parties to refer to this rule irrespective of the investigation of their

[112] Ténékidès, C. G.: Le principe rebus sic stantibus, ses limites rationnelles et sa récente évolution. *Revue générale de droit international public*, 1934, p. 294.

[113] Ibid., p. 279.

[114] Although provisions of this kind may be found sporadically in certain treaties, these must be considered rare exceptions. A treaty coming under this heading was e.g. the Washington treaty on the limitation of naval armament of 1922, or the German-Dutch treaty of shipping and commerce of 1934, or the International Sugar Convention of 1956, or the Treaty on the Non-Proliferation of Nuclear Weapons of 1968. Minutely elaborated prescriptions and the express right of denunciation in the case of a change of circumstances have been taken up in the Economic Cooperation Agreements concluded by the United States with several European countries by virtue of the European Recovery Program of 1948.

intention at the conclusion of the treaty. Hence, according to this doctrine, there is in international law a rule of general validity and operating independently of the agreement of the parties at treaty-making, which in the event of a fundamental change of the circumstances existing at the conclusion of the treaty authorizes either party to terminate the treaty. This doctrine elevates the clause to the level of the other rules of international law governing treaties, ranking it along with the latter at least. This in our opinion solely acceptable doctrine, rejecting all fictions, suits best actual conditions. This is the doctrine which has been adopted by the draft of the International Law Commission, and eventually integrated into the Vienna Convention. The doctrine is borne out also by diplomatic practice, for if the argumentation of the states in the practical instances reviewed in the foregoing, from the Euxine case to the French memorandum of 1966, are made subject to an analysis, it will become evident that in general the various states never refer to an implied condition of a treaty, or to the concrete will of the contracting parties, but construe the effect of the change of circumstances on treaties as a rule of international law which in the given instance entitles the parties to terminate an otherwise effective treaty by an express declaration.

Attempts have also been made at a reconciliation of the two conflicting doctrines. A theory was advanced, according to which it was an objective rule of international law that in each treaty a tacit resolutory condition had to be incorporated which would prevail at a change of circumstances. This theory did not break with the untenable doctrine of fiction, although it wanted to guarantee the clause's character of an objective legal rule. However, as compared to the objective rule theory reviewed before, in addition to its fictitious character this theory betrays other serious deficiencies. As a matter of fact, this hybrid theory would at the supervention of the resolutory condition, i.e. the fundamental change of circumstances, of necessity bring about an automatic termination of the treaty, a termination independent of the declaration of the contracting parties, or one of them, to such effect. On the other hand, the theory which construes the clause as an objective rule of international law, and definitively jettisons the fiction of an implied condition, makes the enforcement of the clause dependent on the intention of the party concerned. Hence, the contracting party may waive the termination of the treaty also in the presence of a fundamental change of circumstances, if this

attitude suits the general interests of the party better. In this way, the doctrine is a better safeguard of the interests of the parties to a treaty, as it allows a wider scope to their autonomous decision. It is for this reason that this theory in international practice has gained an overwhelming currency, and that the doctrine which has tried to reconcile the two theories, and which results in the automatic termination of a treaty, could not strike root.

Hence, to sum up, the principle included in the *rebus sic stantibus* clause belongs to the objective rules of international law, enforceable irrespective of the express or tacit intention of the parties at treaty-making, and in the given instance bringing about the termination of the treaty, wholly or partially. This lesson can be drawn from analysis of international practice.

In the following, we proceed to a short survey of the discussions abounding in the literature of international law which try to create some sort of a theoretical foundation for the clause. In many cases the framers of these theories appear to be influenced by reminiscences of natural law, and if so, try to demonstrate that the principle of law implied in the clause must prevail in all circumstances. This influence of natural law is manifest in an early work of Radoikovitch, this excellent Yugoslav scholar of international law, where in the course of an exhaustive discussion of these theories he remarks: "Nous croyons que même si elle n'était pas expressément reconnue par les Etats, même si elle ne découlait pas de la coutume, la clause *rebus sic stantibus* s'imposerait d'elle-même, comme une règle de droit naturel, comme un principe de droit nécessaire."[115]

Naturally we are unable to adopt this opinion. As a matter of fact, the clause is a rule of positive international law and its existence cannot be explained by any principle of natural law. Nevertheless, the theories characterized below have a certain significance for the present purpose, inasmuch as they may point out certain reasons responsible for the development of the practice of the various states guaranteeing the life of the clause, and also because they may help to draw the limits within which a change of the circumstances existing at the time of the conclusion of a treaty may have an effect on the operation of this treaty. As a matter of fact, what has been stated so far is that

[115] Radoikovitch, M. M.: *La révision des traités et le Pacte de la Société des Nations*. Paris, 1930, p. 107.

a change of circumstances may have an effect on the operation of a treaty, but nothing has been said about what circumstances have to change, and to what extent, so that the clause may be applicable. To this question an answer will be given after a survey of the theories in question.

Not much must be said of the theory which wants to find the foundations of the doctrine of *rebus sic stantibus* in justice. This theory exposed in details by Fiore, bases the principle *pacta sunt servanda* in a similar way on justice, and although Article 1 of the Charter of the United Nations in the first place mentions the settlement of international disputes in conformity with justice, the too general notion of justice does not bring us any closer to either the causes of the evolution of the clause, or the cognition of the limitations of its applicability.

A whole set of theories associate the institution of the clause with the fundamental rights of states. Within this group of theories, several authors emphasize the right of self-preservation of states which imperatively demands that the performance of a treaty cannot go beyond certain limits, and if performance jeopardizes the very existence of the state, then the treaty will have to forfeit its validity. This doctrine finds an expression already in Vattel's work,[116] and in his wake there follows a whole series of studies of more recent date.[117] Reference to the right of self-preservation as a limit of the performance of international obligations may be discovered also in the judgement of the Permanent Court of Arbitration quoted above.[118]

There is no essential difference between this theory and the one that wants to find the foundations of the clause in the right of states to existence. As a matter of fact, a distinction of the right to existence and that of self-preservation relies on an approach to the same right from different angles.

In like way the theory that bases the clause on the right of the states to independence belongs to the set of those built upon the fundamental rights of states. Similarly here also the doctrine referring to the right of states to development may be mentioned.

[116] Vattel, E. de: *Op. cit.*, Liv. II, chap. XII. § 170 (Classics, 1, 1916).

[117] This principle has been expressed in a particularly accentuated form by L. Le Fur. Cf. *Etat fédéral et Confédération d'Etats*. Paris, 1927, pp. 450—451.

[118] Scott, J. B.: *The Hague Court Reports*. New York, 1916, p. 546.

As regards a critical analysis of these theories, in the first place it has to be pointed out that in so far as they in general refer to the fundamental rights of states, they reflect a decided influence of natural law. International law does not define the fundamental rights of states. Such fundamental rights are construed more or less arbitrarily by certain theoreticians, who by the way cannot even agree on the enumeration of these rights.[119] Hence, this approach does not lead us closer to the discovery of the essence of the clause.

On the other hand, if the particular rights referred to are reviewed one by one, then it will be found that these are either too general, such as e.g. the right of a state to development, and therefore throw open the gates to a number of abuses of the clause, or on the contrary recognize the application of the clause within too narrow limits only. If the termination of a treaty were recognized only in the event of a jeopardy to the very existence of the state, then we should come into conflict with the general practice of states discussed above which would by far not agree to such an extreme limitation of the application of the clause. Obviously, there is not a legal system which would insist on the performance of a contract to an extent involving the self-annihilation of the subject of law. This would be the less feasible in international law which is built upon the cooperation of sovereign states based on their own act of will. In point of fact, practice shows that a treaty would not endure a pressure even lower than this, and at the application of the clause in the overwhelming majority of instances the states do not invoke the jeopardy to their survival, but consequences of by far lesser gravity when it comes to providing reasons for the termination of a treaty. For this reason the underlying principles of the clause have to be kept apart from the fundamental rights of states.

A counterpole to this doctrine is the one which attaches the justification of the clause to the contracting parties' interests. Accordingly, the function of a treaty is to promote their interests, and if it fails to do so, it has to be terminated. This utilitarian doctrine, Machiavel-

[119] On this see Buza, L. and Hajdu, Gy.: *Nemzetközi jog* (International law). Budapest, 1961, pp. 21—22. It should be noted, however, that the so-called fundamental rights of states can by no means be identified with the fundamental principles of interstate relations, many of which are enumerated in *Resolution No. 2625 (XXV) of the U. N. General Assembly*.

lian as it is, also reminds of Spinoza, according to whom a state should be led exclusively by its own interests in its actions in respect of another state. A similar doctrine was advanced by Hegel construing international law as external state law, from which it follows of necessity that states are above international law and their obligations under a treaty are subordinate to their interests. Although this so-called theory of interest turns up in the works of both philosophers and jurists, essentially it amounts to a denial of the legal character of a treaty. If we adopted the thesis that whenever a state comes to the conclusion that in the given situation a treaty has ceased to serve its interests, this statement by itself permits the termination of the treaty, we would at the same time throw overboard the principle *pacta sunt servanda* and deprive the treaty of its legal character altogether. It is for this reason that even when in certain instances the only motive of a state to terminate a treaty is its loss of interest in it, this fact is never expressed openly, and in practice the *rebus sic stantibus* clause is invoked for other reasons. In all events here the conclusion appears to be justified that in the opinion of the particular states a loss of interest by itself can never become the motive of recourse to the clause and if it can be established that the loss of interest attached to a treaty is the sole underlying motive of terminating it, the other party may rightfully decline such a declaration.

The next group of theories is the theory of ends which manifests itself in a variety of forms. A common feature of these is that they start from the reason of the treaty, the ends guiding the parties at its conclusion, and lay down the rule that in the event of a frustration of the end also the obligations under the treaty will lapse. A close relationship between the theory of ends and that of interest is too obvious,[120] still there is no doubt that the former, trying to find legal foundations for itself, is not so coarsely utilitarian as the latter. This is evident mainly from the variant of the theory which departs from the common purpose of the parties and attaches termination to the frustration of this purpose. The difficulties thrown out by the theory are obvious: the ends the different parties had in mind at the conclusion of a treaty can be established with difficulties only. Moreover, in the majority of cases, no concrete end can be named at all, that had been decisive at treaty-making. It is even more difficult to estab-

[120] For more details see Radoikovitch, M. M.: *Op. cit.*, pp. 128 et seq.

lish the common end, if any, which led the parties at the conclusion of the treaty. A more recent partisan of the theory, Charles de Visscher, also refers to these difficulties.[121] At the same time, the statement may be made that rendering the application of the clause conditional on the frustration of the common end might restrict the effect of a change of circumstances on the treaty to a very narrow scope and utterly preclude recourse to the clause for a large number of treaties.

Another group of theories identify the institution of the *clausula rebus sic stantibus* with *force majeure* or the notion of supervening impossibility. An application of the clause in this sense has already been discussed in connection with the award of the Permanent Court of Arbitration in the Russian Indemnity case. There are discrepancies among the representatives of this theory as regards the delimitation of the scope of the notion of supervening impossibility in international law. There are some who would have supervening impossibility confined to the cases of a physical impossibility of performance. This notion finds expression also in Article 61 of the Vienna Convention. According to others, a case of supervening impossibility may also be established when performance would imply sacrifice which could not reasonably be expected from one of the parties. Still others operate with the notion of moral impossibility, being the case when performance of the treaty would be prejudicial to a third state. If we are unable to approve the theory identifying the *rebus sic stantibus* clause with supervening impossibility of performance, this we have not done for the same reason as did Hill who stated that the notion of supervening impossibility was uncertain and for practical purposes inapplicable,[122] but merely because we accept supervening impossibility of performance as a special cause of the termination of a treaty. In our opinion, international law, similarly to the municipal legal systems, recognizes and applies the notion of supervening impossibility of performance, a notion which, however, is much narrower than the *clausula rebus sic stantibus*. Whereas in the first case, as will be seen below,[123] the performance of a treaty stumbles upon obstacles which for physical or legal reasons cannot be overcome, so that the termination of the treaty will eventually

[121] Cf. Visscher, Ch. de: *Théories et réalités en droit international public*. Paris, 1955, p. 389.
[122] See Hill, C.: *Op. cit.*, p. 12.
[123] See pp. 421 et seq.

take place, in the case of the clause no such reasons will have to be produced. Here it is sufficient to plead a fundamental change of circumstances, a contingency that aggravates the parties' situation performing the treaty, still be short of serving as an insurmountable obstacle. If a description had to be given of the relationship existing between the clause and supervening impossibility, this could be done in a most tangible form if we say that the supervention of impossibility is in each case accompanied by a change of circumstances to an extent that the clause could also be invoked; this, however, will not operate the other way round. Hence the conditions of supervening impossibility in each case cover the conditions of application of the clause, whereas the clause does not necessarily imply supervening impossibility. Since, however, supervening impossibility of performance is accepted as an independent category of treaty termination, it follows that recourse to the clause may be had in cases of fundamentally changed circumstances, when there cannot as yet be talk of impossibility of performance, whereas with the supervention of impossibility the function of the clause comes to an end. Identification of clause and supervening impossibility would unjustifiably restrict the sphere of application of the *rebus sic stantibus* clause, and at the same time raise difficulties to invoking supervening impossibility as a cause of treaty termination. In like way, also the doctrine has to be dismissed which would but discover in the clause a recourse to emergency in international contractual relations.[124] International practice as reviewed earlier too defeats the theories now discussed, as the states invoking the clause in exceptional cases only combine this action with a reference to *force majeure* or supervening impossibility. If nevertheless they do so, they are led by the idea of bringing into relief the gravity of the effects of the change of circumstances rather than by legal considerations. On the other hand, on invoking supervening impossibility the

[124] Virtually also K. Strupp comes to an identification of emergency and the clause. According to his opinion, the recognition of the clause is uniform with the bankruptcy of international law and here he agrees with Kelsen. Still at the same time he does not dispute the justification of a recourse to emergency in international relations, and presents a whole series of cases where the clause was resorted to, hereincluded the Euxine case and the abrogation of the capitulatory agreements as such of an appeal to emergency. (Strupp, K.: *Grundzüge des positiven Völkerrechts*. 2nd ed., Bonn, 1922, pp. 135 et seq.)

states concerned in general do not refer to the clause, an indication of their conceiving supervening impossibility as an independent category of the termination of treaties.

Some writers on international law would represent the opinion that tries to justify the need for the clause by emphasizing the impossibility of perpetual treaties as a theory for and by itself. The partisans of this opinion, as a matter of course, decline the notion according to which a treaty concluded *sine die* can be terminated unilaterally by giving a reasonable notice term, even though no special stipulation to such effect was included in the text of the treaty. Since for our part we regard precisely this notion as correct, with the limitations referred to above, the motive for the application of the clause analyzed in this connexion has to be rejected. Still we have to point out that the propagators of this opinion, which cannot be taken for an independent theory, rather restrict the scope of application of the clause, as they would have it confined to "perpetual" treaties concluded *sine die*. Among others this opinion found an expression in the above-mentioned decision of the Egyptian Mixed Court in the dispute between Rothschild and Sons and the Egyptian State. At the same time, international practice indicates that a fundamental change of circumstances may necessitate termination of treaties concluded for an extended period before their expiry, a contingency precluded by the partisans of the opinion here discussed.

Among the long series of theories, there is still one more which, in our opinion, deserves mentioning, namely the one starting from the assumption that in each case a treaty attaches to an actual situation, and is a reflection of this situation in the legal norm created by the contracting parties. Hence, if a change takes place in this situation, this change will necessarily react on the treaty. Since, however, unless corrected this theory would lead to an uncertainty of law, some of its representatives try to confine it within narrower limits in a manner that treaty termination is made conditional on the nature of the changes. Consequently, definitions occur according to which a party to a treaty may abrogate it in the event of substantial or fundamental changes, or such of vital importance. In order to prevent as far as possible disputes from arising as regards the nature of changes, the advocates of the theory try to classify essential and non-essential changes beforehand, and in this classification they take for essential changes extinction of a state, destruction of physical objects to be

delivered under the treaty, breach of treaty, war, emergence of a new norm of international law, etc.; whereas they regard as non-essential ones territorial changes, severance of diplomatic relations between the parties, change of *régime*, modification of the domestic legal rules of a state.

On the whole, this theory is on the right track and to a certain extent in agreement with marxist doctrine, too, according to which with the change of the economic basis of society also its superstructure, including law, has to change. However, this principle is insufficient in itself for the motivation of the doctrine of *rebus sic stantibus*, as it would restrict treaty termination resulting from a change of circumstances to the most decisive contingency only, viz. changes in the relations of production. Obviously, it was the relation between economic basis and superstructure which led Korovin when in his works referred to earlier[125] he restricted the application of the clause virtually to the case of social revolution. However, the diplomatic practice of states demonstrates that the treaty-terminating effect of a change of circumstances has been recognized within a considerably wider scope.

For our part we too consider the theory here analyzed decisive for the definition of the underlying principle of the clause in so far as it emphasizes the close relationship between facts and the provisions of a treaty. According to Korovin "the theory of *rebus sic stantibus* is one of the aspects of the normative significance of facts".[126] Still at the same time Korovin confines this normative significance in this respect to an extremely narrow scope. In his often-quoted work, Radoikovitch misunderstood the situation when he levelled the charge of an extraordinary extension of the scope of application of the clause against the Soviet doctrine of international law of the twenties, mainly against Korovin.[127] Exactly the contrary is true.

The majority of cases occurring in diplomatic practice also bear testimony to the fact that states consider a treaty being tied to a certain given situation, and base the termination of the treaty merely on this, i.e. the close relationship between the given facts and the legal

[125] See pp. 352—353.

[126] Коровин, Е. А. (Korovin, E. A.): *Международное право переходного времени* (International law of the period of transition). Moscow, 1924, p. 107.

[127] Radoikovitch, M. M.: *Op. cit.*, p. 168.

norm, the dependence of the rule created by the parties on the actual situation. Even the states objecting to a reference to the clause in the particular instances do not deny this relation in their responses to their contracting partners. What they call into doubt is the change of facts, or the significance of this change for the purposes of the given treaty.

Hence, the practical application of the theory here analyzed will become problematic when the question as to the circumstances and the nature of their change justifying the termination of a treaty will have to be answered. Any attempt to offer an exhaustive enumeration of the circumstances and the nature of changes is obviously doomed to failure. Life, in fact, continually produces new cases, and no classification of changes of circumstances referred to in the past can provide exhaustive information for future purposes. Even if such an exhaustive enumeration were imaginable, the attempt would come to naught, as the very same change would for the one treaty authorize a contracting party to invoke the clause, whereas for another not. At the same time, it is not sufficient to state either that essential or fundamental changes, or such of vital importance, may provide bases for recourse to the clause. As a matter of fact, it is extremely difficult to decide whether or not the change is of such a nature, on the one hand, and on the other hand one and the same change may have to be appraised, as mentioned above, differently for various treaties.

Diplomatic and judicial practice brings us to the conclusion that only changes of circumstances may be invoked for the termination of a treaty which — as appears from the nature and content of the given treaty — served, so to say, as a basis for its conclusion, i.e. where the dependence referred to above may be established between the facts and the provisions of the treaty.[128] In our opinion the change of circumstances has to be of an extent which decisively affects the burden devolving from the treaty on the parties or one of them.[129] The fundamental change of circumstances resulting in such consequences is an

[128] Similar conclusions were drawn by the International Law Commission in the draft (*U.N. Doc. A/CN.4/190*, p. 23) and so also in Article 62 of the Vienna Convention.

[129] According to the Vienna Convention, the change has to be such as to radically transform the extent of the obligations still to be performed under the treaty.

objective criterion which may be established in a manner independent of the appraisal of the parties.

Even though we have adopted the opinion that justification of recourse to the clause could be established by relying on objective criteria, by this we do not want to say as if the opinion of the parties could be ignored altogether in this matter. As a matter of fact, when it can be established beyond doubt that at the time of concluding the treaty the parties agreed that the presence of certain circumstances was a fundamental consideration, then in the event of a supervening change of these circumstances the treaty may be terminated on this plea. Hence, even in a case where on the ground of objective criteria no recourse could be had to the clause, by interpreting the treaty we may nevertheless come to the conclusion that the changes are of a nature for which the original intention of the parties did not foresee the continuation of the treaty. Here the declarations of the parties at the conclusion of the treaty, and the preparatory work, the so-called *travaux préparatoires* may serve as guidance. This position is by far not a smuggling in of the subjective theory. All that is expressed here is that the parties are free to extend the cases of the application of the clause to certain concrete circumstances.[130]

After this lower limit of the changes required for the application of the *rebus sic stantibus* clause has been drawn, also some sort of an upper limit will have to be fixed, i.e. the cases of the application of

[130] Although in the debate that took place in the International Law Commission he agreed that the clause was an objective norm of international law, R. Ago warned against carrying the objective theory to extremes, and wholly ignoring the will of the parties. According to him, when it could be established that the parties would have concluded the treaty even under the changed circumstances, there was no case of invoking the clause (*Yearbook*, 1963, Vol. I, p. 142). This statement is somewhat related to the one advanced above. Still whereas we wanted to demonstrate that in the event of an intention of the parties to this end a change of circumstances might bring about the termination of the treaty even when owing to the nature of the changes there was not a case for termination, Ago studied the problem from the other side and came to the conclusion that where the relevant intention of the parties can be discovered, the clause has to be disregarded even though conditions for its application were otherwise given. The two statements result from the same underlying principle, although we believe that the statement we have advanced is more of practical importance and may be resorted to rather than Ago's statement.

the clause have to be segregated from the changes which act as causes by themselves for treaty termination. Earlier we have mentioned that some authors e.g. merge the notion of supervening impossibility into the clause, or extend the notion of a change of circumstances to war, extinction of a state, or even breach of treaty, and on this ground attribute a treaty-terminating effect to these contingencies.

This conception overreaches itself. The *rebus sic stantibus* clause has gained a position for itself in international law as the outcome of a process extending over ages. It has become established in international law just because the independent treaty-terminating categories proved to be insufficient to meet the exigencies of practice. However, the introduction of the clause should by no means bring about a merger into it of other categories of treaty termination which in a way or other are connected with changes of circumstances. True, the instances of treaty termination referred to above all imply a change of circumstances from the conclusion of the treaty, still they are cases of specific changes and most of them automatically entail the termination. The extinction of the one party to the treaty in general brings about this consequence. A war may have similar effects, although only as far as certain categories of treaties are concerned, and the same consequences will be produced by supervening impossibility implying the physical or legal impossibility of performance. In respect of these specific changes the clause embodies a general rule that may be enforced only when there is no chance for invoking the specific rules.[131]

[131] In the International Law Commission M. Lachs called the case of an application of the clause the quasi-impossibility of performance (*Yearbook*, 1963, Vol. I, p. 140). This statement is to the point in so far as it indicates that a change of circumstances creates a new situation for the purpose of the performance of the treaty. Nevertheless, this new situation does not add to the burdens of performance by one of the parties to an extent that a case of impossibility could be established. Since, however above we have tried to segregate supervening impossibility from the cases of the application of the clause, mainly because certain authors insert the sign of equality between the two notions, and because attempts of this sort occur also in practice, we believe that, in order to avoid misunderstandings, the proper course is to keep these notions apart; consequently we have not used the term introduced by Lachs. In a memorandum submitted by Chile to the League of Nations in her dispute with Bolivia the *rebus sic stantibus* clause was called political impossibility of performance. (*De la non-révision des traités de paix*. Exposé de la délégation du Chili à propos de la demande de la Bolivie contre le Chili en révision des traités

After this analysis of the underlying theory of the *clausula rebus sic stantibus* the question has to be asked whether the rule implying an effect of the change of circumstances on the life of a treaty, a rule to which the character of an objective rule of international has been above attributed, will prevail unconditionally, or whether by mutual agreement the parties may eliminate it? Or in other words, is it a case of a peremptory rule, or one of a permissive nature? For a long time it had been argued whether international law knew the notion of rules of a peremptory character at all, and even today there are some who doubt the existence of peremptory rules of international law.[132] At the same time the majority of modern writers on international law are inclined to the opinion which recognizes the peremptory nature of certain rules of international law.[133] It would lead too far from the aim of the present work, if we entered into a detailed analysis of the problem. However, in modern democratic international law, which has formulated the prohibition of force and extended the category of international crimes considerably, the justification of the category of *ius cogens* can hardly be contested, nor can it be doubted that modern

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de paix de 1904. Geneva, no year [1921], p. 24.) In fact, recourse to the clause may be had in cases when there can be talk of neither physical nor legal impossibility of performance, still owing to changes which have taken place in the meantime the performance of the treaty has become incompatible with the general policy of the state concerned and so the treaty constitutes a further excessive burden to that state. In this connexion we have quoted Korovin's example. However, the case called "political impossibility of performance" may be but one of the extraordinary manifestations of a change of circumstances which might bring about the termination of a treaty, and therefore does not cover the whole sphere of applicability of the doctrine of *rebus sic stantibus*. Else the memorandum of Chile is an interesting example of a state which, though in the actual dispute interested in the unaltered maintenance of a treaty, recognizes the clause calling it by its name, proclaiming at the same time its inapplicability to the given case.

[132] So e.g. Rousseau, Ch.: *Principes généraux du droit international public*. Paris, 1944, Vol. I, pp. 340—341; Morelli, G.: *Nozioni di diritto internazionale*. Roma, 1951, p. 37; or Schwarzenberger, G.: International *ius cogens*. *Texas Law Review*, March 1965, p. 477.

[133] See e.g. Tunkin, G. I.: *Questions of the theory of international law* (in Hungarian). Budapest, 1963, p. 122, or Verdross, A.: *Ius dispositivum* and *ius cogens* in international law. *The American Journal of International Law*, 1966, No. 1, pp. 55 et seq.

international law incorporates norms coming within this category; although on the other hand it follows from the nature of international law that peremptory rules can be exceptions only by the side of the enormous mass of rules from which sovereign states may contract out at their own free will. For this reason Articles 53 and 64 of the Vienna Convention must be approved. The provisions of these articles expressly recognize the existence of peremptory rules of international law and consider treaties conflicting with these void, and if a new peremptory rule emerges any treaty conflicting with it will in like way become null and void.

As regards the problem here analyzed, i.e. whether or not the *rebus sic stantibus* clause may be enumerated among the peremptory norms of international law, there is hardly even a reference in the literature on international law, and if occasionally a word or two are dropped on the problem, most of the authors content themselves by taking a position for or against the incorporation of the clause in the category of peremptory rules; but so far the authors have never exposed their point of view in detail, and they have never produced arguments for it.[134] Similarly neither international practice gives the necessary infor-

[134] In the discussions in the International Law Commission only Yasseen and Bartoš enlarged on the problem, and both merely declared that the clause was an objective norm of international law, from which the parties could not derogate. M. Bartoš (*Yearbook*, 1963, Vol. I, pp. 141, 148, 149, 251) also added that this was the outcome of a certain evolution, for it was in the course of history that the clause became from an implied condition a fundamental norm, a peremptory rule of international law. In the literature on international law B. Pouritch adds his reasons of about half a sentence to his stand taken in favour of the character of *ius cogens*: the state cannot forgo its right to abrogate a treaty in view of a change of circumstances, as a stipulation to the contrary would be conflicting with the nature of international relations and the essential functions of the state (*Op. cit.*, p. 75). Nor are those denying the nature of *ius cogens* more verbose. According to G. S. Fusco, even if the clause is a generally recognized principle, it is not a principle of international public policy, which the parties could not preclude (*La clausola "rebus sic stantibus" nel diritto internazionale*. Napoli, 1936, p. 60). The argumentation of C. Lipartiti moves on the same lines, still he is more explicit, as in the actual situation he does not attribute the character of public policy to the clause, because still protests are sounded against it (*La clausola "rebus sic stantibus" nel diritto internazionale*. Milano, 1939, p. 172). As far as the latter argument is concerned we would refer only to the fact emphasized on several occasions above that the clause was

mation, and it is beyond doubt that instances where states would have precluded a potential recourse to the application of the clause are of extremely rare occurrence. In addition, it may be stated that treaties occasionally containing a precluding provision are in general unequal treaties, forced by a power for the protection of the interests of its own monopolies on a developing country.[135] The same category includes certain agreements signed for loans from the International Bank for Reconstruction and Development. However, here it may even be argued whether these are at all international agreements.

Hence, it is evident from international practice that the contracting states in general do not preclude in their treaties the recognition of the effect of a change of circumstances on the operation of a treaty. Apart from this, logically it follows that if the existence of the clause is recognized, a circumstance that an observer of modern international life will hardly call into doubt, then as a matter of course also its peremptory nature has to be taken for granted. It is exactly the reasoning that no sovereign state can bind itself under a treaty for an unforeseen change of circumstances, at the supervention of which the performance of the treaty would imply a burden much graver than originally presumed, that has eventually led to a recognition of the clause. Consequently, in our opinion the enforcement of the clause cannot be excluded even by the will of the parties for changes entail-

called into doubt in principle on extremely rare occasions only, and that disputes on it in general centred round the question whether or not the conditions for the application of the clause had supervened. Schwelb argues similarly to C. Lipartiti. He bases his rejection of the clause on the circumstance that a number of important states, expressly naming the United States, do not recognize the clause, so that its content cannot be considered a peremptory norm of international law accepted by the international community of states as a whole. (Fundamental Change of Circumstances. *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1969, No. 1, p. 54.) To this we would merely add that as has already been pointed out, the United States themselves on several occasions invoked the clause in the past, and in the Vienna Conference the United States gave up their earlier opposition on grounds of principle against the codification of the legal principle implied in the clause. The positions taken by the participants of the Vienna Conference in a conclusive manner confirm the generally accepted character of the principle of law expressed by the clause.

[135] See the contribution of M. Bartoš to the discussion in the International Law Commission (*Yearbook*, 1963, Vol. I, p. 251).

ing consequences which cannot be assessed beforehand. What can be done at most is that the parties preclude the application of the clause for changes of certain circumstances specifically named in the treaty, but never in general. In such and similar instances, in point of fact, the parties agree on considering the presence of certain circumstances non-decisive, or certain specified changes non-fundamental for the purpose of the treaty.[136]

Yet, does not the opinion recognizing the effect of a change of circumstances on the operation of a treaty imply the rejection of the principle of *pacta sunt servanda*, known as one of the most important principles of international law, or at least a far-reaching depreciation of it? And if this is not the case, what is the relationship between these two fundamental principles of international law?

In our opinion, there can be no question of a forced choice between the two principles. Here the case is of two norms of international law which necessarily supplement each other and in combination guarantee the performance of treaties. In fact, the principle of a respect for treaty obligations is one of the pillars of international law, and the overthrow of this pillar would be equal to a collapse of the whole structure of international law. At the same time the *pacta sunt servanda* rule cannot be fetishized. Just on the same ground as the socialist science of international law has made it a matter of general knowledge that the rule *pacta sunt servanda* can attach only to treaties recognizing an equality of rights, and cannot protect unequal treaties, we have to recognize that when a fundamental change of circumstances modifies the position of one of the parties, thus adding to the burdens devolving on this party from the treaty considerably, and therefore virtually turning the treaty into an unequal one, the principle of *pacta sunt servanda* cannot anymore be invoked for the purpose of the given

[136] The position here defined is not defeated by the fact that as has already been mentioned several treaties contain express provisions governing the procedure to be followed in the event of a change of circumstances. These provisions are meant to forestall any disputes that might be started by possible opposers of the clause, and mainly want to bring under regulation the procedure by which a plea of a change of circumstances may be made good. Else naturally we share the opinion of many others that an express incorporation of the clause in a treaty can take place only in a general way without any specification. Still an incorporation of the clause is not necessary, and serves merely considerations of expediency (cf. Fusco, G. S.: *Op. cit.*, pp. 47—48).

treaty. Treaties are inviolable, but not for ever, stated Amado in the International Law Commission.[137] We believe that by insisting on the performance of a treaty with fire and sword we should cause the principle of *pacta sunt servanda* (a rigid enforcement of which is in practice anyhow unfeasible, as there is not a state that would take on burdens going beyond reasonable limits) to run down to a much graver extent than we should do if we recognized the existence of another norm known as the *rebus sic stantibus* rule, which, however, cannot be invoked unless certain specified conditions have supervened. If now somebody advanced the counter-argument that the recognition of the effect of a change of circumstances on the operation of a treaty would imply particular risks because the supervention of a change of circumstances could easily be contested by the other parties, then we may retort that in international law, which is a coordinating legal system valid among parties of equal rank, anxieties of a similar nature may emerge in a number of instances. Similar problems may confront us, for example, at making good the generally recognized norm of international law which permits the termination of a treaty owing to the violation of it by one of the parties, since the parties concerned may and will actually develop highly controversial opinions as regards the presence or absence of a breach of treaty.[138]

Having made clear our position in this question, it will become a matter of minor importance to clarify the relation between the norms known as *pacta sunt servanda* and *rebus sic stantibus* clause. An an-

[137] *Yearbook*, 1963, Vol. I, p. 142.

[138] Hans Kelsen who has been for a long time a most decided denier of the clause (see e.g. *Principles of International Law*. New York, 1952, p. 359) in a talk this author had with him in Berkeley, in March 1966, set up the thesis in the form of "either clause, or international law", as in his opinion the application of the clause would introduce complete arbitrariness into international relations. But he failed to advance conclusive arguments as to why disputes arising in connexion with the application of the clause could not be decided with the same means as, in general, other controversies, some even of greater weight, likely to emerge in international relations, and why should unsolved extraordinary cases be attributed an effect laying in ruins international law as a whole. Nobody contested that in general states had recourse to the application of the clause reluctantly only, and in exceptional cases, and although we could by far not deny grave abuses at invoking the clause in certain cases, still experience indicated that anxieties as to the recourse to the clause were strongly exaggerated.

swer to the question whether here we have a single norm only, with an exception implied, or two self-contained norms, can be but one in favour of the latter alternative. As a reason we may bring forward that whereas the principle of *pacta sunt servanda* guarantees the performance of treaties in force, the thesis implied in the *rebus sic stantibus* clause is but the definition of one of the ways of terminating a treaty. The clause precludes the enforcement of the principle of *pacta sunt servanda* in the same way as do other norms defining the cases of treaty termination, i.e. through the abrogation of the treaty. For this reason, we think that the reasoning of those recognizing the need for the clause and its character of a legal norm on the one hand, yet regarding it as an integral part of the *pacta sunt servanda* rule, or a supplementation thereof derived by way of interpretation on the other, would run counter logic.[139]

[139] For the former see the contribution of Bartoš, for the latter that of A. Verdross to the debate in the International Law Commission (*Yearbook*, 1963, Vol. I, pp. 148 and 155). Fusco combines the two theses into a single unity when he declares: *pacta sunt servanda rebus sic stantibus*, i.e. essentially he also supplements the first thesis with the second (*Op. cit.*, p. 9). — A. Ghobashy attributes equal importance and necessity to the principles of *pacta sunt servanda* and *rebus sic stantibus*, and regards the two principles as mutually supplementing each other (Treaties and changed conditions. *The Egyptian Economic and Political Review*, 1958, issue of April, p. 17). According to E. van Bogaert, the rule of *pacta sunt servanda* and the *rebus sic stantibus* rule are the two elements which ought to guarantee the existence of an effective and at the same time equitable law.—Naturally the opinions denying the existence of the clause want to discover a contrast between the principle of respect for treaties and the *rebus sic stantibus* rule. In addition to Kelsen's opinion, mention should be made among the writers of monographs on the question also of Schmidt, according to whom the legal thesis of *pacta sunt servanda* is partly broken through by a *de facto* effective law. (*Über die völkerrechtliche clausula rebus sic stantibus sowie einige verwandte Völkerrechtsnormen*. Leipzig, 1907, p. 112.) Hence, this writer does not recognize the nature of a legal norm of the clause. Since, however, he cannot call into doubt the actual effectiveness of the clause, he tries to escape from the *cul-de-sac* he has built up for himself, by introducing the notion of supervening impossibility, at the same time stating that under such circumstances the principle of interest is valid not only in connexion with treaties, but in the whole sphere of international law. This position suffers of the very same shortcomings as referred to earlier, namely it offers no explanation for the termination of treaties in the event of changes not coming under the heading of supervening impossibility.

5. TREATIES NOT COMING UNDER THE EFFECT OF THE CLAUSE

So far on the ground of an analysis of international practice and the literature of international law we have come to the conclusion that the clause is a living norm of international law, which under definite conditions may entail the termination of a treaty, and have tried to clarify the legal character of this norm, and its relation to one of the most fundamental principles of international law. Yet, by recognizing the clause, as having the character of an objective legal rule, we have not taken a position as to whether the clause is applicable in respect of any treaty, or only of some of the categories of treaties.

Article 62 of the Vienna Convention makes an exception in so far as it declares that in the instances of treaties establishing a boundary a fundamental change of circumstances cannot be invoked for terminating them. Earlier we have already stated that fundamentally the incorporation of this provision in the Convention appears to be to the purpose, because in the overwhelming majority of cases a state would not agree to a change of its frontiers unless force was applied, so that abrogation of a boundary treaty by invoking the *rebus sic stantibus* clause would mostly constitute a *casus belli*, which in turn could amount to a serious jeopardy to the peace of the world.

All that has been set forth so far provides ample reasons for the regulation of the problem in a treaty of codification, on grounds of expediency. However, it still fails to inform us of what the actual situation is; nor does it offer an underlying principle for this differentiation among the particular categories of treaties for the purpose of the application of the clause.

The literature on the law of nations has shown interest in the problem for a long time. Rivier e.g. has pointed out that the application of the clause is out of the question for treaties intending to create a definitive situation once for all. This category of treaties, in his opinion, includes the boundary and the peace treaties, obviously because they also include arrangements, as a rule, for establishing boundaries.[140] This opinion may be traced through the works of a large group of writers. In more recent times among others Verzijl has given expres-

[140] Rivier, A.: *Lehrbuch des Völkerrechts*. Stuttgart, 1899, p. 352.

sion to it in his paper dealing with the clause, where he exempts treaties of cession from under the effects of the clause.[141]

There are works on international law which try to extend the sphere of exemptions in so far as treaties on various territorial rights have also been included in the category of boundary treaties. Accordingly, the clause could not be enforced in respect of treaties stipulating different international servitudes.[142] This would apply also to treaties allowing establishment of military bases in another state's territory. Moreover it is on this ground that Jessup tries to extend the exemption to treaties of a political character in general,[143] a doctrine that would almost be equal to an elimination of the clause.

It was this exemption of treaties granting territorial rights from under the effect of the clause what among others Professor Logoz, the agent of Switzerland, pleaded before the Permanent Court of International Justice in the dispute between France and Switzerland on the Free Zones of Upper Savoy and the District of Gex.[144]

In her comments on the draft of the International Law Commission, Australia wanted to extend the validity of the exemption in question in addition to the boundary treaties at least to all other provisions defining territorial sovereignty.[145]

As stated above, for the purpose of international peace and security it is expedient to declare that a boundary between states cannot be contested even on the plea of a change of circumstances. But does this in fact imply an exemption from under the *rebus sic stantibus* clause? We are inclined to believe that this is generally not the case, nor is the formulation of the question in this manner quite correct, as here different ideas have been confused.

[141] Verzijl, J.: *Le principe rebus sic stantibus en droit international public.* Internationalrechtliche und staatsrechtliche Abhandlungen. Düsseldorf, 1960, p. 528.

[142] This opinion is reflected e.g. in the work of Professor Waldock, author of the draft submitted to the International Law Commission. He expressly emphasized that the effect of the clause does not extend to treaties granting territorial rights, e.g. rights of passage through the territory of a foreign state (*Yearbook*, 1963, Vol. II, p. 85).

[143] Jessup, Ph. C.: Modernization of the Law of International Contractual Agreements. *The American Journal of International Law*, 1947, p. 401.

[144] *P.C.I.J.*, Ser. C, No. 2, 17-I, p. 254.

[145] Law of Treaties. Comments by Governments on parts I and II of the draft articles on the law of treaties drawn up by the Commission at its fourteenth and fifteenth sessions. *U.N. Doc. A/CN.4/175*, p. 12.

It has been shown in the foregoing that with the execution of its provisions a treaty is terminated.[146] It will hold at most in so far as it establishes the title of the parties to the prestations received in conformity with the provisions of the treaty. When this thesis is applied to boundary treaties, then with the execution of the territorial rearrangements they will lapse, and "continue their life" only in so far as they guarantee a legal title to the state exercising sovereignty over the territory in question in conformity with the treaty. Since any obligation of performance by the parties has ceased, there can be no question of a repeated termination of a treaty once executed and therefore lapsed on the plea of a change of circumstances. Nevertheless there are some who give reasons for the continuation of the treaty saying that in the case of treaties executed *uno ictu*, such as e.g. treaties of cession, termination is out of the question, inasmuch as after the carrying into effect of the provisions of the treaty a permanent situation will come into being which is, in fact, the object proper of the treaty. Accordingly, the treaty cannot be really considered executed and consequently terminated, as execution means here the respect for the situation so created, and it is the obligation of this respect which is established by the treaty. However, against this argument we may set another, namely that the obligation of respect for the newly created situation follows from the general principles of international law rather than from the provisions of the original treaty, since the treaty once executed guarantees a title only, whereas respect for the territorial rearrangement must be derived from the general obligation concerning respect for the sovereignty and the territorial integrity of the state. Yet even though one adopted the view, according to which a treaty once performed could not be considered terminated merely because the treaty might have still further effects, the application of the clause could not emerge, since neither party were in the position to plead that owing to a change of circumstances performance had become considerably more onerous for it. Hence it is entirely out of the question that by referring to a change of circumstances either party should qualify the already executed treaty as ineffective subsequently and demand the return of prestations once performed.

[146] See pp. 307 et seq.

From the argumentation it also follows that the doctrine which in general would have the treaties concerning territorial rights withdrawn from under the effect of a change of circumstances cannot be accepted. Treaties disposing of other territorial rights, such as e.g. establishing an international servitude, do not come within the category of the treaties executed *uno ictu*. Obviously a treaty guaranteeing a right of passage or authorizing the establishment of military bases does not expire by a single act of performance. These treaties in fact authorize the grantee state to repeated action in the territory of another state, whereas the burdened state is bound to sustained toleration of such acts. Consequently, treaties of this category cannot be considered exceptions from under the general rule of the clause, the less because their termination in the majority of instances purposes the preservation of international peace and security rather than becoming a threat to them. Obviously, Lachs and Tunkin, two representatives of the socialist legal system in the International Law Commission, were led by such considerations when they objected to the extension of the exemptions from the clause to territorial provisions in general.[147]

Hence, our point of view according to which treaties once executed and so also the boundary treaties lapse by the act of performance will entail the conclusion that in point of fact here the application of the *rebus sic stantibus* clause is out of the question. On the other hand, when apart from territorial arrangements a treaty also includes provisions in connexion of which there can be no question of performance of obligations at once and by a single act, and consequently no question of termination may arise, then in cases of separable provisions, as far as obligations not yet lapsed by execution are concerned, there is no obstacle whatever to a party's invoking fundamental change of circumstances. This may frequently be the case with peace treaties providing also for territorial rearrangements. We may e.g. refer to the Euxine case, when Russia wanted to terminate certain provisions of the Paris Treaty of 1856, which Treaty also included the establishment of boundaries, on the plea of a change of circumstances.

All this does not, however, apply to not yet executed and therefore not yet terminated boundary treaties. In the analysis of earlier diplomatic practice mention has been made of the dispute between Serbia and Bulgaria after the first Balkan war, when by referring to a fun-

[147] *Yearbook*, 1963, Vol. I, pp. 140 and 253.

damental change of circumstances Serbia insisted on the invalidation of the boundary line drawn for a successful outcome of the war. In this case there could be no obstacle of principle to the application of the clause, there being a case of an international obligation still in force. However, cases of this kind will occur exceptionally only, especially in these days, when the threat or use of force against the territorial integrity of a state is prohibited by a universally valid peremptory rule of international law.[148] Consequently, a treaty applying to a partition of territories to be conquered by war will be invalid for its very subject-matter. Still even in the case of boundary treaties for future contingencies, as has been shown by the example taken from the history of the Balkan wars, a reference to a change of circumstances will necessarily entail a jeopardy to international peace and security.

This example again prompts us to the conclusion that even if in principle boundary treaties have to be exempted from the effect of the clause in wholly exceptional instances, since for reasons mentioned above the question of the application of the clause cannot even emerge for the overwhelming majority of cases, for the sake of expediency and with adequate provisos of principle we recognize that Article 62 of the Vienna Convention was correct when in general it precluded the applicability of the clause to treaties establishing a boundary. This is the case in particular at present, when territorial arrangements carried through after the Second World War must be considered definitive and the recognition of the inviolability of the frontiers has become a vital condition of world peace. That is, in all events the possibility of raising the question of a modification of the frontiers by anyone of the states and on any pretext must be precluded. This is of significance the more because the famous Article 19 of the League of Nations Covenant held out promise of a reconsideration of the provisions of the peace treaties which have become inapplicable. However, it has to be emphasized that in this article, which by the way has never been applied, we have the case of the idea of what may be called peaceful change rather than of the *rebus sic stantibus* clause, i.e. the revision

[148] In our opinion the provision in paragraph 2 of Article 2 of the Charter has become a norm of general international law equally binding for all states irrespective of whether or not they are members of the United Nations.

of treaties which should be clearly distinguished from the termination of a treaty on the ground of the clause.[149]

Again it has to be pointed out that the position we have taken above does not affect the right of nations to self-determination, a principle recognized by international law of today. It was obviously the anxiety as if the principle of inviolability of frontiers prevented the right to self-determination from being enforced, that led the members representing the legal systems of the Asiatic and African countries in the International Law Commission, and the members of the recently liberated states in the Sixth Commission of the General Assembly of the United Nations, when they objected to the withdrawal of the boundary treaties from under the effect of the clause.[150] However, the anxiety was unjustified. As a matter of fact, the right of nations to self-determination has become a fundamental peremptory norm of international law whose enforcement not even the nation concerned could waive validly, the less the colonial powers in treaties concluded by them. That is, in the event of the enforcement of the right to self-determination the question is not one of abrogating a valid treaty in view of a change of circumstances, but of enforcing a right which has never and can never become the subject-matter of a boundary treaty. Hence, a nation exercising its right to self-determination makes good a fundamental right recognized by international law, the enforcement of which cannot be hampered by a treaty concluded by other parties.[151]

In the foregoing we have taken a stand as to the nature of treaties, in respect of which the *rebus sic stantibus* clause cannot be invoked. In the literature also opinions may be encountered in large numbers

[149] The statement of Count von Westarp, this typical representative of German imperialism, that the clause was often applied exactly to the boundary establishing provisions of peace treaties is partly due to a confusion of the two notions, yet even more to an endeavour to find a justification for modifications of frontiers by force. (Die clausula rebus sic stantibus im heutigen Völkerrecht. *Juristische Wochenschrift*, 1934, No. 4, p. 201.)

[150] See the comments of Elias and Tabibi in the International Law Commission (*Yearbook*, 1963, Vol. I, pp. 147 and 256), further the remarks of N'Nang, the representative of Cameroon, in the Sixth Committee of the General Assembly, (*U.N. Doc. A/CN.4/175*, p. 289).

[151] It is for this reason that we do not consider the anxiety of M. Bartoš in the International Law Commission in connexion with the exemption of boundary treaties from the operation of the clause properly founded (*Yearbook*, 1963, Vol. I, p. 149).

which would have the application of the clause limited to treaties signed for an indefinite period, or possibly to such of a permanent character. Treaties whose expiry has been defined by the treaty itself would therefore have to be exempted from the effect of a change of circumstances. According to Fitzmaurice, for example, who was one of the rapporteurs of the draft codification of the law of treaties and is actually a judge of the International Court of Justice, the application of the clause ought to be restricted to treaties of a permanent nature. Similar opinions were sounded in the International Law Commission also by Paredes, who wanted to have the application of the clause limited to treaties concluded *sine die*.[152]

Rousseau too believes that recourse to the *clausula rebus sic stantibus* is only justified for treaties signed for an indefinite period, as here the equilibrium between the interests to be reconciled by the treaty might be upset.[153] However, he still owes us a reply as to why this state of equilibrium is of necessity upheld for treaties signed for a definite period, where the lapse of a certain length of time and the consequential change of circumstances may produce disproportions very much the same as in the case of treaties concluded for an indefinite period.

A hiatus of the same sort may also be discovered in the argumentation of Pouritch, according to whom the problem of the clause will emerge only in connexion with treaties signed *sine die*. Still he made the preliminary statement that a state cannot waive a recourse to the clause, because such a waiver would be conflicting with the nature of international relations and the essential functions of the state.[154] If, however, this latter statement is correct, then the preclusion of the application of the clause to treaties signed for a definite period would be responsible for the same collision.

Already Laghi was aware of the contradiction between the recognition of the need for the clause and the limitation of its potential application to "perpetual treaties". However, Laghi in his endeavour to eliminate this contradiction merely came to the pious wish that states should not take up a "clause of eternity" in their treaties.[155]

[152] *Yearbook*, 1963, Vol. I, p. 147.
[153] Rousseau, Ch.: *Principes généraux du droit international public*. Paris, 1944, tome I, p. 580.
[154] Pouritch, B.: *Op. cit.*, p. 75.
[155] Laghi, F.: *Teoria dei trattati internazionali*. Parma, 1882, pp. 250

André Gros, actually judge of the International Court of Justice, in the International Law Commission too took a stand for restricted application of the clause. According to him, for modern society the *rebus sic stantibus* clause could be of use only if there were no provisions governing denunciation in the treaty and if the states in question were not members of an international organization whose function was exactly to provide facilities for a peaceful settlement of international disputes.[156] However, membership in an international organization can by no means be a substitute for the clause. At most such a membership can smooth the ground for the application of the clause in certain cases.[157]

Nor are representatives of the opinion missing in the literature on the law of nations according to which the clause is applicable to treaties of whatever category. This opinion was adopted by Waldock, the last rapporteur on the law of treaties in the International Law Commission.[158] It is partly his opinion that is reflected in the final wording of the draft and so also in the Vienna Convention, as neither draws a line between treaties signed for definite or indefinite periods. Similarly Fusco believes that even for treaties concluded for a definite period a change may supervene, which might necessitate the application of the clause.[159] Lipartiti emphasizes that if the position restricting recourse to the clause exclusively to treaties signed for an indefi-

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and 254. More than ten years before the publication of Laghi's work John Stuart Mill pointed out the inappropriateness of eternal treaties (Treaty obligations. *Fortnightly Review*, 1 December 1870).

[156] *Yearbook*, 1963, Vol. I, p. 153.

[157] There are international lawyers who raise the question of a justification of the application of the clause just in connexion with membership in international organizations. So in the International Law Commission Castrén thought that the applicability of the clause could justly be recognized in respect of international organizations whose constitutions did not provide for a right of withdrawal. A. Verdross (*Yearbook*, 1963, Vol. I, pp. 138—139) expressly stated that termination of membership in the United Nations was justified on the plea of a change of circumstances. However, in our opinion in these cases the clause has not to be invoked, because on the strength of its sovereignty no state can be forced to remain member of an international organization against its will. The question has been extensively discussed above in connexion with the denunciation of treaties concluded *sine die* (see pp. 261 et seq.).

[158] *Yearbook*, 1963, Vol. II, p. 83.

[159] Fusco, G. S.: *Op. cit.*, pp. 42—43.

nite period were adopted, treaties concluded for a definite period would become even more onerous than "perpetual" treaties.[160] Several other writers on international law, among them Houlard[161] and Werth-Regendanz,[162] also took a stand against the limitation of recourse to the clause to treaties concluded for an indefinite period.

In this connexion mention ought to be made of the position adopted by the British Government in their comments on the draft of the International Law Commission. The British Government gave expression to the opinion that the application of the clause was justified only to treaties which did not recognize the right of notice at all, or at least within a twenty years' period from the coming into force of the treaty.[163] This proposal which completely ignores considerations of principle, is one of the characteristic manifestations of English pragmatism.

In our opinion for this purpose of applying the clause, differentiation between treaties concluded for definite and indefinite periods is arbitrary and unjustifiable. Although it is obvious that for treaties concluded for an indefinite period, where a right of notice might be questionable,[164] there is greater need for recourse to the clause than in the case of a treaty signed for a definite period, still it cannot be denied that even for the latter changes may supervene which are prohibitive to the continuation of the treaty to the date provided by it. Since in our construction the *rebus sic stantibus* clause is justified exactly by the circumstance that the burdens devolving on the contracting parties from a treaty cannot go beyond a certain predictable limit, we also have to recognize that no state is under obligation to accept burdens beyond this limit, not even in case when the date of expiry is fixed in the treaty itself. Exactly for this reason no lower limit whatever can be established where the application of the clause to treaties concluded for shorter periods would be precluded. It has to be taken

[160] Lipartiti, C.: *Op. cit.*, p. 32.

[161] Houlard, M.: *La nature juridique des traités internationaux et son application aux théories de la nullité, de la caducité et de la révision des traités.* Bordeaux, 1936, p. 134.

[162] Werth-Regendanz,A.: *Die clausula rebus sic stantibus im Völkerrecht, insbesondere in ihrer Anwendung auf den Young-Plan.* Göttingen, 1931, p. 97.

[163] *U.N. Doc. A/CN.4/175*, p. 155.

[164] For the denunciation of treaties concluded for an indefinite period see pp. 261 et seq.

into account that in international life overnight changes critical for the purposes of a given treaty may take place.

Naturally we do not call it into doubt that for treaties concluded for shorter periods recourse to the clause would be of rarer occurrence than for treaties for longer periods. However, there is no established norm for such and similar contingencies, and it would not even be desirable to formulate any. On the other hand, it stands to reason that for treaties that may be terminated at any time after reasonable notice or which guarantee the right of denunciation at short intervals, the states will have recourse to the *rebus sic stantibus* clause on exceptional occasions only. The parties will, in all likelihood, prefer terminating a treaty by way of denunciation. As a matter of fact, in the event of denunciation the risk of disputes would be less imminent than with a recourse to the clause. Here the parties of contrasting interests often call into doubt the supervention of fundamental changes referred to by the party invoking the clause, or the significance of the changes for the treaty in question.

For that matter, examples may be quoted from international practice for the application of the clause to treaties concluded for definite periods. Let it suffice here to mention once more the withdrawal of France from the military organization of NATO.

On this understanding, the position adopted by the International Law Commission and also by the Vienna Convention, namely that the clause may be applied to a treaty irrespective of its period of validity, is in every respect the correct one.

In the same way, the opinion occasionally turning up in the literature, namely that for the purpose of the *rebus sic stantibus* clause too a line must be drawn between law-making and other treaties, appears to be void of a proper foundation. Some of the partisans of this differentiation substantiate the need for this classification exactly by referring to an alleged difference manifesting itself at the application of the clause.[165] According to this opinion, the application of the clause to purely law-making treaties is out of the question, the applicability of the clause being restricted to treaties settling concrete political, economic, etc. problems, i.e. to so-called contract-treaties. Although there is no doubt that a need for the application of the clause to trea-

[165] For the distinction of law-making and other treaties see pp. 223 et seq. in Part One of this work.

ties setting up norms of general character for future purposes is of a rather rare occurrence, still it is certain that changes may take place which even in this case will necessitate the termination of treaty provisions by the one party or the other. Since, however, not even law-making treaties can lay a claim to perpetual validity, which fact manifests itself also in the circumstance that a large number of these treaties expressly recognize the right of withdrawal,[166] obviously the so-called law-making treaties cannot be in a preferential position as regards the application of the clause. The justification of this statement is also confirmed by international practice.

Eventually we have to come to the conclusion that for certain categories the need for a recourse to the *rebus sic stantibus* clause will manifest itself with greater frequency than for others. However, apart from boundary treaties, termination on the ground of a change of circumstances cannot be precluded even for a single category of treaties.[167]

6. THE LEGAL EFFECTS OF THE APPLICATION OF THE CLAUSE

So far discussions centred round the reference to a fundamental change of the circumstances from the conclusion of the treaty as one of the means and ways to terminate it. Here, however, we have to add that reference to the clause will not necessarily entail the abrogation of the treaty as a whole. In a large number of cases a situation may arise where only some of the provisions of the treaty will have to be ter-

[166] Merely as an example taken at random mention should be made of the conventions signed at the first and second Peace Conferences at the Hague, or the Convention on the Prevention and Punishment of the Crime of Genocide.

[167] For the sake of completeness it should be remembered that reference to a change of circumstances may abrogate not only treaties but also unilateral declarations. As an example, the declarations of France and the United Kingdom on the recognition of the compulsory jurisdiction of the Permanent Court of International Justice by virtue of paragraph 2, Article 36 of the Statute of the Court should be mentioned. These declarations were partially abrogated by notifications addressed by the two states to the Secretary-General of the League of Nations in September 1939 following the outbreak of the Second World War on the plea of a change of circumstances (see pp. 351—352).

minated, as was the case in the Euxine affair when certain provisions of the Paris Treaty of 1856 were abrogated. Among the other examples quoted earlier we also have such ones where only a demand for a partial termination was forthcoming. The action of the states concerned was directed to a partial termination in the Batum case, the annexation of Bosnia and Hercegovina, the dispute between France and Switzerland on the free zones, etc. In cases of treaties bringing under regulation a mass of questions, such as e.g. the Paris Treaty of 1856, or the Treaty of Berlin of 1878, it was unlikely that fundamental changes of circumstances might have entailed the termination of the treaties as a whole. Neither Russia, nor the Austro-Hungarian Monarchy had in mind to postulate abrogation of the treaty as a whole by invoking changes that had taken place in the meantime.

Hence, it is beyond doubt that as testified by diplomatic practice a change of circumstances may serve as an occasion for the partial termination of a treaty. However, this does not mean that this may be the case for any treaty, or for any of the provisions of a treaty. It will have to be decided in each case separately whether or not the particular provisions are separable, so that they may be terminated, while others should continue valid. If there is an unbreakable cohesion among the particular provisions of a treaty, obviously a change of circumstances may be invoked only in respect of the treaty as a whole, whereas a partial termination will be out of the question.[168] However, another problem that might emerge is whether a justified and well-founded application of the *rebus sic stantibus* clause would necessarily entail *termination* for the whole or a part of a treaty. As a matter of fact, often the state concerned will on the plea of a change of circumstances demand an appropriate modification of the provisions of the treaty rather than its termination.

In the literature on international law some of the authors combine this demand for a revision of the treaty with the *rebus sic stantibus* clause as one of the manifestations of the former. Others press the question to a point where the effect of a change of circumstances is discovered exclusively in the potential demand for a revision of the treaty. In the International Law Commission Bartoš came to the conclusion that in general the application of the clause entails the

[168] On the separability of treaty provisions, see the previous chapter, pp. 324—325.

revision, and on extremely rare occasions the termination of the treaty. Further he added that if in the matter of the effects of a change of circumstances on the treaty a dispute arose between the parties, priority should be given to a revision of the treaty. However, even the termination of the treaty would follow, if its maintenance became impossible, or created an impermissible situation.[169] Yasseen too stated that the function of the clause consisted mainly in the permission of a revision of the treaty, although he added that in certain cases recourse to the clause would bring about termination.[170] Waldock, the rapporteur of the question in the International Law Commission, while recognizing that the majority of authors attributed a treaty-terminating effect to the clause, made the surprising statement that there was no great practical difference between the two positions since the parties would first have negotiations about revision and that termination of the treaties would be resorted to only if those negotiations remained fruitless.[171] There is an inkling of truth in this latter statement, still we cannot follow Waldock in denying any practical importance to the question whether the party pleading a change of circumstances can demand termination or only revision of the treaty. Else Waldock in the following discussion too recognized that a potential termination of the treaty could in no circumstances be excluded from the *rebus sic stantibus* clause.

Ténékidès in an earlier paper wrote that while in the period before the First World War application of the clause terminated the treaty, in the following period, however, only a revision of the treaty was demandable. On adopting this position he mainly relied on Article 19 of the League of Nations Covenant.[172]

According to Gould, on the ground of a reference to a change of circumstances, the revision of a treaty or its termination may equally be demanded.[173] Wengler's manual of international law similarly comes to the conclusion that the application of the clause may equally result in termination, revision, or suspension of the operation of a

[169] *Yearbook*, 1963, Vol. I, pp. 98 and 148.
[170] Ibid., p. 98.
[171] Ibid., pp. 156—157.
[172] Ténékidès, C. G.: Le principe rebus sic stantibus, ses limites rationnelles et sa récente évolution. *Revue générale de droit international public*, 1934, pp. 284 et seq.
[173] Gould, W. L.: *An Introduction to International Law*. New York, 1957, p. 340.

treaty.[174] Radoikovitch too interprets the *rebus sic stantibus* clause as a means of revising or terminating a treaty.[175]

In his widely used handbook on international law, O'Connell shows some hesitation as regards the effect of a change of circumstances on a treaty. Eventually he comes to the conclusion that properly the application of the clause should be considered a question of treaty revision rather than one of treaty termination, "except in the most extreme instances of political significance".[176] Verzijl got to the point where he wanted to have the *rebus sic stantibus* clause expunged from the chapter dealing with the causes of termination of treaties, and have it included in a separate chapter discussing the conditions authorizing claims to a revision of a treaty.[177]

A number of writers on the law of nations identify the provisions of Article 19 of the League of Nations Covenant[178] with the clause, or want to discover in these provisions an embodiment of the principle implied in the clause in a concrete form. The above-mentioned position of Ténékidès, according to which since the end of the First World War only a revision of the treaty may be demanded on the plea of the clause, in like way reflects this idea, because essentially it is based on the consideration that the article in question of the League of Nations Convenant has incorporated the clause and that it has modified its content to a certain extent. The same idea was expressed by Paul-Boncour representing France in the dispute before the Permanent Court of International Justice on the free zones of Upper Savoy and Gex, when he put the rhetoric question: "Qu'est-ce que l'article 19, si non l'application à l'avenir de la clause sic rebus stantibus?"[179] According to a French lawyer, Article 19 of the League of Nations Covenant is "à n'en pas douter, une consécration de principe

[174] Wengler, W.: *Völkerrecht*. Berlin, 1964, Bd. I, p. 376.
[175] Radoikovitch, M. M.: *Op. cit.*, p. 181.
[176] O'Connell, D. P.: *International Law*. London, 1965, Vol. I, p. 297.
[177] Verzijl, J.: *Le principe rebus sic stantibus en droit international public*. Internationalrechtliche und staatsrechtliche Abhandlungen. Düsseldorf, 1960, p. 525.
[178] Article 19 of the League of Nations Covenant: "The Assembly may from time to time advise the reconsideration by members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."
[179] *P.C.I.J.*, Ser. C, No. 17—I, Vol. I, p. 89.

de la clause *rebus*".[180] The Chinese Huang expresses himself in a similar way.[181] According to Radoikovitch, the Covenant has recognized the clause,[182] and Fauchille concludes that Article 19 wants to bring under regulation the recourse to the clause.[183] Opinions similar to those of Fauchille have been expressed by André Weiss in the dispute between Bolivia and Chile. Accordingly, the provision in question of the Covenant wants to arm the states against possible abuses in connexion with the application of the clause.[184] Reut-Nicolussi wants to discover in Article 19 a tentative social regulation of the clause.[185]

Finally, here is a position taken from diplomatic practice. In the Sino-Belgian dispute developed round and about the capitulatory agreements and discussed earlier in this chapter, the Chinese Foreign Ministry in its memorandum of 16 November 1926 to the Belgian minister in Peking made the statement that Article 19 of the League of Nations Covenant clearly recognized the principle of *rebus sic stantibus*.[186]

The positions so far reviewed put the sign of equality between the *rebus sic stantibus* clause and the principle contained in Article 19 of the League of Nations Covenant. In our opinion this is wrong. Article 19 emphasized the principle of a revision of treaties without establishing a right of the parties concerned to claim a revision. It merely guaranteed a potentiality for the General Assembly of the League of Nations to advise the reconsideration by member states of treaties which have become inapplicable. However, not even a unanimous resolution of the General Assembly would have created

[180] Valade, A.: *Sanctions de la violation des traités*. Paris, 1936, p. 43.
[181] Huang, Ting-Young: *The doctrine of rebus sic stantibus in international law*. Shanghai, 1935, p. 5.
[182] Radoikovitch, M. M.: *Op. cit.*, p. 242.
[183] Fauchille, P.: *Traité de droit international public*. Paris, 1926, tome I, troisième partie, p. 393.
[184] *De la non révision des traités de paix*. Exposé de la délégation du Chili à propos de la demande de la Bolivie contra le Chili en révision du traité de paix de 1904. Geneva, no year [1921], p. 113.
[185] Reut-Nicolussi, E.: *Zur Problematik der Heiligkeit der Verträge*. Innsbruck, 1931, p. 173.
[186] Statement of the Chinese Government and other official documents relating to the negotiation for the termination of the Sino-Belgian treaty of amity, commerce and navigation of November 2, 1865. Peking, 1926, p. 39.

a legal obligation for the modification of a treaty (though such a unanimous resolution was hardly within the range of the possible).

But the question of a revision of treaties will hardly yield to legal regulation of a general nature. The revision of a treaty is a political rather than a legal problem, which in all events requires the agreement of the contracting parties. No state has a claim to have the content of a treaty in force altered according to its intentions, nor can a contracting party be obliged to yield to anyone of the parties defining obligations under the treaty unilaterally. International law does not recognize a claim to revision. Naturally, a state party to a treaty is free to demand modification and to reinforce its claim by invoking changes that have occurred in circumstances. Since, however, the other parties are under no obligation whatever of international law to take part in a treaty of a content departing from the original, they may dismiss any claim advanced against them without violating their obligations under international law. Hence, a claim to revision is of a political character, and does not purpose the enforcement of the *rebus sic stantibus* clause implying a norm of international law. From this the conclusion follows that Article 19 of the Covenant embraces a field differing from the scope of the clause, and an identification of the two involves a dangerous confusion of notions.[187]

As regards the legal effects of a reference to fundamental changes of circumstances, we have come to the conclusion that the party invoking the clause may demand termination or suspension of the operation[188] of the treaty in question but will have no claim to a modi-

[187] The need for a segregation of the clause and Article 19 of the Covenant was recognized by several authors in the literature on international law in the period between the two world wars. For the question see Fusco, G. S.: *Op. cit.*, p. 87; Williams, J. F.: The Permanence of Treaties. *The American Journal of International Law*, 1928, p. 100; Kunz, J. L.: The Meaning and the Range of the Norm Pacta Sunt Servanda. *The American Journal of International Law*, 1945, p. 190; Hill, C.: *Op. cit.*, p. 840; Cereti, C.; *La revisione dei trattati*. Milan, 1934, p. 35.

[188] Since we do not intend to deal with the suspension of the operation of treaties in this work, we merely mention that in the event of a fundamental change of circumstances of a temporary character the state concerned may demand the suspension of the operation of the treaty instead of its termination. An example from diplomatic practice is the action of the United States quoted above, by which the United States suspended the operation of the International Load Line Convention by invoking a change of circumstances owing to the Second World War.

fication of it. Hence a modification of the treaty can take place only when there is an agreement between the parties on a modification. In the event of a rejection of a claim to revision, provided that all other conditions are present, the contracting party can, as a matter of course, rightfully make good its right to a termination or suspension of the operation of the treaty. However, a claim to suspension is not conditional on an abortive attempt at revision.

We have to emphasize, however, that in our opinion the party concerned has to enforce its right expressly, i.e. there can be no question of automatic termination or suspension of the operation of a treaty owing to a change of circumstances. This has to be stressed, because partisans of an automatic operation of the clause are by no means lacking in the literature. So e.g. according to Fischer Williams a treaty will not become voidable owing to a change of circumstances, but lapses at one stroke. The ties are broken by the change that has taken place, and it is not the right of anyone of the parties to break them.[189] Similar opinions are professed by Cereti[190] and Reuterskiöld.[191]

The opinion attributing an automatic effect to the clause is wholly unacceptable. A treaty cannot lapse owing to a change of circumstances unless this change affects certain definite circumstances and the extent of the change has reached a certain degree. Here a decision will depend on the weighing of the cons and pros by the parties concerned. Still even if in the judgement of the party concerned the changes provide a ground for treaty termination, established practice merely guarantees a right to the party to the termination of the treaty, and at the same time makes it dependent on the decision of the party whether or not it wants to make use of this right. The party concerned might as well come to the conclusion that drawbacks on the other side might easily become a setoff to the benefits implied in the riddance from the treaty. Consequently, the party may have its choice among termination, suspension, or continuation of the treaty. If the effects of a change of circumstances set in automatically, there could not even be a question of choosing the suspension of the operation of the treaty instead of its termination for good.

[189] Williams, J. F.: *Op. cit.*, pp. 91—92.
[190] Cereti, C.: *Op. cit.*, p. 41.
[191] Reuterskiöld, C.: Die "clausula rebus sic stantibus" im heutigen Völkerrecht. *Tidskrift utgiven av Juridiska Föreningen i Finland.* 1939, Häft 3—4, p. 277.

Diplomatic practice too rejects the automatic effect of the clause. There has been only one exceptional case where an international organ, on the plea of a change of circumstances, has declared treaties of an earlier date lapsed, although none of the parties has made an express declaration to such effect. Here we have in mind the minorities treaties discussed above.[192] These treaties have been considered by the Secretariat of the United Nations as lapsed owing to a change of circumstances. Still, as has already been pointed out, the conclusion could be drawn from the attitude of the contracting parties that they themselves were in agreement with the opinion of the Secretariat, and they themselves did not consider the treaties in question as being in force. This case, however, must be accepted as very exceptional, and as such it cannot provide a ground for the formulation of a norm decreeing automatic operation of the clause.

Another question coming within the sphere of operation of the clause concerns multipartite treaties. What will happen in the reciprocal relations of the parties to the treaty, if one of them wants to terminate it by invoking a change of circumstances? Naturally, the contractual relations of the party making the declaration to the other parties will be broken off. However, for so-called general multilateral treaties no alterations will take place as a rule in the reciprocal relations of the other parties, because for them the treaty will retain its original interest notwithstanding the withdrawal of one of the parties. In general, the situation is similar to that of the termination of a treaty by way of denunciation, provided by it, as has been discussed above,[193] and the exceptions referred to there are valid also for the present case.

7. PROCEDURE IN THE CASE OF A CLAIM TO TERMINATE A TREATY

The last set of problems connected with the *clausula rebus sic stantibus* is that of procedure, i.e. the ways and means of how a party desirous to be relieved of the obligations under the treaty may make good its claim to termination owing to a fundamental change of circumstances. This problems goes far beyond the usual significance of

[192] See pp. 358—359.
[193] See pp. 255—256.

procedural questions in general and influences the actual enforcement of the *rebus sic stantibus* clause to the highest degree. By an arbitrary definition of the procedural rules and their linking up with certain norms of substantive law, some of the writers on international law try to frustrate the abrogation of a treaty on the plea of a fundamental change of circumstances even when these writers formally recognize the validity of the clause.

The basic problem which has to be settled in the first place is whether the party claiming the termination of a treaty may make good its claim unilaterally, or whether the lapse of the treaty can be established only by the joint agreement of all contracting parties. Or in other words, in the event of a general recognition of the principle of law implied in the clause (which can be hardly contested anymore), who is authorized, and how, to establish the supervention of such fundamental changes in the circumstances which were extant at the time of and also decisive for, the conclusion of the treaty, as would provide an adequate ground for the termination of the treaty. It is therefore a question of the right of qualification, i.e. to decide whether or not a change has affected circumstances which for the application of the clause are decisive and whether or not the character of the changes is such as would authorize the party to invoke the clause.

In our opinion the party invoking a material change of circumstances is not authorized to a unilateral qualification of the change with definitive and obligatory effect on the spot. Therefore a chance must be offered to the other contracting parties to call into doubt the qualification of the changes invoked as a ground for the termination of the treaty. If the parties fail to agree on the point of qualification of the changes, which is likely to be the case in a considerable number of instances, then we shall be confronted with an international legal dispute of the same sort as may emerge in connexion with other problems of international law, i.e. a dispute, for the solution of which recourse may be had to all the means offered by international law for a peaceful settlement.

To quote an example from another field of international law, the International Court of Justice held in the judgement pronounced in the Asylum case that the diplomatic representative of the state granting an asylum "must have the competence to make .... a provisional qualification of any offence alleged to have been committed by the refugee", although the state in whose territory the diplomatic re-

presentation resided "would not thereby be deprived of its right to contest the qualification". If differences arose between the parties, according to the statement of the Court these "might be settled by the methods provided by the Parties for the settlement of their disputes".[194]

Obviously, the situation is very much the same also as regards other norms of the law of treaties. For the enforcement of the treaty-terminating effect of a breach of treaty the attitude in question has to be qualified, on the ground of which the injured party wants to enforce its right to terminate the treaty. Here too a unilateral statement of the party abrogating the treaty cannot by itself settle the question, and obviously an opportunity must be given the other party to a rejoinder. For the settlement of the dispute recourse should be had to the appropriate means. Many more examples may be quoted from other fields of international law.

Hence, the situation is such that the state invoking the clause cannot abrogate a treaty by a unilateral statement definitively, nor a separable part of it. First of all, the party concerned has to acquire the consent of the other contracting parties, properly substantiated, and when necessary by producing evidence of the supervention of changes and their effect on the treaty. It is with this restriction that we accept the resolution of the London Conference of 1871 analyzed earlier in this chapter,[195] which states that a state "ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes au moyen d'une entente amicale". Hence the state invoking changes has to try in all events to come to terms with the other contracting parties. It has to negotiate with its partners and make efforts to obtain their agreement to the termination of the treaty, wholly or partially. It is for this reason that we are unable to adopt Kaufmann's opinion who considers the need for an amicable agreement rejectable.[196]

If, however, we want to solve the problem to its roots, we have to seek for a reply to the question, what if the endeavours of the party invoking the clause come to naught either because the other parties refuse to enter into negotiations, or decline to satisfy the demand of

[194] *I.C.J., Reports 1950,* p. 274.
[195] See p. 336.
[196] Kaufmann, E.: *Op. cit.,* p. 221.

the party having recourse to the clause, or because of the means promoting a peaceful settlement of the dispute and enumerated in Article 33 of the Charter of the United Nations, those on the recourse to which the parties have agreed have failed to produce the wanted results. In other words, is the party invoking the clause in this case authorized to take unilateral action?

The reply to the question will segregate the ostensible and true partisans of the clause. As a matter of fact, if we discarded the right to unilateral decision-making altogether, we should deprive the clause of its *raison d'être*, and by lifting it out of the causes of the termination of a treaty degrade it to one of the means which may be used for the substantiation of political machinations. In this case we should namely have to adopt the point of view that a treaty cannot be terminated before its expiry unless by the agreement of the parties, and that a recourse to the change of circumstances may serve merely as one of the arguments advanced in order to obtain the consent of the other contracting parties. If we set out from this thesis, it would be meaningless to define rules for the character of the changes, as in fact the consent of the parties may terminate a treaty even in absence of any other condition.

The partisans of the opinion that a fundamental change of circumstances brings about the termination of a treaty automatically will be relieved of the problem on the face only. It is in vain when Fischer Williams states that the doctrine of *rebus sic stantibus* is independent of a unilateral repudiation of the obligations under the treaty.[197] He merely evades the essence of the problem. Irrespective of whether the clause operates automatically, or merely provides facilities for the party to the treaty to terminate it, the character of the change of circumstances has to be qualified in all events, and the problem to be solved is exactly, what should happen if the parties failed to agree in the matter of qualification?

In our opinion, anybody accepting the clause as an institution of international law of to-day will eventually come to the recognition that if the dispute cannot be settled with the means available for the parties, in the last resort the party invoking the clause will be entitled to unilateral action. The recognition that the mere objection of the party

[197] Williams, J. F.: The Permanence of Treaties. *The American Journal of International Law*, 1928, pp. 89—90.

protesting against the application of the clause could definitively frustrate the termination of a treaty on the plea of fundamental changes of circumstances would create an untenable situation.[198] This is the conclusion we shall have to come to as long as international law does not recognize an obligation of states to have recourse to the means available for settling disputes with a binding force. That is, as long as there is no compulsory jurisdiction in international relations — which we believe will not come into being for a long time, is not even desirable,[199] and in disputes associated with the clause particularly impractical—for reasons already made clear the right to unilateral decision cannot be precluded.[200] As a matter of course, we agree with Westlake, when he emphasizes that the states should proceed with a deep sense of responsibility.[201] A state which by invoking a change of circumstances terminates a treaty without sound foundations would be liable for a breach of treaty, and this act establishes the international responsibility of the state with all the consequences international law attaches to such responsibility.

The opponents of the clause will obviously try to turn this conclusion to good account for their own purposes, or even to call into doubt the very existence of international law. However, even here the situa-

[198] Here we have come to the same conclusion as E. Kaufmann, according to whom the states cannot waive the right under certain conditions to create a situation of a unilateral *fait accompli* (*Op. cit.*, p. 221). Nevertheless, even a defender of the statements of the London Protocol, like van Bogaert, is forced to admit that from this Protocol a conclusion as if any unilateral termination of a treaty on the plea of a change of circumstances were unlawful cannot be drawn. (Le sens de la clause "rebus sic stantibus" dans le droit des gens actuel. *Revue générale de droit international public*, 1966, p. 58.)

[199] It would go far beyond the scope of this work if we discussed in detail the deficiencies of the present system of international adjudication and the anxieties rightfully advanced against the introduction of a compulsory jurisdiction. For more details the reader is referred to Haraszti, Gy.: The Problem of International Jurisdiction. In: *Questions of International Law*. Budapest, 1964, pp. 24 et seq.

[200] The statement of the Chinese Alfred Sze, that it is a generally recognized principle that treaties are subject to unilateral denunciation if the conditions under which they were entered into fundamentally changed, can be accepted only within the limitations specified above. (Quoted by Tseng Yu-hao: *The Termination of Unequal Treaties in International Law*. Shanghai, 1931, p. 70.)

[201] Westlake, J.: *International Law*. 2nd ed., 1910, Vol. I, p. 296.

tion will not present a picture essentially differing from those seen in other spheres of the law of nations, where a dispute might arise between the opposing parties in the matter of the application of a legal norm. We have to be aware of the fact that modern international law, whose function is in the first place to bring under regulation the relations among sovereign states, is of a different nature than the municipal legal systems, and that for the settlement of disputes it does not control a machinery like the latter. As a long-term target perhaps the idea may be raised of the creation of a partly political, partly judicial organ, which would decide disputes emerging on and about the application of the clause with binding force. However, actually such an expedient is outside the confines of reality.[202]

[202] As indicated above, judicial procedure is, in general, unsuitable for the settlement of disputes in connexion with the clause. As a matter of fact, here the issue is a political rather than a legal one when it has to be established whether in view of the changes which have taken place a state can still be expected to perform its contractual obligations. Consequently, the opinion brought forward by several authors that for want of an agreement of the parties the dispute must in all events be referred to the jurisdiction of an international judicial organ (so e.g. Werth-Regendanz, A.: *Die clausula rebus sic stantibus im Völkerrecht, insbesondere in ihrer Anwendung auf den Young-Plan*. Göttingen, 1931, p. 102) is unacceptable. In like way we cannot agree with the statement of Fusco that on the ground of paragraph (b) the force of Article 36(2) of the Statute of the Permanent Court of International Justice (at present the International Court of Justice) extends to disputes in connexion with the clause (La clausola "rebus sic stantibus" nel diritto internazionale. Naples, 1936, p. 64) which paragraph in general refers any question of international law to the jurisdiction of the Court in the event of a valid declaration of submission to such jurisdiction. Nor can we agree with R. Genet who on the ground of paragraph (c) of the same article establishes the jurisdiction of the court (Le problème rebus sic stantibus. *Revue générale de droit international public*, 1930, p. 296), because the question is not merely one of establishing the existence of a fact which constitutes a breach of an international obligation, but one of defining the nature and significance of a change of circumstances. Practical experience too demonstrates that G. Scelle was right when he came to the conclusion that questions of this kind were not suited for a judicial decision. Still we cannot adopt his final conclusion, namely that for the solution of the problem a legislative organ above the states (superlégislateur) is needed. Scelle wanted to discover the recognition of this in Article 19 of the Covenant (*Précis de droit des gens*. Paris, 1934, deuxième partie, pp. 426 et seq.). Ph. C. Jessup too admits the inadequacy of a court for the settlement of these and similar problems, and therefore wants to endow the Security Council of the United Nations or the General Assembly with the right of decision

Yet, in the same way as in other spheres of international law anxieties as to the actual operation of the norms of international law are for the most part exaggerated; as far as the clause is concerned the situation is very much the same. To those acquainted with everyday practice it is obvious that the norms of international law, in general, hold their own in the relations of the various states and that the principal guarantee of the operation of these norms is exactly the interest of the states attached to the general application of international law. Nor do we have to be concerned for the treaties in the face of the clause. These anxieties are best refuted by the fact that states have recourse to the clause on very rare occasions only. Cases of a unilateral termination of a treaty on the plea of a change of circumstances are even rarer, and the number of unsolved disputes in association with the application of the clause is for practical purposes insignificant. In these circumstances the opinion which in the application of the clause within the limits circumscribed above wants to discover the gravedigger of the principle of *pacta sunt servanda* is void of any foundation.

A potential unilateral termination of a treaty with the limitations here set forth has the support also of international practice. Among the examples enumerated in this chapter there are several where recourse was had to a unilateral declaration unprotested by the parties concerned. Moreover the Swiss Federal Court in its judgement given

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in matters concerning peace treaties. (Modernization of the Law of International Contractual Agreements. *The American Journal of International Law*, 1947, p. 401.) For a court the appraisal of the changes would be a task which it could hardly cope with, and very likely C. Pergler was not far from the truth when he stated that there is hardly a case to which a judicial organ could apply the clause and abrogate the treaty on this ground (*Judicial Interpretation of International Law in the United States*. New York, 1928, p. 680). — Nor would the prevalence of political considerations be guaranteed by the rather utopian plan of the Indian author C. Raja, who would have a special organ set up within the United Nations for a supervision of the treaties from the point of view of the clause (*United Nations Committee for Reconsideration and Supervision of Treaties*). This organ would consist of excellent representatives of international law to be elected jointly by the General Assembly and the Security Council, by considering the geographical distribution, and endowed with "quasi-judicial" authority. Against the decision of this organ an appeal would lie with the International Court of Justice. (Clausula rebus sic stantibus. *Sarada Vilasa Law College Journal*, 1964, Nos. 6—7, pp. 20—21.)

in the dispute between the Cantons of Lucerne and Aargau expressly held that in the event of a change of circumstances there was an opportunity for the unilateral termination of a treaty.[203] In our opinion, however, the American author Glahn somewhat oversteps the mark when with reference to international practice in general he comes to the conclusion that the *rebus sic stantibus* clause, as a valid principle of international law, may be invoked without *applying* for or acquiring the consent of the other parties.[204] As has already been made clear, on the ground of international practice, the only permissible conclusion is that recourse to a unilateral action may be had in the last resort only.

From Articles 65 and 66 of the Vienna Convention, too, which as a matter of course cannot for the time being be considered valid norms of international law, conclusions essentially in agreement with the above have to be drawn. The articles born after most heated debates in the Vienna Conference, which by the way are far from being considered a satisfactory solution of the problem, try to bring under general regulation the procedure to be followed with respect to invalidity, termination or suspension of the operation of a treaty. The innovations these articles are to introduce are implied in the provisions which partly establish fixed periods within which objections can be raised against the foreseen measure, or within which the particular phases of the procedure have to be completed, partly, for want of an agreement of the parties, decree compulsory conciliation.[205] If, however, one of the

[203] *Arrêts du Tribunal Fédéral Suisse*, 1882, Vol. III, p. 57. In our opinion this judgement for this statement has been subjected to criticism without proper foundations by Lord McNair (La termination et la dissolution des traités. *Recueil des Cours*, Vol. 22, p. 471), and C. G. Ténékidès (Le principe rebus sic stantibus, ses limites rationnelles et sa récente évolution. *Revue générale de droit international public*, 1934, pp. 282—283), who with by no means little exaggeration states that the decision of the court implants the germ of death in the treaties.

[204] Glahn, G.: *Law among nations. An Introduction to Public International Law*. New York, 1965, p. 443 (italics by author).

[205] The Vienna Convention decrees the notification of a claim for declaring invalid, terminating, or suspending the operation of a treaty to the other parties and, except in cases of special urgency, provides a period of three months for the raising of objections to the act. When objections have been raised, the parties are bound to seek a peaceful solution of the dispute through the means indicated in Article 33 of the Charter of the United Nations. If no solution is reached within a year, in a single instance,

parties refuses to accept the conclusion having the character of recommendation of the Conciliation Commission, again the possibility of a unilateral act will emerge. At this point the Vienna Convention stops dead in the same way as the draft of the International Law Commission, where there was not yet talk of obligatory conciliation.[206] However, the silence on drawing a definitive conclusion can in no circumstances be construed so as to imply a limitation of the freedom of action of the parties to the treaty, i.e. we have to come to the conclusion that neither the Vienna Convention precludes the unilateral termination of a treaty by invoking a fundamental change of circumstances. The only difficulty the Convention introduces is that unilateral termination is made conditional on the unsuccessful conclusion of a lengthy preliminary procedure.

There is yet another problem which is apt to emerge at the institution of any action for the termination of a treaty owing to a change of circumstances. The question is, whether there is a limited period within which the party invoking the clause must make good its claim. In practice this question will emerge on rare occasions, because the states when invoking a change of circumstances in general equally refer to earlier and recent changes. Notwithstanding it was exactly

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namely in the event if the invalidity or termination of a treaty was based on its coming into conflict with a peremptory norm of international law, the dispute shall be referred to the International Court of Justice, unless the parties agree to submit it to arbitration; in any other instance, hereincluded the termination of a treaty on the plea of a fundamental change of circumstances, recourse should be had to a procedure of conciliation. Here too a period of one year has been specified for the procedure of the Conciliation Commission by the Annex to the Convention. The report of the Commission has only the character of a recommendation.

[206] H. Waldock, the rapporteur of the final draft of the International Law Commission, evidently did not favour the idea of a unilateral abrogation of a treaty, because in the commentaries of his second report he emphasized that the *rebus sic stantibus* doctrine could be applied only by agreement of the parties, or by a procedure which offered the objecting party the possibility of an independent determination of the claim to invoke the doctrine (*Yearbook*, 1963, Vol. II, p. 85). However, this statement not suiting the actual legal situation was no more reflected by the final text of the draft. For that matter the members of the International Law Commission did not share this opinion unanimously. G. I. Tunkin, for example, also made it clear in his remarks at the session that the possibility of a unilateral termination of a treaty could not be precluded (ibid., Vol. I, p. 145).

this problem on which the decision centred in a judgement pronounced by the Swiss Federal Court in 1928. As has already been indicated,[207] according to the position taken by the Swiss Federal Court in the dispute between the Cantons of Thurgau and St. Gall, the party concerned has to make good its claim within a certain defined interval from the moment the change was first perceived. The court bases this position on the principle of good faith which must obtain in interstate matters.

Very few of the representatives of the science of international law have dealt with this problem. Even these few, who testify the existence of the problem, have failed to come to a uniform conclusion. According to Hill, it is a rule that a change of circumstances has to be invoked within a reasonable period from its supervention.[208] A similar opinion was sounded in the International Law Commission by Pessou, who, however, commingled the problem with foreign elements. As a matter of fact, he studied the problem in its bearing on emancipated colonies, and came to the conclusion that the new states have to denounce the treaties concluded by the former metropolitan country after their liberation, else they would be bound by them.[209] Hence, Pessou links up the clause with the special question of state succession. On this path we are unable to follow him. Nevertheless, as in the given instance he wants to discover the motive of the termination of a treaty in the change of circumstances, we may lay down that he too is of the opinion that a claim to the termination of a treaty on the ground of a change of circumstances has to be made good within a definite period of time. The opposite position was taken in the International Law Commission by Bartoš, who believed it was inequitable to set any term, as this would punish the contracting party, who in spite of the change tried to perform its obligation under the treaty for some time.[210]

In our opinion the problem has to be settled on the ground of the general principles of law. Undoubtedly *bona fides* as referred to by the Swiss Federal Court is one of the fundamental principles of international law. Since the judgement of the Swiss court this principle has been laid down in paragraph 2 of Article 2 of the United Nations

[207] See p. 370.
[208] Hill, C.: *Op. cit.*, p. 77.
[209] *Yearbook*, 1963, Vol. I, p. 151.
[210] Ibid., p. 149.

Charter.[211] The principle also implies that no state can keep its partners to a treaty in suspense as to the validity of a treaty for excessive periods of time, and therefore action for terminating the treaty will have to be taken within a reasonable period following upon a change of circumstances, at a time when the purport of the change can be assessed with certainty. An unjustified delay in excess of this term must be construed as a waiver of the given party to make good its claim to an exceptional termination of a treaty owing to a change of circumstances. It is only this understanding of the problem which we may accept as being in agreement with the principle of obligatory *bona fides*.

To sum up briefly, the statement may be advanced that the effect of a fundamental change of circumstances on the operation of treaties cannot be called into doubt anymore. After the many onslaughts, the *rebus sic stantibus* clause dropping its pseudonym that originated from the past and reflected the fiction of a tacit condition, has come to life again. The principle implied in it has become an indispensable element of the law of treaties, and kept within the proper limits will redound to the authority of the *pacta sunt servanda* rule. Hence a fundamental change of circumstances establishes a claim of the parties to terminate a treaty.

[211] Paragraph 2 of Article 2 of the Charter of the United Nations declares: "All members . . . shall fulfil in good faith the obligations assumed by them in accordance with the present Charter."

Chapter IX

SUPERVENING IMPOSSIBILITY OF PERFORMANCE

In the foregoing chapter we have come to the conclusion that if owing to a fundamental change of circumstances the performance of the contractual obligations has become appreciably more onerous for the parties, or at least for one of them, the party or parties concerned may terminate the treaty.

However, cases may occur where a change of circumstances not only causes difficulties in performance, but makes it impossible altogether. In this case, obviously, the treaty will lapse, owing to impossibility of performance. Hence, there is first of all a quantitative difference between the *rebus sic stantibus* doctrine and supervening impossibility of performance. This quantitative difference, however, is changing into a qualitative one owing to the fact that the difficulties of performance reach a limit where the obliged party, in spite of all its efforts, is unable to perform its obligations under the treaty. In this case we have to deal with yet a further case of treaty termination, namely with that of supervening impossibility of performance.[1] In our opinion,

[1] As has been indicated in the previous chapter, owing to a relation existing between the clause and supervening impossibility of performance, often opinions turn up in the literature which merge the clause and impossibility into a single notion, making the one merely a special case of the other. This is e.g. the position taken by G. Jellinek (*Die rechtliche Natur der Staatenverträge*, Vienna, 1880, p. 62), who regards the clause as one of the cases of supervening impossibility. On the other hand H. Waldock, who though in his draft mentions supervening impossibility and a change of circumstances as distinct causes of treaty termination, considers impossibility a case of the application of the doctrine of *rebus sic stantibus* (*Yearbook*, 1963, Vol. II, p. 78); he, however, for reasons of practicability, has taken a stand for keeping them apart. G. Carnevali identifies the two notions (*Studio intorno ai trattati internazionali*. Torino, no year [1907], pp. 82—83). All these opinions while recognizing a similarity

impossibility of performance has therefore to be absolute in international law. A what is called relative impossibility of performance can be qualified only as a fundamental change of circumstances existing at the time of the conclusion of a treaty, when the *rebus sic stantibus* rule may be invoked.

As compared to the *rebus sic stantibus* clause, supervening impossibility of performance as one of the cases of treaty termination is of rather subordinate importance, as occasions to invoke impossibility are extremely rare. Relying on the character of the causes responsible for the supervention of impossibility, the literature discusses a variety of categories of impossibility of performance. So we may read of physical, legal, moral, sociological, etc. impossibility. However, for the purpose of treaties we can recognize the justification of the first two only, namely of physical and legal impossibility. As a matter of fact, for practical purposes it is unimaginable that a treaty should become inexecutable, owing to a change of moral principles which cannot find an expression in a norm of international law. On the other hand, if a change of moral principles is reflected also by a norm of international law, then we have a case of legal impossibility. As regards sociological impossibility of performance, this category of impossibility is either covered by the *rebus sic stantibus* clause, therefore its presentation as a separate category is unjustified, or the backers of this distinction want to provide a title for imperialist conquest on this ground. An example for the latter is also the question raised by Perlowski, whether or not the continuous growth of the population of a state may for the given state serve as a motive for denouncing its boundary treaties.[2] Occasionally sociological impossibility is defined as a category of supervening impossibility of performance applicable to treaties incompatible with the independent existence of a state. However, here we have a case of initial nullity of the treaty rather than of supervening impossibility of performance, because unequal treaties are in conflict with the principle of sovereign equality of states, i.e. a peremptory norm of international law, and must therefore be considered void. Even though today the thesis appears in a clear-cut form only in the Marxist doctrine of international law, neither in

between the two notions ignore the existence of a qualitative difference (for a detailed analysis of the question see pp. 380 et seq.).

[2] Perlowski, M.: *Op. cit.*, p. 55.

bourgeois literature on international law, nor in international practice are standpoints in this sense missing.

Hence for our part we would draw into the sphere of the notion of supervening impossibility of performance only the cases of physical and legal impossibility. The notion of physical impossibility includes the cases of a physical annihilation of the object of the treaty, or of the objects required for the performance of the treaty, and the case when the latter have become wholly unfit for the purpose envisaged by the treaty. Obviously, it is of extremely rare occurrence that owing to an elemental disaster or any other cause, e.g. an island for which the treaty has been concluded or a power plant the exploitation of which is governed by a treaty, should be destroyed. Similarly, it is highly improbable that a river for which a treaty of navigation has been signed should, owing to natural causes, become unnavigable. Yet, if such exceptional cases supervened, the performance of the treaty becomes impossible and consequently the treaty will lapse. On the other hand, we have to add that if supervening impossiblity is temporary only, e.g. if in the case referred to before the electrical power plant can be restored, the treaty will not terminate, merely its operation will be suspended for the time performance is impossible.[3]

The notion of legal impossibility of performance is far not so clear-cut. There are authors who identify legal impossibility with the case of treaties incompatible with one another.[4] However, we have already demonstrated that for treaties concluded by the same parties an earlier treaty will cease to exist, owing to the express or tacit consent of the parties. For a collision of treaties concluded partly by different parties there can be no case of treaty termination owing to supervening impossibility, only of a special case of a breach of treaty.[5]

[3] It should be noted that we do not consider the case of the extinction of a state as coming within the scope of supervening impossibility. There are authors who in this case speak of physical impossibility, although as we have a case of state succession here, physical impossibility is out of the question. It is an altogether different question to what extent if at all treaties remain valid and binding for the successor state, in conformity with the still rather unsettled norms of international law concerning state succession. Nevertheless, if a treaty lapses in pursuance of the norms of succession, we have a specific case of treaty termination rather than one of supervening impossibility, for which the rules governing state succession are normative.

[4] See e.g. Hoijer, C.: *Op. cit.*, p. 447.

[5] See above, pp. 294 et seq.

Nor is it a case of legal impossibility when in the domestic law of a contracting party subsequently a norm begins to operate which raises obstacles to the performance of an international obligation. The act of an organ of a state, in the given case, of the legislation, cannot release the state from its obligations under international law. According to the Permanent Court of International Justice "a State cannot invoke its own constitution against another State only to be released from obligations incumbent on it under international law, or by virtue of an effective treaty".[6]

On the other hand, in our opinion we shall have a case of legal impossibility when a new peremptory norm of international law comes into being without the violation of which an earlier treaty cannot be performed. Here we shall have a case of legal impossibility of performance for treaties concluded before the introduction of the new peremptory norm and incompatible with it. A peremptory norm constitutes an obstacle to the conclusion of a treaty conflicting with it, i.e. a treaty violating a peremptory norm is void. But if the peremptory norm comes into being after the conclusion of the treaty, the validity of the treaty cannot be called into doubt. On the other hand, it is obvious that the treaty conflicting with the peremptory norm cannot anymore be applied, i.e. the performance of the treaty will become legally impossible.[7]

Earlier we have pointed out the close relation which exists between the *rebus sic stantibus* clause and supervening impossibility of performance. At the same time we have indicated that there is a qualitative difference between the otherwise related categories, so that the two will have to be segregated as self-sufficient cases of treaty termination. It is an immediate consequence of this qualitative difference which results from the fact that, unlike in the cases coming within the scope of the application of the clause, we are faced here not with a case where the performance of a treaty is aggravated but with one of an absolute

[6] *P.C.I.J.*, Ser. C, No. 56, p. 24.

[7] When examining in the previous chapter the nature of the rule determining the effect of a change of circumstances on the life of a treaty, we have referred to the dispute, still going on in the science of international law, about the existence of peremptory norms (pp. 387—390). The present author starts consistently from the point of view that modern international law cannot do without peremptory norms, — a stand also supported by the provisions of the Vienna Convention.

impossibility of performance, that impossibility of performance will set in automatically, without any declaration of the parties to such effect. Whereas in the case of an application of the clause for the termination of a treaty first the assessment of the situation by the party concerned is needed, then either negotiation and agreement of the parties, or for want of an agreement a unilateral declaration of will of the party concerned follows, i.e. in the given case this declaration will have a constitutive effect, — in the event of supervening impossibility of performance this is out of the question. With the supervention of the physical or legal cause definitively frustrating performance, a treaty will lapse automatically. The declaration of one of the parties establishing the termination of a treaty will merely ascertain the fact and its legal effect, i.e. it will have a declaratory effect only.

It is for this reason that we are even in principle unable to agree with the provisions of Article 61 of the Vienna Convention which attribute a uniform effect to impossibility of performance and the *rebus sic stantibus* rule in a sense as if either of the two would merely entitle one of the contracting parties to demand the termination of the treaty with reference to supervening events.[8]

[8] The automatic treaty-terminating effect of supervening impossibility was emphasized also by G. Morelli at the 1967 session of the Institut de Droit International in Nice (see *Annuaire*, 1967, Vol. 52, tome II, p. 325).

BIBLIOGRAPHICAL ABBREVIATIONS USED IN THIS BOOK

Annuaire — Annuaire de l'Institut de droit international

Classics — The Classics of International Law. Edited by J. B. Scott, Washington, 1916

I.C.J. Reports — International Court of Justice, Reports of Judgements, Advisory Opinions and Orders

I.L.C. Reports — Reports of the International Law Commission

P.C.I.J. — Publications of the Permanent Court of International Justice

U.N.C.I.O. — United Nations Conference on International Organization

Yearbook — Yearbook of the International Law Commission

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