



The John Rylands
University Library
of Manchester

**The Vienna Convention
on the Law of Treaties**

**Melland Schill Monographs
in International Law**

forthcoming

The rights of aliens in international law *R. B. Lillich*
Human rights in the Israeli-occupied territories *E. R. Cohen*

The Vienna Convention on the Law of Treaties

Second edition

SIR IAN SINCLAIR

KCMG, QC

Bencher of the Middle Temple

Member of the International Law Commission

Associate member of the Institut de Droit International

Sometime Legal Adviser to H.M. Foreign and Commonwealth Office



MANCHESTER
UNIVERSITY PRESS

Copyright © Melland Schill Fund 1984

First edition 1973

Second, revised and enlarged edition 1984

Published by

Manchester University Press

Oxford Road, Manchester M13 9PL, U.K.

51 Washington Street, Dover, N.H. 03820, U.S.A.

British Library cataloguing in publication data

Sinclair, Sir Ian

The Vienna Convention on the Law of Treaties.

— 2nd ed. — (Melland Schill monographs in international law)

1. Vienna Convention on the Law of Treaties

I. Title II. Series

341.3'7 JX4165

ISBN 0-7190-1480-8

Library of Congress cataloguing in publication data

Sinclair, Ian

The Vienna Convention on the Law of Treaties.

(Melland Schill monographs in international law)

Includes index.

1. Vienna Convention on the Law of Treaties (1969)

2. Treaties. I. Title. II. Series.

JX4165.855 1984 341.3'7 83-26726

ISBN 0-7190-1480-8

*Printed and bound in Great Britain by
Biddles Ltd, Guildford and King's Lynn*

CONTENTS

Foreword	<i>Gillian White</i>	<i>page</i>	vii
Preface			ix
I	The scope of the Convention and its relationship to customary law		1
	I Why a treaty on the law of treaties?		3
	II Relationship between the Vienna Convention and customary international law		5
	III The Convention rules: codification or progressive development?		10
	IV Treaty and custom: relevance of the <i>North Sea Continental Shelf</i> cases		22
II	The conclusion and entry into force of treaties		29
	I Conclusion of treaties		29
	II Entry into force and provisional application of treaties		44
III	Reservations		51
	I Introduction: what is a reservation?		51
	II The traditional rule		54
	III The Genocide Convention case		56
	IV Developments in the International Law Commission		58
	V Developments at the Vienna Conference		61
	VI Reservations to the Convention itself		63
	VII Recent jurisprudence on reservations		68
	VIII Conclusions		77

IV	The observance, application, amendment and modification of treaties	83
	I Observance of treaties	83
	II Application of treaties	84
	III Treaties and third States	98
	IV Amendment and modification of treaties	106
V	Interpretation of treaties	114
	I General	114
	II The Convention rules	119
	III Conclusions	153
VI	The invalidity, termination and suspension of operation of treaties	159
	I General and terminological	159
	II Introduction to Part V	162
	III Specific grounds of invalidity	169
	IV Termination and suspension of operation of treaties	181
	V Conclusions	196
VII	<i>Jus cogens</i> and the settlement of disputes	203
	I <i>Jus cogens</i>	203
	II Settlement of Part V disputes	226
	III Conclusions on the settlement of disputes	233
VIII	The significance of the Convention	242
	I Codification of the law of treaties: the unintended triptych?	242
	II The temporal element	246
	III The invalidity of treaties	250
	IV The final paradox	251
	V Treaty and custom	252
	Articles of the Convention cited in the text	261
	Cases cited in the text	263
	Index	265

FOREWORD

Some years have elapsed since the publication of the previous volume of Melland Schill lectures in international law, the late Professor D. P. O'Connell's masterly and original work, *The Influence of Law on Sea Power* (1975). When I assumed responsibility for the Melland Schill lectures in 1975, I gave considerable thought to the future of this established series of publications, which had been made possible by the great generosity of the late Miss Olive B. Schill of Prestbury, Cheshire. By her will, she bequeathed £10,000 to the University in memory of her brother, Melland Schill, who met his death in the 1914–18 war. I consulted the Publisher of the University Press and various colleagues working in international law and familiar with its literature. Finally, I decided that the most appropriate way of giving effect, in current conditions, to the wishes and intentions of Miss Schill would be to invite individual scholars and practitioners of international law to contribute specialised monographs on selected aspects of this huge and continually growing field, and to allow them greater space in which to develop their subjects than could be given in a series of five or so public lectures, subsequently published without further expansion. In short, the *Melland Schill Lectures* have been replaced by the new *Melland Schill Monographs in International Law*, to be published by the University Press, with appropriate assistance from the Melland Schill Fund. Authors of monographs have been and will be invited to the Faculty of Law to give lectures or seminars to interested students and academic staff, based upon the work done for their monographs.

It was clear to me from the outset that one work in this new series should be a revised and enlarged version of Sir Ian Sinclair's acclaimed study, *The Vienna Convention on the Law of Treaties*. His Melland Schill lectures on this subject were published in 1973 and have been out of print for the last few years. Accordingly, I was delighted when he agreed to undertake the work of revision and responded positively to the prospect of further space in which to expound his views. The resulting work bids fair to be one of the classic

studies of this centrally important subject. The author writes from great practical experience with every stage of the treaty-making process and with the complex legal issues which so often arise in relation to concluded treaties. He also played a distinguished part in the work of the United Kingdom delegation to the Vienna Conference itself.

The Vienna Convention on the Law of Treaties, which entered into force in January 1980, has already prompted scholarly commentaries and, more significantly, a corpus of State practice applying its provisions is coming into being. Sir Ian has been able to survey much of this practice and the major international judgments which refer to particular Convention provisions as authoritative statements of the modern law of treaties. The Melland Schill series is embellished by this contribution to international legal scholarship.

Gillian White
Professor of International Law
Director of the Melland Schill Fund

Faculty of Law
University of Manchester
October 1983

PREFACE

The first edition of this work, comprising an expanded version of the Melland Schill lectures delivered at the University of Manchester, was published in 1973. At that time the Vienna Convention on the Law of Treaties, which had been opened for signature on 23 May 1969, following the conclusion of the Vienna Conference, was still in its infancy. It had not yet entered into force. The impact and influence it might have on the development of the law of treaties was still untested.

Some three years ago, it was suggested to me that I might undertake the task of preparing a second edition. The project attracted me, the more particularly as the Convention had just entered into force (on 27 January 1980). I felt that it would be illuminating and helpful to assess how far particular rules embodied in the Convention had been applied by international tribunals even in advance of its formal entry into force; and that this might shed some new light on the interaction between treaty and custom.

This then is the genesis of this new edition. As will be seen, I have now devoted a separate chapter to the topic of reservations (Chapter III) in order to provide a more detailed and coherent treatment of this difficult issue. I have also devoted a separate chapter to the question of interpretation of treaties, seeking to incorporate in the text reference to some of the more recent international jurisprudence in which the Convention rules have been applied. For the rest, the new edition endeavours to take into account the more significant scholarly contributions on the Convention which have been published during the past ten years, and certain instances of State practice relevant to matters covered by the Convention rules. The inclusion of all this new material has regrettably resulted in a doubling of the size of the original book.

My thanks are due to my colleagues Mr A. D. Watts, CMG (Deputy Legal Adviser, FCO), Mr D. M. Edwards (Legal Counsellor, FCO) and Miss Jean Shepherd (Nationality and Treaty Department, FCO), who read the various chapters in draft and made a number of valuable suggestions. They are also due to Professor Gillian White of the University of Manchester, who encouraged

me in this venture and likewise drew my attention to certain infelicities in the text. I am in addition indebted to her for the preparation of the Table of Articles of the Vienna Convention and the Table of Cases.

Last, but by no means least, I must express my warmest gratitude to the Trustees of the Rockefeller Foundation for having invited me to spend a period of one month in the spring of 1983 as a resident scholar at the Bellagio Study and Conference Center on Lake Como. All those who have enjoyed the unrivalled hospitality of the Villa Serbelloni can attest to the opportunities it affords to the scholar to engage in uninterrupted study. During my residence at Bellagio I was able to complete the revision of Chapters VI and VII of this new edition and indeed to prepare a first draft of Chapter VIII. It was a unique and stimulating experience to work in such idyllic surroundings, freed from the constant pressures and anxieties of a busy official life.

I need hardly say that the views expressed in this book are my own personal views and do not have any official standing.

Ian Sinclair
2 Hare Court
Temple, E.C.4

CHAPTER ONE

The scope of the Convention and its relationship to customary law

The Vienna Convention on the Law of Treaties was opened for signature at Vienna on 23 May 1969, following the successful conclusion of the United Nations Conference on the Law of Treaties which met at Vienna from 26 March to 24 May 1968, and from 9 April to 22 May 1969. The Convention entered into force on 27 January 1980, following the deposit by Togo on 28 December 1979 of the thirty-fifth instrument of ratification or accession. Having regard to the significance of treaties as a primary source of international law, and having regard equally to the range and complexity of the law of treaties, it may be permissible to express satisfaction that this major enterprise in the field of codification and progressive development of international law — an enterprise which was embarked upon by the International Law Commission as early as 1949 — has achieved finality, and has achieved it in the form of a Convention which has, albeit after more than ten years, attracted sufficient support from States to bring it into force. But satisfaction must be tempered with realism. The Convention is the product of many conflicting interests and viewpoints and has the customary vices of compromise. Among these is a tendency to overcome points of difficulty by expressing rules at a level of generality and abstraction sufficient to hide the underlying divergencies. This tendency is a feature of the drafting of the Convention which will emerge in due course; for the object of this book is to offer a critical analysis of the principal provisions of the Convention against the background of pre-existing law and practice, and taking into account developments subsequent to the adoption of the Convention in 1969. But before embarking on an analysis of the Convention something has to be said about the broader perspective against which the Convention should be viewed. One has to seek to assess the significance of a convention on the law of treaties in the light of certain traditional assumptions about the sources of international law in general. An eminent and highly respected authority has undertaken a comprehensive and evocative survey of the sources of international law.¹ It would be straying too far from the central theme of this work to attempt to

cover the same ground as the late Professor Parry. But still something remains to be said. Article 38 of the Statute of the International Court of Justice lists, among the matters which the Court is called upon to apply in order to decide in accordance with international law such disputes as are submitted to it, 'international Conventions, whether general or particular, establishing rules expressly recognised by the contracting States'. The fact that 'international Conventions' are listed first among the sources of international law on which the International Court can draw may imply a value judgment as to the place which treaties occupy in the hierarchy of sources, if such a hierarchy exists; on the other hand, it may simply be indicative of the logical concept that, the consent of States (whether express or tacit) being the method whereby rules of international law are effectively created or accorded recognition within the framework of an international society of individual nation States, one should first apply those rules to which assent has been specifically and expressly given before having recourse to rules (such as those deriving from international custom and general principles of law) whose validity depends more on the notion of tacit, rather than express, consent. As Lauterpacht puts it:

The order in which the sources of international law are enumerated in the Statute of the International Court of Justice is, essentially, in accordance both with correct legal principle and with the character of international law as a body of rules based on consent to a degree higher than is law within the State. The rights and duties of States are determined, in the first instance, by their agreement as expressed in treaties – just as, in the case of individuals their rights are specifically determined by any contract which is binding upon them. When a controversy arises between two or more States with regard to a matter regulated by a treaty, it is natural that the parties should invoke and that the adjudicating agency should apply, in the first instance, the provisions of the treaty in question.²

So it would appear that, among the sources of international law, pride of place must be accorded to treaties precisely because they embody rules expressly recognised by the parties. But then, what is the source of the legal rules governing the conclusion, formation, interpretation and validity of treaties themselves? Prior to the conclusion of the Vienna Convention on the Law of Treaties, one would have asserted with a fair degree of confidence that the source (in the sense of that which gives to the content of rules of international law their character as law) of most of the rules of the law of treaties lay in international custom representing evidence of a general practice accepted as law. I deliberately refer to 'most' of the rules of the law of treaties, because I do not wish to venture into doctrinal arguments about the source (in the sense which I have used) of the most fundamental principle of treaty law — namely, *pacta sunt servanda*. That source is, and can only be, extra-legal in character. It is easy enough to posit the rule that every treaty in force is binding upon the parties to it; but the source of that rule rests, not on the principle of consent (which is, or may be, germane only as evidence that the rule is accepted as

law), but rather on considerations relating to the binding force of international law in general, which of necessity leads us into somewhat metaphysical regions.³

But if the source of most of the rules of the law of treaties lay in international custom, what has been the effect of the conclusion of the Convention? Has it transformed pre-existing customary rules into conventional rules? Why, in any event, a treaty on the law of treaties? And what can be the source of validity of an international Convention on the law of treaties itself? Without seeking to engage in too rigorous or profound an analysis, it will be shown that these questions did not escape the attention of those responsible for the drafting of the Convention. To this end, it is proposed first to discuss why the codification of the law of treaties has itself been embodied in treaty form and then to consider, in somewhat greater detail, the relationship between the Vienna Convention and customary law.

I. Why a treaty on the law of treaties?

The topic of the law of treaties was included in the work programme of the International Law Commission at its first session in 1949 and was placed high on the priority list of topics for codification. Progress in the early days was slow, partly because the Commission was heavily engaged on other matters. The first two Special Rapporteurs (the late Professors Brierly and Lauterpacht) appear to have proceeded on the assumption that the objective was to prepare draft articles which could form the basis of an eventual international convention, although there was no specific decision by the Commission on this point.⁴ However, when the late Sir Gerald Fitzmaurice was elected Special Rapporteur on the Law of Treaties in succession to Professor Lauterpacht in 1955 he raised, in his first report, the fundamental question of whether the codification of the law of treaties should take the form of an international convention or of an expository code. Fitzmaurice himself favoured an expository code, for two principal reasons:

First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation.⁵

After a relatively brief debate at its eighth session in 1956, the Commission approved the proposal that codification of the law of treaties should take the form of an expository code. Doubts, however, appear to have arisen within the Commission when it was confronted with the five detailed reports submitted

in successive years by Fitzmaurice. These incorporated, in the form of draft articles for a code, a considerable amount of descriptive material, based upon the author's long experience with treaty-making practice. The Commission was unable to devote much time to the five reports presented by Fitzmaurice before the latter resigned from the Commission following upon his election to the International Court of Justice in 1960 to fill the vacancy caused by the death of Judge Lauterpacht. However, in 1961 the Commission was obliged to reconsider the fundamental issue. Many members of the Commission, while paying tribute to the magisterial reports tabled by Fitzmaurice, expressed serious reservations about the basic approach. Those who, by virtue of their legal background and training, were more accustomed to a process of codification involving the establishment of general rules of a normative character were particularly critical of the descriptive and analytical nature of the draft articles. Among the reasons advanced in favour of a Convention rather than a code were the following:

- (a) that an expository code, however well formulated, could not, in the nature of things, be so effective as a convention for consolidating the law; and
- (b) that the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished, which would be desirable in order to place the law of treaties upon the widest and most secure foundations.⁶

The testimony of Professor (now Judge) Ago, who was a member of the Commission at the critical time, confirms that one of the factors which most influenced the Commission in deciding in favour of formulating draft articles for a convention rather than a code was the need to satisfy the aspirations of newly independent States and to permit them to participate in the elaboration of the principles by which they would be bound:

Le moment est donc venu de procéder à la codification, et à une codification qui ne se contente pas d'une systématisation et clarification ordinaire, mais qui réponde à cette finalité de réélaboration évolutive qui a caractérisé à travers l'histoire toutes les codifications réalisées après de profondes transformations sociales. Ce qui s'impose dans la société internationale d'aujourd'hui c'est un reexamen approfondi des branches fondamentales du système juridique de cette société, c'est une nouvelle définition des principes faites avec la participation directe et active de tous les membres actuels de ladite société, de manière à parvenir à la formulation de règles qui représentent un juste équilibre entre les différentes conceptions et tendances, et qui répondent aux besoins d'une communauté internationale devenue réellement universelle.⁷

The Commission accordingly came to a clear decision in 1961 (and this decision was subsequently affirmed in 1962 and reaffirmed in 1965) that the codification of the law of treaties should be completed in a form which could serve as a basis for a convention. It was subsequently disclosed that the new

Special Rapporteur — Sir Humphrey Waldock — appointed to succeed Sir Gerald Fitzmaurice had virtually made his acceptance of the post conditional on the draft articles being given the form of a convention.⁸

The hesitations of the Commission as to the precise form which the codification of the law of treaties should take were matched by similar hesitations on the part of certain governments. Although the vast majority of governments were generally in favour of formulating a convention on the law of treaties on the basis of draft articles prepared by the Commission, some doubts remained, even as late as 1965. It was argued, for example, that ‘consolidation’ could be achieved just as well with a code as with a convention, and that it was not essential to opt in favour of a convention in order to secure the participation of the new States in the work of codification; it was also maintained that there was a certain logical inconsistency in drawing up a treaty on the method of drawing up a treaty, and that a treaty on treaties would inevitably create a dualistic system, since it would apply between the parties to it, whereas the customary law would continue to apply as between other States.⁹

Despite the doctrinal doubts as to the value and usefulness of a treaty on treaties, the Commission, during the period between 1961 and 1966, sought to recast the material on which it was working into the form of draft articles suitable for incorporating into an international convention. This involved discarding descriptive and exhortatory elements and producing a series of condensed texts confined to a statement of the legal principle or rule to be applied, qualified, as necessary, by a clause permitting the parties to any particular treaty to agree otherwise.¹²

So much for the reasons why the codification of the law of treaties has taken the form of an international convention. But what, one may ask, is the consequence? What is the relationship between the Vienna Convention and customary international law?

II. Relationship between the Vienna Convention and customary international law

It is first necessary to say a few words about the scope of the Vienna Convention. A glance at the headings to the various Parts of the Convention quickly reveals that it covers all the topics traditionally regarded as falling within the framework of the law of treaties — that is to say, the conclusion and entry into force of treaties (including reservations), the observance, application and interpretation of treaties, the amendment and modification of treaties, and the invalidity, termination and suspension of operation of treaties. The Convention in addition lays down procedural rules concerning depositaries, notifications, corrections and registration. In sum, therefore, the Convention purports to constitute a comprehensive set of principles and rules governing all the most significant aspects of the law of treaties.

However, certain limitations should be noted at the outset. In the first place, the Convention is limited to treaties concluded between States (Article 1). Thus treaties concluded between States and international organisations, or between international organisations themselves, are deliberately excluded from the scope of the Convention. The Conference, however, recognising the importance of such treaties, adopted a resolution recommending that the General Assembly refer to the International Law Commission the study, in consultation with the principal international organisations, of the question of treaties concluded between States and international organisations or between two or more international organisations.¹¹ In the second place, the Convention is limited to international agreements concluded between States in written form and governed by international law, so that agreements *not* in written form, even if governed by international law, are not covered by the Convention.¹² In the third place, the Convention deliberately does not seek to regulate questions concerning succession to treaties, State responsibility and the effect of the outbreak of hostilities on treaties.¹³ In the fourth place, the Convention is non-retroactive in its application — that is to say, it applies only to treaties which are concluded by States after the entry into force of the Convention with regard to such States.¹⁴ Finally, many of the provisions of the Convention are expressed as residual rules which are to operate unless the treaty otherwise provides, or it is otherwise agreed by the parties, or a different intention is otherwise established. By means of this device, a considerable degree of liberty of action is left to the parties to any particular treaty; in large measure, the principle of the autonomy of the parties is preserved, and allowance is made for variations in treaty-making practice.

Thus the Convention, although comprehensive in its scope, proves, on closer analysis, to be more restricted in its application than first appearances might suggest. This is self-evidently a factor to be taken into account in assessing the relationship between the Convention and customary international law.

That the authors of the Convention were careful to preserve, where appropriate, the operation of rules of customary international law relating to treaties emerges from a study of the text. It is proposed to concentrate attention on four relevant provisions — Articles 3(b), 4, 38 and 43.

Article 3 of the Convention is concerned with international agreements not within the scope of the Convention — that is to say, international agreements concluded between States and other subjects of international law (for example, international organisations) and between such other subjects of international law, and international agreements not in written form. Sub-paragraph (b) of Article 3 declares that the rules set forth in the Convention to which such agreements ‘would be subject under international law independently of the Convention’ remain unaffected by the fact that the Convention does not in terms apply to them. At the first session of the Vienna Conference several delegations

expressed doubts as to the meaning of the phrase 'to which they would be subject independently of the Convention' (the language used by the Commission).¹⁵ It was explained that the purpose of this phrase was to underline the concept that the rules set forth in the draft articles under discussion could be applied not only as conventional rules but also because they were rules of customary international law or general principles of law. The Drafting Committee, to which several amendments proposing the deletion or modification of this phrase had been transmitted, made only one minor change, inserting the phrase 'under international law' before 'independently of the Convention'. The chairman of the Drafting Committee explained that the phrase 'independently of the Convention' was necessary 'in order to show that the rules stated in the Convention could apply, not as articles of the Convention, but on other grounds, because they had another source; for example, custom'.¹⁶

It is perhaps noteworthy in this respect that the final set of draft articles prepared by the International Law Commission on the law of treaties between States and international organisations or between international organisations contains an analogue to Article 3 of the Convention. It might have been thought that a codification of the rules governing international agreements between States and international organisations or between international organisations themselves would have so extended the scope of the law of treaties as to leave virtually nothing unregulated; but the Commission have rightly pointed out that there may be international agreements between an international organisation and an entity other than a State or another international organisation — for example, an agreement between an international organisation and the Holy See or between an international organisation and the International Committee of the Red Cross (which is not an intergovernmental organisation and therefore falls outside the definition of the term 'international organisation' in the draft articles and indeed in Article 2(1)(i) of the Convention itself).¹⁷

Article 4 of the Convention establishes the general principle of non-retroactivity of the Convention. But this principle is again expressed as being 'without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention'. It is perhaps of interest to offer some analysis of the debates at the Vienna Conference on this most significant article. It did not appear in the final set of draft articles proposed by the Commission, although the principle of non-retroactivity of treaties in general was reflected in Article 24 of the draft articles proposed by the Commission.¹⁸ A proposal specifically designed to make the Convention as such non-retroactive was first tabled by Venezuela late in the second session of the Conference in 1969, when the Conference began consideration of the final provisions of the Convention. The initial Venezuelan proposal was eventually withdrawn in favour of a five-power proposal introduced by the representative of Sweden. The five-power proposal preserved the operation of 'the rules of customary international

law codified in the present Convention'. In introducing the proposal, the representative of Sweden stated:

It was generally agreed that most of the contents of the present Convention were merely expressive of rules which existed under customary international law. Those rules obviously could be invoked as custom without any reference to the present Convention. But to the limited extent that the Convention laid down rules that were not rules of customary international law, those rules could not be so invoked. That position could be regarded as already made clear from the general rule contained in article 24¹⁹ of the Convention. It might nevertheless be safer to make the point explicit in one of the final clauses.²⁰

In subsequent debate it was pointed out that the five-power proposal was too restrictive in preserving only the operation of the rules of customary international law. It was necessary also to take into account general principles of law which were a separate source of international law. Furthermore, it was incorrect to restrict the operation of the rules of customary international law to those embodied in the present Convention; other rules of customary international law might be applicable. In deference to this criticism, the sponsors of the five-power proposal revised it to bring the wording more closely into line with that adopted for Article 3(b).

Article 4 in fact presents more problems than might appear at first sight. What is meant by the phrase 'the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States'? In the case of a bilateral treaty, the answer appears relatively simple; the Convention as such will apply only to treaties concluded between States A and B after the entry into force of the Convention for and in respect of States A and B. But what of a multilateral treaty? If the phrase 'such States' has to be interpreted as meaning '*all* such States', Article 4 will operate as a general participation clause — that is to say, a clause limiting the applicability of the Convention to cases involving States all of whom are parties to the Convention. In other words, on this interpretation, if States A, B and C conclude a future treaty and State A is *not* a party to the Convention (whereas States B and C are parties to the Convention), the Convention will not be applicable even as between States B and C. Furthermore, if States A, B and C are all parties to the Convention at the time they conclude the treaty, the Convention will be applicable to their relations *inter se*, but will subsequently cease to be applicable if State D, which is not a party to the Convention, accedes to the treaty at a later date. It is for this reason that general participation clauses, of the kind originally stipulated in the Hague Conventions of 1899 and 1907 on the laws of war, have fallen into desuetude.²¹

Must Article 4 be regarded as a general participation clause? It is submitted that the answer is in the negative, despite suggestions to the contrary.²² There is indeed evidence in the Conference records which points in the opposite direction. As already indicated, the Swedish delegation had been the prime

mover in introducing the proposal which subsequently became Article 4 of the Convention. In explaining his position after the vote, the representative of Sweden stated:

It was his delegation's understanding that, when applied to a multilateral treaty, the article meant that the Convention would be applicable between States which participated in the conclusion of a multilateral treaty after the Convention had come into force for them, although there might be other parties to the same multilateral treaty for which the Convention had not come into force.²³

No contrary opinion was expressed. The view that Article 4 was not intended to operate as a general participation clause receives some support from the fact that Article 3(c) envisages the application of the Convention to the relations of States as between themselves under international agreements to which other subjects of international law are also parties.²⁴

The third reference to customary international law is to be found in Article 38, which provides that nothing in Articles 34–37 (dealing with treaties and third States) 'precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such'. Article 38 has its origin in Article 34 of the final set of draft articles on the law of treaties drawn up by the International Law Commission in 1966. In its commentary to Article 34 the Commission noted the role played by custom in sometimes extending the application of rules contained in a treaty beyond the contracting States. After citing the examples of treaties concluded between certain States which establish a territorial, fluvial or maritime regime and which afterwards come to be accepted by other States as binding upon them by way of custom, the Commission expressed the view that so also a 'codifying Convention purporting to state existing rules of customary international law may come to be regarded as the generally accepted formulation of the customary rules in question even by States not parties to the Convention'.²⁵ But, the Commission went on, these were not cases of the treaty itself having legal effects for third States. For the third States concerned, the source of the binding force of rules formulated in a treaty to which they are not parties is custom, not the treaty.

At the Conference there was a certain amount of criticism of this particular draft article. It was not disputed that there did exist a process whereby rules contained in a treaty might become binding on third States as rules of customary international law. But it was maintained that this process had nothing to do with the law of treaties. How treaty rules become transformed into customary rules was part and parcel of the principles governing the growth and formation of custom. Despite this cogent line of argument, the majority of delegations represented at the Conference favoured the retention of a provision on the lines of Article 34 of the I.L.C. draft, if only, as the late Sir Humphrey Waldock pointed out, to 'obviate any misunderstanding' about

the legal effects of the preceding series of articles on treaties and third States.²⁶

Article 43 of the Convention establishes the general principle that the invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the Convention or of the provisions of the treaty, does not in any way impair the duty of any State to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of the treaty. In commenting on the draft of this provision at the first session of the Conference, the United States representative, Mr Briggs (at that time a member of the International Law Commission) stated that 'it contained a very important rule of international law that complemented the provision of Article [38] under which a rule set forth in a treaty might become binding upon a third State as a customary rule of international law'.

Attention has been directed to the four provisions of the Convention itself which are directly relevant to this question of the relationship between the Convention and customary international law. But it would be wrong to conclude on this aspect without making mention of the preamble to the Convention. The final clause of the preamble to the Convention, following, in this respect, the precedents afforded by the preambles to the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations, affirms that 'the rules of international customary law will continue to govern questions not regulated by the provisions of the present Convention'. This preambular clause does not, of course, have a direct bearing on the relationship between the rules laid down in the Convention and existing rules of customary international law. It is intended simply as a saving for those rules of customary international law relating to the law of treaties which govern questions not regulated by the Convention. In the words of the Swiss sponsor of the proposal to add to the preamble a clause of this nature, 'the Conference had succeeded in reducing a new and substantial part of customary law to writing; but gaps remained, so that occasionally it was still necessary, in the practice of international relations, to fall back on custom'.²⁷

III. The Convention rules: codification or progressive development?

So far, it has been established that the drafters of the Convention were aware of the complex interrelationship between the rules embodied in the Convention and the existing rules of customary international law. They did not seek to define this interrelationship further than to preserve, where appropriate, the applicability of any rules contained in the Convention to which treaties would be subject under international law independently of the Convention. Is it possible to distinguish between those provisions of the Convention which simply formulate existing rules of customary, or general, international law

and those provisions which involve an extension or development of the existing rules? This requires an analysis of the distinction between codification and progressive development.

Article 15 of the Statute of the International Law Commission defines the expression 'progressive development of international law' for the purposes of the Statute as meaning 'the preparation of draft Conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States'. Similarly, it defines the expression 'codification of international law' as meaning 'the more precise formulation and systemisation of rules of international law in fields where there already has been extensive State practice, precedent and doctrine'.

This distinction between the two concepts has proved extremely difficult for the Commission to sustain in practice. Originally, the distinction was considered to be of great importance so far as the methods and procedures of the Commission were concerned. Doubt had been expressed as to the desirability of using the convention method for codification in the narrow sense. It was pointed out in particular, in a memorandum prepared by the United Nations Secretariat in 1947, that the failure of governments to reach agreement, for political reasons, in a conference convened to codify rules of international law would seem to cast doubt on certain rules of international law whose validity had been admitted for a very long time and which had hitherto generally been assumed to be part of customary international law.²⁸ For this and other reasons it was felt that there might be utility in the preparation of scientific restatements of existing international law by an impartial group of jurists, possibly as a preliminary step to prepare the ground for eventual codification by international agreement.²⁹

But the experience of the International Law Commission has proved that a clear and sharp dividing line between codification and progressive development is, in any particular case, impossible to establish. When submitting, in 1953, its draft Convention on Arbitral Procedure, the Commission pointed out that the draft fell within the categories both of progressive development of international law and the codification of international law. In 1956 the Commission submitted to the General Assembly a final set of draft articles on the law of the sea. In its report covering these draft articles the Commission stated:

In preparing its rules on the law of the sea, the Commission has become convinced that, in this domain at any rate, the distinction established in the Statute between these two activities [i.e. progressive development and codification] can hardly be maintained. Not only may there be wide differences of opinion as to whether a subject is already 'sufficiently developed in practice', but also several of the provisions adopted by the Commission, based on a 'recognised principle of international law' have been framed in such a way as to place them in the 'progressive development' category. Although it tried at first to specify which articles fell into one and which into the other category, the Commission has had to abandon the attempt, as several do not wholly belong to either.³⁰

Thus it will be seen that, from a very early stage, the Commission had encountered difficulty in distinguishing clearly between the progressive development of international law and its codification. It is clear that the very act of formulating a rule which is generally thought to reflect State practice, precedent and doctrine may involve the transformation of that rule into progressive development, for example, where it is found necessary or desirable to incorporate a qualification or exception in relation to which the practice of States is ambivalent or conflicting.

The Commission, in submitting its final set of draft articles on the law of treaties, followed previous practice in refusing to categorise its work starkly as either progressive development or codification. In its covering report the Commission stated:

The Commission's work on the law of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in Article 15 of the Commission's Statute, and, as was the case with several previous drafts, it is not practicable to determine into which category each provision falls. Some of the commentaries, however, indicate that certain new rules are being proposed for the consideration of the General Assembly and of Governments.³¹

It might be thought that the clue suggested in the last sentence of the passage just cited would enable one to identify clearly those rules proposed by the Commission which were considered to involve progressive development rather than codification. But a careful scrutiny of the commentaries dispels this illusion. It is only in rare cases, and then by implication rather than by express pronouncement, that one can determine where the Commission has put forward a proposal by way of progressive development rather than by way of codification. In the circumstances, it may be thought over-bold for a commentator to seek to determine which provisions of the Convention constitute progressive development rather than codification. Nevertheless, the attempt will be made if only because a preliminary and necessarily tentative analysis of this nature may assist in identifying which rules set forth in the Convention may be regarded as declaratory of pre-existing customary law and therefore applicable independently of the Convention.

The first provision in the Convention which clearly seems to involve progressive development rather than codification is Article 9(2), which provides that the adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they decide to apply a different rule. In its commentary to the proposal on which this provision is based, the Commission states that 'in former times the adoption of the text of a treaty almost always took place by the agreement of all the States participating in the negotiations and unanimity could be said to be the general rule'. But, went on the Commission, the growth of the practice of drawing up treaties in large international conferences or within international organisations had led to so normal a use of

the procedure of majority vote that, in its opinion, 'it would be *unrealistic*' to lay down unanimity as the general rule for the adoption of the texts of treaties drawn up at conferences or within organisations.³² In the course of debate at the first session, Mr Yasseen (Iraq), a member of the International Law Commission, stated unequivocally that 'paragraph 2 contained a rule which represented progressive development of international law and was based on international practice'.³³

A further example of where a proposal by the Commission represented progressive development rather than codification is afforded by the text of Article 15(a) of the final set of draft articles adopted by the Commission in 1966. This particular proposal stipulated that 'a State is obliged to refrain from acts tending to frustrate the object of a proposed treaty when ... it has agreed to enter into negotiations for the conclusion of the treaty, while those negotiations are in progress'. At the first session of the Conference this proposal was harshly criticised. In the view of the Venezuelan representative, sub-paragraph (a) 'laid down a new principle of international law'. The Swiss representative asserted that the rule 'was new and seemed to go beyond the scope of codification'. To the Greek representative the rule in sub-paragraph (a) 'might be termed a sweeping development of international law', while to the Indian representative the rule 'was a new one and did not derive from doctrine, case law or practice'. The Austrian representative considered that sub-paragraph (a) 'went far beyond existing rules of international law' and the German delegate maintained that it 'had no support in international law or practice and was hardly advisable from the point of view of progressive development of international law'.³⁴ Replying to the debate, Sir Humphrey Waldock (who acted as Expert Consultant to the Conference) conceded that, in putting forward this proposal:

the Commission had not based itself on any specific authority or precedent, and would not wish to maintain that the principle stated in Article 15 sub-paragraph (a) was a rule of customary international law. Whether its proposal should be regarded as progressive development or as codification of the law was a matter of opinion.³⁵

In the event, sub-paragraph (a) was deleted by decision of the Conference, and the remainder of what was Article 15 in the I.L.C. draft now appears, with a number of drafting modifications, as Article 18 of the Convention.

It can also be said, with a fair degree of confidence, that the series of articles on reservations (Articles 19–23 of the Convention) represent, at least in some measure, progressive development rather than codification. The commentary to the draft articles prepared by the Commission sets out in some detail the complex history of developments concerning reservations to multilateral conventions. There is no doubt that the advisory opinion given by the International Court in 1951 in the case concerning *Reservations to the Genocide Convention*³⁶ had brought about a movement away from the traditional

unanimity rule whereby a reservation, in order to be valid, must have the assent of all interested States. On the other hand, those who adhered to the extreme 'sovereignty' school of thought, according to which every State has an absolute sovereign right to make reservations at will and to become a party to international conventions subject to such reservations, and notwithstanding any objection made to them, were not satisfied with the limited move away from the unanimity rule represented by the principle underlying the *Genocide Convention* case. There was no doubt that the subject of reservations to multilateral conventions was one where the pre-Convention state of the law was uncertain and controversial, and where differing theories were held with conviction. The flexible Convention regime on reservations (which is discussed fully in Chapter III) is based, in large measure, on the pan-American system, but it would be a bold jurist who would assert, with any degree of confidence, that the Convention regime represents in its entirety codification rather than rules of progressive development.³⁷

It seems clear that certain of the rules set out in Articles 40 and 41 of the Convention, relating respectively to the amendment and the *inter se* modification of multilateral treaties, constitute progressive development rather than codification. McNair points out that 'as a matter of principle, no State has a legal right to demand the revision of a treaty in the absence of some provision to that effect contained in that treaty or in some other treaty to which it is a party' and that 'treaty revision is a matter for politics and diplomacy and has little, if any, place in this book'.³⁸ It has none the less become customary to incorporate in recent multilateral treaties specific provisions as to the means by which the amendment of the treaty may be effected. The Commission, however, proposed that a distinction should be drawn between amendment and *inter se* modification and that residual rules should be established to deal with the case where a treaty is silent on the question of revision. The Conference accepted the substance of the proposals advanced by the Commission, although at least one delegation commented that the text of what is now Article 40 'represented the progressive development of international law and might give rise to some practical difficulties', and the Expert Consultant, Sir Humphrey Waldock, stated, with reference to paragraph 5 of Article 40, that it involved 'a presumption ... *de lege ferenda* of the intention (of the State concerned) to become a party to the amended version of the treaty'.³⁹

Much more controversial is the question of how far the rules relating to the invalidity, termination and suspension of the operation of treaties set out in Part V of the Convention represent progressive development rather than codification *stricto sensu*. This applies in particular to such grounds of invalidity as error, fraud, corruption, coercion of a representative of a State, coercion of a State by the threat or use of force or conflict with a peremptory norm of general international law (*jus cogens*) as set out in Articles 48–53 of the Convention. A fuller analysis of these controversial grounds of invalidity

will be given at a later stage. At this point, it is proposed simply to concentrate on the issue whether these grounds of invalidity constitute progressive development rather than codification, and to take as a basis for the discussion the I.L.C. commentaries and the records of the Conference.

As regards error, the Commission, in their commentary to the relevant provision in the final set of draft articles, concede that 'the instances in which errors of substance have been invoked as affecting the essential validity of a treaty have not been frequent' and that 'almost all the recorded instances concern geographical errors, and most of them concern errors in maps'.⁴⁰ The two cases cited by the Commission (the *Eastern Greenland* case⁴¹ and the *Temple* case⁴²) throw light only on the conditions under which error will *not* vitiate consent rather than on those under which it will do so, as the Commission itself admitted. Against this background, there is (or may be) a question as to how far Article 48 of the Convention represents progressive development rather than codification. Certainly, paragraph 1 of Article 48 confines the right of States to invoke error within quite narrow limits and could be said to derive from *dicta* in the *Temple* case. But the question was raised at the Conference whether the article covers all possible instances of error — for example, error brought about by innocent misrepresentation. Furthermore, it was pointed out that paragraph 2 was incomplete in that it omitted the defence that the party advancing the error could have avoided it by the exercise of reasonable diligence. It will be recalled that, in the second stage of the *Temple* case, the International Court had stated:

It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent, if the party advancing it contributed by its own conduct to the error, *or could have avoided it*, or if the circumstances were such as to put that party on notice of a possible error.⁴³

An amendment proposed by the United States delegation sought to reintroduce the missing phrase, but the amendment was rejected on a vote at the first session of the Conference.

To sum up on this point, it would seem that there is a certain amount of jurisprudence on the effect of error in a treaty, but that Article 48 of the Convention may involve some measure of progressive development as well as of codification, or may, at the very least, not be exhaustive of the content of customary law on the matter.

Examples of fraud are rare, if not non-existent, in treaty law. The Commission were unable to cite any instances and admitted that 'in international law, the paucity of precedents means that there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept'.⁴⁴ No definition was attempted by the Commission of the term 'fraudulent conduct' which it incorporated into the text of its proposal; but the Commission indicated that the expression was

'designed to include any false statements, misrepresentations or other deceitful proceedings by which a State is induced to give a consent to a treaty which it would not otherwise have given'. The Commission also sounded a warning against seeking to apply to the interpretation of the concept in international law the detailed connotations given to such expressions as 'fraud' or 'dol' in national law.

The vagueness and uncertain effect of the Commission's proposal on fraud led to an attempt at the first session of the Conference to secure the deletion of this article; but it was retained in the text by a large majority. Although it would no doubt be right to characterise fraud as a general principle of law which operates to vitiate consent, the application of this concept to the law of treaties does not derive much, if any, support from State practice and precedent. Accordingly, Article 49 must be accounted to involve some measure of progressive development.

An even more striking example of progressive development is Article 50, which permits a State to invoke the corruption of its representative as a ground for invalidating its consent to be bound by a treaty. The Commission had not included any specific rule on corruption in the set of draft articles which it had provisionally adopted in 1963, and it was indeed only at its final session, in 1966, that the proposal which forms the basis for Article 50 of the Convention was adopted by the Commission. The Commission was unable to cite any example in State practice of a treaty having been procured through the corruption of the representative of a State. To a number of delegations represented at the Conference, corruption was only another form of fraud and should not be included as a separate ground of invalidity.⁴⁵ To others, such as the representative of Greece, Article 50 'boldly inaugurated a new institution of international law'.⁴⁶

Article 51 of the Convention provides that the expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect. This accordingly is a case of absolute nullity. McNair appears to take the view that coercion directed against the representatives of a State may invalidate consent; but he argues that, if the treaty requires ratification and has been freely and knowingly ratified by the appropriate organ of the State, that ratification should wipe out the effect of any threat or application of force to the person signing the treaty.⁴⁷

The notion that coercion directed against the representative of a State may be invoked by the State concerned as a ground for invalidating its consent to be bound by the treaty has a basis in customary international law; what is new in the formulation of Article 51 is the concept of absolute, rather than relative, nullity.⁴⁸

Article 52 of the Convention deals with coercion of the State itself and again lays down a rule of absolute nullity. The Commission, after reviewing the

history of the matter and taking into account the clear-cut prohibition of the threat or use of force in Article 2(4) of the United Nations Charter, considered that these developments 'justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today'.⁴⁹ Discussion at the Conference on this article tended to concentrate on two issues:

- (a) Whether the expression 'threat or use of force' could, or should, be interpreted as covering economic and political pressure.
- (b) The temporal application of the rule — that is to say, the date from which the rule invalidating a treaty procured by the threat or use of force in violation of the principles of international law embodied in the Charter may be said to operate.

The records of the Conference reveal strongly conflicting views on both these points.⁵⁰ That the rule now embodied in Article 52 of the Convention represents the modern law on this topic is beyond serious dispute; but there are clearly uncertainties about the scope of the rule and its temporal application, and these uncertainties are not removed by the lapidary formulation of the article. In this context, it is interesting to note that, in the *Icelandic Fisheries Jurisdiction* case (jurisdictional phase), the International Court of Justice had occasion to consider the terms of Article 52 of the Convention in the context of a veiled charge by Iceland that the 1961 Exchange of Notes between Iceland and the United Kingdom had been entered into under duress. In rejecting this contention, the Court stated:

There can be little doubt, as is implied in the Charter of the United Nations and recognized in Article 52 of the Vienna Convention on the Law of Treaties, that under contemporary international law an agreement concluded under the threat or use of force is void. It is equally clear that a court cannot consider an accusation of this nature on the basis of a vague general charge unfortified by evidence in its support. The history of the negotiations which led up to the 1961 Exchange of Notes reveals that these instruments were freely negotiated by the interested parties on the basis of perfect equality and freedom of decision on both sides. No fact has been brought to the attention of the Court from any quarter suggesting the slightest doubt on this matter.⁵¹

From this, it may be concluded that Article 52 may savour more of codification than of progressive development, at least insofar as the expression 'threat or use of force' is confined to physical or armed force and no question arises as to the temporal application of the rule.

Finally, we come to *jus cogens*. The concept that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law must be regarded as the most significant instance of progressive development in the Convention as a whole. Some, of course, would deny this. Nahlik, for example, claims that 'the provision of the Vienna Convention declaring void treaties which are contrary to a norm of international *jus cogens*

is not an invention of either the International Law Commission or the Vienna Conference' but is based on the concept that 'the freedom of States in concluding treaties had *already* been restricted by the progressive development of international law'.⁵² But the controversy surrounding the existence even of rules of *jus cogens*, far less their definition and identification, requires one to analyse the issue closely. Schwarzenberger's stark and uncompromising statement that 'international law on the level of unorganised international society does not know of any *jus cogens*'⁵³ may perhaps be an exaggeration; but it is striking that a concept so widely supported in doctrine and in the writings of jurists⁵⁴ has found so little application in State practice. It is noteworthy that even the Commission itself, while stating that it has become increasingly difficult to sustain the view that in the last analysis there is no rule of international law from which States cannot at their own free will contract out, acknowledges that 'some jurists deny the existence of any rules of *jus cogens* in international law'.⁵⁵ It may be conceded that any developed system of law must dispose of certain rules of a higher order than those of a merely dispositive character from which persons subject to the law are free to contract out. It may also be conceded that there is a general recognition that there exist certain fundamental rules of international law, such as the rule prohibiting the threat or use of force in international relations, from which States cannot derogate by treaty. But the definition and identification of these rules of the 'higher law' is surrounded by immense difficulties. The Commission itself admitted that 'there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*'.⁵⁶ The records of the Conference also reveal a wide variety of opinions as to the scope and content of *jus cogens*. This lack of agreement on the essential content of *jus cogens* is in itself sufficient evidence that the rule embodied in Article 53 of the Convention bears the hallmark of progressive development rather than codification.⁵⁷

It may be noted that, referring to the series of articles on error, fraud, corruption and so on, Sir Francis Vallat had this to say on behalf of the United Kingdom delegation at the second session of the Conference:

It had often been stated that many, if not all, of the articles merely put into writing existing principles or rules of international law, but his delegation very much doubted whether that was altogether true. Whether it was true or not, the articles undoubtedly contained a substantial element of progressive development, if only as regards their formulation and modalities and the procedures for their application. By any normal, legislative standards, the articles as drafted were in many respects broad and vague; such key words as 'fraud' and 'coercion', difficult enough to interpret in municipal law, and not previously applied in international law, were left completely undefined.⁵⁸

Before concluding on this aspect, it may be useful to consider the views expressed by other commentators on the extent to which the rules embodied in the Convention constitute progressive development or codification. Nisot,

in a trenchant contribution, argues that Article 18 of the Convention concerning the obligation not to defeat the object and purpose of a treaty prior to its entry into force constitutes a new regime which amounts to a derogation from customary international law.⁵⁹ O'Connell likewise takes the view that Article 18 of the Vienna Convention 'goes further than customary international law would appear to go.' He argues that the provision is at once more rigid and more relaxed than the principle of good faith on which it is said to be based — more rigid in the sense that it omits the relevance of circumstances and more relaxed in that it relates the obligation only to the 'object and purpose' of the treaty, and not to its incidents.⁶⁰

It has also been argued that Article 46 of the Convention is to some extent innovative in restricting the right to invoke a violation of constitutional law as a ground for invalidating the consent of a State to be bound by a treaty.⁶⁴ This is debatable ground, since much depends on whether one starts from the position that constitutional limitations on the treaty-making power are, as it were, incorporated into international law so as to render voidable any consent to a treaty given on the international plane in violation of a constitutional limitation; or from the position that international law leaves to each State the determination of the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane (subject perhaps to a qualification in cases where a State is aware, or must be assumed to be aware, of a lack of constitutional authority on the part of another negotiating State). As the weight of international jurisprudence and State practice has in recent years tended to favour the second or 'internationalist' position,⁶² it may be doubted whether Article 46 of the Convention involves any material element of progressive development.⁶³

It may be useful to draw attention here to pronouncements by international tribunals indicating that certain of the rules embodied in the Vienna Convention are declaratory, or generally declaratory, of pre-existing customary international law. The rules on interpretation of treaties contained in Articles 31 to 33 of the Convention have been said by the European Court of Human Rights (in the *Golder* case) to 'enunciate in essence generally accepted principles of international law ...'.⁶⁴ The Court of Arbitration in the *Beagle Channel* case (Argentina/Chile) has referred to 'the traditional canons of treaty interpretation now enshrined in the Vienna Convention on the Law of Treaties.'⁶⁵ Similarly, in the *Young Loan* case, the majority judgment of the Arbitral Tribunal for the Agreement on German External Debts has recently (on 16 May 1980) expressed the view that '... the Convention properly reflects both the present and the past state of international treaty law since, as regards interpretation at least, it is restricted to the codification of customary law in force'.⁶⁶ Accordingly, there is now strong judicial support for the view that the rules of treaty interpretation incorporated in the Convention are declaratory of customary law.

There is also judicial authority for the view that the rule relating to the termination of a treaty by reason of a fundamental change of circumstances (*rebus sic stantibus*), as formulated in Article 62 of the Convention, is declaratory of customary law. In the *Fisheries Jurisdiction* case (jurisdictional phase), the International Court of Justice had occasion to refer to an Icelandic argument invoking changed circumstances and stated:

This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.⁶⁷

The dictum of the International Court of Justice in the *Fisheries Jurisdiction* case (jurisdictional phase) concerning duress and Article 52 of the Convention has already been noted.⁶⁸ It remains only to draw attention to other statements made by the Court about the extent to which Article 60 of the Convention (which deals with termination of a treaty on account of material breach) may be declaratory of customary law. In its *Namibia* advisory opinion, the Court had occasion to refer to the rules relating to termination of a treaty on account of material breach, and stated:

The rules laid down by the Vienna Convention on the Law of Treaties concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject.⁶⁹

The Court also had to consider the relevance of Article 60 in the *Jurisdiction of the ICAO Council* case (India/Pakistan) where India sought to deny the assumption of jurisdiction by the ICAO Council on a Pakistani complaint that India had violated provisions of the Chicago Convention by unilaterally suspending flights of Pakistani aircraft over Indian territory. India argued that (a) the treaties concerned were or became terminated or suspended as between the parties because of the outbreak of hostilities between India and Pakistan in 1965 and, alternatively, that (b) India had the right to suspend them unilaterally and should be regarded as having suspended them unilaterally. India further maintained that the dispute related to the termination or suspension of the treaties, not to their application or interpretation, and was therefore outside the jurisdictional clause. The Court (rightly) considered that the Indian arguments went to the merits of the dispute, rather than to the issue of jurisdiction, holding that a dispute as to the termination or suspension of a treaty on the ground of alleged material breach:

... is inherently and by its very nature, one that must involve the examination of the treaties in order to see whether, according to the definition of a material breach of a treaty contained in Article 60 of the 1969 Vienna Convention on the Law of Treaties, there has been (paragraph 3(b)) a violation by Pakistan of a provision essential to the accomplishment of the object or purpose of a treaty.⁷⁰

These sporadic *dicta* of international tribunals cannot of course be regarded in any way as exhaustive of which rules embodied in the Convention should be assumed to amount to codification as opposed to progressive development. The hazards of international litigation are such that any such assumption would be wholly unwarranted. Moreover, it would be unwise to take at face value the hint given by the International Court in its *Namibia* advisory opinion that adoption of an article at the Vienna Conference without a dissenting vote may serve to establish that the rule embodied in that article is declaratory of customary law. Certainly, the converse proposition does not hold good, if only for the reason that States represented at a codification conference may vote against a provision which is clearly declaratory of existing customary law for wholly unrelated reasons. A good example is afforded by Article 6 of the Convention providing that 'every State possesses capacity to conclude treaties'. This is unquestionably expressive of a customary rule. Yet Article 6 was finally adopted by the Vienna Conference by a divided vote of eighty-eight to five, with ten abstentions, the reason being that a controversial second paragraph dealing with the capacity of States members of a federal union to conclude treaties subject to certain conditions had previously been deleted. Accordingly, in all cases, it is necessary to analyse scrupulously and meticulously the origin of the rule embodied in the Convention in order to determine whether, and if so to what extent, it can be said to represent a codification of pre-existing customary law.

This brief analysis of the extent to which some of the more significant provisions of the Convention can be said to represent, with whatever qualifications may be necessary, codification or progressive development is not intended to be comprehensive. It is rather intended to illustrate the thesis that the distinction between progressive development and codification becomes increasingly blurred when the attempt is made to spell out in conventional form rules deriving their source from international custom or from general principles of law. The distinction nevertheless remains one of prime importance to the practitioner as well as to the theorist. The question is: to what extent will the rules embodied in the Convention bind States not parties to the Convention as well as States parties to it? We have hitherto considered the extent to which the provisions of the Convention represent progressive development rather than codification. It now remains to investigate whether, and if so to what extent, the Convention itself may *generate* rules which will be accepted and recognised as customary rules of international law, notwithstanding that they do not have all the characteristics of such customary rules.

IV. Treaty and custom: relevance of the *North Sea Continental Shelf* cases

The process by which rules embodied in a multilateral convention may come to be recognised and accepted as rules of customary or general international law to which States are subject independently of the convention has been described in the following terms by the International Court of Justice in the *North Sea Continental Shelf* cases:

The Court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention no rule of customary international law in favour of the equidistance principle and no such rule was crystallised in Article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent State practice — and that this rule, being now a rule of customary international law binding on all States, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the Parties' respective continental shelf areas in the North Sea.

In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that Article as a norm-creating provision which has generated a rule which, while only conventional or contractual in its origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which new rules of customary international law may be formed. At the same time, this result is not lightly to be regarded as having been attained.⁷¹

The Court, having accorded a cautious recognition to the process whereby certain multilateral conventions may generate rules which gradually come to be accepted as forming part of customary international law, immediately proceeded to indicate, in general terms, the conditions which must be satisfied before the process can be regarded as having been effective. In the first place, the conventional provision whose transformation into a rule of customary rule is in question must 'be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law'. In the second place there must be a very widespread and representative participation in the Convention, particularly of those States whose interests are specifically affected. In the third place, there must be the *opinio juris* reflected in an extensive State practice virtually uniform in the sense of the provision invoked. The Court appears to discount the importance of the time element, treating this as being subsidiary to the requirement of the *opinio juris*.

Applying these conditions to the circumstances of the particular case, the Court concluded 'that if the Geneva Convention was not in its origins or inception declaratory of a mandatory rule of customary international law enjoining the use of the equidistance principle for the delimitation of continental

shelf areas between adjacent States, neither has its subsequent effect been constitutive of such a rule; and that State practice up to date has equally been insufficient for the purpose'.⁷²

What conclusion can we draw from the judgment of the Court in the *North Sea Continental Shelf* cases? First, and perhaps most important, the Court has in terms recognised the possibility that customary international law may be generated by treaty. But it has carefully qualified this recognition by establishing a series of conditions which, in the instant case, it was found had not been fulfilled. The caution displayed by the Court hardly justifies the conclusion that it was seeking to establish a new doctrine or methodological rule of looking to the manifest intent of the treaty itself in determining whether any provision in the treaty generates customary international law.⁷³ True it is that the Court analysed in detail the drafting history of Article 6(2) of the Continental Shelf Convention and the relationship between this and other provisions of the Convention. It attached importance to the fact that Article 6(2) of the Convention imposed a primary obligation to effect delimitation by agreement, putting second the obligation to make use of the equidistance method; this, the Court maintained, constituted an unusual preface to what was claimed to be a potential general rule of law. The notion of 'special circumstances' embodied in Article 6 of the Convention raised further doubts as to the potentially norm-creating character of the equidistance principle. Finally, the fact that Article 12 of the Convention permitted reservations to be made to Article 6 was regarded as adding to the difficulty of considering Article 6 to be capable of generating a rule of customary international law. But the Court did not simply deduce the non-generating effect of Article 6 from the terms of the Convention itself; it devoted considerable space to establishing that State practice in the sense of the provision involved was neither as extensive nor as uniform as had been claimed, but that, even if it were, it would still be insufficient unless the State activity was motivated by the 'belief that this practice is rendered obligatory by the existence of a rule of law requiring it'.⁷⁴ It may be that, as Baxter claims, this requirement is unduly severe, and that *opinio juris* should be considered as being presumptively present unless evidence can be adduced that a State was acting from other than a sense of legal obligation.⁷⁵ The fact nonetheless remains that the judgment suggests clearly defined limits to the process of generation by treaty of customary rules, and that these limits involve the consideration of criteria external to the treaty itself.⁷⁶

To sum up, it may be said that the Vienna Convention on the Law of Treaties is in part declaratory of existing customary law, and in part a deliberate exercise in progressive development. To what extent those provisions of the Convention which recognisably constitute progressive development may come in time to generate rules of customary international law will depend on a number of elements — the extent of participation in the Convention, the

development of State practice in the sense of the alleged generated rule, the evidence of *opinio juris* and, above all, the interaction between norm-creating and procedural provisions. This last is a factor which is perhaps unique to the Vienna Convention on the Law of Treaties; but the drafting history of the Convention makes it abundantly clear that, for the majority of States, the acceptance of certain norm-creating provisions, particularly in Part V of the Convention, was conditional upon the inclusion in the Convention of specific procedural safeguards. It may therefore be concluded that this special feature of the Vienna Convention will constitute an additional hurdle to be overcome in seeking to establish, in the future, the custom-generating effect of particular Convention rules.

Notes

- 1 Parry, *The Sources and Evidences of International Law* (1965).
- 2 Lauterpacht, *International Law: Collected Papers*, Vol. 1, *General Works* 87 (1970).
- 3 See Brierly, *The Basis of Obligation in International Law* (1958); and cf. Fitzmaurice, 'The Foundations of the Authority of International Law and the Problem of Enforcement', 19 *M.L.R.* (1956), 1–13. But Thirlway argues that the statement *pacta sunt servanda* derives its meaning from the definitions given to the terms *pacta* and *servanda* by virtue of international law itself; that the rule must accordingly refer to concepts of international law; and that it cannot therefore stand outside international law 'as a necessary postulate of inherent validity independently of international law': *International Customary Law and Codification*, 38 (1972).
- 4 Rosenne, *The Law of Treaties: Guide to the Legislative History of the Vienna Convention*, 34 (1970).
- 5 *Yearbook of the International Law Commission* (1956–II), 107.
- 6 *Yearbook of the International Law Commission* (1961–II), 128.
- 7 Ago, 'Droit des traités à la lumière de la Convention de Vienne', 134 *Recueil des Cours* (1971), 308.
- 8 Statement by Professor Ago (chairman of the sixteenth session of the Commission) at the 851st meeting of the Sixth Committee of the General Assembly held on 14 October 1965: 20 GAOR A/C.6/SR851; cf. also Rosenne, *op. cit.*, 34.
- 9 See statements by the representatives of Austria, France and Greece respectively at the 851st, 849th and 845th meetings of the Sixth Committee in 1965.
- 10 Rosenne, *op. cit.*, 35–8.
- 11 Effect was given to this recommendation by operative paragraph 5 of General Assembly Resolution 2501(XXIV) of 12 November 1969. For the early consideration of this topic within the Commission, for which Professor Reuter was appointed Special Rapporteur, see *Yearbook of the International Law Commission* (1974–II), Part One, 290–2. The Commission completed its second reading of a set of eighty draft articles on this topic, together with an Annex, at its 34th session in 1982 and forwarded this final set of draft articles to the General Assembly with a recommendation that a plenipotentiary conference be convened to study the draft articles and to conclude a convention on the subject: see *Report of the International Law Commission on the work of its 34th session* (1982), 37 GAOR Suppl. No. 10 (A/37/10), paras. 56–61. In doing so, the Commission drew attention to the question of participation by international organisations in the conference and indeed in the Convention itself. The General Assembly, by virtue of Resolution 37/112

- adopted on 16 December 1982, decided that an international convention should be concluded on the basis of the draft articles adopted by the Commission, but deferred until its 38th session a decision upon the appropriate forum for the adoption of the convention. The eighty draft articles on the law of treaties between States and international organisations or between international organisations correspond closely, but with certain modifications because of the special features of international organisations, to Arts. 1 to 80 of the Vienna Convention on the Law of Treaties.
- 12 This results clearly from the terms of Arts. 2(1)(a) (definition of the expression 'treaty') and 3 of the Convention. As regards oral agreements, see Widdows, 'On the Form and Distinctive Nature of International Agreements', 7 *Australian Y.B.I.L.* (1981), 114–20.
 - 13 Art. 73. The International Law Commission already had the topics of State Responsibility and Succession of States and Governments on its active agenda when it submitted its final set of draft articles on the law of treaties to the General Assembly in 1966. The latter topic was split up into two in 1967 and the late Sir Humphrey Waldock was appointed Special Rapporteur on Succession of States in respect of Treaties. Following upon the submission to the General Assembly in 1974 of a final set of draft articles on the topic, a plenipotentiary conference was convened. On 23 August 1978 the Vienna Convention on Succession of States in respect of Treaties was opened for signature. For an analysis of the Convention (which is not yet in force), see Sinclair, 'Some Reflections on the Vienna Convention on Succession of States in respect of Treaties', *Essays in Honour of Erik Castren*, 149–83 (1978), and Yasseen, 'La Convention de Vienne sur la Succession d'Etats en matiere de traités', 24 *Annuaire français de droit international*, 59–113 (1978).
 - 14 Art. 4.
 - 15 For example, the delegations of Switzerland, Gabon, Ethiopia, Mexico, Cuba, France and Greece.
 - 16 *United Nations Conference on the Law of Treaties, Official Records, First Session* (A/Conf.39/11) (hereinafter cited as *Official Records, First Session*), 28th meeting (Yasseen).
 - 17 *Report of the International Law Commission on the work of its 34th session* (1982), 36.
 - 18 *Yearbook of the International Law Commission* (1966–II), 211.
 - 19 Now Art. 28.
 - 20 *Official Records, Second Session* (A/Conf.39/11 Add.1), 101st meeting of the Committee of the Whole (Blix).
 - 21 For example, Art. 2 of the Fourth Hague Convention on the Laws and Customs of War on Land (1907) provides: 'The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.'
 - 22 Thirlway suggests, with reference to Art. 4, that 'it will be a long time before anything like the majority of existing treaties in effective operation will be treaties concluded between States *both or all* of which are parties to the Vienna Convention of 1969': *op. cit.*, 108. O'Connell, 1 *International Law*, 205 (2nd ed., 1970), takes a similar view.
 - 23 *Official Records, Second Session*, 30th Plenary meeting (Blix).
 - 24 For a detailed analysis of the problems which arise if a 'double regime' is regarded as being applicable to future treaties (i.e. the Convention for parties to the treaty who are also parties to the Convention and customary law for parties to the treaty who are *not* also parties to the Convention), see the illuminating article by Vierdag,

- 'The Law governing Treaty Relations between Parties to the Vienna Convention on the Law of Treaties and States not Party to the Convention', 76 *A.J.I.L.* (1982), 779–801.
- 25 *Yearbook of the International Law Commission* (1966–II), 231.
- 26 *Official Records, First Session*, 36th meeting.
- 27 *Official Records, Second Session*, 31st plenary meeting (Ruegger).
- 28 'Memorandum on Methods for Encouraging the Progressive Development of International Law and its Eventual Codification', A/AC.10/7 of 6 May 1947, at 7.
- 29 *Loc. cit.*, at 8; see also Briggs, *The International Law Commission*, 129–41 (1965).
- 30 *Report of the International Law Commission covering the work of its 8th Session* (1956), 11 GAOR Suppl. No. 9 (A/3159), para. 26; for a fuller survey of the distinction between codification and progressive development, see Dhokalia, *The Codification of Public International Law*, 203–16 (1970). That the Commission continues to find it impracticable to distinguish between those elements in its drafts which constitute codification and those which constitute progressive development is confirmed by the general remarks accompanying its final set of draft articles on the law of treaties between States and international organisations or between international organisations submitted to the General Assembly in 1982: 'Finally, the Commission wishes to indicate that its work on the law of treaties between States and international organizations or between international organizations constitutes both codification and progressive development in the sense in which those concepts are defined in article 15 of the Commission's Statutes. The articles it has formulated contain elements both of progressive development and of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls': *Report of the International Law Commission covering the work of its 34th Session* (1982), para. 55.
- 31 *Yearbook of the International Law Commission* (1966–II), 177.
- 32 *Ibid.*, at 194.
- 33 *Official Records, First Session*, 15th meeting. See also the statement by Mr (now Judge) Ruda, also a member of the Commission at the time, at the same meeting. Ruda maintained that 'the provisions of paragraph 2, on the other hand, did not constitute a rule of positive international law'; they represented 'progressive development'.
- 34 These statements can be found in *Official Records, First Session*, 19th meeting.
- 35 *Official Records, First Session*, 20th meeting.
- 36 *I.C.J. Rep.* 1951, 15; and see Chapter III, *infra*.
- 37 This having been said, it is noteworthy that the Court of Arbitration, in the *UK/French Continental Shelf* case in 1977, in effect applied the rule now embodied in Art. 21(3) of the Convention in order to determine the legal effect of an objection to a reservation in circumstances where the objecting State had not opposed the entry into force of the treaty between itself and the reserving State: see Chapter III *infra*, pp. 70–6.
- 38 *Law of Treaties*, 534 (1961).
- 39 *Official Records, First Session*, 36th and 37th meetings.
- 40 *Yearbook of the International Law Commission* (1966–II), 243.
- 41 (1933) *P.C.I.J.*, ser. A/B, No. 53, at 71.
- 42 *I.C.J. Rep.* 1961, 30.
- 43 *I.C.J. Rep.* 1962, at 26: emphasis supplied.
- 44 *Yearbook of the International Law Commission* (1966–II), 244.
- 45 *Official Records, First Session*, 46th and 47th meetings (Mexico, Chile, Switzerland, Japan and United Kingdom).

- 46 *Ibid.*
- 47 *Op. cit.*, at 207–8.
- 48 The Commission did consider whether coercion of a representative, as distinct from coercion of the State, should render the treaty *ipso facto* void or whether it should merely entitle it to invoke the coercion of its representative as invalidating its consent to the treaty; but concluded that the use of coercion against the representative of a State for the purpose of procuring the conclusion of a treaty ‘would be a matter of such gravity that the article should provide for the absolute nullity of a consent to a treaty so obtained’: *Yearbook of the International Law Commission* (1966–II), 246.
- 49 *Yearbook of the International Law Commission* (1966–II), 246.
- 50 As to the first point, see Kearney and Dalton, ‘The treaty on treaties’, 64 *A.J.I.L.* (1970), 532–35, and Chapter VI *infra*, pp. 177–9; as to the second, see Jacobs, ‘Innovation and Continuity in the Law of Treaties’, 33 *M.L.R.* (1970), 514–15.
- 51 *I.C.J. Rep.* 1973, at 14. Briggs notes the significance of the Court’s ‘unhesitating acceptance as a principle of contemporary international law of the rule recognised in Article 52 of the Vienna Convention’, commenting that ‘this was not the traditional view under which treaties procured through the coercion of a State by the threat or use of force were nevertheless considered valid in international law’: ‘Unilateral Denunciation of Treaties: the Vienna Convention and the International Court of Justice’, 68 *A.J.I.L.* (1974), 62–3.
- 52 Nahlik, ‘The grounds of invalidity and termination of treaties’, 65 *A.J.I.L.* (1971), 745.
- 53 ‘International *jus cogens*’, first published in 43 *Texas L.R.* (1965) 455 and reprinted in *The Concept of Jus Cogens in International Law* 138 (Carnegie Endowment for International Peace, 1967).
- 54 For an analysis of the history of the concept, see Suy, in *The Concept of Jus Cogens in International Law*, 18–76 (1967).
- 55 *Yearbook of the International Law Commission* (1966–II), 247.
- 56 *Ibid.*, 247–8.
- 57 For further discussion of *jus cogens*, see Chapter VII *infra*.
- 58 *Official Records, Second Session*, 18th plenary meeting.
- 59 *Revue Belge de Droit International* (1970–71), 501.
- 60 1 *International Law*, 223–4 (2nd ed., 1970).
- 61 Jacobs, *loc. cit.*, at 510–12.
- 62 *Yearbook of the International Law Commission* (1966–II), 241.
- 63 For a much fuller analysis of doctrine and practice relating to the significance of constitutional limitations on the treaty-making power, see Wildhaber, *Treaty-making Power and Constitution*, 146–82 (1971); see also Meron, ‘Article 46 of the Vienna Convention on the Law of Treaties (*Ultra Vires* Treaties): some Recent Cases’, 49 *B.Y.I.L.* (1978), 175–99, who draws attention to the invocation of Art. 46 in the Senate of the United States in the context of the Sinai II Agreements of 1975 and the Panama Canal Treaties of 1977.
- 64 57 *I.L.R.* 214.
- 65 52 *I.L.R.* 93.
- 66 59 *I.L.R.* 529.
- 67 *I.C.J. Rep.* 1973, at 18.
- 68 *Supra*, p. 17.
- 69 *I.C.J. Rep.* (1971), at 47. A later dictum of the Court in the same case to the effect that there exists ‘a general principle that a right of termination on account of breach must be presumed to exist in respect of all treaties’ (except treaties of a humanitarian

character) has been criticised by Briggs, who rightly points out that, at any rate as regards bilateral treaties, Art. 60 provides only that material breach may be *invoked* as a ground for termination or suspension: *loc. cit.*, at 55–6.

70 *I.C.J. Rep.* 1972, at 67.

71 *I.C.J. Rep.* 1969, at 41.

72 *Loc. cit.*, at 45.

73 D'Amato, 'Manifest intent and the generation by treaty of customary rules of international law', 64 *A.J.I.L.* (1970), 892–902.

74 *I.C.J. Rep.* 1969, at 44.

75 Baxter, 'Treaties and custom', 129 *Recueil des Cours* (1970), at 69.

76 The relationship between treaty and custom, and the extent to which the provisions of a general multilateral treaty of a law-making character may generate rules of customary law, have recently been the subject of a number of detailed studies. D'Amato takes the very forward position that generalisable provisions in bilateral and multilateral treaties generate customary rules of law binding upon all States, down-playing the requirements of subsequent State practice and acceptance by the *opinio juris*: *The Concept of Custom in International Law*, 103–66 (1971). Thirlway criticises d'Amato's approach, arguing that it seems to be based on the 'claim-oriented' theory that customary law is a process rather than a set of rules: *op. cit.*, at 81–4. Akehurst also takes issue with d'Amato, emphasising the need for a strict approach to *opinio juris*: 'Custom as a source of international law', 47 *B.Y.I.L.* (1974–5), 1–53. For a recent riposte by d'Amato, see 'The Concept of Human Rights in International Law', 82 *Columbia L.R.* (1982), 1129–47. See also Chapter VIII *infra*, pp. 252–8.

CHAPTER TWO

The conclusion and entry into force of treaties

Part II of the Vienna Convention deals with the conclusion and entry into force of treaties. It is divided into three sections, the first relating to the conclusion of treaties (Articles 6–18), the second to reservations (Articles 19–23) and the third to entry into force and provisional application (Articles 24 and 25). The topic of reservations is sufficiently important and complex to warrant special treatment; it is accordingly dealt with in Chapter III below. The present chapter is therefore devoted to the conclusion of treaties and to entry into force and provisional application of treaties.

I. Conclusion of treaties

The series of articles in the Vienna Convention relating to the conclusion of treaties follows a certain logical pattern, a pattern dictated by the order in time at which the various acts involved in the treaty-making process are executed. First, certain rules are established as to the authority of diplomatic or other agents of the State to negotiate and subsequently to adopt or authenticate the text of a treaty; those rules naturally embrace the circumstances in which full powers are required. The second stage is, of course, the stage of negotiation itself, and here the Convention contains provisions relating to the adoption and authentication of the text of a treaty. Next in order of time comes the means whereby States express their consent to be bound by a treaty, namely, signature, exchange of instruments, ratification, acceptance, approval or accession. Finally, there is the period, if any, between signature of a treaty and its entry into force; here the Convention lays down a rule, which we have already considered briefly, relating to the obligation of a State which has signed a treaty, or otherwise expressed its consent to be bound by it, not to defeat the object and purpose of that treaty prior to its entry into force.

1. Full powers

The first stage in the treaty-making process is to establish the authority of the representatives of the negotiating State or States concerned to perform the necessary formal acts involved in the drawing up of the text of a treaty or in the conclusion of a treaty. This authority is in principle determined by the issuance of a formal document entitled a 'full power' which designates a

named individual or individuals to represent the State for the purpose of negotiating and concluding a treaty. Historically, the full power was of much greater significance than it is today.¹ The original purpose of a full power, during the period of absolute monarchy, when treaties were contracted in form and in substance in the name of and as an expression of the will of the sovereign, was to clothe the personal agent of the sovereign with power to bind his principal, provided that he acted within the limits of his authority.² It was thus of fundamental importance that the authority of the agent should be defined with precision in advance of the negotiation, and considerable emphasis was placed on the form of the instrument, the more particularly as, depending on the language used, a refusal on the part of the sovereign to ratify the treaty concluded by his agent could be justified only on the basis that the agent had exceeded his authority.³ Thus it is not surprising that the early history of full powers is replete with examples of lengthy and meticulous discussion of the meaning and significance to be attached to the particular phraseology employed in full powers.⁴

Two related developments led to a decline in the importance attached to full powers. The first was the end of the period of absolute monarchy, which, for present purposes, can be fixed towards the conclusion of the eighteenth century. With the gradual establishment of a measure of democratic control over foreign policy following upon the American and French revolutions, it came to be accepted in State practice that ratification was discretionary, even if the agent who had negotiated the treaty had acted within the limits of the authority confided to him by the full power. The second was the increasing ease of communications, culminating in the development of the electric telegraph, which rendered it possible for negotiators to ensure that they were not exceeding the limits of their authority.

In more modern times a third factor has been at work which has accentuated the decline in the significance of full powers. This is the increasing tendency of States to conclude agreements in simplified form, that is to say, by exchange of notes or exchange of letters, thereby dispensing with the need to produce full powers. This more informal approach to the conclusion of treaties is no doubt attributable to the increasing complexity of international relations, requiring a much wider and more comprehensive nexus of treaty links than was thought necessary in the earlier part of this century. International co-operation in such technical fields as telecommunications, the safety of life at sea, the protection of industrial property, air services and sanitary regulations has resulted in the construction of whole networks of treaty relationships which were undreamt of a hundred years ago. The rapid expansion of the international community with the advent of new States in Africa and Asia has meant a corresponding increase in the range of treaty links. It is accordingly not surprising that all these developments, requiring, as they do, a streamlining of the treaty-making process, have been accompanied

by a tendency to simplify the formalities involved in the conclusion of treaties.⁵

Article 7 of the Vienna Convention reflects these disparate, but parallel, tendencies. It first of all sets out the general rule that a person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:

- (a) he produces full powers; or
- (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

Thus the general rule is expressed in suitably flexible terms. Subparagraph (b) is intended to preserve the modern practice of States to dispense with full powers in the case of agreements in simplified form. At the first session of the Conference a proposal to delete this particular provision was defeated. It was argued in favour of deletion that the provision 'by creating a presumption of authority to conclude a treaty could have the effect of binding a State without its Government being even aware that a binding commitment was being undertaken on the State's behalf'.⁶ In reply it was pointed out that the essential idea was that normally full powers were required, but that the States engaged in the negotiations could agree to dispense with them if it became apparent that the results of the negotiations could be incorporated in an agreement in simplified form; in such circumstances 'the onus was on the negotiators to see that they were qualified to bind their respective States'.⁷

In their commentary to the draft article which eventually emerged (with some minor modification) as Article 7 of the Convention, the Commission pointed out that the general rule 'makes it clear that the production of full powers is the fundamental safeguard for the representatives of the States concerned of each other's qualifications to represent their State for the purpose of performing the particular act in question'.⁸ Implicitly, therefore, the Commission recognised that the non-production of full powers might involve a certain risk for one or other of the States concerned, in the sense that it might be subsequently claimed that an act relating to the conclusion of a treaty had been performed without authority.

Partly to guard against this risk and also to respect accepted international practice, paragraph 2 of Article 7 of the Convention establishes that, 'in virtue of their functions and without having to produce full powers', Heads of State, Heads of Government and Ministers for Foreign Affairs are considered as representing their State for the purpose of all acts relating to the conclusion of a treaty. Heads of diplomatic missions are likewise considered as representing their State *ex officio* and without the need to produce full powers, but only for the purpose of adopting the text of a treaty between the accrediting

State and the State to which they are accredited. Finally, representatives accredited by States to an international conference or to an international organisation or one of its organs enjoy similar powers, but only for the purpose of adopting the text of a treaty in that conference, organisation or organ.

Modern State practice as regards the issuance of full powers is flexible. United Kingdom practice distinguishes between 'general full powers' and 'special full powers'. 'General full powers' which are at present held by the Secretary of State for Foreign and Commonwealth Affairs (notwithstanding paragraph 2 of Article 7), Ministers of State and Parliamentary Under-Secretaries in the Foreign and Commonwealth Office, and by the United Kingdom Permanent Representatives to the United Nations, to the European Communities and to the GATT, entitle the holder to negotiate and sign any treaty.⁹ 'Special full powers' are directed to a particular named individual authorising him to negotiate and sign a specified treaty. On occasion, telegraphic authority to sign a treaty may be given by a Foreign Ministry to one of its ambassadors or permanent representatives, but it must be followed by the presentation of the formal full power.

An interesting point which was raised at the Conference is the relationship between this rule about inherent capacity to perform certain acts relating to the conclusion of treaties and the rule set out in Article 46 of the Convention concerning the violation of provisions of internal law regarding competence to conclude treaties. It will be recalled that Article 46 establishes the principle that a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties unless that violation was manifest and concerned a rule of its internal law of fundamental importance. The question is: does paragraph 2 of Article 7 raise an incontestable presumption as a matter of international law that the designated office-holders are *ex officio* entitled to perform the specified acts without the need to produce full powers notwithstanding that, as a matter of internal law, they are not empowered to do so? It would seem that the presumption is incontestable. A proposal at the first session of the Conference to include a reference to internal law in the text of Article 7 was not pressed to a vote. Furthermore, the point at issue had already been covered by the Commission in their commentary to what is now Article 46. In discussing the doctrine that internal laws limiting the powers of State organs to enter into treaties may render voidable any consent given on the international plane in disregard of a constitutional limitation, the Commission had specifically stated, in rejecting that doctrine:

If this view were to be accepted, it would follow that other States would not be entitled to rely on the authority to commit the State ostensibly possessed by a Head of State, Prime Minister, Foreign Minister, etc., under Article [7]; they would have to satisfy themselves in each case that the provisions of the State's constitution are not infringed or take the risk of subsequently finding the treaty void.¹⁰

Article 8 of the Convention forms the corollary to Article 7. It provides that an act relating to the conclusion of a treaty performed by a person who cannot be considered under Article 7 as authorised to represent a State for that purpose is without legal effect unless afterwards confirmed by that State. Cases of this kind are, of course, very rare, but the Commission's commentary cites two or three relevant examples from diplomatic history where State representatives had signed treaties in the absence of authority to do so. The *rationale* of the rule embodied in Article 8 would appear to be, as the Commission suggest, that 'where there is no authority to enter into a treaty ... the State must be entitled to disavow the act of its representative'.¹¹ An important point, which the text of Article 8 does not entirely resolve, is whether the subsequent confirmation must be expressed or can be implied from the conduct of the State concerned. The drafting history demonstrates fairly conclusively that confirmation can be so implied. In the first place, the Commission, in their commentary to the provision on which Article 8 is based, state explicitly that a State will be held to have endorsed the unauthorised act of its representative by implication if it invokes the provisions of the treaty or otherwise acts in such a way as to appear to treat the act of its representative as effective.¹² In the second place, an amendment proposed by Venezuela at the first session of the Conference requiring confirmation to be express was decisively rejected on the grounds *inter alia* that 'confirmation implied by the silence of the State in question was recognised in practice'¹³ and that 'there was no objection to providing for tacit confirmation from the behaviour of the State concerned'.¹⁴

2. Adoption and authentication of the text of a treaty

The next stage in the conclusion of a treaty is the adoption of the text. In the Convention itself there is no definition of the term 'adoption', but it would appear to mean the formal act whereby the form and content of the proposed treaty are settled.¹⁵ Historically, the adoption of the text of a treaty took place by the agreement of all the States participating in the negotiations. Unanimity could therefore be said to constitute the classical rule — a rule which was considered so obvious as hardly to require stating in terms.

Unanimity must, by the nature of things, remain the unqualified rule for the adoption of the text of a bilateral treaty. If the parties to a proposed bilateral treaty have not reached agreement on the terms of the treaty, there is self-evidently no *consensus ad idem* and no text to be 'adopted'. The negotiations will obviously continue until the outstanding points in dispute have been settled and the necessary wording for the treaty agreed upon.

Unanimity likewise remains the rule for the category of treaties known, for purposes of convenience, as 'restricted multilateral treaties'. A 'restricted multilateral treaty' may be defined as a treaty whose object and purpose are such that the application of the treaty in its entirety between all the parties

is an essential condition of the consent of each one to be bound by the treaty.¹⁶ Examples of restricted multilateral treaties are treaties establishing very close co-operation between a limited number of States, such as treaties of economic integration, treaties between riparian States relating to the development of a river basin or treaties relating to the building of a hydro-electric dam, scientific installations or the like.¹⁷ Treaties of this nature, particularly treaties providing for economic integration, are of growing significance in current practice. The most notable illustration is the series of treaties providing for the establishment and enlargement of the European Communities. The essential characteristic of such treaties is that they incorporate a nexus of clearly interdependent rights and obligations, the fulfilment of which in their entirety by all the States involved is a precondition for the staged progress towards the objectives set out in the treaty. Thus unanimity remains the rule for the adoption of the text of such a treaty, and unanimity remains the rule for its entry into force.¹⁸ In principle, unanimity is also required for the admission of a new member to a grouping of this nature, in the sense that the consent of all the original member States, as well as of the applicant State, to be bound by an agreement embodying conditions of admission is required as a condition precedent to admission.¹⁹

Article 9 of the Convention accordingly sets out, in paragraph 1, the general rule that the adoption of the text of a treaty takes place by the consent of the States participating in its drawing up. But it is obvious that this rule is not appropriate to the process whereby the texts of treaties are adopted at international conferences. Accordingly, Article 9(2) of the Convention establishes the general rule that 'the adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting unless by the same majority they shall decide to apply a different rule'.

Both in the Commission and at the Conference, considerable attention was devoted to the question whether the same majority should be required for a decision to apply a different rule as is required for the adoption of the text of the treaty itself. There was little disposition to argue against the requirement for a two-thirds majority for the adoption of the text of a general multilateral treaty at an international conference. But there were divided views in the Commission on the majority required for the procedural vote by which a particular conference would decide on the voting rule by which a decision would be taken on the adoption of the text of the treaty. The Commission, in their commentary to what is now Article 9 of the Convention, summed up the position as follows:

While the States at the conference must retain the ultimate power to decide the voting rule by which they will adopt the text of the treaty, it appeared to the Commission to be desirable to fix in the present articles the procedure by which a conference is to arrive at its decision concerning that voting rule. Otherwise there is some risk of the work of the conference being delayed by long procedural debates concerning the

preliminary voting rule by which it is to decide upon its substantive voting rule for adopting the text of the treaty. Some members of the Commission considered that the procedural vote should be taken by simple majority. Others felt that such a rule might not afford sufficient protection to minority groups at the conference, for the other States would be able in every case to decide by a simple majority to adopt the text of the treaty by the vote of a simple majority and in that way override the views of what might be quite a substantial minority group of States at the conference. The rule in paragraph 2 takes account of the interests of minorities to the extent of requiring at least two-thirds of the States²⁰ to be in favour of proceeding by simple majorities before recourse can be had to simple majority votes for adopting the text of a treaty.²¹

The difficulty was, as the representative of the Secretary-General did not fail to point out at the second session of the Vienna Conference, that:

In United Nations practice, the rules of procedure of conferences were adopted by a simple majority because, under the United Nations Charter, decisions on procedural matters were normally adopted by a simple majority, and that rule had been automatically extended to United Nations conferences.²²

Notwithstanding this expression of view, the Conference decided to retain the requirement of a two-thirds majority for the procedural vote, if only for the following reason advanced by the representative of Iraq:

... the decision whether a text should be adopted by simple majority or whether it required unanimity or a two-thirds majority was certainly a matter of substance, and the two-thirds majority rule, as compared with the traditional unanimity rule, was an essential part of the progressive development of international law in that context and was a rule that should be observed and safeguarded. Any derogation from that rule at a general international conference should therefore be permitted only by a two-thirds majority vote, since the treaties in question were multilateral treaties which concerned the international community as a whole.²³

In the event, the only material change made by the Conference to the proposal put forward by the Commission as regards Article 9 was to alter the requirement (applicable both to the substantive vote and the procedural vote) of 'two-thirds of the States participating in the conference' to 'two-thirds of the States present and voting'; and this in response to the point made by the representative of the Secretary-General that United Nations practice dictated that decisions were taken by a majority of the representatives 'present and voting', abstentions and absences not being counted.²⁴

We have already noted that this particular provision constitutes progressive development rather than codification.²⁵ At the Conference further doubts were expressed about the substance of this rule, particularly in view of the differing types of international conference to which it might be thought to be applicable. At the first session the delegation of Austria drew attention to the fact 'no criterion qualifying an international conference emerges from the commentary to paragraph 2'.²⁶ The representative of Iraq (himself a member of the International Law Commission) commented that the rule laid down in

paragraph 2 'was in fact followed only at major conferences and it would therefore be desirable to insert the word "general" before "international conference"'.²⁷ There was general agreement that the rule set out in Article 9(2) did not automatically apply to treaties adopted within international organisations if the relevant rules of the organisation provided otherwise; in their comments on what is now Article 5 of the Convention, representatives of such disparate international organisations as the FAO, the Council of Europe, the League of Arab States, BIRPI (International Bureaux for the Protection of Intellectual and Industrial Property) and the International Bank had all pointed to the existence of rules or practices operating within their organisations which were, or might be, contrary to the general rule proposed for the adoption of the text of a treaty at an international conference.

In this context, the recent practice of the United Nations itself furnishes some interesting examples of conventions being adopted and opened for signature by means of resolutions of the General Assembly (to which the normal voting rules for the adoption of General Assembly resolutions apply). The conventions which have been adopted and opened for signature by this method are those conventions which have been drafted and negotiated directly by a main committee of the General Assembly. They include the International Covenants on Civil and Political and Economic and Social Rights, together with the Optional Protocol to the former, all of which were adopted and opened for signature, ratification and accession by means of General Assembly Resolution 2200(XXI); the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted and opened for signature etc. by means of General Assembly Resolution 2391(XXIII); the Convention on Special Missions and Optional Protocol thereto, adopted and opened for signature, etc., by means of General Assembly Resolution 2530(XXIV); and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by means of General Assembly Resolution 3166(XXVIII). These are but a few random examples of what has become almost standard practice in relation to conventions negotiated directly within the framework of the normal business of a main committee of the General Assembly.

It would accordingly seem that the rule set out in Article 9(2) applies essentially to major international conferences — that is to say, large conferences attended by a great number of States. If such conferences are convened within the framework of international organisations, then any special rules of the organisation for the adoption of treaties will apply, notwithstanding Article 9(2); and the only remaining point of doubt would appear to be whether the rule in Article 9(2) applies to regional conferences organised independently of regional organisations. The answer would appear to be that suggested by Sir Humphrey Waldock and endorsed by the Commission, when considering, at an earlier stage, certain governmental comments — namely, that Article

9(2) does in principle apply to regional conferences, but that such a conference can always decide, by a two-thirds majority, to apply the unanimity rule.²⁸

The specific character of a particular international conference will of course determine whether the States participating in the conference will wish to depart from the residual two-thirds majority rule for which provision is made in Article 9(2) of the Convention. A recent and noteworthy example of a variation from the basic rule is provided by the Third United Nations Conference on the Law of the Sea. During the debate in the General Assembly in 1973 on the Report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, the Chairman of the Committee (Mr Amerasinghe of Sri Lanka) proposed that the Conference should combine the decision-making processes of previous codification conferences (a simple majority in committee and a two-thirds majority in plenary) with a 'gentleman's agreement' that at all stages decisions should be arrived at through a consensus. This general approach was supported by the delegations of the Soviet Union, Pakistan, United States and the United Kingdom; but reservations were expressed by the delegations of Kenya, Zambia and China. Nevertheless, Mr Amerasinghe persisted and, at the conclusion of the debate, the General Assembly approved a revised text of the 'gentleman's agreement' in the following terms:

Recognizing that the Conference at its inaugural session will adopt its procedures, including its rules regarding methods of voting, and bearing in mind that the problems of ocean space are closely inter-related and need to be considered as a whole and the desirability of adopting a Convention on the Law of the Sea which will secure the widest possible acceptance,

The General Assembly expresses the view that the Conference should make every effort to reach agreement on substantive matters by way of consensus; that there should be no voting on such matters until all efforts at consensus have been exhausted; and further expresses the view that the Conference at its inaugural session will consider devising appropriate means to that end.²⁹

A lengthy debate on the draft rules of procedure of the Conference ensued, both at the organisational session held in New York in December 1973 and at further informal consultations held between 25 February and 1 March 1974, and between 10 June and 12 June 1974.³⁰ As a result, the President of the Conference presented the following declaration to be endorsed by consensus:

Bearing in mind that the problems of ocean space are closely inter-related and need to be considered as a whole and the desirability of adopting a Convention on the Law of the Sea which will secure the widest possible acceptance,

The Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted.³¹

In presenting this declaration, the President of the Conference explained that it was not a rule of procedure but merely a declaratory statement expressing

the good faith of the Conference and its desire to give effect to the gentleman's agreement. After adoption of the declaration by consensus, discussion shifted to the draft rules of procedure. The President of the Conference submitted a series of amendments to be taken as a package. All were designed to tighten up the requirements for voting. They included:

- (a) a high quorum requirement, in the sense that the presence of representatives of a majority of the States *participating* in the particular session of the Conference would be required for any decision to be taken, the presence of representatives of two-thirds of the States *so participating* being required for a decision on any matter of substance;
- (b) a double-majority requirement for all decisions of substance, that is to say, a two-thirds majority of representatives present and voting, provided that such majority included at least a majority of the States participating in the particular session of the Conference;
- (c) a simple majority requirement of representatives present and voting for decisions on all matters of procedure, including the crucial question of whether a matter was one of procedure or of substance;
- (d) an elaborate procedure for determining whether all efforts at reaching general agreement (consensus) had been exhausted, including automatic deferment of a vote for ten days at the request of a specified number of representatives or at the President's discretion, or deferment by the Conference itself for a specified period of time;
- (e) a special negotiating effort during the period of deferment, the conduct of the negotiations to be primarily in the hands of the President;
- (f) a double-majority requirement (as in (b) above) for the decision that all efforts at reaching a general agreement had been exhausted and that the matter of substance should be put to the vote;
- (g) proper notice for each vote on any matter of substance.³²

There can be little doubt but that these stringent decision-making requirements as set out in the 'gentleman's agreement' and reinforced by the special rules of procedure adopted by the Conference were the product of a combined effort by Western and Eastern European delegations to ensure that their interests were taken into account in the formulation of the Convention. By the early 1970s Third World delegations could easily command a two-thirds majority of States present and voting at any particular international conference; for the industrialised countries at least, the outcome of the Conference on the Law of the Sea was only too easily predictable if the minority which they constituted must automatically yield to a two-thirds majority.³³

Having regard to the experience at the Third Conference on the Law of the Sea, it has been said that 'the pendulum has swung around the circle, from unanimity to consensus'.³⁴ This is an exaggeration. As we have seen, there were special reasons why particularly stringent decision-making procedures

should have been adopted by that Conference. Standard rules of procedure were adopted without debate by the UN Conference on Succession of States in respect of Treaties in 1977, and, during the Conference, a number of amendments tabled by delegations were duly voted upon and either accepted or rejected.

Article 10 of the Convention, relating to authentication, requires little comment. It should be noted that this rule relates to the establishment as authentic and definitive of the *text* of a treaty. It is a common feature of international negotiations, as the United States government pointed out in written comments to an early draft prepared by the Commission, that 'in some instances, initialling [a text] merely constitutes agreement by the representatives negotiating the treaty that they have reached agreement upon a particular text to refer to their respective governments for consideration'.³⁵ Following upon this and other comments, the Commission undertook a redraft of the rule. There seems little risk that the text of Article 10, as finally adopted, could be interpreted as applying to the initialling of drafts by negotiators at some midway stage in the negotiations for the purpose of consultation with governments. Where negotiations are interrupted for this purpose, it will normally be quite clear what is the precise status of the texts and the act of initialling at this particular stage ought not to be capable of being confused with authentication as such.

3. *Expression of consent to be bound by a treaty*

Articles 11–17 of the Convention are concerned with the means by which States express their consent to be bound by a treaty. Article 11, which is a new article adopted at the Conference on a proposal by Poland and the United States, lists the various means as 'signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or ... any other means if so agreed'. The Commission had not thought it necessary to put forward such a general rule on the means of expressing consent to be bound, nor had it suggested any specific provision for the expression of consent to be bound by a treaty to be effected by means of an exchange of instruments. The Conference decided otherwise, no doubt influenced by the growing practice of constituting treaties by an exchange of unsigned *notes verbales*.

The major issue which arises on this series of articles is, however, the question whether, in the absence of an express provision to that effect, treaties require ratification. There has been a long-standing doctrinal argument on this point. On the one hand, McNair³⁶ and the Harvard Research³⁷ had taken the view that ratification is required when the treaty or the attendant circumstances do not indicate an intention to dispense with ratification. As against this, Fitzmaurice, writing in 1934, had expressed the view that 'the necessity for ratification is not inherent and depends in the last resort, not on any general rules, but on the intention of the parties; and that where no intention to

ratify is apparent it may be assumed that none exists'.³⁸ Blix, in more recent years, after an extensive review of modern State practice, had concluded that 'whenever States intend to bring treaties into force by some procedure other than signature, that intention is evidenced by express provisions or by cogent implication' and that 'in the present practice of States the treaties in which there is no clear evidence, express or implied, of the parties' intentions as to the mode of entry into force almost without exception enter into force by signature'.³⁹

The Commission had clearly been rather perplexed as to how to handle this potentially divisive issue. In 1962 the Commission had adopted a rather complex preliminary draft article to the effect that 'treaties in principle require ratification unless they fall within one of the exceptions ... below'. But this had encountered opposition from a number of States, such as Denmark, Japan, Sweden and the United Kingdom, who had suggested that the presumption should be reversed. Other States had criticised the wording of the exceptions, and yet others suggested that the Commission need not adopt a position on the doctrinal issue. In the light of these developments the Commission reconstructed the draft article so as 'simply to set out the conditions under which the consent of a State to be bound by a treaty is expressed by ratification in modern international law' and 'to leave the question of ratification as a matter of the intention of the negotiating States without recourse to a statement of a controversial residuary rule'.⁴⁰

Thus the Commission had avoided the crucial issue of whether, when a treaty is silent on the matter, the consent of a State to be bound is expressed by signature or by ratification. But it had done so deliberately, drawing attention to the fact that treaties normally either provide that the instrument shall be ratified or, by laying down that the treaty shall enter into force upon signature or upon a specific date or event, dispense with ratification, and that accordingly 'total silence on the subject is exceptional'. This is confirmed by the analysis made by Blix, who points out that, of the 1,300 instruments reproduced in the United Nations Treaty Series between 1946 and 1951, at least 1,125 expressly or by clear implication state the manner by which they are to come into force.⁴¹

At the Conference, however, the issue was not so easily disposed of. At the first session there was a lengthy discussion on whether there should be incorporated in the Convention a residuary rule in favour of signature or of ratification when a treaty was silent as to how consent to be bound should be expressed. Czechoslovakia, Poland and Sweden tabled an amendment favouring signature as the residuary rule; and a group of nine Latin American States tabled an amendment establishing ratification as the residuary rule. The discussion revealed very little in the way of new argument. The proponents of ratification as the residuary rule stressed that this would have the advantage of order and certainty and would ensure compliance with internal

constitutional requirements. The proponents of signature as the residuary rule insisted that this reflected the current practice of States, given the tendency towards the conclusion of agreements in simplified form (e.g. exchanges of notes) not requiring ratification. In the event the debate was inconclusive; of some thirty speakers, ten expressed themselves (sometimes with qualifications) in favour of a residuary rule of signature,⁴² thirteen favoured a residuary rule of ratification⁴³ and seven adopted an indeterminate position.⁴⁴ The sponsors of the amendment favouring a residuary rule of signature thereupon withdrew their proposal, and the Latin American amendment calling for a residuary rule of ratification was defeated by a vote of twenty-five in favour and fifty-three against, with sixteen abstentions.⁴⁵ Thus the Convention, as adopted, makes no attempt to resolve the doctrinal dispute as to whether there is a presumption in favour of signature or ratification as a means of expressing a State's consent to be bound when the treaty is silent on the matter. It simply enumerates the circumstances in which consent to be bound is expressed by signature and the circumstances in which consent to be bound is expressed by ratification. In this respect, it may be said to have respected the principle of the procedural autonomy of the negotiating States; and the lack of a residuary rule in the Convention is unlikely to create difficulties in practice, no such difficulties having arisen before its adoption.⁴⁶

A few additional points on this series of articles are worthy of note.

Article 12(2) provides that:

- (a) the initialling of a treaty constitutes a signature of the treaty when it is established that the negotiating States so agreed;
- (b) the signature *ad referendum* of a treaty by a representative, if confirmed by his State, constitutes a full signature of the treaty.

In its commentary to what is now Article 12(2), the Commission noted that 'in practice initialling, especially by a Head of State, Prime Minister or Foreign Minister, is not infrequently intended as the equivalent of full signature'.⁴⁷ In practice, initialling by lesser dignitaries may equally have the effect of full signature if this is the clear intention of the parties.⁴⁸

Article 14 sets out the circumstances in which the consent of a State to be bound by a treaty is expressed by ratification. In this context, the expression 'ratification' bears the meaning set out in Article 2(1)(b) of the Convention — that is to say, 'the international act ... whereby a State establishes on the international plane its consent to be bound by a treaty'. Ratification in this sense must not be confused with the approval of the legislature or other State organ whose approval may be constitutionally necessary as a condition precedent to the making of the international act.⁴⁹ Furthermore, ratification must, in principle, be unconditional. Its operative effect cannot, unless the treaty itself specifically so provides, be made dependent on the receipt or deposit of instruments of ratification by other States.⁵⁰ Finally, as ratification

constitutes, at least in part, confirmation of a signature already given, it must relate to what the signature relates to, and must therefore relate to the treaty in its entirety, and not merely to a part of it, unless the treaty provides that States may elect to become bound by a certain part or parts only; this is of course without prejudice to the possibility of attaching reservations to the instrument of ratification.⁵¹

Accession as a means of expressing the consent of a State to be bound by a treaty is dealt with in Article 15. Accession is normally a secondary process — that is to say, the act whereby a State accepts the offer or the opportunity of becoming a party to a treaty already negotiated and signed by other States.⁵² But it can exceptionally constitute the primary (indeed, the exclusive) process whereby a State may express its consent to be bound by a treaty. This is particularly the case with certain treaties negotiated under the auspices of the League of Nations or the United Nations, notably the 1928 General Act for the Pacific Settlement of International Disputes, the Revised General Act of 1949, and the Convention on the Privileges and Immunities of the United Nations approved by the General Assembly on 13 February 1946. These are however exceptional cases.

It used to be thought that it was legally impossible for a State to accede to a treaty which was not yet formally in force. This view reflected the theory that accession amounted in essence to acceptance of a contract already entered into, thereby implying the existence of an operative instrument to accede to. Modern practice, however, clearly contradicts this view of the matter. As the Commission point out in their commentary to what is now Article 15:

... an examination of the most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty, either expressly, by allowing accession to take place before the date fixed for the entry into force of the treaty, or impliedly, by making the entry into force of the treaty conditional on the deposit, *inter alia*, of instruments of accession.⁵³

Accession as a secondary process comprehends accession as of right (where the treaty expressly provides that certain States or categories of States may accede to it) and accession by invitation (where the treaty expressly provides that non-signatory States may accede only upon the invitation of the contracting parties or of a body representative of the contracting parties which has been set up by the treaty).⁵⁴

4. Obligation not to defeat the object and purpose of a treaty

As has already been indicated, the treaty-making process involves a number of stages. The penultimate stage is the period between signature of a treaty (assuming the treaty is subject to ratification) and entry into force, or between ratification and entry into force (in circumstances where entry into force is conditional upon the deposit of a specified number of instruments of

ratification). Article 18 of the Convention lays down the rule that 'a State is obliged to refrain from acts which would defeat the object and purpose of a treaty' during this grey period preceding entry into force.

The point has already been made that this provision in all probability constitutes at least a measure of progressive development, although there is some inchoate authority for the proposition that States which have signed a treaty subject to ratification must observe certain restraints on their activities during the period preceding entry into force, particularly if those activities would render the performance by any party of the obligations stipulated in the treaty impossible or more difficult.⁵⁵ As Anzilotti puts it:

Il faut encore observer que, en excluant tout effet obligatoire du traité antérieurement à la ratification, on ne veut pas dire que l'Etat puisse ne tenir aucun compte du texte intervenu et faire comme si rien ne s'était produit. Il y a lieu, par contre, d'admettre que, lorsque la procédure de ratification d'un traité régulièrement signé est pendante, l'Etat doit s'abstenir d'accomplir des actes de nature à rendre impossible ou plus difficile l'exécution régulière du traité une fois ratifié. Mais il est clair qu'il ne s'agit pas alors d'un effet du traité comme tel mais bien d'une application du principe qui défend d'abuser du droit.⁵⁶

McNair also cites a certain amount of material, much of which he concedes to be somewhat inconclusive, in support of the proposition that 'States which have signed a treaty requiring ratification have thereby placed certain limitations upon their freedom of action during the period which precedes its entry into force'.⁵⁷

It should be noted that the final draft article submitted by the Commission in 1966 stated the nature of the obligation as an obligation 'to refrain from acts *tending to frustrate* the object of a proposed treaty'. At the Conference this phraseology was modified to refer to an obligation 'to refrain from acts *which would defeat the object and purpose* of a treaty'. The phrase 'tending to frustrate' had been criticised by a number of delegations, including those of the United Kingdom, the United States, Ghana and Uruguay and, although the Expert Consultant, Sir Humphrey Waldock, explained that the phrase 'was based on a well established notion in English law' and meant simply that 'the treaty was rendered meaningless by such acts and lost its object',⁵⁸ it was clearly felt desirable to tighten up the language employed. The modification was accordingly proposed by the Drafting Committee, and accepted without any material comment.

Specific treaty provisions do, of course, occasionally seek to give some kind of material content to the general principle expressed in Article 18 of the Convention. There is, for example, an implicit acknowledgment of the principle involved in the instrument entitled 'Procedure for the Adoption of Certain Decisions and Other Measures to be taken during the Period preceding Accession' which was annexed to the Final Act signed simultaneously with the Treaty concerning the Accession of Denmark, Ireland, Norway and the

United Kingdom to the European Economic Community and the European Atomic Energy Community. This instrument provided that, during the period preceding accession, any proposal or communication from the Commission of the European Communities which might lead to decisions by the Council of these Communities should be brought to the attention of the acceding States. Elaborate arrangements were then made for consultations at various levels. Conversely, it was provided that the procedures for consultation should also apply to any decision to be taken by the acceding States which might affect the commitments resulting from their position as future members of the Communities.⁵⁹ In this way, practical consultation procedures were arranged in order to ensure that on neither side would action be taken which would defeat, or render substantially more difficult of accomplishment, the object and purpose of the Treaty of Accession, namely, the enlargement of the European Communities.

II. Entry into force and provisional application of treaties

Articles 24 and 25 of the Convention, which deal with the entry into force and provisional application of treaties, do not call for extensive treatment.

Article 24 lays down the unexceptional rule that a treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree; and that, failing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States. Consent to be bound can, of course, be expressed by any of the means specified in Article 11 of the Convention, depending on the terms of the treaty concerned. In their commentary to what is now Article 24, the Commission noted that if, in a particular case, the fixing of a date for the exchange or deposit of instruments or for signatures were to constitute a clear indication of the intended date of entry into force, the case would fall within the words 'in such manner and upon such date as it may provide'.⁶⁰

Clauses on the entry into force of a treaty can take many forms. In the case of a bilateral treaty, the treaty may be expressed to enter into force upon signature or upon the date of exchange of instruments of ratification; exceptionally, it may be expressed to enter into force on a fixed future date, with or without a condition of approval by the competent authorities of both parties or of fulfilment of necessary constitutional requirements by one or both parties, or on a date to be specified in a subsequent exchange of notes, or on the happening of a certain event. In the case of a multilateral treaty, the treaty may be expressed to enter into force on the deposit (or on a date following the deposit) of a specified number of instruments of ratification or accession, or on the deposit of such instruments by a fixed number of States specially qualified, possibly including States expressly named.⁶¹

In the case of a multilateral treaty which is expressed to enter into force on a date following the deposit of a specified number of instruments of ratification or accession, difficulties can arise if one or more of the instruments already deposited has been accompanied by a reservation to which other States have objected. This problem arose in an acute form in connexion with the determination of the date of entry into force of the Vienna Convention itself. Article 84 of the Convention provides that it '... shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession'. Togo deposited the thirty-fifth instrument with the UN Secretary-General on 28 December 1979. However, the Secretary-General felt obliged at that stage to undertake a consultation of the interested States drawing attention to the fact that several of the thirty-five instruments already deposited had been accompanied by reservations to which other States had objected. The Secretary-General presumed that the interested States would accept that, for the purposes of calculating the date of entry into force of the Convention, account should be taken of the thirty-five instruments already deposited up to 28 December 1979 (so that the Convention would enter into force on 27 January 1980), but gave an opportunity to the contracting States to signify a contrary intention within ninety days. No objection having been raised within this period of ninety days, the Secretary-General sent round another circular letter confirming 27 January 1980 as the date of entry into force of the Convention.⁶²

What is now paragraph 4 of Article 24 of the Convention is an addition to the Commission proposal which was agreed upon at the Vienna Conference. Article 42(4) of Fitzmaurice's 'First Report on the Law of Treaties' stated that:

Nevertheless, prior to its entry into force, a treaty has an operative effect ... so far as concerns those of its provisions that regulate the processes of ratification, acceptance and similar matters, and the date or manner of entry into force itself ...⁶³

In his commentary Fitzmaurice justified this provision as follows:

Logically, a treaty which, *ex hypothesi*, is not yet in force, cannot provide for its own entry into force — since, until that occurs, the clause so providing can itself have no force. The real truth is that, by a tacit assumption invariably made, the clauses of a treaty providing for ratification, accession, entry into force, and certain other possible matters, are deemed to come into force separately and at once, on signature — or are treated as if they did — even though the substance of the treaty does not.⁶⁴

The International Law Commission had not included any provision on this aspect of entry into force in the proposals which they had submitted in 1966. Accordingly, at the first session of the Vienna Conference, the United Kingdom delegation put forward a proposal based on the Fitzmaurice text. This received general support as a useful addition to the Commission text and was in principle accepted subject to redrafting by the Drafting Committee. Paragraph 4 of Article 24 of the Convention accordingly now specifies that

'the provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary, and other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of its text'.

The word 'necessarily' as used in this paragraph may not be entirely apposite. Certain of the listed matters, such as those concerning the establishment of the consent of States to be bound by a treaty, reservations and the functions of the depositary, may apply both before and after entry into force. 'Necessarily' should not accordingly be construed as meaning 'exclusively'; the concept is rather that there may be treaty provisions regulating other matters which may also arise before entry into force — for example, a clause providing for provisional application.⁶⁵

Article 25 of the Convention in fact deals with provisional application. Neither the Harvard draft nor McNair refer in terms to provisional application of a treaty. The inclusion in treaties of clauses providing for the provisional application of the whole or part of the treaty is a relatively recent development in international practice. It has been brought about principally because there may on occasions be an urgent need to realise immediate international co-operation on certain problems.⁶⁶

The Commission had refrained from proposing any rule regarding the termination of provisional application of a treaty, stating that this point should be left to be determined by the agreement of the parties and the operation of the rules regarding termination of treaties.⁶⁷ The Conference thought otherwise, however, and, on the basis of proposals by Belgium and by Hungary and Poland, adopted what is now paragraph 2 of Article 25, providing that the provisional application of a treaty with respect to a State is terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party.

The text of Article 25 is not, however, without difficulty. In the first place, there are instances in international practice where a treaty may continue to apply provisionally among certain States notwithstanding that it has entered into force definitively between other States. A statement by the United Kingdom delegation expressing the understanding that 'the inclusion of the phrase "pending its entry into force" in paragraph 1 did not preclude the provisional application of a treaty by one or more States after the treaty had entered into force definitively between other States' encountered no objection at the Conference, and was indeed specifically endorsed by India.⁶⁸ In the second place, there are other instances where some only of the negotiating States may agree to apply the treaty or part of it provisionally pending its entry into force. Again, a statement by the United Kingdom delegation to the effect that 'paragraph 1(b) of [Article 25] would apply equally to the situation where certain of the negotiating States had agreed to apply the treaty or part of the treaty

provisionally pending its entry into force' encountered no opposition at the Conference and was specifically endorsed by India and Greece.⁶⁹

Notes

- 1 For a fascinating survey of the early history of full powers, see Mervyn Jones, *Full Powers and Ratification* 1–33 (1946).
- 2 McNair, *op. cit.*, at 120.
- 3 O'Connell, *op. cit.*, at 211.
- 4 The form and extent of full powers was a major preoccupation of the plenipotentiaries at the Congress of Munster which opened in 1644: Mervyn Jones, *op. cit.*, at 5–8. It has been suggested that this sensitivity to the question of full powers had been provoked by the earlier refusal by Richelieu to ratify the Treaty of Regensburg of 1630 on the ground that the French delegates (Brulart and Père Joseph) had exceeded the powers conferred upon them: O'Connell, 'A *Cause Célèbre* in the History of Treaty-making: the Refusal to Ratify the Peace Treaty of Regensburg in 1630', 42 *B.Y.I.L.* (1967), 71–90.
- 5 A recent survey of treaty instruments published in the United Kingdom Treaty Series during the years 1971 to 1974 reveals that 54 per cent of the treaty instruments so published were in the form of 'exchange of notes': Satow, *Guide to Diplomatic Practice*, 248 (5th ed. 1979).
- 6 *Official Records, First Session*, 13th meeting (Carmona).
- 7 *Loc. cit.* (Jagota).
- 8 *Yearbook of the International Law Commission* (1966–II), 193.
- 9 Satow, *op. cit.*, at 62, who gives examples of general and special full powers. Further examples of full powers to sign can be found in *The Treaty Maker's Handbook*, 37–44 (Blix and Emerson eds., 1973).
- 10 *Yearbook of the International Law Commission* (1966–II), 240. p. 240. For a contrary view, see Hostert, 'Droit international et droit interne', *Annuaire français de droit international* (1969), 108.
- 11 *Loc. cit.*, at 194.
- 12 *Ibid.*
- 13 *Official Records, First Session*, 14th meeting (Blix).
- 14 *Loc. cit.* (Ruda). It should be noted that a Malaysian proposal to insert the words 'expressly or by necessary implication' in the text of what is now Art. 8 was likewise defeated. As objection had been taken to the word 'necessary', it may be inferred not only that confirmation may be implied, but also that the implication need not be a 'necessary' one.
- 15 *Yearbook of the International Law Commission* (1966–II), 194.
- 16 There is no definition of the term as such in the Vienna Convention. France proposed a definition of the expression at the first session of the Vienna Conference (A/Conf. 39/C.1/L.24), but withdrew this proposal at the opening of the second session; see M. Hubert's statement at the 84th meeting of the Committee of the Whole, recorded in *Official Records, Second Session*, 213. The definition suggested is based on the wording of Art. 20(2) of the Vienna Convention, which makes it clear that reservations to restricted multilateral treaties require acceptance by all the parties.
- 17 *Official Records, First Session*, 4th meeting (Virally).
- 18 In this context note the terms of Art. 247 of the EEC Treaty and Art. 224 of the Euratom Treaty.

- 19 Art. 237, EEC Treaty, and Art. 205, Euratom Treaty. But where there is more than one applicant State, and the conditions of admission are incorporated in a multi-lateral agreement adopted by the original member States and the applicant States, the agreement may exceptionally authorise entry into force on condition that all the original member States and at least one applicant State ratify it. In such circumstances, there will obviously be a need, because of the close interdependence of the treaty provisions and the fact that they have been drawn up on the assumption that all applicant States will join the grouping, to make certain indispensable adaptations to the treaty, particularly the institutional provisions embodied therein. An interesting example of this exceptional type of arrangement will be found in Art. 2 of the Treaty concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community, signed at Brussels on 22 January 1972. The presence of the negotiators was confirmed when Norway failed to ratify the Treaty and Art. 2 had to be applied. See *Treaty Series* No. 1 (1973) — Part I (Cmnd. 5179-1) and *Treaty Series* No. 43 (1973) (Cmnd. 5277), the latter setting out the texts of the various Council Decisions of 1 January 1973, adjusting the instruments concerning the accession of new Member States to the European Communities.
- 20 As adopted by the Commission, the rule in paragraph 2 required that the procedural vote, as well as the substantive vote on the adoption of the text, should require a vote of 'two-thirds of the States *participating in the conference*' (emphasis supplied).
- 21 *Yearbook of the International Law Commission* (1966-II), 194-5. For a review of the discussion within the Commission on this particular issue, see Sohn, 'Voting Procedures in United Nations Conferences for the Codification of International Law', 69 *A.J.I.L.* (1975), 318-26.
- 22 *Official Records, Second Session*, 84th meeting (Stavropoulos).
- 23 *Loc. cit.*, 85th meeting (Yasseen).
- 24 *Loc. cit.*, 84th meeting (Stavropoulos). An amendment in this sense, proposed by Mexico and the United Kingdom, was adopted by a vote of 73-16-10 at the ninth plenary meeting of the Conference on 29 April 1969.
- 25 *Supra*, pp. 12-13.
- 26 *Official Records, First Session*, 15th meeting (Zemanek).
- 27 *Loc. cit.* (Yasseen).
- 28 The Luxembourg Government had pointed out the unsuitability of applying the two-thirds voting rule to regional conferences: see comment to Art. 6 of the 1962 ILC Report, reproduced in *Yearbook of the International Law Commission* (1966-II), 306. Sir Humphrey Waldock, in his *Fourth Report on the Law of Treaties* (A/CN.4/177 of 19 March 1965) maintained that 'if, in a regional conference, unanimity is the only acceptable voting rule the States participating will have no difficulty in arriving at a decision, by the two-thirds majority procedural vote ... to apply the unanimity rule' (at 58).
- 29 UN Doc. A/C.1/PV.1936; for a short survey of the debates on this point at the General Assembly in 1973, see Sohn, *loc. cit.*, at 333-40.
- 30 Sohn, *loc. cit.*, at 341-7.
- 31 UN Doc. A/Conf.62/WP.2.
- 32 Sohn, *loc. cit.*, at 348-51.
- 33 De Lacharrière, 'Aspects juridiques de la négociation sur un "package deal" à la Conférence des Nations Unies sur le droit de la mer', *Essays in honour of Erik Castren* (1979), 38.
- 34 Sohn, *loc. cit.*, at 352.

- 35 *Yearbook of the International Law Commission* (1966–II), 347.
- 36 *Op. cit.*, at 133.
- 37 29 *A.J.I.L.* (1935), Supplement, 763. In support of this view, the Harvard Research cites Crandall, *Treaties: their Making and Enforcement*, 2 (1916), Hall, *International Law*, s. 110 (8th ed., 1924), and various other writers.
- 38 Fitzmaurice, 'Do treaties need ratification?', 15 *B. Y.I.L.* (1934), 129.
- 39 Blix, 'The requirement of ratification', 30 *B. Y.I.L.* (1953), 380.
- 40 *Yearbook of the International Law Commission* (1966–II), 198.
- 41 *Loc. cit.*, at 359–60. Frankowska confirms this by pointing out that, of the 1,597 treaties published in the United Nations Treaty Series between 1963 and 1965, only 151 contain no provision on the means to express consent to be bound by them: 'De la prétendue présomption en faveur de la ratification', 73 *Revue Générale de Droit International Public* (1969), at 78.
- 42 The representatives of Czechoslovakia, Poland, South Africa, the United Kingdom, Denmark, Hungary, the Federal Republic of Germany, Sweden, Japan and Australia.
- 43 The representatives of Venezuela, Switzerland, Uruguay, Bulgaria, Iraq, Guinea, Iran, France, Ethiopia, Turkey, Greece, Congo (Brazzaville) and India.
- 44 The representatives of Romania, Israel, Ghana, Italy, Yugoslavia, Nigeria and Brazil.
- 45 *Official Records, First Session*, 18th meeting, at 94–5.
- 46 Bolintineanu, 'Expression of consent to be bound by a treaty in the light of the 1969 Vienna Convention', 68 *A.J.I.L.* (1974), 677.
- 47 *Yearbook of the International Law Commission* (1966–II), 196.
- 48 Satow, *op. cit.*, at 249, who gives the example of the Memorandum of Understanding of 5 October 1954, between the Governments of the United Kingdom, the United States, Italy and Yugoslavia about the Free Territory of Trieste.
- 49 Satow, *op. cit.*, at 272.
- 50 *Ibid.*, at 273.
- 51 *Ibid.*; as regards reservations, see Chapter III *infra*.
- 52 McNair, *op. cit.*, at 149.
- 53 *Yearbook of the International Law Commission* (1966–II), 199.
- 54 Satow, *op. cit.*, at 278, who gives examples of accession by invitation.
- 55 Cf. Art. 9 of the Harvard Research draft, *loc. cit.*, at 778–87.
- 56 *Cours de droit international*, 372–3 (Gidel trans. 1929).
- 57 *Op. cit.*, at 199.
- 58 *Official Records, First Session*, 20th meeting.
- 59 *Treaty Series* No. 1 (1973) — Part I, at 292–4.
- 60 *Yearbook of the International Law Commission* (1966–II), 210.
- 61 Examples of these differing types of entry into force clause will be found in *The Treaty-Maker's Handbook*, 75–84 (Blix and Emerson eds., 1973).
- 62 The practice followed by the Secretary-General of undertaking a consultation of interested States as regards the date of entry into force when there is a need to determine whether instruments accompanied by reservations to which objection has been taken should be counted towards the total has been criticised as unnecessarily complex by Imbert, 'A l'occasion de l'entrée en vigueur de la Convention de Vienne sur le droit des traités', 26 *Annuaire français de droit international* (1980), 524–40.
- 63 A/CN.4/101 (14 March 1956), at 42.
- 64 *Loc. cit.*, at 75.
- 65 For a more detailed account of the genesis of Art. 24, see Nascimento e Silva, 'Le facteur temps et les traités', 154 *Recueil des Cours* (1977), at 226–9.

- 66 A good example is provided by the OEEC Convention, designed to give effect to the Marshall plan for economic cooperation in Europe in 1948. Given the urgency of the problems to be overcome, Art. 24(b) of the Convention recorded the agreement of the signatories 'to put it into operation on signature on a provisional basis and in accordance with their several constitutional requirements'; see *Treaty Series* No. 59 (1949); Cmnd. 7796. For other examples of provisional application clauses, see *The Treaty-Maker's Handbook*, at 84–6.
- 67 *Yearbook of the International Law Commission* (1966–II), 210.
- 68 *Official Records, Second Session*, 11th plenary meeting.
- 69 *Loc. cit.*, statements by Sir Francis Vallat (UK), Jagota (India) and Eustathiades (Greece). For further comment on Art. 25, see Nascimento e Silva, *loc. cit.*, at 229–35.

CHAPTER THREE

Reservations

I. Introduction: what is a reservation?

The topic of reservations to multilateral conventions is inevitably complex. First of all, there arises the preliminary question of what exactly is a reservation. Article 2(1)(d) of the Convention defines the term 'reservation' as meaning:

... a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

This definition requires a certain amount of explanation. What is the object and purpose of a reservations régime? McNair explains it in the following terms:

A State which, while wishing to become a party to a treaty, considers that it can only do so if it can exclude or modify the application to itself of one or more of its particular provisions can achieve this object in one or more of the following ways:

1. By inducing the other party or parties to insert an express term to this effect ... ;
2. By a reservation attached to the signature of a treaty by its representatives and duly recorded in a *procès-verbal* or protocol of signature;
3. By a reservation attached to the ratification and duly recorded;
4. In the case of a treaty left open for accession, by a reservation attached to its accession and duly recorded.¹

Against this background, one has to appreciate the significance of the phrase 'unilateral statement' in the Convention definition of the term 'reservation'. Clearly, the Convention definition would exclude special stipulations contained in a treaty and agreed upon by the negotiating States which qualify, limit or vary the legal effect of other provisions of the treaty either as between all the parties or as between a particular party and all or some of the remaining parties. A reservation is a declaration which is external to the text of a treaty.² It is unilateral at the time of its formulation; but it produces no legal effects unless it is accepted, in one way or another, by another State.³

This is not to say that a particular treaty may not provide for the making of particular reservations, thereby excluding, either expressly or impliedly, the making of other reservations. This will depend on the terms of the treaty, and of the specific 'reservations clause' contained in the treaty. 'Reservations clauses' in individual treaties vary widely in their formulation and legal effect. They range from clauses which permit a party, by means of a reservation, to exclude from the application of the treaty defined categories of subject matter,⁴ through clauses which specify in terms the precise reservations which can be made by a party,⁵ to clauses which limit the faculty of making specified reservations to named States.⁶ Within this range of reservation clauses may be found others which fix the maximum number of reservations which can be made to a treaty or which fix a maximum number of articles of the treaty to which reservations can be made.⁷

Where a particular treaty specifies whether, and if so what, reservations can be made, the terms of the treaty will prevail; and attention will be directed later to a particular case-study on the question of reservations to the Geneva Convention on the Continental Shelf of 1958.⁸

The next element in the Convention definition of the term 'reservation' which requires exegesis is the phrase 'however phrased or named'. In the 1966 Report of the International Law Commission transmitting to the General Assembly its final set of draft articles on the law of treaties, the Commission drew attention to the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. The Commission went on to say:

Such a declaration may be a mere clarification of the State's position or it may amount to a reservation according as it does or does not vary or exclude the application of the terms of the treaty as adopted.⁹

This cryptic observation calls for more detailed analysis. Prior to the conclusion of the Convention, doctrine had been divided as to whether interpretative declarations should or should not be assimilated to reservations properly so-called. There were some who took the view that interpretative declarations amounted to reservations. Thus David Hunter Miller, in an early work on reservations, defined the term 'reservation' as a declaration that purported 'to add to or limit the terms of a treaty, or to exclude or to modify, or to qualify, *to interpret*, or to explain certain terms.'¹⁰ Kappeler also considered an interpretative declaration to be a form of reservation by which 'un État fixe définitivement, en ce qui le concerne, l'interprétation d'une ou plusieurs stipulations du traité'.¹¹ So also the Harvard Research appears to have considered that interpretative declarations amount to reservations.¹² Fitzmaurice, on the other hand, has drawn attention to the need for careful analysis of the terms of any declaration made by a State on signature, ratification or accession:

Governments often append to their signatures, ratifications or acceptances of a treaty, statements or declarations of a purely explanatory character e.g. regarding the position or motives of the government in becoming a party; or which are of a political character, or of domestic import. These may loosely be termed 'reservations', but strictly are not, because, on examination, it appears that they leave unaffected the obligations of the treaty for the party concerned. Similarly, governments not infrequently make declarations in which they do not say they will not carry out, or will only partly carry out, a certain provision — but make statements of intention, or say how they understand or propose to interpret or apply the provision, either generally or in certain events. Whether this will amount strictly to an actual reservation or not will depend on whether, by way of special interpretation, the party concerned is really purporting, so far as its own obligations are concerned, to alter the substantive content or application of the provision affected; or whether the statement is truly interpretational, and merely clarifies some obscurity, or makes explicit something that in the clause is only implicit. Thus, the use of the *term* 'reservation' is not conclusive in either sense.¹³

The accuracy of Fitzmaurice's comment is strikingly confirmed by a study of certain declarations made by States on signing, ratifying or acceding to the Vienna Convention on the Law of the Treaties itself. Thus, Bolivia, on signing the Convention, made a declaration to the effect that 'the shortcomings of the Vienna Convention are such as to postpone the realisation of the aspirations of mankind' but that 'nevertheless, the rules endorsed by the Convention do represent significant advances, based on the principles of international justice which Bolivia has traditionally supported.' This is clearly a statement of a political character not amounting to a reservation.

Where a statement made by a State on signature, ratification or accession purports to interpret a particular provision of a treaty, it may not be easy to determine whether it amounts to a reservation *stricto sensu*. It has been suggested that a distinction should be drawn between a 'mere interpretative declaration' (that is to say, a statement that simply purports to offer an interpretation) and a 'qualified interpretative declaration' (that is to say, a statement whereby a State makes its ratification of or accession to a treaty subject to, or on condition of, a particular interpretation of the whole or part of the treaty). On the basis of this distinction, a 'qualified interpretative declaration' should be treated as a reservation *stricto sensu* since the declaring State is making its acceptance of the treaty subject to or conditional upon acquiescence in its interpretation (regardless of the true interpretation) and is thereby purporting to exclude or to modify the terms of the treaty.¹⁴ The problem with this view of the matter is that it puts other States in a very difficult if not impossible position. The declaring State may have framed its declaration (relating to a particular provision of a treaty) as an interpretative declaration rather than a reservation precisely because the treaty prohibits reservations to that particular provision. If it amounts to a 'mere interpretative declaration', then other States can properly indicate that they do not accept the interpretation; if they do not so indicate, they will risk, in their relations with the State having made the interpretative declaration, being fixed with the

interpretation put on the particular provision. But if it is characterised (whether at the time or subsequently) as a 'qualified interpretative declaration' which is to be treated as a reservation, it will be an impermissible reservation because attached to a provision of the treaty to which reservations are prohibited. In the circumstances, it seems that the declaring State's own characterisation of its statement as a 'declaration' rather than a 'reservation' should be accepted.¹⁵

The third and final element in the Convention definition to which attention should be directed is the phrase 'to exclude or modify'. There is no difficulty about the use of the term 'exclude' since the doctrine and practice of States confirms that a reservation directed to exclude the legal effect of a particular provision of a treaty is a true reservation.¹⁶ More doubtful is the use of the term 'modify' in the definition. It seems that the verb 'modify' was included in the definition to take account of the possibility of so-called extensive reservations, that is to say, declarations or statements purporting to enlarge the obligations contained in the treaty.¹⁷ But a declaration whereby a State purports to enlarge the obligations it has assumed under a treaty cannot truly be termed a reservation, since the essence of a reservation is to *restrict* or *limit* the obligations of the reserving State under the treaty. So-called 'extensive reservations' are, in the final analysis, no more than unilateral declarations whereby the declaring State assumes obligations without receiving anything in exchange.¹⁸

II. The traditional rule

It will be apparent from the foregoing discussion that the question of reservations arises almost exclusively in the context of multilateral conventions. In the case of negotiations leading to the conclusion of a *bilateral* treaty, any attempt by one of the negotiating States *unilaterally* to vary the terms of the agreed text after the negotiations have been concluded will simply mean that the negotiations have to be reopened in order to establish whether *consensus ad idem* can be reached on the text. As the International Law Commission put it in their commentary to the series of draft provisions on reservations included in the final set of draft articles transmitted to the General Assembly in 1966:

- A reservation to a bilateral treaty presents no problems, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement — either adopting or rejecting the reservation — the treaty will be concluded; if not, it will fall to the ground.¹⁹

What we are therefore concerned with is the régime applicable to reservations to multilateral conventions. The traditional rule governing reservations to multilateral conventions was that any such reservation, in order to be

admitted, must be accepted by all the contracting parties to the treaty in question. This was certainly the practice during the period prior to the First World War. Malkin gives numerous examples of how this practice developed in the context of reservations to the International Sanitary Convention (Venice) 1892, the International Sanitary Convention (Dresden) 1893, the International Sanitary Convention (Paris) 1894, the International Sugar Convention (Brussels) 1902, and many other multilateral conventions concluded in the early years of the twentieth century. In some of these instances, the consent of the other negotiating States to the making of the reservation was specifically recorded in a *procès-verbal* or protocol drawn up and signed on behalf of all the signatories; in other instances, it was clear from the record that the reservation had been drawn to the attention of the other signatories and had been tacitly accepted.²⁰ During this period, there were two occasions on which the depositary Government refused to accept that a State which had participated in the negotiations could accompany its signature or ratification of the resulting convention with a reservation which had not been drawn to the attention of and accepted by the other negotiating States. Thus, the Netherlands Government adopted this attitude in relation to a reservation which the British Government wished to append to its signature of the Convention for the Adaptation of the Principles of the Geneva Convention to Maritime Warfare, drawn up at the Hague Peace Conference of 1899; and the French Government adopted a similar attitude when the British Government sought to attach certain reservations to its ratification of the International Sanitary Convention (Paris) 1903.²¹ One eminent authority sums up the position resulting from these pre-1914 instances in the following terms:

From these and other examples, it could be deduced that before the creation of the League of Nations, it was an established customary rule of international law that the acceptance of a reservation to a multilateral convention by all signatory States was necessary, in order that it could be regarded as admissible, and the reserving State considered a party to the treaty. If the unanimous approval of the signatories could not be obtained, the reserving State had the alternative of withdrawing the reservation or refraining from becoming a party to the treaty.²²

The customary rule was applied in the practice of the League of Nations. It was subjected to detailed analysis in the context of an attempt by Austria, which had not participated in the negotiations leading up to the adoption and opening for signature of the Second Opium Convention in 1925, to attach a reservation to her signature of the Convention. The British Government addressed a memorandum to the Secretariat of the League of Nations drawing attention to this incident and proposing that the question of the admissibility of reservations to general conventions should be investigated by the Committee of Experts for the Progressive Codification of International Law. The Committee of Experts was duly seized with the problem and, on 24 March 1927, submitted a report which contained the following passage:

It no doubt frequently happens that, in the course of the negotiation of a treaty, agreement is reached between the contracting parties regarding a reservation which is put forward by one of them and accepted by the others. In such a case the former party may naturally, when appending its signature to the act concluded, mention and maintain its reservation. The other contracting parties, when they also append their signatures, signify thereby that they have accepted the reservation and consent thereto.

But when the treaty declares, as we have seen above, that it permits signature by Powers which have not taken part in its negotiation, such signature can only relate to what has been agreed upon between the contracting Powers. In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void.²³

Thus, the unanimity rule was emphatically endorsed by the Committee of Experts. The Council of the League of Nations adopted the report of the Committee of Experts and, in a resolution, requested the Secretary-General '... to be guided by the principles of the report regarding the necessity for acceptance by all the Contracting States when dealing with reservations made after the close of a conference at which a convention is concluded, subject, of course, to any special decisions taken by the conference itself.'²⁴ Thereafter, the practice of the Secretariat of the League of Nations conformed with the terms of this resolution; and the Secretariat of the United Nations took over and followed the League practice until the *Genocide Convention* case in 1951.

III. The Genocide Convention case

The traditional unanimity rule governing the admissibility of reservations to multilateral conventions was closely linked with the traditional unanimity rule applying to the establishment of the text of such conventions. If, as was the practice prior to the First World War, the text of a multilateral convention had to be adopted by unanimity, every State participating in the negotiations could be assured that no provision which was unacceptable to it could be made binding upon it without its consent.²⁵ Unanimous consent as regards the admissibility of reservations was the logical concomitant of the unanimity rule applying to the establishment of the text of multilateral conventions.

It must not be thought, however, that the unanimity rule governing the admissibility of reservations was universally acknowledged to be correct even during the League of Nations period and the early post-war period. A small number of States, principally from Eastern Europe, adhered to the view that every State had the sovereign right to make reservations unilaterally and at will, and to become a party to treaties subject to such reservations, even if they were objected to by other contracting States. A larger group of countries from Latin America supported, and applied in relations *inter se*, the so-called

pan-American system which, as it was refined by the Governing Board of the Pan-American Union in 1932, included the following key elements:

- (a) as between States which ratify a treaty without reservations, the treaty applies in the terms in which it was originally drafted and signed;
- (b) as between States which ratify a treaty with reservations and States which accept those reservations, the treaty applies in the form in which it may be modified by the reservations; and
- (c) as between States which ratify a treaty with reservations and States which, having already ratified, do not accept those reservations, the treaty will not be in force.²⁶

Rules (a) and (b) clearly reflect the classical doctrine on the admissibility of reservations as it had developed over the years. But rule (c) marked a significant departure from the traditional unanimity rule in the sense that it permitted a reserving State to become a party to the treaty in relation to those contracting States which were prepared, expressly or tacitly, to accept the reservation. In other words, a reserving State might become a party to an inter-American convention in spite of the objections of one or more States to its reservation; the convention would not, however, be in force as between the reserving and the objecting States.²⁷

These underlying differences of approach on the admissibility of reservations to multilateral conventions came to the surface in 1950 when a number of States sought to attach reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (the 'Genocide Convention') adopted by the United Nations General Assembly on 9 December 1948. The Genocide Convention contains no provision governing reservations. A number of contracting States had objected to certain of those reservations and the Secretary-General, as depositary of the Convention, had become engaged in correspondence with those States as to the legal effect of their objections. Accordingly, the General Assembly decided to request an advisory opinion from the International Court of Justice on certain key questions relating to the reservations to the Genocide Convention. The most significant of these questions were:

- I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?
- II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:
 - (a) The parties which object to the reservation?
 - (b) Those which accept it?

The Court ruled by seven votes to five, in response to question I:

that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention

and, again by seven votes to five, in response to question II:

- (a) that if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;
- (b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.²⁸

This Delphic pronouncement was initially received with disfavour in many quarters. Particular criticism was directed towards the 'compatibility' test on the ground that it was fundamentally subjective and uncertain in its application and would prove to be unworkable in practice.²⁹ Certain of the critics, in addition to expressing doubts about the 'compatibility' test as such, also pointed out that the Court's response to question II significantly undermined the principle of the integrity of the text of a treaty and could result in fragmenting multilateral conventions into bilateral treaties of variable content.³⁰

IV. Developments in the International Law Commission

At the same time as it had submitted to the International Court of Justice its request for an advisory opinion on questions relating to reservations to the Genocide Convention, the United Nations General Assembly had invited the International Law Commission, in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions as a matter of priority.

The Commission undertook this study immediately and reported in 1951. By this time, the Court had rendered its advisory opinion in the Genocide Convention case. The Commission shared the view of the critics that the 'compatibility' test, as formulated by the Court, was too subjective and was accordingly not suitable for application to multilateral conventions in general. The Commission believed it reasonable to assume that, ordinarily at least, the parties regard the provisions of a convention as an integral whole so that a reservation to any of them might be deemed to impair its object and purpose. As long as the application of the 'compatibility' test remained a matter of subjective discretion so that some of the parties might accept a reservation and others not, the status of the reserving State in relation to the convention would remain unclear; and, in particular, questions could arise as to whether an

instrument of ratification or accession accompanied by a reservation to which some of the contracting States had objected should count towards the number of instruments of ratification or accession required to bring the convention into force. For all these reasons, the Commission recommended reversion to the traditional rule whereby unanimous consent was required to admit a State as a party to a treaty subject to a reservation, while proposing some minor modifications to that rule.³¹

The General Assembly was divided in its reaction to the Commission's 1951 report on reservations. The outcome was a deliberately neutral procedural resolution which, as regards reservations to the Genocide Convention, requested the Secretary-General to conform his practice to the advisory opinion rendered by the Court; and, as regards all future conventions concluded under the auspices of the United Nations of which he would become the depositary:

1. to continue to act as depositary in connection with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and
2. to communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.³²

The Commission was of course entitled, and indeed required, to keep the question of reservations to multilateral conventions under review in the context of its continuing work on the law of treaties in general. Both Lauterpacht and Fitzmaurice, as Special Rapporteurs on the law of treaties within the Commission, formulated proposals based upon the traditional unanimity rule but incorporating ameliorations designed to introduce a greater degree of flexibility into the system. Fitzmaurice in addition distinguished, for the purposes of reservations, between bilateral, plurilateral and general multilateral treaties. For bilateral and plurilateral treaties (the latter being defined as multilateral treaties made between a limited number of States for purposes specially interesting those States) no reservations could be made unless the treaty in terms so permitted or all the other negotiating States expressly so agreed.³³

A fundamental change in the Commission's approach to reservations came about with the appointment in 1961 of Waldock as Special Rapporteur on the law of treaties in succession to Fitzmaurice. In his First Report, Waldock proposed a flexible system whereby, in the case of a multilateral convention which was silent on reservations, a reserving State would be considered to be party to the convention vis-à-vis any other contracting State that did not give notice of its objection to the reservation. Waldock advanced the following arguments in favour of his proposals and against the traditional requirement of unanimous consent:

- (1) The Commission's 1951 proposals based upon the principle of unanimous consent had not commended themselves to the General Assembly;

- (2) The international community had undergone rapid expansion since 1951 so that the very number of potential participants in multilateral conventions now seemed to make the unanimity principle less appropriate and less practicable;
- (3) The system which had been in operation *de facto* since early 1952 for all new multilateral conventions of which the Secretary-General was depositary approximated closely in its effect to the flexible system he was advocating;
- (4) Under his proposed flexible system, as under the unanimity system, the essential interests of each individual State were to a very great extent safeguarded by the two fundamental rules that (i) a State which within a reasonable time objected to a reservation was entitled to regard the treaty as not being in force between it and the reserving State and (ii) a State which assented to another State's reservation was nevertheless entitled to object to any attempt by the reserving State to invoke against it the provisions of the treaty from which the reserving State had exempted itself by its reservation;
- (5) The flexible system would not have detrimental effects on the drafting of multilateral conventions; and although it might tend in some measure to stimulate the formulation of reservations, one could exaggerate the adverse effect of reservations upon the general integrity of the text of a treaty since the majority of reservations related to a particular point which a particular State for one reason or another found difficult to accept.³⁴

The Commission was clearly influenced by these considerations in giving broad approval to Waldock's proposals. In its 1962 Report to the General Assembly, the Commission starkly reversed the stand it had taken in 1951³⁵ by including the following passage in its commentary on the preliminary set of draft articles on reservations:

... the Commission was agreed that, when the treaty itself deals with reservations, the matter is concluded by the terms of the treaty. Reservations expressly or impliedly prohibited by the terms of the treaty are excluded, while those expressly or impliedly authorized are *ipso facto* effective. The problem concerns only the cases where the treaty is silent in regard to reservations, and here the Commission was agreed that the Court's principle of 'compatibility with the object and purpose of the treaty' is one suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties and of objections to them. The difficulty lies in the process by which that principle is to be applied, and especially where there is no tribunal or other organ vested with standing competence to interpret the treaty. Where the treaty is the constituent instrument of an international organisation, the Commission was agreed that the question is one for determination by its competent organ. It was also agreed that where the treaty is one concluded between a small group of States, unanimous agreement to the acceptance of a reservation must be presumed to be necessary in the absence of any contrary indication. Accordingly, the problem essentially concerns multilateral treaties which are not constituent instruments of international organisations and which contain no provisions in regard to reservations.³⁶

The Commission was divided in its approach to the question of how the 'compatibility' criterion should be applied. Various solutions were considered, including a 'collegiate' system under which the reserving State would become a party to the treaty only if the reservation were accepted by a given proportion of the other interested States. In the end, however, the Commission concluded

that considerations in favour of a flexible system, under which it was for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty, outweighed the arguments advanced in favour of retaining a 'collegiate' system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned.³⁷ It is this flexible system which, with minor modifications, is now incorporated in the Convention.

V. Developments at the Vienna Conference

The final set of draft articles on reservations submitted by the Commission in 1966 differed in only minor respects from the preliminary proposals adopted on first reading in 1962. One significant change related to the nature and scope of objections. The Commission had suggested in 1962 that the 'compatibility' criterion was applicable to objections as well as to reservations. However, several Governments³⁸ had, in their written comments on the 1962 proposals, pointed out that very often objections were made to a reservation not on the ground that the reservation was incompatible with the object and purpose of the treaty, but on other grounds. The Commission accordingly dropped the application of the 'compatibility' criterion to objections, explaining the position in the following terms:

Although an objection to a reservation normally indicates a refusal to enter into treaty relations on the basis of the reservation, objections are sometimes made for reasons of principle or policy without the intention of precluding the entry into force of the treaty between the objecting and reserving States³⁹

The Convention régime on reservations is incorporated in Articles 19 to 23. The substance of the régime can be summarised as follows:

- (a) States are entitled to formulate a reservation on signature or ratification of a treaty or accession thereto unless the treaty prohibits the reservation or provides that only specified reservations, which do not include the reservation in question, may be made (Article 19(a) and (b));
- (b) In other cases, States are entitled to formulate a reservation unless the reservation is incompatible with the object and purpose of the treaty (Article 19(c)). This is of course the test laid down in the *Genocide Convention* case;
- (c) A reservation expressly authorized by a treaty does not require subsequent acceptance unless the treaty so provides (Article 20(1));
- (d) Reservations to a restricted multilateral treaty⁴⁰ require acceptance by all the parties, and reservations to a constituent instrument of an international organization, unless the constituent instrument otherwise provides, require the acceptance of the competent organ of that organization (Articles 20(2) and (3));

- (e) In cases not falling within (c) and (d) and unless the treaty otherwise provides:
- (i) the express or tacit acceptance of a reservation by another contracting State constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States, tacit acceptance being assumed if no objection is raised within a specified period;⁴¹
 - (ii) an objection to a reservation by another contracting State does not preclude the entry into force of the treaty as between the objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;
 - (iii) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation (Articles 20(4) and (5)).
- (f) The legal effect of a reservation established with regard to another party in accordance with these provisions is that it:
- (i) modifies for the reserving party in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and
 - (ii) modifies those provisions to the same extent for that other party in its relations with the reserving State (Article 21(1)).
- (g) When an objecting State has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation (Article 21(3)).

It will be seen that the régime is a complex one and conceals many difficulties of application. There are some minor variations from the proposals submitted by the Commission in 1966. The most significant change made at the Conference was in relation to the rule concerning the legal effect of an objection to a reservation. The Commission had put forward the rule that an objection to a reservation precludes the entry into force of a treaty as between the objecting and reserving States. The Conference, on the basis of a proposal by the Soviet Union at the second session, put the onus on the objecting State to declare positively that its objection had the effect of precluding entry into force (see (e)(ii) above). At the conclusion of the short debate on the Soviet amendment at the second session, the Expert Consultant, Sir Humphrey Waldock, stated:

... the problem was merely that of formulating a rule one way or the other. The essential aim was to have a stated rule as a guide to the conduct of States, and from the point of view of substance it was doubtful if there was any very great consideration in

in favour of stating the rule in one way rather than the other, provided it was perfectly clear.⁴²

Notwithstanding the force of this argument, the reversal of the rule has already had some consequences and will unquestionably have further consequences for the future. The most significant feature of international practice concerning reservations is the part played by tacit consent. Tacit consent is of course presumed from failure to object to a reservation, and provision is made for this in the Convention. But in no way should one underestimate the role played by tacit consent in this context; Governments tend to be sluggish in their reaction to reservations, if only for the reason that many administrations are simply not equipped to keep under constant review reservations to multilateral conventions formulated by other States, whether on signature or ratification. This may be regrettable, but it is a fact of international life. The reversal of the rule concerning the legal effect of an objection to a reservation enlarges the role played by tacit consent and unquestionably renders it easier for a reserving State to be or remain in treaty relations with an objecting State. Objections to reservations have frequently been made in the past in an endeavour to persuade the reserving State to withdraw its reservation;⁴³ the pressure to withdraw a reservation may now be slight if the treaty may enter into force between the reserving and objecting State in any case. There is the additional psychological consideration that the onus is now on the innocent party (that is to say, the objecting State) to declare publicly that it does not intend to have treaty relations with the reserving State; this is an onus which smaller States may find difficult to discharge when the reserving State is a powerful neighbour.

VI. Reservations to the Convention itself

It may be argued that these considerations are theoretical. But we already have some experience as to how the Convention régime on reservations will operate. The Vienna Conference decided, in full knowledge of the consequences, that it would not have a separate provision governing reservations to the Convention itself.⁴⁴ Articles 19 to 23 of the Convention accordingly apply to reservations to the Convention itself.⁴⁵

A number of declarations and reservations have been made by various States on signature of the Convention, and still more have been made on ratification or accession. It will be noted that, on signature, declarations or reservations were appended by Afghanistan, Bolivia, Costa Rica, Ecuador, the Federal Republic of Germany, Guatemala, Morocco and the United Kingdom. On ratification or accession, further declarations or reservations were made by Argentina, Canada, Chile, Denmark, Finland, Japan, Kuwait, Morocco, Syria, Tunisia, the United Kingdom and Tanzania. Objections to certain of

these reservations have been lodged by Canada, Israel, Japan, New Zealand, Sweden, the United Kingdom and the United States.⁴⁶ We have already commented on the Bolivian declaration made on signature of the Convention;⁴⁷ this clearly amounts to no more than a statement of a political character. Other declarations appended on signature or ratification which are in the nature of interpretative declarations are more numerous. There is first the declaration made by Afghanistan and Morocco on signature (and confirmed by Morocco on ratification) stating their understanding that sub-paragraph 2(a) of Article 62, concerning fundamental change of circumstances, does not cover (or apply to) unequal and illegal treaties or treaties contradictory to the principle of self-determination.⁴⁸ There is, second, the declaration made by Ecuador on signature about the effect of Article 4 of the Convention. And there is, third, the declaration made by the United Kingdom on signature, and confirmed on ratification, about the relationship between Article 66 of the Convention and the United Kingdom's acceptance of the compulsory jurisdiction of the International Court of Justice.⁴⁹

It may be permissible to say something in explanation of the United Kingdom declaration. Article 66 of the Convention (which will be discussed in more detail later) provides for reference to the International Court of Justice, at the instance of any of the parties, of any dispute concerning the interpretation or application of the articles relating to *jus cogens*; and for compulsory conciliation in relation to disputes concerning the interpretation or application of any of the other articles in Part V of the Convention. But the report of the conciliation commission provided for under the Annex to the Convention is not to be binding on the parties; it is to have 'no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute'.⁵⁰ Now, sub-paragraph (i)(a) of the declaration made by the United Kingdom Government on 1 January 1969, accepting as compulsory the jurisdiction of the International Court of Justice, had specifically excluded 'any dispute which the United Kingdom ... has agreed with the other Party or Parties thereto to settle by some other method of peaceful settlement.'⁵¹ Conciliation may, in principle, be regarded as another method of peaceful settlement, but the difficulty is that the procedures for conciliation laid down in the Annex to the Convention may not lead to a settlement, since the report of the conciliation commission is not binding on the parties, and no provision is made for further action in the event of the conciliation effort proving unsuccessful. Against this background, the United Kingdom Government were clearly anxious to ensure that, *vis-à-vis* States parties to the Vienna Convention which had accepted as compulsory the jurisdiction of the International Court of Justice, the combined effect of Article 66 of the Convention and of the terms of the United Kingdom optional clause declaration should not be such as to oust the jurisdiction of the Court.

We must now consider what are clearly intended to be reservations to the Convention in the strict sense. We can ignore those made on signature and not yet confirmed on ratification, since Article 23(2) of the Convention provides that a reservation formulated on signature must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty and that, in such a case, the reservation shall be considered as having been made on the date of its confirmation. (By way of contrast, an express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.) Reservations in the strict sense have been made on signature by Costa Rica and Guatemala, seeking to preserve certain constitutional provisions as against the terms of the Convention or otherwise to vary or modify those terms; but, as neither Costa Rica nor Guatemala has yet sought to ratify the Convention, no occasion has yet arisen for other States to take a final position on these reservations. Reservations in the strict sense have also been made on ratification by Argentina and Chile. These reservations relate to Article 45(b), concerning acquiescence, and Article 62, paragraphs 1 and 3, respectively. There appears to have been no reaction to these reservations by Argentina and Chile.

Finally, it remains to consider those reservations formulated by States on ratification or accession which have encountered objections. Here one must draw attention to the reservations formulated by Syria when acceding to the Convention on 2 October 1970. They are five in number and require careful analysis. First, there is a declaration that acceptance of the Convention by Syria does not signify recognition of Israel. Second, there is a political statement (which clearly does not amount to a reservation in the strict sense) that Article 81 is not in conformity with the aims and purposes of the Convention in that it does not allow all States, without distinction or discrimination, to become parties to it. Third, there is an interpretative declaration stating that the Syrian Government interpret the expression 'threat or use of force' as used in Article 52 of the Convention as extending also to the employment of economic, political, military or psychological coercion and to all types of coercion constraining a State to conclude a treaty against its wishes or its interests. Fourth, there is a specific reservation (in the strict sense) stating that the Syrian Government does not accept the non-applicability of the principle of a fundamental change of circumstances with regard to treaties establishing boundaries, notwithstanding the terms of Article 62(2)(a) of the Convention. Finally, and most significantly, there is a general reservation stating that the accession of Syria to the Convention shall not apply to the Annex to the Convention, which concerns obligatory conciliation. With this series of Syrian reservations, we may also conveniently consider a reservation which Tunisia attached to its accession to the Convention on 23 June 1971 stating that the dispute referred to in Article 66(a) of the Convention requires the consent of all parties thereto in order to be submitted to the International Court of Justice for a decision.

What has been the reaction of other States to the Syrian declarations and reservations and to the Tunisian reservation? It should be noted initially that the principle of tacit consent as formulated in the Convention is to the effect that a reservation is considered to have been accepted by a State if it raises no objection by the end of a period of twelve months after notification of the reservation or by the date on which it expresses its consent to be bound by the treaty, *whichever is later*. Accordingly, it is only those States which have ratified or acceded to the Convention which have been obliged to take a position on the Syrian declarations and reservations and on the Tunisian reservation.

A number of States, including some which have not yet expressed their consent to be bound by the Convention, have in fact taken a position on the Syrian declarations and reservations and on the Tunisian reservation. The United States Government, in a note transmitted to the Secretary-General on 26 May 1971, objected to the Syrian reservation excluding the applicability of the Annex to the Convention as being incompatible with the object and purpose of the Convention. The note continued:

The United States Government intends, at such time as it may become a party to the Vienna Convention on the Law of Treaties, to reaffirm its objection to the foregoing reservation and to reject treaty relations with the Syrian Arab Republic under all provisions in Part V of the Convention with regard to which the Syrian Arab Republic has rejected the obligatory conciliation procedures set forth in the Annex to the Convention.

The effect of this objection would appear to be that, as between the United States and Syria, Parts I to IV and Parts VI to VIII of the Convention will apply if or when the United States becomes a party to the Convention, but that Part V will not apply, with the possible exception of Articles 53, 64 and 66(a).

In relation to the Tunisian reservation, the United States Government made a similar objection in a note transmitted to the Secretary-General on 29 September 1972 indicating that, at such time as it becomes a party to the Convention, it would reaffirm its objection and declare that 'it [would] not consider that Article 53 or 64 of the Convention is in force between the United States of America and Tunisia'.

Denmark, on ratifying the Convention on 1 June 1976, appears to have taken a similar stand, declaring that, as between itself and any State which formulates, wholly or in part, a reservation relating to the provisions of Article 66 of the Convention concerning the compulsory settlement of certain disputes, 'Denmark will not consider itself bound by those provisions of Part V of the Convention, according to which the procedures for settlement set forth in Article 66 are not to apply in the event of reservations formulated by other States'. Canada, in a note transmitted to the Secretary-General on 22 October 1971, has likewise stated that it 'does not consider itself in treaty relations

with the Syrian Arab Republic in respect of those provisions of the ... Convention ... to which the compulsory conciliation procedures set out in the Annex to that Convention are applicable'. Sweden, in ratifying the Convention on 4 February 1975, equally objected to the Syrian and Tunisian reservations on settlement procedures and declared:

... firstly, that the treaty relations between Sweden and the Syrian Arab Republic will not include those provisions of Part V of the Convention to which the conciliation procedure in the Annex applies and, secondly, that the treaty relations between Sweden and Tunisia will not include Articles 53 and 64 of the Convention.

Japan made a declaration, in terms similar to that of Sweden, when acceding to the Convention on 2 July 1981.

With these reactions should be contrasted the even stronger attitude taken by the United Kingdom in relation to the Syrian and Tunisian reservations. The United Kingdom declaration appended to its instrument of ratification of the Convention deposited on 25 June 1971 contains two observations on the Syrian reservation. First, and with reference to the Syrian interpretative declaration on Article 52, the declaration records that 'the United Kingdom does not accept that the interpretation of Article 52 put forward by the Government of Syria correctly reflects the conclusions reached at the Conference of Vienna on the subject of coercion; the Conference dealt with this matter by adopting a Declaration on this subject which forms part of the Final Act'.⁵² Second, and of immeasurably greater consequence, the United Kingdom lodged a formal objection to the reservation entered by the Government of Syria in respect of the Annex to the Convention and declared that it did not accept the entry into force of the Convention as between the United Kingdom and Syria. In a further note of 22 June 1972, the United Kingdom similarly lodged a formal objection to the Tunisian reservation regarding Article 66(a) of the Convention and declared that it did not accept the entry into force of the Convention as between the United Kingdom and Tunisia.⁵³

Why was this serious step taken? As will be seen later,⁵⁴ the dominant issue at the Vienna Conference was the relationship between the series of articles relating to the invalidity, termination and suspension of operation of treaties and the provisions to be written into the Convention concerning the settlement of disputes arising on the interpretation or application of these articles. A majority of States represented at the Conference were not prepared to commit themselves to what they perceived to be the degree of progressive development represented by Part V of the Convention, and in particular by the sometimes vague and ill-defined grounds of invalidity, without an assurance that there would be automatically available procedures for the settlement of disputes when a particular ground of invalidity was invoked. Article 66 of the Convention represented the hard-won and vital compromise on this dominant issue. A reservation to Article 66 or to the Annex might or might

not eventually be determined to be incompatible with the object and purpose of the Convention; certainly, any such reservation, to use the words of the International Law Commission, 'undermined the basis of the treaty or of a compromise made in the negotiations'.⁵⁵ The Syrian and Tunisian reservations relating to Article 66 and the Annex to the Convention struck at the roots of the compromise solution which had been achieved with such difficulty at the Vienna Conference. It is perhaps not altogether surprising that, in these circumstances, the United Kingdom exercised its right under Article 20 of the Convention to declare that the effect of its objections was to preclude the entry into force of the Convention as between the United Kingdom and Syria and as between the United Kingdom and Tunisia.

The United Kingdom's reaction to the Syrian and Tunisian reservations presents no particular problem from the juridical point of view. The United Kingdom was clearly within its rights in taking up the position it did. What about the more muted United States reaction, which has now been followed by a number of other States? This raises an interesting doctrinal problem. Article 20(4)(b) of the Convention, as will be recalled, gives the objecting State an option to declare that the effect of its objection is to preclude the entry into force of the treaty as between the objecting and the reserving State. Can this be utilised by the objecting State to preclude treaty relations only as regards part of a treaty? This is hitherto untested ground, but in principle there would appear to be no reason why an objection to a reservation may not produce this effect, provided the treaty is of such a nature that separability of its provisions is a practicable proposition. One could possibly apply here by analogy the terms of Article 44(3) of the Convention. The analogy is all the more apt since the negotiating history clearly and unequivocally demonstrates that the inclusion of automatically available procedures for the settlement of Part V disputes formed an essential basis of the consent of many States to be bound by the series of substantive articles on the invalidity, termination and suspension of operation of treaties. It would seem to follow, however, from the nature of the objections taken by the United States and others to the Syrian and Tunisian reservations that Syria or Tunisia, as the case may be, would be entitled to refuse treaty relations with the United States and others on the basis set out in their notes, since the objections amount in essence to an offer of treaty relations on a limited scale.

VII. Recent jurisprudence on reservations

Before leaving the question of reservations, it may be helpful to consider what recent international jurisprudence has to offer on the topic. It is relatively rarely that international tribunals are called upon to consider issues concerning the admissibility of reservations and the legal effect of objections to reservations. There was however some discussion of certain aspects of the law relating to

reservations in the *Nuclear Tests* cases (Australia/France and New Zealand/France); and, more significantly, the Court of Arbitration in the *UK/French Continental Shelf* case was called upon to consider in detail the combined legal effect of reservations attached by France to her accession to the Convention on the Continental Shelf of 1958, and of objections lodged by the United Kingdom to those reservations.

Let us take the *Nuclear Tests* cases⁵⁶ first. It will be recalled that the International Court of Justice, in its judgments of 20 December 1974, found, by nine votes to six, that the claims of Australia and New Zealand no longer had any object and that the Court was not therefore called upon to give a decision thereon. In so ruling, the Court avoided pronouncing on the issue of jurisdiction, Australia and New Zealand having argued that the Court's jurisdiction was founded on Article 17 of the General Act for the Pacific Settlement of International Disputes 1928, read together with Articles 36(1) and 37 of the Statute of the Court, or, alternatively, on Article 36(2) of the Statute of the Court, Australia and New Zealand, on the one hand, and France, on the other hand, having both made declarations thereunder.

Four judges,⁵⁷ in a powerful joint dissent, dealt with the arguments that had been advanced on the jurisdictional issue. For present purposes, we can confine ourselves to one of those arguments. In denying the applicability of the General Act as between France and Australia with respect to the dispute over nuclear tests, France had sought to argue that the terms of the declarations of the two countries under the optional clause must be regarded as prevailing over the terms of their accessions to the General Act of 1928; this would have had the effect of rendering applicable the reservation relating to 'disputes concerning activities connected with national defence' contained in the French optional clause declaration of 1966. The four dissenting judges rejected this French argument, primarily on the ground of the separate and independent character of the two main sources of the Court's jurisdiction — treaties and optional clause declarations. But they went further by drawing attention to the consideration that 'the 1928 Act contains a strict code of rules regulating the making of reservations, whereas no such rules govern the making of reservations to acceptances of the Court's jurisdiction under the optional clause'. Consequently, they maintained, 'to admit that reservations made by a State under the uncontrolled and extremely flexible system of the optional clause may automatically modify the conditions under which it accepted jurisdiction under the 1928 Act would run directly counter to the strict system of reservations provided for in the Act'.⁵⁸

France had ingeniously sought to argue in the alternative that her 'national defence' reservation contained in her optional clause declaration could be regarded as having taken effect, in relation to the 1928 Act, only at the end of the then current five year period of duration of the Act, namely in September 1969. This alternative submission was designed to overcome the difficulty

presented by Article 45(2) of the General Act, which required any changes in reservations to be notified at least six months before the end of the current five-year period of the Act's duration. The four dissenting judges also rejected this argument. They cited the definition of the term 'reservation' in Article 2(1)(d) of the Vienna Convention on the Law of Treaties, and commented as follows:

Thus, in principle, a reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some unspecified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations. The mere fact that it never seems to have occurred to the Secretary-General of the League or of the United Nations that reservations made in declarations under the optional clause are of any concern whatever to parties to the General Act shows how novel is this suggestion.⁵⁹

Although this dictum derives from a dissenting opinion, there can be little doubt as to its essential correctness.⁶⁰ It would be wholly inconsistent with the basic concept of a reservation to a treaty which is designed to exclude or to modify the legal effect of certain provisions of the treaty in their application to the reserving State to regard that reservation as being somehow transferable to another treaty.

A much broader range of issues concerning reservations arose in the *UK/French Continental Shelf* arbitration.⁶¹ To understand how these issues had to be determined in the course of the arbitration, it is necessary to bear certain facts in mind. The United Kingdom ratified the 1958 Continental Shelf Convention on 11 May 1964. France acceded to the 1958 Continental Shelf Convention on 14 June 1965. The French instrument of accession was accompanied by a communication in the following terms:

In depositing this instrument of accession, the Government of the French Republic declares:

Article 1

In the view of the Government of the French Republic, the expression 'adjacent' areas implies a notion of geophysical, geological and geographical dependence which *ipso facto* rules out an unlimited extension of the continental shelf.

Article 2 (paragraph 4)

The Government of the French Republic considers that the expression 'living organisms belonging to sedentary species' must be interpreted as excluding crustaceans, with the exception of the species of crab termed 'barnacle'; and it makes the following reservations:

Article 4

The Government of the French Republic accepts this article only on condition that the coastal State claiming that the measures it intends to take are 'reasonable' agrees that if their reasonableness is contested it shall be determined by arbitration.

Article 5 (paragraph 1)

The Government of the French Republic accepts the provisions of Article 5, paragraph 1, with the following reservations:

(a) An essential element which should serve as the basis for appreciating any 'interference' with the conservation of the living sources of the sea, resulting from the exploitation of the continental shelf, particularly in breeding areas for the maintenance of stocks, shall be the technical report of the international scientific bodies responsible for the conservation of the living resources of the sea in the areas specified respectively in Article 1 of the Convention for the Northwest Atlantic Fisheries of 8 February 1949, and Article 1 of the Convention for the Northeast Atlantic Fisheries of 24 January 1959.

(b) Any restrictions placed on the exercise of acquired fishing rights in waters above the continental shelf shall give rise to a right to compensation.

(c) It must be possible to establish by means of arbitration, if the matter is contested, whether the exploration of the continental shelf and the exploitation of its national resources result in an interference with the other activities protected by Article 5, paragraph 1, which is 'unjustifiable'.

Article 6 (paragraphs 1 and 2)

In the absence of a specific agreement, the Government of the French Republic will not accept that any boundary of the continental shelf determined by application of the principle of equidistance shall be invoked against it:

- if such boundary is calculated from baselines established after 29 April 1958;
- if it extends beyond the 200-metre isobath;
- if it lies in areas where, in the Government's opinion, there are 'special circumstances' within the meaning of Article 6, paragraphs 1 and 2, that is to say: the Bay of Biscay, the Bay of Granville, and the sea areas of the Straits of Dover and of the North Sea off the French coast.⁶²

Notification of France's instrument of accession with the accompanying communication was received by the United Kingdom from the Secretary-General of the United Nations on 30 July 1965. On 14 January 1966 the United Kingdom addressed a communication to the Secretary-General in the following terms:

Article 1: The Government of the United Kingdom take note of the declaration made by the Government of the French Republic and reserve their position concerning it.

Article 2, paragraph 4: This declaration does not call for any observations on the part of the Government of the United Kingdom.

Article 4: The Government of the United Kingdom and the Government of the French Republic are both parties to the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes done at Geneva on the 29th of April 1958. The Government of the United Kingdom assume that the declaration made by the Government of the French Republic is not intended to derogate from the rights and obligations of the parties to the Optional Protocol.

Article 5, paragraph 1: Reservation (a) does not call for any observations on the part of the Government of the United Kingdom.

The Government of the United Kingdom are unable to accept reservation (b).

The Government of the United Kingdom are prepared to accept reservation (c) on the understanding that it is not intended to derogate from the rights and obligations

of parties to the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.

Article 6, paragraphs 1 and 2: The Government of the United Kingdom are unable to accept the reservations made by the Government of the French Republic.⁶³

It is against this background of 'reservation' and 'objection' that various issues concerning the nature and admissibility of the French 'reservations' and the legal effect of the United Kingdom 'objections' to those reservations were argued before the Court of Arbitration. It was of course highly relevant to consideration of these issues that the 1958 Continental Shelf Convention contained a reservations provision (Article 12) which stipulated that 'at the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than Articles 1 to 3 inclusive'. It was also highly relevant that the United Kingdom was contending for the application of Article 6 of the 1958 Continental Shelf Convention to the entire delimitation, maintaining that this required, in the absence of agreement between the parties, a median line solution since, in the view of the United Kingdom, another boundary line could not be justified by 'special circumstances'. France, on the other hand, argued that the delimitation must be effected on the basis of equitable principles since, by reason of the United Kingdom objection to the French reservations to Article 6 of the Convention, the Convention as a whole, and Article 6 in particular, was not in force as between the United Kingdom and France.

There was little dispute between the parties on certain preliminary questions. As the Court of Arbitration noted in its award,⁶⁴ the parties were agreed in considering that the legal effect of the French 'reservations' and the United Kingdom 'objections' to those reservations had to be determined by reference to the law governing reservations to multilateral conventions in the years 1965 and 1966. They were also agreed that the law governing reservations was then undergoing a major evolution in the wake of the Advisory Opinion in the *Genocide Convention* case and the continuing work of the International Law Commission on the law of treaties; but they disagreed as to the precise state of the law governing reservations in the years in question and also as to the practice followed by each of them in regard to the need for unanimous consent to reservations.

The Court of Arbitration shared the view of the parties that the combined effect of the French 'reservations' and the United Kingdom response thereto had to be appreciated '... in the light of the law in force when those acts occurred'. While accepting that the law governing reservations was, at that time, undergoing an evolution, the Court did not think that any importance attached in the instant case to the precise state which that evolution might have reached in the years 1965–66, since the evolution then in progress related primarily to those cases where the treaty was silent on reservations. The Court then considered the relevance of Article 12 of the 1958 Convention:

Article 12, by its clear terms, authorised any Contracting State, including the French Republic, to make its consent to be bound subject to reservations to articles other than Articles 1 to 3 inclusive. It follows that the United Kingdom, when it ratified the Convention in 1964, gave its express consent to the French Republic's becoming a party to the Convention subject to such reservations as the latter might make to any article other than Articles 1, 2 or 3 The responses made by the United Kingdom to the reservations of the French Republic have thus to be appreciated in the light of its previous agreement to the formulation of those reservations. On the other hand, the Court considers the view expressed by both Parties that Article 12 cannot be read as committing States to accept in advance any and every reservation to articles other than Articles 1, 2 or 3 to be clearly correct. Such an interpretation of Article 12 would amount almost to a licence to contracting States to write their own treaty and would manifestly go beyond the purpose of the Article. Only if the Article had authorised the making of specified reservations could Parties to the Convention be understood as having accepted a particular reservation in advance. But this is not the case with Article 12, which authorises the making of reservations to articles other than Article 1 to 3 in quite general terms. Article 12 ... leaves contracting States free to react in any way they think fit to a reservation made in conformity with its provisions, including refusal to accept the reservation. Whether any such reaction amounts to a mere comment, a mere reserving of position, a rejection merely of the particular reservation or a wholesale rejection of any mutual relations with the reserving State under the treaty consequently depends on the intention of the State concerned.⁶⁵

This is an important passage. It serves, in a negative way, to clarify what is meant by a reservation 'expressly authorized' by a treaty which, according to Article 20(1) of the Vienna Convention on the Law of Treaties, does not require subsequent acceptance by the other contracting States unless the treaty so provides. Article 12 of the 1958 Convention did not provide for *specified reservations*, even though it may have specified articles to which reservations might be made.⁶⁶ The distinction is crucial. In the case of a specified reservation which the contracting Parties have agreed in advance may be made, there can be no question of challenging the reservation as impermissible or objecting to it on other grounds; in the case of a reservations article which confines itself to indicating expressly or by necessary implication the range of articles to which reservations may be made, any particular reservation may be open to challenge as being impermissible or may be objected to on other grounds.

The Court of Arbitration rejected the French argument that the United Kingdom 'objections' to the French reservations to Articles 5(1) and 6 of the 1958 Convention had the legal effect of precluding entry into force of the Convention as a whole between the United Kingdom and France. In doing so, the Court appears to have been particularly influenced by arguments based upon the United Kingdom observations with respect to the French reservation to Article 4. In those observations, the United Kingdom had drawn attention to the consideration that both France and the United Kingdom were parties to the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. In its written and oral pleadings, the United Kingdom had pointed

out that, under the terms of that Protocol, the two States could be parties thereto in relation to each other only if they were parties to the same Geneva Convention on the Law of the Sea. As the 1958 Continental Shelf Convention was the only one to which France was a party, the United Kingdom argued that its observations regarding the Optional Protocol contained in its communication of 14 January 1966 were consistent only with the inference that, notwithstanding its reaction to certain of the French reservations, it considered itself as in treaty relations with France under that Convention. The Court was clearly impressed by this argument deriving from the precise terms of the United Kingdom response and accepted that:

... the terms of the communication of 14 January 1966, and more especially its references to the Optional Protocol of Signature, indicate that it was not the intention of the United Kingdom to prevent by that communication the entry into force of the Convention as between the two countries.⁶⁷

The Court was less impressed by other United Kingdom arguments going to the admissibility of the French reservations to Article 6. As regards the first French reservation to Article 6, the United Kingdom contended that, although formally expressed to attach to Article 6, it was in reality a reservation either to Articles 3 and 4 of the Territorial Sea Convention or to the rules of customary law regarding the use of straight baselines. The Court rejected this contention, holding that the first reservation was both a true reservation and a reservation to Article 6 itself and not to the general rules of international law regarding straight baselines.⁶⁸

The United Kingdom invoked different arguments to challenge the admissibility of the second French reservation to Article 6. It was pointed out that this second French reservation to Article 6 was closely linked with the French declaration on Article 1, since it was well known that France had been opposed in 1958, and was still opposed in 1965, to the extension of the concept of the continental shelf beyond the 200-metre isobath through the exploitability criterion. Accordingly, it was argued that the second French reservation to Article 6 was in reality a reservation to Article 1 to which reservations were not permitted. The Court rejected this United Kingdom submission, holding that 'the reservation, whatever the motive which inspired it, relates in substance as well as in form to the regime of delimitation prescribed in Article 6; for it is so expressed as to have its effect only in the context of a delimitation by application of the principle of equidistance in Article 6'.⁶⁹

By way of contrast, the United Kingdom did not seek to challenge the third French reservation to Article 6 as inadmissible. Rather, it was argued not to be a true reservation but an interpretative declaration — that is to say, a mere advance notice by France of areas in which it considered special circumstances to exist. It could not be a true reservation because the object of the 'reservation' was already covered by the very terms of Article 6 which embodied a 'combined

equidistance — special circumstances rule'. The 'reservation' was in reality an invocation of Article 6 and not an exclusion or modification of it. France, on the other hand, contended that the effect of the third reservation to Article 6 was not to interpret Article 6 but to modify the scope of its application.

The Court concluded that, although the third reservation doubtless had within it elements of interpretation, it also appeared to constitute a specific condition imposed by France on its acceptance of the delimitation regime provided for in Article 6. The Court recalled the definition of the term 'reservation' in Article 2(1)(d) of the Vienna Convention on the Law of Treaties, and went on to say:

This definition does not limit reservations to statements purporting to exclude or modify the actual terms of the treaty; it also covers statements purporting to exclude or modify the *legal effect* of certain provisions in their application to the reserving State.⁷⁰

The Court's ruling on the nature and effect of the third French reservation to Article 6 has not escaped criticism. It has been forcibly represented that the legal effect of Article 6 is not to impose one delimitation solution more than another and that a 'reservation' purporting to designate named areas as 'special circumstances' does nothing to modify the legal effect of Article 6:

Cela signifie que, dans un cas concret, il n'est pas possible de dire à l'avance que l'article 6 impose nécessairement telle délimitation plutôt que telle autres. Son 'effet juridique' est donc, par nature, susceptible d'appréciations différentes. C'est pourquoi, si un Etat déclare qu'il existe, selon lui, des circonstances spéciales dans une certaine zone, il ne 'modifie' rien. Une telle déclaration n'est qu'une prise de position, dont il faudra tenir compte, mais qui ne s'impose ni à l'autre Etat, ni au Tribunal; le premier pourra toujours la contester, le second pourra toujours procéder à un réexamen de la question.⁷¹

Having concluded that all three French reservations to Article 6 were true reservations to that Article and accordingly admissible, the Court had to consider the effect of the French reservations on the assumption that the 1958 Convention was, as the Court had already found, a treaty in force as between the parties. Here again the parties were in complete disagreement, France maintaining that, by virtue of the United Kingdom objections to the French reservations to Article 6, Article 6 as a whole could not be in force between the parties and was therefore inapplicable in the proceedings, and the United Kingdom contending that the effect of its objection to the French reservations to Article 6 was to render the *reservations* unopposable to the United Kingdom, with the result that Article 6 applied as between the parties unaffected by the reservations.

The Court rejected both extreme positions; but drew inspiration from the terms of Article 21(3) of the Vienna Convention on the Law of Treaties in determining the legal effect of the combination of reservations and objection:

Thus, the combined effect of the French reservations and their rejection by the United Kingdom is neither to render Article 6 inapplicable *in toto*, as the French Republic contends, nor to render it applicable *in toto*, as the United Kingdom primarily contends. It is to render the Article inapplicable as between the two countries to the extent, but only to the extent, of the reservations; and this is precisely the effect envisaged in such cases by Article 21, paragraph 3, of the Vienna Convention on the Law of Treaties and the effect indicated by the principle of mutuality of consent.⁷²

There is no doubt a certain inevitability about this conclusion, given the Court's earlier finding that the third French reservation was a true, admissible reservation. But let us examine the consequences. The third French reservation to Article 6 declared that France would not accept the application of the principle of equidistance in areas where, in its opinion, there were 'special circumstances', such 'special circumstances' existing in *inter alia* the Bay of Granville. The nature of this reservation is such that, as one commentator has pointed out, Article 6 had to be excluded entirely so far as the delimitation in the Channel Islands sector was concerned: for the phrase 'to the extent of the reservation' had to be interpreted as meaning 'in the cases provided for in the reservation'.⁷³ This indeed points up a latent ambiguity in the text of Article 21(3) of the Vienna Convention on the Law of Treaties. Article 21(1) of the Convention states that a reservation duly established with regard to another party 'modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation'. Article 21(3), dealing with the case where a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, likewise states that 'the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation'. Given the parallelism of the language, is there any difference in the legal effect of a reservation accepted by a party and one objected to by a party in circumstances where the latter has not opposed entry into force of the treaty as between itself and the reserving State? This question was the subject of a confused debate at the second session of the Vienna Conference.⁷⁴ The short answer would appear to be that where the reservation *excludes* a particular provision, there is no difference between the two cases. But what is the position where the reservation *modifies* the legal effect of a particular provision? It might be thought that there was a difference between the two cases in such circumstances, the difference being that acceptance of a 'modifying' reservation would mean that the clause which was the subject of the reservation would be applied in the modified form, whereas objection to a 'modifying' reservation would mean that the clause which was the subject of the reservation would not be applied at all. This is however inconsistent with a textual interpretation of Article 21(3) of the Convention since it gives no meaning to the phrase 'to the extent of the reservation'. Most commentators accordingly believe that, even in the case of a 'modifying'

reservation, the legal effects of an objection to and acceptance of the reservation are identical, when the treaty remains in force between the objecting and reserving States.⁷⁵ Imbert however suggests that the wording of Article 21(3) could justify the reaction of certain States such as the United States, Denmark, Canada, Sweden and Japan, to the Syrian and Tunisian reservations to the Vienna Convention on the Law of Treaties,⁷⁶ in the sense that it leaves open the possibility of an objecting State rejecting the application of provisions which are not directly the subject of the reservation itself.⁷⁷ It may be doubted whether Article 21(3) can truly be read as bearing this interpretation, given that the phrase 'the provisions to which the reservation relates' would, on any normal construction, be read as applying only to those provisions which are *directly* touched by the reservation.

VIII. Conclusions

The topic of reservations to multilateral conventions is one of the most difficult in the law of treaties. The Convention system establishes a balance (albeit a precarious balance) between the right of a contracting State to formulate a reservation to a treaty (provided that the treaty neither prohibits reservations *in toto* nor prohibits the particular reservation directly or indirectly) and the right of other contracting States to object to that reservation. The system is flexible — some might say too flexible — in the sense that it is left to individual contracting States to apply the 'compatibility' criterion in those cases where the treaty is silent on reservations.⁷⁸ It also leaves unanswered a whole series of questions of the kind that arose in the *UK/French Continental Shelf* arbitration, particularly questions concerning the distinction between reservations and interpretative declarations and between permissible and impermissible reservations. Despite these imperfections, the Convention system does provide some general guidelines for assessing the combined legal effect of reservation and objection. In practice, a great deal of discretion is left to individual contracting States to determine their attitude towards particular reservations; and this is an area where State practice will undoubtedly foster further development of the law. Paradoxically, experience does not as yet substantiate the fear expressed by many of those who upheld the traditional 'unanimity' doctrine — namely, that to allow a greater faculty for States to become parties to multilateral conventions subject to reservations would encourage the making of reservations and result in the fragmentation of treaty regimes. A recent study of reservations to multilateral conventions during the period from 1919 to 1971 suggests that most reservations are of a fairly minor nature and that only 6 per cent of reservations submitted can be said to have 'major substantive' significance; the same study also concludes that there has not been a startling increase in the making of reservations in the post-war era (as compared to the pre-war era) if one takes into account the enormously increased expansion

and diversity of the international community.⁷⁹ Although this may be reassuring, the fact remains that reservations will continue to play an important role in the development of the law of treaties, and that issues concerning the validity or permissibility of particular reservations or the legal effect of objections to those reservations will from time to time form the subject of international litigation.

Notes

- 1 McNair, *op. cit.*, at 160–1.
- 2 Imbert, *Les réserves aux traités multilatéraux* (1978), at 10; in the same sense, Ruda, 'Reservations to Treaties', 146 *Recueil des Cours* (1975), 105.
- 3 Ruda, *loc. cit.*
- 4 For example, the European Convention on the Peaceful Settlement of Disputes, done at Strasbourg on 29 April 1957, permits parties to make reservations excluding from the application of the Convention '... disputes concerning particular cases or clearly specified subject-matters such as territorial status, or disputes falling within clearly defined categories'; *Treaty Series* No. 10 (1961), Cmnd. 1298.
- 5 Examples are given in Satow, *Guide to Diplomatic Practice*, 285–6 (5th ed. by Lord Gore-Booth 1979).
- 6 Under Annex II to the European Convention on the Place of Payment of Money Liabilities, done at Basle on 16 May 1972, the faculty of making reservations to Art. 3 of Annex I is confined to Italy and the Netherlands: see *Conventions and Agreements concluded within the Council of Europe and which concern the European Committee on Legal Co-operation*, (1974), 170.
- 7 Imbert, *op. cit.*, at 168–9.
- 8 *Infra*, pp. 70–6.
- 9 *Yearbook of the International Law Commission*, (1966–II), 190.
- 10 *Reservations to Treaties*, 79 (1919).
- 11 Kappeler, *Les réserves dans les traités internationaux*, 13 (1958).
- 12 Harvard Research in International Law, Law of Treaties, 29 *A.J.I.L.* (1935), Supplement, 860.
- 13 Fitzmaurice, 'Law and Procedure of the International Court of Justice, 1951–4: Treaty interpretation and other treaty points', 33 *B.Y.I.L.* (1957), 273.
- 14 McRae, 'The Legal Effect of Interpretative Declarations', 49 *B.Y.I.L.* (1978), at 160–1.
- 15 Bowett, 'Reservations to Non-restricted Multilateral Treaties', 48 *B.Y.I.L.* (1976–77), 69; see also *infra*, pp. 74–5 for a further analysis of these difficulties in the light of the Award in the *UK/French Continental Shelf Arbitration*.
- 16 Ruda, *loc. cit.*, at 106–7.
- 17 *Ibid.*, at 107.
- 18 Imbert, *op. cit.*, at 16.
- 19 *Yearbook of the International Law Commission* (1966–II), 203; see also Ruda, *loc. cit.*, at 109–10, Reuter, *op. cit.*, at 89 and Satow, *op. cit.*, at 286.
- 20 Malkin, 'Reservations to Multilateral Conventions', 7 *B.Y.I.L.* (1926), at 141–62.
- 21 Imbert, *op. cit.*, at 24–5.
- 22 Ruda, *loc. cit.*, at 112: cf. Holloway, *Modern Trends in Treaty Law*, 480–1 (1967).
- 23 Document C.357.M.130. 1927.V of 13 July 1927, reproduced in 2 Rosenne, *The Progressive Codification of International Law [1925–1928]*, 25–7 (1972).

- 24 Cited in McNair, *op. cit.*, at 163.
- 25 Reuter, *Introduction au droit des traités*, 89 (1972).
- 26 For a more detailed account of the development of the pan-American system prior to 1951, see the written statement submitted to the International Court of Justice in the *Genocide Convention* case by the Organization of American States: *Pleadings, Oral Arguments, Documents (Genocide Convention case)*, at 15–20: see also Ruda, *loc. cit.*, at 115–33, who also reviews subsequent developments in the inter-American system.
- 27 Ruda, *loc. cit.*, at 121.
- 28 *I.C.J. Rep.* 1951, at 29–30.
- 29 Fitzmaurice, 'Reservations to Multilateral Conventions', 2 *I.C.L.Q.* (1953), 1–26 and 'The Law and Procedure of the International Court of Justice 1951–4; Treaty Interpretation and other Treaty Points', 33 *B.Y.I.L.* (1957), 272–93.
- 30 Holloway, *op. cit.*, at 505–8; Imbert, *op. cit.*, at 67.
- 31 *Yearbook of the International Law Commission* (1951–II), 130–1.
- 32 G.A. Resolution 598 (VI) of 12 January 1952.
- 33 For a fuller account of the Lauterpacht and Fitzmaurice proposals, see Ruda, *loc. cit.*, at 156–61.
- 34 *Yearbook of the International Law Commission* (1962–II), at 62–5; see also Ruda, *loc. cit.*, at 161–4.
- 35 *Supra*, pp 58–9.
- 36 *Yearbook of the International Law Commission* (1962–II), at 178–9.
- 37 *Loc. cit.*, at 180.
- 38 Notably, the Governments of Australia, Denmark and the United States.
- 39 *Yearbook of the International Law Commission* (1966–II), 207.
- 40 A restricted multilateral treaty is one concluded by a limited number of negotiating States whose object and purpose is such 'that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty' (Art. 20(2) of the Convention). Obvious examples would be the Treaty establishing the European Economic Community and the other basic European Community treaties.
- 41 The specified period being twelve months after the State concerned was notified of the reservation or the date on which it expressed its consent to be bound by the treaty, whichever is the later (Art. 20(5)).
- 42 *Official Records, Second Session*, 10th plenary meeting.
- 43 Denza, *Diplomatic Law*, 229–30 (1976), in relation to the reservations formulated by Egypt, Morocco, Portugal and Cambodia to Art. 37(2) of the Vienna Convention on Diplomatic Relations.
- 44 A specific proposal by Spain to prohibit reservations to Part V of the Convention was rejected by sixty-two votes to nine, with thirty-three abstentions, in the concluding stages of the Conference, after strong objections had been voiced by the delegations of Brazil, Israel, the Soviet Union, India, the United Kingdom and Nigeria: see *Official Records, Second Session*, 34th plenary meeting, paras. 93–102.
- 45 This may seem a surprising conclusion in view of the terms of Art. 4 of the Convention. But there is considerable evidence in the *travaux préparatoires* to support it. The set of draft final clauses proposed by Brazil and the United Kingdom (A/Conf.39/C.1/L.386/Rev.1) did not contain a reservations clause. In introducing that proposal, the representative of Brazil commented on the absence of a reservations clause, saying that either such a clause '... would be identical with the provisions already contained in the Convention and therefore unnecessary, or ... would be different and therefore contradictory'; and the representative of the

- United Kingdom said that 'the effect of having no provision [on reservations] could be that Articles [19 to 23] might be applied': *Official Records, Second Session*, 100th meeting (Nascimento e Silva and Sinclair). The Australian delegation was also of the view that, in the absence of a specific provision on reservations, the residual rules laid down in Arts. 19 to 23 would apply: *Official Records, Second Session*, 101st meeting (Brazil). In plenary, the Spanish delegation sought to reopen the matter by tabling a specific proposal to prohibit reservations to Part V of the Convention. This proposal was rejected. Among the reasons advanced against it was 'that the substantive articles concerning reservations in the Convention were perfectly adequate and it was preferable not to have a further article on reservations in the final provisions'; and that '... the question of reservations was already adequately covered in the Convention': *Official Records, Second Session* 34th plenary meeting (Rosenne and Jagota). There is therefore strong internal evidence to suggest that the Conference intended the provisions of Arts. 19 to 23 to apply to reservations to the Convention itself. The debate on what is now Art. 4 proceeded in parallel with the debate on the final clauses, and the question of reservations was not touched upon in the former context.
- 46 A full list of declarations, reservations and objections will be found in *Multilateral Treaties deposited with the Secretary-General: Status as at 31 December 1981* (doc. ST/LEG/SER.E/1), at 620–5.
- 47 *Supra*, p. 53.
- 48 As an example of the confusion which still subsists between reservations and interpretative declarations, it may be noted that Argentina objected to the 'reservations' made by Afghanistan and Morocco with respect to Art. 62(2)(a), and that Chile likewise objected to the reservations which have been made or may be made in future relating to Art. 62(2).
- 49 Similar declarations were made on ratification and accession by the Governments of New Zealand and Canada respectively.
- 50 Para. 6 of the Annex to the Convention.
- 51 *I.C.J. Yearbook* (1980–1), 87.
- 52 Japan made a similar observation on the Syrian interpretation of Art. 52, and the United States also expressed its concern about the Syrian interpretation.
- 53 New Zealand likewise objected to the Syrian reservation in respect of the Annex to the Convention and declared that it did not accept the entry into force of the Convention as between New Zealand and Syria; but, as regards the Tunisian reservation to Art. 66(a), New Zealand has confined itself to declaring that it '... does not consider New Zealand to be in treaty relations with Tunisia in respect of those provisions of the Convention to which the dispute settlement procedure provided for in Article 66(a) is applicable'.
- 54 *Infra*, Chapter VII.
- 55 *Yearbook of the International Law Commission* (1966–II), 205.
- 56 *I.C.J. Rep.* 1974, 253 (Australia v. France); *ibid.*, 457 (New Zealand v. France).
- 57 Judges Onyeama, Dillard, Jimenez de Arechaga, and Waldock.
- 58 *I.C.J. Rep.* 1974, at 349.
- 89 *Ibid.*, at 350.
- 60 Merrills, 'The International Court of Justice and the General Act of 1928', 39 *C.L.J.* (1980), at 159–61.
- 61 The two awards of the Court of Arbitration, consisting of Castren (President), Waldock, Gros, Briggs and Ustor have been published in the United Kingdom as a Command Paper (Miscellaneous No. 15 (1978): Cmnd. 7438). The awards have also been reprinted in 54 *I.L.R.*, 6–213.

- 62 Cited in first award, para. 33.
- 63 Cited in first award, para. 34.
- 64 First award, para. 37.
- 65 *Ibid.*, para. 39.
- 66 Bowett, *loc. cit.*, at 71: see also Satow, *op. cit.*, at 285–6, where several examples are given of treaties which authorize the making of specific reservations to particular identified provisions.
- 67 First award, para. 44.
- 68 *Ibid.*, para. 51; but note that the Court later found (para. 71) that the first French reservation to Art. 6 could be left out of account, because the United Kingdom had nowhere invoked straight baselines for the purpose of delimiting the median line boundary which it proposed.
- 69 *Ibid.*, para. 53; but again note that the Court later found (para. 73) that the agreement of the parties in the negotiations to prolong the delimitation of the boundary to the 1,000 metre isobath disposed both of the French reservation regarding the 200 metre isobath and the United Kingdom objection thereto. It is also worth recalling that Briggs, in his separate opinion attached to the first award, declared that if, following the method of the Court, he were to examine the legal nature of the French reservations to Art. 6, he '... would have to find the first and second reservations as invalid as reservations to Article 6 because, whatever modifying effect they purport to have on delimitations based upon equidistance, they attempt to exclude or modify rights not dependent upon Article 6, but upon Articles 1 and 2 of the ... Convention ... , to which no such reservations are permitted, or upon rules of customary international law, the rights deriving from which cannot, in my opinion, be excluded collaterally by another State through incidental reservations to a treaty which merely refers to such established rules of international law.'
- 70 *Ibid.*, para. 55: Briggs again disagreed with the Court on this analysis of the third reservation, holding it not to be a reservation at all.
- 71 Imbert, 'La question des réserves dans la décision arbitrale du 30 juin 1977 relative à la délimitation du plateau continental entre la République Française et le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord', 24 *Annuaire français de droit international* (1978), 35.
- 72 First award, para. 61.
- 73 Imbert, *loc. cit.*, at 47.
- 74 For a short summary of the debate, see Ruda, *loc. cit.*, at 198–200.
- 75 Ruda, *loc. cit.*, at 200. Chaumont also considers that the effect of Art. 21(3) of the Convention is to give to an objection '... la valeur d'un geste purement théorique, sans conséquences juridiques': 129 *Recueil des Cours* (1970), at 448.
- 76 *Supra*, pp. 66–7.
- 77 Imbert, *op. cit.*, at 265.
- 78 This in itself raises the fundamental question whether, in the case of a treaty which is silent on reservations, it is possible for a State to 'accept' a reservation which is incompatible with the object and purpose of the treaty. Bowett appears to take the view that any such reservation, being wholly impermissible, is incapable of being 'accepted' by another State: *loc. cit.*, at 83. Ruda, on the other hand, is of the view that 'there is nothing to prevent a State accepting a reservation, even if such reservation is intrinsically contrary to the object and purpose of the treaty, if it sees fit to do so': *loc. cit.*, at 190. As a matter of abstract logic, there is considerable force in the Bowett view; but, given that the objective determination of whether a reservation is compatible with the object and purpose of the treaty is likely to be made *ex post facto*, occasions may well arise when a State 'accepts' a reservation

subsequently found to be incompatible. For a fuller discussion of this issue, see Koh, 'Reservations to Multilateral Treaties: How International Legal Doctrine Reflects World Vision', 23 *Harvard International Law Journal* (1982), 71–116.

79 Gamble, 'Reservations to Multilateral Treaties: A Macroscopic View of State Practice', 74 *A.J.I.L.* (1980), 372–94.

CHAPTER FOUR

The observance, application, amendment and modification of treaties

Parts III and IV of the Vienna Convention cover the observance, application and interpretation of treaties and the amendment and modification of treaties respectively. Part III is divided into four sections headed observance of treaties, application of treaties, interpretation of treaties and treaties and third states. Part IV consists of three articles (Articles 39 to 41) under the heading amendment and modification of treaties. This chapter discusses the more important issues which arise under each of these headings, with the significant exception of the provisions on interpretation of treaties. The topic of interpretation, dealt with in Articles 31 to 33 of the Convention, requires rather fuller treatment in the light of recent jurisprudence and comment, and is accordingly the subject of Chapter V below.

I. Observance of treaties

Article 26 of the Convention reproduces, in lapidary language, the basic principle *pacta sunt servanda*, designated by the Commission as ‘the fundamental principle of the law of treaties’.¹ The Commission’s formulation of the principle:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith

was adopted by the Conference without change, although a group of States proposed to replace the words ‘every treaty in force’ by ‘every *valid* treaty’. This was objected to, however, by other delegations on the grounds that it would weaken the text, that questions of validity were governed by Part V of the Convention and that, in any event, a treaty duly determined to be invalid would not be ‘in force’ for the purpose of the application of the rule. In the event, the amendment was not pressed to a vote, but was referred to the Drafting Committee, which reported out the original Commission text without change, the sponsors of the amendment making statements to the

effect that the expression 'treaty in force' meant a treaty that was in force in accordance with the provisions of the Convention, including the provisions relating to validity.²

The Commission, in their commentary to what is now Article 26, stress that 'the principle of good faith is a legal principle which forms an integral part of the rule *pacta sunt servanda*'.³ The Commission was also of the opinion that a means should be found in the ultimate text of a convention on the law of treaties to emphasise the fundamental nature of the obligation to perform treaties *in good faith*; and suggested that 'the principle of *pacta sunt servanda* might suitably be given stress in the preamble to the convention just as it is already stressed in the Preamble to the Charter'.⁴ This suggestion was accepted by the Conference, the third paragraph of the preamble to the Convention noting 'that the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognised'.

The genesis of what is now Article 27 of the Convention, dealing with internal law and the observance of treaties, is to be found in an amendment tabled by Pakistan at the first session of the Conference.⁵ The Pakistan delegation wished it to be made clear that no party to a treaty might invoke the provisions of its constitution or its laws as an excuse for its failure to perform a treaty. The Pakistan amendment found general favour among delegations. It was explained that the Commission had not included this principle in its draft articles since it was thought that it belonged to the topic of State responsibility, although it had some relevance to the law of treaties.⁶ The Pakistan amendment was nonetheless approved in principle and referred to the Drafting Committee. It was reported out with the addition of a qualification to the effect that the rule is without prejudice to Article 46. Article 46, of course, establishes that a State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance. Given the existence of the possible exception in Article 46 concerning manifest violations, it was not unnatural that the Drafting Committee should take the view that some qualification was necessary in Article 27, since 'there might be a certain overlapping between the two articles'.⁷

II. Application of treaties

Articles 28–30 of the Convention deal with three separate aspects of the application of treaties — application *ratione temporis*, application to territory and application of successive treaties relating to the same subject-matter.

1. Application 'ratione temporis'

The Convention lays down the basic rule of non-retroactivity of treaties — that is to say that, unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of entry into force of the treaty with respect to that party. The basic rule of non-retroactivity is supported by the judgment of the International Court in the *Ambatielos* case (Preliminary Objection), where the Court rejected a Greek contention that it was entitled, under a treaty of 1926, to present a claim based on acts which had taken place in 1922 and 1923 on the ground that this would mean giving retroactive effect to the 1926 treaty.⁸

Article 28 is not, however, free from difficulty. Let us take first the opening phrase 'Unless a different intention appears from the treaty or is otherwise established'. The Commission, in their commentary to what is now Article 28, draw attention to the use of this phrase (rather than the more usual wording 'unless the treaty otherwise provides') and state that it has been used:

... in order to allow for cases where the very nature of the treaty rather than its specific provisions indicates that it is intended to have certain retroactive effects.⁹

The content of a particular treaty may also be sufficient to indicate the intention of the parties that it should be applicable retroactively. For example, in the *Mavrommatis Palestine Concessions* case, the United Kingdom contested the jurisdiction of the Permanent Court of International Justice on the ground *inter alia* that the acts complained of had taken place before Protocol XII to the Treaty of Lausanne had come into force. In rejecting this submission, the Court stated:

Protocol XII was drawn up in order to fix the conditions governing the recognition and treatment by the contracting Parties of certain concessions granted by the Ottoman authorities before the conclusion of the Protocol. An essential characteristic therefore of Protocol XII is that its effects extend to legal situations dating from a time previous to its own existence. If provision were not made in the clauses of the Protocol for the protection of the rights recognised therein as against infringements before the coming into force of that instrument, the Protocol would be ineffective as regards the very period at which the rights in question are most in need of protection. The Court therefore considers that the Protocol guarantees the rights recognised in it against any violation regardless of the date at which it may have taken place.¹⁰

It will thus be apparent that the principle of non-retroactivity is not a peremptory norm of international law;¹¹ everything depends on the intention of the parties.

At the Conference, the United States delegation proposed the deletion of the phrase 'or any situation which ceased to exist', pointing out that the expression was ambiguous and that:

... the ambiguity could encourage States seeking to apply the convention retroactively to claim that a previous fact, excluded by Article 24¹² from the application of the convention, had given rise to a situation which had not ceased to exist. Although it was relatively easy to establish the date of an act or fact, it was more difficult to state with precision when a situation resulting from an act or fact had ceased to exist.¹³

The United States proposal was supported by a number of delegations.¹⁴ But it was strongly resisted by others. The Spanish delegation could not support the United States proposal to delete the reference to situations 'since that would lead to an unduly rigid regime where retroactivity was concerned'.¹⁵ The Uruguayan delegation was of the same view. If the United States proposal were accepted:

... article 24 would be incomplete, since there were situations which could not be described as acts or facts, for example a sentence for a criminal offence that was still being served. It was curious that in almost all the cases in which the problem of the retroactive application of a treaty was involved, the courts had described them as 'situations'. For example, in the *Phosphates in Morocco* case, the Permanent Court of International Justice had used the term 'situation'. It would be preferable not to amend the original text of the article ... The cautious wording did not say explicitly, but implied, that the treaty could apply to pending situations. That was not stated positively, because, generally speaking, the authors of a treaty took into account facts and situations which existed on the date of the entry into force of the treaty. It was therefore not necessary to state a residual rule, and what mattered was the intention of the parties.¹⁶

The delegation of Iraq likewise considered that retention of the phrase 'or any situation which ceased to exist' was absolutely essential, being intended to take account of cases not covered by the words 'any act or fact which took place ... before':

The acts could have been performed before the date of entry into force, but the situation could continue after that date, and if so, the provisions of the treaty must apply even if the situation commenced before entry into force.¹⁷

In the event, the United States proposal was defeated by a vote of 47 to 23, with seventeen abstentions.

It may be noted that the Convention itself embodies two other provisions which might, at first sight, be thought to derogate from the rule of non-retroactivity. There is first of all the rule laid down in Article 18 of the Convention (which we have already discussed) about the obligation of States not to defeat the object and purpose of a treaty prior to its entry into force. But it seems clear that the rule laid down in Article 18 is not a true exception to the principle of non-retroactivity. It is rather an expression of what is an autonomous obligation imposed upon States by virtue of the principle of good faith, quite independently of the treaty.¹⁸ Second, there is the rule contained in Article 24(4) about the application of certain provisions of a treaty, such as those concerning authentication of the text and the manner and date of

entry into force, from the time of the adoption of the text. This may be taken to be an example of a case where a different intention appears from the treaty, since the *rationale* of the rule expressed in Article 24(4) is the tacit assumption of the negotiating States that the formal provisions of the treaty will become operative as from the adoption of the text so far as necessary to make those provisions effective.¹⁹

There is one final point. In the absence of any express provision in the Vienna Convention, Article 28 would have operated with respect to the Convention itself. But this was a cause of concern to many delegations, who were preoccupied with the possible application of a clause providing for compulsory settlement of disputes procedures to disputes arising in connection with treaties concluded before the entry into force of the Vienna Convention. Accordingly, Article 4 of the Convention lays down a specific rule to the effect that, without prejudice to the application of customary rules, the Convention applies only to treaties concluded by States after the entry into force of the Convention with regard to such States.²⁰

2. Application to territory

More difficult doctrinally, and indeed in terms of practice, is the question of the territorial application of treaties. One has to start from the proposition that not all treaties apply territorially. Some treaties apply exclusively to the State as an international person, that is to say, they apply *ratione personae*. Examples of such treaties are treaties of alliance, treaties establishing international organisations and treaties for the submission of a dispute to arbitration or adjudication. It is obvious that treaties of this nature are intended to bind the States parties as political entities and not in respect of a particular stretch of territory. There are other treaties which apply to the nationals of a State, whether within the national territory or not. Such treaties, if they purport to establish rights and obligations for nationals, irrespective of their place of residence or domicile, may not have any clear territorial application; but treaties of this nature may of course be of a mixed character — for example, a visa abolition agreement will accord rights to the nationals of the parties but will also have a specified territorial application.

But let us confine ourselves to those treaties which unquestionably do apply territorially. There are of course treaties which, by their very terms, apply only to a defined area of territory. A prime example is the Antarctic Treaty of 1 December 1959, which, according to Article VI of the Treaty, applies 'to the area south of 60° South Latitude, including all ice shelves' (with the important qualification that nothing in the Treaty shall prejudice or in any way affect the rights, or the exercise of the rights, of any State under international law with regard to the high seas within that area). Another example is the Treaty of 21 October 1920, concerning the recognition of Norwegian sovereignty over Spitzbergen (Svalbard). But treaties of this nature, designed to apply to a

specific geographical area or region, are rare. What of the more normal case? What is the rule of international law which applies when a treaty is silent on its territorial application? Doctrine has been divided on this point, particularly on the question whether a 'silent' treaty applies only to the metropolitan territory of the State or to both metropolitan and non-metropolitan territories. This is clearly a matter of prime importance to those States, such as the United Kingdom, which possess both metropolitan and overseas territories and bear a measure of international responsibility for the conduct of the international relations of other territories with whom they are in treaty relations. The nature of the problem is perhaps best described in the following extract from a statement prepared by the Secretariat of the United Nations in 1952:

Thus, although, from the international point of view, the United Kingdom is responsible for its overseas territories, and can conclude treaties which apply to those territories, the constitutional relationship of the territories to the United Kingdom varies widely according to the status of the territory concerned. Because of the intricate legal issues which may arise in connection with the application to any such territory of a treaty concluded by the United Kingdom the latter has, for many years, made a practice of ensuring the insertion in its treaties of an article (the so-called 'colonial' article) providing, either that the treaty applies to territories 'for whose international relations the United Kingdom is responsible' if special notice to that effect is given (thus implying that, in the absence of any such notice, it extends to the metropolitan territory only) or, in the reverse form, under which the territories are included unless a declaration is made, or notice given, that the treaty shall not apply to specified territories in the absence of a special acceptance on their behalf.²¹

It should be noted that this is a description of the situation as it existed in 1952. Subsequent developments need not be described in any detail. It is sufficient to note that the so-called 'colonial' article, whether in the contracting-in or in the contracting-out version, has come under increasing attack within the framework of conferences organised by, or under the auspices of, the United Nations on the grounds that it accords recognition to, or seeks to perpetuate, colonial-type situations which should be brought to an end with all reasonable despatch. This opposition to the inclusion in general multilateral treaties concluded under the auspices of the United Nations of clauses relating to territorial application has led to a marked increase in the number of such treaties which are 'silent' on territorial application, thereby posing in stark fashion the problem of what is the residual rule.

As indicated earlier, doctrine is somewhat divided on this point. McNair expresses the predominant trend of opinion when he states:

The treaty may be of such a kind that it contains no obvious restriction of its application to any particular geographical area ... in such a case the rule is that, subject to express or implied provision to the contrary, the treaty applies to all the territory of the Contracting Party, whether metropolitan or not.²²

Several Continental jurists have, however, taken the opposite view — that, in principle, a 'silent' treaty applies exclusively to the metropolitan territory

of a State and does not affect dependent territories. Thus Rousseau states the basic rule as follows:

Réserve faite de l'hypothèse où, par son objet, un traité concerne exclusivement des colonies, les traités conclus par un Etat ne s'étendent pas de plein droit à ses colonies.²³

Others again have expressed themselves more cautiously to the effect that the applicability of treaties to overseas possessions or other dependent territories is doubtful and depends from case to case on the basic intention of the parties.²⁴

The practice of the United Kingdom tends in the direction indicated by McNair. Arguing in favour of the inclusion in a United Nations Convention of a suitable territorial application article, the then Minister of State for Foreign Affairs (Mr Godber) drew the attention of the General Assembly in 1962 to the fact that most United Kingdom dependent territories were in large measure self-governing; he went on to say that 'if there is no such provision, it really means that all the people living in those territories, including the British Isles itself, will be excluded [from the Convention] until the last one is in a position to accept'.²⁵ Implied support for the McNair view can also be deduced from the statement made by the United Kingdom representative to the United Nations Commission on the Status of Women in 1963 to the effect that the United Kingdom government 'could not ratify the Convention on Political Rights of Women because it had no territorial application clause and some territories would be unable to conform to the Convention'.²⁶

So matters stood before the Vienna Convention. The Commission, in their final set of draft articles, proposed a simple clause to the effect that 'unless a different intention appears from the treaty or is otherwise established, the application of a treaty extends to the entire territory of each party'. The proposed rule was justified on the basis that 'State practice, the jurisprudence of international tribunals and the writings of jurists appear to support the view that a treaty is to be presumed to apply to all the territory of each party unless it otherwise appears from the treaty'.²⁷

The Commission likewise stated in their commentary that they preferred the phrase 'the entire territory of each party' to the phrase 'all the territory or territories for which the parties are internationally responsible' because of the association of the latter term with the so-called 'colonial' clause. The phrase 'the entire territory of each party' was intended to be a comprehensive term designed to embrace all the land and appurtenant territorial waters and air space which constitute the territory of the State.²⁸ The Commission also noted in their commentary to what is now Article 29 that one Government had proposed that a second paragraph be added to the article providing specifically that a State, which is composed of distinct autonomous parts, should have the right to declare to which of the constituent parts of the State a treaty is to apply. The Commission was however of the view that such a

provision, however formulated, might raise as many problems as it would solve. But it went on to say that:

... the words 'unless a different intention appears from the treaty or is otherwise established' in the text now proposed give the necessary flexibility to the rule to cover all legitimate requirements in regard to the application of treaties to territory.²⁹

There was little discussion of this provision at the Vienna Conference. Following upon an amendment tabled by the Ukraine, the drafting of the article was slightly modified to take account of a problem concerning the relationship of international law to internal law. The Australian delegation, having surveyed the problems confronting States parts of whose territories were regarded as distinct for the purposes of various phases of the treaty-making process, concluded that

[Article 29] was only a residual rule of interpretation and could not in any way be construed as a norm requiring a State to express its consent to be bound by treaties without first establishing whether the treaty was acceptable and applicable to all the component parts of the State.³⁰

The United Kingdom delegation stated, in a brief intervention, their understanding that 'the expression "its entire territory" applied solely to the territory over which a party to the treaty in question exercised its sovereignty'.³¹

It is clear that, as the Commission have noted, the opening words of Article 29 of the Convention impart a considerable degree of flexibility into the operation of the basic rule. But in what circumstances will a different intention appear from the treaty or be otherwise established? In other words, what exceptions are there to the residual rule?

It would appear that exceptions to the residual rule can be either express or implied. The obvious express exception is a territorial application clause in the treaty itself. But there can be other kinds of express exception. The device whereby, on signature or ratification, a State makes a declaration as to the territorial effect or extent of the act of signature or ratification has long been known and accepted in State practice. Thus, in ratifying the Convention on the High Seas in 1963, the United Kingdom government declared that 'ratification of this Convention on behalf of the United Kingdom does not extend to the States in the Persian Gulf enjoying British protection'.³² So also, in signing the European Convention on the International Classification of Patents for Invention, the United Kingdom signatory declared 'that my signature is in respect of the United Kingdom of Great Britain and Northern Ireland (including the Isle of Man) and is not in respect of any other territory or territories for whose international relations the Government of the United Kingdom are responsible'.³³ Numerous other examples of comparable declarations, made on signature or on ratification, could be cited. The recent practice of the United Kingdom in relation to treaties which are 'silent' on territorial application appears to be to specify in the instrument of ratification

itself the territories in respect of which the treaty is being ratified. Thus, ratification by the United Kingdom of the Treaty on the Non-proliferation of Nuclear Weapons is in respect of the United Kingdom of Great Britain and Northern Ireland, the Associated States (Antigua, Dominica, Grenada, Saint Christopher–Nevis–Anguilla and Saint Lucia) and territories under the territorial sovereignty of the United Kingdom, as well as the State of Brunei, the kingdom of Tonga and the British Solomon Islands protectorate.³⁴

Another category of express exception to the residual rule would be a reservation on territorial application duly established *vis-à-vis* the other parties to the treaty in question. Examples of such reservations are not infrequent in practice, and they may, of course, be combined with declarations of the kind indicated above. Thus, on acceding to the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage in 1970, the United Kingdom instrument of accession specified, as had been done for the Non-proliferation Treaty, the territories in respect of which the accession took effect; but it was accompanied by a reservation postponing the application of Article 2 of the Convention in Montserrat pending notification to the Secretary-General that the article would be applied there.³⁵ In other instances, a reservation may be established which will permit a State to extend the provisions of the Convention at a later date to territories for whose international relations the Government of the State is responsible. Thus, in ratifying the International Convention for Safe Containers of 2 December 1972, the United Kingdom Government reserved

the right not to apply the said Convention in respect of any territory for whose international relations the Government of the United Kingdom is responsible until 12 months after the date on which the Government of the United Kingdom notify the Secretary General of the Inter-Governmental Maritime Consultative Organisation that the said Convention shall apply in respect of any such territory.³⁶

A word of caution is, however, necessary here. A reservation on the territorial application of certain types of treaty may be excluded because such a reservation would be incompatible with the object and purpose of the treaty. There are certain treaties, principally in the field of disarmament or humanitarian law, which are clearly intended to be world-wide in their application. It is arguable that the nature of such treaties would preclude the making of a reservation designed to limit their territorial application.³⁷

We have so far concentrated on express provisions operating as exceptions to the residual rule. What about implied exceptions? The principal implied exception is a treaty adopted by, or within the framework of, a regional organisation or intended to apply only within a particular region. Where such a treaty is 'silent' as to its territorial application, its regional character may be such as to create a presumption that territorial units outside the region which are dependent upon a State within the region are excluded. Thus the United

Kingdom Government ratified the Agreement on Travel by Young Persons on Collective Passports between Member Countries of the Council of Europe (an agreement adopted within the framework of the Council of Europe but containing no express provision on territorial application) 'in respect of the United Kingdom of Great Britain and Northern Ireland, Jersey, the Bailiwick of Guernsey, the Isle of Man, Gibraltar and the State of Malta only'.³⁸ Reservations can also be established to postpone the application of a regional treaty to dependent territories within the particular region. The Oslo Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft of 15 February/15 August 1972, applies only to defined parts of the Atlantic and Arctic Oceans and dependent seas, within which lie the Channel Islands and the Isle of Man. On ratifying the Convention, the United Kingdom Government declared that 'the Convention will not enter into force for the Bailiwick of Jersey until the thirtieth day following the date on which the Government of the United Kingdom notify the Government of the Kingdom of Norway that the measures required to implement the Convention in the Bailiwick of Jersey have been taken'.³⁹ So also, in relation to the Paris Convention for the Prevention of Marine Pollution from land-based sources of 4 June 1974, which equally applies only to defined parts of the Atlantic and Arctic Oceans and dependent seas, within which lie Gibraltar, the Channel Islands and the Isle of Man, the United Kingdom Government, on ratifying the Convention, declared that

... the Convention will not enter into force for Gibraltar, the Bailiwick of Jersey and the Isle of Man until the thirtieth day following the date on which the Government of the United Kingdom notify the Government of the French Republic that the measures required to implement the provisions of the Convention in Gibraltar, the Bailiwick of Jersey and the Isle of Man have been taken.⁴⁰

The context of a particular treaty can also constitute an implied exception to the residual rule. An example would be a treaty which specified a particular zone of application (thereby impliedly excluding any dependent territories not included within the zone).⁴¹

Thus it would appear that the operation of the residual rule on territorial application is subject to a number of exceptions. In cases where a particular treaty is silent upon its territorial application, declarations made by a State on signature or ratification, the specific terms of an instrument of ratification or accession or a valid reservation can operate to exclude the rule.⁴² Furthermore, the regional character, or the particular context, of a treaty may impliedly operate to exclude the rule, in so far as the regional character or context is indicative of the intention of the parties that the treaty should have a limited territorial application.

3. *Application of successive treaties relating to the same subject-matter*

A particularly obscure aspect of the law of treaties is the question of application of successive treaties which relate to the same subject-matter. With the post-war growth in international co-operation, accompanied by a massive increase in the numbers and range of international agreements of a law-making character, the problem of incidental conflict between successive treaties has become more acute. This is in part attributable to the very nature of the international legislative process, characterised as it is by a diversity of functional or regional organisations having overlapping responsibilities for the preparation of international conventions for acceptance by States.⁴³

McNair discusses this question of incompatible treaties in some detail. He deals first with the situation where the treaties which are alleged to be in conflict are made by the same parties on different dates. In these circumstances, and as a matter of interpretation, the later treaty will prevail:

Where the parties to the two treaties said to be in conflict are the same, an allegation of conflict raises a question of interpretation rather than a question of a rule of law; the parties are masters of the situation and they are free to modify one treaty by a later one.⁴⁴

Where the earlier treaty is general in nature and the later treaty contains special and detailed rules, the operation of the maxim *generalia specialibus non derogant* would in any event ensure that the later treaty prevailed.

The complications begin when the case is one of conflict between a treaty to which States A and B are parties and a later treaty to which States A and C are parties. McNair suggests four cases in which the later treaty may be null and void:

- (a) Where, by virtue of the earlier treaty, State A has surrendered or diminished its treaty-making capacity and the later treaty has been concluded by State A in the absence, or in excess, of its treaty-making capacity.
- (b) Where the earlier treaty is of a constitutive character (such as the Charter of the United Nations) and State A later concludes a treaty which is in conflict with an imperative provision of the earlier treaty.
- (c) If the earlier treaty is a multipartite law-making treaty clearly intended to create permanent rules and containing no power of denunciation, and the later treaty purports to derogate from its provisions.
- (d) If the performance of the second treaty involves a violation of 'universal law'.⁴⁵

McNair then goes on to maintain that, in other cases, the later treaty will not be void. State A, in the hypothetical situation envisaged, would not *ipso facto* be committing a wrongful act against State B by concluding a later, inconsistent treaty with State C. State A would commit a wrongful act against State B only by failing to perform its treaty with State B; and

if State A fails to perform its later treaty with State C, it would incur responsibility towards the latter, provided at any rate that State C had been unaware of the earlier treaty between States A and B.⁴⁶

The Commission were clearly puzzled as to how to deal with this complex problem on the borderline between the law of treaties and the law relating to State responsibility. Lauterpacht, in his 'First Report on the Law of Treaties', suggested the general rule that a treaty is void if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties.⁴⁷ Fitzmaurice took a position closer to that outlined by McNair. Where a treaty between State A and C was inconsistent with an earlier treaty between States A and B, the second treaty was not to be invalid, but State A might incur responsibility to either State B or State C for failure to perform its treaty obligations. The later treaty would be invalid only when (a) the earlier treaty had expressly prohibited the conclusion of a later inconsistent treaty or (b) the later treaty necessarily involved a direct breach of the earlier treaty.⁴⁸

Waldock reviewed *de novo* the proposals of the previous Special Rapporteurs and recommended that the approach based on the invalidity of a later, inconsistent treaty be dropped. He did not feel that the *Oscar Chinn*⁴⁹ case or the *European Commission of the Danube*⁵⁰ case afforded real support for the doctrine of the invalidity of a later treaty which infringed the rights of third States under a prior treaty. He was rather of the view that the issue should be approached, not from the point of view of the validity or invalidity of the later treaty, but from that of the *priority* of incompatible treaty obligations.⁵¹

The Convention regime on successive treaties, which is based largely on Waldock's proposals, may be briefly summarised as follows:

- (a) If a treaty says that it is subject to, or is not to be considered as incompatible with, another treaty, that other treaty will prevail.
- (b) As between parties to a treaty who become parties to a later, inconsistent, treaty, the earlier treaty will apply only where its provisions are not incompatible with the later treaty.
- (c) As between a party to both treaties and a party to only one of them, the treaty to which both are parties will govern the mutual rights and obligations of the States concerned.

These rules are expressed to be without prejudice to the rules governing the *inter se* modification of multilateral treaties by certain of the parties only, or to any question of termination or suspension of the operation of a treaty as a consequence of its breach, or to any question of responsibility which may arise for a State from the conclusion or application of a treaty which is incompatible with its obligations towards another State under another treaty.

Although these rules may appear to be somewhat complicated, their substance is relatively simple. Indeed, it is their very simplicity which may

occasion some concern, given the varying types of situation which they are designed to cover. A particular problem arises, for example, with respect to 'chains' of treaties where, for eminently practical reasons, it may be necessary to apply the later treaty even *vis-à-vis* States which are parties only to the earlier treaty. The rules and practices of BIRPI (International Bureau for the Protection of Intellectual and Industrial Property) afford an example of the kind of problem which can arise. The observer from the Bureau explained the difficulty at the Conference in the following terms:

However, a special situation existed in international Unions such as those administered by B.I.R.P.I., which included the Unions instituted by the 1883 Paris Convention for the Protection of Industrial Property and the 1886 Berne Convention for the Protection of Literary and Artistic Works. Those Conventions had been revised on several occasions but each revision was merely a different version of the original Convention, which continued to exist. There was only one Union constituted by each original Convention.

Technically, each original Convention and its revising Acts were separate and successive treaties, each calling for ratification. A State, however, sometimes acceded to the most recent Act of a Union, without declaring that its accession was valid for the previous Acts. In its relations with States parties to the most recent Act, no problem arose. In its relations with States members of the Union but not parties to the most recent Act, on the other hand, the acceding State was understood to have tacitly accepted all the previous texts, so that its relations with the States parties only to the earlier texts were governed by those earlier texts. The legal position was arguable, but the system was the only practicable one. The Union was more important than the Convention which had set it up. Without that tacit acceptance system, the State acceding to the latest text would have no relations with half the membership of the Union.⁵²

The special features of the system operating within the framework of the Berne and Paris Union are fortunately preserved by the saving clause in Article 5 of the Vienna Convention, which protects 'any relevant rules' of an international organisation. These rules embrace not only written rules but also 'unwritten customary rules'.⁵³ But it is not to be thought that the BIRPI system constitutes a unique exception to the general rules. Other international organisations of a technical character also operate rules which differ from those laid down in Article 30. Thus the Universal Postal Union and the International Telecommunications Union have, at least in the past, been accustomed to re-enact their basic constitutional instruments every five years. This has involved the abrogation of the existing Convention and its replacement by a new Convention. But complications have arisen because of the failure of some member countries of the Union to ratify the new Convention by the date of its entry into force, which is always a fixed date. Rules and practices have therefore been developed whereby States which, for one reason or another, have failed to ratify a revised postal Convention continue to participate in the world postal regime on the basis of tacit adherence to the Convention.⁵⁴ Similar, but more formal, arrangements apply within the International Telecommunications Union.⁵⁵

Nascimento e Silva perceives six basic principles as being relevant to the solution of problems posed by incompatible treaties or by successive treaties relating to the same subject matter. These are:

- (a) the hierarchical principle;
- (b) the principle of the *lex prior*;
- (c) the principle of the *lex posterior*;
- (d) the principle of the *lex specialis*;
- (e) the principle of autonomous operation; and
- (f) the principle of legislative intent.⁵⁶

He is however careful to point out that these principles are not to be considered as exclusive, and that most of them can coexist if they are applied in accordance with the factors which must be taken into account in each case.⁵⁷ Seeking to apply these principles, it will be seen that Article 30 embodies elements of them all. The hierarchical principle is respected in the sense that Article 30 is qualified by its opening phrase 'Subject to Article 103 of the Charter of the United Nations'. Article 103, it will be recalled, provides that, in the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail. The principle of the *lex prior* finds partial expression in the concept that if a treaty is expressed to be subject, or not to be considered as incompatible with, an *earlier* or later treaty, the provisions of that other treaty prevail. The principle of the *lex posterior* also finds partial expression in the concept that when all the parties to the earlier treaty are parties also to the later treaty, the earlier treaty applies only to the extent *that its provisions are compatible with those of the later treaty*. The principle of the *lex specialis* is not expressed as such in Article 30, but is widely supported in doctrine;⁵⁸ the concept that a specific norm of conventional international law may prevail over a more general norm can of course be seen as raising primarily a question of interpretation. The principle of autonomous operation, as articulated by Jenks, applies primarily to international organisations and in essence seeks to establish that '... each international organisation must regard itself as being bound in the first instance by its own constitution and will naturally apply instruments which it is itself responsible for administering rather than other instruments with which they may be in conflict'.⁵⁹ Again this finds no place in Article 30, save to the extent that the hierarchical principle may be applicable to establish, as a matter of the rules and practices of an international organisation, the superiority of the constitution of the organisation over incompatible provisions of treaties adopted within the framework of the organisation.⁶⁰ Finally, the principle of legislative intent is again primarily a rule of interpretation; the search for the legislative intent may involve consideration of the *travaux préparatoires* and the circumstances of the conclusion of the successive treaties in question.⁶¹

Because of the inevitable complications surrounding this question of incompatibility between successive treaties relating to the same subject-matter, it may be useful to draw attention to certain points of clarification which emerge from a study of the Conference records.

First, and perhaps most important, it is clear that the rules laid down in Article 30 are intended to be residuary rules — that is to say, rules which will operate in the absence of express treaty provisions regulating priority. Paragraph 2 of the commentary to the proposal submitted by the Commission had already drawn attention to the fact that ‘treaties not infrequently contain a clause intended to regulate the relation between the provisions of the treaty and those of another treaty or of any other treaty related to the matters with which the treaty deals’ and that ‘whatever the nature of the provision, the clause has necessarily to be taken into account in appreciating the priority of successive treaties relating to the same subject matter’.⁶² But the Commission’s proposal was not (and indeed the text of Article 30 is not) drafted in such a way as to make it clear that the proposed rules were residuary in nature. However, in response to a comment made at the Conference, Sir Humphrey Waldock confirmed ‘that the rules in paragraphs 3, 4 and 5 were thus designed essentially as residuary rules’.⁶³

Second, the Chairman of the Drafting Committee, in introducing the revised text of what later became Article 30 at the 91st meeting of the Committee of the Whole, clarified the meaning to be attached to the concept of compatibility as used in paragraph 3 of the Article. Ambassador Yasseen spoke as follows:

In the view of the Drafting Committee, the mere fact that there was a difference between the provisions of a later treaty and those of an earlier treaty did not necessarily mean that there existed an incompatibility within the meaning of the last phrase of paragraph 3. In point of fact, maintenance in force of the provisions of the earlier treaty might be justified by circumstances or by the intention of the parties. That would be so, for example, in the following case. If a small number of States concluded a consular convention granting wide privileges and immunities, and those same States later concluded with other States a consular convention having a much larger number of parties but providing for a more restricted regime, the earlier convention would continue to govern relations between the States parties thereto if the circumstances or the intention of the parties justified its maintenance in force.⁶⁴

This is clearly relevant to the type of problem which arises when there coexist two international conventions on the same subject-matter, one adopted within a regional framework and one within a universal framework. A good example is afforded by the European Convention on Human Rights and the United Nations Covenants on Human Rights. Quite apart from any conflict of substantive provisions, there would inevitably, unless special provision had been made, have been a conflict between the implementation provisions of the two conventions. For this reason, Article 44 of the United Nations Covenant on Civil and Political Rights states that:

the provisions for the implementation of the present Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the specialised agencies and shall not prevent the States Parties to the present Covenant from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.⁶⁵

Third, it seems clear that, in determining which treaty is the 'earlier' and which the 'later', the relevant date is that of the adoption of the text and not that of its entry into force. Adoption of the second treaty manifests the new legislative intent.⁶⁶ But, of course, the rules laid down in Article 30 have effect for each individual party to a treaty only as from the date of entry into force of the treaty for that party.

Finally, it would seem that the expression 'relating to the same subject-matter' must be construed strictly. It will not cover cases where a general treaty impinges indirectly on the content of a particular provision of an earlier treaty. Accordingly, a general treaty on the reciprocal enforcement of judgments will not affect the continued applicability of particular provisions concerning the enforcement of judgments contained in an earlier treaty dealing with third-party liability in the field of nuclear energy. This is not a question of the application of successive treaties relating to the same subject-matter, but is again a question of treaty interpretation involving consideration of the maxim *generalia specialibus non derogant*.⁶⁷

It will be apparent from this brief analysis that Article 30 of the Vienna Convention is in many respects not entirely satisfactory. The rules laid down fail to take account of the many complications which arise when there coexist two treaties relating to the same subject-matter, one negotiated at the regional level among States between whom there is a high degree of mutual confidence and another negotiated within the framework of a universal organisation. The complications are perhaps such that no attempt to lay down general rules would have disposed of all the difficulties; this is an area where State practice is continually developing, and where it may possibly have been premature to seek to establish fixed guidelines. Perhaps little harm has been done so long as the Convention rules are regarded as residuary in character, so that the negotiators of treaties are left reasonably free to determine for themselves the relationship between the text which they are seeking to draw up and previous, or future, treaties in the same field.

III. Treaties and third States

Articles 34–38 of the Convention, which deal with treaties and third States, do not call for extensive comment. The maxim *pacta tertiis nec nocent nec prosunt* is supported both by general legal principle and by common sense. In so far as a treaty may bear the attributes of a contract, third States are

clearly strangers to that contract. Such problems as exist in international law about the relationship of third States to a treaty concern the scope of the exceptions to the general principle.

It is however necessary at the outset to distinguish a whole series of situations which might be thought to involve exceptions to the general principle but which prove, on closer examination, to be outwith its scope. There is, first, the case of the treaty which 'affects' a third State, either favourably or unfavourably, without touching upon its rights or obligations.⁶⁸ So long as the application of a treaty does not touch upon the rights of, or seek to impose obligations upon, a third State, the third State has no right of redress, even if the treaty affects it detrimentally.⁶⁹ There is, secondly, a possible duty upon States under general international law, deriving from the principle of non-intervention, not to hinder the execution of valid treaties concluded by other States, provided that such treaties do not impair the rights of or impose obligations upon third States;⁷⁰ the existence of such a rule has however been doubted by others, notably Waldock who states that 'the general duty ... for all States to respect and not impede the operation of lawful treaties, even when limited to treaties not impairing their rights or imposing disabilities upon them, seems to go beyond the existing law.'⁷¹ In any event, if and to the extent that such a duty can be argued to exist (which must be doubtful), it is a duty which does not flow from the treaty but rather from the asserted general rule. There is, thirdly, the case where the rules contained in a treaty apply to third States by reason of the formation of international custom; but it is equally clear in this case that the source of obligation for the third State is not the treaty but custom.⁷² There is, fourthly, the case of succession of States in respect of treaties; again, however, this is not an instance of an exception to the general principle but rather of the application of other rules of international law relating to the means of establishing the consent of the successor State to be bound by the treaty. There is, fifthly, the obligation imposed by Article 18 of the Convention upon signatory States and States which have expressed their consent to be bound by a treaty not to defeat the object and purpose of the treaty; but this obligation does not flow from the particular treaty but rather from the general rule of international law to which concrete expression is given in Article 18.⁷³ Just as Article 18 does not constitute an exception to the principle of non-retroactivity,⁷⁴ so also it does not constitute an exception to the *pacta tertiis* rule. There is, finally, the case of the final clauses of a treaty; but again, as we have already noted, the concept that final clauses, so far as they relate to the processes of signature, ratification, accession, deposit of instruments and entry into force, become operative from the date on which the treaty is adopted rests on the tacit assumption of the negotiating States that these provisions will be applicable from that date.

The rule laid down in Article 34 that a treaty does not create either obligations or rights for a third State without its consent is unexceptionable as a

statement of principle. So far as obligations are concerned, it has been confirmed by the Permanent Court in the *Free Zones* case⁷⁵ and in the *River Oder* case.⁷⁶ Judge Huber, in the *Island of Palmas* arbitration, also applied the general rule in stating that '... whatever may be the right construction of a treaty, it cannot be interpreted as disposing of the rights of independent third Powers'⁷⁷ and in emphasising that '... the inchoate title of the Netherlands could not have been modified by a treaty concluded between third Powers'.⁷⁸ So far as rights are concerned, the International Court of Justice, in the *North Sea Continental Shelf* cases, dealt with an argument that the Federal Republic of Germany, although not a party to the 1958 Continental Shelf Convention, had, by virtue of its conduct, manifested its acceptance of the conventional regime. In rejecting this argument, the Court stated:

In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested — namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way. Indeed if it were a question not of obligation but of rights, and if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime, it would simply be told that, not having become a party to the convention, it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.⁷⁹

It should be noted that, as a matter of treaty law, the rule admits of no exception in the case of obligations, although this is, of course, without prejudice to the principle that certain obligations stipulated in a treaty may bind third States independently as customary rules of international law. So far as rights are concerned, there are doctrinal differences between those jurists who claim that, at most, a treaty can confer a *benefit* on a third State, which can be transformed into a right only by some collateral agreement between the third State and the parties to the treaty,⁸⁰ and those jurists who maintain that there is nothing in international law to prevent two or more States from effectively creating a right in favour of another State by treaty if they so intend.⁸¹ The two schools of thought differ as to the significance to be attached to the *dictum* of the Permanent Court in the *Free Zones* case, where the Court stated:

It cannot be lightly presumed that stipulations favourable to a third State have been adopted with the object of creating an actual right in its favour. There is however nothing to prevent the will of sovereign States from having this object and this effect. The question of the existence of a right acquired under an instrument drawn between other States is therefore one to be decided in each particular case: it must be ascertained whether the States which have stipulated in favour of a third State meant to create for that State an actual right which the latter has accepted as such.⁸²

To McNair this is merely an *obiter dictum*, since the Court had expressly held that Switzerland had acquired true contractual rights by virtue of agreements made in the years 1815 and 1816 to which Switzerland was at that time a party and which had not been abrogated since. To those of the opposite persuasion, the *dictum* supports the view that the States parties to a treaty can confer true rights upon a third State, which the latter can invoke directly and on its own account.

Having regard to this doctrinal difference, it is probably best to regard Article 34 as merely establishing a presumption; certainly it must be read together with Articles 35–37, which set out the possible exceptions to the general principle, and Article 38, which preserves the principle that rules in a treaty may become binding on third States as customary principles of international law.

Article 35 provides that an obligation may arise for a third State from a provision of a treaty if two conditions are met:

- (a) the parties to the treaty must have intended the provision to be the means of establishing the obligation; and
- (b) the third State must have expressly accepted that obligation in writing.

It should be noted that this article is so worded as to make it clear that the juridical basis of the obligation for the third State is not the treaty itself but the collateral agreement whereby the third State has accepted the obligation. The original proposal by the Commission did not require that the express acceptance of the obligation by third States (condition (b)) should be ‘in writing’. At the Conference, the delegation of Vietnam proposed the addition to the text of the words ‘in writing’, arguing that:

Because of its importance, the obligation must be accepted by the third State in a form which could not give rise to any misunderstanding and which involved no risk of tendentious interpretation ... It was therefore desirable that third States, and particularly developing countries, should express their willingness to accept an international obligation in writing only.⁸³

The debate on this proposal was very brief, but it was opposed by the United Kingdom delegation on the ground that:

... it ran counter to the fundamental principle of international customary law underlying the convention, namely that States were free to bind themselves otherwise than by written treaties. Acceptance of the amendment would represent a departure from that principle and would restrict the freedom of States to accept contractual obligations otherwise than in writing.⁸⁴

The amendment was nonetheless adopted. It should also be noted that the Convention contains, in Article 75, an express reservation about obligations which may arise for an aggressor State in consequence of measures taken in conformity with the Charter with reference to the aggression. The inclusion

of Article 75 in the Convention results from certain governmental comments on the earlier draft articles proposed by the Commission to the effect that the rule stated in Article 35 should not apply with respect to treaty provisions imposed upon an aggressor State in consequence of action taken in conformity with the Charter.⁸⁵

Article 36 deals with the converse case of rights arising for a third State from a provision of a treaty. For such a right to arise, two conditions must be satisfied:

- (a) the parties to the treaty must have intended the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all States; and
- (b) the third State must have assented thereto, assent being presumed so long as the contrary is not indicated, unless the treaty has provided otherwise.

Paragraph 2 of Article 36 also provides that a State exercising such a right must comply with the conditions for its exercise provided for in the treaty or established in conformity with the treaty. Of course, the right itself may be a conditional right. Thus Article 35(2) of the Charter of the United Nations stipulates that a State which is not a member of the United Nations may bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party 'if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter'. In this case, the right itself is made subject to the fulfilment by the third State of the condition stipulated.⁸⁶

Articles 35 and 36 call for some further observations. In the first place, it will be noted that the text of Article 35 contains nothing corresponding to paragraph 2 of Article 36. And yet it would seem that any third State giving effect to an obligation contained in a treaty to which it is not a party should be entitled to enjoy any benefits or rights which flow from the execution of the obligation.⁸⁷ In the second place, there is the difficulty that most treaties simultaneously confer rights and impose obligations on the parties. How then should a third State give its consent when the treaty envisages both rights and obligations for the third State? It might be thought that the rule stated in paragraph 2 of Article 36 might provide the answer in the sense that Article 36 will clearly apply where two States wish to grant a right of passage across their territory to a third State; in these circumstances, the third State must comply with the conditions for the exercise of the right which are stipulated in the treaty, and its assent will be presumed if it exercises the right in accordance with the conditions so stipulated. By way of contrast, where a treaty between two States purports to establish a right of passage over the territory of a third State (subject possibly to the payment of dues to the third State), the case clearly falls within Article 35, and the third State must expressly accept the obligation in writing. The difficult case is one where a treaty between two

States confers a right upon a third State to the use of ports situated in the territories of the States parties to the treaty in return for a right of passage by the States parties to the treaty over the territory of the third State. Where, as in this case, both rights and obligations arise for the third State from the provisions of a treaty to which it is not a party, it is suggested that the stricter rule — that related to obligations — should apply, so that the third State must give its consent in writing.⁸⁸

Finally, and with reference to Article 36, it can be argued that the condition of presumed assent is consistent only with the principle that rights stipulated in a treaty in favour of a third State derive directly from the treaty itself and not from a collateral agreement between the third State and the States parties to the treaty. As Jimenez de Arechaga puts it:

This presumption of consent shows clearly that the *jus tertii* is created by the treaty and that the third State's conduct in exercising the right is not an expression of assent to a second agreement but an act of appropriation of rights directly derived from the treaty.⁸⁹

The revocation or modification of obligations or rights arising for third States from the provisions of a treaty is covered by Article 37. Again, a distinction is drawn between obligations and rights. As regards obligations, the rule is stated to be that the obligation may be revoked or modified only with the consent of the parties to the treaty and the third State. Fortunately, this is expressed as a residuary rule. Theoretically, it is no doubt correct, since the obligation has arisen for the third State by virtue of a collateral agreement with the parties to the treaty, and it is this collateral agreement which must be revoked or modified. But, in practice, the rule may be rather artificial, since circumstances can be envisaged in which the parties to the treaty would simply wish to release the third State from further performance of the obligation.

As regards the revocation or modification of rights, the rule is expressed that a right which has arisen for a third State may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State. There are conflicting considerations here. On the one hand, States would no doubt be reluctant to stipulate rights in favour of third States if the effect of so doing would be to limit their freedom of action to modify or terminate the treaty. On the other hand, it is important that rights stipulated in favour of third States, particularly if they relate to such matters as rights of passage through international waterways, should have a firm and solid basis. The rule now embodied in the Convention seeks to resolve these conflicting considerations and would appear to be generally satisfactory.

Finally, Article 38, which we have already considered, merely saves the principle that rules contained in a treaty may become binding upon third States as customary rules of international law recognised as such.

There is one additional point to be noted on this series of articles dealing with treaties and third States. In their commentary to what is now Article 38, the Commission refer in the following terms to the notion of treaties establishing so-called 'objective regimes':

The Commission considered whether treaties creating so-called 'objective regimes', that is, obligations and rights valid *erga omnes*, should be dealt with separately as a special case. Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective regimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralisation or demilitarisation of particular territories or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognising that in certain cases treaty rights and obligations may come to be valid *erga omnes*, did not regard these cases as resulting from any special concept or institution in the law of treaties. They considered that these cases resulted either from the application of the principle in Article [36] or from the grafting of an international custom upon a treaty Since to lay down a rule recognising the possibility of the creation of objective regimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the law of treaties.⁹⁰

Doctrine tends in the main to support the notion that treaties establishing 'objective regimes' may have effects *erga omnes*. Thus, McNair regards as having effects *erga omnes* what he terms 'dispositive or real treaties' — that is to say, treaties which create or transfer or recognise the existence of certain permanent rights of a territorial character — and 'constitutive or semi-legislative' treaties — that is to say, treaties of a public law character relating, for example, to neutralisation or demilitarisation.⁹¹ Rousseau also supports the view that there is an exception to the general *pacta tertiis* rule in the case of treaties creating 'objective regimes'.⁹² As against this, Reuter doubts the relevance of private law analogies such as those deriving from 'droits réels' to justify a broad exception to the general rule in the case of so-called 'objective regimes', arguing that the concept of the collateral agreement is sufficient to explain why 'dispositive or real treaties' have effects as regards third States.⁹³ In this context, it is worth noting that Article 12 of the Vienna Convention on Succession of States in respect of Treaties acknowledges the existence of a category of treaties creating 'objective regimes' by providing that:

1. A succession of States does not as such affect:
 - (a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question:
 - (b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.
2. A succession of States does not as such affect:
 - (a) obligations relating to the use of any territory, or to restrictions upon its use,

- established by treaty for the benefit of a group of States or of all States and considered as attaching to that territory;
- (b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.
3. The provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates.⁹⁴

The Commission's commentary to what is now Article 12 of the Vienna Convention on Succession of States in respect of Treaties reveals a wealth of material in support of the proposed rule based upon doctrine, State practice and the decisions of international tribunals.⁹⁵ The Commission recall that the Vienna Convention on the Law of Treaties does not except treaties intended to create objective regimes from the general rules which it lays down concerning the effects or treaties upon third States. But, the Commission continue:

In the present context, if a succession of States occurs in respect of the territory affected by the treaty intended to create an objective regime, the successor State is not properly speaking a 'third State' in relation to the treaty. Owing to the legal nexus which existed between the treaty and the territory prior to the date of the succession of States, it is not open to the successor State simply to invoke Article 35 of the Vienna Convention under which a treaty cannot impose obligations upon a third State without its consent. The rules concerning succession in respect of treaties also come into play. But under these rules there are cases where the treaty intended to establish an objective regime would not be binding upon a successor State, unless such a treaty were considered to fall under a special rule to that effect. Equally, if the succession of States occurs in relation to a treaty establishing an objective regime, under the general law of treaties and the law of succession the successor State would not necessarily be entitled to claim the rights enjoyed by its predecessor State, unless the treaty were considered to fall under such a special rule. That such a special rule exists is, in the opinion of the Commission, established by a number of convincing precedents.⁹⁶

Accordingly, in the context of its work on succession of States in respect of treaties, the Commission were convinced that special provision had to be made to cover the particular case of treaties creating 'objective regimes'. In doing so, however (and the text of Article 12 of the resulting Vienna Convention confirms this), the Commission were careful to ensure that the rule should be expressed as relating to the legal situation — the regime — resulting from the dispositive effects of the treaty rather than to succession in respect of the treaty itself.⁹⁷

It must not therefore be assumed that the deliberate decision of the Commission and the Conference not to make special provision for treaties creating 'objective regimes' in the series of articles on treaties and third States in the Vienna Convention on the Law of Treaties constitutes a denial of the existence

of this category of treaties. It constitutes at most a denial of the need for a special rule to explain the relationship between treaties creating 'objective regimes' and third States; the category still has its significance in the separate, but related, context of succession of States in respect of treaties.

IV. Amendment and modification of treaties

Articles 39–41 concern the amendment and modification of treaties. This is an area where State practice diverges to some extent from what is often asserted to be the rule of customary international law, namely, that a treaty may not be revised without the consent of all the parties.⁹⁸ The Commission, in their commentary to this series of articles, rightly stress that the development of international organisations and the tremendous increase in multilateral treaty-making have made a considerable impact on the process of amending treaties. They draw attention to three important considerations:

1. the amendment of many multilateral treaties is now a matter which concerns an international organisation;
2. the proliferation of multilateral treaties has led to an increased awareness of the importance of making provision in advance, in the treaty itself, for the possibility of its future amendment; and
3. the growth of multilateral treaties having a very large number of parties has made it virtually impossible to limit the amending process to amendments brought into force by an agreement entered into by all the parties to the original treaty; and has led to an increasing practice of bringing amending agreements into force as between those States willing to accept the amendment, while at the same time leaving the existing treaty in force with respect to the other parties to the earlier treaty.⁹⁹

The consequence of this last consideration is, as Reuter points out, that an amending treaty may well create two categories of States each bound by differing obligations; the parallel with the effects of the reservations system embodied in the Convention is striking:

A cet égard, on a justement comparé ce système avec celui qui est engendré avec le régime des réserves, surtout tel qu'il est libéralement défini par la Convention de Vienne: dans les deux cas il y a création d'un système conventionnel formé d'engagements différents, quant à leur substance et quant au cercle d'États qu'ils obligent.¹⁰⁰

The Commission, in proposing the series of provisions which now constitute Articles 39–41 drew a clear distinction between 'amendment' and 'modification'. Amendment was said to denote a *formal* amendment of a treaty intended to alter its provisions with respect to all the parties, while modification was used in connection with an *inter se* agreement concluded between certain of the parties only, and intended to vary provisions of the treaty

between themselves alone.¹⁰¹ Although, in theory, there may be something to be said for this distinction, the position is not quite so clear-cut in practice. For one thing, the parties to a treaty may set out with the intention of formally amending the treaty. But one or more of the parties may fail to ratify the amending instrument, in which case the eventual result may be an *inter se* modification; even if all the parties do ratify the amending instrument there will inevitably be a certain lapse of time before they do so, during which period the amending instrument, if it has entered into force, will presumably operate as an *inter se* modification. Then there is the converse case where two or more of the parties to a treaty deliberately set out with the intention of negotiating an *inter se* modification; but this *inter se* modification may be open to acceptance by other parties to the treaty and, if accepted, may eventually operate as a formal amendment.

Thus, it will be seen that the distinction between formal amendment and *inter se* modification is by no means as clear-cut as the Convention regime might suggest. No doubt it is possible to determine whether the *initial* intent of the parties was to engage in a process of formal amendment or in a process of *inter se* modification; but the end result may differ from the initial intent.

Article 39 lays down the general rule that a treaty may be amended by agreement between the parties. Clearly, in the case of a bilateral treaty, the agreement of both parties is required; but, in the case of a multilateral treaty, agreement among *all* the parties is not required, having regard to the modern practice of amending multilateral treaties by another multilateral treaty which comes into force only for those States which become bound by it.¹⁰² Article 39 then goes on to lay down that the rules contained in Part II of the Convention concerning the conclusion and entry into force of treaties apply to an amending agreement except in so far as the treaty may otherwise provide. As the Convention applies only to treaties in written form, the question was raised at the Conference whether an oral agreement to amend a treaty was permissible. The Expert Consultant, Sir Humphrey Waldock, pointed out that the Commission 'had recognised that in some cases treaties, especially those in simplified form, were varied by informal procedures and even by oral agreement of Ministers'; in his view, amendment by oral agreement would be covered by the general reservation about international agreements not in written form which was contained in Article 3.¹⁰³

Article 40 contains complex residuary rules about the amendment of multilateral treaties. Its effect may be summarised as follows:

- (a) A proposal to amend a multilateral treaty must be notified to all the contracting States, each of which becomes entitled to participate in the negotiation and conclusion of any amending agreement.
- (b) A State entitled to become a party to a treaty also has the right to become a party to the treaty as amended.

- (c) The amending agreement does not bind any State party to the original treaty which does not become a party to the amending agreement.
- (d) A State which becomes a party to a treaty after it has been amended is, failing the expression of a contrary intention, considered to be a party to the treaty as amended, and a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

These rules prompt several comments. The first is that while it is no doubt right in principle to stipulate that any proposal to amend a multilateral treaty must be notified to all the parties, it is often very difficult for a depositary government or institution to comply with this requirement. This may be because one or more of the original parties have lost their identity and there is doubt as to whether successor States have inherited rights and obligations under the original treaty. It may equally result from the consideration that the parties to the original treaty may be divided in their views as to whether certain territorial entities are to be considered as States. Thus the rule as stated in the Convention could, in theory, constitute an obstacle to the revision of treaties; but State practice reveals that there may be ways of overcoming this difficulty — for example, by the conclusion of a new treaty as opposed to the revision of an existing treaty. In such a case, of course, the rules set out in Article 30 would apply in the event that one or more of the parties to the later treaty failed to give notice of termination of the earlier treaty in accordance with the terms of the latter.

It should be noted that the International Labour Organisation has particular rules governing the procedure for the revision of conventions and the legal consequences of revision. In the majority of cases *inter se* modification is excluded as being incompatible with the effective execution of the object and purpose of the treaty as a whole; but a few international labour conventions expressly permit the modification of certain provisions by *inter se* agreement, on condition that the rights of other parties are not affected and that the *inter se* agreement affords equivalent protection.¹⁰⁴ These special rules are, of course, preserved by virtue of Article 5 of the Vienna Convention.

Article 41 sets out the circumstances in which two or more of the parties to a multilateral treaty may agree to modify the treaty as between themselves. The first, and most obvious case, is where the original treaty specifically provides for the possibility of an *inter se* modification; here it is quite clear that the parties intended to admit the possibility of 'contracting out'. But what is the position where the original treaty does not admit of this possibility? State practice furnishes many instances of *inter se* modification having been effected even where the original treaty did not admit of 'contracting out'; but, as the Commission rightly point out, 'an *inter se* agreement is more likely [than an amendment] to have an aim and effect incompatible with the object and purpose of the treaty'.¹⁰⁵ Accordingly, Article 41 imposes three conditions

on the conclusion of *inter se* agreements, where such agreements are not contemplated in the original treaty:

- (a) the modification in question must not be prohibited by the treaty.
- (b) it must not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations; and
- (c) it must not relate to a provision derogation from which would be incompatible with the effective execution of the object and purpose of the treaty as a whole.

The first of these conditions is self-evident and unexceptionable. The second and third conditions may prove to be unduly onerous in practice for would-be 'modifying' States, particularly where it is a question of seeking to modify a technical convention in the field of international communications which is essentially of a regulatory character. A change in international regulations of this nature (for example, in relation to rules for the safety of life at sea) must of practical necessity take effect *erga omnes*, and will therefore fall foul of the rule prohibiting *inter se* modification in cases where the enjoyment by the other parties of their rights under the treaty is affected. In practice, it may be that would-be 'modifying' States will seek to overcome this difficulty by the simple device of concluding a completely new Convention.

Notes

- 1 *Yearbook of the International Law Commission*, (1966–II), 211.
- 2 See statements by the delegations of Cyprus, Ecuador, Czechoslovakia, Bolivia and Spain in *Official Records, First Session*, 72nd meeting.
- 3 *Yearbook of the International Law Commission*, (1966–II), 211.
- 4 *Ibid.*
- 5 A/Conf.39/C.1/L.181.
- 6 *Official Records, First Session*, 29th meeting (Sir Humphrey Waldock).
- 7 *Official Records, First Session*, 72nd meeting, para 32 (Yasseen).
- 8 *I.C.J. Rep.* 1952, 40.
- 9 *Yearbook of the International Law Commission*, (1966–II), 212–13.
- 10 (1924) *P.C.I.J. ser. A*, No. 2, at 34.
- 11 Nascimento e Silva, *loc. cit.*, at 275.
- 12 Art. 28 in the text of the Convention as finally adopted.
- 13 *Official Records, First Session*, 30th meeting (Bevans).
- 14 Including the delegations of Portugal, Canada, France, Guinea, Israel and, somewhat cautiously, the United Kingdom.
- 15 *Official Records, First Session*, 30th meeting (Gonzalez Campos).
- 16 *Ibid.* (Jimenez de Arechaga).
- 17 *Ibid.* (Yasseen).
- 18 Cf. the explanation given by the Chairman of the Drafting Committee for the refusal of the Drafting Committee to accept a Finnish amendment proposing that a cross reference to Art. 18 be included in the text of what is now Art. 28: *Official Records, First Session*, 72nd meeting (Yasseen).

- 19 Cf. Nascimento e Silva, *loc. cit.*, at 229, who takes the view that one should not speak of a possible retroactive effect in this case, since the provisions are applicable as from the date of signature of the treaty.
- 20 See Chapter I *supra*, pp. 7–9. The temporal effect of the invalidity of a treaty conflicting with a peremptory norm of international law is considered in Chapter VII, p. 225 *infra*.
- 21 *Laws and Practices concerning the Conclusion of Treaties*, United Nations Legislative Series, 1953 (ST/LEG/Ser.B/3), at 122–3.
- 22 *Op. cit.*, at 116–17. To the same effect, see Fawcett, *The British Commonwealth in International Law*, 210–14 (1963), and Higgins, *The Development of International Law by the Political Organs of the United Nations*, 310 (1963).
- 23 1 *Principes généraux du droit international public*, 381 (1944) (but note that Rousseau, in a more recent work, qualifies this view by drawing attention to the general principle set out in Art. 29 of the Vienna Convention, while stressing its ‘relative’ rather than ‘absolute’ nature: 1 *Droit international public*, 165 (1970). See also Huber, *Le droit de conclure des traités internationaux*, 28 (1951).
- 24 Dahm, 3 *Völkerrecht*, 110 (1961).
- 25 Cited in *British Practice in International Law* (1962–II), 237.
- 26 Cited in *British Practice in International Law* (1963–II), 144.
- 27 *Yearbook of the International Law Commission* (1966–II), 213.
- 28 *Ibid.*
- 29 *Ibid.*
- 30 *Official Records, First Session*, 30th meeting (Harry).
- 31 *Loc. cit.*, 72nd meeting (Sinclair).
- 32 UKTS No. 5 (1963): Cmnd. 1929.
- 33 UKTS No. 12 (1963): Cmnd. 1956.
- 34 UKTS No. 88 (1970). Other recent multilateral treaties where the UK instrument of ratification contains a list of the territories in respect of which the treaty is being ratified include the following:
- Convention on the Political Rights of Women of 31 March, 1953; UKTS No. 101 (1967: Cmnd. 3449).
- Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space of 27 January 1967; UKTS No. 10 (1968): Cmnd. 3519.
- Convention on Offences and Certain other Acts committed on board Aircraft of 14 September 1963; UKTS No. 126 (1969): Cmnd. 4230.
- Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects launched into Outer Space of 22 April 1968: UKTS No. 56 (1969): Cmnd. 3997.
- International Convention on the Elimination of All Forms of Racial Discrimination of 7 March 1966; UKTS No. 77 (1969): Cmnd. 4108.
- Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970: UKTS No. 39 (1972): Cmnd. 4956.
- Convention on International Liability for Damage caused by Space Objects of 29 March 1972; UKTS No. 16 (1974): Cmnd. 5551.
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; UKTS No. 10 (1974): Cmnd. 5524.
- 35 UKTS No. 102 (1970): Cmnd. 4538.
- 36 UKTS No. 40 (1979): Cmnd. 7535.
- 37 But, in special circumstances, a State will not be precluded from making a declaration at the time of signature, ratification or accession that the treaty (even a humanitarian

- treaty) shall not apply to a named territory. Thus, during the period from 1965 to 1979, the United Kingdom Government, on signing, ratifying or acceding to multilateral treaties which had a potential application to Southern Rhodesia (now Zimbabwe) invariably accompanied the instrument of ratification or accession with a declaration that the provisions of the treaty 'shall not apply in regard to Southern Rhodesia until the Government of the United Kingdom inform the [depository] that they are in a position to ensure that the obligations imposed by the [treaty] in respect of that territory can be fully implemented'.
- 38 UKTS No. 52 (1964): Cmnd. 2482.
- 39 UKTS No. 119 (1975): Cmnd. 6228.
- 40 UKTS No. 64 (1978): Cmnd. 7251.
- 41 See examples referred to in footnotes 39 and 40 above.
- 42 There are also rare examples of later additions of a territory to the lists of those named in the instrument of ratification or accession. Thus, the list of territories specified in the United Kingdom instrument of ratification of the Convention on Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973 did not include the Cayman Islands. By notice given to the Government of the Swiss Confederation (acting as depository Government), the Convention was extended to the Cayman Islands with effect from 8 August 1979.
- 43 Jenks, 'The conflict of law-making treaties', 30 *B. Y.I.L.* (1953), 401–53.
- 44 *Op. cit.*, at 219.
- 45 *Op. cit.*, at 221.
- 46 *Op. cit.*, at 221–2.
- 47 A/CN.4/63 (1953), Art. 16(1).
- 48 Fitzmaurice, *Third Report on the Law of Treaties*, A/CN.4/115 (1958), Arts. 18 and 19.
- 49 *P.C.I.J.* ser. A/B, No. 63. In this case Judges Van Eysinga and Schücking, in dissenting judgments, had asserted the invalidity of the Convention of St. Germain, a later treaty between certain of the parties to the General Act of Berlin of 1885, which purported to modify the latter. But the Court was content to regard the Convention of St. Germain, which had been relied on by both the litigating States as the source of their obligations, as the treaty which must be applied.
- 50 *P.C.I.J.* ser. B, No. 14.
- 51 Waldock, *Second Report on the Law of Treaties*, A/CN.4/156 (1963), 53–72.
- 52 *Official Records, First Session*, 31st meeting (Woodley).
- 53 *Loc. cit.*, 28th meeting (explanation given by Yasseen, Chairman of the Drafting Committee). It may be noted that Reuter considers that the problems raised by the B.I.R.P.I. observer are in fact resolved by Art. 40 of the Convention relating to the amendment of multilateral treaties: *op. cit.*, at 150 (footnote to para. 188).
- 54 Alexandrowicz, *World Economic Agencies*, 16 (1962).
- 55 *Ibid.*, at 40–1.
- 56 Nascimento e Silva, *loc. cit.*, at 244, following in this respect Jenks, *loc. cit.*, at 436–50.
- 57 *Ibid.*
- 58 Anzilotti states that '... la norme de droit particulier l'emporte sur la norme générale; par suite, la convention entre deux Etats prévaut sur le traité collectif et celui-ci prévaut à son tour sur le droit commun coutumier': 1 *Cours de droit international*, 103 (1929, trans. Gidel).
- 59 Jenks, *loc. cit.*, at 448.
- 60 Cf. Nascimento e Silva, *loc. cit.*, at 246.
- 61 Jenks, *loc. cit.*, at 450.

- 62 *Yearbook of the International Law Commission* (1966–II), 214.
- 63 *Official Records, Second Session*, 91st meeting.
- 64 *Ibid.*
- 65 UKTS No. 6 (1977): Cmnd. 6702. But Art. 44 of the United Nations Covenant by no means resolves all the problems of potential conflict between the European and United Nations Conventions; see Eissen, 'Convention Européenne des Droits de l'Homme et Pacte des Nations Unies relatifs aux droits civils et politiques: problèmes de coexistence', 30 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1970), at 237–61 and 646–7, Robertson, *Human Rights in the World*, 80–110 (1972), and Jacobs, *The European Convention on Human Rights*, 276 (1975). For a brief discussion of the interaction between the Vienna Convention on Consular Relations and the European Convention on Consular Functions, see Maryan Green in 8 *Revue Belge de Droit International* (1972), 184.
- 66 *Official Records, Second Session*, 91st meeting (Waldock). If the rule were otherwise, there could be difficulties in determining which was the 'earlier' and which the 'later' treaty: see *Official Records, First Session*, 31st meeting (Sinclair).
- 67 *Official Records, Second Session*, 85th meeting (Sinclair) and 91st meeting (Waldock).
- 68 Cahier, 'Le problème des effets des traités à l'égard des Etats tiers', 143 *Recueil des Cours* (1974), 597.
- 69 Roxburgh, *International Conventions and Third States*, 31–2 (1917).
- 70 Cahier, *loc. cit.*, at 598.
- 71 Waldock, *Third Report on the Law of Treaties*, A/CN.4/167 (1964), 28.
- 72 Cahier, *loc. cit.*, at 600: in any event, Art. 38 of the Convention provides that nothing in Arts. 34 to 37 [dealing with treaties and third States] precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law, recognised as such.
- 73 Cahier, *loc. cit.*, at 601.
- 74 *Supra*, p. 86.
- 75 *P.C.I.J.* ser. A/B, No. 46, at 41.
- 76 *P.C.I.J.* ser. A, No. 23, at 19–22.
- 77 2 *R.I.A.A.*, 842.
- 78 *Ibid.*, at 870.
- 79 *I.C.J. Rep.* 1969, at 25–6.
- 80 See, for example, McNair, *op. cit.*, at 312, Anzilotti, *op. cit.*, at 424–5 and Rousseau, 1 *Droit international public*, 190–1 (1970).
- 81 See, for example, Jimenez de Arechaga, 'International Law in the Past Third of a Century', 159 *Recueil des Cours* (1978), at 50–55. For a brief summary of the conflicting viewpoints, see *Yearbook of the International Law Commission* (1966–II), 228–9.
- 82 *P.C.I.J.* ser. A/B, No. 46, at 147–8.
- 83 *Official Records, Second Session*, 14th plenary meeting (Pham-Huy-Ty).
- 84 *Ibid.* (Vallat).
- 85 Kearney and Dalton, *loc. cit.*, at 523.
- 86 Jimenez de Arechaga, 'Treaty stipulations in favour of third States', 50 *A.J.I.L.* (1956), at 255–6.
- 87 Cahier, *loc. cit.*, at 646–7.
- 88 Cahier, *ibid.*, takes the same view.
- 89 Jimenez de Arechaga, *loc. cit.* at n. 81 above, at 54.
- 90 *Yearbook of the International Law Commission* (1966–II), 231.
- 91 McNair, *op. cit.*, at 256–9.

- 92 Rousseau, 1 *Droit international public*, 192 (1970).
- 93 Reuter, *Introduction au droit des traités*, 112–15 (1972).
- 94 A/Conf. 80/31 of 22 August 1978; reprinted in 17 *I.L.M.* (1978), 1488.
- 95 *Yearbook of the International Law Commission* (1974–II), 196–208.
- 96 *Ibid.*, at 204.
- 97 *Ibid.*, at 206.
- 98 Hoyt, *The Unanimity Rule in the Revision of Treaties* (1959), contains a useful survey of State practice. See also Blix, 'The rule of unanimity in the revision of treaties', 5 *I.C.L.Q.* (1956), at 447–65 and 581–96, for a study of the procedures adopted for the revision of the treaties governing the international status of Tangier.
- 99 *Yearbook of the International Law Commission* (1966–II), 232. For examples of the wide variety of amendment clauses contained in multilateral treaties, see *The Treaty-Maker's Handbook*, 225–39 (Blix and Emerson eds., 1973).
- 100 Reuter, *op. cit.*, at 132.
- 101 *Yearbook of the International Law Commission* (1966–II), 232.
- 102 *Ibid.*
- 103 *Official Records, First Session*, 37th meeting.
- 104 See statement by Mr Jenks in *Official Records, First Session*, 7th meeting.
- 105 *Yearbook of the International Law Commission* (1966–II), 235.

CHAPTER FIVE

Interpretation of treaties

I. General

There are few topics in international law which have given rise to such extensive doctrinal dispute as the topic of treaty interpretation. The passion which is generated among jurists on this one issue is such that, with McNair, the present author confesses that 'there is no part of the law of treaties which [he] approaches with more trepidation than the question of interpretation'.¹

Let us begin by seeking to analyse what are the main areas of contention. At one end of the spectrum, there are those who in essence deny the existence of any rules or principles governing treaty interpretation, arguing that their application in any particular case is merely an *ex post facto* rationalisation of a conclusion reached on other grounds or serves as a cover for judicial creativeness.² This somewhat extreme view is understandable as a reaction against the indiscriminate use of the hotchpotch of contradictory and conflicting maxims asserted by certain writers to constitute the applicable principles of treaty interpretation; but it gives no constructive guidance as to the attitude which an international tribunal will take when confronted with a problem of treaty interpretation, and it ignores the *indicia* (unhelpful and conflicting though they may be) which are available as a guide to what that attitude is likely to be.

At the other end of the spectrum will be found those who, far from wishing the would-be interpreter to traverse the arid desert without signposts, seek to plunge him into the impenetrable jungle of interpretation by reference to 'overriding community goals' while instructing him not to ignore any pathway (however meandering) which might be thought to lead in the direction of the 'genuine shared expectations' of the parties.³

But, first, you may ask, what is the aim and goal of treaty interpretation? Even on this preliminary issue, there is a measure of disagreement among publicists. On the one hand, there are those who assert that the primary, and indeed only, aim and goal of treaty interpretation is to ascertain the intention of the parties.⁴ There are others who start from the proposition that there

must exist a presumption that the intentions of the parties are reflected in the text of the treaty which they have drawn up, and that the primary goal of treaty interpretation is to ascertain the meaning of this text.⁵ Finally, there are those who maintain that the decision-maker must first ascertain the object and purpose of a treaty and then interpret it so as to give effect to that object and purpose.⁶

These three different schools of thought, with their varying emphases, are commonly said to reflect the subjective (or 'intentions of the parties') approach, the objective (or 'textual') approach and the teleological (or 'object and purpose') approach.⁷ They are not, of course, mutually exclusive. The most rigid adherent of the textual approach would scarcely argue that a tribunal should deliberately seek to establish a meaning which was not within the contemplation, or intention, of any of the parties to the dispute; and the most rigid adherent of the intentions approach would not seek to deny that the text of the treaty will constitute evidence of what was the intent of the parties.

McNair, in an attempt to find a synthesis of all three approaches, suggests that the main task of any tribunal which is called upon to construe or apply or interpret a treaty is to give effect to the expressed intention of the parties, that is 'their intention as expressed in the words used by them in the light of the surrounding circumstances'.⁸

The Commission, in their final set of draft articles, suggested a general rule of interpretation in the following terms: 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. This was accompanied by a definition of what is meant by the context of the treaty and what other elements have to be taken into account together with the context — namely, any subsequent practice in the application of the treaty establishing the understanding of the parties regarding its interpretation, and any relevant rules of international law. The *travaux préparatoires* of a treaty, together with the circumstances of its conclusion, are characterised as 'supplementary means' of interpretation which may be resorted to to confirm the meaning resulting from the application of the general rule, or to determine the meaning when the interpretation according to the general rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.

The Commission's proposals (which were adopted virtually without change by the Conference and are now reflected in Articles 31 and 32 of the Convention) were clearly based on the view that the text of a treaty must be presumed to be the authentic expression of the intentions of the parties; the Commission accordingly came down firmly in favour of the view that 'the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties'.⁹ This is not to say that the *travaux préparatoires* of a treaty, or the circumstances of its conclusion, are

relegated to a subordinate, and wholly ineffective, role. As Professor Briggs points out, no rigid temporal prohibition on resort to the *travaux préparatoires* of a treaty was intended by the use of the phrase 'supplementary means of interpretation' in what is now Article 32 of the Vienna Convention.¹⁰ The distinction between the general rule of interpretation and the supplementary means of interpretation is intended rather to ensure that the supplementary means do not constitute an alternative, autonomous method of interpretation divorced from the general rule.

The question of recourse to *travaux préparatoires* has often been regarded as the touchstone which serves to distinguish the adherents of the 'textual' approach from the adherents of the 'intentions' approach. It is implied that those who attach prime significance to the text of a treaty are reluctant to countenance resort to the *travaux préparatoires*, which will afford useful evidence as to the intentions of the parties.¹¹ But this is not necessarily so. If the intentions of the parties, or the object and purpose of a treaty, do not reveal themselves from a careful analysis of the text, it is unlikely that the *travaux* will shed a pellucid light upon the matter. And, even if they did, there would still remain a difference of approach; for, in the case of those who favour the 'textual' approach, resort to the *travaux préparatoires* is for the purpose of elucidating the meaning of the text, not for the purpose of ascertaining, independently of the text, the intentions of the parties.

In any event, it is clear that no would-be interpreter of a treaty, whatever his doctrinal point of departure, will deliberately ignore any material which can usefully serve as a guide towards establishing the meaning of the text with which he is confronted. It can readily be admitted that the famous principle laid down by Vattel — 'La première maxime générale sur l'interprétation est qu'il n'est pas permis d'interpréter ce qui n'a pas besoin d'interprétation' — is a *petitio principii*. It is obvious that this states the result of a process of interpretation rather than a rule about interpretation itself. Every text, however clear on its face, requires to be scrutinised in its context and in the light of the object and purpose which it is designed to serve. The *conclusion* which may be reached after such a scrutiny is, in most instances, that the clear meaning which originally presented itself is the correct one, but this should not be used to disguise the fact that what is involved is a process of interpretation.

It is suggested that many of the doctrinal disputes about treaty interpretation are somewhat unreal. There are, no doubt, real differences of emphasis as to what is the proper aim and goal of treaty interpretation. These differences we have already discussed. But, for the rest, many of the features that are said to distinguish the adherents of one school from the adherents of another stem from the fact that the argument is being conducted on two different levels. On the one hand, there are those who are seeking, as it were, to *describe* the process of interpretation and who, accordingly, focus attention upon the

materials which the would-be interpreter should consult; and, on the other hand, there are those who are seeking to establish certain principles or rules as to the relative value or weight to be attributed to the materials to be taken into consideration.

It must be said that the Convention rules on interpretation reflect an attempt to assess the relative value and weight of the elements to be taken into account in the process of interpretation rather than to describe the process of interpretation itself. This does *not* mean that the Convention system establishes a rigid and utterly unyielding hierarchy between the general rule and the supplementary means. The relationship is considerably more subtle than that. The would-be interpreter is still expected, when confronted with a problem of treaty interpretation (which, *ex hypothesi*, involves an argument as to the meaning of a text) to have recourse to all the materials which will furnish him with evidence as to what is the meaning to be attributed to the text; such materials will naturally include the *travaux préparatoires* of the treaty, and the circumstances of its conclusion. It is only when he has available to him all the necessary materials that he will be in a position to assess their relative value and weight in the light of the rules laid down in the Convention.

It has been argued that the Convention rules on treaty interpretation constitute a departure from the *lex lata* and can be justified only by reference to their value in preventing conflict.¹² This argument is difficult to sustain. It is based on the assumption that the only relevant rule of customary international law is that the meaning and effect of consensual obligations must be interpreted in a spirit of equity. But this comes very near to an assertion that the principles which international tribunals purport to apply are no more than an exercise in justification, disguise and self-deception. This is no doubt one view of the matter (and it is a view to which we have already drawn attention) but it is not a view which commands general support.

More significantly, it is asserted that the Convention rules are incomplete and possibly misleading. Thus, O'Connell maintains that 'the priorities inherent in the application of these rules are not clearly indicated, and the rules themselves are in part so general that it is necessary to review traditional methods whenever interpreting a treaty'.¹³ The criticism directed towards the generality of the rules is no doubt well founded if (but only if) the intention had been to formulate a comprehensive code of the canons of interpretation available to international tribunals or other decision-makers. But the Commission specifically disavowed any such intent in making the proposals which (with very minor drafting changes) now appear as Articles 31 and 32 of the Convention. In their commentary the Commission refer to the rich variety of principles and maxims of interpretation applied by international tribunals. They point out that these are, for the most part, principles of logic and good sense which are valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions employed

in a document; and that recourse to many of these principles is discretionary rather than obligatory, interpretation being to some extent an art rather than an exact science. Accordingly, the Commission concluded that 'any attempt to codify the conditions of the application of those principles of interpretation whose appropriateness in any given case depends on the particular context and on a subjective appreciation of varying circumstances would clearly be inadvisable'.¹⁴

O'Connell also characterises the general rule laid down in the Convention as embodying the literal and teleological techniques of interpretation. He argues that the teleological technique is not altogether the same as the principle of effectiveness 'and the omission of any reference to the principle of effectiveness in Article 31 will lead States to argue that it is not an established canon of interpretation'.¹⁵ It is doubtful whether the wording of Article 31 could be invoked to sustain so narrow a view. Certainly, the Commission seem to have believed that the principle of effectiveness expressed in the maxim *ut res magis valeat quam pereat* was subsumed in the reference to 'good faith' and 'the object and purpose of a treaty' contained in Article 31:

When a treaty is open to two interpretations one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purpose of the treaty demand that the former interpretation should be adopted.¹⁶

It may be that the teleological approach differs in some respects from the approach based on effectiveness, since it can be argued that the effective interpretation of a treaty is a matter of necessity based upon the presumed interest of the authors to make the treaty provision effective rather than ineffective, whereas interpretation by reference to the object and purpose of a treaty requires a subjective appreciation by the would-be interpreter of what were the aims of the parties.¹⁷ The criticism is a fair one, but it would appear from the Commission's commentary that, in their view, the object and purpose of a treaty are primarily to be gathered from the text of the treaty and particularly from the preamble.¹⁸ If the Convention rules are applied in this sense — that is to say, if consideration of the object and purpose is largely confined to the terms of the treaty itself — the danger that teleological interpretation will involve an excessive departure from the text is minimised; it is in any event clear that, within the framework of the Convention regime, consideration of the object and purpose is only one element of the general rule, and a subsidiary element at that.

It should be noted that the Convention rules on interpretation draw a clear distinction between what de Visscher refers to as the 'intrinsic' and the 'extrinsic' techniques of interpretation.¹⁹ The intrinsic method utilises only those elements which are contained in the treaty itself and the extrinsic method utilises elements external to the treaty. Clearly, the text of the treaty itself is the principal intrinsic element, but so also is the *context of the treaty*, which

the Convention defines as comprising any agreement relating to the treaty made between all the parties in connection with the conclusion of the treaty and any instrument made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. It should be noted that this definition of the context is deliberately narrow, in the sense that it is confined to documents drawn up in connection with the conclusion of a treaty. Subsequent agreements or subsequent practice in the application of the treaty, together with any relevant rules of international law applicable in the relations between the parties are treated rather as extrinsic elements which have to be taken into account together with the context. The reference to 'relevant rules of international law applicable in the relations between the parties' may be taken to include not only the general rules of international law but also treaty obligations existing for the parties.²⁰

II. The Convention rules

As we have already noted, Article 31(1) of the Convention states the general rule of interpretation as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

This formula has the virtue of brevity; but it does require further elaboration. It may therefore be useful to look more closely at some of the key elements in the formula.

1. Good faith

The principle of good faith underlies the most fundamental of all the norms of treaty law — namely, the rule *pacta sunt servanda*. Indeed, Article 26 of the Convention specifically establishes that every treaty in force is binding upon the parties to it and must be performed by them 'in good faith'. If 'good faith' is required of the parties in relation to the observance of treaties, logic demands that 'good faith' be applied to the interpretation of treaties. As one eminent authority puts it:

Or, si le traité doit être exécuté de bonne foi, il doit nécessairement être interprété de bonne foi. L'exécution dépend de l'interprétation et, sans se confrondre, ces deux opérations juridiques sont intimement liées.²¹

The Commission indeed justify the inclusion of the 'good faith' element in the general rule of interpretation by recalling that the principle of interpretation in good faith 'flows directly from the rule *pacta sunt servanda*'.²²

Whose good faith is in issue in the process of interpretation? Given that the principle of good faith in this context is so closely linked with the principle *pacta sunt servanda*, it is primarily the good faith of the parties to the treaty.

Where a third party is called upon to interpret the treaty, his obligation is to draw inspiration from the good faith which should animate the parties if they were themselves called upon to seek the meaning of the text which they have drawn up.²³

The principle of good faith applies to the entire process of interpretation, including the examination of the text, the context and subsequent practice. In addition, the result obtained must be appreciated in good faith — that is to say, good faith as an objective criterion in the light of the particular circumstances, not good faith as an abstract notion.²⁴

It is often said that the principle of good faith in the process of interpretation underlies the concept that interpretation should not lead to a result which is manifestly absurd or unreasonable. A recent example of interpretation of a treaty provision by one of the organs of the United Nations may serve as an illustration of this. The sad death of Sir Humphrey Waldock on 15 August 1981 created a casual vacancy in the International Court of Justice. Sir Humphrey's term of office, together with the terms of office of four other judges, was due to expire on 5 February 1982, and the regular elections to fill the vacancies thus created were due to be held during the course of the General Assembly session beginning in September 1981. Article 5 of the Statute of the Court requires that the Secretary-General's invitation to national groups to nominate candidates should be sent out at least three months before the date of the election. Accordingly, any election to fill the casual vacancy created by Sir Humphrey Waldock's death could hardly have been held before the date on which the regular elections would be held, these regular elections ensuring that the seat vacated by Sir Humphrey Waldock would be filled with effect from 6 February 1982. The Secretary-General consulted the President of the Security Council about this anomalous situation and, on 25 August 1981, the latter informed the Secretary-General of the outcome of his consultations with the members of the Security Council:

... the Council considers that, as the vacancy which has arisen ... will be filled through the regular election procedure as from 6 February, 1982, no purpose would be served by invoking the procedures of the Statute of the Court relating to the filling of a casual vacancy for the remainder of Sir Humphrey's term of office. Those procedures are applicable in cases where otherwise a considerable delay would elapse in filling a vacancy. No such delay is involved in this instance, as the seat will be filled as from 6 February, 1982.²⁵

A learned authority on the practice of the International Court of Justice has commended this new interpretation of the Statute in the following terms:

It is a cardinal principle of interpretation that a treaty should be interpreted in good faith and not lead to a result that would be manifestly absurd or unreasonable. The interpretation by the Secretary-General and by the Security Council of the provisions of the Statute on the filling of casual vacancies in this case may be held up as an illustration of an interpretation meeting this condition.²⁶

2. Ordinary meaning

The next element in the general rule of interpretation is that of the ordinary meaning to be given to the terms of the treaty. But this 'ordinary meaning' does not necessarily result from a pure grammatical analysis. The true meaning of a text has to be arrived at by taking into account all the consequences which normally and reasonably flow from that text. Furthermore, there is no such thing as an abstract ordinary meaning of a phrase, divorced from the place which that phrase occupies in the text to be interpreted:

Il ne s'agit donc pas d'un sens ordinaire abstrait, mais d'un sens ordinaire concret qui ne peut être discerné que par l'examen du terme en question dans le contexte de ce terme et à la lumière du but et de l'objet du traité. C'est ce sens qui peut être retenu dans le processus de l'interprétation du traité.²⁷

Or, as another learned authority puts it:

... l'interprétation consiste non pas simplement à retrouver la signification primitive d'un instrument juridique mais à lui donner, sous réserve toujours du respect du texte, la signification spécifique que postule son application pratique.²⁸

The concept of the 'ordinary meaning' of a text has to be understood in this sense.

Two examples from recent international jurisprudence illustrate the necessity to go beyond a purely grammatical or linguistic interpretation of a particular word or phrase.

The first example is the *Young Loan* arbitration.²⁹ The key issue here was the interpretation of the exchange guarantee in Article 2(e) of Annex 1A to the London Debt Agreement (LDA) which required that, should the rates of exchange ruling any of the currencies of issue on 1 August 1952 alter thereafter by 5 per cent or more, the instalments due after that date, while still being made in the currency of the country of issue:

... shall be calculated on the basis of the least depreciated currency ... [English text]

... seront calculés sur la base de la devise la moins dépréciée ... [French text]

... auf der Grundlage der Währung mit der geringsten Abwertung ... zu berechnen ... [German text]

What was meant by '... the least depreciated currency' in this context? Did it cover any general fall in the value of one currency in relation to another, or was it confined to the formal devaluation of a currency by governmental act? Although the tribunal which was called upon to decide the substantive issue divided four to three on how Article 2(e) Annex 1A to the LDA should be interpreted, there was at least a minimum of agreement that a purely grammatical construction of the crucial phrase was insufficient to resolve the dispute. As the majority opinion, after citing Article 31(1) of the Vienna Convention on the Law of Treaties, puts it:

The decisive terms to be interpreted are the words *Abwertung*, 'depreciation', *dépréciation*. The Tribunal has no doubt that if it were to proceed on terminology alone, and take the words in their ordinary, everyday sense in the language concerned, it is at least not excluded that the German text would provide one answer to the original query, and the French and English texts a different one. In German, the meaning of the term *Abwertung* is relatively clear. In the proper, technical language, it means a reduction in the external value of a currency — in relation to a fixed yardstick e.g. gold — by an act of government In English and French, on the other hand, the terms 'depreciation' and *dépréciation*, as they occur in the disputed clause, are normally used to describe the economic phenomenon of depreciation of a currency quite generally, while 'formal' devaluation is usually termed 'devaluation' or *dévaluation* Since the vagueness of the terms used in the English and French texts and the possible discrepancy between the German version of the disputed clause on the one hand and the French and English versions on the other cannot be eliminated by textual interpretation, the words to be construed must, under Article 31(1) of the Vienna Convention on the Law of Treaties, be interpreted 'in their context'. 'Context' in this case means both the wording in full of the disputed clause and the body of the LDA as a whole.³⁰

The second example is taken from the advisory opinion given by the International Court of Justice on 20 December 1980 concerning the *Interpretation of the Agreement of 25 March, 1951 between the World Health Organisation and Egypt*.³¹ Briefly, the World Health Organisation (WHO) had entered into an agreement on 25 March, 1951, with the Government of Egypt concerning privileges and immunities to be accorded to the Eastern Mediterranean Regional Office of WHO at Alexandria. Section 37 of that agreement provided that:

Section 37. The present Agreement may be revised at the request of either party. In this event the two parties shall consult each other concerning the modifications to be made in its provisions. If the negotiations do not result in an understanding within one year, the present Agreement may be denounced by either party giving two years' notice.

In 1979 a majority of the member States of the WHO Regional Committee for the Eastern Mediterranean expressed their wish that the Regional Office be transferred from Alexandria to another State in the region. The question was then raised whether this transfer could be effected without reference to the negotiation and notice provisions of section 37 of the 1951 agreement. The WHO Assembly accordingly requested an advisory opinion from the Court on the following questions:

1. Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March, 1951, between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?
2. If so, what would be the legal responsibilities of both the World Health Organization and Egypt, with regard to the Regional Office at Alexandria, during the two year period between notice and termination of the Agreement?

In the event, the Court did not respond specifically to the questions posed by the World Health Assembly, but in effect concluded that the true legal question under consideration in the World Health Assembly was: What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected?³² What is of interest in the present context is that the advisory opinion stresses that the differing views which had emerged in the World Health Assembly turned crucially on the meaning of the word 'revise' in the first sentence of section 37 of the 1951 Agreement and on the interpretation then to be given to the two following sentences:

According to one view the word 'revise' can cover only modifications of particular provisions of the Agreement and cannot cover a termination or denunciation of the Agreement, such as would be involved in the removal of the seat of the office from Egypt; and this is the meaning of the word 'revise' in law dictionaries. On that assumption, and on the basis of what they consider to be the general character of the 1951 Agreement, they consider all the provisions of the Section, including the right of denunciation in the third sentence, to apply only in cases where a request has been made by one or other party for a partial modification of the terms of the Agreement.³³

The Court then describes the opposite thesis:

Opponents of the view just described insist, however, that the word 'revise' may also have the wider meaning of 'review' and cover a general or total revision of an agreement, including its termination. According to them, the word has not infrequently been used with that meaning in treaties and was so used in the 1951 Agreement. They maintain that this is confirmed by the *travaux préparatoires* of Section 37 ... [which, in their view] confirm that the formula ... was designed to cover revision of the location of the Regional Office's seat at Alexandria, including the possibility of its transfer outside Egypt. They further argue that this interpretation is one required by the object and purpose of Section 37 which, they say, was clearly meant to preclude either of the parties to the Agreement from suddenly and precipitately terminating the legal régime it created.

The Court deftly avoids taking a position on this key question of interpretation. By re-formulating the questions submitted to it and by insisting that '... the emphasis placed on Section 37 in the questions posed in the request distorts in some measure the general legal framework in which the true legal issues before the Court have to be resolved',³⁵ the Court provides a justification for refraining from deciding on the issue of interpretation of Section 37 of the 1951 Agreement.

A study of the separate and dissenting opinions is however illuminating. Five of the judges who delivered separate opinions (Judges Lachs, Ruda, Mosler, Oda and Sette Camara) favoured, with varying degrees of emphasis, the view that Section 37 of the 1951 Agreement was inapplicable to the question of the transfer of the WHO Regional Office from Egypt. Judge Mosler defended his viewpoint on the basis of his assessment of the ordinary meaning of the clause:

If the term 'revision' be understood in accordance with the ordinary meaning to be given to it (cf. Article 31, para. 1, of the Vienna Convention on the Law of Treaties), it suggests the idea of introducing partial changes in a situation, agreement or status, rather than the abolition or complete and total cessation of the situation, treaty or status in question. Nothing is to be found in the context which might justify an interpretation departing from the ordinary meaning. I doubt therefore whether Section 37 is applicable in the present case, since I do not think that to cease to apply the Agreement can be construed as a *revision*. I admit that the word *revision* may in certain circumstances have the meaning of a radical and total change in a treaty; but the second sentence in Section 37, which speaks of 'modifications', prevents my interpreting the revision referred to in the first sentence in this broader sense.³⁶

As against this, three of the judges who delivered separate opinions (Judges Gros, Ago and El Erian) adhered to the alternative view that Section 37 of the 1951 Agreement *was* applicable to the transfer of the WHO Regional Office from Egypt. Judges Gros and Ago were not persuaded by the semantic argument that the term 'revision' in Section 37 must be construed as being confined to partial changes in the Agreement. In the words of Judge Gros:

It is carrying formalism a long way to say that only a request for partial revision is possible; it would in fact be easy to demand a modification unacceptable to the other party and then to denounce the Agreement.³⁷

Perhaps more significantly, all three judges who favoured the alternative view derived support for their conclusion from an analysis of the *travaux préparatoires*, finding that the origin of Section 37 of the 1951 Agreement was to be found in Article 30 of the 1946 Agreement between the Swiss Federal Council and the International Labour Organisation. After reviewing the origins of the compromise solution embodied in Article 30 of the ILO/Switzerland Agreement, Judge Ago concludes that the parties to that Agreement:

... were both agreed upon a power of unilateral denunciation contained within the limits of the provisions of Article 30, and that the term 'revision' as used in this clause was understood in its widest connotation and thus covered in particular the eventuality of the radical revision which would be entailed by a change in the seat of the organization.³⁸

The ordinary meaning of a treaty provision should in principle be the meaning which would be attributed to it at the time of the conclusion of the treaty. This is what Fitzmaurice has termed the 'principle of contemporaneity' requiring that 'the terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the time when the treaty was originally concluded'.³⁹ It is supported by a passage from the judgment of the International Court of Justice in the *US Nationals in Morocco* case, where the Court, in interpreting Article 20 of the US/Morocco Treaty of 1836, stated:

It is also necessary to take into account that, at the times of these two treaties, the clear-cut distinction between civil and criminal matters had not yet been developed in Morocco.

Accordingly, it is necessary to construe the word 'dispute', as used in Article 20, as referring both to civil disputes and to criminal disputes ...⁴⁰

Fitzmaurice correctly points out that his 'principle of contemporaneity' is really a particular application of the doctrine of the inter-temporal law,⁴¹ and it is in this context that one must view certain pronouncements by the International Court of Justice in the *Aegean Continental Shelf* case which might seem to be at variance with the principle of contemporaneity. One of the issues in this case related to the interpretation of a Greek reservation to its instrument of accession to the General Act of 1928, the reservation excluding *inter alia* disputes '... relating to the territorial status of Greece ...'. The Greek Government argued that this part of the reservation could not be applicable to her continental shelf dispute with Turkey since the very idea of the continental shelf was unknown in 1928 when the General Act was concluded and in 1931 when Greece acceded to it. The Court found that the term 'territorial status' in the Greek reservation was a generic term which *in the practice of the time* (that is to say, in the League of Nations period) was understood as embracing the integrity and frontiers, as well as the legal régime, of the territory in question. Turning more particularly to the Greek argument that the continental shelf doctrine was unknown in 1928 and 1931, the Court stated:

Once it is established that the expression 'the territorial status of Greece' was used in Greece's instrument of accession as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time.⁴²

There were of course certain special features of the *Aegean Continental Shelf* case. In the first place, Greece was invoking as a basis for the Court's jurisdiction in the case the terms of Article 17 of the General Act of 1928 whereby the parties agreed to submit to judicial settlement all disputes with which they were in conflict 'as to their respective rights'. Accordingly, Greece was compelled to maintain that the reference to 'respective rights' must be understood as referring to rights over the continental shelf in existence at the time the dispute was submitted to the Court. The Court commented:

If the Greek Government is correct, as it undoubtedly is, in assuming that the meaning of the generic term 'rights' in Article 17 follows the evolution of the law, so as to be capable of embracing rights over the continental shelf, it is not clear why the similar term 'territorial status' should not likewise be liable to evolve in meaning in accordance with 'the development of international relations' ...⁴³

In the second place, the Greek claims included claims to continental shelf rights in respect of the Dodecanese group of islands which was not in the possession

of Greece at the time of the Greek accession to the General Act of 1928, these islands having been ceded to Greece by Italy only in 1947. It followed that the territorial extent of Greece had also evolved, and this clearly had some bearing on the interpretation of the Greek reservation as to 'territorial status'. For these reasons, the Court concluded that:

... the close and necessary link that always exists between a jurisdictional clause and reservations to it, makes it difficult to accept that the meaning of the clause, but not of the reservation, should follow the evolution of the law.⁴⁴

The reasoning of the Court in the *Aegean Continental Shelf* case may be said to represent a specific application of the principle of inter-temporal law, tempered by the equitable doctrine of approbation and reprobation. The Greek argument involved placing a temporal limitation upon her reservation, but not upon the compromissory clause. This the Court would not permit.⁴⁵

3. *Special meaning*

The converse of the 'ordinary meaning' of a term is its special meaning. Paragraph 4 of Article 31 stipulates that 'a special meaning shall be given to a term if it is established that the parties so intended'. Within the International Law Commission, there was some doubt as to whether there was any need to have a specific provision on this point, the argument being that a technical or special use of a term normally appeared from the context and the technical or special meaning became, as it were, the ordinary meaning in the particular context. However, on balance, the Commission considered that there was a certain utility in laying down a specific rule on the point 'if only to emphasize that the burden of proof lies on the party invoking the special meaning of the term'.⁴⁶

That what underlies the specific rule about a special meaning is essentially the question of burden of proof emerges from the scant jurisprudence on the point. In the *Legal Status of Eastern Greenland* case, for example, the Permanent Court of International Justice stated:

The geographical meaning of the word 'Greenland' i.e. the name which is habitually used in the maps to denominate the whole island, must be regarded as the ordinary meaning of the word. If it is alleged by one of the Parties that some unusual or exceptional meaning is to be attributed to it, it lies on that Party to establish its contention.⁴⁷

More recently, the Court of Arbitration in the *UK/French Continental Shelf* arbitration was confronted with the interpretation to be given to the phrase 'Bay of Granville' in the French reservation to Article 6 of the Continental Shelf Convention of 1958. The Court commented on this aspect in the following terms:

In the pleadings the United Kingdom has contested the French Government's interpretation of the expression 'Bay of Granville' as covering the whole Channel Islands

region. Tracing the development of the various uses of the expression, the United Kingdom claims that previous uses of the expression have related only to sea areas to the east and south of Jersey; and it maintains that the French Republic has, accordingly, not established that, as used in the reservation, the expression extends to the Channel Islands region as a whole. No doubt the expression 'Baie de Granville' may have normally been used in the past with a more restricted sense. During the negotiations in the years 1970–1974, however, as the Court has already noted in paragraph 35, mention was made by both Parties of the French reservation regarding 'Granville Bay', and in the documents before the Court relating to those negotiations they are recorded as having discussed the delimitation of the boundary in the whole Channel Islands region under the rubric 'Granville Bay'. Nor is there any indication in those documents of the French reservations having been given a more restricted interpretation. As, moreover, it hardly seems probable that the French Government intended to restrict its reservations to the 'Baie de Granville' in one of the narrower senses of this expression, the Court considers that this reservation must be viewed as relating to the Channel Islands region as a whole.⁴⁸

The interpretation given to the phrase 'Bay of Granville' in *UK/French Continental Shelf* arbitration is a somewhat rare example of what appears to be the attribution of a special meaning to a geographical expression. More often than not, attempts to establish that a particular provision in a treaty must be given a special meaning have failed if only for the reason given by the International Court of Justice in the (*Second*) *Admissions* case:

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.⁴⁹

4. The context

Paragraph 2 of Article 31 defines the context for the purpose of the interpretation of a treaty as comprising:

... in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the 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.

The text of the treaty must of course be read as a whole. One cannot simply concentrate on a paragraph, an article, a section, a chapter or a part. As one distinguished commentator rightly says:

D'autres dispositions plus ou moins éloignées risquent d'apporter une exception à la disposition qu'il s'agit d'interpréter ou de poser une condition à la mise en oeuvre de cette disposition.⁵⁰

The preamble to a treaty may assist in determining the object and purpose of the treaty:

Although the objects of a treaty may be gathered from its operative clauses taken as a whole, the preamble is the normal place in which to embody, and the natural place in which to look for, an express or explicit general statement of the treaty's objects and purposes. Where these are stated in the preamble, the latter will, to that extent, govern the whole treaty.⁵¹

There are many examples in international jurisprudence of reference being made to the preamble of a treaty in order to elucidate the meaning of a particular provision. Thus, in the *United States Nationals in Morocco* case, the International Court of Justice referred to the preamble to the Madrid Convention of 1880 to ascertain its object and purpose, and went on to say:

In these circumstances, the Court can not adopt a construction by implication of the provisions of the Madrid Convention which would go beyond the scope of its declared purposes and objects.⁵²

More recently, the European Court of Human Rights, in the *Golder* case, had occasion to refer to the preamble to the European Convention of Human Rights when seeking to determine whether Article 6(1) of the Convention conferred a right of access to the courts. The Court noted that the preamble stated the resolve of the signatory Governments having a common heritage of political traditions, ideals, freedom and the rule of law 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration of Human Rights'. Despite the fact that, as the Court admitted, the preamble did not include the rule of law in the object and purpose of the Convention, but simply pointed to it as one of the features of the common heritage of the Member States of the Council of Europe, the Court sought to utilise this preambular reference in the interpretation of Article 6(1):

It seems both natural and in conformity with the principle of good faith ... to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6(1) according to their context and in the light of the object and purpose of the Convention.⁵³

It is, however, difficult to escape the conclusion that, in the *Golder* case, the Court was engaging in judicial legislation, given that Article 6(1) of the Convention was perfectly meaningful without a right of access being read into it *ab extra*.

Reference is also made in the *Beagle Channel* award to the preamble of the Chile/Argentine Boundary Treaty of 23 July 1881. The preamble to the Treaty had stated the desire of both governments to 'resolve' the boundary controversy existing between the two countries. The Court of Arbitration deduced from this preambular statement the consequence:

... that the regime set up by the Treaty, and no other, was meant thenceforth to govern the question of boundaries and title to territory, and that it was meant to be definitive, final and complete, leaving no boundary undefined, or territory then in dispute unallocated or, it might be added, left over for some future allocation.⁵⁴

So much for the preamble. What about the other main components of the 'context' as defined in paragraph 2 of Article 31 — namely, agreements relating to the treaty made between all the parties and instruments made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties? The Commission, in their commentary to the final set of draft articles on the law of treaties, explain that the principle on which this provision is based is that a unilateral document cannot be regarded as forming part of the context unless not only was it made in connexion with the conclusion of the treaty but its relation to the treaty was accepted by the other parties. The Commission continues:

On the other hand, the fact that these two classes of documents are recognized in paragraph 2 as forming part of the 'context' does not mean that they are necessarily to be considered as an integral part of the treaty. Whether they are an actual part of the treaty depends on the intention of the parties in each case.⁵⁵

The *Ambatielos* case⁵⁶ is authority for the proposition in the final sentence of this citation.

It is of course essential that the agreement or instrument should be related to the treaty. It must be concerned with the substance of the treaty and clarify certain concepts in the treaty or limit its field of application.⁵⁷ It must equally be drawn up on the occasion of the conclusion of the treaty. Any agreement or instrument fulfilling these criteria will form part of the 'context' of the treaty and will thus not be treated as part of the *travaux préparatoires* but rather as an element in the general rule of interpretation.

Applying these suggested tests to the instruments related to the Vienna Convention on the Law of Treaties, it would appear that the Declaration on the prohibition of military, political or economic coercion in the conclusion of treaties adopted unanimously by the Conference in consequence of the protracted debate on the meaning of the term 'force' in Article 52 of the Convention⁵⁸ may be regarded as part of the 'context' of the Convention for the purpose of interpreting Article 52.

Let us take another example. It has become consistent practice within the Council of Europe that governmental experts charged with the task of negotiating and formulating an international convention on a particular topic draw up, in parallel with the text of the convention, an Explanatory Report which sets out the framework within which and the background against which the convention has been drawn up, and which then goes on to furnish an article by article commentary on the text. The Explanatory Report is agreed upon unanimously by the governmental experts responsible for drawing up the text of the convention and it is adopted simultaneously with the text of the convention. Although any Explanatory Report, when published, is normally prefaced by a note indicating that 'it does not constitute an instrument providing an authoritative interpretation of the text ... although it may

facilitate the understanding of the provisions of the agreement', it would nonetheless seem that an Explanatory Report of this nature should be considered to be part of the 'context' of the agreement for the purposes of interpretation. Such an Explanatory Report, by virtue of the fact that it has been established by all the negotiating States in connexion with the conclusion of the treaty, falls more naturally to be treated as part of the 'context' of the treaty than as an element of the *travaux préparatoires* of the treaty.

It has also been suggested that uncontested interpretations given at a conference by, for example, the chairman of a drafting committee may constitute an 'agreement' forming part of the 'context' of the treaty which is being concluded.⁵⁹ This is debatable. There can be no doubt that considerable weight should be attached to such interpretations (as also to explanatory statements given by an expert consultant at a codification conference when he is elucidating proposals made by the International Law Commission); but the better view may well be that such interpretative or explanatory statements simply constitute part of the *travaux préparatoires* of the treaty, but a part whose significance in the interpretative process is greatly enhanced by the authority of the person making the statement.

5. Object and purpose

Reverting to the general rule expressed in paragraph 1 of Article 31, we now have to consider the relevance of the object and purpose of the treaty, in the light of which it falls to be interpreted. We have already noted that the preamble to the treaty may assist in elucidating that object and purpose. It is also worth stressing that reference to the object and purpose of the treaty is, as it were, a secondary or ancillary process in the application of the general rule on interpretation. The initial search is for the 'ordinary meaning' to be given to the terms of the treaty in their 'context'; it is *in the light of* the object and purpose of the treaty that the initial and preliminary conclusion must be tested and either confirmed or modified. It may of course be that the intellectual process can be short-circuited where the object or purpose of the treaty is so overwhelmingly apparent that it must necessarily and from the very outset exercise a determining influence upon the search for the contextual 'ordinary meaning'; but this is likely to be a rare case, given that most treaties have no single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes. A number of authors consider that the search for the object and purpose of a treaty is in reality a search for the common intentions of the parties who drew up the treaty.⁶⁰ This approach has certain dangers. In the case of general multilateral conventions, a search for the common intentions of the parties can be likened to a search for the pot of gold at the end of a rainbow. Many of the parties will have acceded to the treaty and for that reason alone (because they have not taken any part in the original framing of the text) must be assumed to have joined not on the basis of what

the original negotiators intended but rather on the basis of what the text actually says and means. In addition, a dispute as to treaty interpretation arises only when two or more parties place differing constructions upon the text; by doing so, they are in reality professing differing intentions in regard to that text and, of necessity, professing to have had differing intentions from the very start.⁶¹ If this is the case, there can be no common intentions of the parties aside or apart from the text they have agreed upon. The text is the *expression* of the intention of the parties;⁶² and it is to that expression of intent that one must first look.

There is also the risk that the placing of undue emphasis on the 'object and purpose' of a treaty will encourage teleological methods of interpretation. The teleological approach, in some of its more extreme forms, will even deny the relevance of the intentions of the parties; it in effect is based on the concept that, whatever the intentions of the parties may have been, the convention as framed has a certain object and purpose, and the task of the interpreter is to ascertain that object and purpose and then interpret the treaty so as to give effect to it.⁶³ An even more dynamic variant of the teleological approach is the so-called theory of 'emergent purpose' whereby the object and purpose itself is not regarded as fixed and static but as variable, so that 'at any given moment, the convention is to be interpreted not so much, or not merely, with reference to what its object was when entered into, but with reference to what that object has since become and now appears to be'.⁶⁴

Several examples are to be found in the recent jurisprudence of the European Court of Human Rights where the tribunal has arguably stretched the interpretation of particular provisions of the European Convention on Human Rights by adopting the teleological approach. It will be recalled that, in the *Golder* case, the Court was confronted with the question whether Article 6(1) of the Convention conferred a right of access to the courts.⁶⁵ In terms it did not so provide, as the Court itself conceded. The Court was prepared on the surface to apply the rules set out in Articles 31 to 33 of the Vienna Convention on the Law of Treaties:

The Court is prepared to consider ... that it should be guided by Articles 31 to 33 of the Vienna Convention That Convention has not yet entered into force and it specifies, at Article 4, that it will not be retroactive, but its Articles 31 to 33 enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. In this respect, for the interpretation of the European Convention account is to be taken of those Articles.

In the way in which it is presented in the 'general rule' in Article 31 of the Vienna Convention, the process of interpretation of a treaty is a unity, a single combined operation: this rule, closely integrated, places on the same footing the various elements enumerated in the four paragraphs of the Article.⁶⁶

But this paying of lip service to the Convention rules on interpretation did not prevent the Court from engaging in a process of reasoning which pays

scant respect to the principle of the 'ordinary meaning' of terms 'in their context'. Article 6(1) of the Convention provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Prima facie, this would appear to guarantee certain defined procedural safeguards for persons engaged in legal proceedings pending before the civil or criminal courts. This is the natural and unstrained meaning of the provision. The Court was, however, prepared to extrapolate from Article 6(1) an antecedent and unqualified right of access to the courts. The Court's method of reasoning can be illustrated by a few salient passages from the judgment:

Again, Article 6(1) does not state a right of access to the courts or tribunals in express terms. It enumerates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.⁶⁷

This passage already provokes the question 'Narrower than what?', duly posed by Judge Fitzmaurice in his trenchant dissenting opinion.⁶⁸

The Court goes on to deal with the argument advanced by the Government in their written and oral pleadings that the expressions 'fair and public hearing' and 'within a reasonable time' clearly presuppose proceedings pending before a court. The Court deals with this argument as follows:

While the right to a fair, public and expeditious judicial procedure can assuredly apply only to proceedings in being, it does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded.⁶⁹

On this passage, it is difficult to deny the force of Judge Fitzmaurice's comment:

The judgment also abounds in the type of logical fallacy that derives B from A because A does not in terms *exclude* B. But non-exclusion is not *ipso facto* inclusion. The latter still remains to be demonstrated.⁷⁰

The Court attempts to buttress its extensive interpretation of Article 6(1) by a further argument that it would, in their opinion:

... be inconceivable that Article 6(1) should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court.⁷¹

Again, however, this argument is not one which is logically compelling. As Judge Fitzmaurice points out in his dissent:

It might perhaps seem natural that procedural guarantees of this kind should 'first' be preceded by a protection of the right of access: the fact remains that, in terms, they are not, and that the inference that they must be deemed so to be is at best a possible

and in no way a necessary one; — for it is a perfectly conceivable situation that a right of access to the courts should not necessarily always be afforded, or should be limited to certain cases, or excluded in certain cases, *but that where it is afforded* there should be safeguards as to the character of the ensuing proceedings.⁷²

Although the Court denies that its conclusion (that the right of access constitutes an element inherent in the right stated in Article 6(1)) is ‘an extensive interpretation forcing new obligations on the Contracting States’, it is difficult to escape the conclusion to which Judge Verdross (another of the dissenting judges) is driven:

In consequence, I do not consider it permissible to extend, by means of an interpretation depending on clues, the framework of the clearly stated rights and freedoms. Considerations of legal certainty too make this conclusion mandatory: the States which have submitted to supervision by the Commission and Court in respect of ‘certain’ rights and freedoms ‘defined’ (*définis*) in the Convention ought to be sure that those bounds will be strictly observed.⁷³

It may be noted that, in the *Golder* case, the European Court of Human Rights did not specifically rely on the ‘object and purpose’ of the Convention to justify their conclusion that a right of access to the courts could be read into Article 6(1). Nevertheless, the line of reasoning employed by the majority clearly led to an interpretation incompatible with the ‘ordinary meaning’ of Article 6(1) read in its context. And the muted and qualified reference by the Court to the mention of the rule of law’ in the preamble to the Convention as being a consideration to be taken into account in interpreting Article 6(1) does not carry conviction.⁷⁴

There are *indicia* in other cases that the Strasbourg organs (particularly the European Commission on Human Rights) have adopted a very specific and decided view of the ‘object and purpose’ of the European Convention of Human Rights and seek deliberately to interpret particular provisions of the Convention so as to give effect to that overriding ‘object and purpose’ — and this notwithstanding that the interpretation may do violence to the ordinary meaning of the provision in its context and may ignore such evidence of the intentions of the parties as are to be found in the *travaux préparatoires*. In the *Golder* case, the report of the Commission had included the following passage:

The overriding function of the Convention is to protect the rights of individuals and not to lay down as between States mutual obligations which are to be restrictively interpreted having regard to the sovereignty of those States. On the contrary the role of the Convention and the function of its interpretation is to make the protection of the individual effective.⁷⁵

This passage is cited with emphasis in the report of the Commission in the *National Union of Belgian Police* case. Judge Fitzmaurice, in his separate opinion in the same case when it came before the Court, draws attention to this

passage and to other remarks made in the course of oral argument before the Court, and forthrightly criticises the general approach adopted by the Court and the Commission to the interpretation of the Convention:

- (i) The objects and purposes of a treaty are not something that exist *in abstracto*: they follow from and are closely bound up with the intentions of the parties, as expressed in the text of the treaty, or as properly to be inferred from it, these intentions being the sole sources of those objects and purposes. Moreover, the Vienna Convention — even if with certain qualifications — indicates, as the primary rule, interpretation ‘in accordance with the ordinary meaning to be given to the terms of the treaty’; — and, as I have previously had the occasion to point out, the real *raison d’être* of the hallowed rule of the textual interpretation of a treaty lies precisely in the fact that the intentions of the parties are supposed to be expressed or embodied in — or derivable from — the text which they finally draw up, and may not therefore be legitimately sought elsewhere save in special circumstances; and *a fortiori* may certainly not be subsequently imported under the guise of objects and purposes not thought of at the time ...
- (ii) ... But what I find it impossible to accept is the implied suggestion that because the Convention has a constitutional aspect, the ordinary rules of treaty interpretation can be ignored or brushed aside in the interests of promoting objects or purposes not originally intended by the parties⁷⁶

An example of a case where the European Court of Human Rights appears deliberately to have ignored such guidance as could be derived from the *travaux préparatoires* of the Convention is the case of *Campbell and Cosans*.⁷⁷ One of the questions at issue in this case was whether the use of corporal punishment in schools contrary to the wishes of the parents of a child subject to such punishment contravened Article 2 of Protocol No. 1 whereby, in the exercise of the functions which it assumes in relation to education and teaching, the State is obliged to ‘respect the rights of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.’ The Court considered whether opposition to the use of corporal punishment in schools could be said to amount to a ‘philosophical conviction’. The majority judgment contains the following passage:

As regards the adjective ‘philosophical’, it is not capable of exhaustive definition and little assistance as to its precise significance is to be gleaned from the *travaux préparatoires*. The Commission pointed out that the word ‘philosophy’ bears numerous meanings: it is used to allude to a fully-fledged system of thought or, rather loosely, to views on more or less trivial matters. The Court agrees with the Commission that neither of these two extremes can be adopted for the purposes of interpreting Article 2: the former would too narrowly restrict the scope of a right that is guaranteed to all parents and the latter might result in the inclusion of matters of insufficient weight or substance.

Having regard to the Convention as a whole, including Article 17, the expression ‘philosophical convictions’ in the present context denotes, in the Court’s opinion, such convictions as are worthy of respect in a democratic society ... and are not incompatible with human dignity: in addition, they must not conflict with the

fundamental right of the child to education, the whole of Article 2 being dominated by its first sentence⁷⁸

Judge Sir Vincent Evans, in his dissenting opinion in this case, draws attention to the fact that the *travaux préparatoires* of Article 2 of Protocol No. 1 do indeed give a clear indication of the scope of the provision. He refers to the two previous cases in which the interpretation of Article 2 has been in issue — the *Belgian Linguistic*⁷⁹ case and the case of *Kjeldsen, Busk Madsen and Pedersen*⁸⁰ — and points out that, in these two cases, the Court had found it indispensable to have recourse to the negotiating history of the Article. He goes on:

In the latter case the Court observed that the *travaux préparatoires* are ‘without doubt of particular consequence in the case of a clause that gave rise to such lengthy and impassioned discussions’. In both the cases cited, the Court, after recourse to the *travaux*, adopted, in respects relevant to the present case, a restrictive view of the aim of the second sentence of Article 2. In the *Kjeldsen, Busk Madsen and Pedersen* case ... this was that the State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents’ religious and philosophical convictions. ‘That’, said the Court, ‘is the limit that must not be exceeded’ and consequently it was held that legislation which ‘in no way amount[ed] to an attempt at indoctrination aimed at advocating a specific kind of sexual behaviour’ did not offend the applicants’ religious and philosophical convictions to the extent forbidden by the second sentence of Article 2 ...

In the course of the preparatory work on Article 2 in the Consultative Assembly of the Council of Europe the expression ‘philosophical convictions’ was criticised as being so vague that it should not be inserted in a legal instrument purporting to protect human rights. But this very criticism evoked from Mr Teitgen, the Rapporteur of the Consultative Assembly’s Committee on Legal and Administrative Questions ... a very emphatic explanation in the light of which the text of Article 2 was finally settled and the Protocol adopted and opened for signature. Mr Teitgen made it clear that the intention was to protect the rights of parents against the use of educational institutions by the State for the ideological indoctrination of children This was precisely the interpretation put upon the text by the Court in the *Kjeldsen, Busk Madsen and Pedersen* case In the light of this background, my understanding of the second sentence of Article 2 is that it is concerned with the content of information and knowledge imparted to the child through education and teaching and the manner of imparting such information and knowledge and that the views of parents on such matters as the use of corporal punishment are as much outside the intended scope of the provision as are their linguistic preferences. If there had been any intention that it should apply to disciplinary measures, and to the use of corporal punishment in particular, it is inconceivable that the implications of this would not have been raised in the course of the lengthy debates that preceded its adoption.⁸¹

6. Subsequent agreements and subsequent practice

Paragraph 3 of Article 31 requires that there should be taken into account together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice between the parties regarding the interpretation of the treaty or the application of its provisions.

Let us consider first the case of subsequent agreements. It follows naturally from the proposition that the parties to a treaty are legally entitled to modify the treaty or indeed to terminate it that they are empowered to interpret it. In its advisory opinion in the *Jaworzina* case, the Permanent Court of International Justice ruled as early as 1923 that:

... it is an established principle that the right of giving an authoritative interpretation of a legal rule belongs solely to the person or body who has the power to modify or suppress it.⁸²

This having been said, it is rarely that one comes across subsequent agreements between the parties bearing upon the interpretation of a treaty which they have concluded. Some of the reasons are given by a learned commentator:

Ce procédé n'est pas toujours facile à manier, il implique des négociations plus ou moins délicates et exige de part et d'autre un désir d'entente, même au prix d'un certain sacrifice, l'ambiguïté étant souvent dans l'intérêt de l'une ou l'autre des parties. De plus, ce procédé devient plus compliqué quand il s'agit d'un traité multilatéral.⁸³

These considerations are equally valid so far as bilateral agreements are concerned. In the award of the arbitral tribunal in the case of the *US/France Air Services Agreement of 27 March 1946*, the tribunal noted that the 1946 agreement was silent as to whether change of gauge (i.e. a change in the type of aircraft used for a particular service) in third countries by a carrier of one Party to the agreement was or was not permitted. The tribunal stated, not altogether without surprise:

The text of the entire Agreement is as significant for what it omits as for what it specifies. It is silent concerning most of the major operational issues facing an air carrier — types of plane, number of crew members and the like. When jet planes were first developed, for example, one unfamiliar with the Agreement might have assumed that a new accord would be necessary. In fact, however, the 1946 Agreement was not modified at the time this remarkable technological innovation was introduced. Similarly, recent objections to supersonic planes were not based on the terms of the Agreement but solely on environmental concerns. The point is that the Agreement leaves to the Parties — and, if a Party chooses, to its designated air carriers — the right to decide a wide range of key issues concerning almost every aspect of service on designated routes apart from those regarding rates and capacity.⁸⁴

If examples of subsequent interpretative agreements are rare, there is ample evidence in State practice and case-law for the proposition that the subsequent practice of the parties is an element to be taken into account in interpreting a treaty. In the *Chamizal* case, the umpire stated:

On the whole, it appears to be impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the Treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary.⁸⁵

The Permanent Court of International Justice in its advisory opinion on the *Competence of the ILO to Regulate Agricultural Labour* entertained no doubt that agricultural labour fell within the scope of Part XIII of the Treaty of Versailles, but went on to say:

If there were any ambiguity, the Court might, for the purpose of arriving at the true meaning, consider the action which has been taken under the Treaty.⁸⁶

So also, in the *Corfu Channel* case, the International Court of Justice has affirmed the utility and significance of subsequent practice as an element to be taken into account in the interpretation of a treaty:

The subsequent attitude of the Parties shows it has not been their intention, by entering into the Special Agreement, to preclude the Court from fixing the amount of the compensation.⁸⁷

The value and significance of subsequent practice will naturally depend on the extent to which it is concordant, common and consistent.⁸⁸ A practice is a sequence of facts or acts and cannot in general be established by one isolated fact or act or even by several individual applications.

A good example of subsequent practice in this sense is the practice of the Security Council in relation to the interpretation of Article 27(3) of the United Nations Charter, which requires that 'decisions of the Security Council on all other matters⁸⁹ shall be made by an affirmative vote of nine members including the concurring votes of the permanent members'. From 1946 onwards, an unvarying practice has been adopted within the Security Council whereby a voluntary abstention by a permanent member has been treated as the equivalent of a 'concurring' vote within the meaning of this provision in the sense that it was not regarded as preventing the adoption of a decision which had otherwise attracted the required arithmetical majority of affirmative votes.⁹⁰ In its advisory opinion of 21 June, 1971, on the *Legal Consequences for States of the continued presence of South Africa in Namibia*, the International Court of Justice firmly rejected a South African argument that Security Council Resolution 284 of 1970 was invalid because two permanent members of the Security Council had abstained in the vote on the Resolution. The Court said:

However, the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly

interpreted the practice of voluntary abstention as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by members of the United Nations and evidences a general practice of that Organization.⁹¹

It will be apparent that the subsequent practice of the parties may operate as a tacit or implicit modification of the terms of the treaty. It is inevitably difficult, if not impossible, to fix the dividing line between interpretation properly so called and modification effected under the pretext of interpretation. There is therefore a close link between the concept that subsequent practice is an element to be taken into account in the interpretation of a treaty and the concept that a treaty may be modified by subsequent practice of the parties. Legally, the two processes are distinct, as was made clear in an arbitration award delivered in 1963 in an earlier case concerning the interpretation of the United States/France Air Services Agreement of 1946. In this case, the tribunal stated:

This course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the Agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the parties and on the rights that each of them could properly claim.⁹²

It should of course be stressed that paragraph 3(b) of Article 31 of the Convention does not cover subsequent practice in general, but only a specific form of subsequent practice — that is to say, concordant subsequent practice common to all the parties. Subsequent practice which does not fall within this narrow definition may nonetheless constitute a supplementary means of interpretation within the meaning of Article 32 of the Convention.⁹³

7. Relevant rules of international law

Paragraph 3 of Article 31 requires that there should also be taken into account together with the context:

- (c) any relevant rules of international law applicable in the relations between the parties.

It would appear from the commentary that this element in the general rule was originally designed to deal with the intertemporal aspect of interpretation. It had appeared in paragraph 1 of the text provisionally adopted by the Commission in 1964 which stated that *inter alia* the ordinary meaning to be given to the terms of a treaty was to be determined ‘in the light of the general rules of international law *in force at the time of its conclusion*’. The underlined

words were intended to reflect the general principle that a juridical fact must be appreciated in the light of the law contemporary with it. During the course of second reading in the Commission, some members suggested that the text as it then stood failed to deal with the problem of the effect of an evolution of the law on the interpretation of legal terms in a treaty and was therefore inadequate. For this reason, the Commission concluded that it should omit the temporal element and transfer this element of interpretation to paragraph 3 as being an element extrinsic both to the text and to the 'context' as defined in paragraph 2.

But what does this reference to 'relevant rules of international law' mean? Every treaty provision must be read not only in its own context, but in the wider context of general international law, whether conventional or customary. But this of necessity raises the question whether a treaty provision is to be interpreted in the light of the rules of international law in force at the time of the conclusion of the treaty or those in force at the time of the interpretation. It would seem logical to take into account, in interpreting a treaty, the state of international law at the time of its conclusion. To do so would be consistent with the principle stated by Huber in the *Island of Palmas* arbitration that '... a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled'.⁹⁴ It would certainly appear to be the case that international law in force at the time of the conclusion of the treaty is alone capable of elucidating the treaty at least in its initial reality:

C'est lui seul qui a pu influencer l'intention des Etats contractants au moment de la conclusion du traité, le droit qui n'existait encore à ce moment-là ne pouvant logiquement avoir aucune influence sur cette intention.⁹⁵

Nonetheless, since a treaty may remain in force for many years, and since international law may evolve and develop during the period when the treaty is in force, the question still remains whether the interpreter can take that evolution and development into account in determining the scope and meaning of the treaty. There is some evidence that the evolution and development of international law may exercise a decisive influence on the meaning to be given to expressions incorporated in a treaty, particularly if these expressions themselves denote relative or evolving notions such as 'public policy' or 'the protection of morals'. In the field of public international law, the notion of what constitutes a matter exclusively within the 'domestic jurisdiction' of a State may likewise be thought to be relativist in nature. The same may be said of such concepts as 'territorial sea' or 'continental shelf', where it may be possible to interpret a treaty employing one or other of these terms by reference to international law in force at the time of the interpretation.⁹⁶

The International Court of Justice has lent its support to this concept that certain provisions of a treaty may be interpreted and applied in the light of

international law as it has evolved and developed since the time when the treaty was concluded. It has however done so within carefully circumscribed limits. In its advisory opinion on the *Legal Consequences for States of the continued presence of South Africa in Namibia*, the Court stated:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant — ‘the strenuous conditions of the modern world’ and ‘the well-being and development’ of the peoples concerned — were not static, but were by definition evolutionary, as also, therefore, was the concept of the ‘sacred trust’. The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.⁹⁷

A word of caution is however necessary here. As already noted,⁹⁸ the principle of contemporaneity has also been approved by the Court. In his separate, but concurring, opinion in the *Minquiers and Ecrehos* case, Judge Levi Carneiro stated:

I do not regard the Treaty of Paris as a treaty of frontiers. To do so would be to fall into the very error we have been warned against: an instrument must not be appraised in the light of concepts that are not contemporaneous with it.⁹⁹

It is not easy to reconcile these two pronouncements. Much will depend on the nature of the treaty provisions calling for interpretation. On the one hand, it would amount to a failure of imagination on the part of an international tribunal if it did not take into account the historical context in which particular treaty provisions may have been negotiated, that context necessarily embracing the state of international law at the time; on the other hand, while it is not for the interpreter, under the guise of interpretation, to impose upon the parties obligations which were never in their contemplation at the time they concluded the treaty, there is scope for the narrow and limited proposition that the evolution and development of the law can be taken into account in interpreting certain terms in a treaty which are by their very nature expressed in such general terms as to lend themselves to an evolutionary interpretation. But this must always be on condition that such an evolutionary interpretation does not conflict with the intentions and expectations of the parties as they may have been expressed during the negotiations preceding the conclusion of the treaty.

8. *Supplementary means of interpretation, including 'travaux préparatoires'*

The foregoing analysis has been confined to certain elements included in the general rule of interpretation. Attention has already been directed to the fact that the Convention rules place emphasis on the consideration that the starting point in interpretation is the elucidation of the text of the treaty which is presumed to be the authentic expression of the intentions of the parties.¹⁰⁰ This explains why the *travaux préparatoires* of a treaty and the circumstances of its conclusion are accorded a secondary or supplementary role in the process of interpretation. Article 32 of the Convention provides that:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Let us take first the circumstances of the conclusion of a treaty. It will already be apparent from what has been said above about the general rule of interpretation that the circumstances of the conclusion of a treaty may be relevant to a determination of its object and purpose. Nevertheless, the reference in Article 32 of the Convention to the circumstances of the conclusion of a treaty may have some value in emphasising the need for the interpreter to bear constantly in mind the historical background against which the treaty has been negotiated:

Il s'agit du cadre historique que forme l'ensemble des événements qui ont porté les parties à conclure le traité pour maintenir ou confirmer le *statu quo* ou apporter un changement qu'une nouvelle conjoncture nécessite.¹⁰¹

It may also be necessary to take into account the individual attitudes of the parties — their economic, political and social conditions, their adherence to certain groupings or their status, for example, as importing or exporting country in the particular case of a commodity agreement — in seeking to determine the reality of the situation which the parties wished to regulate by means of the treaty.¹⁰² Certain of these factors may of course emerge from a study of the *travaux préparatoires* or may indeed be apparent from a study of the text of the treaty when read in its context; there may however be cases where neither the text of the treaty nor the *travaux préparatoires* gives a sufficiently comprehensive view of the historical background and where recourse may therefore have to be made to extrinsic evidence.

Although there has been considerable doctrinal dispute in the past about the question whether and in what circumstances recourse may be had to the *travaux préparatoires* of a treaty in the process of interpretation, there can

be little doubt that such recourse is permissible in carefully controlled circumstances; indeed, the jurisprudence of international tribunals demonstrates the extent to which the parties to any international dispute involving the interpretation or application of a treaty will rely upon the *travaux préparatoires* as upholding their interpretation of a disputed provision or as denying the interpretation which the other party seeks to put upon that provision. The reason is not far to seek. One can, almost by definition, assume that a dispute about the interpretation of a treaty provision which reaches the stage of international adjudication will have arisen because the text is ambiguous or obscure.¹⁰³ Even where this assumption may not be entirely justified (and *a fortiori*, where it is), counsel for the parties involved in international litigation will, *ex abundanti cautela*, seek to derive support for their interpretation from an analysis of the *travaux préparatoires*, against the contingency that the tribunal will, applying the general rule of interpretation, find the meaning of the disputed provision ambiguous or obscure. This no doubt explains why, *in practice*, international tribunals are regularly called upon to assess the significance of *travaux préparatoires*, even if they may in the event conclude that the text of the disputed provision is so clear that no reference to the *travaux préparatoires* is called for.¹⁰⁴

Recourse to the *travaux préparatoires* of a treaty must always be undertaken with caution and prudence. As has been pointed out, the obscurity of a particular text will often find its origin in the *travaux préparatoires* themselves. The natural desire of negotiators to bring negotiations to a successful conclusion will often result in the adoption of vague or ambiguous formulations. Sometimes the parties will have deliberately wished to avoid too much precision in order to allow themselves in future to argue that the provision as formulated does not commit them to an inconvenient or too onerous obligation. Finally, the *travaux préparatoires* are unlikely to reveal accurately and in detail what happened during the negotiations, since, more often than not, they will not disclose what may have been agreed between the heads of delegations during private corridor discussions.¹⁰⁵

A highly controversial question is whether the *travaux préparatoires* of a multilateral convention may be invoked as against States which did not participate in the negotiations (or did not participate on a basis of full equality), but which subsequently acceded to the treaty. In the *Territorial Jurisdiction of the International Commission of the River Oder* case, the Permanent Court of International Justice refused to take into consideration the *travaux préparatoires* of certain provisions of the Treaty of Versailles on the ground that three of the States before the Court had not participated in the conference which prepared the Treaty; in making this ruling, the Court expressly refused to acknowledge any distinction between published and unpublished documents.¹⁰⁶ The International Law Commission, in its commentary on what is now Article 32 of the Convention, dissociated itself, at least in part, from the

decision of the Permanent Court in the *River Oder* case:

The Commission doubted, however, whether this ruling reflects the actual practice regarding the use of *travaux préparatoires* in the case of multilateral treaties that are open to accession by States which did not attend the conference at which they were drawn up. Moreover, the principle behind the ruling did not seem to be so compelling as might appear from the language of the Court in that case. A State acceding to a treaty in the drafting of which it did not participate is perfectly entitled to request to see the *travaux préparatoires*, if it wishes, before acceding. Nor did the rule seem likely to be practically convenient, having regard to the many important multilateral treaties open generally to accession.¹⁰⁷

The argument of 'practical convenience' no doubt reflects the criticism made by the late Sir Hersch Lauterpacht at the 1950 session of the Institut de Droit International when he pointed out that, if the *River Oder* principle were applied to the interpretation of the United Nations Charter, very peculiar results would follow since the admissibility of the *travaux préparatoires* of the Charter would depend on the (fortuitous) circumstance that all the parties to the dispute had been present at the San Francisco Conference. The Commission's reference to 'actual practice' is explicable if one takes into account that, in two cases before the Arbitral Commission on Property, Rights and Interests in Germany — the cases of *Italian Republic v. Federal Republic of Germany*¹⁰⁸ and *Kingdom of Greece v. Federal Republic of Germany*¹⁰⁹ — the Commission held admissible, as against States acceding to the Bonn Convention on the Settlement of Matters arising out of the War and the Occupation, the *travaux préparatoires* of that Convention.¹¹⁰

In the recent *Young Loan* arbitration (decided in 1980), this issue again arose. As has already been noted, the tribunal was divided four to three on the critical question of interpretation of the clause in dispute. Although the majority decision analyses the *travaux préparatoires* of the London Debt Agreement (LDA) as contained in the records of the London Debt Conference (LDC) and concludes that they confirm the interpretation already reached in application of Article 31 of the Vienna Convention on the Law of Treaties, it contains a *dictum* which casts doubt on the extent to which *travaux préparatoires* can be set up against a party to whom certain documents may not have been made known:

A further prerequisite if material is to be considered as a component of *travaux préparatoires* is that it was actually accessible and known to all the original parties. Drafts of particular articles, preparatory documents and proceedings of meetings from which one member or some members of the contracting parties were excluded cannot serve as an indication of common intentions and agreed definitions unless all the parties had become familiar with the documents or material by the time the treaty was signed. If doubts already exist amongst the experts on international law and in international case law on whether the *travaux préparatoires* can be held against a State which accedes to a treaty at a later date ... such doubts become certainty when, as in the present case, it is a fact that the Federal Republic of Germany, even though it was an original

contracting party — and in principle had equal rights — at the LDC, owing to the untypical organisational structure and procedures at the Conference, had no knowledge of certain documents and was excluded from certain negotiating committees, albeit temporarily.¹¹¹

The three-man dissenting opinion in this case takes strong issue with the majority decision on this point. The joint dissent, after making reference to the jurisprudence of the Arbitral Commission on Property, Rights and Interests on the admissibility of *travaux préparatoires* as against acceding States, continues:

In our opinion, without in any way impugning the good faith of the Federal Government of Germany in the present proceedings, that Government well knew, before it signed and ratified the LDA, what were essentially the solutions contemplated for the abandoned gold clause in the Young Loan; the 'guiding principles' had been made plain at the LDC and in its Report.

We therefore consider that the Tribunal, in the exercise of its unfettered discretion, should apply to a signatory State which participated in the negotiation of a multilateral treaty the considerations which led the Arbitral Commission [on Property, Rights and Interests] to set up *travaux préparatoires* against an acceding State which had not participated in the negotiation of the treaty in question. Just as the Arbitral Commission would not 'encourage an interpretation ... which would lead to distinguishing between the Signatory Parties against whom the *travaux préparatoires* may undoubtedly be set up, and the Acceding Parties who (argue for) the right to oppose any resort' to them (see Decisions, Vol. III, p. 351), we cannot accept an argument which would allow the preparatory work on the disputed clause on 5 August, 1952, to be set up against the Three Powers, but deny resort to them when the obligations of the Federal Republic of Germany are in issue.¹¹²

Despite the majority decision in the *Young Loan* arbitration, the better view would still appear to be that recourse to *travaux préparatoires* does not depend on the participation in the drafting of the text of the State against whom the *travaux* are invoked. To hold otherwise would disrupt the unity of a multilateral treaty, since it would imply that two different methods of interpretation should be employed, the one for States who participated in the *travaux préparatoires* and the other for States who did not so participate. One qualification should, however, be made. The *travaux préparatoires* should be in the public domain so that States which have not participated in the drafting of the text should have the possibility of consulting them. *Travaux préparatoires* which are kept secret by the negotiating States should not be capable of being invoked against subsequently acceding States.¹¹³

It may be noted that there is now a growing tendency, even in the municipal courts of States which do not permit recourse to *travaux préparatoires* in construing statutes or other domestic legislative instruments, to apply this supplementary means of interpretation in determining the meaning of those statutes which give the force of domestic law to the provisions of international treaties. In the (English) case of *Fothergill v. Monarch Lines*,¹¹⁴ the House

of Lords was called upon to consider whether the phrase 'in the case of damage' (in French 'en cas d'avarie') appearing in Article 26(2) of the Warsaw Convention of 1929, as amended by the Hague Protocol of 1955, which was incorporated into English law by the Carriage by Air Act, 1961, was apt to cover the partial loss of objects contained in baggage. Their Lordships were not wholly persuaded that the French term 'avarie' necessarily pointed to partial loss of, as well as physical damage, to a movable, although Lord Wilberforce was prepared to say of the governing French text that 'it can at least be said that it does not exclude partial loss from the scope of the paragraph'. More interesting are the observations of their Lordships on the possibility of having recourse to the *travaux préparatoires* of the Hague Protocol. Although arguably *obiter*, they constitute clear recognition that the English courts in construing the provisions of international conventions which have been incorporated into English law may, in rare cases, and subject to certain conditions of accessibility and relevance, take *travaux préparatoires* into account in the process of interpretation. Thus, Lord Wilberforce says:

There is little firm authority in English law supporting the use of *travaux préparatoires* in the interpretation of treaties or conventions. The passage usually cited in support of such use is from the judgment of Lord Reading C.J. in *Porter v. Freudenberg* [1915] 1 K.B. 857, 876 when reference was made to statements made in a committee of the conference which prepared the Hague Convention of 1907 upon the Laws and Customs of War on Land. The judgment contains no reasoning in support of this approach, and the case was decided upon the wording of the relevant article in preference to the (inconsistent) statements. There is a passing reference to *travaux préparatoires* in relation to an international convention in *Post Office v. Estuary Radio Ltd* [1968] 2 Q.B. 740, *per* Diplock L.J., at p. 761, but even this is tentatively expressed. When dealing with an international treaty or convention I think that there is no doubt that international courts and tribunals ... do in general make use of *travaux préparatoires* as an aid to interpretation This practice is cautiously endorsed by the Vienna Convention on the Law of Treaties (1969), Article 32.¹¹⁵

Lord Wilberforce then goes on to analyse the general practice applied, or likely to be applied, in the courts of other contracting States and concludes that practice in the courts of a number of Western European States and in the courts of the United States would seem to allow a prudent and cautious resort to *travaux préparatoires* where the meaning of a treaty provision is ambiguous or obscure. Lord Wilberforce concludes:

... I think that it would be proper for us, in the same interest, to recognize that there may be cases where such *travaux préparatoires* can profitably be used. These cases should be rare, and only where two conditions are fulfilled, first, that the material involved is public and accessible, and secondly, that the *travaux préparatoires* clearly and indisputably point to a definite legislative intention. It would I think be unnecessarily restrictive to exclude from consideration, as *travaux préparatoires*, the work of the Paris Conference of 1925, and the work of the C.I.T.E.J.A. before 1929, both of which are well known to those concerned with air law, in any case where a clear intention were to be revealed.¹¹⁶

Lord Diplock strongly supports this view of the matter, and indeed goes further in suggesting that, because the United Kingdom Government had ratified the Vienna Convention on the Law of Treaties, the English courts 'might well be under a constitutional obligation' to interpret Acts of Parliament giving effect to future treaties in the light of the Convention rules, including the possible use of *travaux préparatoires*.¹¹⁷

Lords Scarman and Roskill also favour the possibility of judicious and cautious recourse to the *travaux préparatoires* in cases of doubt or ambiguity. Lord Scarman supports the view taken in the lower courts that one must look first to the terms of the convention as enacted by Parliament. He continues:

But if there be ambiguity or doubt, or if a literal construction appears to conflict with the purpose of the convention, the court must then, in my judgment, have recourse to such aids as are admissible and appear to it to be not only relevant but helpful on the point (or points) under consideration. Mere marginal relevance will not suffice: the aid (or aids) must have weight as well. A great deal of relevant material will fail to meet these criteria. Working papers of delegates to the conference, or memoranda submitted by delegates for consideration by the conference, though relevant, will seldom be helpful: but an agreed conference minute of the understanding upon the basis of which the draft of an article of the convention was accepted may well be of great value.¹¹⁸

Lord Fraser of Tullybelton was the only member of the House of Lords who was not prepared to countenance reference, in this case, to the minutes of the Hague Conference of 1955, which, it was argued, demonstrated agreement between the States represented at the Conference that the phrase 'damage' in Article 26(2) was to be construed as including partial loss. His reasoning was that even if the minutes disclosed such an agreement (which he did not concede) the courts should still decline to take judicial notice of it 'because it has not been sufficiently published to persons whose rights would be affected by it'.¹¹⁹ Lord Fraser of Tullybelton admitted that the minutes of the Hague Conference had been published and were on sale at Her Majesty's Stationery Office; but he pointed out that 'they have never been reasonably accessible to private citizens, or even to lawyers who do not specialise in air transport law'.¹²⁰ In his view, any precisely stated understanding in the records of a conference on the construction of a word or phrase in a convention ought to be expressly set out in an interpretation section of the statute giving effect to the convention.

This judgment of the House of Lords has a significance over and above the particular interpretation given to the disputed clause in the convention. The dicta of Lords Wilberforce, Scarman and Diplock evidence a growing willingness on the part of the English courts to align their practice on the admissibility of *travaux préparatoires* of treaties incorporated into English law with the practice of the courts of other countries in Western Europe and North America. Given that most conventions which are likely to be litigated

in municipal courts are, as Lord Diplock puts it, conventions 'designed to achieve uniformity of national laws in some particular field of public or private law', the development of judicial attitudes in *Fothergill v. Monarch Airlines* is to be commended, if only because it should tend to foster uniformity of interpretation.

9. Plurilingual treaties

Article 33 of the Convention is devoted to the interpretation of treaties authenticated in two or more languages. Paragraph 1 expresses the basic rule which is that, in such a case:

... the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

State practice on the use of differing language texts is highly various. In the case of bilateral treaties, the normal practice is that the treaty texts should be drawn up in the two languages, both texts being equally authentic. Exceptionally, however, there may be only a single authentic text, as in the case of the Cultural Agreement of 1957 between Japan and Pakistan which was done only in the English language. Again exceptionally, the parties to a bilateral treaty may draw up the text in their respective languages, but provide that a third language text should prevail in the event of a divergence of interpretation. The text of the Treaty of Peace between Japan and Indonesia in 1958 was, for example, drawn up in the Japanese, Indonesian and English languages, provision being made for the English text to prevail in case of any divergence of interpretation.¹²¹ There have even been cases in the past where the text of a bilateral treaty has been established in languages other than those of the negotiating States: the Treaty of Peace between Japan and Russia of 23 August/5 September 1905 was, for example, drawn up in English and French.¹²²

In the case of multilateral treaties, practice is equally various. The number of language texts in a multilateral treaty may range from a single text to as many as six (Arabic, Chinese, English, French, Russian and Spanish) for treaties concluded under the auspices of the United Nations¹²³ or eight (Danish, Dutch, English, French, German, Greek, Irish and Italian) for the Treaty concerning the Accession of the Hellenic Republic to the European Economic Community and EURATOM of 28 May 1979,¹²⁴ all those texts being equally authentic. But a multilateral treaty may be drawn up in two or three widely spoken languages only (for example, in English, French and Spanish), provision being made for agreed or official translations to be established in other languages and deposited with the signed original.¹²⁵

Article 111 of the Charter of the United Nations provides that 'the Chinese, French, Russian, English and Spanish texts are equally authentic'. However, since the working languages at the San Francisco Conference in 1945 were

English and French, it is not unreasonable to assume that, in interpreting the Charter, greater weight should be given to the texts in those languages than in others. As between the English and the French texts, the English can probably be regarded as the more authoritative if only for the reason that the text of the Charter finally approved by the Co-ordination Committee — and the text from which translations into other languages were made — was in English. Certainly, the jurisprudence of the International Court of Justice would seem to confirm the impression that, in interpreting the Charter, more significance is attached to the French and English texts than to the other language versions. For example, in the *First Admissions* case, the Court referred only to the French and English versions of Article 4(1) of the Charter in determining that the text was sufficiently clear in itself as not to warrant recourse to the *travaux préparatoires*.¹²⁶ In practice, therefore, the Court and its individual members tend, despite the provisions of Article 111 of the Charter regarding the authenticity of texts, 'to rely solely on the French and English versions of that instrument and to consider the Chinese, Spanish and Russian versions as mere translations'.¹²⁷

Paragraph 2 of Article 33 of the Convention provides that 'a version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree'. Examples have already been given of this practice. A further example is the boundary treaty of 1897 between the United Kingdom and Ethiopia which was drawn up in English and Amharic, both texts being declared to be equally authentic; provision was, however, made in a separate exchange of letters annexed to the treaty that a French translation of the treaty was to be authoritative in the event of a dispute.¹²⁸

Paragraph 3 of Article 33 sets out the basic rule that 'the terms of a treaty are presumed to have the same meaning in each authentic text'. This imposes upon negotiators the task of ensuring that the several language texts of the treaty are in concordance one with another. It may not always be possible to fulfil this task adequately. As the International Law Commission have pointed out:

Few plurilingual treaties containing more than one or two articles are without some discrepancy between the texts. The different genius of the languages, the absence of a complete *consensus ad idem*, or lack of sufficient time to co-ordinate the texts may result in minor or even major discrepancies in the meaning of the texts. In that event, the plurality of the texts may be a serious additional source of ambiguity or obscurity in the terms of the treaty.¹²⁹

What has always to be borne in mind, however, is that while the treaty may be plurilingual in expression, it remains a single treaty with a single set of terms, the interpretation of which is governed by the substantive rules of interpretation set out in Articles 31 and 32. As the Commission point out, 'the unity of the treaty and of each of its terms is of fundamental importance in the

interpretation of plurilingual treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text'.¹³⁰ For the interpreter, therefore, the first rule — and this applies whether the ambiguity or obscurity is found in all the language texts or arises from the plurilingual form of the treaty — 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.

This having been said, occasions inevitably arise when the application of the standard rules for the interpretation of treaties cannot resolve a difference between language texts all of which are equally authentic. For this case, paragraph 4 of Article 33 lays down the rule that:

Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

It was formerly thought that, in the case of a divergence between two or more equally authentic texts of a treaty, a restrictive interpretation was called for. In the *Mavrommatis Palestine Concessions* case, the Permanent Court of International Justice stated that:

... where two versions possessing equal authority exist, one of which appears to have a wider bearing than another, it [the Court] 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.¹³¹

It is doubtful, however, whether this passage necessarily bears the construction which has been put upon it. In the first place, the Court was concerned essentially with the question whether a particular act (i.e. the grant of a concession) fell within certain defined powers conferred by the mandate instrument. The powers seemed wider in the French version than in the English version. But in effect what the Court did was to confine itself to proving that, whether the French or the English version was taken as a basis, the grant of the concession came within the powers defined in the mandate instrument.¹³² In the second place, the International Law Commission does not regard this dictum in the *Mavrommatis Palestine Concessions* case as establishing that a restrictive interpretation is called for in all cases where a difference between language texts has been established:

But the Court does not appear necessarily to have intended ... to lay down as a general rule that the more limited interpretation which can be made to harmonize with both texts is the one which must always be adopted. Restrictive interpretation was appropriate in that case. But the question whether in case of ambiguity a restrictive interpretation ought to be adopted is a more general one the answer to which hinges on the nature of the treaty and the particular context in which the ambiguous term occurs. The mere

fact that the ambiguity arises from a difference of expression in a plurilingual treaty does not alter the principles by which the presumption should or should not be made in favour of a restrictive interpretation.¹³³

The principles embodied in Article 33 have recently been considered in the *Young Loan* arbitration where, it will be recalled,¹³⁴ a question arose as to the meaning of the terms *Abwertung*, 'depreciation' and *dépréciation* in the German, English and French versions of Article 2(e) of Annex IA to the London Debt Agreement (LDA). In English and French, the expression used could refer to the economic phenomenon of depreciation of a currency generally, whereas the German term used referred to a reduction in the external value of a currency by an act of government (i.e. a formal devaluation). The final clauses of the LDA provided that the Agreement had been established 'in three original texts, in the English, French and German languages respectively, all three texts being equally authoritative'. The majority judgment of the Tribunal attached no special weight to the consideration that the disputed clause had been drafted in English:

It may be directly inferred from the final clause of the LDA in conjunction with Article 33(1) of the VCT¹³⁵ that the English text of the Agreement and the Annexes thereto carry no special interpretative weight merely because the Agreement was largely — and undisputedly, as far as the disputed clause is concerned — drafted in that language and discussed in English by the committees concerned with it on the basis of English texts. The Tribunal takes the view that the habit occasionally found in earlier international practice of referring to the basic or original text as an aid for interpretation is now, as a general rule, incompatible with the principle, incorporated in Article 33(1) of the VCT, of the equal status of all authentic texts in plurilingual treaties.¹³⁶

Although the majority judgment of the Tribunal is based upon an interpretation of the disputed clause in accordance with the general rule of interpretation stated in Article 31 of the Convention, it also gives some consideration to the rule stated in Article 33(4) of the Convention:

The repeated reference by Article 33(4) of the VCT to the 'object and purpose' of the treaty means in effect nothing else than that any person having to interpret a plurilingual international treaty has the opportunity of resolving any divergence in the texts which persists after the principles of Articles 31 and 32 of the VCT have been applied by opting, for a final interpretation, for the one or the other text which in his opinion most closely approaches the 'object and purpose' of the treaty.¹³⁷

The majority judgment then rejects the notions that the clearest text (in their view, the German text) should prevail, that the lowest common denominator text (again, the German text) should be applied, that the language version in which the text was originally drafted (the English text) should be given precedence, and that the *contra proferentem* principle (invoked by the respondents) should be regarded as the governing rule — all on the ground that these notions may not necessarily correspond to the 'object and purpose' of the treaty. That object and purpose, according to the majority judgment,

was to protect creditors, especially, and undisputedly, against financial loss through devaluation of the currency in which they had originally made their money available to the debtor or to its predecessor; in other words, the purpose of the clause in dispute was fully achieved by using the German text as the basis of the decision.

The strong joint dissent by three of the judges composing the seven-member Tribunal takes issue with the majority judgment on this, as on other, points. Referring specifically to Article 33(4) of the Convention, the joint dissenting opinion states:

In cases where it is obvious that the terms used in the different authentic languages have different meanings that can be 'reconciled' only by adopting one or the other, it becomes necessary to apply rules of interpretation not specifically codified by the Convention. For this purpose, the rules of customary international law will govern. Resort to such customary rules is specifically affirmed in the last paragraph of the preamble to the Convention ...¹³⁸

The joint dissenting opinion then goes on to cite authors such as Germer¹³⁹ and Hilf,¹⁴⁰ who, while accepting that to give any precedence or superiority to the original text in the working language in which the treaty was negotiated would be incompatible with the principle of the equality of authentic texts stipulated in Article 33(1) of the Convention, nonetheless do *not* exclude any reference to the original text in the process of interpretation under Articles 31 and 32. It also recites dicta from the advisory opinions of the Permanent Court of International Justice in the cases of the *Competence of the ILO to Regulate Agricultural Labour*¹⁴¹ and of the *Convention concerning the Employment of Women during the Night*¹⁴² where terms which could be interpreted more narrowly on the basis of the French version of the disputed provision were given a broader construction by reference to the English (original) version of the provision. More specifically, the joint dissenting opinion draws heavily upon the detailed and exhaustive research done by Hardy and quotes with approval the following passage:

If the texts prove incompatible, it must be supposed that, as far as the provision in question is concerned, the parties made a mistake as to the equivalence of the texts and erroneously conferred the same authority on them all. The common intention of the parties at the time of the conclusion may in principle be established by any means available, but first and foremost, for the reasons stated above, on the basis of the texts themselves: the fact that one text is defective on a given point is not enough to justify the automatic rejection of all the texts. A choice must then be made between incompatible texts; and it is only normal that the presumption should be in favour of the original version, because that was the basis on which the negotiators in fact first reached agreement and the authoritative value of the other texts is subordinated to their equivalence to the original. The strength of the presumption in favour of the original version depends on the circumstances in which the other versions were drawn up. It will be weak if the negotiators all participated directly in the elaboration of those texts; stronger if they only exercised partial control over it, as, for example, by entrusting the

task to a small drafting committee; and decide if they left the entire job of drawing up those texts to one of the parties or to some specified body. Since the drafting process may assume any one of many varied forms, the evidential value of the original text tends to depend on the facts of each case; and only a study of the preparatory work, in the widest sense of that expression, will enable the judge to appraise it in each particular instance.¹⁴³

The joint dissenting opinion goes on to point out forcibly that the original text of the disputed clause, and the text which was accepted by all the negotiators, was in the English language and that the entire task of drafting the authentic non-English texts was left to the translation section. The joint dissenting opinion continues:

Those professionals who are engaged in the exacting task of putting into one language that which is the exact effect of another undoubtedly feel gratified that judicial recognition of their product, once it is termed 'authentic', has been given in some cases. But it cannot be responsibly contended that simply because one language is as authentic as another, no argument can be entertained which seeks to show that it does not correctly reflect the meaning of the other, particularly when the other was the basic language in the negotiations. The affairs of sovereign States cannot, and should not, be influenced by the fortuitous choice of words selected by a nameless translator.¹⁴⁴

With respect, it is submitted that, on this point, the approach of the dissentient members of the Tribunal is to be preferred to the approach adopted in the majority decision. Where there is a difference of meaning between expressions used in several authentic texts, some weight ought to be given to the original language text on which the negotiators agreed if it is apparent from the *travaux préparatoires* (as it was in the *Young Loan* case) that other language versions are mere translations. The jurisprudence of the International Court of Justice in interpreting Charter provisions supports the view that account must be taken, by way of priority, of the language version or versions in which the disputed provision of the treaty was originally drafted. Automatic and unthinking reliance on the principle of equal authenticity of texts can lead to a failure to give effect to the common intentions of the parties where it is or becomes apparent from the *travaux préparatoires* of the treaty that a disputed provision was originally drafted in a particular language version and that the other language versions are no more than translations; in such a case, it is submitted that the common intentions of the parties are reflected in the original text and that, as Hardy suggests, there should be a presumption in favour of that original text, the strength of the presumption depending upon the circumstances in which the various language versions of the disputed clause were drawn up.

III. Conclusions

There is no doubt that Articles 31 to 33 of the Convention constitute a general expression of the principles of customary international law relating to treaty interpretation. The phrase 'a general expression' has been used deliberately, since few would seek to argue that the rules embodied in Articles 31 to 33 of the Convention are exhaustive of the techniques which may be properly adopted by the interpreter in giving effect to the broad guidelines laid down in those rules. Thus, no reference is made in the Convention rules to the *ejusdem generis* doctrine whereby general words following special words are limited to the genus indicated by the special words. Nor is reference made to the maxim *expressio unius est exclusio alterius* whereby the interpreter is required to take into account the consideration that express mention of one circumstance or condition may exclude other circumstances or conditions. Indeed, there are many other principles of logic or of common sense which might have been included if the intention had been to draw up a comprehensive catalogue of all those aids to interpretation which have from time to time, and depending upon the circumstances of the particular case, been invoked by international tribunals. What we have in the Convention is an 'economical code of principles'.¹⁴⁵ Some may argue that it is too economical. But to have gone further would have involved incorporating principles and maxims whose suitability for use in any given case will inevitably depend on a variety of considerations which first have to be appreciated by the interpreter. Interpretation is a process involving the deployment of analytical and other skills: it cannot be reduced to a few propositions capable of purely automatic application in all circumstances.

Against this background, the Convention rules on interpretation nonetheless have their value. By placing emphasis on the key elements of treaty interpretation, and on the relationship between those elements, the Convention rules establish a set of guidelines which are not only firmly grounded in antecedent State practice and international case law but which serve to indicate to the would-be interpreter the relative weight which he should attribute to each of those elements.

This is by no means to say that application of the Convention rules will readily result in uniformity of interpretation. The Convention rules are expressed in very general terms and much in the way of discretion and appreciation is left to the tribunal called upon to interpret a particular treaty provision. Our review of recent international case law on treaty interpretation reveals only too clearly that widely differing results can still be achieved even if a conscious effort is being made to apply the Convention rules. In some instances, it may be thought that lip service only is being paid to the Convention rules. In others, it may be thought that too much emphasis is being put on the 'object and purpose' of the particular provision at the expense of its

ordinary, contextual, meaning. One thing is, however, certain. The Convention rules do mark a major advance in resolving some of the doctrinal disputes which have divided jurists in the past in their approach to treaty interpretation. Equally, however, they are expressed at a level of generality sufficient to ensure that questions of treaty interpretation will still give rise to serious divisions of opinion as among the members of international tribunals and indeed as among international jurists in general. If the topic of treaty interpretation has generated passions among jurists in the past, it will, notwithstanding the Convention rules, continue to generate similar passions in the future.

Notes

- 1 *Op. cit.*, at 364.
- 2 See, for example, Stone, 'Fictional elements in treaty interpretation', 1 *Sydney Law Review* (1955), 344–68.
- 3 McDougal, Lasswell and Miller, *Interpretation of Agreements and World Order* (1967). For a powerful critique of this approach, see Fitzmaurice, 'Vae Victis, or woe to the negotiators', 65 *A.J.I.L.* (1971), 358–73.
- 4 Verdross, *Volkerrecht*, 173 (5th ed. 1964); Parry in *Manual of International Law*, 210 (Sorensen ed., 1968); Haraszti, *Some Fundamental Problems of the Law of Treaties*, 28 (1973); and, above all, Lauterpacht in *Annuaire de l'Institut de Droit International*, Vol. 43(1) (1950), 366–434.
- 5 Fitzmaurice in 33 *B.Y.I.L.* (1957), 204–7.
- 6 Art. 19(a) of the Harvard draft reflects this approach.
- 7 See Jacobs, 'Varieties of approach to treaty interpretation: with special reference to the draft Convention on the Law of Treaties before the Vienna diplomatic conference.' 18 *I.C.L.Q.* (1969), 318–346; and Sinclair, 'Vienna Conference on the Law of Treaties', 19 *I.C.L.Q.* (1970), at 61.
- 8 *Op. cit.*, at 365.
- 9 *Yearbook of the International Law Commission* (1966–II), 220.
- 10 Briggs, 'The travaux préparatoires of the Vienna Convention on the Law of Treaties', 65 *A.J.I.L.* (1971), at 709.
- 11 *Annuaire de l'Institut de Droit International*, 43(1) (1950), at 392.
- 12 Schwarzenberger, 'Myths and Realities of Treaty Interpretation', *Current Legal Problems* (1969), 205–27.
- 13 *Op. cit.*, at 253.
- 14 *Yearbook of the International Law Commission* (1966–II), 218.
- 15 *Op. cit.*, at 255.
- 16 *Yearbook of the International Law Commission* (1966–II), 219.
- 17 See Chaumont, 129 *Recueil des Cours* (1970), 470–83.
- 18 Jacobs, *loc. cit.*, at 337.
- 19 *Problèmes d'Interprétation Judiciaire en Droit International Public* (1963), 50 *et seq.*
- 20 *Official Records, Second Session*, 13th plenary meeting (Fleischauer).
- 21 Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le Droit des Traités', 151 *Recueil des Cours* (1976–III), at 20.
- 22 *Yearbook of the International Law Commission* (1966–II), 221.
- 23 Yasseen, *loc. cit.*, at 22.
- 24 Yasseen, *loc. cit.*, at 22–3.
- 25 UN doc. A/36/451–5/14645 of 26 August 1981.

- 26 Rosenne, 'The Election of Five Members of the International Court of Justice in 1981', 76 *A.J.I.L.* (1982), at 365–6.
- 27 Yasseen, *loc. cit.*, at 26.
- 28 de Visscher, *op. cit.*, footnote 19 above, at 30.
- 29 59 *I.L.R.*, 495 gives the full text of the majority opinion and the joint dissenting opinion of 16 May 1980: for comment on this case, see Gianviti, 'Garantie de change et réévaluation monétaire: l'affaire de l'emprunt Young', 26 *Annuaire français de droit international* (1980), 250–73.
- 30 *Loc. cit.*, at 530.
- 31 *I.C.J. Rep.* (1980), 73: reproduced in 62 *I.L.R.*, 451.
- 32 *Loc. cit.*, paras. 35 and 36.
- 33 *Loc. cit.*, para. 40.
- 34 Para. 41.
- 35 Para. 42.
- 36 *I.C.J. Rep.* (1980), at 128.
- 37 *Loc. cit.*, at 106.
- 38 *Loc. cit.*, at 161–2.
- 39 Fitzmaurice in 33 *B.Y.I.L.* (1957), at 212.
- 40 *I.C.J. Rep.* (1952), at 189.
- 41 *Loc. cit.*, at 225.
- 42 *I.C.J. Rep.* (1978), at 32.
- 43 *Ibid.*, at 33.
- 44 *Ibid.*
- 45 For a fuller discussion of this aspect of the *Aegean Continental Shelf* case, see Elias, 'The Doctrine of Intertemporal Law', 74 *A.J.I.L.* (1980), at 285–307, particularly at 296–302.
- 46 *Yearbook of the International Law Commission* (1966–II), 222.
- 47 (1933) *P.C.I.J.*, ser. A/B, No. 53, at 49.
- 48 54 *I.L.R.*, at 57; but note that Professor Briggs, in his separate opinion, expresses considerable scepticism about this conclusion, noting that, as the Court has found that it lacked competence to delimit a boundary 'in any area historically or traditionally covered by the concept "Granville Bay", it stretches credulity to retain the Granville Bay reservation ... as a disabling reservation to prevent the application of Article 6 in areas north and northwest of the Channel Islands ...' (at 131).
- 49 *I.C.J. Rep.* (1950), at 8.
- 50 Yasseen, *loc. cit.*, at 34.
- 51 Fitzmaurice in 33 *B.Y.I.L.* (1957), at 228.
- 52 *I.C.J. Rep.* (1952), at 196.
- 53 57 *I.L.R.*, at 217; Judge Fitzmaurice, in a vigorous dissent, points out that the references to 'first steps' and 'certain of the rights' in the preamble convey a compelling implication that the right of access to the courts would not necessarily be included among the rights protected by the Convention (at 256). For a trenchant criticism of the decision of the European Court of Human Rights in the *Golder* case, see Mann, 'Britain's Bill of Rights', 94 *L.Q.R.* (1978), at 512–33. See also *infra*, pp. 131–3.
- 54 *Award*, para. 19: reprinted in 52 *I.L.R.* 93 and in 17 *I.L.M.* (1978) 634.
- 55 *Yearbook of the International Law Commission* (1966–II), 221.
- 56 *I.C.J. Rep.* (1952), 28.
- 57 Yasseen, *loc. cit.*, at 37.
- 58 *Infra*, Chapter VI, pp. 177–9.
- 59 Yasseen, *loc. cit.*, p. 39.

- 60 Degan, *L'interprétation des accords en droit international* (1963), 134.
- 61 Fitzmaurice in 33 *B. Y.I.L.* (1957), at 205.
- 62 Reuter, *op. cit.*, at 103.
- 63 Fitzmaurice in 33 *B. Y.I.L.* (1957), at 208.
- 64 *Ibid.*
- 65 *Supra*, p. 128.
- 66 57 *I.L.R.*, at 213–4.
- 67 *Loc. cit.*, at 213.
- 68 *Loc. cit.*, at 245, footnote 18.
- 69 *Loc. cit.*, at 215.
- 70 *Loc. cit.*, at 249.
- 71 *Loc. cit.*, at 218.
- 72 *Loc. cit.*, at 247.
- 73 *Loc. cit.*, at 224.
- 74 *Supra*, p. 128.
- 75 Report of the Commission in the *Golder* case, para. 57.
- 76 57 *I.L.R.*, at 293–4.
- 77 Judgment of 25 February 1982, published by the Council of Europe.
- 78 Judgment, para. 36.
- 79 45 *I.L.R.*, 136.
- 80 58 *I.L.R.*, 117.
- 81 Dissenting Opinion, paras. 3 and 4.
- 82 *P.C.I.J.*, ser. B, No. 8, at 37.
- 83 Yasseen, *loc. cit.*, at 44.
- 84 54 *I.L.R.*, at 331.
- 85 5 *A.J.I.L.* (1911), at 805.
- 86 *P.C.I.J.*, ser. B, No. 2, at 39.
- 87 *I.C.J. Rep.* (1949), at 25.
- 88 Yasseen, *loc. cit.*, at 48.
- 89 That is to say, all matters other than procedural matters.
- 90 See Bailey, *Voting in the Security Council*, 69–73 (1969). For a detailed survey of Security Council practice from 1946 to 1966, see Stavropoulos, 'The Practice of Voluntary Abstentions by Permanent Members of the Security Council under Article 27 Paragraph 3 of the Charter of the United Nations', 61 *A.J.I.L.* (1967), 737–52.
- 91 *I.C.J. Rep.* (1971), at 22.
- 92 *Air Transport Services Agreement Arbitration*, 38 *I.L.R.* 182, at 249; cited in *Yearbook of the International Law Commission* (1966–II), 236 (commentary to Art. 38).
- 93 Yasseen, *loc. cit.*, at 52.
- 94 2 *R.I.A.A.* 845.
- 95 Yasseen, *loc. cit.*, at 64.
- 96 *Loc. cit.*, at 67.
- 97 *I.C.J. Rep.* (1971), at 31.
- 98 *Supra*, pp. 124–5.
- 99 *I.C.J. Rep.* (1953), at 91.
- 100 *Supra*, p. 115.
- 101 Yasseen, *loc. cit.*, at 90.
- 102 *Ibid.*
- 103 The assumption may not, in every case, be justified, but as a general rule of thumb, it is a reasonable assumption to make.

- 104 As, for example, did the ICJ in the *First Admissions* case, where it stated:
 The Court considers that the text is sufficiently clear; consequently it feels that it should not deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself: *ICJ Rep.* (1948), at 63.
- 105 Yasseen, *loc. cit.*, at 85.
 106 (1929) *P.C.I.J.*, ser. A, No. 23.
 107 *Yearbook of the International Law Commission* (1966–II), 223.
 108 3 *Decisions of the Arbitral Commission on Property, Rights and Interests*, (1960), 268: 29 *I.L.R.*, 442.
 109 *Loc. cit.*, at 329: 34 *I.L.R.*, 219.
 110 See Sinclair, 'The Principles of Treaty Interpretation and their Application by the English Courts', 12 *I.C.L.Q.* (1963), at 512–7.
 111 59 *I.L.R.*, at 544–5.
 112 *Loc. cit.*, at 564.
 113 Yasseen, *loc. cit.*, at 89–90.
 114 [1981] A.C. 251.
 115 At 276.
 116 At 278.
 117 At 283.
 118 At 294–5.
 119 At 287.
 120 At 288.
 121 324 *UNTS* 241. A provision in similar terms will be found in the Treaty of Friendship between Japan and Ethiopia of 19 December 1957: 325 *UNTS* 99.
 122 98 *B.F.S.P.* 75.
 123 See, for example, Art. 20 of the International Convention against the Taking of Hostages annexed to GA Res. 34/146 of 17 December 1979.
 124 European Communities No. 18 (1979): Cmnd. 7650.
 125 A recent example is the Protocol of 1978 to the International Convention for the Safety of Life at Sea, 1974, Art. VIII of which declares that the Protocol is established in a signed original in Chinese, English, French, Russian and Spanish, with official translations in Arabic, German and Italian to be prepared and deposited with the signed original: *UKTS*, No. 40 (1981). For further examples of specific language clauses in both bilateral and multilateral treaties, see *The Treaty Makers Handbook*, 254–7 (Blix and Emerson eds., 1973): see also Satow, *op. cit.*, at 250–2, and Tabory, *Multilingualism in International Law and Relations* (1980), *passim*.
 126 *I.C.J. Rep.* (1948), at 62–3. In the *Aerial Incident* case, Judges Lauterpacht, Wellington Koo and Spender went even further in their joint dissent by stating that the Chinese, Russian and Spanish texts of the Statute of the I.C.J. were mere translations of the English; they established no priority as between the English and French texts, but drew attention to the consideration that, in its final version, the disputed passage had originally been drawn up in French: *I.C.J. Rep.* (1959), at 161–3.
 127 Hardy, 'The Interpretation of Plurilingual Treaties by International Courts and Tribunals', 37 *B.Y.I.L.* (1961), 72–155, at 143.
 128 The texts will be found in Brownlie, *African Boundaries*, 830–5 (1979).
 129 *Yearbook of the International Law Commission* (1966–II), 225.
 130 *Ibid.*
 131 (1924) *P.C.I.J.*, ser. A, No. 2, at 19.

- 132 Hardy, *loc. cit.*, at 76–81.
- 133 *Yearbook of the International Law Commission* (1966–II), 225.
- 134 *Supra*, pp. 121–2.
- 135 Vienna Convention on the Law of Treaties.
- 136 59 *I.L.R.*, at 529–30.
- 137 *Loc. cit.*, at 548.
- 138 *Loc. cit.*, at 578.
- 139 ‘Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties’, 11 *Harvard International Law Journal* (1970), 400.
- 140 *Die Auslegung mehrsprachiger Verträge* (1973), at 93, 94.
- 141 (1922) *P.C.I.J.*, ser. B, Nos. 2 and 3, at 23–7 and 33–41.
- 142 (1932) *P.C.I.J.*, ser. A/B, No. 50, at 378–9.
- 143 Hardy, *loc. cit.*, at 105.
- 144 59 *I.L.R.*, at 584–5.
- 145 Brownlie, *Principles of International Law*, 625 (3rd ed. 1979).

CHAPTER SIX

The invalidity, termination and suspension of operation of treaties

Part V of the Vienna Convention, consisting of Articles 42–72, sets out the circumstances in which a treaty will cease to be applicable, in whole or in part, for a State party to it by reason of an acknowledged ground of invalidity, termination or suspension. Part V is divided into five sections under the headings ‘General Provisions’ (Articles 42–45), ‘Invalidity of Treaties’ (Articles 46–53), ‘Termination and Suspension of the Operation of Treaties’ (Articles 54–64), ‘Procedure’ (Articles 65–68) and ‘Consequences of the Invalidity, Termination or Suspension of the Operation of Treaties’ (Articles 69–72). This chapter will deal with this complex and interrelated series of articles, with the exception of the two articles (Articles 53 and 64) which deal with the concept that conflict with a peremptory norm of general international law (that is to say, a norm of *jus cogens*) may render a treaty void, and the four articles (Articles 65–68) devoted to procedures for the peaceful settlement of disputes arising out of the interpretation or application of the entire series of provisions contained in Part V. This distinction has been made largely for reasons of convenience. The principle that conflict with an existing or emerging norm of *jus cogens* may render a treaty void is highly controversial and accordingly requires rather fuller analysis than would be possible if it were treated on a par with the other grounds of invalidity set out in the Convention. At the same time, there is a close link between the Convention provisions on *jus cogens* and those on the settlement of disputes in the sense that special arrangements are made for the resolution of disputes concerning the interpretation or application of the Convention provisions on *jus cogens*.

I. General and terminological

Part V of the Convention can usefully be analysed against the broader background of the various causes of the non-application of treaties. Such causes can extend beyond the particular grounds of invalidity, termination and suspension specified in Part V. For example, as we have already noted, there

may be at least partial non-application of a treaty when all the parties to it conclude a later treaty relating to the same subject-matter and the earlier treaty is not considered as terminated or suspended.¹ Partial non-application of a treaty may likewise result from the processes of amendment and *inter se* modification for which provision is made in Articles 40 and 41.² The principle of non-retroactivity set out in Article 28 also has as its consequence the non-application of a treaty in relation to acts or facts which took place or situations which ceased to exist before the date of entry into force of the treaty with respect to the State party concerned.³

These causes of non-application of a treaty are dependent upon the operation of legal rules. But what Part V is concerned with is essentially the circumstances in which a treaty may, in whole or in part, for all the parties or for one party alone, cease to have legal effects by reason of vices in or relating to the treaty instrument itself, by reason of certain facts external to the treaty or by reason of unlawful acts committed in the execution of the treaty.⁴ It is these three broad categories of situations which are covered by Part V, although, as will presently be seen, the causes of termination or suspension of the operation of a treaty are so various that they cannot be classified too rigorously.

Before proceeding to discuss the various sections of Part V, it is necessary to say a word about the terminology utilised in this series of articles since, regrettably, the drafting of the provisions is somewhat obscure. The difficulty arises primarily because of the use of the expression 'the invalidity of a treaty' to cover both those cases where, by virtue of the Convention, a treaty is rendered void *ab initio* and those cases where a State is entitled to invoke a particular ground as invalidating its consent to be bound by the treaty. It will be noted that Articles 46–50 inclusive of the Convention set out, in negative or positive form, a series of grounds which a State may invoke as invalidating its consent to be bound by a treaty. Article 51 deals with the special case where the expression of a State's consent to be bound by a treaty has been procured by the coercion of its representative and provides that the expression of consent is without any legal effect. Finally, Articles 52 and 53 are concerned with those cases in which the treaty itself is void by reason of considerations of what one might term international public policy (coercion of a State by the threat or use of force and conflict with a norm of *jus cogens*).

Part of the terminological difficulty stems from the fact that the Convention makes no clear distinction between bilateral and multilateral treaties. In the case of a bilateral treaty the distinction between absolute nullity and voidability is material only so far as the *consequences* are concerned: the legal effect of establishing a ground whereby the consent of one party to a bilateral treaty is invalidated is precisely the same as the legal effect of absolute nullity — the treaty falls to the ground. But in the case of a multilateral treaty different considerations apply. Absolute nullity means that the treaty has no legal force;

but the establishment of a ground whereby the consent of a particular State to a multilateral treaty is invalidated will not cause the treaty as a whole to fall to the ground — the treaty will continue to be valid as between the remaining parties, and only the relations between that particular State and the parties to the treaty will be affected.⁵

The point is one of some importance, since reference is made in some provisions of the Convention (notably Articles 44 and 45) to the expression ‘a ground for invalidating ... a treaty’. It is quite clear from the context in which this expression is used that it is intended to cover, in addition to those cases in which the treaty as a whole becomes invalid, those cases where it is simply the consent of one State to a multilateral treaty which becomes invalidated.

Other commentators make much the same point by noting the distinction between the concepts of ‘relative nullity’ and ‘absolute nullity’ in the drafting of Part V. Thus, Jimenez de Arechaga describes the difference between the concepts by reference to two closely linked elements:

- (a) Relative nullity may be invoked only by a State which has been the victim of error, fraud or corruption or whose representative has acted in manifest violation of internal law or of the restriction on his powers. Absolute nullity exists *erga omnes*, may be invoked by any interested State and must be declared *motu proprio* by a competent tribunal or any international organ charged with the application of the treaty, even if it is not alleged by the parties concerned.
- (b) Relative nullity may be cured by the express agreement or subsequent acquiescence of the party concerned (*sanatio*) whereas absolute nullity cannot be cured by any subsequent conduct.⁶

Ago likewise regards the distinction between ‘relative nullity’ and ‘absolute nullity’ as more accurately describing the situation in international law than the dichotomy between nullity and voidability, which is linked in domestic law to procedures for annulment.⁷

Whatever terminology is used, the fact remains that those articles in Part V which are devoted to the invalidity of treaties are so formulated as to indicate the differing degrees of ‘voidness’ which attach to particular grounds of invalidity. In the case of defects of capacity (Articles 46 and 47) and vices of consent (Articles 48, 49 and 50), it is the concept of *relative nullity* which operates, at the instance of the affected State, to invalidate its consent to be bound by the treaty; in the case of offences against international public policy — that is to say, the coercion of a representative of a State (Article 51), the coercion of the State itself by the threat or use of force (Article 52) and conflict with a norm of *jus cogens* (Article 53) — it is the concept of *absolute nullity* which denies legal effect to any treaty procured or concluded by such means or in defiance of such a norm. As we shall see later, the distinction is also of paramount importance so far as the *consequences* of invalidity are concerned.

II. Introduction to Part V

Part V of the Convention provoked lengthy and serious debates at both sessions of the Vienna Conference. The reason is not far to seek. The spelling out in conventional form of a long series of separate and unrelated grounds for the avoidance of treaties is a disturbing phenomenon for the vast majority of international lawyers, who see in the principle *pacta sunt servanda* the principal safeguard for the security of treaties and other international transactions. Prior to the conclusion of the Vienna Convention most writers and publicists on the law of treaties had concentrated attention on the conditions for the essential validity of treaties. Thus McNair devotes a chapter of his magisterial work to 'Essential validity', discussing under this rubric the vitiating effect of coercion, mistake and incompatibility or conflict with rules of international law or treaty obligations.⁸ Fitzmaurice and Waldock, as Special Rapporteurs on the law of treaties, also approached this topic from the standpoint of setting out the principles governing the essential validity of treaties,⁹ Fitzmaurice cautiously prefacing his report on the matter by pointing to the paucity of material on essential validity, and the potentially misleading nature of private law analogies.

The Commission, however, preferred to group the conditions of essential validity under the general heading 'Invalidity of treaties', thus creating the unfortunate impression (even if the impression is misleading) that there existed no real presumption in favour of the validity of treaties. There is something to be said for the view advanced by Nahlik that a *positive* approach to the drafting of Part V of the Convention might have been preferable to the *negative* approach favoured by the Commission and endorsed by the Conference.¹⁰ But what is perhaps even more significant is that the drafting method adopted by the Commission required an exhaustive catalogue of all possible grounds of invalidity, no matter how theoretical and how little supported by State practice and international jurisprudence. This tends to reinforce the disturbing psychological impact of according authoritative expression to so many apparent exceptions to the principle *pacta sunt servanda*. These considerations explain in part the anxiety evinced by many delegations, particularly from Western Europe and Latin America, about the content of Part V of the Convention, and their insistence that the inclusion of controversial grounds of invalidity must be accompanied by automatically available third-party procedures for the settlement of disputes arising on the interpretation or application of this series of articles.

The Commission were of course anxious to dispel the fears and anxieties which they anticipated would be provoked by their general approach to the topic of invalidity, termination and suspension of the operation of treaties. In their commentary to what is now Article 42 of the Convention, the Commission emphasised that it was desirable,

... as a safeguard for the stability of treaties, to underline in a general provision at the beginning of this part that the validity and continuance in force of a treaty is the normal state of things which may be set aside only on the grounds and under the conditions provided for in the present articles.¹¹

Article 42 of the Convention indeed lays down that the validity of a treaty or the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention; and that the termination of a treaty, its denunciation or the withdrawal of a party, or the suspension of the operation of a treaty, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The distinction between the various processes is deliberate. Invalidity normally results from something external to the text of the treaty itself; but provision is frequently made in the wording of a treaty for its termination or denunciation, for the withdrawal of a party or for the suspension of the operation of the treaty. This explains why, in the cases of termination, denunciation, withdrawal or suspension, reference is made to *the application of the provisions of the treaty* as well as to the application of the present Convention.

In their commentary to this article, the Commission also explained that the phrase 'application of the present articles' (the last word was changed to 'Convention' at the Conference) referred not merely to the particular article dealing with the particular ground of invalidity or termination relevant in the case but also to other articles governing the conditions for putting that article into effect, notably the articles dealing with procedure (now Articles 65–68). This is a most important explanation of the underlying meaning of Article 42, since it confirms that the procedural safeguards set out in Articles 65–68 are applicable whenever a State party to the Convention seeks to invoke, as against another State party, one of the grounds of invalidity set out in Articles 46–53.

Notwithstanding these explanations, Article 42 provoked lengthy debates at the Conference, and has since been the subject of critical comment. Attention has been focussed in particular on whether the Commission were right in asserting, as they did in their commentary, that the grounds of invalidity, termination, denunciation, withdrawal and suspension, as set out in the later articles in Part V, were exhaustive of all such grounds, leaving aside the operation of rules relating to State succession, State responsibility and the outbreak of hostilities on treaties which are excepted from the scope of the Convention by virtue of Article 73.

In arguing the 'exhaustiveness' of the later articles in Part V, the Commission considered the particular cases of 'obsolescence' or 'desuetude' and of the disappearance or extinction of a party. As regards 'obsolescence' or 'desuetude', the Commission remarked:

... while 'obsolescence' or 'desuetude' may be a factual cause of the termination of a treaty, the legal basis of such termination, when it occurs, is the consent of the parties,

which is to be implied from their conduct in relation to the treaty. In the Commission's view, therefore, cases of 'obsolescence' or 'desuetude' may be considered as covered by [Article 54, paragraph (b)] under which a treaty may be terminated 'at any time by consent of all the parties'.¹²

This explanation is not altogether convincing. At the Conference, the point was already made that 'it might be difficult to subsume certain situations such as desuetude under the provisions of the articles'.¹³ Capotorti goes further, maintaining that implied consent cannot be the *rationale* for the operation of 'obsolescence' or 'desuetude' which derives, in his view, more from supervening custom.¹⁴ Capotorti recalls that the factual basis for the invocation of 'obsolescence' or 'desuetude' is that the parties no longer apply a treaty (or some of its clauses), that this behaviour continues without giving rise to any claim or protest over a period of time sufficient to consider a custom as having been formed, and that the States concerned become convinced during this period of time that their behaviour is legitimate.¹⁵ Reuter also suggests that the Commission were somewhat hasty in characterising desuetude as falling within the notion of implied consent.¹⁶

The Commission sought to justify omission of any reference to the disappearance or extinction of a party on the following ground:

Again, although a change in the legal personality of a party resulting in its disappearance as a separate international person may be a factual cause of the termination of a bilateral treaty, this does not appear to be a distinct legal ground for terminating a treaty requiring to be covered in the present articles. A bilateral treaty, lacking two parties, may simply cease any longer to exist, while a multilateral treaty in such circumstances may simply lose a party.¹⁷

In further explanation of this omission, the Commission, in their commentary to what is now Article 61 (dealing with supervening impossibility of performance), recalled that the total extinction of the international personality of one of the parties was often cited as an instance of supervening impossibility of performance. The Commission however decided against including it in Article 61 for the following reason:

... it would be misleading to formulate a provision concerning the extinction of the international personality of a party without at the same time dealing with, or at least reserving, the question of the succession of States to treaty rights and obligations.¹⁸

There may again be some reason for doubting the wisdom of not including a specific reference to extinction of the international personality of a State in the later series of articles devoted to the termination and suspension of the operation of treaties. As Capotorti points out, the recognition by the Commission that the loss of the international personality of a party may be a 'factual cause' of termination of a treaty should have led to the incorporation of this ground in the Convention so as to avoid another gap in the catalogue of causes of termination.¹⁹

It has also been suggested that the list of causes of invalidity, termination and suspension as set out in Part V is incomplete in that no mention is made of the complete execution of a treaty or of renunciation of rights under a treaty. Execution as a mode of termination of a treaty cannot of course put an end to a treaty imposing obligations of a nature intended to be permanent, nor indeed to a treaty creating abstract or hypothetical rules capable of application as or when the situation to which they might apply arises. Execution can, on the other hand, operate as a cause of termination of treaties, such as treaties of cession of territory or treaties providing for the making of payments, whose object and purpose are completed as soon as specific action has been taken by the parties in fulfilment of the obligations contracted. Part V does not mention execution as a particular ground of termination. This again may be considered as a *lacuna* in the scheme, although a strained interpretation of Article 54, paragraph (a), may permit the conclusion that, as complete execution of a treaty is necessarily and by definition in accordance with the treaty, termination as an automatic consequence of complete execution is 'in conformity with the provisions of the treaty'.²⁰

Finally, it may be argued that renunciation of rights under a treaty should also have been listed as a possible cause of termination under Part V. There are cases (rare, admittedly) where a treaty, or particular clauses in a treaty, confer rights on one of the parties without at the same time imposing obligations on that party, while the other party has obligations but no rights. In the case of a bilateral treaty of this nature, the renunciation of its rights by the party in whose favour they have been created will put an end to the treaty.²¹

For all these reasons, there is good reason to suppose that the Commission's categorical affirmation in its commentary to what is now Article 42 that the list of grounds of invalidity, termination and suspension contained in the later articles of Part V is exhaustive of all such grounds is questionable. Even if one acknowledges that all questions relating to State succession, State responsibilities and the outbreak of hostilities on treaties are, by virtue of Article 73, excepted from the scope of the Convention, there are at any rate doubts as to whether Part V properly covers such possible grounds of termination as desuetude, extinction of the international personality of a party, complete execution and renunciation.

Before examining specific grounds of invalidity, termination or suspension, it may also be useful to examine at this point two general provisions which apply to the whole of Part V — Articles 44 and 45, dealing with separability and acquiescence respectively.

1. Separability

A fundamental issue which inevitably arises in the context of the consideration of grounds of invalidity, termination and suspension is whether the grounds must be invoked with respect to the treaty in its entirety or whether they may

be invoked only with respect to particular clauses in the treaty. Here again, as in the case of reservations, we are in the presence of a certain tension between the integrity of the treaty as a whole and its possible divisibility.²²

Traditionally, it was thought that separability was permissible only in the context of the exercise of a right to terminate a treaty on the ground of a breach by the other party. However, on the basis of a study of the *Norwegian Loans*²³ and *Interhandel*²⁴ cases, in which a number of the judges on the International Court of Justice had accepted the applicability of the principle of separating treaty provisions in the case of the alleged nullity of an Optional Clause declaration, the Commission was led to examine *de novo* the appropriateness and utility of recognising the principle of separability of treaty provisions in the context of the invalidity, termination and suspension of the operation of treaties.²⁵

There is therefore good reason to think that Article 44 constitutes an innovation in the law of treaties in extending the principle of separability beyond the particular case of breach.²⁶ Nonetheless, the Convention regime on separability is framed in suitably cautious terms.

In the first place, paragraph 1 incorporates the principle that where a right of denunciation, withdrawal or suspension is provided for in the treaty itself, that right is exercisable only with respect to the whole treaty unless the treaty otherwise provides or the parties otherwise agree. The Commission justify this rule on the following ground:

In the case of a right provided for in the treaty, it is for the parties to lay down the conditions for the exercise of the right; and, if they have not specifically contemplated a right to denounce, terminate etc. parts only of the treaty, the presumption is that they intended the right to relate to the whole treaty.²⁷

In the second place, the principle of the integrity of the treaty is again underlined in paragraph 2 which provides that a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty may be invoked only with respect to the whole treaty except as provided in later paragraphs or in Article 60.²⁸

In the third place, paragraph 3 establishes the principle of separability in cases where the ground relates solely to particular clauses and:

- (a) those 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.

These three conditions are cumulative. The Commission make it clear in their commentary that the question whether condition (b) is met 'would necessarily

be a matter to be established by reference to the subject-matter of the clauses, their relation to the other clauses, to the *travaux préparatoires* and to the circumstances of the conclusion of the treaty'.²⁹ In other words, this raises a very delicate problem of interpretation where elements other than those deriving from the text of the treaty itself will play a significant role.³⁰ Condition (c) was added to the text at the Conference on the basis of a proposal by the United States delegation, who argued that it was necessary to maintain the balance of interests of the parties under the treaty even in the context of the possible invalidation of part of the treaty; and that this balance would not necessarily be reflected by the terms of the treaty or the preparatory work since, after some years of application, certain treaty provisions might gain or lose importance in a way not foreseen during the negotiations.³¹ The addition of condition (c) is a useful reminder of the variable significance of particular treaty provisions over a period of time; but it is difficult to gainsay the comment that the test in condition (c) is inevitably subjective and does not seem to add much to the underlying basis of condition (b), namely, that it is necessary to establish whether the continued application of the remainder of the treaty does or does not upset the equilibrium between the parties.³²

In the fourth place, paragraph 4 lays down a different rule for cases of fraud (Article 49) and corruption (Article 50) by giving to the State which is the victim of these practices the option of invalidating the whole of the treaty or, provided that the conditions in paragraph 3 are satisfied, the particular clauses to which the fraud or corruption related.

Finally, paragraph 5 specifically prohibits separability in cases of coercion of a representative of a State (Article 51), coercion of a State by the threat or use of force (Article 52) and conflict with an existing norm of *jus cogens* (Article 53). At the Conference, strenuous efforts were made to delete the reference to Article 53 in paragraph 5 of Article 44, so that separability might be permitted in relation to a treaty some of whose provisions might conflict with a norm of *jus cogens*. But these efforts were in vain, the majority adhering to the view voiced in the Commission's commentary that:

... rules of *jus cogens* are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid.³³

It is difficult to escape the conclusion that the denial of separability in cases where particular clauses of a treaty are in conflict with an existing norm of *jus cogens* is designed to operate as a sanction, the more particularly as separability is *not* prohibited in cases where particular clauses of a treaty may come into conflict with an emerging norm of *jus cogens* (no reference being made to Article 64 in paragraph 5 of Article 44).³⁴

2. Acquiescence

Article 45 embodies one of the essential safeguards operating to protect the stability of treaty relations — namely, the principle of acquiescence. This principle derives support from two cases decided by the International Court of Justice, the *Arbitral award made by the King of Spain* case³⁵ and the *Temple* case.³⁶ The effect of Article 45 is to prohibit a State from claiming that a treaty is invalid on grounds of lack of competence, restrictions on authority to express consent, error, fraud or corruption, or seeking to terminate or suspend the operation of a treaty on grounds of material breach or fundamental change of circumstances if, after becoming aware of the facts, the State has expressly agreed that the treaty is valid or must, by reason of its conduct, be considered as having acquiesced in the validity of the treaty or its maintenance in force or in operation. It should be noted that there are differences between the principle of acquiescence and the operation of estoppel, although the effect may, in particular circumstances, be very similar. To the extent that acquiescence may be an element in the establishment of title to territory by prescription, it is the acquiescence of States generally, or at least of those States adversely affected by the claim, which may have to be established. By way of contrast, estoppel is a matter of adjectival, rather than substantive, law and accordingly the effect of a true estoppel is confined to the parties.³⁷ It is also relevant that estoppel is a concept of general application, the essential aim of which is to preclude a party from benefitting by his own inconsistency to the detriment of another party who has in good faith relied upon a representation of fact made by the former party.

For these reasons, it would be wrong to regard Article 45 as imposing restrictions upon the circumstances in which an estoppel may be invoked before an international tribunal in relation to a treaty dispute. The operation of estoppel is presumably admissible, under customary international law, in relation to the application of all articles of the Convention except those laying down grounds of absolute nullity, e.g. coercion or conflict with an existing norm of *jus cogens*.

One final point may be noted here. At the Conference an amendment to delete what is now sub-paragraph (b) of Article 45 was proposed by the delegations of Bolivia, Byelorussia, Colombia, the Dominican Republic, Guatemala, the USSR, Venezuela and Congo (Brazzaville). The Commission had of course justified the inclusion of sub-paragraph (b), which deals with acquiescence by conduct, on general grounds of good faith and fair dealing:

In such a case the State is not permitted to take up a legal position which is in contradiction with the position which its own previous conduct must have led the other parties to suppose that it had taken up with respect to the validity, maintenance in force or maintenance in operation of the treaty.³⁸

In the event, the amendment was defeated by a substantial majority, but it is a matter for ironical comment that a number of this rather disparate group of co-sponsoring States were at the time, and still are, involved in territorial disputes raising, sometimes in an acute form, questions concerning the application of the principle of acquiescence.

III. Specific grounds of invalidity

The Convention lays down eight specific grounds of invalidity which may be classified into three groups according to whether they impeach the capacity of a party, the validity of its consent to be bound or the lawfulness of the object of the treaty.³⁹ In this Chapter, we shall deal only with grounds relating to capacity and grounds relating to the vitiation of consent.

1. Grounds relating to capacity

Part V of the Convention incorporates two such grounds:

1. Violation of provisions of internal law regarding competence to conclude treaties (Article 46); and
2. Violation of specific restrictions on authority to express the consent of a State (Article 47).

It is proposed to discuss each of these grounds briefly.

(a) *Violation of internal law.* The question whether the violation of a provision of internal law regarding competence to conclude treaties constitutes a ground which the State concerned may invoke as invalidating its consent to be bound is an issue which has long divided international lawyers. In the main, doctrine is divided between what may, for purposes of convenience, be termed the constitutionalist and the internationalist schools.⁴⁰ The constitutionalist school holds that international law leaves it to internal law to determine the organs and procedures by which the consent of a State to be bound by a treaty is formed and expressed, and that violation of a prescription of internal law renders void (or voidable) the expression of a State's consent to be bound. The internationalist school bases itself upon the theory that international law is concerned only with the external manifestations of the expression of a State's consent to be bound, and that the act of an agent who is competent under international law to bind the State and apparently authorised to do so in the particular case binds the State even if a prescription of internal law has not been complied with.⁴¹ Between the two extremes there are those who, while adhering in principle to the constitutionalist school, attempt to soften its impact by laying down that only those constitutional limitations which are 'notorious' need be taken into account by other States, so that a State contesting the validity of a treaty on the grounds of a violation

of internal law may invoke only those provisions of its constitution which are notorious.

Wildhaber, on the basis of a comprehensive survey of doctrine and State practice, concludes that, in the 1930s, the majority of publicists, including Scelle, Schücking, Dehousse, Paul de Visscher and the Harvard Research, supported the constitutionalist school; but that the more modern trend, as evidenced in the writings of Blix, Geck, Fitzmaurice, Waldock and Holloway, was in favour of the internationalist school. He also points out that international practice does not support the view that provisions of internal law relating to competence to conclude treaties are relevant under international law. In his view, only the *Cleveland* award of 1888,⁴² relating to a boundary dispute between Costa Rica and Nicaragua, and two diplomatic incidents relating to the conclusion of concordats between the Vatican and Baden in 1859 and between the Vatican and Württemberg in 1859, favoured the constitutionalist position. As against this, the award in the *Rio Martin* case⁴³ (where Judge Huber unhesitatingly refused to inquire into the domestic law of Morocco in the context of a dispute between the United Kingdom and Spain about the failure to implement an exchange of letters promising the British representative a new residence in Tetuan) and the award in the *Franco-Swiss Customs* arbitration of 1912,⁴⁴ together with *dicta* in the *Free Zones*⁴⁵ and *Eastern Greenland*⁴⁶ cases, supported the internationalist position. On balance, Wildhaber finds the internationalist position more convincing than the constitutionalist position.⁴⁷

Within the Commission, there was a gradual shift of opinion on this issue over the years. The first two Special Rapporteurs (Messrs Brierly and Lauterpacht) put forward drafts based upon the constitutionalist position, in the belief that governments would reject any other rule. Fitzmaurice, however, broke with tradition, advancing unequivocally the proposition that 'consent means consent on the international plane, and the reality of such consent is not impaired by the fact that, on the domestic plane, certain consents are lacking; or that there has otherwise been a failure by the State concerned, or its authorities, to observe the correct constitutional processes ... for the purpose of proceeding to signature; or to keep within any limitations on the treaty-making power imposed by the domestic law or constitution'.⁴⁸ Waldock also favoured the internationalist theory, although with some qualifications.⁴⁹ Majority opinion within the Commission eventually coalesced on the principle that non-observance of a provision of internal law regarding competence to enter into treaties does not affect the validity of a consent given in due form by a State organ or agent competent under international law to give that consent. But the majority were persuaded to admit an exception in the case where the violation of a provision of internal law regarding competence to conclude treaties was absolutely manifest.

At the Conference an amendment tabled by Pakistan and Japan proposed

to delete the 'manifest violation' exception. This was defeated by a fairly substantial majority. On the other hand, it was apparent that the Conference was rather uneasy about the danger to the security of treaties represented by the 'manifest violation' exception. For this reason, two significant proposals designed to narrow the scope of the exception and to define it more closely were adopted. The first proposal, tabled by Peru, required the violation not only to be manifest but also to relate to a rule of internal law 'of fundamental importance'. The second proposal, tabled by the United Kingdom, picked up a phrase from the Commission's commentary by requiring that a 'manifest violation' should be objectively evident to any State dealing with the matter normally and in good faith. With minor drafting variations, these two proposals were incorporated in the final text of Article 46.

Reuter points up the close link between alleged violations of internal law as invalidating consent and the operation of the principle of acquiescence. He rightly draws attention to the fact that it is normally only after a treaty has been in force for a number of years and has been partly executed that, following internal political changes, the question may be raised as to whether consent has been expressed in violation of a provision of internal law. But, he continues, in such a case the invalidity, even supposing it to exist, could no longer be invoked because it would have been cured by acquiescence:

C'est moins la bonne foi des autres États qui est protégée par le droit international que le comportement de l'État intéressé qui est sanctionné: il a fait naître une conviction légitime chez ses partenaires et il doit en supporter les conséquences.⁵⁰

Accordingly, Reuter concludes that although a violation of internal law may, in certain narrowly defined circumstances, vitiate consent, it is an irregularity which is closely linked with the problem of State responsibility.

(b) *Violation of specific restrictions on authority to express the consent of a State.* Article 47 deals with the possibility of invoking, as a ground of invalidity, the failure of a representative to observe restrictions on his authority to express the consent of the State to be bound. Failure to observe such a restriction cannot be invoked as a ground of invalidity unless the restriction was notified to the other negotiating States prior to the expression of consent.

It should be noted that Article 47 does *not* apply where a treaty is subject to ratification, acceptance or approval, since, as the Commission point out in their commentary, any excess of authority committed by a representative in establishing the text of the treaty will automatically be dealt with at the subsequent stage of ratification, acceptance or approval:

The State in question will then have the clear choice either of repudiating the text established by its representative or of ratifying, accepting or approving the treaty; and if it does the latter, it will necessarily be held to have endorsed the unauthorized act of its representative and, by doing so, to have cured the original defect of authority.⁵¹

Article 47 is therefore confined to those cases in which the defect of authority relates to the execution of an act by which a representative purports *finally* to establish his State's consent to be bound.

Having regard to the cumulative conditions set out in Articles 46 and 47, and to the negative manner in which they are formulated, it may be conceded that practical cases in which they could be invoked will be rather rare.⁵²

2. *Grounds relating to the vitiation of consent*

Five such grounds are specified in Part V of the Convention: (1) error, (2) fraud, (3) corruption, (4) coercion of a representative of a State, (5) coercion of a State by the threat or use of force. The first three of these grounds (error, fraud and corruption) render the treaty voidable at the instance of the victim State; the fourth renders the expression of consent void and the fifth renders the treaty void. It is proposed to consider each of these grounds briefly.

(a) *Error*. In customary international law, instances in which errors of substance have been invoked as a ground for vitiating consent are extremely rare. As the Commission point out, most of them concern errors in maps. The effect of error was considered by the Permanent Court of International Justice in the *Eastern Greenland* case⁵³ and by the present International Court in the *Temple* case.⁵⁴ In neither was the plea of error accepted, and the *dicta* in the two cases accordingly throw light primarily on the conditions under which error will *not* vitiate consent rather than on those under which it will do so.

Having regard to the paucity of material on error as a ground which may be invoked as invalidating consent, it is perhaps as well that the text proposed by the Commission, and in substance accepted by the Conference as Article 48, is drafted in suitably restrictive terms. Error may be invoked as a ground for invalidating consent only if:

- (a) the error relates to a fact or situation which was assumed by the State invoking the error to exist at the time when the treaty was concluded; and
- (b) that fact or situation formed an essential basis of its consent to be bound by the treaty.

Furthermore, error may not be invoked by a State if it contributed by its own conduct to the error or if the circumstances were such as to put the State on notice of a possible error.⁵⁵

Although the text of Article 48 uses the expression 'error *in* a treaty', it should be noted that this is intended to mean any error of fact *relating* to a treaty.⁵⁶ Thus an error in the calculation of the capacity of turbines underlying a treaty for the sharing of hydro-electric power would presumably constitute an error capable of being invoked under this article.⁵⁷

Earlier Special Rapporteurs, notably Fitzmaurice, had sought to distinguish

between unilateral error and mutual error, maintaining that unilateral error could be invoked only if the error had been induced by the fraud, fraudulent misrepresentation, concealment or non-disclosure, or culpable negligence, of the other party. The Commission, however, took the view that international law did not distinguish between mutual error and unilateral error, the distinction being relevant only in certain legal systems.

Finally, it was made clear at the Conference that cases of innocent misrepresentation (as opposed to fraudulent representation) would not affect the validity of consent unless the innocent misrepresentation led to an error which could be invoked as invalidating consent. In certain circumstances, innocent misrepresentation by one party might help to defeat the suggestion that the other party ought to have discovered the error.⁵⁸

(b) *Fraud.* Examples of fraud as a ground for vitiating consent to be bound by a treaty are rare, if not non-existent, in State practice. The Commission, in their commentary to what is now Article 49, were unable to cite a single instance of fraud, admitting that 'the paucity of precedents means that there is little guidance to be found either in practice or in the jurisprudence of international tribunals as to the scope to be given to the concept'.⁵⁹ Writers and publicists have of course long accepted the principle that fraud exercised by a negotiating State to induce the conclusion of a treaty with another State may entitle the latter to claim that its consent to the treaty has been vitiated. Thus McNair draws attention to the general agreement among writers that 'a treaty concluded as a result of a fundamental mistake induced in one party ... by the fraud of another party is void, or at least voidable'.⁶⁰ Guggenheim treats fraud as being one of the 'vices de volonte',⁶¹ while Rousseau mentions fraud as being a ground of invalidity, while admitting the lack of concrete international practice in the matter.⁶²

The Commission, in their commentary to what is now Article 49, stressed that cases of deliberate fraud in order to procure the conclusion of a treaty were likely to be rare and likewise acknowledged that any fraudulent misrepresentation of a material fact inducing an essential error would be caught by the provisions of Article 48 dealing with error. They nevertheless considered it advisable to keep fraud and error distinct in separate articles, since fraud, when it occurred, struck at the root of an agreement in a somewhat different way from innocent misrepresentation and error. They also felt it necessary to explain that the terms 'fraud' and 'fraudulent conduct' were not intended to convey that all the detailed connotations given to them in internal law are necessarily applicable in international law:

It is the broad concept comprised in each of these words, rather than its detailed application in internal law, that is dealt with in the present article.⁶³

Accordingly, the concept of 'fraudulent conduct' would appear to cover any false statements, misrepresentations or other deceitful proceedings by which a State may be induced to give a consent to a treaty which it would not otherwise have given.⁶⁴

Reuter points out that fraud has much the same effect as error in the sense that it gives the victim State an incorrect representation of the true position; but he also draws attention to the consideration that fraud involves in addition an illicit element of deceit or deception.⁶⁵ This no doubt explains why the State victim of fraud should have greater rights than the State victim of error; and this is indeed the effect of the Convention, since Article 44, paragraph 4, allows a State victim of fraud the option of invalidating the entire treaty or, subject to the general conditions affecting separability, the particular clauses affected by the fraud, and Article 69, paragraph 3, denies to the State responsible for the fraud protection for acts performed by it under the treaty before the fraud was invoked. Fraud, in contra-distinction to error, is thus treated as an illicit act to which more punitive consequences attach.

At the Conference the delegations of Chile and Malaysia tabled a proposal to delete the Commission's draft article on fraud. It was argued that the Commission's text was based on 'the mechanical and unconsidered application of rules of internal private law to public international law' and that the complex procedure for the conclusion of treaties, involving the participation of capable and experienced officials, rendered it extremely unlikely that governments would be unable to take the necessary precautions to protect their interests.⁶⁶ Other delegations sought to invoke examples of fraud in State practice, the Soviet delegation citing the example of a treaty concluded between Italy and Ethiopia in 1899. Interestingly, the Ethiopian delegation (which nonetheless supported the retention of the article on fraud) denied that this was a case of fraud, pointing out that the dispute had arisen because of a discrepancy between the Italian and Amharic texts of the treaty; it was thus a case of error striking at the roots of the treaty.⁶⁷ Notwithstanding the paucity of State practice on fraud as a ground for vitiating consent to be bound by a treaty, the Conference rejected the Chilean and Malaysian proposal. It also rejected an amendment tabled by the United States delegation and designed to incorporate two additional limitations in the text — that there should have been 'reasonable reliance' upon the fraudulent conduct and that the conduct should have concerned a fact or situation 'of material importance' to the consent of the State concerned to be bound by the treaty.⁶⁸

(c) *Corruption.* If instances of fraud are rare enough in State practice, examples of corruption being invoked as a ground for invalidating consent to be bound by a treaty are non-existent. The Commission's commentary is strikingly devoid of any incident in which it has been alleged that the consent of a State to be bound by a treaty has been procured by the corruption of

its representative. It was only at the final session of the Commission in 1966 that a specific provision establishing corruption as a separate ground of invalidity was written into the set of draft articles presented by the Commission. The commentary discloses that the members of the Commission were divided in their views as to whether corruption should be regarded as a separate ground of invalidity. Some maintained that corruption was not an independent cause of defective consent, but merely one of the possible means of securing consent through fraudulent conduct; but the majority were of the view 'that the corruption of a representative by another negotiating State undermines the consent which the representative purports to express on behalf of his State in a quite special manner which differentiates the case from one of fraud'.⁶⁹

Again, an attempt was made at the Conference by the delegations of Chile, Japan and Mexico to secure the deletion of this provision, the sponsors maintaining that corruption was simply another form of fraud and that the vagueness of the wording might lead to abuses; but the proposal to delete Article 50 from the text of the Convention was defeated by a fairly substantial majority.

The Commission, in their commentary, seek to limit the scope of the provision by indicating that the expression 'corruption' is used 'expressly in order to indicate that only acts calculated to exercise a substantial influence on the disposition of the representative to conclude a treaty' may be invoked and that 'a small courtesy or favour' shown to a representative cannot be invoked as a pretext for invalidating a treaty.⁷⁰ This explanation does little to clarify the meaning of the text. The distinction between a substantial inducement and a small courtesy or favour is self-evidently a matter for subjective appreciation. It is to be feared that the inclusion of corruption as a separate ground of invalidity will make it easier for a State to repudiate a representative who may have exceeded his instructions. There is no doubt a practical safeguard in that States will be reluctant to admit that their own representatives have been corrupted; but, of course, a revolutionary regime wishing to escape from an inconvenient treaty concluded by a previous government would be under no such inhibitions, since the corruption would be attributed to a representative of the ousted regime.

Two other points should be noted, one on the text of Article 50 itself and one on the consequences which flow from the establishment of corruption as a ground of invalidity. First, the text of Article 50 requires that the corruption of a representative of a State should have been effected 'directly or indirectly by another negotiating State'. As has been pointed out, corruption is scarcely ever effected by overt acts. But it is not enough, under Article 50, merely to establish that the representative has been corrupted; it must be shown that the corruption has been effected directly or indirectly by the other negotiating State.⁷¹ In this context, Reuter suggests that the test should be, as it is in the case of State responsibility, whether the act of corruption is imputable to the

State. This does not mean that it must have been effected by an official representative; it is sufficient that it should have come from a person acting under the control or on behalf of the State.⁷² Secondly, so far as the consequences of invalidity are concerned, corruption is treated in the same way as fraud in the sense that the same option is available to the victim State under Article 44 paragraph 4, and the same denial of protection is afforded to the State responsible under Article 69 paragraph 3.

(d) *Coercion of a representative of a State.* Article 51 provides that the expression of a State's consent to be bound by a treaty which has been procured by the coercion of its representative through acts or threats directed against him shall be without any legal effect. There is no doubt that duress exercised against the person of a representative concluding a treaty has long been recognised by jurists as an element which may vitiate the consent of the State to be bound by the treaty,⁷³ although it has been suggested that if the treaty requires ratification and has been knowingly ratified the State may no longer invoke duress exercised against its representative to procure signature.⁷⁴ The draft article proposed by the Commission did not include this qualification.

At the Conference the text of what is now Article 51 was criticised on the grounds that as drafted:

- (a) it might be thought to enable the coercing State to claim that the treaty was null and void;
- (b) it did not specifically exclude the possibility that a third State might seek to claim that a treaty between two other States was rendered null and void by reason of coercion directed against a representative;
- (c) it did not give the injured State the option to retain the treaty if it decided that, on balance and despite the vice of coercion, the benefits of maintaining the treaty in force outweighed the loss which would occur if the treaty were terminated.⁷⁵

It is doubtful whether there is much substance in point (a). One would assume in any event that the operation of general principles of law (*ex turpi causa non oritur jus*) would preclude the making of any claim by the coercing State. Points (b) and (c) are of more significance, and no effective answer was vouchsafed to them at the Conference. Nevertheless, it is perhaps not very likely that a third State would seek to deny the validity of a treaty concluded between two other States on this ground; and the wording of Article 51 indicates that it will apply almost exclusively to duress exercised against a representative to procure signature, since it is difficult to envisage circumstances in which duress could be exercised against an *individual* (as distinct from the State) to procure ratification.

The text proposed by the Commission for what is now Article 51 referred

to coercion of a representative 'through acts or threats directed against him personally'. In their commentary, the Commission indicate that this phrase is intended to cover any form of constraint or threat against a representative affecting him as an individual and not as an organ of his State. It would therefore include not only a threat to his person, but a threat to ruin his career by exposing a private indiscretion, as also a threat to injure a member of the representative's family with a view to coercing the representative.⁷⁶ At the Conference, the word 'personally' was deleted on a proposal by the Austrian delegation in order to make it clear that threats directed against the next-of-kin of the representative of a State were covered.⁷⁷

(e) *Coercion of a State by the threat or use of force.* Article 52 gave rise to lengthy discussions at the Conference. The concept that a treaty may be void if its conclusion has been procured by the threat or use of force is of very recent origin. The traditional doctrine was that a treaty was not rendered null and void, or voidable at the instance of one of the parties, by reason only of the fact that such party was coerced by the other party into concluding it, whether the coercion was applied at the time of signature or of ratification or at both times.⁷⁸ It was accepted that treaties procured by the threat or use of force were morally questionable, but it was argued that to place the stigma of invalidity upon treaties procured by the threat or use of force would place in jeopardy all peace treaties entered into on the conclusion of hostilities.

The traditional doctrine became established at the time when force as an instrument of national policy was not outlawed. With the gradual development of the principle prohibiting the threat or use of force in international relations, now embodied in Article 2(4) of the United Nations Charter, the foundations of the traditional doctrine were shaken. As the Commission put it in their commentary to what is now Article 52:

With the Covenant [of the League of Nations] and the Pact of Paris there began to develop a strong body of opinion which held that treaties [brought about by the threat or use of force] should no longer be recognised as legally valid. The endorsement of the criminality of aggressive war in the Charters of the Allied Military Tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2(4) of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this development in the law. The Commission considers that these developments justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today.⁷⁹

Two distinct issues were discussed at the Conference in connection with the drafting of this Article. The first arose out of an amendment tabled by a group of nineteen Afro-Asian and Latin American countries which sought to define the expression 'force' as including any 'economic or political pressure'. As the text proposed by the Commission referred to 'the threat or

use of force in violation of the principles of the Charter of the United Nations' it was clear that the nineteen-power amendment sought to put a gloss upon the wording of the Charter, and particularly of Article 2(4). The vast majority of the Western States represented at the Conference, together with certain Latin American States, vigorously opposed the nineteen-power amendment, arguing that (a) the drafting history and text of the Charter clearly demonstrated that the expression 'force' as used in Article 2(4) referred only to physical or armed force, and (b) the acceptance of economic or political pressure as a sufficient ground for rendering a treaty null and void would seriously prejudice the stability of treaty relations, given the vagueness of the language employed and the varying interpretations which would undoubtedly be given to the concept of 'pressure'. That the sponsors of the nineteen-power amendment intended to give the broadest possible interpretation to the concept of 'pressure' emerged from the statements made in support of the amendment. The representative of Tanzania indicated that among the means of economic pressure which would render a treaty null and void would be 'the withdrawal of aid or of promises of aid, the recall of economic experts and so on'.⁸⁰ The representative of the United Arab Republic referred to economic pressure directed against developing countries, particularly those whose 'economy depended on a single crop or the export of a single product'.⁸¹ The representative of Algeria claimed that economic pressure was 'a characteristic of neo-colonialism' and openly spelt out what would be the consequences of admitting that economic pressure could render a treaty null and void:

Political independence could not be an end in itself; it was even illusory if it was not backed by genuine economic independence. That was why some countries had chosen the political, economic and social system they regarded as best calculated to overcome underdevelopment as quickly as possible. That choice provoked intense opposition from certain interests which saw their privileges threatened and then sought through economic pressure to abolish or at least restrict the right of peoples to self-determination. Such neo-colonialist practices which affected more than two-thirds of the world's population and were retarding or nullifying all efforts to overcome underdevelopment, should therefore be denounced with the utmost rigour.⁸²

It is not unnatural that those delegations concerned to preserve the security and stability of treaties should regard such sweeping statements with intense misgivings. Acceptance of the concept that economic pressure could operate to render a treaty null and void would appear, if these sweeping views as to the dominant position of developed countries were accepted, to invite claims which would put at risk any treaty concluded between a developing and a developed country.

In the event, and after a major confrontation, the nineteen-power amendment was not pressed to a vote, since many Western delegations had hinted that its acceptance by the Conference would seriously prejudice the prospect of producing a Convention which would command their support. Instead,

a declaration condemning the threat or use of pressure in any form by a State to coerce any other State to conclude a treaty was adopted unanimously by the Committee of the Whole and eventually by the Plenary.

It should be noted that, during the debate on this issue, reference was made by many delegations to the parallel discussion being carried on at the time within the framework of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, where, in the context of the elaboration of the principle prohibiting the threat or use of force in international relations, a corresponding dispute had arisen as to the meaning of the term 'force'. The Declaration on Friendly Relations, adopted by the General Assembly at its twenty-fifth session in 1970,⁸³ papers over the difference on this point by failing to give any definition of the expression 'force'; but it would appear from a close study of the records of the Special Committee that a restrictive interpretation is called for.⁸⁴ The drafting history of Article 52 of the Vienna Convention would likewise seem to support the conclusion that nullity attaches only to those treaties procured by the threat or use of physical or armed force; but, of course, any extended interpretation of the Charter provisions on this point might have as a consequence that an extended interpretation would be given to Article 52.

The second point discussed at the conference in relation to Article 52 concerns the application *ratione temporis* of the rule laid down. The attention of the Commission had been drawn to this point in several governmental comments. The Commission, in their commentary to what is now Article 52, stated that it would be illogical and unacceptable to formulate the rule as applicable only from the date of the conclusion of a convention on the law of treaties, since the invalidity of a treaty procured by the illegal threat or use of force was a principle which was *lex lata*. After referring to Article 2(4) of the Charter the Commission went on to say:

The present article by its formulation recognises by implication that the rule which it lays down is applicable at any rate to all treaties concluded since the entry into force of the Charter. On the other hand, the Commission did not think that it was part of its function, in codifying the modern law of treaties, to specify on what precise date in the past an existing general rule in another branch of international law came to be established as such. Accordingly, it did not feel that it should go beyond the temporal indication given by the reference in the article to 'the principles of the Charter of the United Nations'.⁸⁵

This was not good enough for the Conference. A group of fourteen countries, led by Czechoslovakia, tabled an amendment to the Commission's draft to refer to 'the principles of *international law embodied in* the Charter of the United Nations'.⁸⁶ It was explained that the purpose of this amendment was 'to specify the time element for the effect of the prohibition of resort to the threat or use of force', but the sponsors appeared to acknowledge the force of the Commission's observation that it would not be right, in codifying

the law of treaties, to specify a precise date.⁸⁷ Reference was made by other speakers to the significance of the Covenant of the League of Nations and the Pact of Paris in the establishment of the modern law prohibiting the threat or use of force. In the event, the fourteen-power amendment was adopted by a large majority.

It is difficult to assess the significance of this in the light of the economy of the Convention as a whole. Article 4 of the Convention, adopted at the second session, makes it clear that the Convention as such has no retroactive application; but this rule is expressed to be 'without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention'. Thus, it would no doubt be possible to invoke the rule stated in Article 52 with respect to a treaty concluded since the establishment of the modern law prohibiting the threat or use of force, but to invoke it only as a rule of customary international law. The wording of Article 52 in any event leaves wholly unresolved the question of the precise point in time at which the modern law crystallised.

Several additional points should be noted in connection with Article 52. First, it follows from the use of the phrase 'in violation of the principles of international law embodied in the Charter of the United Nations' that it is only the *unlawful* use of force which can bring about the nullity of a treaty.⁸⁸ It can accordingly be maintained that coercion of a State by the threat or use of force does not, strictly speaking, vitiate consent; it rather involves the commission of an international delict with all the sanctions attaching thereto. Secondly, it equally follows from the use of this phrase that the sanction of nullity will not apply to a treaty imposed by the United Nations, in the course of enforcement action, upon a State guilty of an act of aggression.⁸⁹ Article 75 indeed establishes that 'the provisions of the ... Convention are without prejudice to any obligation in relation to a treaty which may arise for an aggressor State in consequence of measures taken in conformity with the Charter of the United Nations with reference to that State's aggression'; and the Commission's commentary to what is now Article 75 makes it clear that 'a treaty provision imposed on an aggressor State would not ... infringe [Article 52]'.⁹⁰ Thirdly, the use of this phrase also serves to emphasise the point made in the Commission's commentary that the article should not be confined in its application to Members of the United Nations (as might have been the case had the phrase 'violation of the Charter' been chosen), but should be expressive of the universally applicable rule of general international law prohibiting the threat or use of force.⁹¹ Fourthly, as in the case of coercion of a representative of a State, the sanction for breach of Article 52 is particularly rigorous. The treaty is totally void without any possibility of separability (excluded by Article 44, paragraph 5). The victim State cannot acquiesce in the maintenance in force of the treaty. As the Commission's commentary to what is now Article 45 makes clear:

... the Commission did not think that the principle [of acquiescence] should be applicable at all in cases of coercion of a representative under Article [51] or coercion of the State itself under Article [52]. The effects and the implications of coercion in international relations are of such gravity that the Commission felt that a consent so obtained must be treated as absolutely void in order to ensure that the victim of the coercion should afterwards be in a position freely to determine its future relations with the State which coerced it.⁹²

The implication of the last sentence of this passage is that a State victim of coercion which might wish to benefit, in whole or in part, from the treaty must conclude a new treaty having the same content as the nullified treaty.⁹³

Finally, as has already been noted,⁹⁴ the International Court of Justice, in the *Icelandic Fisheries Jurisdiction* case (jurisdictional phrase), referred to Article 52 in concluding that 'under contemporary international law an agreement concluded under the threat or use of force is void'.⁹⁵

IV. Termination and suspension of operation of treaties

The termination of a treaty normally results from the application of its own provisions. Most treaties are concluded for a fixed term of years, or are expressed to terminate on the happening of a particular event, or are entered into for recurrent terms of years with a right to denounce the treaty at the end of each term. There is a very wide variety of termination, denunciation or duration clauses.⁹⁶ Where a treaty is expressed to remain in force for a fixed term of years or until a particular date or event, the clause is normally referred to as a duration or expiry clause rather than a termination or denunciation clause (which, *stricto sensu*, covers action by one or more of the contracting parties to bring a particular treaty to an end or to withdraw from it during the period when it remains in force).⁹⁷

There are differing ways of characterising the causes of termination of a treaty (termination being used as a generic term to cover also withdrawal from a treaty or denunciation of a treaty). Jimenez de Arechaga distinguishes *intrinsic* grounds of termination, that is to say, grounds contained in the treaty itself, and *extrinsic* grounds of termination, that is to say, those resulting from rules of general international law.⁹⁸ Capotorti prefers to divide the grounds of termination or suspension into three groups:

- (a) termination or suspension resulting from *ad hoc* clauses in the treaty;
- (b) termination or suspension resulting from a subsequent treaty; and
- (c) termination or suspension resulting from the application of rules of general international law.⁹⁹

It is proposed to follow Capotorti's classification, concentrating attention specially on the grounds of termination or suspension resulting from the application of rules of general international law, if only for the reason that

these were the grounds which were the object of more careful regulation in the Convention.¹⁰⁰

*1. Termination or suspension resulting from 'ad hoc' clauses
in the treaty*

Article 54 of the Convention states the self-evident rule that the termination of a treaty or the withdrawal of a party may take place in conformity with the provisions of the treaty. Similarly, Article 57 of the Convention provides that the operation of a treaty in regard to all the parties or to a particular party may be suspended in conformity with the provisions of the treaty. In their commentary to what is now Article 54, the Commission draw attention to the varied nature of termination clauses in a treaty:

Many treaties provide that they are to remain in force for a specified period of years or until a particular date or event; others provide for the termination of the treaty through the operation of a resolatory condition. Specific periods fixed by individual treaties may be of very different lengths, periods between one and twelve years being usual, but longer periods up to twenty, fifty and even ninety-nine years being sometimes found. More common in modern practice are treaties which fix a comparatively short initial period for their duration, such as five or ten years, but at the same time provide for their continuance in force after the expiry of the period subject to a right of denunciation or withdrawal. These provisions normally take the form either of an indefinite continuance in force of the treaty subject to a right of denunciation on six or twelve months' notice, or of a renewal of the treaty for successive periods of years subject to a right of denunciation or withdrawal on giving notice to that effect six months before the expiry of each period. Some treaties fix no period for their duration and simply provide for a right to denounce or withdraw from the treaty, either with or without a period of notice. Occasionally, a treaty which fixes a single specific period, such as five or ten years, for its duration, allows a right of denunciation or withdrawal even during the currency of the period.¹⁰¹

Thus, it can be seen that a treaty may provide for withdrawal or denunciation upon notice after the expiry of an initial period, for withdrawal or denunciation at any time, effective immediately, or for withdrawal or denunciation at any time, upon notice.¹⁰² In particular cases (and this depends essentially upon the nature of the treaty), a party wishing to exercise a right of withdrawal or denunciation may have to show special cause. Thus, the Partial Nuclear Test Ban Treaty, signed at Moscow on 5 August 1963,¹⁰³ and the Treaty on the Non-proliferation of Nuclear Weapons, opened for signature in London, Moscow and Washington on 1 July 1968, contain similar clauses covering the right of withdrawal for special cause. It is sufficient for the purposes of illustration to cite Article X(1) of the Non-proliferation Treaty, which reads as follows:

Each Party shall in exercising its national sovereignty have the right to withdraw from the treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of

such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.¹⁰⁴

A distinction must of course be made between those treaties which are expressed to remain in force for an initial period and to continue in force indefinitely or for successive periods thereafter unless denounced at any time or at the end of a particular successive period, and those treaties which expire at the end of a fixed period unless specifically renewed or extended. In the first type of case, it is the *denunciation* which is the true ground of termination and the treaty in reality is one of unlimited duration; in the second type of case, renewal or extension is subject to a later and express manifestation of the common will of the parties, and the treaty must be considered as having a limited duration, since its continuance in force is the result of a new treaty.¹⁰⁵

2. Termination or suspension resulting from a subsequent treaty

Article 54 of the Convention states in addition that the termination of a treaty or the withdrawal of a party may take place at any time by consent of all the parties after consultation with the other contracting States. Similarly, Article 57 of the Convention stipulates that the operation of a treaty in regard to all the parties or to a particular party may be suspended at any time by consent of all the parties after consultation with the other contracting States.

It should be noted that the expression used in both articles is 'consent of all the parties' rather than 'a new treaty'. This wording was chosen deliberately to emphasize that the particular *form* of an agreement between all the parties to put an end to a treaty is a matter for the parties themselves to decide in each case. The Commission rejected the theory sometimes advanced in the past that an agreement terminating a treaty must be cast in the same form as the treaty which is to be terminated or must at least constitute a treaty form of equal weight:

In [the Commission's] opinion, international law does not accept the theory of the *acte contraire*. The States concerned are always free to choose the form in which they arrive at their agreement to terminate the treaty. In doing so, they will doubtless take into account their own constitutional requirements, but international law requires no more than that they should consent to the treaty's termination.¹⁰⁶

Accordingly, it would appear that 'the consent of all the parties' in terms of Articles 54 and 57 may be manifested by any kind of agreement, whether in solemn or simplified form, and whether, in the case of an agreement in writing, resulting from a single document or two distinct documents.¹⁰⁷

The requirement in Articles 54 and 57 that there should be prior consultation with the other contracting States parallels the similar requirement in Article 40 that all the contracting States should be notified of any proposal to

amend a multilateral treaty as between all the parties. The *rationale* would seem to be that, in practice, it would be unjust for decisions to be taken about the amendment or termination of a treaty without taking any account of the views of those States which have expressed their consent to be bound by the treaty, even if the treaty has not entered into force for them.¹⁰⁸ The requirement in Articles 54 and 57 that there should be prior consultation with the other contracting States resulted from amendments tabled at the Conference by the Netherlands and Hungary respectively.¹⁰⁹

It is also worth recalling in this context the link between Articles 54 and 57, on the one hand, and Article 37, on the other hand. If an obligation has arisen for a third State from a provision of a treaty in accordance with the provisions of Article 35, the consent of the third State, as well as of the parties to the treaty, is in principle required for the revocation of that obligation. So also, if a right has arisen for a third State from a provision of a treaty in accordance with Article 36, the right may not be revoked or modified by the parties if it is established that the right was intended not to be revocable or subject to modification without the consent of the third State.¹¹⁰

The *express* termination or abrogation of a treaty by a subsequent treaty is, in practice, rare. A more usual case is where the subsequent treaty embodies new provisions regulating the same subject-matter as an earlier treaty or treaties and, in consequence, also incorporates a clause terminating the earlier inconsistent treaty or treaties. But one is then confronted in principle with a case of total or partial revision, and the provisions of Article 40 and 41 will also be relevant.¹¹¹

There can of course also be *tacit* termination or abrogation of a treaty resulting from the conclusion by all the parties to the treaty of a subsequent treaty relating to the same subject-matter. This is the case covered by Article 59 of the Convention which provides that the earlier treaty is considered as terminated if either of two conditions are met:

- (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
- (b) the provisions of the later treaty are so far incompatible with the earlier one that the two treaties are not capable of being applied at the same time.

There is clearly a link here with Article 30, which deals with the application of successive treaties relating to the same subject-matter.¹¹² But, as the Commission point out in their commentary to what is now Article 59, Article 30 deals only with the *priority* of inconsistent obligations both of which are to be considered as in force and in operation. Article 30 does not apply to cases where it is clear that the parties *intended* the earlier treaty to be abrogated or its operation to be wholly suspended by the conclusion of the later treaty; for then there are not two sets of incompatible treaty provisions in force, but only those of the later treaty. Thus Article 30 comes into play only after it

has first been determined under Article 59 that the parties did not intend to abrogate, or wholly to suspend the operation of, the earlier treaty.¹¹³

Finally, we have the case of the suspension of the operation of a multilateral treaty by agreement between certain of the parties only. This is governed by Article 58 of the Convention which subjects this process to similar conditions as are specified in Article 41 for the corresponding process of *inter se* modification of a multilateral treaty.¹¹⁴ But, if Article 58 parallels Article 41, there is nothing in Part V of the Convention about *inter se* agreements (that is to say, agreements between certain of the parties only) which purport to *terminate*, as between the parties to the later treaty, the provisions of an earlier multilateral treaty. The Commission appear to have taken the view that *inter se* agreements of this nature should be excluded. In their commentary to what is now Article 54, the Commission state that 'the termination, unlike the amendment, of a treaty necessarily deprives all the parties of all their rights and, in consequence, the consent of all of them is necessary'.¹¹⁵ But, as Capotorti points out, there may be reason to doubt the premise on which this conclusion is based. Certain of the parties to a multilateral treaty may decide, by common agreement, to terminate the treaty in their relations *inter se* while leaving intact the rights and obligations of the other parties under the treaty.¹¹⁶ There is of course a close relation between the processes of revision, amendment and *inter se* modification of a treaty, on the one hand, and the process of termination of a treaty, on the other hand. Provisions inserted in treaties designed to revise earlier treaties, which envisage that the new treaty replaces the earlier treaty in relations between the contracting parties, imply beyond question the termination (total or partial) of the earlier treaty in relations between parties to both treaties. It may be argued that this result is achieved by the operation of Article 30 paragraph 4; but, as we have already noted, Article 30, at least in the view of the Commission, deals only with the *priority* of inconsistent obligations and not with the case where there is an intention to terminate the earlier treaty. Accordingly, the absence in Part V of any mention of *termination* of a multilateral treaty by agreement between certain of the parties only may be considered another *lacuna* in the scheme drawn up by the Commission and endorsed by the Conference. It is clear in any event that *inter se* terminating agreements would have to fulfil the conditions specified in Articles 41 and 58.

3. Termination or suspension resulting from the application of rules of general international law

Leaving aside the effect of emergence of a new norm of *jus cogens* (which will be dealt with in Chapter VII below), Part V of the Convention incorporates four grounds of termination or suspension which are extrinsic to the treaty and do not depend on a subsequent treaty, but rather derive from rules of general international law. These four grounds are:

1. Denunciation of a treaty containing no provision for denunciation (Article 56);
2. Breach (Article 60);
3. Supervening impossibility of performance (Article 61); and
4. Fundamental change of circumstances (*rebus sic stantibus*) (Article 62).

It is now proposed to review briefly each of these grounds.

1. *Denunciation of a treaty containing no provision for denunciation.* Article 56 deals with the controversial issue of whether it is possible for a State to denounce or withdraw from a treaty which contains no provision regarding its termination. In theory, and having regard to the significance of the principle *pacta sunt servanda*, the answer should be in the negative; but doctrine and State practice have long recognised the existence of certain strictly limited exceptions to the general rule. The Commission submitted, in their final set of draft articles, a text which admitted the possibility of unilateral denunciation or withdrawal only where 'it is established that the parties intended to admit the possibility of denunciation or withdrawal'. They explained that 'under this rule, the character of the treaty is only one of the elements to be taken into account, and a right of denunciation or withdrawal will not be implied unless it appears from the general circumstances of the case that the parties intended to allow the possibility of unilateral denunciation or withdrawal'.¹¹⁷

The very limited nature of this exception was challenged at the Conference. Respectable authority was invoked for the proposition that a right of unilateral denunciation might be implied from the character or nature of the treaty alone. Thus Fitzmaurice, in his 'Second Report on the Law of Treaties', had drawn attention to the general conviction that 'there are certain sorts of treaties which, unless entered into for a fixed and stated period or expressed to be in perpetuity, are *in their nature* such that any of the parties to them have an implied right to bring them to an end or to withdraw from them'.¹¹⁸ As examples, Fitzmaurice cited treaties of alliance and commercial or trading agreements. In the same sense, Brierly had suggested that there were certain types of treaty which, from the nature of the subject matter or the circumstances in which they were concluded, might be presumed to be susceptible of denunciation even though they contain no express term to that effect. 'A *modus vivendi* is an obvious illustration; treaties of alliance and commerce are probably in the same case, though in practice such treaties ordinarily have a fixed period of duration.'¹¹⁹

Following this general line of thought, the delegations of Cuba and the United Kingdom submitted separate amendments at the first session of the Conference designed to establish that the character or nature of the treaty might alone be such as to justify an implication that unilateral denunciation was permissible. In the event, the United Kingdom amendment was adopted,

and the text of Article 56 of the Convention now embodies two exceptions to the general rule:

- (a) where it is established that the parties intended to admit the possibility of denunciation or withdrawal;
- (b) where a right of denunciation or withdrawal may be implied by the nature of the treaty.

Two additional points should be noted in connection with Article 56. In the first place, it is quite clear that this article lays down a ground for termination independently of the other grounds of termination, denunciation or withdrawal provided for in the other articles of the Convention and in particular in Articles 52 and 62.¹²⁰ In the second place, although the text of Article 65 makes no specific reference to denunciation as such, it is clear that any State wishing to invoke Article 56 must notify the other parties to the treaty of its claim. This is confirmed by a statement of the Chairman of the Drafting Committee at the second session of the Conference.¹²¹

There is no doubt that the addition to Article 56 of an exception permitting unilateral denunciation to be implied by the nature of the treaty alone imports into the text an element of imprecision. The concept that the nature of a treaty may render it susceptible to unilateral denunciation is not easy to apply. In recent years, there has been considerable controversy over the purported denunciation by the Government of Senegal, on 9 June 1971, of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone and the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (Senegal having acceded to these two Conventions on 25 April 1961). None of the four Geneva Conventions on the Law of the Sea adopted in 1958 contains a denunciation clause.¹²² The Senegalese action gave rise to a lengthy exchange of correspondence between the Government of Senegal and the United Nations Secretary-General (in his capacity as depositary), correspondence which was subsequently circulated to all States entitled to become parties to the conventions concerned,¹²³ in the course of which several governments (including the United Kingdom Government) put on record their view that the 1958 Geneva Conventions on the Law of the Sea are not susceptible to unilateral denunciation.¹²⁴

Capotorti rightly draws attention to the fact that as Article 56 now incorporates two distinct hypotheses for a right of unilateral denunciation of or withdrawal from a treaty — that is to say, one based on the intentions of the parties and the other based on the nature of the treaty — it is necessary to consider what *types* of treaty may be susceptible to unilateral denunciation or withdrawal. He finds it unsatisfactory that the only criterion which suggests itself is the intrinsically temporary character of the treaty.¹²⁵ As against this, other commentators have remarked that it has now become customary in State practice to insert specific provisions in treaties governing denunciation and

withdrawal so that the occasions on which recourse will be made to the exceptions in Article 56 are unlikely to be frequent.¹²⁶ There is the additional consideration that Article 56 itself requires that a party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty so that sufficient time is left for discussion and negotiation before the notice takes effect.¹²⁷

2. *Breach.* That a right of unilateral denunciation or termination of a treaty on the grounds of prior material breach by another party exists is attested to by jurists and confirmed by State practice.¹²⁸ The problems in this area concern the modalities of application of the principle.

Article 60 of the Convention lays down a series of residuary rules which may be summarised as follows:

- (a) a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part (paragraph 1);
- (b) a material breach of a multilateral treaty by one of the parties entitles the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either in relations between themselves and the defaulting State or generally (paragraph 2(a));
- (c) a material breach of a multilateral treaty by one of the parties entitles a party specially affected by the breach to invoke it as a ground for suspending the operation of a treaty as a whole or in part in relations between itself and the defaulting State (paragraph 2(b));
- (d) a material breach of a multilateral treaty by one of the parties entitles any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the performance of its obligations under the treaty (paragraph 2(c)).

This summary of the rules laid down in Article 60 provokes the following observations. The consequences of a material breach of a bilateral treaty are no doubt correctly expressed under (a) above; it is in any event satisfactory that the exercise of the right of termination or suspension is optional at the discretion of the injured party. On the other hand, it may not be entirely satisfactory that, in the case of a material breach of a bilateral treaty, the party seeking to invoke the breach as a ground for terminating the treaty must comply with the procedural safeguards set out in Articles 65 to 68. In effect, this means that the aggrieved party must continue compliance with a treaty which the other party is violating, while the protracted procedure of dispute settlement is in progress. Jimenez de Arechaga indeed suggests that the general

principle of law expressed in the maxim *inadimplenti non est adimplendum* entitles the aggrieved party in such circumstances to suspend provisionally its own performance of the treaty, notwithstanding the strict terms of the Convention; but he emphasises that any party which suspends its own performance of a treaty on the basis of this general principle of law does so at its own risk, since the act of unilateral suspension could itself constitute a breach giving rise to a claim for damages if the means of dispute settlement resorted to in the case lead to the conclusion that there had been no material breach by the other party.¹²⁹ Indeed, in the recent award of the arbitral tribunal in the case of the *US/France Air Services Agreement of 27 March 1946*, the tribunal upheld the right of the United States Government to deny certain rights under the agreement to French carriers pending resolution of a dispute as to whether change of gauge in third countries by a carrier of one party to the agreement was or was not permitted.¹³⁰

Furthermore, the rules concerning the consequences of a breach of a multi-lateral treaty are also somewhat less than satisfactory. In particular, the procedural safeguards in Articles 65 to 68 do not apply in the case where the parties to the treaty, other than the party alleged to be in breach, unanimously agree to suspend the operation of the treaty or to terminate it either in relations between themselves and the defaulting State or generally (rule (b) above). The justification for this appears to be that the requirement of unanimous agreement provides adequate guarantees against arbitrary action.¹³¹ It may be questionable, however, whether this is correct; circumstances can certainly be envisaged where the party alleged to be in breach may be in the right, and *not* the other parties acting collectively.

The rule under (d) above is designed to deal with breaches of special types of treaties, such as disarmament treaties, where a breach by one party tends to undermine the whole treaty regime in a very special manner. In the case of disarmament treaties, it is necessary for the innocent party to be able to protect itself against the threat resulting from the arming of the defaulting State, and accordingly to be permitted to claim release from obligations owed not only to the defaulting State but also to the other parties.¹³²

Paragraph 3 of Article 60 defines a material breach of a treaty for the purposes of the article as consisting in:

- (a) a repudiation of the treaty not sanctioned by the Convention; or
- (b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

In their commentary to what is now Article 60 the Commission explain why they prefer the term 'material' to 'fundamental' to express the kind of breach which is required:

The word 'fundamental' might be understood as meaning that only the violation of a provision directly touching the *central* purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an ancillary character.¹³³

This is an important and significant gloss upon the definition in paragraph 3.

Paragraph 5 of Article 60 provides, in effect, that material breach by one of the parties to a treaty does not operate as a ground for termination or suspension where the breach concerns provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular provisions prohibiting reprisals against persons protected by such treaties. This paragraph was added to the text at the second session of the Conference on a proposal by Switzerland. It constitutes a part-recognition of the principle advocated by Fitzmaurice according to which the rule of unilateral denunciation in the event of breach is inapplicable in the case of law-making treaties which embody absolute or unconditional obligations and not reciprocal obligations:

This is because all rules of this particular character are intended not so much for the benefit of the States, as directly for the benefit of the individuals concerned, as human beings and on humanitarian grounds. In the same way, a breach by one party of a convention on human rights, a convention providing for the safety of life at sea, labour conventions regarding hours and conditions of work, etc. would not justify corresponding breaches of the treaty by other parties even *vis-à-vis* the treaty-breaking State and its nationals, for reasons of a broadly similar character. Such conventions involve obligations of an absolute and, so to speak, self-existent kind, the duty to perform which, once assumed, is not (as for instance with commercial treaties or such conventions as disarmament conventions) dependent on a reciprocal or corresponding performance by other parties.¹³⁴

Finally, it should be noted that, in its advisory opinion in the *Namibia (South West Africa)* case, the majority opinion cited the definition of material breach set out in Article 60 of the Vienna Convention and noted that General Assembly Resolution 2145 (XXI) had determined that both forms of material breach (i.e. repudiation of the treaty and violation of a provision essential to the accomplishment of the object or purpose of the treaty) had occurred in this case.¹³⁵ As against this, Judge Fitzmaurice, in his dissenting opinion, points out that the justification for the revocation of the mandate which the Court finds in Article 60(3)(a) of the Vienna Convention is quite misplaced, since the South African attitude was in no sense equivalent to a disavowal of the mandate — 'to deny the existence of an obligation is *ex hypothesi* not the same as to repudiate it'.¹³⁶

3. *Supervening impossibility of performance.* Article 61, paragraph 1, of the Convention lays down the rule that a party may invoke the impossibility

of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

Paragraph 2 of the same article establishes an exception in the sense that impossibility of performance may not be invoked by a party if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

The basis for the rule laid down in Article 61 is the general principle of law expressed in the maxim *ad impossibilia nemo tenetur*. The Commission, in their commentary to what is now Article 61, admit that State practice furnishes few examples of the termination of a treaty on this ground, but give as an indication of the type of cases envisaged:

... the submergence of an island, the drying-up of a river or the destruction of a dam or hydro-electric installation indispensable for the execution of a treaty.¹³⁷

Another illustration often referred to in the literature is the case of a State which becomes landlocked as a result of the loss or cession of its maritime littoral. In such a case the State is clearly no longer in a position to give effect to any previous agreement it may have concluded conceding the use of one of its ports to another State.¹³⁸

Article 61 did not give rise to much discussion at the Conference. Paragraph 2 was added to the text on a proposal by the Netherlands delegation, based upon the principle that a party should not be permitted to take advantage of its own wrong.¹³⁹ Capotorti is critical of this addition to the text, pointing out that impossibility of performance, as an objective fact, paralyses the treaty in all cases, whatever the cause. Naturally, termination or suspension on this ground does not affect the responsibility of the State which has committed a breach of its obligations; but that is a matter of State responsibility which is excluded from the scope of the Convention by virtue of Article 73.¹⁴⁰

There are also those who take the view that the formulation of Article 61 is too narrow in referring to 'the permanent disappearance or destruction of an object indispensable for the execution of the treaty'. Capotorti, for example, argues that the concept of impossibility of performance does not necessarily imply that the fate of an object indispensable for the execution of the treaty should be in issue; many treaties envisage actions which have nothing to do with such objects but which can nonetheless become impossible of performance. Capotorti also points out that the exception in Article 63 (which provides that the severance of diplomatic or consular relations between parties to a treaty does not affect the legal relations established between them by the treaty *except in so far as the existence of diplomatic or consular relations is indispensable for the application of a treaty*) is a striking example of

temporary impossibility of performance unrelated to an object.¹⁴¹ The critics take the view that it might have been preferable to cover the contingencies of permanent and temporary impossibility of performance by reference to the concept of *force majeure*, while conceding that *force majeure* is in reality a defence exonerating a State from liability for non-performance of a treaty obligation.¹⁴² The Commission, in their commentary, do in fact acknowledge the link between continuing impossibility of performance and *force majeure*, but it was clearly their wish to recognise, *as part of the law of treaties*, that the operation of a treaty might be suspended temporarily in such circumstances.¹⁴³

It remains only to note that supervening impossibility of performance does not operate *automatically* to bring a treaty to an end or to suspend its operation temporarily, the Commission taking the view that disputes may arise as to whether a total disappearance or destruction of the subject-matter of a treaty has in fact occurred;¹⁴⁴ and that the termination or suspension of the operation of a treaty on this ground can relate only to certain clauses in the treaty if the conditions for separability set out in paragraph 3 of Article 44 are fulfilled.

4. *Fundamental change of circumstances (rebus sic stantibus)*. All international lawyers are aware of the pitfalls surrounding the application of the *clausula rebus sic stantibus* and the controversies which have raged as to its admissibility as a ground for the unilateral denunciation or termination of a treaty.¹⁴⁵ The concept that (whether by an implied term or otherwise) a treaty may become inapplicable by reason of a fundamental change in circumstances obviously presents serious dangers to the security of treaties. Nevertheless, the doctrine that a fundamental change of circumstances may operate to bring about the termination of a treaty is of ancient origin. Traces of the *rebus* principle can be found in early canon law, Thomas Aquinas in his *Summa Theologica* asserting that a party is exempted from the observance of an engagement if the initial conditions affecting the persons or the object of the engagement have changed.¹⁴⁶ Gentili appears to have been the first to apply this private law concept in the sphere of international relations, maintaining in his *De jure belli libri tres* that a treaty need not be performed when the condition of affairs is changed, if the change could not have been foreseen. Grotius, on the other hand, took a very restrictive attitude towards the *rebus* doctrine, as did Pufendorf and Bynkershoek, the latter asserting that invocation of the doctrine was but one of the cloaks of treachery. But Vattel was a convinced defender of the clause, maintaining unequivocally that if promises have been given by reference to and in consideration of the existence of particular circumstances, a change in the circumstances will release the promisor from his engagement, if the existing circumstances were essential to the promise which would not otherwise have been given.¹⁴⁷ Subsequent

publicists have all taken a position one way or the other on the clause, some doubting, but the majority accepting, the justification of the doctrine. However, diplomatic practice in the nineteenth century — and, particularly, the invocation by Russia of the *rebus* doctrine to justify her assertion in 1870 that the provisions of the 1856 Treaty regarding the neutralisation of the Black Sea were no longer binding upon her (this in turn leading to the London Conference of 1871) — began to demonstrate some of the dangers inherent in the notion of the clause; and indeed the *rebus* doctrine fell into serious disrepute during the inter-war period, largely as a result of its indiscriminate invocation by States in the period immediately preceding 1914 to escape from inconvenient treaty obligations.¹⁴⁸

The *rebus* doctrine has never been applied *eo nomine* by the International Court of Justice or its predecessor. In the *Free Zones* case, the Permanent Court of International Justice, having held that the facts did not in any event justify application of the principle, expressly reserved its position on the issue, declaring that it became unnecessary for the Court to consider ‘any of the questions 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 [and] the occasions on which and the method by which effect can be given to the theory if recognised’.¹⁴⁹ It has nonetheless been suggested that the Court’s reasoning in the *Free Zones* case is supportive of the doctrine, since it would have been easier for the Court to deny the existence of the principle than to enter into an investigation of the extent to which circumstances had changed;¹⁵⁰ but this suggestion must be regarded as speculative, given the terms of the Court’s specific disavowal of any intent to rule on the question of principle.

Against this background, the Commission approached the formulation of a text on *rebus sic stantibus* with considerable caution. After extensive debate, they decided to formulate it in negative terms, declaring that a fundamental change of circumstances which had occurred with regard to those existing at the time of the conclusion of a treaty might not be invoked as a ground for terminating or withdrawing from the treaty unless two conditions were met:

- (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; *and*
- (b) the effect of the change was radically to transform the scope of obligations still to be performed under the treaty.

To this the Commission proposed two exceptions:

- (a) a fundamental change of circumstances could not be invoked as a ground for terminating or withdrawing from a treaty establishing a boundary.
- (b) a fundamental change of circumstances could not be invoked if it was the result of a breach by the invoking party either of the treaty or of a different international obligation owed to the other parties to the treaty.

In explaining their proposals, the Commission emphasised that they did not accept the implied term theory, according to which a tacit condition must be read into every treaty of unlimited duration that would dissolve it in the event of a fundamental change of circumstances:

The Commission noted, however, that the tendency to-day was to regard the implied term as only a fiction by which it was attempted to reconcile the principle of the dissolution of treaties in consequence of a fundamental change of circumstances with the rule *pacta sunt servanda*. In most cases the parties gave no thought to the possibility of a change in circumstances and, if they had done so, would probably have provided for it in a different manner. Furthermore, the Commission considered the fiction to be an undesirable one since it increased the risk of subjective interpretation and abuse. For this reason, the Commission was agreed that the theory of an implied term must be rejected and the doctrine formulated as an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty.¹⁵¹

The Commission likewise rejected the notion which had been advanced by some jurists in the past, that the doctrine applied only to 'perpetual' treaties — that is to say, treaties of unlimited duration. They concluded that State practice did not support the view that the principle was confined to 'perpetual' treaties; and they saw no reason to draw a distinction between 'perpetual' and 'long-term' treaties if the doctrine were regarded as an objective rule of law founded upon the equity and justice of the matter.¹⁵²

There was a lengthy debate at the Conference on the Commission's proposal, which emerged at the end relatively unscathed. Taking up a suggestion which had been made by Lissitzyn,¹⁵² the Canadian delegation proposed that, in circumstances where a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty, it may also invoke that change as a ground for suspending the operation of the treaty: this proposal was adopted by the Conference, and is now reflected in paragraph 3 of Article 62.¹⁵³

Some interesting points were made in the course of the debate. In the first place, it was suggested, and not denied, that a State would not be entitled to invoke its own acts or omissions as amounting to a fundamental change of circumstances giving rise to the operation of Article 62.¹⁵⁴ Attention was also directed to the view expressed by some members of the Commission, and recorded in the commentary to the Commission's proposal, that 'a subjective change in the attitude or policy of a Government could never be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty'.¹⁵⁵ As regards the asserted exception to this principle in the case of a treaty of alliance, where it was said that a radical change of political alignment by the government of a country might make it unacceptable, *from the point of view of both parties*, to continue the treaty, some delegations expressed the view that this was not a case for the operation of the principle *rebus sic*

stantibus but rather for the application of the concept that a right of unilateral denunciation might be implied from the character of the treaty.¹⁵⁶ Other delegations were of opinion that a change in government policy should in no event be invoked as a ground for unilaterally terminating a treaty.¹⁵⁷

Concern was expressed by several delegations (notably the delegations of Afghanistan and Syria) about the Commission's proposals to preclude invocation of fundamental change of circumstances in the case of a treaty establishing a boundary, but a proposal to delete what is now paragraph 2(a) of Article 62 was not pressed to a vote.

Since the Convention was adopted in 1969, the International Court of Justice has had occasion to consider the applicability of the principle that a treaty may be dissolved by reason of a fundamental change of circumstances. In the *Icelandic Fisheries Jurisdiction* case (jurisdictional phase), the Court was confronted with an argument advanced on behalf of Iceland that an Exchange of Notes of 11 March 1961 (on which the United Kingdom relied as establishing the jurisdiction of the Court) 'was not of a permanent nature' and that 'an undertaking for judicial settlement cannot be considered to be of a permanent nature'. From these and other assertions, the Court concluded that Iceland (which did not appear in the proceedings) was *inter alia* invoking a fundamental change of circumstances as a ground for regarding the 1961 Exchange of Notes as having terminated. On the general principle, the Court pronounced itself in reasonably positive terms:

International law admits that a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.¹⁵⁸

Seeking to apply the tests suggested by Article 62, the Court concluded that 'the apprehended dangers for the vital interests of Iceland, resulting from changes in fishing techniques, cannot constitute a fundamental change with respect to the lapse or subsistence of the compromissory clause establishing the Court's jurisdiction'.¹⁵⁹ Moreover, the Court could find no fundamental change of circumstances which (in terms of Article 62) radically increased the burden of obligations to be performed by Iceland; the dispute was 'exactly of the character anticipated in the compromissory clause'.

The Court also referred, with seeming approval, to what it referred to as 'the procedural complement to the doctrine of changed circumstances', that is to say, the requirement that a State invoking a fundamental change of circumstances should be prepared to allow a third party to determine whether the conditions for the operation of the doctrine are present. The Court in fact

found that the provisions of the 1961 Exchange of Notes already provided this 'procedural complement'.¹⁶⁰

V. Conclusions

The foregoing survey of the various grounds for the invalidity, termination and suspension of the operation of treaties now incorporated in the Convention prompts a few critical observations. One can understand the anxiety of the Commission to include in Part V a comprehensive catalogue of all possible grounds of invalidity, termination and suspension. One can equally appreciate the concern of governments and commentators that the vagueness of the language employed in formulating this series of articles presents a potential danger to the stability of treaty relations. This is certainly true of the provisions relating to error, fraud and corruption, and may equally be true of the provisions concerning coercion of a State by the threat or use of force and *rebus sic stantibus* (notwithstanding their subsequent endorsement in principle by the International Court of Justice in the *Icelandic Fisheries Jurisdiction* case). O'Connell has expressed the view that the Convention rules on coercion 'constitute a blank cheque to States seeking escape from inconvenient treaty commitments entered into in moments of political subordination to other Powers'.¹⁶¹ Lissitzyn is highly critical of the ambiguities residing in such expressions as 'fundamental change', 'not foreseen by the parties' and 'radically to transform the extent of obligations' as used in Article 62 concerning the doctrine *rebus sic stantibus*.¹⁶² Capotorti, as we have seen, finds fault with the formulation of many of the detailed grounds of termination and suspension, and indeed doubts that the Convention is exhaustive of all such grounds. Deleau regards the series of articles on error, fraud, corruption and coercion exercised against the representative of a State as being open to serious question:

En effet, ces dispositions constituent une transposition assez discutable de la théorie des vices du consentement du droit interne des contrats dans le domaine des traités internationaux, et surtout formulent des hypothèses incertaines, subjectives and indéfiniment extensibles.¹⁶³

Serious attempts were made at the Conference to remove some of the ambiguities and uncertainties inherent in this series of articles; but most of the proposals designed to circumscribe the application of the various grounds of invalidity and termination of treaties met with strong resistance and were defeated on a vote. The majority in the Conference were reluctant to countenance any material departure from the texts proposed by the Commission, particularly if it could be represented that the change would have the effect of keeping in being so-called 'unequal' treaties.

Against this background, and because all serious endeavours to effect

improvements in the substantive content of articles in Part V were largely unavailing, those delegations primarily concerned to uphold the sanctity of the principle *pacta sunt servanda* concentrated their effects at the Conference on seeking to establish a built-in system of automatically available procedures for the settlement of disputes arising out of the interpretation or application of Part V of the Convention. The establishment of such a system was rendered all the more necessary by the decision of the Conference to accord recognition to the much-disputed concept that conflict with a peremptory norm of general international law from which no derogation is permitted (i.e. a norm of *jus cogens*) will render a treaty null and void. These two issues will be considered in the next chapter.

Notes

- 1 Chapter IV *supra*, pp. 93–8.
- 2 Chapter IV *supra*, pp. 106–9.
- 3 Chapter IV *supra*, pp. 85–7.
- 4 Reuter, *op. cit.*, at 155.
- 5 Art. 69(4) of the Convention recognises the distinction by making special reference to the consequences which flow from the ‘invalidity’ of a particular State’s consent to be bound by a multilateral treaty.
- 6 Jimenez de Arechaga, ‘International Law in the Past Third of a Century’, 159 *Recueil des Cours* (1978), 68.
- 7 Ago, ‘Droit des traités à la lumière de la Convention de Vienne’, 134 *Recueil des Cours* (1971), 319 fn. 32.
- 8 *Op. cit.*, at 206–36.
- 9 See Fitzmaurice, *Third Report on the Law of Treaties*, A/CN.4/115 of 18 March 1958, and Waldock, *Second Report on the Law of Treaties*, A/CN.4/156 of 20 March 1963.
- 10 Nahlik, ‘The grounds of invalidity and termination of treaties’, 65 *A.J.I.L.* (1971), at 738–9.
- 11 *Yearbook of the International Law Commission* (1966–II), 236.
- 12 *Ibid.*, at 237.
- 13 *Official Records, First Session*, 40th meeting (Blix).
- 14 Capotorti, ‘L’extinction et la suspension des traités’, 134 *Recueil des Cours* (1971), 519.
- 15 *Loc. cit.*, at 517. Capotorti cites the arbitral award of 21 October 1861, by the Senate of Hamburg in the *Yuille-Shortridge* case (between the United Kingdom and Portugal) as an example of the recognition of desuetude as an independent cause of termination of a treaty. The case is reported in 2 Lapradelle-Politis, *Recueil d’arbitrages internationaux* (1954), 105.
- 16 *Op. cit.*, at 190 (footnote to para. 220).
- 17 *Yearbook of the International Law Commission* (1966–II), 237.
- 18 *Ibid.*, at 256.
- 19 Capotorti, *loc. cit.*, at 535.
- 20 Capotorti, *loc. cit.*, at 525–7.
- 21 Capotorti, *loc. cit.*, at 535–6.
- 22 Reuter, *op. cit.*, at 159.
- 23 *I.C.J. Rep.* (1957), at 55–9.

- 24 *I.C.J. Rep.* (1959), 6.
- 25 *Yearbook of the International Law Commission* (1966–II), 238.
- 26 Jacobs, 'Innovation and Continuity in the Law of Treaties', 33 *M.L.R.* (1970), 516.
- 27 *Yearbook of the International Law Commission* (1966–II), 238.
- 28 At the Conference, the United Kingdom delegation proposed the deletion of the phrase 'or in Article 60', arguing that the right to suspend or terminate part only of a treaty in the case of breach should also be subject to the conditions specified in paragraph 3 of Article 44. In replying to the debate, the Special Rapporteur (Sir Humphrey Waldock) said that to submit the case of breach to the conditions set out in paragraph 3 of Article 44 'would have the awkward result that, when a State committed a breach of one article, the other party might be precluded from suspending the operation even of that article, because it did not fall within the provisions of paragraph 3'. In his (Waldock's) view, it was important not to make the position of the victim of breach too difficult. *Official Records, First Session*, 41st meeting (Gordon-Smith) and 42nd meeting (Waldock). In the event, the United Kingdom proposal on this point was not accepted.
- 29 *Yearbook of the International Law Commission* (1966–II), 238.
- 30 Capotorti, *loc. cit.*, at 462.
- 31 *Official Records, First Session*, 41st meeting (Kearney).
- 32 Capotorti, *loc. cit.*, at 463.
- 33 *Yearbook of the International Law Commission* (1966–II), 239.
- 34 Capotorti, *loc. cit.*, 464; in the same sense, Reuter, *op. cit.*, 162.
- 35 *I.C.J. Rep.* (1960), at 213–14.
- 36 *I.C.J. Rep.* (1962), at 23–32. Note also the discussion of the principle in the Argentina — Chile Palena arbitration: Award of Her Majesty Queen Elizabeth II (1966), at 66: 38 *I.L.R.*, 10.
- 37 Bowett, 'Estoppel before International Tribunals and its relation to Acquiescence', 33 *B.Y.I.L.* (1957), at 176–202.
- 38 *Yearbook of the International Law Commission* (1966–II), 239.
- 39 Jimenez de Arechaga, *loc. cit.*, at 60.
- 40 Hostert, 'Droit international et droit interne', *Annuaire français de droit international* (1969), at 100–9. Wildhaber utilises slightly different terminology, distinguishing between 'theories of international relevance' (the constitutionalist school) and 'theories of international irrelevance' (the internationalist school): *Treaty-Making Power and Constitution*, 147–52 (1971).
- 41 For a full survey of the conflicting theories, see Wildhaber, *op. cit.*, at 147–52 and 172–81, and Holloway, *Modern Trends in Treaty Law*, 123–33 (1967).
- 42 2 Moore, *International Arbitrations*, at 1945–68; but the award, although providing authority for the principle that disregard of constitutional provisions may entail the invalidity of a treaty, in fact relied on Nicaragua's subsequent conduct as providing sufficient evidence of her acquiescence in the maintenance in force of the treaty.
- 43 2 *R.I.A.A.*, 615.
- 44 11 *R.I.A.A.*, at 411–420.
- 45 (1932) *P.C.I.J.*, ser. A/B, No. 46, at 169–70.
- 46 (1933) *P.C.I.J.*, ser. A/B, No. 53, at 71.
- 47 *Op. cit.*, at 172 *et seq.*
- 48 A/CN.4/115, Art. 10.
- 49 A/CN.4/156, Art. 5.
- 50 Reuter, *op. cit.*, at 167.
- 51 *Yearbook of the International Law Commission* (1966–II), 243.

52 Nahlik, *loc. cit.*, at 741.

53 (1933) *P.C.I.J.*, ser. A/B, No. 53, at 71 and 91.

54 *I.C.J. Rep.* (1962), at 26.

55 In the *Temple* case, the International Court of Justice said of an error in a map:

It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, *or could have avoided it*, or if the circumstances were such as to put that party on notice of a possible error: *I.C.J. Rep.* (1962), at 26. (emphasis supplied)

The Commission deliberately omitted the underlined phrase from their formulation of paragraph 2 of what is now Article 48, explaining in their commentary that the formulation of the exception in the *Temple* case (and particularly the underlined phrase) was so wide as to leave little room for the operation of the rule. An attempt by the United States delegation at the Conference to restore the omitted phrase (with the addition of 'by the exercise of reasonable diligence') was defeated by a vote of 45 to 25 with 20 abstentions, after the Special Rapporteur (Sir Humphrey Waldock) had explained the Commission's view that legitimate examples of that type of case were sufficiently covered by the other two phrases: *Official Records, First Session*, 44th meeting (Kearney) and 45th meeting (Waldock).

56 See explanation given by Sir Humphrey Waldock: *Official Records, First Session*, 45th meeting.

57 This was an example given by the United States delegation: *Official Records, First Session*, 44th meeting (Kearney). But it should be noted that an error relating only to the wording of the text of a treaty does not affect its validity and falls under the provisions of Art. 79 relating to the correction of errors in the texts of treaties.

58 Explanation given by Sir Humphrey Waldock in response to a question posed by the representative of Sri Lanka (Pinto) at the 44th meeting of the Committee of the Whole: *Official Records, First Session*, 45th meeting.

59 *Yearbook of the International Law Commission* (1966–II), 244.

60 *Op. cit.*, at 211.

61 1 *Traité de Droit International Public*, 92 (1953).

62 1 *Principes Généraux de Droit International Public*, 351.

63 *Yearbook of the International Law Commission* (1966–II), 244.

64 *Ibid.*, at 245.

65 Reuter, *op. cit.*, at 169–70.

66 *Official Records, First Session*, 45th meeting (Vargas).

67 *Ibid.*, 47th meeting (Kebreth).

68 A/Conf.39/C.1/L.276. See Kearney and Dalton, 'The treaty on treaties', 64 *A.J.I.L.* (1970), 528.

69 *Yearbook of the International Law Commission* (1966–II), 245.

70 *Ibid.*

71 Elias, 'Problems concerning the Validity of Treaties', 134 *Recueil des Cours* (1971), at 377–8.

72 Reuter, *op. cit.*, at 171.

73 McNair, *op. cit.*, at 207; O'Connell, *op. cit.*, at 239.

74 Harvard Research, Art. 32(a): 29 *A.J.I.L.* (1935), Supplement, at 1148–59.

75 *Official Records, First Session*, 47th meeting (Briggs).

76 *Yearbook of the International Law Commission* (1966–II), 246.

77 *Official Records, Second Session*, 18th plenary meeting (Nettel).

78 McNair, *op. cit.*, at 208; Fauchille, 1 *Traité de Droit International Public*, Part 3, 298 (1926); de Louter, 1 *Le Droit International Public Positif*, 478 (1920);; Hall, *International Law*, 381 (1924); de Visscher, *Théories et Réalités en Droit International Public*, 313–14 (1960).

- 79 *Yearbook of the International Law Commission* (1966–II), 246.
- 80 *Official Records, First Session*, 48th meeting (Bishota).
- 81 *Ibid.*, 49th meeting (El Dessoui).
- 82 *Ibid.*, 49th meeting (Haddad).
- 83 GA Res. 2625 (XXV) of 24 October 1970; Brownlie, *Basic Documents in International Law*, 32 (2nd ed., 1972).
- 84 Rosenstock, 'The Declaration of Principles of International Law concerning Friendly Relations: a Survey', 65 *A.J.I.L.* (1971) at 724–5; Sinclair, 'Principles of International Law concerning Friendly Relations and Co-operation among States', *Essays in honour of Krishna Rao*, 115–16 (1975); and McWhinney, 'The New Countries and the New International Law: the United Nations Special Conference on Friendly Relations and Co-operation among States', 60 *A.J.I.L.* (1966), at 9–10.
- 85 *Yearbook of the International Law Commission* (1966–II), 247.
- 86 A/Conf.39/C.1/L.289.
- 87 *Official Records, First Session*, 48th meeting (Smejkal).
- 88 Reuter, *op. cit.*, at 172.
- 89 Jimenez de Arechaga, *loc. cit.*, at 61.
- 90 *Yearbook of the International Law Commission* (1966–II), 268.
- 91 *Ibid.*; cf. Jacobs, *loc. cit.*, at 514–15.
- 92 *Yearbook of the International Law Commission* (1966–II), 239.
- 93 Reuter, *op. cit.*, at 175–6. Reuter then poses the question whether, if Art. 52 is expressive of a norm of *jus cogens*, it would in fact be possible to negotiate a new treaty having the same content as the original treaty, even if the duress had been removed; but he concludes that the removal of the duress would validate the new treaty.
- 94 Chapter I *supra*, p. 17.
- 95 *I.C.J. Rep.* (1973) at 14; cf. Briggs, 'Unilateral Denunciation of Treaties: the Vienna Convention and the International Court of Justice', 68 *A.J.I.L.* (1974), at 62–3.
- 96 Examples are given in *The Treaty-Maker's Handbook*, at 96–116.
- 97 Satow, *op. cit.*, at 293.
- 98 Jimenez de Arechaga, *loc. cit.*, at 70.
- 99 Capotorti, *loc. cit.*, at 471–2.
- 100 Jimenez de Arechaga, *loc. cit.*, at 70.
- 101 *Yearbook of the International Law Commission* (1966–II), 249.
- 102 For examples of each of these three types of clause, see Satow, *op. cit.*, at 294–5.
- 103 UKTS No. 3 (1964): Cmnd. 2245.
- 104 UKTS No. 88 (1970): Cmnd. 4474.
- 105 Capotorti, *loc. cit.*, at 474.
- 106 *Yearbook of the International Law Commission* (1966–II), 249.
- 107 Capotorti, *loc. cit.*, at 493.
- 108 *Ibid.* For definition of 'contracting State' and 'party' see Art. 1(f) and (g).
- 109 See *Official Records, First Session*, 58th meeting (Geesteranus) and 81st meeting (Yasseen); and *Second Session*, 21st plenary meeting (Talos).
- 110 See Chapter IV *supra*, p. 103.
- 111 See Chapter IV *supra*, pp. 106–9; cf. Capotorti, *loc. cit.*, at 491–2.
- 112 See Chapter IV *supra*, pp. 93–8.
- 113 *Yearbook of the International Law Commission* (1966–II), 253.
- 114 See Chapter IV *supra*, p. 109.
- 115 *Yearbook of the International Law Commission* (1966–II), 249.

- 116 Capotorti, *loc. cit.*, at 511–12.
- 117 *Yearbook of the International Law Commission* (1966–II), 251.
- 118 A/CN.4/107 of 15 March 1957, at 72. As regards the possibility of unilateral denunciation of commercial treaties, see McNair, *op. cit.*, at 504–5.
- 119 Briery, *The Law of Nations*, 331 (6th ed., 1963); cf. Dettner, *Essays on the Law of Treaties*, 87–8 (1967).
- 120 *Official Records, First Session*, 59th meeting (Small and Waldo).
- 121 *Official Records, Second Session*, 25th plenary meeting (Yasseen).
- 122 For a brief account of the reasons for this omission of a denunciation clause in the 1958 Convention on the Law of the Sea, see *Yearbook of the International Law Commission* (1966–II), 251.
- 123 *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions: List of Signatures etc. as at 31 December, 1974*, 436 n. 3.
- 124 *Ibid.* For a full account of this incident, see Bardonnnet, ‘La dénonciation par le gouvernement sénégalais de la Convention sur la Mer Territoriale et la Zone Contigüe et de la Convention sur la Pêche et la Conservation des Ressources biologiques de la Haute Mer’, in *Annuaire français de droit international* (1972), at 123–80; cf. Satow, *op. cit.*, at 296–7.
- 125 Capotorti, *loc. cit.*, at 539.
- 126 de la Guardia and Delpech, *El derecho de los tratados y la Convención de Viena de 1969*, 447 (1970).
- 127 *Official Records, First Session*, 59th meeting (Vallat).
- 128 For an extensive survey of doctrinal opinion on this point, see Bhek Pati Sinha, *Unilateral Denunciation of Treaty because of Prior Violations of Obligations by other Party*, 5–34 (1966). The principle that a treaty may be terminated on the ground of material breach rests on the ancient maxim *inadimplenti non est adimplendum* and has its roots in the notion of contractual balance, that is to say, the necessity of maintaining the relationship between the action required of one party and the action required of another party under the treaty. See Capotorti, *loc. cit.*, at 548–9 and Simma, ‘Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law’, *Oesterreichische Zeitschrift für öffentliches Recht* (1970), at 5 *et seq.*
- 129 Jimenez de Arechaga, *loc. cit.*, at 81.
- 130 54 *I.L.R.*, at 331.
- 131 *Official Records, Second Session*, 21st plenary meeting (Rosenne); see also Jimenez de Arechaga, *loc. cit.*, at 82, who points out that, to a very large extent, this was the situation confronting the International Court in its advisory opinion in the *Namibia (South West Africa)* case in 1971 in connexion with the revocation of the Mandate for that territory.
- 132 *Yearbook of the International Law Commission* (1966–II), 255.
- 133 *Ibid.*
- 134 Fitzmaurice, ‘*Ex injuria non oritur jus*’, 92 *Recueil des Cours* (1957), at 125–6. By the same token, it must be assumed *a fortiori* that violation by a party of a norm of *jus cogens* contained in a treaty would not authorise another party not to respect the norm, although this essential consequence of the nature of norms of *jus cogens* was not specifically raised at the Conference: Reuter, *op. cit.*, at 188.
- 135 *I.C.J. Rep.* (1971), at 47.
- 136 *Loc. cit.*, at 300.
- 137 *Yearbook of the International Law Commission* (1966–II), 256.
- 138 Capotorti, *loc. cit.*, at 527–8.
- 139 *Official Records, First Session*, 62nd meeting (Geesteranus).

- 140 Capotorti, *loc. cit.*, at 532.
- 141 *Ibid.*, at 530.
- 142 Capotorti, *loc. cit.*, at 531; cf. Reuter, *op. cit.*, at 178–9, who does however accept that *force majeure* is a broader concept.
- 143 *Yearbook of the International Law Commission* (1966–II), 256.
- 144 This aspect of the rule has been criticised on the ground that absolute impossibility of performance should operate automatically to terminate a treaty. See Haraszti, *Some Fundamental Problems of the Law of Treaties*, 425 (1973); in the same sense, Capotorti, *loc. cit.*, at 531–2.
- 145 There is a voluminous literature on the topic. Among the more significant contributions are Hill, *The Doctrine of Rebus Sic Stantibus in International Law* (1934), *passim*; Lissitzyn, ‘Treaties and changed circumstances (*rebus sic stantibus*)’, 61 *A.J.I.L.* (1967), at 895–922; Harvard Research, at 1096–1126; McNair, *op. cit.*, at 681–91; Detter, *op. cit.*, at 95–9; Haraszti, ‘Treaties and the fundamental change of circumstances’, 146 *Recueil des Cours* (1975), at 7–91.
- 146 Haraszti, *loc. cit.*, at 10. Haraszti traces the historical foundation of the doctrine at some length. The brief summary in the text is based largely on his researches.
- 147 Vattel, 2 *Le droit des gens*, Chap. XVII, para. 296.
- 148 Garner, ‘The doctrine of *rebus sic stantibus* and the termination of treaties’, 21 *A.J.I.L.* (1927), 409.
- 149 (1932) *P.C.I.J.*, ser. A/B, No. 46, at 156–8.
- 150 Haraszti, *loc. cit.*, at 40–1.
- 151 *Yearbook of the International Law Commission* (1966–II), 258.
- 152 *Loc. cit.*, at 916.
- 153 This addition to the text is criticised by Capotorti who argues that, from the practical point of view, the possibility that a State might invoke the *rebus* principle as a ground for suspension rather than termination could lead States to give a less rigorous interpretation to the concept of change of circumstances and could produce a dangerous state of uncertainty in international legal relations: *loc. cit.*, at 545.
- 154 *Official Records, First Session*, 63rd meeting (Vallat).
- 155 *Yearbook of the International Law Commission* (1966–II), 259.
- 156 *Official Records, First Session*, 63rd meeting (Vallat).
- 157 *Ibid.*, 64th meeting (Harry).
- 158 *I.C.J. Rep.* (1973), at 20–1.
- 159 *Ibid.*
- 160 *Ibid.*, at 21–2.
- 161 O’Connell, *op. cit.*, at 240.
- 162 *Loc. cit.*, at 914.
- 163 Deleau, ‘Les positions françaises à la conférence de Vienne sur le droit des traités’, 15 *Annuaire français de droit international* (1969), 13.

CHAPTER SEVEN

Jus cogens and the settlement of disputes

I. *Jus cogens*

The concept that a treaty concluded in violation of a norm of *jus cogens* is null and void is highly controversial. Any analysis of the concept requires an investigation into the relevance in international law of private law analogies and into the extent to which, if at all, there exists an objective notion of international public policy consisting of legal rules from which States are not permitted to derogate by way of international agreement.

But first, it may be asked, what is *jus cogens*? Suy defines it as 'the body of those general rules of law whose non-observance may affect the very essence of the legal system to which they belong to such an extent that the subject of law may not, under pain of absolute nullity, depart from them in virtue of particular agreements'.¹ From this definition it will be noted that the concept of *jus cogens* is wholly general in nature and applicable to any system of law. It is not a concept which has been specially developed within the framework of public international law; on the contrary, it derives from, and is deeply embedded in, particular systems of private law.

The origin of the notion of *jus cogens* has been traced to Roman law. The maxim *jus publicum privatorum pactis mutari non potest* is to be found in the *Digest*.² The *jus publicum* was to be understood in a wide sense as embracing not only public law in the strict sense (that is to say, the law governing relations between individuals and the State) but also rules from which individuals were not permitted to depart by virtue of particular agreements.

The pervading influence of this general notion can be recognised by the development of such concepts as *ordre public* and *öffentliche Ordnung* in French and German law respectively, and by the gradual establishment in common law jurisdictions of the principle that certain types of contract are, by their very nature, injurious to society and therefore contrary to public policy. The genesis of this principle in English law can be traced back to Elizabethan times, although it was only in the eighteenth century that its foundations were effectively laid in a series of decisions proclaiming, in somewhat vague and indeterminate language, the nullity of contracts injurious to the public good or *contra bonos mores*.³

It will, then, be seen that every developed national system of law has devised its own concept of public policy. In civil law jurisdictions the notion of *ordre public* is essentially variable and relative, evolving in accordance with the political, social and economic circumstances of the time.⁴ In English law it is less variable; certain defined heads of public policy have been established by the courts, and although these heads can be moulded to fit the new conditions of a changing world, it is rarely possible for the courts to establish new heads of public policy.⁵

Thus there has gradually evolved over the years, in practically all systems of municipal law, the principle that the will of the parties to conclude contracts is not unfettered but is subject to certain restraints essential to the continued existence of an ordered society. What the nature of these restraints is will vary according to the political, economic or social climate in the country concerned. Certain restraints may be imposed by statute, others may have been developed by the jurisprudence of the courts. So far as restraints imposed by statute are concerned, political and economic factors may lead to the imposition of new controls on the freedom of individuals to contract; thus, in England, the Resale Prices Act, 1964, rendered void (subject to an exemption procedure) any term or condition of a contract for the sale of goods by a supplier to a dealer in so far as it provided for the establishment of minimum prices for the resale of the goods.

Notwithstanding the close connection between *jus cogens* and public policy, the two concepts do not entirely coincide,⁶ at least if public policy is conceived of in the narrower sense as being confined to the circumstances in which municipal courts will refuse to enforce a contract. *Jus cogens* is the sum of absolute, ordering, prohibiting municipal law prescriptions, in contrast to the *jus dispositivum*, that is to say, legal prescriptions which can, and do, yield to the will of the parties.

But of what relevance is this indeterminate concept to the development of international law? Does international law know — has it ever known — any corresponding notion of a superior order of legal prescriptions from which States are not free to derogate by treaty? The use of the phrase ‘superior order’ must ring a bell. Do we not begin to discern the outlines of the familiar doctrinal dispute between the naturalist and positivist schools? It will be recalled that long before Grotius it was generally accepted that, above the positive law grounded in custom and the practice of States, there was in existence another law rooted in human reason and deriving its force from theological and philosophical doctrine — the Law of Nature.⁷ Grotius distinguished between the *jus gentium* (the customary law of nations, which he styled ‘voluntary law’) and the *jus naturae* (the natural law of nations), assigning a proper place to each. To the naturalists, the Law of Nature was hierarchically superior to the voluntary law — no State was at liberty to disregard the Law of Nature; the more extreme proponents of the naturalist school, such as

Pufendorf, even denied the existence of any voluntary or positive law of nations outside the Law of Nature.

As a reaction against the theoretical and, at times, dogmatic approach of the naturalists, there began to develop, in the eighteenth century, a school of jurists, led by Bynkershoek, Moser and Martens, who laid increasing stress on the part played by custom and treaties in the development of positive international law. They did not wholly deny the role of natural law in filling gaps, but their emphasis on the constituent elements of positive international law gave them the title 'positivists'.

The predominance of the positivist school of jurists in the late nineteenth and early twentieth centuries led to a certain reaction in the inter-war years. The great contribution of the positivist school was to concentrate attention on State practice as a determining factor in the development of international law; but the more extreme adherents of the positivist school carried matters to excess when they equated positivism with exaggerated notions of State sovereignty by insisting that the will of States constituted the only valid source of international law.

Current discussion of the concept of *jus cogens* re-echoes some of the great debates of the past between naturalists and positivists, though with a more modern flavour. There has been a vast outpouring of studies on the concept of *jus cogens* in international law, stimulated in large measure by the activities of the International Law Commission on the law of treaties.⁸ The current debate turns in large measure on the extent to which one can make use of private law analogies, and on the evidence for the recognition of a rule in international law which restricts the liberty of States to conclude treaties regardless of their content.

Let us examine first the usefulness in this sphere of private law analogies. No one would deny the existence in municipal legal systems of a concept of public policy comparable to, even if not synonymous with, *jus cogens*. But, interestingly, Lauterpacht, writing in 1927 about the application of private law analogies to treaties, nowhere makes mention of any concept of *jus cogens* as a restriction upon the power of States to conclude treaties, notwithstanding his express statement that 'the legal nature of private law contracts and international law treaties is essentially the same'.⁹ He discusses in detail such matters as duress and *rebus sic stantibus*, where the analogy between contracts and treaties tends to fall down, and he acknowledges the vitiating effect of fraud and error in relation to treaties;¹⁰ but he is singularly silent on what one would assume to be a more pertinent analogy between contracts and treaties — namely, the extent to which the parties are free to determine the content of their agreement.

In a much more recent study Marek points out some of the conditions for the effective application in domestic law of notions of public policy or *ordre public* — conditions which do not exist in the present state of international

society or which exist only in a very rudimentary form. First, she reminds us that, in any developed national legal system, there is a recognised hierarchy of legal norms — the constitution, statutes, regulations, judicial decisions and administrative acts. Second, she recalls that, within national legal systems, the subjects of the law do not, in general, have capacity to lay down general rules: this is the exclusive responsibility of the legislator. Third, she draws attention to the fact that, in municipal law, legal rights enjoyed by subjects of the law (i.e. individuals) are in general heteronomous (that is to say, subject to external and objective law) rather than autonomous (that is to say, created by the subjects of the law themselves). Fourth, she mentions that the effective limitation of freedom to contract in municipal law results from the sanctions which State organs (including the courts) can impose upon any breach of that limitation. Fifth and finally, she points to the existence, in all municipal law systems, of courts endowed with effective, permanent and obligatory jurisdiction to define and crystallise the limits within which the principle of freedom of contract subject to the law can operate.¹¹

These necessary conditions for the application of legal rules restricting the freedom of parties to determine the content of their agreements exist only in a very fragmentary and rudimentary form in international law. In contrast to the position in developed municipal legal system, international law has no regular and defined hierarchy of norms, at any rate if one ignores the metaphysical search for the *Grundnorm* as the source for the binding force of international law in general. As the subjects of international law are, generally speaking, States, there is no independent legislator, so that there is in reality no distinction, as there is in municipal law, between the parties to a contract, who can create only individual rights between themselves, and the legislator who can lay down general rules. In international law, there are, of course, no centralised sanctions for the breach of limitations imposed by law, save where sanctions may be imposed under the U.N. Charter, and equally no system of compulsory jurisdiction enabling a judicial organ to determine questions concerning the legality of treaties.

Thus the analogies from private law sources do not seem very apt to warrant the conclusion that there exist, in present-day international law, certain peremptory norms from which States cannot derogate by treaty. But this by no means concludes the analysis. Indeed, it is only the beginning. If the private law analogies do not afford much guidance, can one deduce the existence of *jus cogens* in international law from other sources?

Admitting that international law is still primitive law in the sense that it lacks certain of the attributes of developed municipal legal systems, is one forced to the conclusion that this very 'primitiveness' excludes the possibility of restraints upon the capacity of States to conclude treaties regardless of their content? Schwarzenberger would respond in the affirmative; after an examination of the principles of customary international law, he concludes that 'the

evidence of international law on the level of *unorganised* international society fails to bear out any claim for the existence of international *jus cogens*.¹² The majority of jurists, however conscious they may be of the dangers which are presented to the security of treaties by recognition of so vague and uncertain a concept, would hesitate to go so far. They would hesitate the more if they were to follow the advice given by the late Sir Eric Beckett, who was accustomed to test the validity of any proposition by applying it to the extreme case and seeing whether it held good for that.¹³

Testing at its limits the proposition that States are free to conclude treaties regardless of their content, one can enquire whether it would be possible for States A and B to conclude a treaty declaring that all treaties which they had previously concluded, or would conclude in the future, were not binding. Such a treaty, in open violation of the principle *pacta sunt servanda*, poses a logical conundrum, for its validity would appear to depend on the very norm which it purports to abolish.¹⁴ Let me take another example. Would it be possible for States A and B, by treaty, to agree to commit an act of aggression on a specified date against State C? The answer is self-evidently in the negative; the stipulation is a nullity, since its execution would involve a criminal act, the planning, preparation, initiation or waging of a war of aggression having been declared to be an international crime against the peace.¹⁵

Here we come close to the heart of the matter, since acceptance of the view that there are certain norms of international law of so fundamental a character that it is legally impermissible to derogate from them by treaty involves acceptance in principle of the operation of *jus cogens* in international law. The question then poses itself: what is the content of *jus cogens*?

Before seeking to analyse the content of *jus cogens*, it would be as well to examine the doctrinal evidence, and the evidence of State practice, in favour of the concept that violation of a norm of *jus cogens* will render a treaty null and void.

1. Doctrinal evidence

Suy has given us an extended analysis of the views of eminent writers on this point. He finds the greatest support for the existence of *jus cogens* in international law among German, Swiss and Austrian publicists. Von der Heydte,¹⁶ Verdross,¹⁷ Dahm,¹⁸ Berber¹⁹ and Guggenheim,²⁰ while acknowledging that the majority of rules of international law are dispositive in character, proclaim the existence of certain rules of so fundamental a character that, exceptionally, treaties concluded in violation of them are void.

French and Italian writers have traditionally been more reserved. Rousseau is highly sceptical about the notion of *jus cogens*. He points out that, in international law, by contrast with the position in domestic law, 'the notion of a public policy limiting the autonomy of the will of the State is practically non-existent, because of the individualistic and voluntarist structure of the

international community'; the notion of a treaty with an illegal object is, for him, without any practical interest, the examples given being purely academic.²¹ Fauchille, on the other hand, admits the possibility of a hierarchy of norms, and avows that treaties must have a lawful object.²² Cavare²³ likewise appears to concede that there are limits to the freedom of States to conclude treaties, and that certain types of treaty, such as a treaty legalising piracy or slavery, are unlawful. Reuter,²⁴ writing after the adoption of the Convention, accepts the notion of *jus cogens* but concludes that, regrettably, norms of *jus cogens* are few in number and extremely difficult to identify because of the vagueness of the formula adopted; he also stresses the incoherence and absence of immediate practical significance of the notion, which can nonetheless, in his view, serve as a vehicle for all kinds of confused aspirations. Quadri,²⁵ on the other hand, takes a positive view of the existence of international public policy in international law having the effect of annulling any norm in contravention thereof, whether customary or conventional; but Morelli²⁶ disputes that a treaty can be invalid as between the parties to it even if it is in conflict with an asserted imperative norm.

English and American writers have expressed a wide range of views on this matter. McNair notes that in every civilised community there are some rules of law and some principles of morality which individuals are not permitted by law to ignore, or to modify, by their agreements; applying this conception to international law, he accepts that among the rules of customary international law which stand in a higher category and which cannot be set aside or modified by contracting States are 'rules which have been accepted, either expressly by treaty or tacitly by custom, as being necessary to protect the public interest of the society of States or to maintain the standards of public morality recognised by them'.²⁷ Brownlie accepts the existence of *jus cogens*, and indeed suggests examples, but he does concede that there is more authority for the category of *jus cogens* than for its particular content.²⁸ Jenks is much more hesitant: although in principle he favours the notion of an international public policy, he takes the view that the *jus dispositivum* consisting of treaty stipulations agreed between the parties is not generally regarded as being governed by any *jus cogens* which negotiators of a treaty can ignore at their peril, although he does not exclude the possibility of a development of *jus cogens* in this sense.²⁹ Schwarzenberger, as we have seen, is the most sceptical of all; he denies the existence of *jus cogens* on the level of unorganised international society and stigmatises the draft article on *jus cogens* submitted by the Commission as being 'perfectly adapted to the idiosyncrasies of a hypocritical age'.³⁰

Finally, we come to the views advanced by the Special Rapporteurs on the Law of Treaties. Lauterpacht, in his 'First Report on the Law of Treaties', proposed a provision in the following terms:

A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the International Court of Justice.³¹

It should be noted that the emphasis is placed here upon *acts* which are illegal under international law and that, already, an indivisible link is posited between the proclamation of the principle and its application by an international tribunal. Lauterpacht makes it clear, in his commentary, that States are free to modify by treaty, as *between themselves*, rules of customary international law so long as the treaty does not affect the rights of third States; in his view, the test whether the object of the treaty is illegal and whether the treaty is void for that reason 'is not inconsistency with customary international law pure and simple, but inconsistency with such overriding principles of international law which may be regarded as constituting international public policy'.

Fitzmaurice, in his 'Third Report on the Law of Treaties', was also prepared to envisage that conflict with a norm of *jus cogens* will invalidate a treaty. Article 16(2) of the Fitzmaurice draft reads as follows:

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

In his commentary to Article 17, Fitzmaurice points out that the majority of the rules of international law are *jus dispositivum* and that it is 'only as regards rules of international law having a kind of absolute and non-rejectable character (which admit of no option) that the question of the illegality and invalidity of a treaty inconsistent with them can arise'. He cites as examples a bilateral treaty to wage a war of aggression against a third State and a bilateral treaty whereby the two States agree not to take any prisoners of war, and to execute all captured personnel, during future hostilities between them.

2. Evidence in jurisprudence and State practice

If there is a preponderant body of opinion among publicists in favour of the existence of a concept of *jus cogens* in international law, it must be admitted that evidence of its application (or even consideration) by international tribunals or in international practice is sparse.

So far as international tribunals are concerned, the only direct references to the concept in the jurisprudence of the Permanent Court of International Justice and the International Court of Justice are to be found in individual or dissenting judgments. The most striking is Judge Schücking's dissent in the *Oscar Chinn* case, where, with reference to Article 20 of the Covenant of the League of Nations, he states:

... I can hardly believe that the League of Nations would have already embarked on the codification of international law if it were not possible even today to create a *jus cogens* the effect of which would be that, once States have agreed on certain rules of

law, and have also given an undertaking that these rules may not be altered by some of their number, any act adopted in contravention of that undertaking would be automatically void.³²

In the *Wimbledon* case, Judge Schücking's dissent was again based in part on the postulated existence of rules of *jus cogens* from which States cannot derogate by treaty. It will be recalled that the question at issue was whether Germany, as a neutral in the hostilities between Poland and the Soviet Union in 1921, was obliged, by virtue of Article 380 of the Treaty of Versailles, to permit contraband for Poland to pass through the Kiel Canal. In dissenting from the Court's view that Germany was so obliged, Judge Schücking expressed the view that the duties of a neutral must take precedence over treaty obligations and that it is impossible to undertake by treaty a contractual obligation to perform acts which would violate rights of third parties.³³

The individual opinions of Judge Anzilotti³⁴ in the *Austro-German customs regime* case and of Judge Moreno Quintana³⁵ in the *Guardianship of infants* case have also been cited as evidence of a recognition by individual judges of the existence of a concept of *jus cogens* in international law. It is doubtful, however, whether these isolated *dicta* add up to very much.

One can perhaps see indirect references to the concept of *jus cogens* in the advisory opinion of the International Court of Justice in the *Reservations to the Genocide Convention* case. Referring to the 'special characteristics' of the Genocide Convention, the Court notes that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations. From this it follows, according to the Court:

... that the principles underlying the Convention are principles which are recognised by civilised nations as binding on States, *even without any conventional obligation*³⁶

Furthermore, the Court continues, the Convention was intended 'to be definitely universal in scope'. It had been manifestly adopted 'for a purely humanitarian and civilising purpose', and its object was *inter alia* '... to confirm and endorse the most elementary principles of morality'. The Court then goes on to state:

In such a convention, the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.³⁷

There is here no direct invocation of a notion of *jus cogens* as such. But the language used by the Court is significant in the sense that it refers to the 'common interest' of the international community, and that it acknowledges that the norm prohibiting genocide may be binding on States even if they are not parties to the Convention itself.³⁸

More interesting is a case before the Bundesverfassungsgericht in the Federal Republic of Germany in the mid-1960s. The German Equalisation of Burdens Law of 1952 had imposed certain taxes for the purpose of raising revenue to defray the costs of compensation for losses suffered by persons expelled from former German territories in the East and by war victims of various designated categories. A Convention between the Federal Republic and Switzerland provided that this law should apply to Swiss nationals to the extent that it applied to nationals of the most favoured nation. A Swiss company claimed that the German–Swiss Convention violated an asserted rule of customary international law to the effect that resort to aliens for the purpose of defraying expenditures resulting from the consequences of a war is not permissible. The Federal Constitutional Court appears to have interpreted this as an argument that the asserted rule of customary international law was *jus cogens* and disposed of the point as follows:

Only a few elementary mandates may be considered to be rules of customary international law which cannot be stipulated away by treaty. The quality of such peremptory norms may be attributed only to such legal rules as are firmly rooted in the legal conviction of the community of nations and are indispensable to the existence of the law of nations as an international legal order, and the observance of which can be required by all members of the international community. The rule that no resort may be had to aliens for the defrayal of expenditure resulting from war consequences certainly does not fall into this class of peremptory rules of international law.³⁹

There have, however, been some more recent cases before the International Court of Justice in which reference has been made, in individual or dissenting judgments, to the notion of *jus cogens*. For example, in the *North Sea Continental Shelf* cases, three of the judges commented on the relationship between reservations and *jus cogens*, it having been argued before the Court that Article 6 of the 1958 Continental Shelf Convention was not expressive of a rule of general international law favouring the equidistance principle because Article 12 permitted reservations to be made to it. Judge Padilla Nervo stated that ‘customary rules belonging to the category of *jus cogens* cannot be subjected to unilateral reservations’:

It follows that if the Convention by express provision permits reservations to certain Articles this is due to recognition of the fact that such Articles are not the codification or expression of existing mandatory principles or established binding rules of general international law, which as such are opposable not only to the Contracting Parties, but also to third States.⁴⁰

In the same vein, Judge Tanaka declared that a reservation would be null and void if it were ‘... contrary to an essential principle of the continental shelf institution which must be recognised as *jus cogens*’.⁴¹ Finally, Judge *ad hoc* Sorensen said:

The acceptance of a reservation ... does not have the effect of depriving the Convention as a whole or the relevant article in particular of its declaratory character. It only has the effect of establishing a special contractual relationship ... Provided the customary rule does not belong to the category of *jus cogens*, a special contractual relationship of this nature is not invalid as such.⁴²

Given the arguments presented to the Court in the *North Sea Continental Shelf* case, it is not unnatural that certain of the judges should have been tempted to pronounce on the relationship between reservations and *jus cogens*; and, indeed, if States cannot enter into a treaty contrary to a norm of *jus cogens*, it seems only logical that they should not be permitted to make reservations to those treaty provisions which embody norms of *jus cogens*.⁴³

Much less closely related to the issues which arose in the case, and indeed much more controversial, is the pronouncement by Judge Ammoun in his separate opinion in the *Barcelona Traction* case that the principle of self-determination is a norm of *jus cogens*.⁴⁴ Judge Ammoun, in the *Namibia* case in 1971, again spoke at length about 'the imperative character of the right of peoples to self-determination',⁴⁵ though it is true that he also asserted the imperative character of the human rights whose violation by the South African authorities the Court had denounced.⁴⁶

In the case of the *United States Diplomatic and Consular Staff in Tehran*, the Court skirted delicately round the question whether the inviolability of the premises of a diplomatic mission is or is not a norm of *jus cogens*. There are tantalising references in the judgment to 'the imperative character of the legal obligations incumbent upon the Iranian Government',⁴⁷ and to 'the fundamental character of the principle of inviolability'⁴⁸ But the Court stops short of categorising the principle of inviolability of diplomatic premises as a norm of *jus cogens*, no doubt because there was not in issue in the case any treaty purporting to derogate from the principle of inviolability.⁴⁹

But of much greater significance from the general point of view is the following passage from the judgment of the Court in the *Barcelona Traction* case:

In particular an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-a-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law ...; others are conferred by international instruments of a universal or quasi-universal character. Obligations the performance of which is the subject of diplomatic protection are not of the same category ...⁵⁰

This is a curious passage, the meaning of which is more than a little obscure.

It makes no reference to *jus cogens* as such, but there can be little doubt that the examples given of obligations *erga omnes* are examples of what the Court would consider to be norms of *jus cogens*.⁵¹ The suspicion cannot, however, be avoided that this passage was deliberately included in the judgment as a reaction against the 1966 judgment of the Court in the *South-West Africa* case⁵² denying the *locus standi* of the applicants (Ethiopia and Liberia) to institute proceedings against South Africa in respect of alleged breaches of South Africa's obligations under the Mandate. However that may be, there must remain a question whether the violation of an obligation *erga omnes* entitles any State to claim against the alleged wrongdoer. It may be conceded that all States have an *interest* in all rules of law being observed; the issue is rather whether States are qualified to take up claims other than those directly affecting it or one of its nationals.⁵³ This is not, however, the place to go into the intricacies of the *actio popularis*.⁵⁴

Despite the ambivalent nature of this pronouncement by the Court in *Barcelona Traction*, the International Law Commission has seized upon it, in the context of its work on State responsibility, as a basis for the distinction which it draws between 'international crimes' and 'international delicts'. An 'international crime' has been defined by the Commission as a violation 'of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole'.⁵⁵ The examples given are:

- (a) a serious breach of an obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;
- (b) a serious breach of an obligation designed to safeguard the right of self-determination, such as that prohibiting the establishment or maintenance by force of colonial domination;
- (c) a serious breach on a widespread scale of an obligation safeguarding the human being, such as those prohibiting slavery, genocide and apartheid; and
- (d) a serious breach of an obligation designed to safeguard and preserve the human environment, such as those prohibiting massive pollution of the atmosphere or of the high seas.

It is abundantly clear that the concept of *jus cogens* inspired the distinction proposed *de lege ferenda* by the Commission's then Special Rapporteur on State responsibility (now Judge Ago), and accepted by the Commission as a whole, between 'international crimes' and 'international delicts'.⁵⁶ Indeed the wording of the proposed general definition of 'international crime' is so obviously reminiscent of the terms of Article 53 of the Vienna Convention on the Law of Treaties as to demonstrate forcibly the link between the two concepts. Nevertheless, there are differences. The Commission have stated

that while an 'international crime' always constitutes a breach of an obligation *erga omnes*, it cannot be said that the breach of an obligation *erga omnes* always constitutes an international crime. Furthermore, the Commission have likewise observed that 'the category of obligations admitting of no derogation is much broader than the category of obligations whose breach is necessarily an international crime'.⁵⁷

The influence of the concept of *jus cogens* is also to be found in other provisions of the Commission's draft on State responsibility. Article 18, paragraph 2, of the draft stipulates that:

... an act of the State which, at the time when it was performed, was not in conformity with what was required of it by an international obligation in force for that State, ceases to be considered an internationally wrongful act if, subsequently, such an act has become compulsory by virtue of a peremptory norm of international law.

The Commission, in their commentary to this extraordinary provision, give as an example the case of:

... a State which, being bound by a treaty to deliver arms to another State, had refused to fulfil its obligation, knowing that the arms were to be used for the perpetration of aggression or genocide or for maintaining by force a policy of *apartheid* and had done so before the rules of *jus cogens* outlawing genocide and aggression had been established, thus making the refusal not only lawful but obligatory.⁵⁸

Now, it is true that the Commission likewise stress in their commentary that if the dual condition is met — that is, (1) that the act of the State prohibited by a rule of international law in force at the time of its commission should since have become not only lawful but obligatory and (2) that this should have come about under a peremptory norm of international law — 'the act of the State is not retroactively considered as lawful *ab initio*, but only as lawful from the time when the new rule of *jus cogens* came into force'.⁵⁹

But this denial of any retroactive effect to the rule does not carry much conviction. It might have been better, as some members of the Commission suggested, for this particular and rather special case to have been dealt with under the rubric of attenuating circumstances. As it is, the formulation in Article 18, paragraph 2, seems only too apt to encourage the violation by States of their treaty obligations in the hope and expectation that the breach will be subsequently justified by the argument that a later norm of *jus cogens* has made the conduct complained of obligatory. However this may be, what is important to note is that:

... the effects given to peremptory norms in Article 18, paragraph 2, go beyond those provided for in Article 71 of the Vienna Convention and are not implied by the concept of peremptory norm Although it may be easier for a new norm protecting a fundamental interest of international society than for any other norm to justify retroactively an action or an omission which was in breach of a previously existing obligation, not all the peremptory norms should necessarily be considered as having that effect, nor should all the norms that produce such an effect be defined as peremptory.⁶⁰

The notion of *jus cogens* has accordingly begun to have a pervasive influence on branches of international law other than the law of treaties. Its effective impact upon the law of State responsibility has yet to be tested. The Commission's proposal to draw a distinction between 'international crimes' and 'international delicts' has been warmly welcomed in some quarters,⁶¹ but strongly criticised, particularly by Western delegations, in the Sixth Committee of the United Nations General Assembly.

We turn now from a consideration of international jurisprudence to evidence of State practice. This is, perhaps fortunately, very limited indeed. The allegation has been made before certain organs of the United Nations (in particular, the Security Council) that Article IV of the Treaty of Guarantee between Cyprus, on the one hand, and Greece, Turkey and the United Kingdom, on the other hand, is invalid in so far as it might be interpreted to authorise the unilateral intervention of any of the guaranteeing Powers in Cyprus. This allegation was contested on the grounds that the action reserved to the guaranteeing Powers as provided for in Article IV(2) of the Treaty of Guarantee could be resorted to only in the event of a breach of the provisions of the treaty i.e. in circumstances in which there was a threat to the independence, territorial integrity or security of the Republic of Cyprus as established by the basic articles of its constitution.⁶²

3. Content of '*jus cogens*'

It now remains to consider the most controversial aspect of them all: if, on the balance of conflicting considerations, one is constrained to admit the existence of *jus cogens* in international law, what is its content? What are these peremptory norms of general international law from which States are not permitted to derogate by treaty?

Let us begin by taking the more obvious candidates. We have already discussed the extreme case of a treaty which purports to abolish both retrospectively and prospectively the rule *pacta sunt servanda* in relations between the contracting parties: however improbable such a treaty may be, it is difficult to see how its validity could be sustained. But leaving aside treaties whose object and purpose is to deny the fundamental principle underlying the law of treaties itself, what other categories of treaty could be regarded as being inconsistent with rules of *jus cogens*?

The Commission's commentary gives three examples:

- (a) A treaty contemplating an unlawful use of force contrary to the principles of the Charter.
- (b) A treaty contemplating the performance of any other act criminal under international law.
- (c) A treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate.

There would be little disposition among jurists to deny the nullity of a treaty contemplating an unlawful use of force contrary to the principles of the Charter; but, given the pervasive influence of the modern propaganda machine designed to stand everything on its head, it is of course necessary to distinguish a treaty of this nature from a perfectly valid treaty for the organisation of collective self-defence in the event of an armed attack or the threat of an armed attack.

The second example given by the Commission in part overlaps the first, since a treaty between States A and B for the initiation of a war of aggression against State C would, as already indicated, fall foul of both prohibitions. But the second example would presumably also cover the other instance cited by Fitzmaurice — that is to say, a treaty whereby two States agree not to take any prisoners of war, and to execute all captured personnel, during future hostilities between them. In this connection, Schwelb aptly reminds us that the four Geneva Conventions of 1949 on the Protection of War Victims all contain denunciation clauses providing that each of the parties shall be at liberty to denounce the Conventions; but the denunciation clauses specifically state that denunciation 'shall in no way impair the obligations which the parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of the public conscience'. Schwelb concludes that this is a reference to something akin to *jus cogens*, since, if a single State cannot release itself from their provisions by the act of denouncing the Conventions, it appears to follow that two or more States cannot derogate from these principles by agreements among themselves.⁶³ In this he is probably right, given the particular content of the Geneva Conventions. But it does not follow that the inclusion of such a provision in the denunciation clause of another Convention would constitute conclusive evidence of the *jus cogens* character of the rules embodied in that Convention, since its purpose may be simply to preserve the operation of the rules as rules of customary international law. In the final analysis, it is the *content* of the rules which will be decisive in the determination of whether or not they have the attributes of *jus cogens*.

The third example given by the Commission opens up the floodgates of controversy. The majority of jurists would no doubt go along with the Commission in asserting that the rules prohibiting trade in slaves, piracy or genocide have become norms of *jus cogens* from which States are not free to derogate by treaty.⁶⁴ But a word of caution is necessary here. It is right to recall that general multilateral conventions (even those recently concluded) which prohibit or outlaw slavery and the slave trade and genocide contain normal denunciation clauses.⁶⁵ If a State can release itself easily from the conventional obligations it has undertaken in these fields, can it be said that the prohibitions are in the nature of *jus cogens*? Of course, it may be said that the rule prohibiting slavery and the slave trade and the rule prohibiting

genocide are rules of general international law which apply independently of the treaties embodying them. More to the point, it is clear that a treaty between two member States of the United Nations contemplating genocide or slavery would be wholly contrary to Articles 55 and 56 of the Charter and would therefore be unenforceable by virtue of Article 103, which provides that, in the event of conflict between the obligations of member States under the Charter and obligations under any other international agreement, Charter obligations prevail. The explanation for the existence of normal denunciation clauses in general multilateral conventions which contain asserted norms of *jus cogens* is, as Schwelb indicates, that 'the idea of international *jus cogens* has not yet penetrated into the day-to-day thinking and action of governments'.⁶⁶

Other examples have been suggested. Barberis mentions treaties contrary to the rules of international law relating to the white slave traffic.⁶⁷ Verdross goes much wider in asserting that 'all rules of general international law created for a humanitarian purpose' constitute *jus cogens*.⁶⁸ Apart from the difficulty of delimiting what is and what is not a humanitarian purpose, this seems to go much too far. It implies that all human rights provisions contained in international treaties have the character of *jus cogens*. Given that even the United Nations Covenant on Civil and Political Rights is geared only towards 'achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means',⁶⁹ it would be unwise to take at its face value the suggestion that *jus cogens* embraces all human rights provisions, despite the fact that, in the Commission's commentary, certain members are recorded as having given treaties violating human rights as an example of treaties which would contravene a rule of *jus cogens*.⁷⁰

Scheuner⁷¹ suggests three categories of norms of *jus cogens*: firstly, rules protecting the foundations of law, peace and humanity, such as the prohibition of genocide, slavery or the use of force; secondly, rules of peaceful co-operation in the protection of common interests, such as freedom of the seas; and thirdly, rules protecting the most fundamental and basic human rights (to which might, as Crawford suggests,⁷² be added the basic rules for the protection of civilians and combatants in time of war). There would be little dispute with the first and, subject to what is said above about human rights provisions, the third of these three categories; but the second category is, as Crawford implies, very doubtful.⁷³ Jimenez de Arechaga would embrace within the first of Scheuner's three categories rules prohibiting racial discrimination, terrorism or the taking of hostages;⁷⁴ and Brownlie tentatively puts forward as candidate rules the principle of permanent sovereignty over natural resources and the principle of self-determination.⁷⁵

Marek, in an attempt to find an underlying principle, advances the superficially attractive proposition that a treaty violative of *jus cogens* is any treaty in which two or more States undertake to commit acts which would be illegal

if committed by a single State.⁷⁶ But even this appears to go too wide; it might be taken to exclude the possibility of *inter se* modification of a multilateral treaty, even although *inter se* modification is permissible under certain conditions.

4. '*Jus cogens*' and the Vienna Convention

We have so far discussed the topic of *jus cogens* in the abstract. It remains to consider how *jus cogens* is dealt with in the Convention.

The Commission had proposed a draft article in the following terms:

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.⁷⁷

A lengthy debate in the Conference brought forth a variety of views. Few, if any, delegations sought to deny entirely the concept of *jus cogens*, but a number of criticisms were directed against the wording of the Commission's proposal. First, it was maintained — particularly by the delegations of Chile and Mexico — that the wording was circular, in the sense that apparently a norm of *jus cogens* (from which no derogation by treaty was permissible) could be modified by a general multilateral treaty laying down new norms of *jus cogens*.⁷⁸ Second, it was argued that the analogy from private law concepts was misconceived, since, within the framework of international society, there was no acknowledged legislator competent to decree that a rule was of the character of public policy.⁷⁹ Third, and most persistently, it was emphasised that the Commission's draft did not provide any definition of *jus cogens* nor did it contain any test whereby norms of *jus cogens* could be identified. This last criticism was voiced by many delegations, particularly from Western countries.

Among the foremost proponents of *jus cogens* at the Conference were the Eastern European delegations. Their views on its content reveal a marked imprecision. The representative of the Soviet Union characterised as having the nature of *jus cogens* 'such principles as non-aggression and non-interference in the internal affairs of States (*sic*), sovereign equality, national self-determination and other basic principles of contemporary international law and Articles 1 and 2 of the United Nations Charter'.⁸⁰ To the representative of Poland, the principles in Article 2 of the United Nations Charter formed part of *jus cogens*, as did 'the freedom of the high seas, the prohibition of slavery and genocide and some of the rules of land warfare'.⁸¹ The Byelorussian delegate cited in this context 'the maintenance of peace among peoples, the struggle against colonial domination and the sovereignty of States';⁸² and the Ukrainian delegate gave as examples of peremptory norms 'the universally recognised principles of international law prohibiting *inter alia* the use of force, unlawful war and colonialism'.⁸³ This vague catalogue

of general principles only served to confirm the anxieties of other delegations that the concept of *jus cogens* might be utilised as a weapon to undermine the security of treaties. Accordingly, it is not surprising that a number of amendments were tabled which were designed to provide a test for the identification of norms of *jus cogens*

The United States delegation proposed a two-part amendment. The first part (which was adopted by the Conference) made it clear that the article applied only to a treaty which 'at the time of its conclusion' violated a norm of *jus cogens*. The Commission's commentary had already made it clear that the rule stated in the article was not intended to operate retroactively,⁸⁴ and this part of the United States amendment merely clarified the underlying meaning of the text. The second part of the United States amendment was designed to establish a test for the identification of norms of *jus cogens* by requiring that such a norm must be 'recognised in common by the national and regional legal systems of the world'. It was explained in support of this part of the amendment that it was based on the consideration that 'a rule of international law was only *jus cogens* if it was universal in character and endorsed by the international community as a whole'.⁸⁵

Following the same line of thought, the delegations of Finland, Greece and Spain tabled a proposal requiring that a norm of *jus cogens* must be 'recognised by the international community' as a norm from which no derogation was permitted. In the view of the sponsors, the essential element of international *jus cogens* lay in the universality of its acceptance by the international community, and their proposal was designed to stress the notion of general consent.⁸⁶

In the event, and after complicated procedural manoeuvres,⁸⁷ the second part of the United States amendment was put to the vote and defeated, while the less stringent proposal by Finland, Greece and Spain was referred to the Drafting Committee. Further lengthy discussions took place in the Drafting Committee, which eventually reported out the text now appearing as Article 53 of the Convention. In introducing this new text, the Chairman of the Drafting Committee stated:

The Drafting Committee had decided that the amendment by Finland, Greece and Spain would clarify the text, and had therefore inserted the phrase 'a peremptory norm of general international law is a norm accepted and recognised by the international community of States as a whole'. Only the word 'recognised' was used in the Three-Power amendment, but the Drafting Committee had added the word 'accepted' because it was to be found, together with the word 'recognised' in Article 38 of the Statute of the International Court of Justice.⁸⁸

Ambassador Yasseen further explained that by inserting the words 'as a whole' in Article 53, the Drafting Committee had wished to stress that there was no question of requiring a rule to be accepted and recognised as peremptory by all States; in other words, no individual State should have the right of veto in determining what were and what were not peremptory norms.

There is little doubt that the revised text reported out by the Drafting Committee and now embodied in Article 53 of the Convention constitutes an improvement on the text originally proposed by the Commission. There is now a criterion (however vague and shadowy it may be) for determining whether or not a particular rule of general international law constitutes a norm of *jus cogens*. The requirement that there must be acceptance and recognition of the peremptory nature of the norm by the international community of States as a whole does provide a degree of protection against abusive claims that particular treaties are null and void because they conflict with an asserted norm of *jus cogens* based upon a self-serving and tortured interpretation of pseudo-legal principles. Whether or not the changes made at the Conference in the text of what is now Article 53 have 'discreetly defused this time-bomb in the edifice of the Vienna Convention', as Schwarzenberger claims,⁸⁹ may be a matter of dispute. It is clear at any rate that some do not think so. Deleau, in describing the French positions at the Vienna Conference, expresses the concern voiced by the French delegation at the time that a State which has not, as it were, participated in the international community consensus may be obliged to accept as imperative a rule which it would not, for its part, have accepted and recognised as such.⁹⁰

The improvements effected in the text of the Commission proposal at Vienna — that is to say, the explicit recognition of the non-retroactive character of the rule and the incorporation of a vague test for the identification of norms *jus cogens* — would not by themselves have been sufficient to allay all the anxieties which had been expressed about the dangers to the security of treaties which might flow from the application of the principle that nullity attaches to any treaty concluded in violation of an existing norm of *jus cogens*. In the view of the overwhelming majority of Western delegations represented at the Conference, supported on this issue by a number of Latin American and Afro-Asian delegations, additional safeguards were essential. In particular, it was made crystal clear that the attitude of many delegations towards the series of articles on invalidity, and particularly the article on *jus cogens*, would be decisively influenced by the outcome of the debate at the Conference on proposals to strengthen the machinery for the settlement of disputes arising in connection with the interpretation and application of Part V of the Convention.

5. *Interim conclusions on 'jus cogens'*

What conclusions can we draw so far from this analysis of the controversy surrounding the admissibility and application of the concept of *jus cogens* in international law? Perhaps one should stress at the outset that the 'great debate' on this issue involves taking a view on some of the fundamental and basic underpinnings of international law in general. It is no accident that some of the more vigorous Western proponents of *jus cogens* base their case largely

upon private law analogies and upon concepts deriving from natural law. It is, equally, no accident that those who deny the existence of *jus cogens* found their denial in part upon considerations relating to State sovereignty and independence,⁹¹ and in part upon an analysis of the evidence of State practice;⁹² these are, of course, some of the hallmarks of the positivist approach. As de Visscher rightly points out, the controversy surrounding *jus cogens* constitutes a renewal, in different terms, of the ancient doctrinal dispute between naturalists and positivists.⁹³

But there is a paradox here, particularly if one notes the enthusiasm of Soviet and other Eastern European publicists and official representatives for an extended application of the concept of *jus cogens* in international law. For those attached to Marxist-Leninist teachings there can be no place for any seed-bed of natural law in which *jus cogens* might take root. Equally, it might be thought unnatural that Soviet representatives, traditionally supporting some of the more exaggerated notions of State sovereignty, should come down in favour of a concept which postulates the existence of a superior international legal order. It is noteworthy that, at the Conference, Soviet and Eastern European representatives went out of their way to deny any natural law basis for the concept of *jus cogens*. The Hungarian representative at the Conference, for example, firmly asserted that *jus cogens* 'was not based on the theory of natural law but on the reality of the relations between States' and that the source of rules of *jus cogens* 'lay in the will of States'.⁹⁴ The Polish representative likewise indicated that *jus cogens* 'had nothing to do with any civil law concepts and was a logical outcome of the modern development of international law'; in his view, it was 'the realities of international life expressed in the conscience and will of States' that constituted the basis for rules of *jus cogens* in contemporary international law.⁹⁵ The leading Soviet publicist on international law, Professor Tunkin, also denies the relevance of natural law doctrine to *jus cogens*:

If principles of *jus cogens* are created, just as other norms of international law, by the agreement of States, then they are completely distinct from the principles of *ordre public* propagated by natural law doctrine which are not dependent upon the wills of States.⁹⁶

Tunkin sees the genesis of rules of *jus cogens* in the 'growing internationalisation of various aspects of the life of society, especially of economic life, and the expansion and intensification of international ties'; but he stresses that imperative principles (i.e. norms of *jus cogens*) 'are created by the agreement of States'.⁹⁷ The doctrinal paradoxes which we have noted lend voice to the suspicion that there may be at the very least an element of opportunism in the attitude of Marxist-Leninist devotees of *jus cogens*. Reuter indeed goes further and suggests that, as Soviet and Eastern European theoreticians place emphasis on treaties (rather than custom) as the source of norms of *jus cogens*,

such norms may not be universal and could be invoked to invalidate any treaty considered to be contrary to the basic treaties embodying the fundamental links between the Soviet Union and her Eastern European allies.⁹⁸

Whatever their doctrinal point of departure, the majority of jurists would no doubt willingly concede to the sceptics that there is little or no evidence in positive international law for the concept that nullity attaches to a treaty concluded in violation of *jus cogens*. But they would be constrained to admit that the validity of a treaty between two States to wage a war of aggression against a third State or to engage in acts of physical or armed force against a third State could not be upheld; and, having made this admission, they may be taken to have accepted the principle that there may exist norms of international law so fundamental to the maintenance of an international legal order that a treaty concluded in violation of them is a nullity.

Some (among whom may be counted the present author) would be prepared to go this far, but would immediately wish to qualify this acceptance of the principle involved by sketching out the limits within which it may be operative in present-day international law. In the first place, they would insist that, in the present state of international society, the concept of an 'international legal order' of hierarchically superior norms binding all States is only just beginning to emerge. Ideological differences and disparities of wealth between the individual nation States which make up the international community, combined with the contrasts between the objectives sought by them, hinder the development of an overarching community consensus upon the content of *jus cogens*. Indeed, it is the existence of these very differences and disparities which constitute the principal danger implicit in an unqualified recognition of *jus cogens*, for it would be only too easy to postulate as a norm of *jus cogens* a principle which happened neatly to serve a particular ideological or economic goal. In the second place, they would test any assertion that a particular rule constitutes a norm of *jus cogens* by reference to the evidence for its acceptance as such by the international community as a whole, and they would require that the burden of proof should be discharged by those who allege the *jus cogens* character of the rule.⁹⁹ Applying this test, and leaving aside the highly theoretical case of a treaty purporting to deny the application of the principle *pacta sunt servanda*, it would seem that sufficient evidence for ascribing the character of *jus cogens* to a rule of international law exists in relation to the rule which requires States to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any other State. There is ample evidence for the proposition that, subject to the necessary exceptions about the use of force in self-defence or under the authority of a competent organ of the United Nations or a regional agency acting in accordance with the Charter, the use of armed or physical force against the territorial integrity or political independence of any State is now prohibited. This proposition is so central to the existence of any international

legal order of individual nation States (however nascent that international legal order may be) that it must be taken to have the character of *jus cogens*. Just as national legal systems begin to discard, at an early stage of their development such concepts as 'trial by battle', so also must the international legal order be assumed now to deny any cover of legality to violations of the fundamental rule embodied in Article 2(4) of the Charter.

Beyond this, uncertainty begins, and one must tread with considerable caution. The dictates of logic, and overriding considerations of morality,¹⁰⁰ would appear to require that one should also characterise as *jus cogens* those rules which prohibit the slave trade and genocide; but the evidence is arguably less than overwhelming, since the treaties which embody these prohibitions contain normal denunciation clauses. Of course, the better view is that the presence or absence of normal denunciation clauses should not be taken as being decisive; denunciation clauses are regularly embodied in treaties for traditional, rather than practical, reasons. In any event, it is likely that the prohibitions may now be taken to form part of general international law binding all States regardless of whether they are parties to the treaties embodying them. The unenforceability of any treaty contemplating genocide or the slave trade is further assured by the fact that such a treaty would contravene the Charter of the United Nations, which prevails in the event of conflict.¹⁰¹

To sum up, there is a place for the concept of *jus cogens* in international law. Its growth and development will parallel the growth and development of an international legal order expressive of the consensus of the international community as a whole. Such an international legal order is, at present, inchoate, unformed and only just discernible. *Jus cogens* is neither Dr Jekyll nor Mr Hyde; but it has the potentialities of both. If it is invoked indiscriminately and to serve short-term political purposes, it could rapidly be destructive of confidence in the security of treaties; if it is developed with wisdom and restraint in the overall interest of the international community it could constitute a useful check upon the unbridled will of individual States.

This was the conclusion presented in the first edition of this book, published more than ten years ago. It is a conclusion which the author considers is still valid. But he would wish to add the following. In the fourteen years which have elapsed since the adoption of the Convention, there has been continued and continuing disputation among scholars as to the content and significance of *jus cogens*, not only in the context of the law of treaties, but also in other contexts. We have already seen how the notion of *jus cogens* has been used by way of analogy to sustain a distinction between so-called 'international crimes' and 'international delicts' within the framework of the law of State responsibility. The question has also been raised whether, and if so to what extent, *jus cogens* may, despite all the difficulties, be applicable to problems of territorial status — that is to say, whether an entity has been created or

extinguished in circumstances of such illegality that international law may, exceptionally, treat an effective entity as not a State (or, conversely, a non-effective entity as continuing to be a State).¹⁰² There has also been speculation about how far, if at all, prescription can be operative if the norm violated is one of *jus cogens*;¹⁰³ it is at any rate clear from the Convention (Article 45) that acquiescence is not admissible in the case of conflict of a treaty with an existing or emerging norm of *jus cogens*.

It is of course only right that there should be a thorough and sustained examination by scholars of the implications of *jus cogens* in the law of treaties and also in other branches of international law. What is, however, significant is that, during the past fourteen years, there have been few, if any, instances in State practice where the validity of a treaty has been seriously challenged on the ground that it conflicted with a rule of *jus cogens*. The mystery of *jus cogens* remains a mystery. To borrow another analogy from the field of English literature,¹⁰⁴ it has some of the attributes of the Cheshire Cat which had the disconcerting habit of vanishing and then reappearing to deliver further words of wisdom. *Jus cogens* will undoubtedly continue to exercise its influence on the development of international law in the foreseeable future. How far that influence will extend to the actual practice of States remains to be seen, although there must now be a consciousness among the legal advisers to Foreign Ministries that international law *does* impose certain limitations upon the freedom of States to enter into treaties regardless of their object or content.

6. '*Jus cogens superveniens*'

It remains to say a few words about *jus cogens superveniens*. Article 53 establishes the nullity of any treaty concluded in violation of an existing norm of *jus cogens*. Article 64 provides that:

If a new preemptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminated.

In their commentary to what is now Article 53, the Commission explain the relationship between the two provisions:

[Article 53] has to be read in conjunction with Article [64] ..., and in the view of the Commission, there is no question of the present article having retroactive effects. It concerns cases where a treaty is void *at the time of its conclusion* by reason of the fact that its provisions are in conflict with an already existing rule of *jus cogens*. The treaty is wholly void because its actual conclusion conflicts with a preemptory norm of general international law from which no States may derogate even by mutual consent. Article [64], on the other hand, concerns cases where a treaty, valid when concluded, becomes void and terminates by the reason of the subsequent establishment of a new rule of *jus cogens* with which its provisions are in conflict. The words '*becomes void and terminates*' make it quite clear, the Commission considered, that the emergence of a new rule of *jus cogens* is not to have retroactive effects on the validity of a treaty. The invalidity is to attach only as from the time of the establishment of the new rule of *jus cogens*.¹⁰⁵

The Commission give as an example of treaties becoming void and terminating as a result of the emergence of a new rule of *jus cogens* the former treaties regulating the slave trade, 'the performance of which later ceased to be compatible with international law owing to the general recognition of the total illegality of all forms of slavery'.¹⁰⁶ The Commission also stress that, in the case of conflict with a new rule of *jus cogens*, the principle of separability may be applied, at least in the case of a treaty entirely valid when concluded, but now found with respect to some of its provisions to conflict with a newly established rule of *jus cogens*.¹⁰⁷

Finally, the Convention draws a distinction between the consequences of invalidity of a treaty conflicting with an existing rule of *jus cogens* and the consequences of invalidity of a treaty conflicting with a new rule of *jus cogens*. In the case of the former, the parties are required to take positive action to eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the existing rule of *jus cogens* (Article 71, paragraph 1). In the case of the latter, the termination of the treaty releases the parties from any obligation further to perform the treaty, but does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new rule of *jus cogens* (Article 71, paragraph 2).

The wording of Article 71, paragraph 2, confirms that, in the case of treaties conflicting with a new rule of *jus cogens*, we are confronted with a ground of *termination* and not of nullity. Several commentators have criticised the use of the expression 'becomes void and terminates' in Article 64 as being ambiguous and contradictory;¹⁰⁸ but it seems clear from the wording of Article 71, paragraph 2, that the normal consequence of the operation of the rule in Article 64 is the ending of the effects of the treaty *ex nunc* (and not *ex tunc*), the case where the new rule of *jus cogens* has repercussions on rights acquired under the treaty remaining exceptional.¹⁰⁹

Article 64 does, however, leave a few questions unanswered. How does a new rule of *jus cogens* emerge? The test of acceptance and recognition by the international community of States as a whole will of course have to be applied. This may present few difficulties beyond those to which attention has already been directed if the new rule of *jus cogens* simply forms an addition to the *corpus* of already existing rules of *jus cogens*. But what if the new rule modifies or purports to modify an already existing rule of *jus cogens*? Such a possibility exists in the sense that Article 53 envisages that a rule of *jus cogens* '... can be modified only by a subsequent norm of general international law having the same character'. Logically, however, a modification of a rule of *jus cogens* cannot be effected by treaty since any treaty concluded in violation of (and, necessarily, by way of derogation from) an existing rule of *jus cogens* is a

nullity. It is hardly a sufficient answer to suggest, as the Commission do in their commentary to what is now Article 53, that any modification of a rule of *jus cogens* would most probably be effected by the conclusion of a general multilateral treaty. Such a treaty would, *at the time of its conclusion*, be in conflict with the very rule of *jus cogens* which it purports to modify. It may be going too far to suggest, as does Sztucki, that the proposition that norms of *jus cogens* may be validly modified by treaties '... renders the whole concept of peremptory norms virtually meaningless'.¹¹⁰ Nevertheless, if, as we have already suggested, the mystery of *jus cogens* remains a mystery, the process by which rules of *jus cogens* can be validly modified is even more enigmatic.

II. Settlement of Part V disputes

In the foregoing review of the various grounds of invalidity, termination and suspension of operation of treaties, attention has been directed, on several occasions, to the importance attached by many States to the inclusion in the Convention of a satisfactory system for the settlement of disputes arising on the interpretation or application of this series of articles.

The Commission had proposed, in 1966, a draft article which in substance laid down certain procedural requirements which had to be fulfilled by States claiming that a treaty was invalid or alleging a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the Convention. These procedural requirements were as follows:

- (a) A party making any such claim or allegation must notify the other parties, indicating the measures which it proposed to take with respect to the treaty and the grounds therefor.
- (b) If no party had raised objection within a period of three months (an exception being made for cases of special urgency) the party making the notification might carry out the measure which it had proposed.
- (c) If objection were raised by any other party, the parties 'shall seek a solution through the means indicated in Article 33 of the Charter of the United Nations'.
- (d) Without prejudice to the rules on acquiescence, a State which had not previously made a notification was not precluded from doing so in answer to another party claiming performance of the treaty or alleging its violation.

The draft article contained, in addition, a clause saving the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

To many Governments these procedural safeguards were wholly insufficient, having regard to the 'progressive' content of many of the proposals made by the Commission as regards grounds of invalidity and termination.

In written comments on the earlier (1963) draft, a number of suggestions had been made, ranging from the possibility of a reservations article whereby Governments might exclude the application of the articles on invalidity and termination in relation to States which had not accepted an undertaking concerning compulsory jurisdiction or compulsory arbitration¹¹¹ to a more modest proposal that the draft articles on invalidity and termination should be capable of being invoked only against a State which had accepted the compulsory jurisdiction of the International Court of Justice if the State relying on the article were willing to submit the issue to the Court.¹¹² Other governmental comments had favoured a general provision conferring compulsory jurisdiction on the International Court of Justice for the settlement of disputes arising out of the series of articles on invalidity and termination of treaties. The Commission, having considered these and other comments, decided not to modify substantially the proposals which they had advanced in 1963, asserting that these proposals (which I have summarised above) represented the highest measure of common ground that could be found among governments as well as in the Commission on this question.¹¹³

It was apparent, even before the Conference began, that there would be a major confrontation on the adequacy or otherwise of the Commission's proposals for settlement of disputes. Professor Briggs had already criticised the shortcomings of the Commission's proposal, particularly the inefficacy of the paragraph requiring the parties to seek a solution through the means indicated in Article 33 of the Charter.¹¹⁴ The demonstrable weakness of this provision is that it does not oblige the parties to resort to any particular mode of third-party determination of the issue dividing them and puts a premium on unilateral (and inevitably self-serving) claims.

But there were formidable barriers facing those States which were determined to tighten up the provisions concerning disputes-settlement and to ensure that, as an integral part of the Convention, automatic procedures for third-party scrutiny of disputed claims of invalidity would be available.

In the first place, precedent was against them. At previous codification conferences¹¹⁵ attempts to include provisions for the settlement of disputes by establishing the compulsory jurisdiction of the International Court of Justice had been defeated. In each case the protagonists of an effective disputes-settlement machinery had been unable to rally sufficient support for their proposals, and the soft alternative of an Optional Protocol for the Settlement of Disputes had been accepted *faute de mieux*. But the unsatisfactory nature of the Optional Protocol approach had become increasingly recognised:

There was ... no requirement that a party to the convention had also to be a party to the protocol. The inadequacy of the protocols as a substitute for compulsory requirements in the conventions themselves is demonstrated by the fact that in no case have as many as half of the parties to a convention ratified the relevant protocol.¹¹⁶

A second factor inhibiting progress in this field was the well-known opposition of the Soviet Union and other Eastern European countries to any form of impartial third-party determination of international disputes. This had been abundantly manifested in the discussions on the principle of peaceful settlement of disputes within the framework of the U.N. Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.¹¹⁷ This anachronistic attitude, based upon ideological convictions¹¹⁸ and upon the more extreme elements of the doctrine of State sovereignty, was sustained by a group of Afro-Asian countries, who, for other reasons, were opposed to the concept of independent and compulsory third-party determination of international disputes. Among the avowed reasons motivating this opposition on the part of certain Afro-Asian countries were (a) the distrust of the international judicial process following upon the controversial 1966 judgment of the International Court of Justice in the *South West Africa* case;¹¹⁹ (b) the expense of international judicial or arbitral proceedings and the delays involved in obtaining a decision on the merits; (c) the asserted lack of balance in the composition of the International Court which weighted it in favour of Western States; and (d) the suspicion that any judicial or arbitral tribunal would apply so-called 'traditional' international law in contrast to the 'new' international law which would be responsive to the needs of newly independent States.

These were indeed formidable obstacles to overcome. There was yet another with a certain superficial attraction. It was argued that the process of codification of norms of substantive international law should not be made dependent upon the development of procedural or institutional devices to secure their proper application; otherwise, it was suggested, the development of the international legal order as a whole would be placed in jeopardy.¹²⁰ But the response to this was quite simply that a group of States were not prepared to engage in the far-reaching and ambitious programme of progressive development represented by the Commission's proposals on invalidity and termination of treaties without a parallel advance in the field of procedures:

If ... the world was not yet ready to adopt the necessary procedures for dealing with the legal questions that might arise out of the provisions codified by the convention on the law of treaties, there was good reason for asking whether the world was really ready for the degree of codification embodied in the draft convention.¹²¹

Against this background, a variety of proposals were presented to the Vienna Conference designed to strengthen the arrangements for the settlement of disputes. Of these, the most far-reaching was a proposal by Switzerland for a general article providing for the compulsory jurisdiction of the International Court of Justice in relation to all disputes concerning the interpretation or application of the Convention, unless the parties agreed to submit the dispute to arbitration.¹²² This proposal was rejected, at the committee

stage of the second session of the Conference, by forty-eight votes to thirty-seven, with twenty abstentions.

Most of the proposals for strengthening the machinery for the settlement of disputes were, however, confined to disputes concerning the interpretation or application of the series of articles in Part V of the Convention, and in fact involved amendments or additions to the Commission proposal designed to spell out the procedure to be followed in cases where objection is raised to a notification.

Prominent among these was a Japanese proposal providing that disputes concerning claims under the *jus cogens* articles should be referred to the International Court at the instance of any party to the dispute and that, in other cases, the dispute should be referred to a simple form of arbitration if no solution had been reached within twelve months of the notification.¹²³

A Swiss proposal required the notifying party to refer any claim to which objection had been raised to the International Court of Justice or to an arbitral tribunal; it was accompanied by a presumption of abandonment of the claim in the event of non-recourse within a prescribed period to one or other of these instances.¹²⁴

Coming down the scale, a thirteen-power amendment, sponsored by a mixed group of Western, Latin American and Afro-Asian States,¹²⁵ embodied a two-stage procedure involving initially an institutionalised form of conciliation followed, in the event of failure of the conciliation process, by a simple form of arbitration.

A United States proposal followed somewhat similar lines, although it envisaged the establishment of a special Commission on Treaty Disputes and contained particular provisions about allegations of material breach.¹²⁶

Finally, a complicated Uruguayan amendment seemed designed to bring into play the powers of the Security Council and the General Assembly in relation to disputes about the invalidity or termination of treaties.¹²⁷

The debates at the first session of the Conference failed to resolve this issue. As anticipated, the Soviet Union and other Eastern European countries, supported by a number of influential Afro-Asian States, resolutely opposed all efforts to improve the disputes-settlement machinery. Nonetheless, there was discernible a growing measure of support for some additional provision along the lines of the thirteen-power proposal. In the event, however, it was decided to defer until the second session consideration of all proposals for additions to the basic Commission proposal on disputes-settlement machinery; as a result of a certain amount of tactical manoeuvring on the part of the Soviet Union and their associates, a link had been established between disputes-settlement and the issue of whether general multilateral treaties, and the Convention in particular, should be open to participation by all States, despite the fact that there was no logical connection between the two issues.

During the interval between the first and second sessions of the Conference

there was a certain amount of diplomatic activity.¹²⁸ This enabled the participants to assess with greater precision the likely reactions to particular proposals. It appeared that the proposal which was likely to command most support at the Conference would be along the lines of the thirteen-power proposal tabled at the first session. Accordingly, when debate was resumed on the issue of disputes settlement at the second session, attention was concentrated on a revised version of the thirteen-power proposal which attracted six additional co-sponsors — Austria, Bolivia, Costa Rica, Malta, Mauritius and Uganda. The nineteen-power proposal was duly adopted in the Committee of the Whole by a vote of fifty-four in favour, thirty-four against and fourteen abstentions after the anticipated defeat of the Swiss and Japanese proposals.

Meanwhile decisions on separate, and formally unconnected, issues had an influence on the final *dénouement* of the drama in plenary. First, the Committee of the Whole adopted a new article (now Article 4 of the Convention) which makes it quite clear that the Convention is strictly prospective and applies only to treaties concluded by States after the entry into force of the Convention for such States.¹²⁹ The genesis of this article is interesting. A close study of the records of the Vienna Conference will reveal how the attitudes of many States towards particular proposals were influenced and in some cases distorted, by the contemplated effect upon existing treaty disputes. In particular the divisions among Latin American States on some of the draft articles proposed by the Commission and on amendments tabled to those draft articles are in large measure attributable to the anticipated impact of the Convention upon existing disputes — particularly territorial disputes where the validity or continued operation of an old treaty might be in question. None of this is apparent on the record, as the debates at Vienna were generally conducted on an abstract level; but it requires no great knowledge of the details of current territorial disputes to see how particular delegations sought to obtain advantage for themselves by fervent support of Commission proposals or of amendments which would support their position in current treaty disputes. Another aspect of this not unexpected trend was that many States involved in existing treaty disputes were anxious lest the automatic disputes-settlement machinery to which they were not necessarily opposed in principle might be invoked in relation to such disputes. By the second session, it had become clear that the Conference would reject the vast majority of amendments and proposals which had been motivated by a desire to obtain an advantage in relation to existing treaty disputes. Accordingly there was growing support for a specific provision about the non-retroactive effect of the Convention as a whole, particularly because this would ensure that any automatic disputes-settlement machinery would not apply to disputes arising out of existing treaties.

The second factor which influenced the final outcome was the defeat, in the

Committee of the Whole, of a series of related proposals designed either to incorporate the principle that 'all States' have the right to participate in general multilateral conventions or to ensure that the Vienna Convention itself would be open to participation by 'all States'. The first of these proposals was objected to on the ground that it ran contrary to the principle that States are, and should be, free to choose their treaty partners, the second on the ground that it raised all too familiar problems of application — who was to determine which entities whose status was in dispute were 'States'.

So matters stood when the decisive Plenary stage began. In the course of consideration in Plenary of the series of articles setting out substantive grounds of invalidity and termination of treaties, a number of delegations, including those of the United States, Canada, Greece, Norway, New Zealand, the United Kingdom, the Federal Republic of Germany and Denmark, made general statements declaring that their positive support for, or abstention on, individual articles in Part V of the Convention was conditional on there being included in the Convention something on the lines of the nineteen-power amendment for automatically available disputes-settlement machinery. Other delegations, including those of Italy, the Netherlands, Senegal, Austria, Ireland and Japan made the same point in the narrower context of the *jus cogens* articles.

It was thus evident that the success or failure of the Conference as a whole hung on the decision which would have to be taken in Plenary on the nineteen-power proposal. For the nineteen-power proposal to be definitely adopted, a two-thirds majority was required. When the decisive moment came, however, the nineteen-power proposal for a new Article 62 *bis* received only sixty-two votes in favour, with thirty-seven against and ten abstentions. It therefore failed of adoption.¹³⁰

There remained only six days before the closure of the Conference. All seemed lost. Renewed efforts on the part of the Eastern European countries to incorporate a substantive article declaring that 'all States' have the right to participate in general multilateral Conventions were decisively rejected. There seemed to be total deadlock, given the undoubted determination of the Western States to secure adequate disputes-settlement machinery and the strong insistence of the Soviet Union and other Eastern European countries that some gesture should be made on the 'all States' issue. Informal meetings among leading delegations failed to move the log-jam. Numerous compromise formulae were floated, but the positions were too far apart to permit of the gap being bridged in a manner that would be positively satisfactory to all.

In these circumstances, a group of Afro-Asian countries, consisting of Ghana, the Ivory Coast, Kenya, Kuwait, Lebanon, Morocco, Nigeria, Sudan, Tunisia and Tanzania, decided to make a last-ditch attempt. They drew up a 'package' proposal consisting of a new article entitled 'Procedures for judicial settlement, arbitration and conciliation' coupled with a declaration on

'universal participation' in the Convention which in substance invited the General Assembly to give consideration, at its twenty-fourth session, to the matter of issuing invitations to States not members of the United Nations or any of its specialised agencies to become parties to the Convention.¹³¹

The new article, which now appears as Article 66 of the Convention, is based largely on the nineteen-power proposal, but it borrows some elements from the Japanese amendment. Thus it permits any party to a dispute concerning the interpretation or application of the *jus cogens* articles to submit that dispute to the International Court of Justice if no solution has been reached within twelve months by use of the procedures in Article 33 of the Charter and unless the parties have agreed instead to refer the issue to arbitration. For the rest, it establishes machinery for compulsory conciliation, at the instance of any party, in relation to disputes concerning the interpretation or application of the other articles in Part V of the Convention. The detailed conciliation machinery is set out in an annex to the Convention. The following are the main features of the conciliation machinery:

- (a) Every State which is a member of the United Nations or a party to the Convention is invited to nominate two qualified jurists as conciliators. The names of the persons so nominated are included in a list to be maintained by the Secretary-General of the United Nations.
- (b) When the conciliation machinery is invoked under Article 66, the Secretary-General brings the dispute before a conciliation commission. The State or States constituting one of the parties to the dispute is entitled to appoint:
 - (i) One conciliator of the nationality of that State or of one of those States who may or may not be chosen from the list.
 - (ii) One conciliator not of the nationality of that State or of one of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute is entitled to appoint two conciliators in the same way. The four conciliators appoint, within a specified period, a fifth conciliator from the list, who acts as chairman. Any appointment not made within the specified time periods will be made by the Secretary-General.
- (c) The conciliation commission so constituted decides its own procedure. It makes decisions or recommendations by majority vote of its members.
- (d) The conciliation commission hears the parties, examines the claims and objections and makes proposals to the parties with a view to reaching an amicable settlement of the dispute.
- (e) The commission is obliged to report within twelve months of its constitution. Its report is deposited with the Secretary-General and transmitted to the parties to the dispute. The report, including any conclusions regarding the facts or questions of law, is not binding upon the parties and

has no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

A number of minor technical criticisms can be made of this conciliation machinery.¹³² In particular there may, on occasions, be difficulty in determining on which side of a dispute a particular State falls, in circumstances where the dispute involves more than two States. But it should equally be noted that the Annex is so constructed as to ensure that a conciliation commission will be constituted even if one of the parties to the dispute fails to appoint its conciliators within the time limit stipulated; thus the difficulties which were experienced in establishing the Treaty Commissions under the peace treaties with Bulgaria, Hungary and Romania and which gave rise to a request for an advisory opinion from the International Court of Justice¹³³ are effectively overcome.

Apart from these technical points, the Annex betrays some of the stresses and strains which were operative in the closing stages of the Conference. The original thirteen-power proposal and the later nineteen-power proposal had, of course, been predicated on a stage of compulsory arbitration if the conciliation procedures had failed to achieve a settlement. Thus there was every reason for having a clear separation between flexible and essentially non-legal conciliation procedures and the fall-back possibility of formal arbitration which would of necessity involve a determination of the legal issues. But the 'package' proposal did not envisage any stage of compulsory arbitration or judicial settlement, except in relation to the *jus cogens* articles. Thus there was concern lest the legal aspects of the dispute might be overlooked in the conciliation process. For this reason the sponsors of the 'package' proposal modified to some extent the content of the nineteen-power proposal by laying additional stress on the obligation of the conciliation commission to hear argument on controverted issues of law and fact.¹³⁴

Of course, there is one obvious gap in the Convention regime — what happens in the event of failure of conciliation? To this the Convention as such provides no answer, but it is not unreasonable to assume, despite the nominally recommendatory character of the conciliation commission's report, that a report favourable to the State having asserted a ground of invalidity or termination would *prima facie* justify that State in going ahead with the measure proposed, and that an unfavourable report would justify the objecting State in claiming continued performance of the treaty.¹³⁵

III. Conclusions on the settlement of disputes

A number of criticisms have been directed against the Convention regime on disputes-settlement. At one end of the spectrum, it is alleged that those States which were and are averse to any form of compulsory adjudication can hardly

be expected to accept the principle of compulsory jurisdiction in relation to all disputes arising in the future over any and all treaties, or even to disputes arising in connection with the *jus cogens* articles.¹³⁶ To this, and to the associated doubt cast on the good faith of those advocating compulsory adjudication in the case of treaties, it can only be said that the touchstone of good faith surely lies in the willingness of States to accept in advance the obligation to submit to some form of impartial third-party machinery any unilateral claim based on the series of articles concerning the invalidity, termination and suspension of operation of treaties.

In the middle of the spectrum is the anxiety expressed notably by Thirlway, that the Convention regime on disputes-settlement may be a retrograde step in relation to the jurisdiction of the International Court of Justice. Thirlway concedes that the Optional Protocol system was never likely to extend the Court's jurisdiction to many States which were otherwise cool towards it:

On the other hand, many of the States which participated in the work of the Vienna Conference, and are likely to become parties to the Convention, have either deposited acceptances of jurisdiction under the 'optional clause', or are linked to other States by general treaties for the settlement of disputes, which provide for the jurisdiction of the International Court of Justice. In such acceptances and in such treaties, a common exception or reservation is the exclusion of disputes which the parties have agreed to settle in some other way.¹³⁷

Thus, Thirlway argues, the Convention provisions on dispute-settlement will operate, so far as such States are concerned, not merely not to increase the role of the International Court of Justice, but actively to decrease it. There is of course some substance in Thirlway's concern. The problem arises from the lack of any specific saving clause in Article 66; and this is in part attributable to the circumstances in which Article 66 was incorporated into the Convention as part of a 'package deal' brooking of little or no discussion of substance. That the point made by Thirlway did not escape some of the participants in the Conference is confirmed by the terms of the declarations made by the Governments of the United Kingdom, Canada and New Zealand respectively, when signing and subsequently ratifying or acceding to the Convention.¹³⁸ These declarations record the understanding of the respective Governments that nothing in Article 66 of the Convention is intended to oust the jurisdiction of the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes; and further record that the respective Governments will not regard the provisions of Article 66(b) as providing 'some other method of peaceful settlement' within the terms of their 'optional clause' declarations. The record of the debates at the Conference on disputes-settlement certainly lends credence to the understanding so recorded. It remains to be seen how effective will be the second element in these declarations.

At the other end of the spectrum, doubt has been expressed as to the

suitability of the Convention regime on disputes-settlement, particularly as regards the role of the International Court of Justice in relation to the *jus cogens* articles. It is maintained that the vague and uncertain language of the articles on *jus cogens* would give to the Court the power to decide, without any solid criteria, whether a norm is peremptory or not and would thus confer on it the task not simply of interpreting the law but of creating it.¹³⁹ It is also argued that a procedure of non-binding conciliation for disputes as grave as those which might arise in connection with the asserted invalidity of a treaty based on the articles concerning coercion of a State by the threat or use of force or *rebus sic stantibus* is thoroughly unsatisfactory.¹⁴⁰

These arguments are *prima facie* compelling; but one must not exaggerate their significance. In the first place, many would say that a limited degree of judicial innovation is already a feature of the jurisprudence of the International Court.¹⁴¹ Others would go much further and argue positively, in the context of a discussion of the distinction between 'legal' and 'political' disputes, that the Court should take a much broader view of its functions and, in particular, should refrain from declining to exercise jurisdiction on the ground that the issue which is before it is 'political'.¹⁴² It is not necessary to go so far as this in order to reach the conclusion that the Court should be able to perform the task conferred upon it by Article 66 of the Convention without indulging in overt judicial law-making. The Court may well in this context have to determine the precise significance of the expression 'the international community of States as a whole'. But beyond this, its function will be the predictable and normal function of any tribunal, that is to say, the weighing and assessment of evidence — in this case, evidence as to whether a particular rule of international law is accepted and recognised by the international community as a whole as being a norm of *jus cogens*. The task will undoubtedly be a difficult one, but it is a task which is essentially judicial in nature.¹⁴³

One must in any event bear in mind that the chief value of the automatic procedures for settlement of disputes now written into the Convention lies not in their precise content but in their mere existence. Paradoxically, the less they are utilised the more effective they will be. No State is anxious to indulge in lengthy and expensive international conciliation or litigation. This imposes a very heavy burden upon Foreign Offices and upon their legal advisers, with the outcome far from certain. What is important — what is indeed crucial — is that there should always be in the background, as a necessary check upon the making of unjustified claims, or upon the denial of justified claims, automatically available procedures for the settlement of disputes. In the absence of such procedures there would be no effective restraint upon States wishing to release themselves from inconvenient treaty obligations. This is the effective response to the other criticism that, if political relations between the States in dispute are bad, major disputes between them are unlikely to be confinable within a treaty dispute context; and, if they are normal, that the

habitual diplomatic and administrative processes will find solutions to them.¹⁴⁴ No one would seek to argue that the mere existence of the Convention procedures will prevent major treaty disputes from arising, particularly when relations between the States concerned are strained; but it is precisely to guard against unjustified action in periods of strained relations that these safeguards have been written into the Convention. It is partly for this reason that reservations to Article 66 of the Convention or to the Annex raise such serious issues.¹⁴⁵

Notes

- 1 Suy in *The Concept of Jus Cogens in International Law*, 18 (1967).
- 2 Digest II, 14, 38.
- 3 Cheshire and Fifoot, *Law of Contract*, 10th edition, 315–19 (1981).
- 4 Suy, *op. cit.*, at 20.
- 5 *Janson v. Driefontein Consolidated Mines Ltd.* [1902] A.C. 484 at 492; *Fender v. St. John Mildmay* [1938] A.C. 1 at 40; see, however, McCaig J. in *Naylor Benzon Ltd. v. Krainische Ind. Ges.* [1918] 1 K.B. 331 at 349, and *Shaw v. Director of Public Prosecutions* [1962] A.C. 220.
- 6 Schwelb, 'Some aspects of international *jus cogens* as formulated by the International Law Commission', 61 *A.J.I.L.* (1967), at 948.
- 7 Oppenheim, 1 *International Law*, 93 (8th ed., 1955).
- 8 See, in particular, the articles by Suy and Schwarzenberger in *The Concept of Jus Cogens in International Law* (Carnegie Endowment for International Peace, 1967); Verdross, '*Jus dispositivum* and *jus cogens* in international law', 60 *A.J.I.L.* (1966), at 55–63; Schwelb, *loc. cit.*, at 946–75; Virally, 'Reflexions sur le *jus cogens*', 12 *Annuaire français de droit international* (1966), at 1–29; Schwarzenberger, *International Law and Order*, 27–56 (1971); Marek, 'Contribution a l'étude du *jus cogens* en droit international' in *Hommage à Paul Guggenheim*, 426–59 (1968); Scheuner, 'Conflict of treaty provisions with a peremptory norm of general international law and its consequences', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1967), at 520–32; Nisot, 'Le concept du *jus cogens* par rapport au droit international', *Revue belge de droit international* (1968), at 1–7; Barberis, 'La liberté de traiter des états et le *jus cogens*', *Z. a. ö. R. V.* (1970), at 19–45; de Visscher, 'Positivisme et *jus cogens*', 75 *Revue Générale de Droit International Public* (1971–I), at 5–11; Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties* (1974); Mann, 'The doctrine of *Jus Cogens* in International Law', *Festschrift für Ulrich Scheuner*, 399–418 (1973); Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (1976); Reuter, *op. cit.*, at 138–43; Brownlie, *Principles of Public International Law*, 512–15 (3rd ed., 1979); Crawford, *The Concept of Statehood in International Law*, 79–84 (1979); Gomez Robledo, 'Le *jus cogens* international: sa genèse, sa nature, ses fonctions', 172 *Recueil des Cours* (1981), 17–208; Alexidze, 'Legal nature of *jus cogens* in contemporary international law', 172 *Recueil des Cours* (1981), 227–63; and Gaja, '*Jus Cogens* beyond the Vienna Convention', 172 *Recueil des Cours* (1981), 279–301.
- 9 *Private Law Sources and Analogies of International Law*, 156 (1927).
- 10 *Ibid.*, at 176.
- 11 Marek, *loc. cit.*, at 429–32. Reuter likewise draws attention to the difficulty of principle arising from the transposition to international law of a private law concept applied to contracts within the framework of a legal system having a legislator capable of imposing general rules on all subjects of the law: *op. cit.*, at 139.

- 12 *International Law and Order*, at 51.
- 13 Fitzmaurice and Vallat, 'Sir (William) Eric Beckett, K.C.M.G., Q.C. (1896–1966): an appreciation,' 17 *I.C.L.Q.* (1968), 288.
- 14 Cf. Marek, *loc. cit.*, at 448. Crawford would deny the legitimacy of this example, arguing that a treaty denying the rule *pacta sunt servanda* is an 'absurdity' since the very activity of treaty-making assumes the general rule. He is of the view that *jus cogens* is concerned only with substantive, and not with structural, rules: *The Concept of Statehood in International Law*, at 79–80.
- 15 Art. 6(a) of the Charter of the International Military Tribunal (UKTS No. 27 (1946)); the Nuremberg principles were endorsed in General Assembly Resolution 95(I) of 11 December 1946. See also GA Res. 2625 (XXV) embodying the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States.
- 16 1 *Völkerrecht*, 23 (1958).
- 17 *Völkerrecht*, 130 (5th ed., 1964); see also *id.*, 'Forbidden treaties in international law', 31 *A.J.I.L.* (1937), 571–7 and 60 *A.J.I.L.* (1966), 56–63.
- 18 1 *Völkerrecht*, at 6, 17 (1958) and 3 *id.*, 140 (1961).
- 19 1 *Lehrbuch des Völkerrechts*, 439 (1960).
- 20 Note on 'Verträge' in Strupp and Schlochauer, 3 *Wörterbuch des Völkerrechts*, 531 (1962). But note that Guggenheim had earlier expressed the view that 'international law accordingly admits that a treaty may have any content whatsoever, without limitations or restrictions of any kind, and that anything can be made the subject of a treaty': 1 *Traité de Droit International Public*, 57 (1953).
- 21 1 *Principes Généraux du Droit International Public*, 341–2.
- 22 1 *Traité de Droit International Public*, Part 3, 300 (1926).
- 23 2 *Droit International Public Positif*, 69 (2nd ed., 1962).
- 24 *Introduction au Droit des Traités*, 141–3 (1972).
- 25 Quadri, 'Cours général de droit international public', 113 *Recueil des Cours* (1964), at 335.
- 26 Morelli, 'A proposito di norme internazionali cogenti', 51 *Rivista di diritto internazionale*, at 108 *et seq.*
- 27 *Op. cit.*, at 214–15.
- 28 *Principles of Public International Law*, 515 (3rd ed., 1979): cf. also *International Law and the Use of Force by States*, 409 (1961).
- 29 *The Prospects of International Adjudication*, 504 and 458–60 (1964).
- 30 *International Law and Order*, at 50. Schwarzenberger continues to assert that foremost among the dubious 'developments' of the law of treaties at the Vienna Conference are 'intrusions into the exclusiveness of treaty relations by alleged but unspecified rules of international *jus cogens*, existing as well as arising in future': 'Detente and International Law', *Yearbook of World Affairs* (1981), 277. For a fuller survey of modern doctrinal opinion, see Gomez Robledo, *loc. cit.*, footnote 8 above, at 69–87.
- 31 A/CN.4/63 of 24 March 1953.
- 32 *P.C.I.J.*, ser. A/B, No. 63, at 149–50.
- 33 *P.C.I.J.*, ser. A, No. 1, at 47.
- 34 *P.C.I.J.*, ser. A/B, No. 41, at 64.
- 35 *I.C.J. Rep.* (1958), at 106–7.
- 36 *I.C.J. Rep.* (1951), at 23. (Emphasis added.)
- 37 *Ibid.*
- 38 Gomez Robledo, *loc. cit.*, footnote 8 above, at 33.

- 39 Judgment of 7 April 1965, 18 BVerfGE 441, and in English in 43 *I.L.R.* 3. See Riesenfeld, '*Jus dispositivum* and *jus cogens* in the light of a recent decision of the German Supreme Constitutional Court,' 60 *A.J.I.L.* (1966), at 511–15.
- 40 *I.C.J. Rep.* (1969), at 97–8.
- 41 *Ibid.*, at 182.
- 42 *Ibid.*, at 248.
- 43 Mann, *loc. cit.*, at 404; cf. Thirlway, *International Customary Law and Codification*, 121–3 (1972).
- 44 *I.C.J. Rep.* (1970), at 304.
- 45 *I.C.J. Rep.* (1971), at 72–5.
- 46 *Ibid.*, at 72.
- 47 *I.C.J. Rep.* (1980), at 41.
- 48 *Ibid.*, at 40.
- 49 Gaja, *loc. cit.*, footnote 8 above, at 286.
- 50 *I.C.J. Rep.* (1970), at 32.
- 51 Elias, *Modern Law of Treaties*, 185 (1974).
- 52 *I.C.J. Rep.* (1966), 4; cf. Mann, *loc. cit.*, at 407.
- 53 Higgins, 'Aspects of the case concerning the Barcelona Traction, Light and Power Company Ltd.' 11 *Virginia Journal of International Law* (1971), 329–30. Cf. the separate opinion of Judge Fitzmaurice, who found himself unable to agree that the question turned on to whom the obligation was owed; Judge Fitzmaurice correctly points out that the issue involved was one of general international law obligations in the sphere of the treatment of foreigners, and adds: 'If in [this] area, a State, either directly or through its agencies or authorities, acts illicitly, it stands in breach of international law irrespective of whether any other State is qualified to take the matter up ...'. *I.C.J. Rep.* (1970), at 66. In Judge Fitzmaurice's view, the relevant question is what person or entity has a cause of action in regard to damages sustained by shareholders, resulting from illicit treatment of the company.
- 54 See generally Schwelb, 'The *actio popularis* and international law', *Israel Yearbook of Human Rights* (1972), 47.
- 55 *Yearbook of the International Law Commission* (1976–II), Part Two, at 95 (Art. 19).
- 56 Jimenez de Arechaga, 'International law in the past third of a century', 159 *Recueil des Cours* (1978), 66.
- 57 *Yearbook of the International Law Commission* (1976–II), 120.
- 58 *Ibid.*, at 91–2.
- 59 *Ibid.*, at 92.
- 60 Gaja, *loc. cit.*, at 293.
- 61 Jimenez de Arechaga, *loc. cit.*, at 275.
- 62 *Repertoire of the Practice of the Security Council*, Supplement 1964–5, 201, 221; see also Schwelb, *loc. cit.*, footnote 6 above, at 952–3. For more recent developments see White, 'The Turkish Federated State of Cyprus: a lawyer's view', *The World Today* (1981), 135–41, and Higgins, *United Nations Peacekeeping: Documents and Commentary*, Vol. IV, Europe 1946–79 (1981), *passim*, but especially at 92–3, 240–2 and 402.
- 63 *Loc. cit.*, at 956–7.
- 64 Barberis, *loc. cit.*, at 34–5; Verdross, 60 *A.J.I.L.* (1966), at 59.
- 65 Schwelb, *loc. cit.*, footnote 6 above, at 953.
- 66 *Loc. cit.*, at 956.
- 67 *Loc. cit.*, at 35.
- 68 60 *A.J.I.L.* (1966), at 59.

- 69 Art. 2(1).
- 70 *Yearbook of the International Law Commission* (1966–II), 248.
- 71 *Loc. cit.*, footnote 8 above, at 526.
- 72 *Op. cit.*, at 81.
- 73 *Ibid.*
- 74 Jimenez de Arechaga, *loc. cit.*, at 64.
- 75 Brownlie, *op. cit.*, at 513. But note that there is considerable controversy over the content of these principles, even as *jus dispositivum*; the suggestion that they may constitute rules of *jus cogens* is accordingly far-fetched.
- 76 Marek, *loc. cit.*, at 452.
- 77 *Yearbook of the International Law Commission* (1966–II), 247 (Article 50).
- 78 *Official Records, First Session, 52nd meeting* (Barros and Suarez).
- 79 *Ibid.*, 53rd meeting (Miras).
- 80 *Ibid.*, 52nd meeting (Khlestov).
- 81 *Ibid.*, 53rd meeting (Nahlik).
- 82 *Ibid.*, 54th meeting (Kudryavtsev).
- 83 *Ibid.*, 56th meeting (Makarevich).
- 84 *Yearbook of the International Law Commission* (1966–II), 248–9.
- 85 *Official Records, First Session, 52nd meeting* (Sweeney).
- 86 *Ibid.*, 52nd meeting (Evrigenis).
- 87 See Neuhold, 'The 1968 session of the United Nations Conference on the Law of Treaties', 19 *Oesterreichische Zeitschrift für öffentliches Recht* (1969), 86. Cf. Elias, *op. cit.*, at 182–4.
- 88 *Official Records, First Session, 80th meeting* (Yasseen).
- 89 *International Law and Order*, at 53.
- 90 *Loc. cit.*, at 18.
- 91 Nisot, *Revue belge de droit international* (1968), at 1–2.
- 92 Schwarzenberger, *International Law and Order*, at 29–48.
- 93 75 *Revue Générale de Droit International Public* (1971), Vol. I, at 11.
- 94 *Official Records, First Session, 54th meeting* (Bokor-Szegö).
- 95 *Ibid.*, 53rd meeting (Nahlik).
- 96 Tunkin, *Theory of International Law*, 158 (trans. Butler, 1974): cf. Sztucki, *op. cit.*, footnote 8 above, who cites other Soviet and Eastern European publicists in the same sense (at 64–6).
- 97 *Ibid.*, at 157, 158.
- 98 Reuter, *op. cit.*, footnote 24 above, at 142.
- 99 In the same sense, see de Visscher, *loc. cit.*, at 5–11.
- 100 The 'moral' foundation for the notion of *jus cogens* has been remarked upon by several commentators: see Capotorti, *loc. cit.*, at 522 and Jimenez de Arechaga, *loc. cit.*, at 64.
- 101 *Supra*, p. 217.
- 102 Crawford, *The Concept of Statehood in International Law*, 82 (1979).
- 103 Brownlie, *op. cit.*, at 514.
- 104 Lewis Carroll, *Alice's Adventures in Wonderland*, Chapter VI.
- 105 *Yearbook of the International Law Commission* (1966–II), 248–9.
- 106 *Ibid.*, at 261.
- 107 *Ibid.* The distinction, as regards the possibility of separability, between treaties conflicting with an existing rule of *jus cogens* and those conflicting with a new rule of *jus cogens* has been criticised on the ground that it clearly imposes an additional sanction in the case of the former: Capotorti, *loc. cit.*, at 464.
- 108 Capotorti, *loc. cit.*, at 458; Reuter, *op. cit.*, at 177.

- 109 Capotorti, *loc. cit.*, at 459.
- 110 Sztucki, *op. cit.*, at 111.
- 111 Comments by Government of Luxembourg, reproduced in *Yearbook of the International Law Commission* (1966–II), 312.
- 112 Comments by United Kingdom Government, reproduced in *Yearbook of the International Law Commission* (1966–II), 345.
- 113 *Yearbook of the International Law Commission* (1966–II), 262.
- 114 Briggs, 'Procedures for establishing the invalidity or termination of treaties under the International Law Commission's 1966 draft articles on the law of treaties', 61 *A.J.I.L.* (1967), at 976–89.
- 115 The Law of the Sea Conference (1958 and 1960) and the Vienna Conferences on Diplomatic Relations (1961) and Consular Relations (1963).
- 116 Kearney and Dalton, 'The treaty on treaties', 64 *A.J.I.L.* (1970), at 546. See also Dupuy, 'Codification et règlement des différends: les débats de Vienne sur les procédures de règlement', 15 *Annuaire français de droit international* (1969), at 72, and Briggs, 'The Optional Protocols of Geneva (1958) and Vienna (1961, 1963) concerning the compulsory settlement of disputes' in *Hommage à Paul Guggenheim*, 640–1 (1968).
- 117 See Houben, 'Principles of international law concerning friendly relations and co-operation among States', 61 *A.J.I.L.* (1967), at 710–16, and other references cited in footnote 84 to Chapter VI *supra*.
- 118 Cf. Tunkin, *op. cit.*, at 60: see also Haraszti, 'Reflections on the invalidity of treaties' in *Questions of International Law*, 75–6 (Haraszti ed., 1977).
- 119 *I.C.J. Rep.* (1966), at 6.
- 120 *Official Records, First Session*, 52nd meeting (Yasseen) and 54th meeting (Rosenne).
- 121 *Official Records, Second Session*, 25th plenary meeting (Vallat).
- 122 A/Conf.39/C.1/L.250.
- 123 A/Conf.39/C.1/L.339 (1968).
- 124 A/Conf.39/C.1/L.347 (1968).
- 125 A/Conf.39/C.1/L.352/Rev.1 (1968), sponsored by the Central African Republic, Colombia, Dahomey, Denmark, Finland, Gabon, the Ivory Coast, Lebanon, Madagascar, the Netherlands, Peru, Sweden and Tunisia.
- 126 A/Conf.39/C.1/L.355 (1968).
- 127 A/Conf.39/C.1/L.343 (1968).
- 128 Kearney and Dalton, *loc. cit.*, at 549–50.
- 129 See Chapter I *supra*, pp. 7–9: see also Vierdag, 'The law governing treaty relations between parties to the Vienna Convention on the Law of Treaties and States not party to the Convention', 76 *A.J.I.L.* (1982), at 779–801. Vierdag discusses at length the formidable problems arising in connexion with the interpretation and application of Art. 4 with respect to multilateral treaties.
- 130 *Official Records, Second Session*, 27th plenary meeting (16 May, 1969).
- 131 Consideration of the action to be taken on this declaration was deferred by the General Assembly until 1974, by which time much of the political heat had gone out of the 'all States' issue as a result of the admission to the United Nations of the Federal Republic of Germany and the German Democratic Republic. On 12 November 1974, the General Assembly adopted Res. 3233 (XXIX) whereby it decided to invite all States to become parties to the Vienna Convention on the Law of Treaties.
- 132 See Rosenne, 'The settlement of treaty disputes under the Vienna Convention', 31 *Z.a.o.R.V.* (1971), at 48–52.

- 133 *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania case: I.C.J. Rep.* (1950), 65 and (Second Phase) *ibid.*, 221.
- 134 Kearney and Dalton, *loc. cit.*, at 553–4; see also Elias, *op. cit.*, at 193–4.
- 135 Kearney and Dalton, *loc. cit.*, at 555; cf. Elias, *op. cit.*, at 194.
- 136 Nahlik, *loc. cit.*, at 755.
- 137 Thirlway, *op. cit.*, at 12–13.
- 138 See Chapter III *supra*, p. 64.
- 139 Deleau, *loc. cit.*, at 21.
- 140 *Ibid.*, at 22.
- 141 Fitzmaurice, 'Judicial innovation — its uses and perils', *Cambridge Essays in International Law* (1965), at 24–47.
- 142 Higgins, 'Policy considerations and the international judicial process', 17 *I.C.L.Q.* (1968), at 58–84.
- 143 Among other commentators who in general approve the Convention regime on disputes-settlement are Kearney and Dalton, *loc. cit.*, at 561; and Capotorti, *loc. cit.*, at 579–81.
- 144 Rosenne, *loc. cit.*, at 61.
- 145 Chapter III *supra*, pp. 65–8.

CHAPTER EIGHT

The significance of the Convention

It is perhaps easier, some fourteen years after the adoption of the Convention, to assess its significance than it was in the immediate aftermath of the Vienna Conference. The hopes and fears of the participants can now be appreciated dispassionately in the light of subsequent experience. It is also possible to form the beginnings of a judgment on the impact which codification of the law of treaties has had, and continues to have, on the development of other branches of international law. Above all, we can now see the ways in which, by the consolidating effect it has had on the law, the Convention has established itself as the foundation-stone of the modern law of treaties.

I. Codification of the law of treaties: the unintended triptych?

There are three conditions which often
look alike
Yet differ completely, flourish in the
same hedgerow.

T. S. Eliot, *Little Gidding*

A quick reading of the Report made by the Commission to the General Assembly in 1966 reveals only too clearly the self-imposed limitations which the Commission had put on their study of the law of treaties. Excluded from the scope of the Commission's proposals were the following:

- (a) treaties between States and other subjects of international law, as well as treaties between such other subjects of international law;
- (b) treaties not in written form;
- (c) the effect of the outbreak of hostilities upon treaties.
- (d) the succession of States in respect of treaties;
- (e) the effect upon treaties of the extinction of the international personality of a State;

- (f) the international responsibility of a State with respect to failure to perform a treaty obligation;
- (g) the most-favoured nation clause;
- (h) the application of treaties providing for obligations or rights to be performed or enjoyed by individuals;
- (i) the relationship between treaty law and customary law.

For each and every one of these exclusions, the Commission gives what at first sight appears to be a plausible reason. As regards (a), it is said that 'treaties concluded by international organisations have many special characteristics'; and that 'it would both unduly complicate and delay the drafting of the present articles if [the Commission] were to include in them satisfactory provisions concerning treaties of international organisations'.¹ As regards (b), the Commission do not deny the legal force of oral agreements under international law, but consider that 'in the interests of clarity and simplicity, its draft articles on the law of treaties must be confined to agreements in written form'.² As regards (c), the Commission had already concluded in 1963 that the draft articles should not contain any provisions concerning the effect of the outbreak of hostilities upon treaties because 'study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question'; this question could not, in the Commission's view, be conveniently dealt with in the context of its work on the law of treaties.³ As regards (d), the Commission had decided that the question of succession of States in respect of treaties could be 'more appropriately dealt with under the item of its agenda relating to succession of States and Governments'.⁴ As regards (e), the Commission likewise considered that no useful provisions could be formulated on the effect upon treaties of the extinction of the international personality of a State 'without taking into account the problem of the succession of States to treaty rights and obligations'.⁵ As regards (f), the Commission had agreed in 1964 that the question of the international responsibility of a State with respect to a failure to perform a treaty obligation 'would involve not only the general principles governing the reparation to be made for breach of a treaty, but also the grounds which may be invoked in justification for the nonperformance of a treaty'; the Commission accordingly decided to take up these matters in connexion with its study of State responsibility.⁶ As regards (g), the Commission had thought it inadvisable to deal with the 'most favoured nation' clause in its general codification of the law of treaties, believing it might at some future time appropriately form the subject of a special study.⁷ As regards (h), there was a division of opinion within the Commission on whether the draft articles on the law of treaties should cover the application of treaties providing for obligations or rights to be performed or enjoyed by individuals, some members taking the view that such a provision

would go beyond the scope of the law of treaties.⁸ Finally, as regards (i), the Commission pointed out in the introduction to their final set of draft articles on the law of treaties that consideration of the whole question of the relationship between treaty law and customary law 'would lead it far outside the scope of the law of treaties proper and would more appropriately be the subject of an independent study'.⁹

Each and every one of these reasons, considered in isolation, can be justified. But, cumulatively, they reveal the Commission's uncertainty about the scope of the law of treaties. This is not surprising. Treaties are one of the primary sources of international law in general; they are simultaneously technical instruments governed by a distinct set of rules relating to their conclusion, entry into force, interpretation, application, amendment, validity and termination. In the broader sense, the law of treaties touches upon and interacts with every other branch of general international law. As Rosenne aptly puts it, many of the articles in the Convention 'only deal with the treaty-law aspect of a given hypothesis which itself may have points of contact with other topics'.¹⁰ This no doubt explains the Commission's unwillingness to venture more than they thought strictly necessary beyond the confines of the law of treaties viewed in the narrower sense — that is to say, as a series of provisions covering the formation, effects and duration of written agreements between States. It is as if the Commission had deliberately decided to paint in the style of Pieter de Hooch rather than Titian or Veronese. They denied the broader canvas in order to concentrate on the domestic minutiae. There is nothing wrong with this; indeed, there is much to be said for this disciplined approach. Nevertheless, the Commission did not escape criticism at the Conference for having subjected their draft to such severe limitations. In particular, many delegations were disturbed at the exclusion from the scope of the draft of treaties between States and international organisations or between international organisations themselves; and this led to the adoption by the Conference of a resolution recommending that the Commission take up the study, in consultation with the principal international organisations, of the question of treaties concluded between States and international organisations or between two or more international organisations.¹¹ As we have seen, this has led to the submission by the Commission in 1982 of a final set of eighty draft articles (together with an Annex) on the topic with a recommendation that a plenipotentiary conference be convened to study the draft articles and to conclude a convention on the subject.¹²

The exclusion from the scope of the Convention of the problem of succession of States in respect of treaties did not attract so much criticism at the Conference. At the time, it was envisaged that the Commission would be tackling this topic within the framework of its study of the problem of succession of States and Governments. It was thought to be more relevant to the law of succession than to the law of treaties.¹³ However, when, after the

conclusion of its work on the law of treaties in 1966, the Commission took up again in 1967 the topic of succession of States and Governments, its new Special Rapporteur on 'Succession of States in respect of treaties' (Sir Humphrey Waldock) rapidly reached the conclusion, in his first report on the topic, that '... the solution of the problems of so-called succession in respect of treaties is to-day to be sought within the framework of the law of treaties rather than of any general law of succession'.¹⁴ Subsequent developments, leading to the opening for signature on 23 August 1978 of the Vienna Convention on Succession of States in respect of Treaties, have been fully covered elsewhere.¹⁵

And so we have, in terms of the title to this section, the unintended triptych. The central panel is, of course, the Vienna Convention on the Law of Treaties. The right-hand panel, now completed, is the Vienna Convention on Succession of States in respect of Treaties (which, *pace* the view expressed by Sir Humphrey Waldock, has at least as much to do with the law of succession as with the law of treaties); and the left-hand panel will be constituted by the projected convention on the law of treaties between States and international organisations or between international organisations. It might be thought that a triptych so composed would exhaust the content of the law of treaties. But the law of treaties, even in the narrower sense, has some of the qualities to be discerned in a series of mirrors so fixed as to provide infinitely receding images; for it is no secret that the Commission's proposals on the law of treaties between States and international organisations or between international organisations would exclude from their scope treaties concluded between international organisations and subjects of international law other than States or organisations (e.g. an agreement concluded between an international organisation and the International Committee of the Red Cross).¹⁶

The unintended triptych is, therefore, even in its own terms, an incomplete work — or, to change the metaphor, an unfinished symphony. But this is no way to underrate or undervalue the significance of what *has* been achieved by way of codification of the law of treaties. The Vienna Convention on the Law of Treaties incorporates technical solutions to a number of problems which have long troubled international lawyers, even if these technical solutions are frequently formulated as residual rules to be applied unless the particular treaty otherwise provides or a different intention is otherwise established. Indeed, it is a mark of the subtlety and sophistication of the Commission's proposals that they were so often formulated in such a way as to give maximum effect to the principle of the autonomy of the negotiating States. The major task at the Vienna Conference was however to establish a proper balance between the requirement of security of treaties and the demand for recognition of newly emerging concepts, such as *jus cogens*, which might be destructive of that very security. A balance has been struck (some might say a precarious balance), and this balance contains one element which,

despite the criticisms to which it has been exposed, is heartening — namely, a renewed role for the International Court of Justice in relation to the interpretation and application of the *jus cogens* articles.

II. The temporal element

But at my back I always hear
Time's winged chariot hurrying near.
Marvell, *To his Coy Mistress*

The time factor in the law of treaties was always present in the consciousness of the Commission and of the participants in the Conference. In some instances, it had to be confronted and settled as an integral part of the rule which it was proposed to lay down. This is certainly true of Articles 24 and 25 (on entry into force and provisional application); it is even more true of Article 30 (successive treaties relating to the same subject-matter). In other instances the inter-temporal element had to be incorporated, even if in a distinctly muted form, as a subsidiary component of the substantive rule; in this context, reference can be made to paragraph 3 of Article 31 requiring, as part of the general rule of interpretation, that there be taken into account, together with the context, not only subsequent agreements between the parties and subsequent practice, but also 'any relevant rules of international law applicable in the relations between the parties'. Finally, the time factor had to be tackled directly in the context of Articles 28 (non-retroactivity of treaties) and 4 (non-retroactivity of the Convention).

Let us look a bit more closely at certain aspects of the rules laid down in the Convention with respect to entry into force and provisional application. Paragraph 3 of Article 24 provides that:

When the consent of a State to be bound by a treaty is established on a date after the treaty has come into force, the treaty enters into force for that State on that date, unless the treaty otherwise provides.

There can be little quarrel with this rule, and indeed it was not discussed at the Conference. What is interesting is its genesis. In first proposing a rule in this sense to the Commission, the Special Rapporteur (Sir Humphrey Waldock) has emphasised that it was based on the principle that a treaty does not have retroactive effect unless it otherwise provides; and that this principle applies equally in those cases where the treaty has been signed subject to ratification. There is no longer any mention of non-retroactivity in the Commission's commentary to what is now Article 24; but the *rationale* of the rule in paragraph 3 must surely be that a State's consent to be bound by a treaty expressed by ratification or accession has no retroactive effects, even if the instrument of ratification or accession is deposited after the treaty has entered into force generally.¹⁷ In other words, paragraph 3 of Article 24

can be viewed as simply another aspect of the general principle of non-retroactivity.

Article 25 raises quite different problems. The Commission had presented a draft article entitled 'Entry into force provisionally' which provided that 'a treaty may enter into force provisionally' if certain conditions were met. The concept of provisional *entry into force* was strongly attacked on the ground that there could not be two entries into force and that confusion should be avoided between mere application, which was a question of practice, and entry into force, which was a formal legal notion.¹⁸ As one of the participants explained:

The word 'provisionally' introduced a time element, and unless emphasis was placed on application rather than entry into force, it would be necessary to specify that the word 'provisionally' referred to time and not to legal effects.¹⁹

In the light of these and other interventions, and on the basis of an amendment tabled by the delegations of Czechoslovakia and Yugoslavia, it was decided to re-formulate Article 25 in terms of provisional application rather than provisional entry into force. In terms of theory and doctrine, this change would appear to be justified, since the better view is that provisional application results from an accessory or secondary informal agreement among the parties to a treaty that the substantive provisions of the treaty, or certain selected substantive provisions, should be applied pending the formal entry into force of the treaty.²⁰

It may also be helpful to analyse at this stage the Commission's handling of the inter-temporal element in the context of the interpretation of treaties. In the set of draft articles adopted by the Commission on first reading, Article 69, paragraph 1, under the heading 'General Rule of Interpretation', was formulated as follows:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to each term:

- (a) in the context of the treaty and in the light of its objects and purposes; and
- (b) in the light of the rules of general international law *in force at the time of its conclusion*.²¹

In their commentary to this provision, the Commission stressed that subparagraph (b) constituted the application to treaties of the general principle of inter-temporal law enunciated by Judge Huber in the *Island of Palmas* arbitration, namely that:

... a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled.²²

However, the members of the Commission were divided in their views on this particular formulation. Some members, while accepting that the initial

meaning of the terms of a treaty is to be found by reference to the law in force at the time of its conclusion, took the view that the interpretation of the treaty might be affected by subsequent changes in the general rules of international law. The majority, however, considered that the effect of changes in the law upon a treaty was more a question of the *modification* of the rule laid down in the treaty by a later legal rule than one of the interpretation of the terms of the treaty.²³ As a result, the Commission dropped the phrase 'in force at the time of its conclusion' in their final draft of the 'General Rule of Interpretation' (which has now become Article 31 of the Convention). The Commission explained their shift in attitude as follows:

On re-examining the provision, the Commission considered that the formula used in the 1964 text was unsatisfactory, since it covered only partially the question of the so-called intertemporal law in its application to the interpretation of treaties and might, in consequence, lead to misunderstanding. It also considered that, in any event, the relevance of rules of international law for the interpretation of treaties in any given case was dependent on the intentions of the parties, and that to attempt to formulate a rule covering comprehensively the temporal element would present difficulties. It further considered that correct application of the temporal element would normally be indicated by interpretation of the term in good faith. The Commission therefore concluded that it should omit the temporal element and revise the reference to international law so as to make it read 'any relevant rules of international law applicable in the relations between the parties'.

This episode demonstrates vividly the complexities of the general principle of inter-temporal law and the reluctance of the Commission (and indeed of the Conference) to come to grips with the problem of how it should be applied in relation to the interpretation of treaties. Here again, the time factor proved to be a notable source of nervousness and confusion.

But of course the time factor had to be faced squarely in the context of what has now become Article 28 of the Convention dealing with the non-retroactivity of treaties. As we have seen, the principle of non-retroactivity embodied in Article 28 is cast as a residual rule to be applied 'unless a different intention appears from the treaty or is otherwise established'. In other words, non-retroactivity is not a rule of *jus cogens*; everything depends on the intentions of the parties.²⁵ Despite the difficulties which they confronted in seeking to formulate precisely the general principle of non-retroactivity of treaties, one can almost sense the feeling of relief with which the Commission must have moved from consideration of the inter-temporal law to consideration of the principle of non-retroactivity. Here at least they were on more solid ground, relying, as they could, on a considerable body of international jurisprudence.

But the concern which the time factor provoked in the participants at the Conference was not altogether dissipated by the adoption of Article 28. It manifested itself again in the concluding stages of the Conference in the context of proposals for a specific article on the non-retroactivity of the

Convention itself. These proposals (which subsequently led to the inclusion in the Convention of Article 4) evoked a sympathetic response from the overwhelming majority of the participants; but it is noteworthy that the sympathetic response was dictated by widely differing considerations. For some delegations, a provision on the lines of Article 4 was needed because several of the provisions in the Convention (Articles 12, 14, 49, 50 and 56) introduced fundamental changes in practice or ran counter to generally accepted rules of international law;²⁶ for other delegations, a provision on the lines of Article 4 was considered desirable, not simply because certain articles in the Convention might not be expressive of rules of customary international law, but more significantly to emphasise that the dispute-settlement machinery could not be invoked in relation to continuing disputes involving treaties concluded before the entry into force of the Convention with respect to the parties in dispute.²⁷ Throughout the debates on what has now become Article 4, the underlying, if not clearly articulated, anxiety was that, notwithstanding the terms of Article 28, some States parties to the new Convention might seek to argue that particular provisions had retroactive effects; the danger was the more real given that the Commission had, in their commentaries to what are now Articles 52, 53 and 64 of the Convention specifically declared that these provisions should *not* be interpreted as applying retroactively, thereby possibly implying (on an *a contrario* argument) that other provisions *could* be interpreted as applying retroactively.²⁸ However that may be, the vast majority of delegations represented at the Conference, if for widely varying reasons, wished to affirm in positive terms the non-retroactivity of the Convention itself (that is to say, its non-application to treaties concluded by States before the entry into force of the Convention with regard to such States), while preserving the application to such treaties of any rules set forth in the Convention to which treaties would be subject independently of the Convention (that is to say, rules of customary international law or general principles of law); and this is the solution now embodied in Article 4.

Article 4 does of course operate as an additional, and highly significant, limitation upon the scope of the Convention. To the substantive limitations noted at the beginning of this Chapter must be added the severe temporal limitation imposed by Article 4. There has been little occasion yet, in the application of the Convention, to assess the full implications of Article 4;²⁹ for present purposes, it is sufficient only to note that the non-retroactivity of the Convention further diminishes its role as a treaty instrument.

III. The invalidity of treaties

'Well, I sha'n't go, at any rate,' said Alice: 'besides that's not a regular rule: you invented it just now.' 'It's the oldest rule in the book,' said the King. — Lewis Carroll, *Alice's Adventures in Wonderland*

This brief excerpt from the trial scene in *Alice in Wonderland* is illustrative of the atmosphere pervading the debates at the Conference on some of the more controversial grounds of invalidity now embodied in Part V of the Convention. More particularly is it evocative of the gulf between the protagonists of *jus cogens* and the doubters; and if there is a modicum of truth in Alice's protest, there is also a modicum of truth in the King's retort. Indeed, Alice's world affords other parallels. The Queen's outrageous call for 'Sentence first — verdict afterwards' was precisely what many delegations feared would be the result if the detailed rules of invalidity were spelt out without any impartial check upon their unilateral application by individual States. In retrospect — or at least in the perspective of fourteen years' subsequent experience — it can be seen that the hopes and fears of those on both sides of the divide were equally exaggerated. The impact of the Convention on the stability of treaty relations has so far been neutral. Treaty disputes have not disappeared; but neither have they proliferated. Admittedly, there have been *dicta* by individual judges in the International Court of Justice supportive of an expanded notion of *jus cogens*; but these *dicta* remain no more than *dicta*, and the influence of the *jus cogens* concept is to be seen rather more in other branches of international law than in the law of treaties itself. In particular, the asserted distinction between 'international crimes' and 'international delicts' in the International Law Commission's draft articles on State responsibility owes much to the new-found enthusiasm for establishing a hierarchical order among international legal obligations; and, equally, any further development of the *actio popularis* (which, if it ever takes place, will inevitably be subjected to stringent conditions because of the danger it poses to the principle of non-intervention) will no doubt be founded on the analogous distinction between obligations *erga omnes* and other obligations — that is to say, the distinction hinted at in the *Barcelona Traction* case.

What of the future? It can be anticipated that, on the political level, vague charges will continue to be made about the invalidity of so-called 'unequal' treaties, and that an attempt may be made to sustain some of these charges by reference to grounds of invalidity codified in the Convention. But the instances in which the validity of a treaty may be impeached on the more classical grounds of error and fraud will remain as infrequent as they have been in the past. *Jus cogens* will continue to be a fruitful subject for scholarly speculation and analysis; but the occasions on which it may be invoked to challenge the validity of a treaty will be rare indeed, if only because the vast

majority of States can be expected to behave with reasonable restraint and to refrain from concluding treaties the content of which would shock the conscience of all mankind.

Can it be said therefore that all the sound and fury generated at the Conference on the content of Part V of the Convention signified nothing? The cynic might argue so; but the cynic would be wrong. The Conference was an arena in which various conflicts of interest were fought out — between East and West, between old established States and newly independent States, between those harbouring a territorial grievance and the objects of that grievance, and between the devotees of *pacta sunt servanda* and those seeking release from what were considered to be inconvenient treaty obligations. Those various groupings overlapped and interwove, forming complicated patterns of mutual interest on particular issues. But above and beyond the traditional and identifiable cross-current of national attitudes and perceptions was a division between those participants who viewed codification of the substantive rules of the law of treaties as an end in itself and those who believed that codification of the substantive rules must march hand in hand with the development of machinery for the even-handed application of those rules. For those of both persuasions, the fact that the Convention has not attracted general, far less universal, participation must be accounted something of a failure: for those of the former because it may be taken to suggest something less than full accord on the content of the law of treaties, and for those of the latter because it demonstrates the continuing (and, in their view, perverse) reluctance of many States to accept that international law is as much a discipline as any other system of law. But the expression 'something of a failure' may be too strong. It ignores the true impact of the Convention as an instrument for consolidating and fixing in written form the central features of the law of treaties between States; for codifying what had hitherto defied codification, for settling long-disputed theoretical issues by ingenious formulations, and for integrating, within the process of codification, elements of progressive development some of which are difficult to disentangle from codification *stricto sensu*. It is to this aspect of the Convention that we now turn.

IV. The final paradox

A paradox, a paradox — a most ingenious paradox. — W. S. Gilbert, *The Pirates of Penzance*

And so we come to the final paradox. We have already seen how, in 1956, the Commission approved a proposal made by its then Special Rapporteur on the Law of Treaties (Fitzmaurice) that the codification of the law of treaties should take the form of an expository code; and how, in 1961, the Commission reversed its position and decided that the codification of the law of treaties

should be completed in a form which could serve as a basis for a convention.³⁰ Now we have the Vienna Convention; but partly because the Convention is subject to the substantive and temporal limitations which have already been noted, and partly because it has not yet attracted more than forty-two instruments of ratification or accession,³¹ its practical effect as a *treaty instrument* is strictly limited. The 'treaty on treaties' has accordingly so far had little or no impact as a *treaty*. But as a code — or rather as a restatement and consolidation of existing or emergent principles of treaty law — it has had a dynamic and continuing influence, and it will continue to have that influence. Long before the formal entry into force of the Convention, its provisions were, as has already been demonstrated, being regularly cited and applied, not as treaty provisions but as the expression in large measure of existing principles of customary international law, by the International Court of Justice and by standing or *ad hoc* arbitration tribunals; and it can confidently be asserted that the legal advisers to Foreign Ministries and to international organisations will nowadays turn initially to the Convention for guidance when confronted with difficult or controversial points of treaty law. The guidance may not always be decisive, given the generality of the rules incorporated in the Convention and the fact that its scope is so limited; but the impact of the Convention on the treaty-making practices of governments cannot be gainsaid. Despite everything, therefore, the Convention has begun to exercise a decisive influence on the growth and development of treaty law; and attempts are even being made to transpose some of its more controversial features, such as the *jus cogens* doctrine, into other branches of international law. The fact nonetheless remains that the fate of the Convention *qua* treaty instrument demonstrates clearly the restrictions which the law of treaties itself (and by its very nature) imposes upon the application of conventional instruments. It is indeed the existence of these very restrictions which puts a premium upon the operation of customary law as a vehicle for determining the rights and obligations of States, even in the field of the law of treaties itself.

V. Treaty and custom

Custom, then, is the great guide of human life — *Hume, Inquiry concerning Human Understanding*

The end of our study and analysis is also the beginning of another — namely, the ever-evolving relationship between treaty and custom. That relationship is particularly delicate when the treaty concerned is designed to codify rules of customary law. Some, including Thirlway, have expressed considerable doubts about the value of the multilateral codifying convention. It is rightly pointed out that 'customary law develops of its own accord, without there being any need for States to do more than continue their day-to-day relations,

whereas a treaty régime can only be changed by deliberate act of the parties'.³² Furthermore, there is the danger, pointed out by Baxter, that a codifying convention can interfere with the organic growth of the law through custom:

But it must be observed that if a treaty is declaratory or constitutive of customary international law, the customary international law dehors the treaty (but identical in terms with it) is frozen in the same pattern as the law of the treaty. To the extent that customary international law assimilates itself to the treaty, to that same extent the growth and further development of customary international law will be arrested. If the treaty is revised or amended, the customary international law will remain in the image of the treaty as it was before it was revised. The process whereby the treaty exercises its effect as declaratory of the law or passes into customary law must be repeated all over again with the amendment or new treaty.³³

To this may be added the further argument that, for States which do *not* become parties to the codifying convention, the latter is only evidence of the state of customary international law at the time of its adoption. For such States, other evidence, in particular of practice since the adoption of the convention, may be invoked to demonstrate that, for them, the law has not stood still; but the convention itself will still remain strong evidence of the continuing state of the law, so that it will undoubtedly have a freezing effect upon the development of customary international law, even for States not parties to it.³⁴

These arguments are formidable, but they are by no means decisive. They depend very much on the view which one takes of customary international law, and its relationship to conventional law. Much has been written in recent years about the constituent elements of customary international law.³⁵ Broadly speaking, it may be said that the existence of a rule of customary international law postulates two elements: (1) a general practice of States and (2) the acceptance by States of the general practice as law.³⁶ The content of each of these two elements is controversial. There is first of all the question whether a claim, as opposed to a physical act, can constitute State practice. For D'Amato, a claim cannot as such constitute a material component of custom, although it may provide some evidence of *opinio juris*.³⁷ He argues that:

A State may make certain claims in diplomatic correspondence, but these often clash with competing claims of other States and thus are not a reliable indicator of the content of international law But a State can act in only one way at one time, and its unique actions recorded in history, speak eloquently and decisively.³⁸

This limited view of one of the two main constituent elements of custom has been cogently criticised by Akehurst who points out that physical acts of a State, which may in any event clash with the physical acts of other States, do not necessarily produce a more consistent picture than claims or other statements do.³⁹ Furthermore, D'Amato takes the view that a treaty or

convention can amount to what he terms an 'act or commitment' of a State which may be constitutive of a general practice. But this also imports a measure of confusion into the process whereby norms of customary international law are generated; for treaties or conventions are not physical acts in themselves — they are merely statements or promises undertaken by the States parties to them.⁴⁰ Furthermore, if (as is usually the case) a treaty or convention creates rights and obligations only *inter partes*, it seems illogical to attribute greater weight to such an instrument than to other statements as evidence of the rules of customary international law applicable generally — that is to say, even in relation to States not parties to the instrument.

Thirlway takes a rather broader view of the quantitative element in the formation of custom by admitting the relevance of claims and other statements in State practice. However, he considers that such claims or other statements are relevant only when made in the context of a concrete situation and not when made, as it were, *in abstracto*. For example, he would treat the recognition by a representative of a State at a diplomatic conference of the existence of an alleged rule of customary international law as being confirmatory, rather than constitutive, of custom.⁴¹

This distinction between what is confirmatory of custom, and what is constitutive of it, may be thought to be rather fine,⁴² the more particularly when unilateral declarations made by senior government officials can be held, in certain circumstances, to be as binding upon a State as a treaty duly ratified.⁴³ The better view would appear to be that State practice covers any act or statement made by or on behalf of a State from which its view can be inferred about the existence or content of a rule of international law. In this context, protest plays an important role. As Akehurst puts it:

When acts or claims by some States encounter protests from other states, the acts (or claims) and protests often cancel each other out, with the result that no rule of customary law comes into being.⁴⁴

Protest normally has this negative connotation, in the sense that it may, if sustained, prevent the formation of custom. Akehurst maintains that protest may also have a positive role in the creation of custom,⁴⁵ but this may be doubted. He is nonetheless right in asserting that:

In determining the relative weight to be attached to acts or claims and to protests against such acts or claims, it is necessary to take into account 'the number of protests, the vehemence of the protests, the subsequent actions of the parties, the importance of the interests affected and the effluxions of time'. Thus isolated protests in the face of repeated claims are probably insufficient to prevent the growth of a customary rule based on such claims.⁴⁵

Practice would seem to confirm this observation. One need only consider claims to exclusive economic zones advanced by States during the negotiation of the (Third) United Nations Convention on the Law of the Sea; although

the exclusive economic zone (EEZ) was a new concept deriving from the process of negotiation itself, many States 'jumped the gun' by advancing EEZ claims in their national legislation before the adoption of the Convention — and it would be a bold jurist who would assert that such claims are or were ill-founded, notwithstanding that some States may have protested against such (possibly) premature assertions.

The other principal element in the formation of custom — the *opinio juris sive necessitatis* — need not detain us long. Again, there are differing views on what is required to establish the *opinio juris*. The International Court of Justice, in the *North Sea Continental Shelf* cases, has stressed the requirement that acts alleged to be constitutive of a general practice accepted as law:

... must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.⁴⁶

This is the traditional concept of the *opinio juris*. But it is not altogether satisfactory since, as Akehurst points out, 'it seems to require that States must believe something is *already* law before it can *become* law'.⁴⁷ Various theories have been constructed to overcome this intellectual difficulty. Thus Thirlway states:

... the requirement of *opinio juris* is equivalent merely to the need for the practice in question to have been accompanied by either a sense of conforming with the law, or the view that the practice was potentially law, as suited to the needs of the international community, and not a mere matter of convenience or courtesy. The psychological element would thus also include the view that if the practice in question was not required by the law, it was in the process of becoming so.⁴⁸

More radical is the approach of D'Amato who appears to deny the need for the *opinio juris*. D'Amato proposes that for the qualitative element in the formation of custom (represented traditionally by the *opinio juris*), there should be substituted the requirement that the practice in question must be preceded or accompanied by the 'articulation' of a rule in the sense of the practice:

The articulation of a rule of international law ... in advance of or concurrently with a positive act (or omission) of a State gives a State notice that its action or decision will have legal implications. In other words, given such notice, statesmen will be able freely to decide whether or not to pursue various policies, knowing that their acts may create or modify international law. The absence of prior notification that acts or abstentions have legal consequences is an effective barrier to the extrapolation of legal norms from patterns of conduct that are noticed *ex post facto*.⁴⁹

In D'Amato's system, 'articulation' of a rule of international law could be effected by means of diplomatic correspondence, by a General Assembly resolution, by the writings of a responsible jurist or by a court, provided the

'articulation' receives sufficient publicity for States to have actual or constructive notice of it.⁵⁰ The 'rule of international law' articulated in D'Amato's system must presumably denote a rule advanced as a new rule *de lege ferenda*, rather than an existing rule.⁵¹

D'Amato's theory, while interesting, lacks conviction. It seems to be clearly linked with his general approach to international law as 'a psychological bargaining mechanism involving conflicting claims among national decision-makers and their legal counsel' and 'as a *process* by which the better of two conflicting claims prevails'.⁵² In this light, Thirlway's criticism of the theory is persuasive:

Thus the reason why the elements of generality and repetition have been excluded from Professor D'Amato's conception of the quantitative constituent of a customary rule is because for him a rule of customary law is merely something of a greater or lesser degree of persuasiveness: it is neither a statement of general practice or conformity, nor an assertion of an obligation. Thus both the element of 'custom' and the element of 'law' in any traditional sense have been whittled down to vanishing point.⁵³

D'Amato of course takes the view that treaties 'articulate' norms of international law. But the problem with this approach is that treaties do not purport to articulate the norms which they contain as norms of customary law, but rather as norms of treaty law, whatever their original source may have been.⁵⁴

The real issue would accordingly appear to be whether treaties, considered as elements of State practice rather than as 'articulations', need to be accompanied by *opinio juris* in the traditional sense in order to be regarded as being expressive of or as generating rules of customary international law; and, if so, how this requirement of *opinio juris* can be satisfied.

In this context, evidence of *opinio juris* may take the form of statements about customary law in the text of a treaty or in the *travaux préparatoires*.⁵⁵ This is particularly the case with codifying conventions. We have already sought to trace⁵⁶ from the *travaux préparatoires* of the Vienna Convention on the Law of Treaties indications of which provisions in the Convention are expressive of customary law rules and which provisions partake more of progressive development. Akehurst also takes the view that statements by States made subsequently to the conclusion of a treaty can fulfil the requirement of *opinio juris*:

Such subsequent statements can take several different forms. They may allege that customary law was the same at the time of the treaty's conclusion, or they may allege that customary law has fallen into line with the treaty at some time (specified or unspecified) after the treaty's conclusion. They may be made by States parties to the treaty, or by other States. They may refer to the treaty by name, or they may not. In a sense any invocation of a provision of a treaty by or against a State which is not a party to it must be interpreted as a statement that customary law coincides with that provision, unless the case can be explained by virtue of the rules of the law of treaties which occasionally allow a treaty to create rights or obligations for third States.⁵⁷

While there is some force in Akehurst's view, it is submitted that subsequent statements in this sense, whether made by States parties to the treaty or by other States, carry much less conviction than the actual practice of States generally. If and to the extent that States not parties to the treaty conform to, or seek to exercise rights deriving from, a provision in the treaty, their action may be taken as expressive of a conviction that that particular provision is expressive of, or has generated, a rule of customary law. But to the extent that they do not, subsequent statements made by States parties to the treaty that the treaty is expressive of or has generated a rule or rules of customary law will carry no more conviction than their intrinsic worth merits. It is the totality of the evidence which must surely count. Akehurst indeed, in a subsequent passage, goes far towards admitting this:

It is also fairly likely that treaty rules will be accepted as rules of customary law if many States are dissatisfied with pre-existing customary law. Where such dissatisfaction exists, any well-publicized statement ... may constitute a catalyst which will stimulate new practice and thus a new customary rule. But the statement, if it is only a statement of the *lex ferenda*, cannot itself create a new customary rule; it is the practice inspired by the statement, and accompanied by *opinio juris*, which creates the rule.⁵⁸

From what has been said above, it will be apparent that the relationship between treaty and custom is a dynamic one. This is particularly true of the relationship between a codifying convention and custom. A codifying convention will, by definition, contain a large number of rules whose source lies in customary law (although the rules formulated in the codifying convention may embody supplementary or qualifying clauses which savour more of progressive development than codification). The rights and obligations of States parties to the codifying convention will, after it has entered into force and subject to whatever temporal or other limitations may be embodied in the convention, henceforth be regulated by the convention as regards matters falling within its scope. But for States not parties to the codifying convention, customary law will continue to apply; and customary law will continue to regulate matters *not* covered in the convention, even for States parties to the codifying convention.

Thus, customary law continues to operate alongside a codifying convention; and the more limitations imposed on the scope of the codifying convention by the convention itself, the greater will be the room for the continued operation of customary law alongside the convention. As we have already seen, the Vienna Convention on the Law of Treaties deliberately excludes from its scope, by virtue of substantive or temporal limitations, many significant aspects of treaty law and practice. These will continue to be regulated by customary law, including any new developments in customary law brought about by the general practice of States accompanied by the *opinio juris*. This could be a cause of some concern if it were to be anticipated that new developments in customary law in relation to those matters of treaty law and practice

which are *not* regulated by the Vienna Convention would run counter to the rules embodied in the Convention itself. Fortunately, this risk would seem to be a very slight one, given the fact that the majority of the rules contained in the Convention are expressed as residual rules which will yield to any contrary provisions contained in a particular treaty.

In sum, therefore, the relationship between the Vienna Convention and customary law will continue to be a subtle and complex one. The interplay between conventional and customary law provides constant challenges to the theoretician (and indeed to the practitioner). A codifying convention will influence the content and the development of custom, to the extent that particular norms contained in the convention may be regarded by a tribunal as being expressive of, or as generating, a rule of customary law; and customary law itself, operating alongside the codifying convention, has its role to play in filling in the gaps which any exercise in codification and progressive development inevitably leaves.

It has been argued that '... in the long run the objective of ensuring unity of practice and obligation in international law will be more effectively achieved if the matters in question are left to the slow accumulation and growth of custom, than if the device of a codifying treaty is adopted'.⁵⁹ Whatever merit there may be in this view of the matter (and it is a view which is certainly open to challenge), the fact remains that the process of progressive development and codification of international law through the activities of the International Law Commission and the United Nations General Assembly is bound to continue. Whether a particular topic selected for progressive development and codification should be translated into a convention will, or ought to, depend on the nature of the topic. Even if the decision is in favour of a codifying convention, there will still be ample scope for the operation of customary law on the topic, given the inherent limitations which the law of treaties imposes on the operation of conventional instruments.

Notes

1 *Yearbook of the International Law Commission* (1966–II), 187.

2 *Ibid.*, 189.

3 *Yearbook of the International Law Commission* (1963–II), 189. The Institut de Droit International has now taken up the topic of the effects of armed conflicts on treaties, Professor Bengt Broms acting as *rapporteur*: see *59 Annuaire de l'Institut de Droit International* (1981), Part I, 201–84.

4 *Yearbook of the International Law Commission* (1966–II), 177.

5 *Yearbook of the International Law Commission* (1963–II), 189.

6 *Yearbook of the International Law Commission* (1966–II), 177.

7 *Ibid.* The m.f.n. clause was placed on the agenda of the Commission in 1967. A brief history of the consideration of this topic by the Commission, leading to the submission to the General Assembly in 1978 of a thirty-article draft on m.f.n. clauses, is given in *The Work of the International Law Commission*, 73–77 (3rd ed., 1980).

- 8 *Yearbook of the International Law Commission* (1964–II), 176.
- 9 *Yearbook of the International Law Commission* (1966–II), 177.
- 10 Rosenne, 'The settlement of treaty disputes under the Vienna Convention of 1969, *Z.a.o.R. V.* (1971), at 61.
- 11 *Official Records, First Session*, 2nd, 3rd and 11th meetings.
- 12 Chapter I *supra*, p. 6, and note 11 to that chapter.
- 13 This was the conclusion reached by a sub-committee of the Commission in 1964, which recommended *inter alia* that succession in respect of treaties should be dealt with in the context of succession of States, rather than in that of the law of treaties. The full text of the sub-committee's report, which was approved by the Commission in 1963, will be found in Annex II to the Report of the International Law Commission covering the work of its fifteenth session: *Yearbook of the International Law Commission* (1963–II), 260–300. See also Sinclair, 'Some Reflections on the Vienna Convention on Succession of States in respect of Treaties', *Essays in honour of Erik Castren*, 149–56 (1979).
- 14 First Report on Succession of States in respect of Treaties (doc. A/CN.4/202): reproduced in *Yearbook of the International Law Commission* (1968–II), 87–93 (at 89).
- 15 Sinclair, *loc. cit.*, footnote 13 above; and Yasseen, 'La Convention de Vienne sur la Succession d'Etats en matière de traités', 24 *Annuaire français de droit international* (1978), at 59–113.
- 16 *Report of the International Law Commission on the work of its 34th session* (1982), G.A.O.R. (XXXVII) Supplement No. 10 (A/37/10), 36. Cf. Chapter I *supra*, p. 7.
- 17 Nascimento e Silva, 'Le facteur temps et les traités', 154 *Recueil des Cours* (1977), at 227–8.
- 18 *Official Records, First Session*, 26th meeting (Mysliil and Maresca).
- 19 *Ibid.* (Rosenne).
- 20 Nascimento e Silva, *loc. cit.*, at 230–2, citing interventions by Messrs. Briggs, Reuter and Ago at the 1965 session of the Commission.
- 21 *Yearbook of the International Law Commission* (1964–II), 199: emphasis supplied.
- 22 2 *R.I.A.A.*, 831.
- 23 Elias, 'The Doctrine of Inter-Temporal Law', 74 *A.J.I.L.* (1980), at 302–3; cf. Nascimento e Silva, *loc. cit.*, at 266–7.
- 24 *Yearbook of the International Law Commission* (1966–II), 222.
- 25 See Chapter IV *supra*, p. 85.
- 26 *Official Records, Second Session*, 100th meeting (Carmona).
- 27 *Ibid.*, 101st meeting (Blix).
- 28 Nascimento e Silva, *loc. cit.*, at 288.
- 29 Some of these implications are addressed by Vierdag, 'The law governing treaty relations between parties to the Vienna Convention on the Law of Treaties and States not party to the Convention', 76 *A.J.I.L.* (1982), at 779–801.
- 30 Chapter I *supra*, pp.3–5.
- 31 As of 31 March 1983.
- 32 Thirlway, *op. cit.*, at 125.
- 33 Baxter, 'Treaties and Custom', 129 *Recueil des Cours* (1970), at 96–7.
- 34 Thirlway, *op. cit.*, at 126.
- 35 See, in particular, Thirlway, *op. cit.*; D'Amato, *The Concept of Custom in International Law* (1971); Baxter, *loc. cit.*, footnote 33 above, at 31–104, and 'Multilateral Treaties as Evidence of Customary International Law', 41 *B.Y.I.L.* (1965–66), at 257–300; and Akehurst, 'Custom as a Source of International Law', 47 *B.Y.I.L.* (1974–75), at 1–53.

- 36 Schwarzenberger, *A Manual of International Law*, 32 (1967).
37 D'Amato, *The Concept of Custom in International Law*, 88 (1971).
38 D'Amato, *op. cit.*, at 50–1.
39 Akehurst, *loc. cit.*, at 3.
40 *Ibid.*
41 Thirlway, *op. cit.*, at 58.
42 Akehurst, *loc. cit.*, at 4.
43 As in the *Nuclear Tests Cases*.
44 Akehurst, *loc. cit.*, at 39.
45 *Ibid.*, at 40.
46 *I.C.J. Rep.* (1969), at 44.
47 Akehurst, *loc. cit.*, at 32.
48 Thirlway, *op. cit.*, at 53–4.
49 D'Amato, *op. cit.*, at 75.
50 *Ibid.*, at 85–7.
51 Thirlway, *op. cit.*, at 50.
52 D'Amato, *op. cit.*, at 18.
53 Thirlway, *op. cit.*, at 51.
54 Akehurst, *loc. cit.*, at 43, footnote 7.
55 Akehurst, *loc. cit.*, at 45.
56 In Chapter I.
57 Akehurst, *loc. cit.*, at 49.
58 Akehurst, *loc. cit.*, at 52.
59 Thirlway, *op. cit.*, at 128–9.

ARTICLES OF THE CONVENTION CITED IN THE TEXT

<i>Article</i>	<i>Page</i>	<i>Article</i>	<i>Page</i>
1	6, 200	35	98, 101, 102, 105
2	6, 7, 25, 41, 51, 70, 75	36	98, 102-3, 184
3	6-7, 8, 9, 107	37	98, 103, 184
4	6, 7-9, 25, 64, 79-80, 87, 180, 230, 240, 246, 249	38	6, 9-10, 98, 101, 103-4
5	36, 95, 108	39	106, 107
6	21	40	14, 106, 107-8, 111, 160, 183, 184
7	31-2	41	14, 106, 108-9, 160, 184, 185
8	33	42	162-5
9	12, 34-7	43	6, 10
10	39	44	68, 161, 165-7, 174, 176, 180, 198
11	39, 44	45	65, 161, 168-9, 180-1, 224
12	41, 249	46	19, 27, 32, 84, 160, 161, 169-71
14	41, 249	47	160, 161, 171-2
15	42	48	14, 15, 160, 161, 172-3, 199
18	13, 19, 43, 86, 99, 109	49	14, 15-16, 160, 161, 167, 173-4, 249
19	13, 61	50	14, 16, 160, 161, 167, 174-6, 249
20	13, 47, 61-2, 68, 73, 79	51	14, 16, 160, 161, 167, 176-77
21	13, 62, 75-7, 81	52	14, 16-17, 65, 67, 80, 129, 160, 161, 167, 177-81, 187, 249
22	13	53	14, 18, 66, 67, 160, 161, 167, 213, 218-20, 224, 225-6, 249
23	13, 65	54	164, 165, 182, 183-4, 185
24	44, 45-6, 49, 86, 246	56	186-8, 249
25	44, 46, 50, 246-7	57	182, 183-4
26	83-4, 119	58	185
27	84	59	184
28	8, 85-7, 109, 160, 246, 248-9	60	20, 28, 166, 188-90, 198, 201
29	89-92, 110	61	164, 190-2
30	94-8, 108, 184-5, 246		
31	19, 115-40, 143, 246, 248		
32	19, 115-17, 131, 141, 142, 145		
33	19, 131, 147-52		
34	98, 99-101		

<i>Article</i>	<i>Page</i>	<i>Article</i>	<i>Page</i>
62	20, 64, 65, 80, 187, 192–6	71	214, 225
63	191	73	6, 25, 163, 165, 191
64	66, 67, 167, 192, 224–6, 249	75	101–2, 180
65	163, 187, 188, 189	79	199
66	64, 65, 66–8, 80, 163, 188, 189, 232, 234–5, 236	81	65
67	163, 188, 189	84	45
68	163, 188, 189		
69	174, 176, 197	Annex	64, 65, 66–8, 232–3, 236

CASES CITED IN THE TEXT

- Admissions to the UN cases: *see* Competence of the General Assembly, etc., *and* Conditions for Admission, etc.
- Aegean Sea Continental Shelf Case, 125–6, 155
- Aerial Incident Case, 157
- Air Transport Services Agreement Arbitration (US *v.* France), 138
- Ambatielos Case (Preliminary Objection), 85, 129
- Arbitral Award made by the King of Spain Case, 168
- Argentine–Chile Frontier (Palena) Arbitration, 198
- Austro-German Customs Union Case, 210
- Barcelona Traction Company Case (Second Phase), 212–13, 250
- Beagle Channel Arbitration, 19, 128
- Belgian Linguistic Case, 135
- Campbell and Cosans Case, 134
- Chamizal Arbitration, 136–7
- Cleveland Award, 170
- Competence of the General Assembly for the Admission of a State to the UN, 127
- Competence of the ILO to Regulate Agricultural Labour, 137, 151
- Conditions of Admission of a State to Membership of the UN, 148, 157
- Convention concerning the Employment of Women during the Night, 151
- Corfu Channel Case (Assessment of Compensation), 137
- Eastern Greenland Case, *see* Legal Status of Eastern Greenland
- European Commission of the Danube, Jurisdiction of, 94
- Fisheries Jurisdiction Case (UK *v.* Iceland), 17, 20, 181, 195–6
- Fothergill *v.* Monarch Lines, 144–7
- Franco-Swiss Customs Arbitration, 170
- Free Zones Case (Judgment on Merits), 100, 170, 193
- Golder Case, 19, 128, 131–3, 155
- Guardianship of Infants Case, 210

- Interhandel Case, 166
Interpretation of Peace Treaties with Bulgaria, Hungary and Roumania, 233
Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 122–4
Island of Palmas Case, *see* Palmas Island Arbitration
Italian Republic *v.* Federal Republic of Germany, 143
- Jaworzina Case, 136
Jurisdiction of the ICAO Council Case, 20
- Kingdom of Greece *v.* Federal Republic of Germany, 143
Kjeldsen, Busk Madsen and Pedersen Case, 135
- Legal Consequences for States of the Continued Presence of South Africa in Namibia, 20, 21, 137, 140, 190, 201, 212
Legal Status of Eastern Greenland Case, 15, 126, 170, 172
- Mavrommatis Palestine Concessions Case, 85, 149
Minquiers and Ecrehos Case, 140
- Namibia Advisory Opinion, *see* Legal Consequences for States, etc.
National Union of Belgian Police Case, 133
North Sea Continental Shelf Cases, 22–3, 100, 211–12, 255
Norwegian Loans Case, 166
Nuclear Tests Cases, 69
- Oscar Chinn Case, 94, 209
- Palmas Island Arbitration, 100, 139, 247
Peace Treaties Case, *see* Interpretation of Peace Treaties, etc.
Phosphates in Morocco Case, 86
- Reservations to the Convention on Genocide, 13, 56–8, 61, 210
Rio Martin Case, 170
River Oder Case, 100, 142–3
- South West Africa Case (1966), 213, 228
- Temple Case (Merits), 15, 168, 172, 199
Territorial Jurisdiction of the International Commission of the River Oder, 100, 142–3
- UK–France, Continental Shelf Arbitration, 69, 70–7, 126–7, 155
US Diplomatic and Consular Staff in Tehran, 212
US–France Air Services Agreement of 27 March 1946, Arbitration, 136, 189
US Nationals in Morocco Case, 124, 128
- Wimbledon Case, 210
- Young Loan Case, 19, 121, 143–4, 150–2, 155
Yuille, Shortridge Case, 197

INDEX

- Accession, *see* Expression of consent
to be bound by a treaty
- Acquiescence, *see* Invalidity of treaties
- Adoption of treaties, 12, 33–4, 98
at international conferences, 12–13,
34–6
within international organisations,
12–13, 36
- Ago, Judge Roberto, 4, 124, 161, 213
- Akehurst, Professor Michael, 253, 254,
255, 256, 257
- Amendment of treaties, 14, 106–8,
160, 183–4
by oral agreement, 107
distinguished from *inter se*
modification, 14, 106–7
procedures of International Labour
Organisation, 108
- Ammoun, Judge Fouad, 212
- Anzilotti, Professor Dionisio, 43, 210
- Application of treaties *ratione*
temporis, *see* Non-retroactivity
of treaties
- Aquinas, St Thomas, 192
- Arbitral Tribunal for the Agreement
on German External Debts, 19
- Arbitration, 227, 228, 229, 232, 233
- Authentication of treaties, 39
- Barberis, 217
- Baxter, Judge Richard, 23, 253
- Beckett, Sir Eric, 207
- Berber, Dr Friedrich, 207
- Blix, Dr Hans, 40, 170
- Boundary treaties, 65, 193, 195
- Breach, *see* Termination of treaties
- Brierly, Professor James, 3, 170, 186
- Briggs, Professor Herbert, 10, 116, 227
- Brownlie, Professor Ian, 208, 217
- Bynkershoek, 192, 205
- Capotorti, Franco, 164, 181, 185, 187,
191, 196
- Cavare, 208
- Charter of the United Nations, 17, 35,
93, 96, 101–2, 137, 140, 143,
147–8, 152, 177, 178, 179, 206,
215, 216, 217, 218, 222, 223,
227, 232, 243
Security Council, 102, 120, 137–8,
183, 215, 229
- Codification of international law, 3–5,
252–3, 257–8
distinguished from progressive
development, 11–12, 21
- Coercion of State, *see* Invalidity of
treaties
- Coercion of State representative, *see*
Invalidity of treaties
- Conclusion of treaties, 29–42
- Corruption of State representative, *see*
Invalidity of treaties
- Crawford, Professor James, 217
- Dahm, Georg, 207
- D'Amato, Professor Anthony, 253,
255–6
- Dehousse, Fernand, 170

- Deleau, Olivier, 196, 220
- Denunciation, *see* Termination of treaties
- de Visscher, Charles, 118, 221
- de Visscher, Paul, 170
- Diplock, Lord, 146
- Disarmament treaties, 91, 189
- Economic or political pressure, 65, 129, 177–9
 as constituting force, 65, 129, 177–9
- Effect of outbreak of hostilities on treaties, 6, 20, 163, 243
- El-Erian, Judge Abdullah, 124
- Entry into force of treaties, 44–6, 86–7, 246–7
 bilateral treaties, 44
 multilateral treaties, 44–5
 restricted multilateral treaties, 34
- Error, *see* Invalidity of treaties
- Estoppel, *see* Invalidity of treaties
- European Court of Human Rights, 19, 128, 131–3
- Evans, Judge Sir Vincent, 135
- Expression of consent to be bound by a treaty, 39–42
 accession, 42
 ratification, 41–2, 171
 signature or ratification as residuary rule, 39–41
- Fauchille, 208
- Fitzmaurice, Sir Gerald, 3, 4, 5, 39, 45, 52–3, 59, 94, 124–5, 132–4, 162, 170, 172, 186, 190, 209, 216, 251
- Force, meaning of, *see* Economic or political pressure
- Fraser of Tullybelton, Lord, 146
- Fraud, *see* Invalidity of treaties
- Full powers, 29–32
 general and special, 32
- Fundamental change of circumstances, *see* Termination of treaties — *rebus sic stantibus*
- Geck, W. K., 170
- General Act for the Pacific Settlement of International Disputes, 42, 69, 125
- General participation clause, 8–9
- General principles of law, 2, 7, 8, 16, 176, 249
 ad impossibilia nemo tenetur, 191
 inadimplenti non est adimplendum, 189
- Geneva Convention on the Continental Shelf, 52, 70–5
- Gentili, 192
- Germer, 151
- Gros, Judge André, 124
- Grotius, 192, 204
- Guggenheim, Professor Paul, 173, 207
- Hardy, Jean, 151–2
- Harvard Research, 39, 46, 52, 170
- Hilf, 151
- Holloway, Kaye, 170
- Holy See, 7
- Huber, Judge, 100, 139, 170, 247
- Humanitarian treaties, 91, 190
- Hunter Miller, David, 52
- Imbert, Pierre-Henri, 77
- Initialling of treaties, 39, 41
- International Committee of the Red Cross, 7, 245
- International Court of Justice, 2, 4, 15, 17, 20, 21, 22, 57, 65, 69, 85, 120, 122–7, 128, 137–40, 148, 152, 166, 168, 172, 181, 193, 195–6, 209–13, 219, 227–9, 232–5, 246, 250, 252, 255
 compulsory jurisdiction of, 64, 69, 206, 227, 228, 234
- International custom, 2, 5–11, 19, 21–4, 55, 74, 99, 100–1, 103–4, 106, 117, 140, 151, 153, 168, 180, 195, 204, 208–9, 211, 244, 249, 252–8
 constituents of, 22, 253
 general practice of States, 22, 204, 253, 257
 generation by treaty, 22–4, 256–7
 opinio juris, 22–3, 253, 255–7
 relationship to conventional law, 6–10, 244, 253, 257–8
 relevance of protest, 254
- International Law Commission, 1, 3–5, 6, 7, 11ff, 31ff, 40, 42, 44ff, 52, 54, 58ff, 68, 72, 83–4, 85,

- 89–90, 94, 97, 104ff, 115, 118,
120, 126, 129, 130, 142–3,
148–9, 162ff, 172ff, 180ff,
192–4, 205, 213ff, 224ff, 242ff,
250, 258
- Interpretation of treaties, 19, 93, 96,
98, 114–54, 167
- canons of, 117–18
- circumstances of conclusion, 96,
115, 117, 141, 167
- differing doctrinal approaches,
114–15, 131
- generalia specialibus non derogant*,
93, 96, 98
- good faith, 118, 119–20, 128
- in context, 118–19, 122, 126,
127–30, 133
- intrinsic and extrinsic elements of,
118–19
- object and purpose, 115, 118, 123,
127–8, 130–5, 141, 149, 150–1,
153
- ordinary meaning, 121–6, 133, 154
- plurilingual treaties, 147–52
- preamble, 127–8, 130
- principle of contemporaneity,
124–5, 140, 248
- principle of effectiveness, 118
- relevant rules of international law,
119, 138–40, 246
- special meaning, 126–7
- subsequent agreements and
subsequent practice, 119,
135–8, 246
- travaux préparatoires*, 96, 115, 116,
117, 123, 124, 129, 130, 133,
134–5, 141–7, 148, 152, 167
- Inter-temporal law, 72, 125–6, 246–8
- in interpretation of treaties, 125–6,
138–40, 247–8
- Invalidity of treaties, 14–18, 67,
159–81, 196–7, 250–1
- absolute nullity and relative nullity,
160–1
- consequences of invalidity, 160,
161, 174, 176, 180, 225
- exhaustiveness of Convention
grounds, 163–5, 185
- link with procedural safeguards, 67,
68, 162, 163, 188–9, 196–7, 220,
226, 231, 245–6
- particular grounds of invalidity:
coercion of State, 14, 16–17, 160,
161, 167, 168, 177–81, 205, 235
- coercion of State representative,
14, 16, 160, 161, 167, 168, 176–7
- corruption of State representative,
14, 16, 161, 174–6
- error, 14–15, 161, 173–3, 174,
205, 250
- fraud, 14, 15–16, 161, 173–4,
205, 250
- jus cogens*, 14, 17–18, 64, 149,
160, 161, 167, 168, 197, 203–24,
229, 231, 232, 233, 235, 245,
248, 250, 252
- violation of internal law, 19, 32,
84, 161, 169–71
- violation of restrictions on
authority to express consent,
161, 171–2
- principle of acquiescence, 168–9,
171, 180–1, 226
- distinguished from estoppel, 168
- Jenks, C. Wilfred, 96, 208
- Jimenez de Arechaga, Eduardo, 102,
161, 181, 188–9, 217
- Jus cogens*, see Invalidation of treaties
- Jus dispositivum*, 204, 207, 208, 209
- as distinguished from *jus cogens*,
18, 204
- Kappeler, D., 52
- Lachs, Judge Manfred, 123
- Lauterpacht, Sir Hersch, 2, 3, 4, 59,
94, 143, 170, 205, 208–9
- Levi Carneiro, Judge, 140
- Lissitzyn, Professor Oliver, 194, 196
- McNair, Lord, 14, 16, 39, 43, 51, 88,
93–4, 101, 104, 114, 115, 162,
173, 208
- Malkin, Sir William, 55
- Marek, Krystina, 205–6, 217
- Martens, 205
- Modification of treaties, 14, 94, 108–9,
160, 185, 218
- conditions for, 109, 185
- Moreno Quintana, Judge, 210
- Morelli, 208
- Moser, 205

- Mosler, Judge Hermann, 123–4
 Most favoured nation clause, 243
- Nahlik, Professor N.E., 17–18, 162
 Nascimento e Silva, Geraldo, 96
 Naturalist school, 204–5, 221
 Nisot, Joseph, 18–19
 Non-retroactivity of treaties, 7, 85–7,
 160, 246, 248
 Nullity, *see* Invalidity of treaties
- Obligation not to defeat object and
 purpose of treaty, 13, 19, 42–4,
 86, 99
 Obligations arising for aggressor State,
 101–2, 180
 Obligations *erga omnes*, 104, 212–14,
 250
 Observance of treaties, 83–4, 119
 and internal law, 84
pacta sunt servanda, 2, 83, 84, 119,
 162, 186, 194, 197, 207, 215,
 222, 251
 O’Connell, Professor Daniel, 19, 117,
 118, 196
 Oda, Judge Shigeru, 123
Offentliche Ordnung, 203
Opinio juris, *see* International custom
 Oral agreements, 6, 243
Ordre public, 203–4, 205, 221
- Pacta sunt servanda*, *see* Observance of
 treaties
Pacta tertiis nec nocent nec prosunt,
 98, 104
 Padilla Nervo, Judge, 211
 Parry, Professor Clive, 2
 Participation in general multilateral
 conventions, 229, 231
 by all States, 229, 231
 Permanent Court of International
 Justice, 85, 86, 100, 126, 136,
 137, 142, 149, 151, 172, 193, 209
 Positivist school, 204–5, 221
 Private law analogies, 205–6, 218, 221
 Protest, *see* International custom
 Provisional application of treaties,
 46–7, 246–7
 Public policy, 203–4, 205, 207, 208,
 209, 218
 Pufendorf, 192, 205
- Quadri, 208
- Ratification, *see* Expression of consent
 to be bound by a treaty
Rebus sic stantibus, *see* Termination of
 treaties
 Reservations, 13–14, 45, 51–78,
 211–12
 compatibility test, 58, 60, 61
 Convention regime, 61–3, 106
 definition of, 51–4, 70, 75
 distinguished from interpretative
 declarations, 52–3, 64, 74–5, 77
 extensive reservations, 54
 legal effect of objections to, 61, 62,
 72, 75–7
 Pan-American system, 14, 57
 qualified interpretative declarations,
 53–4
 reservations clause in a treaty, 52,
 72, 73
 to bilateral treaties, 54, 59
 to the Continental Shelf Convention,
 23, 52, 69, 70–6, 211–12
 to the Genocide Convention, 13–14,
 56–8, 72, 210
 to the Vienna Convention itself,
 63–8, 77, 236
 traditional unanimity rule, 13–14,
 54–6, 59, 77
 Restricted multilateral treaties, 33–4,
 61
 Reuter, Professor Paul, 104, 106, 171,
 174, 175–6, 208, 221–2
 Rosenne, Shabtai, 244
 Roskill, Lord, 146
 Rousseau, Professor Charles, 89, 104,
 173, 207–8
 Ruda, Judge José-María, 123
- Scarman, Lord, 146
 Scelle, Georges, 170
 Scheuner, Ulrich, 217
 Schücking, Judge, 170, 209, 210
 Schwarzenberger, Professor Georg, 18,
 206–7, 208, 220
 Schwelb, Egon, 216–17
 Separability of treaties, 68, 165–7,
 192, 225
 breach, 166
 cases of fraud or corruption, 167

- prohibitions upon, 167
- Sette Camara, Judge José, 123
- Settlement of disputes, 64, 67, 68, 197, 220, 226–36, 249
 - conciliation machinery, 64, 65, 229, 232–3
- Sorensen, Judge Max, 211–12
- Sources of international law, 1–3, 8
- Special Committee on Principles of International Law concerning Friendly Relations, 179, 228
- State responsibility, 6, 84, 94, 163, 171, 175, 191, 213–15, 223, 243, 250
- Succession to treaties, 6, 99, 104–6, 108, 163, 243, 244
- Successive treaties relating to the same subject-matter, 93–8, 160, 184–5, 246
 - chains of treaties, 95
 - hierarchical principle, 96
 - incompatibility between regional and universal treaties, 97–8
 - lex posterior* principle, 96
 - lex prior* principle, 96
 - principle of autonomous operation, 96
 - principle of legislative intent, 96
 - relationship between general and particular treaties, 98
- Suspension of the operation of treaties, 20, 159–69, 181–97
 - as a consequence of breach, 20, 94, 188–90
- Suy, Erik, 203, 207
- Sztucki, 226
- Tanaka, Judge, 211
- Termination of treaties, 20, 159–69, 181–97
 - as a consequence of breach, 20, 94, 188–90
 - complete execution, 165
 - denunciation, 181, 182–3, 186–8, 216, 223
 - disappearance or extinction of a party, 164, 243
 - new rule of *jus cogens*, 159, 167, 185, 224–6
 - obsolescence or desuetude, 163–4
 - rebus sic stantibus*, 20, 192–6, 205, 235
 - renunciation of rights, 165
 - resulting from *ad hoc* clauses, 181, 182–3
 - resulting from subsequent treaty, 181, 183–5
 - supervening impossibility of performance, 164, 190–2
- Territorial application of treaties, 87–92
 - residuary rule, 88–90
 - exceptions to residuary rule, 90–2
- Thirlway, Hugh, 234, 252, 254, 255, 256
- Third United Nations Conference on the Law of the Sea, 37–9, 254–5
 - gentleman's agreement on consensus, 37–8
 - voting requirements, 38
- Treaties and third States, 98–106, 256
 - obligations arising for third States, 100, 101–2
 - rights arising for third States, 100, 101, 102–3
 - revocation or modification of obligations or rights, 103, 184
 - treaties establishing objective régimes, 104–6
- Treaties between States and international organisations or between international organisations, 6, 7, 242–3, 244, 245
- Tunkin, Professor Grigori, 221
- Vallat, Sir Francis, 18
- Vattel, 116, 192
- Verdross, Judge Alfred, 133, 207, 217
- Vienna Convention on Succession of States in respect of Treaties, 104–5, 245
 - objective régimes in, 104–5
- Vienna Convention on the Law of Treaties
 - entry into force of, 1, 45
 - limitations upon scope of, 6, 242–5, 249
 - non-retroactivity of, 6, 7–9, 87, 180, 230, 246, 249
 - preamble to, 10, 84
 - progressive development in, 12–21, 23–4, 35, 43, 228, 256

- Violation of internal law, *see* Invalidity
of treaties
- Violation of restrictions on authority
to express consent, *see* Invalidity
of treaties
- Von der Heydte, 207
- Waldock, Sir Humphrey, 5, 9, 43,
59–60, 62, 94, 97, 99, 107, 120,
162, 170, 245, 246
- Wilberforce, Lord, 145–6
- Wildhaber, Professor Luzius, 170
- Yasseen, Mustapha Kamil, 13, 97, 219