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THEORETICAL PAPERS
(Annex Volume I)

Study "Riposte"

A Report prepared for the United States Arms Control and Disarmament Agency under ACDA Contract GC-17, dated March 29, 1963

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The Rationale of Treaty Law and Treaty Negotiations
(Annex I-A)

by

Albert J. Esgain

This paper is concerned primarily with the drafting and negotiating of treaties, the objectives of treaties, and the rules and principles which are applicable to treaties, particularly those which relate to their enforcement and termination.

The general rules and principles of international law, and those pertaining to treaties in particular, are as applicable to arms control and disarmament agreements as they are to any other political treaties. The material contained in this paper has relevance for those who may be called upon to draft, negotiate, or implement agreements with the Soviet Union. The views of the Soviet Union which differ materially from those of the West on rules and principles of international law are set forth and their implications discussed. As a general observation it may be said at the outset that the Soviets recognize, ostensibly, most of the rules and principles of international law that are recognized by the West. In practice, however, material differences exist as to their application and their binding effect. This is because international law in the USSR plays a subordinate role in Soviet foreign policy and is used primarily to justify and further that policy, whether it is legal or not.[1]

INTERNATIONAL LAW DEFINED

For the purpose of this paper international law is defined as those principles and rules of conduct, both customary and conventional, which states consider legally binding upon them in their relationships with each other. These principles and rules include those which relate to the functioning and the relationships of international institutions and organizations and those which relate to the conduct of entities and individuals which is of concern to the international community.[2]

Consent of States

This definition implies, as it should, that the basis of international law is the common consent of the states which comprise the international community.[3] The consent of states, however, may be either tacit or express. Tacit consent is an implied consent, or consent which is clearly evidenced by the conduct of states and reflected by their adoption of the custom of conforming to certain general rules of international behavior. Express consent, on the other hand, is an affirmative consent which is given either verbally or in writing to rules of international conduct.[4]

SOURCES OF INTERNATIONAL LAW

Custom is the original source of international law and it is for that reason that international custom is referred to when the proper interpretation of a treaty is in doubt. It is worth noting that treaties derive their force and effectiveness from the rule of customary international law that treaties are binding upon the contracting parties (pacta sunt servanda).[5]

Soviet View

The USSR gives limited recognition to custom as a source of international law. The USSR, however, has consistently held that treaties are the primary, and until recently, the sole source of international law, and that they form the fundamental foundation of international relationships.[6] International custom is now recognized by the USSR as the second source of international law but only to the extent that it "reflected the agreement of governments" so to consider it.[7] Soviet recognition of custom as a source of international law was dictated by a desire to obtain for the USSR certain rights which were compatible with its ideology and which "required no treaty formulation."[8] The Soviet Union has also asserted as fundamental sources of international law what Soviet scholars refer to as basic "concepts and principles," which would appear to include for the Soviets a series of "basic laws, norms and concepts" which have been given a peculiar Soviet legal, political, ideological, and ethical content.[9] On occasions the Soviets have also viewed decisions of international organizations such as the League of Nations, the United Nations, and other

international agencies as sources of international law provided, however, "that they were recognized and applied in practice" as sources of international law.[10] In theory, the Soviet sources of international law resemble closely those recognized by the West. As Triska and Slusser have pointed out, however, Soviet adherence to these rules and their interpretation of them is an entirely different matter, in that the Soviets in their self-interest select freely from any and all sources of international law, even those not recognized by others, under the criterion of "domestic principles" (discussed below) which, when read in proper Soviet syntax, means "with the consent of the Soviet Union" or in other words those which are compatible with Soviet ideological goals.[11]

The General View: That of the West

In the West, the two most important sources of international law are custom and treaties. Other, but less important sources include the following.

The General Principles of Law

Article 38, par. 1 (a) of the Statute of the International Court of Justice authorizes the court to apply in the resolution of justiciable disputes "the general principles of law recognized by civilized nations." This provision is considered as empowering the court "to apply legal analogies; natural law; general principles of justice; general principles of international law, as opposed to specific rules of international law; customary international law; and general principles of positive national law, or comparative law."[12] Charles Rousseau states that the jurisprudence of international tribunals indicates that recourse to general principles of international law, and to general principles of positive law recognized in foro domestico (nationally) has been recognized by states as a subsidiary means for determining the rules of international law.[13] Thus, even excluding the Statute of the International Court of Justice, by which states conferred this authorization upon the court, the recourse to general principles of law is an accepted juridical procedure. Although sparingly employed by the court in practice, it provides a means of extending the scope of content of international law.[14] The resort to "general principles of law" is an acceptance of the view that while decisive weight will be given to the will of the states as the basis of international law, that law is not divorced from the legal experience and practice of

mankind.[15] The international courts have seldom found occasion to apply the ambiguous formula "general principles of law" in the resolution of disputes, as they have been able to find in cases before them the applicable law in either treaties, customary rules, principles of international law, or judicial precedent.[16]

Judicial Decisions

Article 38 of the Statute of the International Court of Justice provides, subject to certain limitations, that the court shall apply judicial decisions as a subsidiary means for the determination of rules of law. The decisions of international courts, however, do not themselves constitute rules of international law: they provide only direct evidence of the existence of a rule of international law. As a practical matter, the decisions of international tribunals exercise a considerable influence on the development of international law,[17] for, unlike the establishment of an international custom, which requires the repetition, continuity, and generality of a series of analogous acts, a single judicial decision is often sufficient to exert a peremptory influence on a judge.[18] There can be little doubt that "with the exception of treaties, the decisions of the . . . court are now the most powerful influence in the development of public international law."[19]

Decisions of national courts are not a source of international law. They may, however, serve as evidence of national practice, and the cumulative effect of uniform decisions of the courts of the most important states does provide direct evidence of customary international law.[20]

Writings

The Statute of the International Court of Justice provides as a subsidiary source of international law, "the teachings of the most highly qualified publicists of the various nations." The court has, to date, not formally relied on the teachings of publicists as a source of international law. Such teachings have occasionally appeared in judicial pronouncements but only as evidence of international law, not as a law-creating factor or as a source of law.[21]

Recommendations, Resolutions, or Decisions of the General Assembly or other Organs of the United Nations

It may be said, as a general rule, that these resolutions and decisions do not create binding obligations in positive law.[22] They represent only intermediate steps in the evolution of customary law.[23] Under certain circumstances, however, they produce "important juridical consequences and possess binding legal force."[24] Under Article 25 of the Charter of the United Nations, for example, the members of the United Nations are obligated by "decisions" of the Security Council. Unfortunately, however, it is not clear that all resolutions of the Security Council are to have a binding effect. In Gould's opinion the "recommendations" of the General Assembly and of other organs of the United Nations "attain the character of law if the Security Council decides, under Article 39, that noncompliance constitutes a threat to the peace."[25] It is his view, however, that ambiguity in the language of the Charter prevents a conclusive judgment concerning which resolutions of the UN organs have the force of law, and that only future practice will permit classification with any degree of certainty.[26]

The strength of the new nations in the United Nations may lead to increased efforts to develop law through UN General Assembly resolutions. It may be said that although such declarations have no binding effect, they reflect a world consensus which cannot be ignored by nations and can be used to strengthen existing precedents or to develop such new rules and principles of international law as may be required.

CONVENTIONAL INTERNATIONAL LAW

The General View

A treaty may be defined as an agreement of a contractual nature between states or organizations of states and their agencies which is legally binding upon them as signatories.[27] A treaty, therefore, no matter how it may be technically designated or referred to, constitutes a restriction on the sovereignty of the signatory states which either establishes, regulates, modifies, or terminates a juridical relationship between them.[28]

The Soviet View

The Soviets define a treaty somewhat differently. Their definition is a composite of traditional and ideological elements. A treaty is defined and explained by them as (a) an international agreement among states creating rights and obligations in international law of a public character, usually embodied in a written instrument, whatever its name, and (b) a typical and most widespread legal form of struggle or cooperation in the realm of political, economic, and other relations among states which "rests on legal principles of equality of the contracting parties, bilateral acceptability, and mutual benefit."[29] The first part of the definition is substantially identical to that given to a treaty by the West. The second part, however, is a doctrinal dissension and qualification which could become, as Triska and Slusser observe, "a serious obstacle to Soviet 'peaceful competition' if and when applied to Soviet treaty practice."[30]

Treaty Form

International law, it may be observed, contains no rules which prescribe a required form for treaties. A treaty is concluded as soon as the mutual consent of the parties to a special undertaking is clearly manifested by their express consent or by their conduct. Thus, it is immaterial whether the understanding or agreement is an oral one or one in writing in order for the understanding reached to be a legally binding one.[31] The international juridical effect on an understanding is not dependent upon its form or upon the name given to the instrument.[32] Tacit acquiescence only, however, does not constitute a treaty.[33]

Classification of Treaties

Attempts at classification of the different kinds of treaties have limited usefulness and are juridically irrelevant, except for municipal purposes.[34] The term "treaty" is applied to a variety of international instruments and understandings which have little in common save their contractual aspect. They range from agreements, exchanges of notes, letters, telegrams, to oral understandings, and they range from those concerned exclusively with political arrangements

through multilateral "legislative" or "law-making" conventions, to international conveyances of a "dispositive" nature. Thus, a treaty may be primarily political, relating to alliances, neutrality, arms control and disarmament arrangements, or to a political settlement; or it may be economic, and concerned solely with commerce and tariffs; or be of an administrative nature and concerned with such matters as drug control, navigation, international postal regulations; or be of a juridical nature and concerned with extradition, international judicial cooperation, or the enforcement of foreign judgments.[35]

The Harvard Research in International Law states:

> In addition to the terms "treaty" and "convention," which in earlier times were employed almost exclusively to designate the instruments which are considered today as treaties in the generic sense, there have come into use on a wide scale such terms as "protocol," "agreement," "arrangement," "accord," "act," "general act," "declaration," "modus vivendi," "statute," "regulations," "provisions," "pact," "covenant," "compromise," etc. In fact the number of instruments designated by these terms is now in excess of those styled "treaties" and "conventions."[36]

The Harvard Research concludes that "from the juridical point of view all treaties are essentially alike and are governed by the same rules of international law."[37] The distinctions, however, under the US Constitution and the decision of the Supreme Court of the United States, between a "treaty" and an "Executive agreement" is of considerable juristic importance, as will be seen below.

In international practice the terms treaty and convention are employed interchangeably by states, including the USSR,[38] to mean formal agreements that require ratification. The term convention has, as a general rule, been reserved for agreements of minor importance or those of a technical nature, while the term treaty has been used to designate treaties which deal with the larger political interests of states and matters of a general nature.[39] Among the formal documents encompassed by the term treaty are those which bear designations reflecting the increased use of international conferences, such as act, general act, final act, declaration, agreement, regulations, statutes, covenant, charter, and pact. Certain of these designations, such as charter, general act, or statute, imply that the agreement reached is law-making, or constitutional in nature, as in the case of the UN Charter.

The term declaration may be used to designate either a legislation instrument, a statement of two or more states of joint policy, or a document issued for propaganda purposes only, an example of which is the joint declaration of August 14, 1941, referred to commonly as the "Atlantic Charter." As to the binding force of a declaration, it is well to remember that the essential factor in determining the binding nature of an instrument as a treaty is not its description, but whether it is intended to create legal rights and obligations. A declaration under this test may not be a treaty. In some cases, as in the Universal Declaration of Human Rights, the absence of an intent to undertake a treaty obligation is clearly apparent from the statements made by the signatories prior to the adoption of its text. In other cases the clauses of the instrument usually indicate with sufficient clarity that they are intended as general statements of policy only, rather than legal obligations.[40]

The term general act is usually applied to agreements arrived at by some congress or conference of powers on matters of general international concern.[41]

The term protocol is used in several senses. It may refer to a document which sets forth the conclusions reached, or the reservations made, by the signatories at various stages in the course of prolonged negotiations or conferences.[42] It may designate, as well, an instrument supplementary to a treaty. The term is also employed to signify the procès-verbal (signed minutes) of a conference.[43]

A compromis refers to an agreement whereby states submit a dispute to arbitration and which specifies the bases on which the court's decision is to be predicated.[44]

A pactum de contrahendo is an agreement whereby the signatories undertake to explore in good faith the possibility of reaching an agreement on a particular subject.[45]

A modus vivendi is a temporary understanding pending a more definitive and permanent agreement.[46]

An exchange of notes may be said to be an understanding reached in a manner similar to that on private commercial transactions by means of offer, counteroffer, and acceptance. The notes exchanged need not be signed. This method of reaching an understanding is both simple and expeditious and its binding nature is in no way prejudiced, it being as binding as any other treaty. An exchange of notes may also be issued to amend or to modify a formal treaty.[47]

Law-Making or Legislative Treaties

L. Oppenheim believes that although the scheme may be theoretically tenuous, the whole body of treaties can be divided into two meaningful general classes. First are those concluded for the purpose of laying down general rules of conduct among a considerable number of states. Treaties of this kind are termed law-making. In the second class are treaties concluded for all other purposes. It is his opinion that although all treaties, bilateral as well as multilateral, are in effect law-making, inasmuch as they lay down rules of conduct which are binding upon the contracting parties, the term law-making should properly be reserved for those which judicial practice has recognized, even though contractual in origin and character, as "possessing an existence independent of and transcending the parties to the treaty." He cites as examples of law-making treaties the provisions of the Mandate for South-West Africa, which were in the nature of a treaty between the Council of the League of Nations and South-West Africa as to which the International Court of Justice held in 1950, in the case of the Status of South-West Africa, that the provisions of the Mandate continued in force and effect even though the League of Nations had ceased to exist.[48] In its decision the court stated: "The international rules regulating the Mandate constituted an international status for the Territory recognized by all the Members of the League of Nations including the Union of South Africa."[49] A second example is the Reparation for Injuries case, in which the International Court of Justice held that the provisions of the Charter of the United Nations invested the United Nations with an international status which transcended the group of states comprising the membership of the United Nations.[50] Arnold McNair asserts that there are "two classes of treaties which have a law-creating effect beyond the immediate parties to them." The first consists of "treaties which form part of an international settlement," for example, World War I peace treaties; the second of "treaties which regulate the dedication to the world of some new facility for transit or transportation," for example, the right of world navigation upon a river formerly closed. In support of his contention he quoted Roxburgh:

> It frequently happens that a treaty becomes the basis of a rule of customary law, because all the States which are concerned in its stipulations have come to conform habitually with them under the conviction that they are legally bound to do so. In this case third states acquire rights and incur obligations which were originally conferred and imposed

by treaty but have come to be conferred and imposed by a rule of law.[51]

Although a "conviction" by third states that such a treaty is legally binding upon them is a matter of proof which is difficult if not impossible of establishment, particularly when the imposition of burden is involved, it is said that the conviction is to be presumed with respect to treaties designated as international settlements.[52] It is more probable, however, that it is not the implied conviction of third states which gives to these treaties whatever binding effect they may have upon non-contracting states but rather the preponderant strength and power of the signatory states, which third states cannot successfully challenge or which they decline to challenge because of the risk of combat, adverse public opinion, political repercussions, or other detrimental action.

It is worth noting that in the Soviet view no treaty can impose obligations on third states. Under the Soviet concepts of consent, will, and equality their position on this matter appears to be absolute, even as to law-making treaties.[53]

Quincy Wright has classified treaties according to their subject matter as being: (1) political (peace, alliance, neutrality, guarantee); (2) commercial (tariff, consular, fishery, navigation); (3) constitutional and administrative (establishing or regulating international unions, international organizations such as the United Nations, and international agencies such as the International Labor Organization); (4) criminal justice (defining international crimes, e.g., the 1949 Geneva Prisoners of War Conventions, extradition); (5) civil justice (human rights, trademarks, and copyrights); (6) codifying international law (Hague Convention of 1907 on rules of land warfare and the 1962 Vienna Convention on Diplomatic Immunities).[54]

A somewhat more functional and informative breakdown of treaties would be one based upon the extent or scope of their effectiveness or enforceability. Under a breakdown of this nature, treaties could be identified as: (1) law-making; (2) universal (binding upon all states without exception); (3) general (binding upon a large number of states, including the leading states); (4) regional (the so-called American International Law binding only upon the various states of the American continent except Canada); (5) particular (binding on two or a few states only).

Treaties can also be broken down into two broad special categories which are indicative of the scope of their dispositive

nature: personal treaties and dispositive treaties. Personal treaties are those which bind the contracting parties only and are subject to the rules generally applicable to treaties (treaties of alliance, tariff, etc.). Dispositive treaties, on the other hand, are those which are in the nature of a conveyance, e.g., cessions of territory, or those fixing territorial boundaries, or which create international servitudes, those which allegedly transfer or create real rights and obligations which, being attached to the territory itself, are alleged to be binding upon all states for all time.[55]

THE NATURE OF INTERNATIONAL LAW:

ITS BINDING EFFECT

It has been said that the designation international law is a misnomer, that such a law does not exist because there is no international agency which is empowered and capable of enforcing it. The critics assert that international law is but an inefficient code of conduct which is of moral force only and that war attests conclusively to its ineffectiveness in influencing and controlling the behavior of states.

This view has persisted since the very development of modern international law. More than three centuries ago Grotius wrote "there is no lack of men who view this branch of law /international/ with contempt as having no reality outside of an empty name. On the lips of men quite generally is the saying of Euphemus which Thucydides quotes that in the case of a king or imperial city nothing is unjust which is expedient. Of like implication is the statement that for those whom fortune favors might makes right. . . ."[56]

International Law--a True Law

Law, properly defined, is "a body of rules for human conduct within a community which by common consent of the community is and must be enforced by external power."[57] It is clear that the essential conditions of law, as defined above, are to be found in international law, including the most essential condition: that the rules of international conduct shall be enforced by external power. Governments of states and world opinion agree that international law shall, if necessary, be enforced by external power. In the absence of a central authority for the

enforcement of international law, states have resorted to self-help, intervention, and war, under the circumstances prescribed by the Charter of the United Nations, as means of enforcing international law. The Charter of the United Nations, by providing a system of sanctions for repressing violations of its principle obligation, has in effect recognized the enforcement of law as a principle of conventional law. Perhaps the best evidence of the existence of international law is its recognition in practice as law.[58] Neither its legal nature nor its obligatory force is questioned by those who create and apply it. States, furthermore, in reliance on their legal nature, continue to make treaties and expect them to be observed;[59] international courts have held that the undertakings in treaties are of a legal nature and are "not of a mere moral" nature and that their interpretation is a legal, and not a political, question;[60] world public opinion considers every state to be legally bound to comply with international law; states recognize the binding effect of international law by requiring, under their domestic legislation, that their citizens, officials, and courts comply with the obligations imposed on their states by international law.[61] Almost without exception states which violate international law give lip service to it by invoking its rules to justify or to prove the validity of their acts; one example is Hitler's instructions of October 1, 1938, which suggested explanations to be issued by the international law group to justify German actions under the laws of war.[62] The nations of the world in international conferences, furthermore, have asserted repeatedly the legally binding effect of international law. Finally, the Charter of the United Nations and the Statute of the International Court of Justice clearly express the belief of nations in the binding effect of international law.[63]

As Payson Wild puts it:

> International law . . . intrinsically is no different from any other form of jurisprudence. The rules in regard to treaties . . . are based upon the same type of community of interest and mutual need in the world society as exists behind the rules of contracts or of traffic regulations in the smaller domestic sphere. What differentiates international law from other law is not a matter of sanctions, sovereignty, and consent, but . . . the community to which it applies. There is not so much of a community internationally as there is nationally; therefore, there is less law in international relations than in domestic. That is all. The difference is not in kind but in extent. Rules which states feel to be to their

> interests to obey, and which in time they consider ought to be obeyed, states for the most part will obey without the need for comprehensive sanctions. It is the same for individuals within the state.[64]

Treaties are in fact more regularly observed than violated and the use or threat of force has, generally, little to do with this behavior of states. The treaties which states are most likely to observe are those which are based on a mutuality of interests.

Treaties most likely to be violated are those which, without considering various political considerations that may cause states to disregard the law, attempt nevertheless to control political conduct by prescriptive rules. International law therefore "must be conceived of less as a body of commands which are expected to achieve their prohibitive purposes in opposition to social and political realities than as a canalizat.on of those tendencies considered valuable in terms of social ends."[65]

It would be correct to state that of municipal and international law the latter is the weaker, but that it is nevertheless law. The absence of an international legislature with power to enact new rules of international law and the lack of compulsory jurisdiction by an international court has not prevented states from recognizing, creating, and applying international law. It is true, however, that international law has stressed substantive rights and obligations but that it has failed to develop adequate remedies and procedural rights. Nevertheless, it cannot be denied that international law has established legal rights and obligations, which are generally recognized, and that the absence of an enforceable judicial remedy does not, any more than in the municipal sphere, preclude the designation of these rights and obligations as real law.[66]

FUNCTIONS AND OBJECTIVES OF TREATIES:

WHY STATES CONCLUDE TREATIES

A treaty is the means by which states carry out their numerous and various international transactions. It is the instrument by which states perform all types of legal international acts. In addition to other purposes, it is used to transfer or lease territory; to establish boundaries; to enact international constitutional law, as for example, the UN Charter; to create international organizations, such as the International Telecommunication Union, the International Monetary Fund, the

International Civil Aviation Organization, the Universal Postal Union, the World Meteorological Organization, and the International Labor Organization; to create military alliances, such as NATO and the Warsaw Pact; to neutralize or demilitarize certain areas, as for example, Austria and the Aaland Islands; and to enact international legislation by law-making treaties, such as the World War I peace treaties and the internationalization of waterways.[67] As a practical matter, treaties are employed to regulate and coordinate the conduct of inter-state relations. They establish the procedures through which international cooperation is promoted, differences are reconciled, national and international security is insured, and economic, commercial, and military activities are developed and coordinated.[68]

Their effectiveness in developing and perfecting a politically integrated world community is impeded only by cultural and ideological differences. Only when states possess certain cultural and ideological similarities in the sphere of values and procedures can international agreements attain a minimum of international stability. These similarities, furthermore, must be of such a nature that the self-interest of the parties under the provisions of treaties may be pursued in an atmosphere of mutual understanding of the value of the treaty and its subject matter.[69]

The reliability of a treaty, therefore, is in large measure proportionate to the cultural and ideological similarities that exist between the contracting states, their comparative strength, and the extent to which they will benefit from its conclusion. Successful recourse to treaties is further ensured when there exists between the contracting states a conviction that there is some certainty that the treaty will accomplish the desired ends, will be observed in good faith by the other signatories, and the record of the other contracting states in the observance of their treaty commitments is reassuring.

In the light of the teachings of Soviet leaders on the advantages of the political tactics of advance, retreat, and consolidation of political advantages[70] and the numerous breaches by Russia of its interwar treaties of friendship,[71] it would seem prudent to recall that the Soviets regard a political treaty primarily as a weapon for attaining a world Communist society, not as an instrument of settlement and mutual advantage.[72]

The Soviets, dedicated to the overthrow of the capitalist world order, envision, eventually, a classless society in which neither states nor laws will be required. They view history as a struggle between antagonistic classes in which compromise is not possible and which will end with the defeat of the capitalists, the oppressors of mankind.[73]

The Role of Self-Interest

The conclusion of treaties is dictated in large measure by self-interest and mutual advantage. The pronouncements and tactics of those negotiating treaties can be understood only by relating them to the interests of their states on questions of military, political, economic, and commercial importance. The primary responsibility of negotiators is of course to protect and enhance the over-all security and general welfare of their states. It is only because states, although politically independent, are otherwise interdependent that they are forced to conclude treaties and thereby forego certain of their interests in order that they may enhance other interests which require or depend upon international cooperation. This end is attained by choosing between conflicting interests and sometimes by compromise.[74] In any event some international relationships are essential to the life and development of a state, and relationships between states can be maintained only within some framework of mutually observed behavioral norms. The penalty for a failure to observe generally recognized standards of behavior is the interruption or termination of desired relationships. This observation, of course, applies to the Soviet Union. It is no exception. The compliance by the Soviet Union with many of the rules and principles of international law is therefore not surprising. It merely reflects the vital role of international law, and reciprocity in particular, in normal day-to-day relations, even between hostile states. Important modifications in Soviet international practice are directly attributable to reciprocity, as for example, the action of the United Kingdom in 1955 in denying to certain Soviet diplomatic personnel the full immunities which were normally enjoyed in the United Kingdom by the diplomatic personnel of other countries, because the domestic law of Russia on diplomatic immunity precluded the extension of diplomatic immunity to certain categories of diplomatic personnel of the United Kingdom. This action, detrimental to Soviet interests, was sufficient to induce the Soviet Union to enact legislation in 1956 which was compatible with its obligations under customary international law to accord immunity to all diplomatic personnel of foreign countries.

The Soviets have always recognized the importance of international treaties as a means of attaining policy objectives and the importance of direct negotiations between states for the purpose of reaching acceptable agreements on disputed matters in the interest of peace.[75] They have, in fact, asserted as their broad treaty objectives the general welfare, nonaggression, and peace. These Soviet statements are illusory, however, because the

Soviets have on a wholesale and ruthless basis breached their treaties whenever such action fostered the interests of world communism, an objective which they have openly and repeatedly admitted. History is replete with instances in which the Soviet Union has, under the guise of nonaggression treaties, relentlessly subjugated its neighbors without in any way satiating its desire to further expand the area of Communist domination.[76]

Considerations of self-interest profoundly influence decisions to make or to break treaties and also the feasibility of enforcement action in cases of breaches of international obligations. Self-interest can also preclude the adoption of treaties. Disarmament conferences, both past and present, have generally foundered upon the desire of the participants to exclude therefrom the weapons which would provide them an advantage in war. France, for example, during the disarmament negotiations under the auspices of the League of Nations, rejected a German suggestion which would have terminated the military inequalities under the Versailles Treaty without at the same time providing for any rearmament on the part of Germany. Under the German proposal the other states would only have had to disarm to Germany's level.[76] In negotiations between the United States and Russia to control the development and use of atomic energy, each insisted on measures to its advantage--the USSR on the destruction of existing stocks of atomic bombs, the United States on inspection. This situation in arms control and disarmament agreements has continued to date for the same reasons: positive security insurance and military advantage. The numerous disarmament proposals by the United States and the Soviet Union since 1945 vividly reflect the role of security and self-interest in negotiations.[77] The Nuclear Test Ban Treaty of August 1963, however, represents a heartening development in the field of disarmament from which broader and more significant arms control agreements may emerge.

The primary role of self-interest as the basis for the conclusion of treaties was recently evidenced in the military operations of the United States and the Communist states in Korea, Laos, and Vietnam. In Korea, the United States acted upon Communist armistice overtures because it had an interest, backed by public sentiment, in ending what was still a limited war on honorable terms. The Communists in Korea were equally desirous of terminating a war which they were losing on a negotiated basis rather than by a surrender. In 1954, the United States considered the Geneva Accords preferable to letting the war continue as it was, and, on that basis, expressed its willingness to

abide by them, as it was willing to abide by the Geneva Accord on Laos in 1962 for the same reason. The Soviet Union accepted these accords because it felt that nothing tangible could be attained from what it considered to be the "wrong war in the wrong place" and perhaps because of internecine rivalry with Communist China. The advantages of the 1954 Accords to North Vietnam and Communist China on the other hand, appear to have been avoidance of an open war with the United States while retaining the possibility of accomplishing their objectives through subversive and covert activities.

Wesley Gould has observed that international negotiations are not initiated or concluded nor treaties breached solely for national advantage or the general welfare of states. Powerful industrial, commerical, or social groups within a nation, in pursuit of their particular interests, are also capable of exerting a motivating influence on foreign policy, international negotiations, and international law. This influence is to be observed in the rules applicable to international claims by entities doing business in foreign countries and the policy of imposing sanctions on foreign states to induce them to comply with their private international commercial commitments. Gould believes that the US position on the Palestine question was in an important degree determined by the Truman administration's fear of losing the Jewish vote in the 1948 elections.[78]

NEGOTIATIONS

Negotiations between states, as indicated previously, are undertaken for a host of purposes. They may be initiated for the purpose of exchanging views on political questions or issues; to discuss procedural matters; for the settlement of differences; or, more particularly, for the purpose of concluding a treaty.

Indirect Negotiations

The stage for negotiations may be set in a variety of ways. Formal negotiations may arise from action taken, or from inquiry made, by representatives of states on the basis of an ostensibly casual statement, a speech, or an expression of a view, public or otherwise, by an influential citizen of another state. They may even arise from an inspired leak to the press, or on the unilateral action or conduct of a state which effectively communicates its intent to other states on a particular issue, as

for example, arms control and disarmament matters, modifications in defense appropriations, a shift from soft to hard missiles or the manner of their deployment, mobilization of troops, their removal from particular areas, or their reduction in numbers. These and other means of indirect but effective communication may result in fruitful negotiations and treaties.

Even though the statements and conduct of representatives of one state may not lead to formal negotiations or the conclusion of a treaty on a particular matter they may, nevertheless, motivate other states to take similar action or to pursue a like course of conduct so that in effect, the result is substantially similar to that which would have been attained by the conclusion of a treaty. In some instances, by unilateral course of conduct which they hope others will follow, states can accomplish indirectly and effectively what could not have been accomplished by treaty because of prestige, face saving, or public opinion considerations.[79] The self-imposed US moratorium on nuclear tests which it was hoped would lead to similar action on the part of the USSR was an attempt to attain indirectly a result which the United States considered improbable of accomplishment by formal negotiations and a treaty.

Negotiations Through Conduct

Unilateral action by one state, the continuance of which is expressly predicated upon reciprocity and which in fact results in reciprocal conduct, can also produce a legal relationship which is substantially similar to the one which would have resulted from a formal understanding on the matter. Should the conduct initiated by this procedure be followed by states generally over an appropriate period of time, it could attain the stature of customary international law. It should also be observed that reciprocal self-restraint can provide an effective means of keeping limited wars from escalating into general war, as was vividly demonstrated during the Korean, Laotian, and Vietnamese conflicts.[80]

The airing before the United Nations of international disputes on which it takes an official stand, by resolution or otherwise, can on occasion attain a binding result which could not have been obtained through treaty negotiations.

Formal Negotiations

Formal international negotiations, bilateral or multilateral, are conducted by official agents of the negotiating states. The heads of states may conduct the negotiations personally or by communications, as appropriate. As a rule, however, negotiations concerning important matters are conducted by their secretaries of state or foreign affairs, as the case may be, with the assistance of their diplomatic agents and a staff of technical advisers.[81]

The agents of the negotiating states operate under preliminary instructions. They may at any time, of course, consult with their governments and, when they deem such action necessary, may seek from them new instructions. As a general rule, they do seek instructions prior to the signing of the agreement.

Manner of Negotiating

International law does not prescribe the manner in which negotiations are to be conducted. They may take place viva voce or by the exchange of written drafts and supporting documents. Generally, important negotiations are initiated and conducted by the exchange of written documents through diplomatic channels, and they should be, for this procedure insures against the misunderstanding that could easily arise if they were undertaken by viva voce negotiations.

Negotiating Factors

The importance of the negotiating stage of the treaty process cannot be overemphasized. The realization of the benefits visualized by the treaty depends in large measure upon the meticulousness of the preparations for the negotiations; the means used to insure that the negotiations progress in the manner and in the direction desired; the assessment of the various possible negotiating positions and tactics which the other party or parties to the agreement may take; and each party's argumentation in support of its position. It is needless to say that the negotiators and the personnel of technical staffs should be men of broad knowledge, experience, and ingenuity. It is essential, for example, that the legal personnel of the negotiating team be extremely well versed in international law, the law of the other contracting states, their own law, and the judicial decisions under these various systems of law. The treaty that is eventually concluded can then be clear, complete, precise, and to the

point. If it is based upon a full knowledge of the various applicable laws (international, foreign, and domestic), the possibility of misunderstanding and varying interpretations of its provisions will be negated or reduced to the very minimum. This objective is paramount, for a treaty is not violated, under international law, through a difference of opinion as to its meaning; it can only be violated when the parties accept the same meaning and the sense thereof is contravened. If a treaty is to have a fair chance of success, therefore, its provisions must be so clear and precise that differing interpretations cannot later arise which could occasion dissension and misunderstanding. This type of draftsmanship is particularly essential in treaties concluded with the Soviets, especially those which relate to defense and security matters, because their views and concepts of international law in practice and application vary considerably from those of the West. They have also used ambiguities and gaps in treaty provisions to justify action which would appear to contravene the over-all intent and purposes of the agreement. The Soviets are clever draftsmen of international agreements and of wording which can be used to their advantage even though ostensibly invulnerable to varying interpretations. For this reason it would be prudent to maintain a complete record of the negotiations leading to treaties with the Soviets and to insure that the minutes reflect their approval by the Soviets. By this procedure the intent of the parties on matters which may later be put in issue can be clarified, and interpretations precluded which would be plausible were it not for the record.

An example of terminology which, although apparently clear on its face, nevertheless led to varying interpretations of equal validity is the language "to be confronted with the witnesses against him" which appears in subparagraph 9 (c) of Article 7 of the North Atlantic Treaty Organization Status of Forces Agreement (NATO SOFA). The article itemizes the rights to which US service-connected personnel shall be entitled when tried by a court of one of the NATO SOFA countries. The US delegation that proposed this terminology intended by its use to insure that US service-connected personnel who were tried by the courts of NATO countries would have the same right in this respect as they would have if tried by a court of the United States. Unfortunately the article as drafted did not specify that this right to confrontation meant confrontation during the trial proper, the sense the US draftsmen had intended. Furthermore, the travaux préparatoires did not reflect the intent of the draftsmen on this matter. As might be supposed the authorities of certain NATO SOFA civil law countries interpreted the language differently: that their obligation under Article 7 was fully met if the accused were confronted with the witnesses against him prior to the

actual trial, as is the practice under their rules of criminal procedure.

This example emphasizes the necessity for treaty language which is clear, precise, and accurate. It also demonstrates the tendency of a draftsman to assume that the terminology he has proposed will be given by the other contracting parties the meaning it has in his own country, in some cases even the precise meaning it has been given under the laws or regulations of his own country. The importance of an intimate knowledge of the terminology and pertinent laws of the other signatory states is also clear.

The language of the recent nuclear test ban treaty between the United States, the United Kingdom, and the Soviet Union presented questions of interpretation. Article 1 specifies that the parties undertake "not to carry out any nuclear weapon test explosion, or any other nuclear explosion in the atmosphere, beyond its limits, including outer space, or underwater, including territorial waters or high seas." The language which is underscored above appears in a similar context in Article 2 of the treaty. There were those who questioned whether these articles could not be interpreted as precluding a recourse to tactical and strategic nuclear weapons during armed conflict prior to the expiration of the 90-day period, as provided in Article 4. The President of the United States and the Secretary of State, however, have both stated that the treaty, properly interpreted, does not preclude the immediate use of nuclear weapons by the signatories during armed conflict.

Guidelines in Treaty Negotiations with the Soviets

Triska and Slusser, based upon a survey of more than 40 years of Soviet theory, law, and policy, have concluded that the following guidelines should "serve as a kind of irreducible minimum" for those who negotiate with the Soviet Union: (a) the Soviets, because of their ideology, have little respect and show little concern for the concept of the sanctity of treaties; (b) the Soviets are ingenious and resourceful in devising reasons to support the abrogation and termination of treaties. The reasons which they advance may be entirely unrelated to the text, the content, or the intent reflected in the treaty;

> "(c) A cardinal point to be kept in mind is the need for precise formulation of any agreement with the Soviet

> rulers. This means in practice an almost total ban on agreements inherently susceptible to a variety of interpretations, for instance oral agreements. The terms used in agreements with the Soviet rulers should be defined as accurately as possible: for example, "democracy," "free elections," "freedom," and "self determination" may appear to be unequivocal and not liable to misinterpretation; yet experience has shown that they can be given diametrically opposed meanings when employed by diplomats of the Soviet Union and those of the nations of the free world. Even better than a definition of such elevated but elastic terms would be the substitution for them of specific practical modes of action designed to help each party put its treaty obligations into operation;

(d) agreements with the Soviet Union should include provisions for their modification, revision, or termination by mutual agreement; (e) the agreements should contain explicit provisions for the adjudication of disputes, the appointment of a joint arbitration board, or the submission of the dispute to an impartial tribunal to enhance the possibility of attaining mutually beneficial results; (f) the agreements should contain a clear and specific provision for their termination by a given date or upon the completion of the purposes for which the agreement was concluded.[82]

These general observations are all cogent. It is believed that it would be preferable to provide for the unilateral termination of treaties subsequent to written notice of intent to terminate, rather than to make their termination subject to mutual consent. It is impractical to base termination upon mutual consent and illogical to suppose that such a provision would in any way deter the Soviets from breaching agreements which have become burdensome or incompatible with their basic interests. The requirement for mutual consent under these circumstances could serve no useful purpose. It would only unnecessarily intensify existing tensions and conflicts.

Providing Methods for the Peaceful Settlement of Disputes

In anticipation of possible misunderstanding that may arise incident to interpretation of treaties or for other reasons, it would be proper for the United States to seek in negotiations with the Soviets express treaty provisions which, depending upon the sensitivity of the subject matter, provide for (1) unilateral

termination after notice; (2) the revision of the treaty or certain provisions thereof on the request of any party, and the right to terminate the treaty should revision by mutual agreement prove impossible; (3) compulsory submission of justiciable disputes to the International Court of Justice, and the settlement of political disputes, preferably ex aequo et bono, by an arbitral tribunal, a group of experts mutually agreeable to both parties, or perhaps even by a majority vote of the UN General Assembly. Provision should be sought for the investigation of disputes and the marshaling of facts by a UN group, and for the submission of its findings and recommendations to the body which the parties have vested with adjudicatory authority.[83]

Soviet View. It is doubtful whether certain of these methods for the peaceful and orderly settlement of disputes will be acceptable to the Soviets, particularly the referral of disputes to the International Court of Justice or the General Assembly, and the investigation of disputed facts by the United Nations or any other international agency. It is improbable, on the basis of past experience, that the Soviets would agree to submit disputes, particularly political disputes, to an arbitral tribunal or group of experts for definitive resolution. In any event, a refusal by the Soviets to agree to one or some of these methods of settling disputes would in itself provide some indication as to the sincerity of the Soviets on the matter at hand, and the extent to which they regarded the proposed treaty as of benefit to them.

Although the Soviets have on numerous occasions alleged their firm desire to have all disputes settled by peaceful means, they have in practice steadfastly refused impartial or judicial settlement by the International Court of Justice, by an arbitral tribunal, or by other impartial agencies, except for disputes which have arisen incident to trade agreements of minimal importance and disputes under agreements which related to private rights only.

The impartial or judicial settlement of disputes is inherently repugnant to Soviet ideology and they view such a means of settlement as posing a threat to the Communist regime. Soviet leaders have taken a negative attitude toward all proposals to refer disputes to the International Court of Justice or to an arbitral tribunal. They have recently rejected the repeated offers of the United States to submit to the court the disputes which have arisen due to the shooting down of US military aircraft by the Soviets. They have also strongly opposed all efforts to extend the compulsory jurisdiction of the court and have never consented to such jurisdiction under the "optional"

clause of Article 36 of the Statute of the International Court of Justice.[84] The Soviet Union still considers itself a minority state and is, therefore, fearful of entrusting its interests for decision by a body which has no rule of unanimity. As Litvinov expressed it in 1922:

> It was necessary to face the fact that there was not one world but two--a Soviet world and a non-Soviet world . . . there was no third world to arbitrate. . . . Only an angel could be unbiased in judging Russian affairs.[85]

The Soviet Union has little trust in the United Nations as an agency for the impartial settlement of disputes. It considers the United Nations to be somewhat a minion of the United States which the United States can manipulate as an instrument of national policy.[86]

For these reasons the Soviets have sought settlement of political disputes through conciliation, diplomatic channels, and mediation, in that order of preference. They much prefer to have disputes settled by conciliation commissions composed of an equal number of nationals of the contracting states, appointed by the contracting states, and when deadlocks occur in conciliation proceedings, to then deal with the dispute through diplomatic channels.[87]

The importance attributed to treaties by the Soviet Union, and the significance which the Soviets give to the drafting of treaties and the development of new international legal norms by treaties, was indicated by Aleksandr Troianovskii, the first Soviet Ambassador to the United States, in a speech delivered before the American Society of International Law in 1934. He expressed the view that moral law and the law of human conscience could hardly be taken seriously as bases of international order, since "the guidance from the source is too subtle" and lacking in preciseness. It was essential, in his view, that "something more positive, more concrete, and definitive" be found. He stated his belief that the solution rested in treaties--"very precise international treaties," based on "exact formulas and determined obligations."[88] These views reflect those of the present Soviet government, which has consistently and unequivocally recited its preference for treaties as the primary source of international order. It is worth noting that Soviet violations have most often been violations of political treaties--treaties of alliance, peace, mutual assistance, regional security, nonaggression, and neutrality. Primarily, Soviet treaty violations have related to three issues: nonaggression and respect for sovereignty and

independence of states; the establishment and maintenance of effective international controls and cooperation; and the forbidding of revolutionary propaganda and subversive activity abroad--all of which are generally incompatible with basic Soviet doctrines and aspirations for a Communist-dominated world.[89]

It is well to remember that the Soviet discipline of international law performs a supporting function in the formulation and the justification of Soviet foreign policy and that Soviet international law experts have repeatedly and ably demonstrated their ability to provide an effective defense for any action taken by the Soviet Union on political matters, no matter how flagrant a violation of generally recognized principles of international law it may constitute.[90] Soviet jurists have consistently claimed the right to reject any rule of international law that is not acceptable to their government.[91] As Triska and Slusser have observed:

> The reasons for the Soviet government's violations of its political obligations and ideological treaty obligations are not difficult to understand in historical terms. What is difficult to understand is the apparent success with which Soviet scholars have persuaded themselves that they have achieved a genuine unity between the "realistic" practice of the Soviet government in its treaty relations and the determinedly high-minded treaty theory developed by the scholars themselves. The relation between Soviet treaty theory and practice displays not the unity proclaimed by Soviet scholars, but a perversion of the rational processes of scholarship and the moral responsibilities of citizenship.[92]

SIGNATURE AND RATIFICATION OF TREATIES

Legal Effect of Signature

The effect of signing a treaty depends on whether it is one which is subject to ratification. In the case of those which are subject to ratification by their terms or which are so under the provisions of the domestic law of one or more of the contracting states, a signature to the treaty merely reflects the fact that the agents of the contracting states have reached an agreed text and are willing to refer it to their governments. The contracting states are under no obligation to ratify a treaty

signed by their authorized representatives, if its coming into force is subject to ratification.

The states, therefore, may take whatever action they desire in regard to the acceptance or rejection of a signed treaty which is subject to ratification. The rationale of ratification is that states require an opportunity to re-examine the whole effect of the treaty upon their interests, as it is possible that there may have been changes since the signing of the treaty that would make the treaty provisions no longer acceptable to them. Furthermore, treaties, according to the constitutional law of most states, are not valid without the consent of their legislative bodies. Governments must therefore have an opportunity of withdrawing from a treaty, should the legislature deny it their approval. Ratification, however, is not always required. Treaties which are concluded by authorized representatives, which do not require ratification by their express provisions, and which do not require ratification under the domestic law of the contracting states, are binding upon the contracting states.[93]

Neither is ratification required when the contracting parties provide expressly that the treaty shall be binding at once without ratification. Express renunciation of the right of ratification is valid only when given by representatives duly authorized under their domestic law to make such a renunciation. A renunciation of a ratification by one not so authorized is not binding upon the state he represents.[94]

Ratification under Municipal Law

United States

Under the Constitution of the United States, a treaty is the "supreme law of the land, binding alike National and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights."[95] Treaties under US law, however, are of two types: those which are self-executing and those which are not--that is, those which require implementing legislation to make them effective as US law. In Foster v. Nelson, Chief Justice of the Supreme Court Marshall stated:

> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial; but is carried into execution by the sovereign power of

> the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in Courts of Justice as equivalent to an act of legislature, when it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political not the judicial department; and the legislature must execute the contract before it can become a rule for the court.[96]

Self-Executing and Non-Self-Executing Treaties. A self-executing treaty has been defined as one which specifies that it has force and effect without the need of any implementing legislation; or one that, in the absence of specification, is later held by the courts not to need such legislation.[97] A non-self-executing treaty is one which specifies that it is ineffective domestically in the absence of implementing legislation, or one that is later held by the courts to be so.[98]

As a matter of US Constitutional law a self-executing treaty, as distinguished from a self-executing executive agreement, effectively supersedes any incompatible Federal statute which was enacted prior to the effective date of the self-executing treaty. A Federal statute, however, which is enacted subsequent to the effective date of a self-executing treaty and which is incompatible with such a treaty effectively supersedes and abrogates the treaty's legal effectiveness.[99] As a practical matter, however, a self-executing treaty is not deemed to have been abrogated or modified by a statute of subsequent date unless such purpose on the part of Congress has been clearly expressed.[100] It is to be noted, however, that the treaty power is subordinate to the United States Constitution and treaties incompatible with the Constitution would have no legally binding effect in the United States.[101]

To date the Supreme Court has never found it necessary to declare a provision of a treaty unconstitutional. It has obviated this necessity on occasions by construing questionable treaty provisions so as to make them conformable to Constitutional limitations. US statutes that were enacted to implement treaties have been declared unconstitutional, however, without any regard for the treaty provisions which were thereby abrogated.[102]

Congressional and Executive Agreements. The foreign relations power of the United States, of course, is not limited to the treaty power, and Congress under its delegated power has provided for the negotiation and conclusion of international agreements other than treaties. The President also may legally conclude agreements under powers delegated to him by the Constitution.

A self-executing agreement, as distinguished from a self-executing treaty, becomes the law of the land unless its provisions are in derogation of the Constitution or are incompatible with the provisions of any prior or subsequent US statutes on the subject matter involved.[103]

It may also be noted that when a treaty or agreement is abrogated in whole or in part within the United States for any of the reasons mentioned above, it nevertheless remains a valid international obligation of the United States, even though it may not be enforceable by US courts or administrative authorities. The abrogation constitutes a breach of an agreement for which the United States is liable internationally.[104]

The United Kingdom

Under the laws of the United Kingdom treaties which affect private rights, and those which require a modification of the common law or of a statute for their enforcement by British courts, must receive parliamentary approval through an enabling act of Parliament. Thus treaties do not become British law until they are expressly made so by the legislature. This departure from the common law rule is due to the fact that, under British constitutional law, the ratification of treaties is a prerogative of the Crown, which, without a departure from the common law rule, would be in a position to legislate without obtaining parliamentary consent. In practice, treaties are, as a rule, submitted to Parliament for approval prior to their ratification by the Crown, so that enabling legislation is enacted before the treaty is ratified on behalf of the United Kingdom. British statutory law is absolutely binding on British courts, even when incompatible with international law. A failure by Parliament to enact legislation giving force and effect to a treaty would constitute a breach of international law on the part of Great Britain for which it would be liable internationally.[105]

The Soviet Union

Ratification is defined by the Soviets as the solemn approval of an international treaty by the supreme organs of the state, followed by the exchange of ratification documents between the contracting states.[106] Under Soviet law ratification is a constitutive and not a declaratory act. A treaty has no legal force until it has been ratified in the manner specified by Soviet domestic legislation, or completion of the exchange or deposit of the instruments of ratification, respectively, depending upon the treaty provisions concerning ratification procedures.[107] Refusal by the Soviet government to ratify a treaty, or to exchange and deposit its instruments of ratification, if the treaty provides for an exchange and deposit of instruments of ratification, is a perfectly legal act under international law, as the Soviets view it, and as does the West.[108] The Soviets consider that treaties concluded by the Soviet Union which are not incompatible with existing Soviet legislation are binding upon it as a matter of international law, and, being constitutional acts of that Union, constitute a part of the municipal law of the Union merely by and upon the publication of their texts. Thus, except for the promulgation of the text of treaties, no special legislation is required to give them the force and effect of domestic legislation.[109] Treaties which are incompatible with existing Soviet domestic legislation, or which require implementing legislation (to obligate funds from the state budget), require specific legislation to give them domestic force and effect or, if they are already in force but require implementing legislation, to enable their fulfillment.[110] However, the Soviet Union is not relieved of its international obligations established by treaty if it should fail or refuse to enact the legislation required to give the treaty force and effect. The treaty, under these circumstances, would simply have no binding effect within the Soviet Union.[111] It is to be observed that under the Constitution of the Union of Soviet Socialist Republics of 1936, as amended, and legislation in implementation thereof, not all treaties which are concluded by the USSR require ratification. Only peace treaties, treaties of mutual defense against aggression, and international agreements whose entry into force is expressly made subject to ratification by the parties need to be ratified, and such treaties can only be ratified or denounced by the Supreme Soviet of the USSR.

All other types of treaties may be concluded, upon the confirmation of the Council of People's Commissars, by negotiators authorized by that Council; treaties so concluded may be denounced by the Council.

Ratification and the Nuclear Test Ban Treaty

The discussion of ratification procedures under the domestic laws of the United States, the United Kingdom, and the Soviet Union explains the signature and ratification procedures followed in concluding the recent Nuclear Test Ban Treaty: all three parties had expressly made the effectiveness of the treaty subject to ratification. The Soviet Constitution and legislation does not require that a treaty of this nature be ratified. In the United States it was considered to be of such import that the approval of the Senate should be sought in the manner which the Constitution requires for "treaties." Ratification would not have been required under British law to make it effective upon its signature as a legal international obligation of the United Kingdom. Its subsequent effectiveness within the United Kingdom, however, would have been based upon the enactment of appropriate enabling legislation by Parliament.

THE LEGAL EFFECT OF TREATIES

Treaties which have as their purpose legal objects under international law are binding upon the signatory states because customary international law gives them such an effect.[112]

Under customary international law and, on certain matters, conventional international law (the UN Charter) as well, certain rights and obligations are precluded from becoming the object of treaties, and treaties on illegal objects are automatically null and void.[113] A treaty, other than an almost universal one of a law-making character enacted for the general good of the international community, which purports to impose an obligation upon a third party without its consent would to that extent be null and void, for treaty obligations do not have a binding effect upon nonsignatories.[114]

ENSURING COMPLIANCE WITH TREATIES

The means and methods of enforcing treaties are covered elsewhere in Study "Riposte." Only general observations, therefore, on this subject are appropriate in this paper.

It has been observed[115] that treaties are permanently obeyed only when they reflect the continued wishes of, and provide continuing benefits to, the contracting parties. Treaty signatories, therefore, can never rest assured that the other signatory or signatories will permanently comply with the obligations which they have assumed under the treaty unless, perhaps, the situation is such or the treaty is so cast that the other signatories will throughout the life of the treaty enjoy as their quid pro quo benefits which they cherish and would not enjoy in the absence of the treaty. In the absence of this kind of situation, signatories will eventually shed by denunciation or some other means those treaty obligations which have become onerous to them. Even in the absence of denunciation or termination of a treaty by a disgruntled signatory, it is obvious that such a state could render the treaty ineffective and in effect relieve itself of its obligations thereunder through purely procedural tactics and devices.

These observations are as much, if not more, applicable to arms control and disarmament agreements as to treaties concerned with other matters. Such agreements are unusually sensitive and are more difficult to conclude and to sustain because of their security impact.

There are few, if any, effective means of ensuring the continuation of a treaty which no longer serves the interests of one or more of the contracting parties. Yet in spite of the fact that no plethora of means exist to ensure the continuation of treaties, the vast majority of them are conscientiously observed, even under unfavorable conditions and at considerable inconvenience to the signatories. States comply with the treaties they conclude for a variety of reasons: to preserve their international reputation and good name both at home and abroad; to ensure the continuance of benefits which they enjoy under other treaties they have concluded on other matters with the same signatories; to avoid unfavorable publicity and the censure of world public opinion; to avoid retortive action, reprisals, and possibly war; to avoid international repercussions and collective sanctions; to persuade the other signatories to relieve them of their obligations in whole or in part or to obtain tacit consent to their nonperformance; to motivate the other signatories to

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These observations are as much, if not more, applicable to arms control and disarmament agreements as to treaties concerned with other matters. Such agreements are unusually sensitive and are more difficult to conclude and to sustain because of their security impact.

There are few, if any, effective means of ensuring the continuation of a treaty which no longer serves the interests of one or more of the contracting parties. Yet in spite of the fact that no plethora of means exist to ensure the continuation of treaties, the vast majority of them are conscientiously observed, even under unfavorable conditions and at considerable inconvenience to the signatories. States comply with the treaties they conclude for a variety of reasons: to preserve their international reputation and good name both at home and abroad; to ensure the continuance of benefits which they enjoy under other treaties they have concluded on other matters with the same signatories; to avoid unfavorable publicity and the censure of world public opinion; to avoid retortive action, reprisals, and possibly war; to avoid international repercussions and collective sanctions; to persuade the other signatories to relieve them of their obligations in whole or in part or to obtain tacit consent to their nonperformance; to motivate the other signatories to

conclude agreements with them on other matters which would be of substantial benefit to them as a further quid pro quo for their continued compliance with treaties which are burdensome. In cases of legal or political disputes, the continued validity of a treaty can, as a matter of right, be submitted to an arbitral tribunal, a group of experts, or the International Court of Justice for amicable and peaceful settlement, if the parties are bound by the treaty to do so, or if the parties are subject to the compulsory jurisdiction of the court or obliged by mutual agreement. These and other reasons may support the continued observance of unfavorable treaty provisions.

As a practical matter it would appear that recourse, individual or collective, to the legal sanctions of international law under the Charter of the United Nations can be both fruitless and impractical, except in serious breaches that threaten the peace, and that it would be preferable when treaties become burdensome that they be renegotiated, modified, or terminated by mutual consent.

INTERPRETATION OF TREATIES

The Soviet Union considers, as does the West, that the interpretation of a treaty is "the clarification of the content, conditions, and aims of the treaty or of its individual articles," so that the treaty may be applied in consonance with the intent of the parties.[116]

Soviet doctrine holds it essential that treaties be interpreted in conformity with "the basic principles of international law"--that is, "principles of universal peace and security of nations," "state sovereignty, equality, and mutual advantage," "pacta sunt servanda" (treaties are binding), and "pacta tertiis nec nocent nec prosunt" (third states have no rights or duties under treaties to which they are not parties).[117] Treaties, in the Soviet view, must also be interpreted (a) with reference to the parties' goals and good faith; (b) without considering the law-making characteristics of the treaty; (c) in accordance with both its letter and meaning; (d) by giving precedence to a prohibitive over a mandatory rule of interpretation and by giving precedence to a mandatory over a permissive rule of interpretation; (e) by giving preference to special over general provisions; and (f) by resolving all doubtful issues in favor of the obligated party.[118]

The Soviets stress the importance of the following methods of interpretation which are not generally amenable or compatible with those of the West: (a) in cases in which a treaty contains terms which, although known to all parties, are understood differently by them (e.g., "nationalization," "cooperative coexistence," "freedom," "democracy," "self-determination"), each state is considered as accepting these terms as it understands them under the terms of its own legal system; (b) treaties may be clarified by comparison and reference to other similar treaties.[119]

As the organs competent to interpret treaties, Soviet doctrine specifies the following: (a) the contracting states, which may agree on the interpretation by which they are then bound, or which may interpret the treaty separately, through their governmental agencies or municipal courts. If one party refuses to accept the domestic interpretation of the other, then only the party that interpreted the agreement is bound by that interpretation and the full responsibility therefor; (b) the International Court of Justice under Article 36 of the Statute of the court. Should the parties agree to make the jurisdiction of the court compulsory for all their disputes involving questions of interpretation, or should the parties agree to accept the jurisdiction of the court only in particular cases (acceptance of the optional jurisdiction of the court), the decision of the court in such cases would be binding upon the parties; (c) the Security Council and General Assembly in the interpretation of the Charter of the United Nations; (d) arbitration courts when the parties so agree. Their decisions under these circumstances are binding on the parties; (e) conciliation commissions, but their interpretations have no binding effect upon the parties; (f) the diplomatic missions of the parties concerned.[120]

Customary international law also holds that treaties which are inconsistent with the obligations assumed by the signatories under former treaties are illegal. This principle extends to multilateral treaties of an almost universal character, such as the Charter of the United Nations, which gives to them the character of legislative enactments affecting all members of the international community, and to such multilateral enactments which have been concluded in the general interest. Treaties which impose an obligation to perform a physical impossibility are null and void, as are treaties which impose immoral or illegal obligations, such as those setting up alliances for the purpose of attacking another state without provocation, or which condone the commission of piratical acts on the open sea by a nation or group of nations.[121]

HOW TREATIES COME TO AN END

A treaty may terminate in four ways: it may expire, be dissolved, become void, or be canceled.[122]

Expiration

Treaties which provide for their own termination--for example, those which are made for a specific purpose or a specified period of time, or are expressly made terminable by notice--terminate automatically upon the fulfillment of their conditions. When the time has expired, the purpose been accomplished, or the notice been given, the treaty goes out of existence.

Mutual Consent

A treaty concluded for a period of time which has not yet expired, or a treaty made in perpetuity, may be dissolved by mutual consent of the signatories. Mutual consent is evidenced in three ways: by the express declaration of the signatories that the treaty is rescinded; by the conclusion of a new treaty by the parties which is incompatible with a former treaty on the same objects (rescission by tacit mutual consent or substitution); or by the renunciation of rights by a signatory state which alone benefits from treaty provisions.[124]

Voidance of Treaties

Treaties which do not expressly provide for the possibility of withdrawal may, nevertheless, be dissolved after notice by one of the signatories. Withdrawal after notice is proper only for treaties which are not intended by the parties to set up an everlasting condition as, for example, commercial treaties. As a general rule treaties concluded for a specified period of time are not terminable by notice. They may, however, be dissolved by mutual consent.[125]

Annulment of Treaties

Vital change of circumstances constitutes an exception to the general rule that treaties concluded for a specified period of time or to set up a permanent condition may not be dissolved by withdrawal. As a practical matter it would appear illogical to maintain that a treaty, even though it may purport to be of indefinite duration, remains binding for all time, notwithstanding any change of conditions, unless discharged or modified by mutual consent. The rapidly changing conditions of national and international life, and the dictates of reason, suggest that there does exist in treaties an implied condition, even in those purportedly in perpetuity, that they are to be regarded as terminable because of material and vital change in the fundamental conditions which existed at the time of their conclusion.[126] Many of the older treaties contained the clause rebus sic stantibus (in these circumstances), under which the treaty was to be construed as abrogated when the material base and circumstances on which it rested materially changed.[127] A recent instance of the use of the clause appears in certain postwar economic agreements concluded by the United States. These stipulate that if during the life of the agreement either party should consider that "there has been a fundamental change in the basic assumptions underlying this agreement" a procedure looking toward revision or termination is to be followed.[128] The maxim conventio omnis intelligitur rebus sic stantibus (in every convention it must be understood that material conditions must remain the same) may reasonably be held to be applicable even though the treaty does not contain the clausula (the rebus sic stantibus clause).[129] In order that the treaty be properly terminable on this basis it would appear that the change upon which the termination is predicated must be one that removes, for all practical purposes, the very basis of the original agreement. Those who deny the legality of recourse to the clausula and who denounce it as a dangerous and lax principle which could negate the sanctity and binding effect of treaties are reminded that the recognition of the clausula rule, as an exception to the general rule pacta sunt servanda, may be a matter of practical and inherent necessity. To espouse the view that treaties are binding for all time, despite such change of conditions and circumstances, could strain the principle of the sanctity of treaties beyond the breaking point, and could imperil not only that principle, but also international peace and security. The principle may be vague, but it is no more so than the rules of municipal law are as to "reasonable case" and "reasonable cause," and the international arbitration tribunal or the International Court of Justice would find it no more difficult to apply this principle than would municipal courts in applying the

test of reasonableness.[130] The doctrine rebus sic stantibus kept within proper limits in fact embodies a general principle of law which is expressed in the doctrine of frustration and supervening impossibility. In this sense it may be said that every treaty implies a condition that, if by an unforeseen change of circumstances an obligation provided for by the treaty should imperil the existence or vital development of one of the parties, it should have the right to demand its release from the obligation concerned.[131] It has been suggested that the doctrine of rebus sic stantibus does not give states a unilateral right to declare themselves free from the obligation of a treaty immediately upon the occurrence of a vital change of circumstances, but only entitles them to claim a release from these obligations from the other party or parties to the treaty. Under this view a state that believes the obligations it has assumed by treaty have become unbearable because of a vital change in circumstances should request the other signatory or signatories to agree to the abrogation of the treaty, and should also offer to submit any disputed issues for judicial determination. Should the other signatory or signatories refuse to agree to abrogation and also refuse to submit the dispute for judicial determination, the requesting state would then be justified in unilaterally declaring the treaty abrogated--the refusal of the other signatory or signatories to refer the dispute for adjudication being prima facie evidence that the state or states benefiting from the treaty were determined to take advantage of a treaty which no longer had a legal reason for existing.[132]

It is to be noted that the United States as recently as 1941 renounced its obligations under the International Load Lines Convention of 1930 on the grounds of "changed conditions" which were alleged as conferring on the United States "an unquestioned right and privilege under approved principles of international law" to declare the treaty inoperative.[133]

Although the practice of states is not conclusive as to the legality of recourse to unilateral denunciation under the doctrine of clausula rebus sic stantibus, the doctrine has been applied by states on numerous occasions.[134] A clear example of the repudiation of treaty obligations on the ground of an essential change of circumstances was Russia's action in 1870 in repudiating that portion of the Treaty of Paris of 1856 which neutralized the Black Sea and placed restrictions on Russia with respect to the keeping of armed vessels in that sea. Russia stated that a material change in conditions contemplated by the treaty had occurred by the subsequent union of the Danubian principalities, acquiesced in by the great powers, as well as by the changes in naval warfare occasioned by the use of

iron-clad vessels. When the powers met in London at the close of the Franco-Prussian War, Russia was rebuked but allowed to have her way.[135]

Again in 1886, Russia closed the port of Batoum contrary to the express provision of Article 59 of the Treaty of Berlin of 1878, which provided for the freedom of the port.[136] All of the signatories except Great Britain appear to have tacitly consented to the denunciation.

Germany in 1936 unilaterally renounced her obligations with respect to the demilitarization of the Rhineland under the Treaty of Versailles and the Locarno Pact, on the ground that these were incompatible with the Franco-Soviet Pact of 1935. The League of Nations, however, declared this illegal.[137]

In the case of Luzern v. Aargau (1882), the Federal Swiss Tribunal recognized the doctrine of rebus sic stantibus in a dispute between two Swiss cantons relative to the extinction of a conventional public law servitude. The court held that it was a principle of law universally recognized that a contract may be denounced by unilateral act as soon as its continued existence is incompatible with the self-preservation of an independent state or when there has been a change in the conditions which formed the tacit condition of the existence of the treaty.[138]

Thus, the practice of states has recognized that treaties are susceptible to unilateral denunciation under the doctrine of rebus sic stantibus when, because of unforeseen changes in circumstances, an obligation imperils the existence or the development of the burdened state.[139]

Payson Wild, Jr., has sagely observed that satisfactory arrangements for treaty relationships involve two important matters: first, provision for treaty revision and termination, and, second, the creation of some system of legal procedures whereby treaty obligations may be placed in their relative order. These two matters, he states, merge into one and are resolved in national affairs by vesting in government agencies the authority to enact new laws, repeal old ones, and declare certain relationships and rules void. In the international community such action is not now possible, and the obsolete rules which are applied to treaties preclude necessary and timely treaty revision. They work, rather, for the enforcement of treaties which either need revision or establish a status quo that is regarded by one party as inequitable.[140] For this reason he believes that the clausula has served a useful purpose in focusing attention on the fact that there may be valid grounds for annulling or canceling a treaty obligation; he believes also that treaties which contain no clause for termination or revision may not legally be considered eternal.[141]

The Soviet international law experts consider, as do some experts in the West, that the clausula rebus sic stantibus must be recognized as a particular exception to the pacta sunt servanda principle that is dictated by life and progress and necessary to economic and political progress. Although the Soviets believe that unilateral repudiation should not take place on the basis of the changed conditions clause, they consider unilateral repudiation to be permitted by international practice when no agreement for termination or rescission is possible.[142] In this connection it should be remembered that the Soviets maintain that a government established as a result of a profound social, economic, and political revolution is not bound by an international agreement concluded by its predecessors, and that the annulment of such agreements by such a government is a legitimate act.[143]

The dissension engendered by the contentious doctrine of rebus sic stantibus vividly reflects the controversial nature of the norms of customary international law, many of which are admittedly imprecise, confused, and outmoded; their limited adequacy for the resolution of international disputes; and the role of international law generally, in an unintegrated world order which has undergone unprecedented political, economic, and social changes. The law essentially represents stability and the status quo. In fact it is the function of law to uphold the existing order of things, not to change or destroy them. Fundamental changes in social, economic, and political processes and the accommodation of incompatible national interests can only be accomplished by legislative action; by the rescission, modification, and alteration of the law. Unfortunately, an official international legislative process is at present but a hope, realizable perhaps only in the far distant future. The courts under the present state of affairs, therefore, can at best only attempt to conciliate and accommodate minor changes in the world order through the adjudication process and within the narrow limits permitted by a society which is composed of sovereign states. It is clear that the international dispute-solving process functions ineffectively and laboriously under exceptional handicaps.

Some opine that if states were rational their disputes could be resolved satisfactorily by court action on the bases of existing norms. Others believe that legal methods are not only inadequate but entirely irrelevant to world politics and the settlement of political disputes. Granting some truth to both of these views it may nevertheless be said that recourse to the doctrine of rebus sic stantibus would provide the courts a legal basis on which they could invalidate obsolete treaties which jeopardize the peace and security of the international community.

Even this opportunity would be very limited, as it would exist only with respect to the few instances in which states submit their disputes to judicial settlement.

The world community is not now equipped institutionally to coordinate, to accommodate, or to stabilize the international society. It has no legislative body which can rescind bad laws and make new laws that are urgently required by changed circumstances, and no police arm capable of enforcing rights under international legislation. Until such institutions and rules are developed it can be anticipated that states will continue to be reluctant to have their disputes adjudicated.[144]

Unilateral Denunciation and Municipal Law

International law, in addition to its recognition of the lawfulness of unilateral denunciation under specified circumstances, recognizes as well the possibility that states may take such action in derogation of international law. The power and the capability of states to breach their international obligations is recognized by the provisions of international sanctions. All states recognize an inherent right in themselves to denounce certain treaties.

The Soviet Union

The Constitution of the Union of Soviet Socialist Republics expressly provides for the denunciation of treaties.[145] Article 49 (P) of this Constitution specifies that it shall be the Presidium of the Supreme Soviet of the USSR which "ratifies and denounces international treaties of the U.S.S.R." that require ratification. The Soviet law of August 20, 1938, expressly vests in the Council of People's Commissars the right to denounce all other treaties which do not require ratification by the Presidium.[146] This express authorization, properly interpreted, means simply that under Soviet municipal legislation only the Presidium of the Supreme Soviet or the Council of the People's Commissars, depending upon the nature of the agreement, may, for proper cause, denounce a treaty. It does not, for example, give to these bodies a right which the legislative bodies or the executives of the countries of the West may not exercise because their constitutions are silent on the subject or do not expressly vest them with that power.

The United States

Under the municipal law of the United States, for example, Congress, by subsequent legislation whose provisions are incompatible with the provisions of existing treaties, or by failing to enact legislation necessary to implement a treaty, does in fact accomplish a denunciation of a treaty in derogation of US international obligations. A Supreme Court decision which holds a treaty to be incompatible with the Constitution of the United States or a subsequent Federal statute would also accomplish denunciation. The President can also denounce treaties under powers vested in him by the Constitution. In fact, as far as the United States is concerned, it is more difficult for it to conclude treaties than it is for it to denounce them.[147]

Triska and Slusser have concluded from their examination of Soviet practice that the USSR considers that the unilateral right to denounce treaties on the basis of changed circumstances is lawful when done by the Soviet Union but unlawful when done by the other party or parties to the treaty.[148]

The Voidance of Treaties

Treaties may become void through the extinction of one of the parties, except those treaties which are dispositive in nature and which, as such, devolve upon successor states. Treaties are also voided when their execution becomes impossible--for example a treaty of alliance in cases when war breaks out between some of the parties. They are voided when the object of the treaty becomes extinct--for example, treaties regarding a third state which disappears due to its merger with another state.[149]

The Soviets maintain that the extinction of a state or government with which the Soviet government has signed a treaty is just ground for the annulment of the treaty by the Soviet government, and for its release from all obligations under the treaty.[150]

The Cancellation of Treaties

Treaties are canceled when, due to the development of international law, they become inconsistent with international law, as, for example, treaties relating to the treatment of civilian personnel in occupied areas which would be incompatible with the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War.[151]

Treaties whose provisions are violated by one of the signatories may be considered void or voidable by the other signatory or signatories unless otherwise specified in the agreement. There are two schools of thought as to whether a treaty is void or merely voidable upon its breach. It is clear that a treaty may properly be considered no longer binding when the breach is a violation of an essential provision of the treaty or its essence. As to breaches of what may be termed miscellaneous or nonessential provisions, it is asserted that it is not always possible to distinguish between them and those that are essential and, as the treaty protects both types of provisions, it is for the injured party to determine whether the breach justifies the cancellation of the treaty.[152]

Allegations of the violation of a treaty by other signatories have frequently been used by Soviet leaders to justify their denunciation of treaties, and their actions which were incompatible with the provisions of treaties. In 1939 the Russians charged that Finland had "systematically violated" its obligations under the Soviet-Finnish Nonaggression Treaty of 1942, and that Finland had by its actions shown that it had "no intention of complying" with the provisions of this treaty, and that on this basis the Soviet government regarded itself "released from the obligations" of the treaty.[153]

A treaty may also become void due to a permanent change in the status of one of the parties to an agreement as, for example, its incorporation within another state.

It is clear, however, that changes in the type of government of a state or in its constitution in no way impair the obligations which were assumed by that state under a prior form of government or constitution.[154] The Soviets, however, have consistently taken a contrary view: that a state may lawfully unilaterally denounce a treaty which had been concluded by a former type of government on the grounds of vital changes in circumstances.[155]

The outbreak of war between the parties, as a general rule, voids or at least suspends treaties of a political nature, except those concluded in anticipation of war or for application in time of war.[156] The Soviet view is at least theoretically the same on this point. Triska and Slusser state that in practice, however, "the difference is profound" due to the politically oriented view of the Soviets and their hostile and purposeful ideology.[157]

Notes*

1. See Triska and Slusser, The Theory, Law, and Policy of Soviet Treaties, pp. 26, 57, 397, 404-405.

2. See Starke, An Introduction to International Law, p. 1 (4th ed., 1958). See generally, Oppenheim, 1 International Law, pp. 15-27 (8th ed., Lauterpacht, 1955).

3. 1 Oppenheim, pp. 17, 25. As to duress or force in the conclusion of peace treaties, Brierly (The Law of Nations, 245 (5th ed. 1955)), has observed that peace treaties belong to an entirely different category of legal transactions from ordinary international agreements. The use of force in their effectuation does not derogate from the legislative character and binding force of a peace treaty. To allow otherwise, he states, would carry the principle of consent to the extreme, beyond the application given to it in municipal legislation where laws are imposed against the will of subjects in the general interest. 1 Oppenheim, pp. 891-892, opines that prior to the Covenant of the League of Nations, the Kellogg-Briand Pact of 1928, and the Charter of the United Nations, international law disregarded the effect of coercion in the conclusion of peace treaties, which was before that period a necessary corollary of the admissibility of war as an instrument for changing the existing law. He believes, however, that insofar as war is now prohibited by the Kellogg-Briand Pact and the UN Charter, states which resort to war in violation of the Pact and the Charter must be considered as having applied force in a manner not permitted by law and that duress in such cases vitiates the treaty.

4. 1 Oppenheim, pp. 25-26.

5. Ibid., p. 28; Gould, An Introduction to International Law, p. 294.

6. Triska and Slusser, p. 26.

7. Ibid., pp. 13-14, 22.

8. Ibid., p. 14.

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*For full information on works and documents cited, see the bibliography that follows.

9. Ibid., p. 28.

10. Ibid., p. 29.

11. Ibid., pp. 29-30.

12. Briggs, The Law of Nations, p. 48 (2nd ed., 1952). See Gould op. cit. p. 136; 1 Oppenheim, pp. 24-35.

13. 1 Principes Generaux du Droit International Public, pp. 889-929 (1944).

14. Briggs, op. cit., p. 48.

15. 1 Oppenheim, pp. 31-32.

16. Ibid., pp. 29-30; Starke, pp. 40-44.

17. 1 Oppenheim, ibid., p. 31; Briggs, p. 49.

18. Sorensen, Les Sources du Droit International, pp. 153-76, 155 (1946); 1 Oppenheim, p. 31; Starke, pp. 40-41; Lauterpacht, The Development of International Law by the Permanent Court of International Justice, p. 10 (1934).

19. Gardner, "Judicial Precedent in the Making of International Public Law," XVII Journal of Comparative Legislation (3d Series, 1935), pp. 251-59.

20. 1 Oppenheim, p. 31; Briggs, p. 19; Lauterpacht, "Decisions of Municipal Courts as a Source of International Law," 10 Brit. Yb. Int'l L., pp. 65-95 (1929); Schwarzenberger, 1 International Law, pp. 12-13 (2d ed. 1949).

21. 1 Oppenheim, ibid., p. 33; Starke, pp. 44-46; Gould, pp. 142-44.

22. Sloan, "The Binding Force of the United Nations," 25 Brit. Yb. Int'l. L., pp. 1-33 (1948).

23. Starke, p. 33.

24. Sloan, p. 27.

25. An Introduction to International Law 144 (1957). See Kelsen, Law of the United Nations, pp. 95-98, 293-95, 444-50, 459 (1950). See also Sloan, pp. 25-28. Cf the position of the

Soviet jurist Krylov, "Les nations principales du droit des gens" (La doctrine soviétique du droit international) 70 Recueil des cours pp. 92-93 (1947).

26. Gould, p. 144.

27. 1 Oppenheim, p. 877.

28. See Myers, "Treaty Violations and Defective Drafting," 17 Am. J. Int'l L. pp. 538, 565 (1917).

29. Triska and Slusser, pp. 40-41.

30. Ibid., pp. 38, 41. Vishinsky in 1948 accurately defined international law under Soviet theory as "the sum total of the norms regulating relations between states in the process of their struggle and cooperation, expressing the will of the ruling classes of these states and secured by coercion exercised by states individually or collectively" (A. Y. Vishinsky "Mezhdunarodnoie Pravo i Mezhdunarodnaii Organizatiia" Sovetskoie Gosudarstvo i Pravo, No. 1 (1948), p. 22, cited by Lissitzyn "International Law in a Divided World" International Conciliation, No. 542, 16-17 (March 1963).

31. Cobbett, Leading Cases on International Law, p. 319 (Part 1, 3d ed. 1909); P.C.I.J.A/B No. 53, p. 75. See 1 Oppenheim, p. 898 and Gould, p. 303 for instances of oral treaties.

32. Harvard Research in International Law, Draft Convention on the Law of Treaties, 710 (James W. Garner, Reporter, 1935). See McNair, "The Functions and Differing Legal Character of Treaties" 11 Brit. Yb. Int'l. L. pp. 100-118 (1930).

33. 1 Oppenheim, p. 877.

34. Ibid.

35. O'Connell, The Law of State Succession, p. 15 (1956).

36. Harvard Research, pp. 686, 688, 711-13. See Gould, pp. 298-306. An examination of more than "300 multipartite instruments concluded during the years 1919-1929 . . . indicates that only 18 are designated as 'treaties,' and 123 as 'conventions'; 105 are designated as 'protocols,' 39 as 'agreements,' 9 as 'statutes,' 12 as 'declarations,' 5 as 'arrangements,' 7 as 'provisions,' 2 as 'general acts,' 2 as 'additional acts,' and several as 'regulations' (reglements). . . ." (Harvard Research, ibid.).

37. Harvard Research, ibid., p. 688.

38. Under US law the term "treaty" is restricted to international agreements concluded by the President by and with the advice and consent of the Senate. The terms "agreement" or "Executive Agreements" are used to designate international agreements concluded by the President or under his constitutional authority without the advice and consent of the Senate. The juridical significance of a "treaty" and of an "Executive Agreement" under US law is considered elsewhere. See Byrd, Treaties and Executive Agreements in the United States, pp. 80-122, 163-65, 177-78, 199-202 (1960).

39. See Triska and Slusser, pp. 38-40.

40. Cobbett, p. 318; Gould, p. 298; Starke, p. 284.

41. See, generally, Fawcett, "The Legal Character of International Agreements," 30 Brit. Yb. Int'l L. (1953).

42. Cobbett, p. 318; Gould, p. 299; Starke, pp. 286-87.

43. Cobbett, ibid.; Starke, ibid., p. 284.

44. Gould, p. 300. See 1 Oppenheim, p. 878.

45. Gould, p. 300.

46. Ibid.

47. Ibid. See Starke, p. 287. See Byrd, Treaties and Executive Agreements in the United States, pp. 148-65 (1960) for a useful summary of the various constitutional methods of effectuating international agreements in the United States.

48. 1 Oppenheim, pp. 878-80.

49. I.C.J. Reports, 1950, pp. 133, 155-57.

50. I.C.J. Reports, 1949, pp. 178-85.

51. McNair, "So-Called State Servitudes" 6 Brit. Yb. Int'l L.,pp. 122-23 (1925); International Conventions and Third States, pp. 51-60 (1917).

52. Ibid., pp. 51-60. Cf. Keith, State Succession pp. 20-25 (1907). 1 Oppenheim, p. 927 n. 2, is of the opinion

that treaties intended to establish an international regime or settlement "would seem to be a case of unanimous consent."

53. See Triska and Slusser, The Theory, Law, and Policy of Soviet Treaties p. 105 (1962).

54. 22 Encyclopaedia Britannica (1963).

55. See O'Connell, The Law of State Succession pp. 16-17, 49-54 (1956); Cf. Esgain, "Military Servitudes and the New Nations" 1963, Yearbook of World Policy, Georgetown University.

56. Grotius, De Jure Belli et Pacis, Libri Tres (1925), Prolegomena, 3 Carnegie Trans. (1925) II, 9.

57. Oppenheim, 1 International Law, p. 10 (8th ed., Lauterpacht, 1955).

58. Ibid., p. 14.

59. See Kuntz "Sanctions in International Law" 54 Am. J. Int'l L. pp. 325-46 (1960) and "The Law of Nations, Static and Dynamic," 27 Am. J. Int'l L pp. 630-50 (1933); Roxburgh, "The Sanctions of International Law" 14 Am. J. Int'l L pp. 26-37 (1920); Brierly, "Problems of Peace and War" 17 Grotius Society pp. 5-14 (1950); Brierly, The Outlook for International Law 105 (1944).

60. P.C.I.J., Ser. B, No. 1 (1922) p. 19; I.C.J. Rep. (1948), p. 61.

61. 1 Oppenheim, p. 15.

62. Gould, An Introduction to International Law, 133 (1957) citing Doc. 002-C, 34 Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946, pp. 145-148, partially translated in VI Nazi Conspiracy and Aggression, pp. 799-814.

63. Starke, An Introduction to International Law 17 (4th ed. 1958).

64. Wild, "What Is The Trouble With International Law," 32 Amer. Pol. Science Review, (No. 3) p. 491 (June 1938).

65. Briggs, The Law of Nations, p. 20 (2d ed., 1952).

66. Ibid.

67. See McNair, "The Functions and Differing Legal Character of Treaties," 11 Brit. Yb. Int'l L. 100 et seq. (1930).

68. See Gould, p. 291.

69. Ibid., p. 292.

70. Ibid.

71. A study prepared by Congress in 1953 of treaties made during World War II between the United States, United Kingdom, and Russia on 72 different subjects concludes that at least 37 provisions of these agreements were violated by the Soviets and that in many instances the violations were recurrent. (Staff Study for the use of the Committee on Foreign Affairs entitled "World War II International Agreements and Understandings," 83d Cong., 1st Sess., 1953). For a consideration of important treaty violations by the USSR see Triska and Slusser, op. cit. supra note 55, and the list of publications on this subject which appears in their footnote 4 to Chapter 26 on p. 523.

72. Gould, p. 292.

73. Lissitzyn, "International Law in a Divided World," International Conciliation No. 542 (March 1963). See Triska and Slusser, pp. 41-42, 47.

74. See Gould, pp. 118-19.

75. Ibid.

76. Ibid.

77. See Spanier and Nogee, The Politics of Disarmament (1962).

78. Gould, p. 124. See The Forrestal Diaries (ed. by Walter Millis (1951)) pp. 309, 322-23, 341, 344-48, 362-64.

79. See Schelling and Halperin, "Negotiation and Agreement," which appears as Chap. 19 in Arms Control and Disarmament (Lefever, ed., 1961). See also Fisher "Constructing Rules That Effect Governments" which appears as Chap. 3 in Arms Control, Disarmament, and National Security (Brennan, ed., 1961).

80. The President of the United States has officially declared the intention of the United States to subscribe to the aim of limiting war should it break out. He has stated: "If . . . a local dispute should flare into armed hostilities, the next problem would be to keep the conflict from spreading" President Eisenhower, State of the Union Message, January 9, 1959, New York Times, January 10, 1959.

81. Starke, p. 292.

82. Triska and Slusser, pp. 404-405.

83. See Bloomfield, The United Nations and US Foreign Policy (1960) pp. 100-101. See also, in this connection, Bowie, "Arms Control and United States Foreign Policy," Arms Control pp. 70-71 (Henkin, ed., 1961).

84. See Lissitzyn, "International Law in a Divided World," International Conciliation, No. 542, pp. 28-29 (March 1963).

85. Quoted by Lissitzyn, ibid., p. 29.

86. See Bloomfield, pp. 111-14.

87. Triska and Slusser, p. 382. The Soviet fear of prejudice and arbitral and judicial decisions dates back to the period when the Soviet's form of government in the international community was a minority of one and it believed an impartial settlement to be impossible. In this respect Korovin in 1923 stated: "The obligatory minimum and the basic premise of any form of arbitration, is a body of common legal opinion and common criteria, and in the absence of such a community any attempt to find an arbitral authority of two halves of humanity speaking different languages is doomed a priori" (quoted in Triska and Slusser, ibid., p. 383). Soviet practice admits of arbitration but only as to minor disputes of a technical nature or disputes concerned with private rights. Ibid., pp. 381, 384-86.

88. "Address delivered on April 28, 1934," Proceedings, American Society of International Law, pp. 195-96 (1934).

89. Triska and Slusser, pp. 394-95.

90. Ibid., p. 398.

91. See Lissitzyn, p. 22.

92. Triska and Slusser, p. 396.

93. 1 Oppenheim, p. 906. See Briggs, pp. 582-83. Cf. Starke, p. 295.

94. 1 Oppenheim, ibid., p. 908.

95. Maiorano v. B. and O. R. R. Co., 213 US 286, 272 (1909) and cases cited in Byrd, Treaties and Executive Agreements in the United States, pp. 81-121 (1960); V. Hackworth, Digest of International Law, 194ff. (1944); V. Moore, Digest of International Law, 221ff. (1906); 2 Hyde, International Law Chiefly as Interpreted by the United States, 458ff. (2nd rev. ed. 1945).

96. 2 Pet. 253, 314 (1829). As to self-and non-self-executing treaties and agreements, see generally Byrd, ibid., pp. 201-203. See also V. Hackworth, ibid., p. 177ff; 2 Hyde, ibid., pp. 1455ff; Reiff, "The Proclaiming of Treaties in the United States," 30 Am. J. Int'l L., pp. 63-79 (1936), and 44 Am. J. Int'l L., pp. 572-76 (1950).

97. Byrd, p. 202.

98. Ibid.

99. See Whitney v. Robertson, 124 US 190, 194 (1888). See Byrd, pp. 121-22.

100. Cook v. United States, 288 US 102. Byrd, p. 121.

101. Byrd, ibid.

102. Ibid.

103. Byrd, ibid., pp. 110-22. See United States v. Belmont, 301 US 324 (1937); United States v. Park, 315 US 203 (1941); Missouri v. Holland, 252 US 416 (1920); Guaranty Trust Company v. United States, 304 US 126 (1938).

104. V. Hackworth, pp. 185-86; Article 23, Harvard Research, pp. 1029-1044; Polish Nationals in Danzig Case, P. C. I. J., Ser. A/B No. 44 (1932) 24.

105. 1 Oppenheim, pp. 40-41.

106. Triska and Slusser, p. 75.

107. Ibid., p. 77.

108. Ibid.

109. Ibid., pp. 106-107.

110. Ibid., p. 108.

111. Ibid., p. 111.

112. 1 Oppenheim, p. 881.

113. Ibid., p. 894.

114. Ibid.

115. Hall, International Law 12 (7th ed., 1917).

116. Triska and Slusser, p. 115.

117. Ibid.

118. Ibid.

119. Ibid., p. 117.

120. Ibid., pp. 114-15.

121. 1 Oppenheim, pp. 894-97; 936-37. See Cobbett, Leading Cases on International Law, pp. 326-27 (Part 1, 3rd ed., 1909).

122. 1 Oppenheim, p. 936.

123. Cobbett, p. 326.

124. 1 Oppenheim, pp. 937-38.

125. Ibid., p. 938.

126. Hall, International Law, pp. 360-61 (7th ed., 1917).

127. Gould, pp. 339-40; Cobbett, p. 326.

128. Gould, ibid., pp. 339-40..

129. Schwarzenberger, Manual of International Law, (4th ed., 1960) p. 158.

130. Cobbett, p. 326.

131. Hall, p. 368, states that a second implied condition of treaties is that "if originally consistent with the primary right of self preservation, it shall remain so. . . . A treaty, therefore, becomes voidable as soon as it is dangerous to the life or incompatible with the independence of a state provided that its injurious effects were not intended by the . . . parties at the time of its conclusion."

132. 1 Oppenheim, pp. 939-42; Briggs, pp. 914-18.

133. T. I. A. S. No. 1819. See Schwarzenberger, pp. 158-59.

134. Myers, "Treaty Violations and Defective Drafting," 17 Am. J. Int'l L. pp. 538-65, 543-45 (1917), states that unilateral denunciation in accordance with the maxim conventio omnis intelligitur rebus sic stantibus is an abrupt, though not an illegal method of extinguishing a treaty as is familiar in the American action in abrogating the Treaty of 1832 with Russia. See Bloomfield, The United Nations and US Foreign Policy p. 237 (1960).

135. Kiatibian, Transformation des Etats 30 (1892); Russia was rebuked by a declaration adopted in a Protocol of January 17, 1871, signed by Austria, France, Germany, Great Britain, Italy, and Turkey, which provided: "It is an essential principle of the law of nations that no Power can liberate itself from the engagements of a treaty, nor modify the stipulations thereof, unless with the consent of the contracting parties, by means of an amicable arrangement." (61 British and Foreign State Papers, p. 1198 (1870-1871); Scott, Cases on International Law, p. 469 (1922).

136. 1 Oppenheim, p. 943. See Martens, Recueil des principaux traités des puissances et états de l'Europe (XVIII Nouveau recueil générale, p. 278 (1873) and XIV Nouveau recueil générale (2 ième série), p. 170 (1889).

137. 1 Oppenheim, pp. 943, 948 n. See Off. J., p. 312 (1936). Germany refused to submit the question of the compatibility of these treaties to any tribunal. The League of Nations found that Germany had breached international law by her unilateral repudiation of these obligations. Off. J., p. 340 (1936).

138. Entscheidungen des Schweitzer Bundesgerichts, p. 57 (1882), cited by Schindler, "The Administration of Justice in the Swiss Federal Court in Inter-cantonal Disputes," 15 Am. J. Int'l L. pp. 164-165 (1921). See 1 Oppenheim, p. 940 n.

139. See 1 Oppenheim, pp. 941-42 ; Crusen, "Les Servitudes Internationales," 22 Recueil des cours, academie de droit international de la Haye (ii) (1928) pp. 60-61. The practice of States is inclusive as to the liability for damages of a State which has legitimately renounced an obligation pursuant to the doctrine of rebus sic stantibus. Crusen, ibid., p. 61, believes that as the renouncing State has had to resort to a right which is implied in all treaties there would be no logical reason why it should be held to indemnify the other party. He states that in the annexation of Bosnia and Herzegovina by Austria-Hungary in 1908, Turkey did not obtain damages to which she believed herself entitled. But see Kaufmann, Das Wesen des Volkerrechts und die Clausula rebus sic stantibus, p. 195 (1911) and Crusen, ibid., p. 60.

140. Sanctions and Treaty Enforcement, pp. 406 (1934).

141. Ibid., p. 12.

142. See Triska and Slusser, pp. 140-41.

143. Ibid., p. 390.

144. See, generally, Bloomfield, The United Nations and US Foreign Policy, pp. 236-38 (1960).

145. Constitution (Fundamental Law) of the Union of the Soviet Socialist Republics, December 5, 1936, as amended. Translated and reproduced in 3 Peaslee, Constitution of Nations, p. 490 (2d ed , 1956).

146. Law of 20 August 1938 Vedomosti Verkhovnogo Soveta SSSR, No. 11, 1938, Sbornik Zakonov SSSR, 1938-1961, p. 253, (Moscow, 1961).

147. See Byrd, p. 147.

148. Triska and Slusser, p. 129.

149. 1 Oppenheim, p. 945.

150. Triska and Slusser, p. 390.

151. 6 U. S. T. and O. I. A., No. 3516; T. I. A. S. No. 3365.

152. 1 Oppenheim, p. 947. USSR has never deviated from the rule that it is lawful for a signatory to terminate, unilaterally, a treaty which it considers to have been breached by the other party or parties to it. See Triska and Slusser, pp. 129-31.

153. Triska and Slusser, p. 391.

154. 1 Oppenheim, ibid., p. 149.

155. See Triska and Slusser, pp. 131-36.

156. Harvard Research (Article 35 (a)) pp. 1119-94, 1183-1204; McNair, The Law of Treaties, pp. 530-51 (1938); V. Hackworth, pp. 377-90; 2 Hyde, pp. 1545-58; Hall, pp. 398, 401; Cobbett, p. 344.

157. Triska and Slusser, pp. 171-72.

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The Theory and Practice of Sanctions
(Annex I-B)

by

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This paper is a preliminary approach to the general problems of sanctions in theory and practice. It deals first with the theory of sanctions in general law, in international law, and in the constitutions of general, political international organizations. It then turns to sanctions as strategy--that is, what sanctioning measures are available to states and international organizations, what are they expected to achieve, and have they, in fact, been tested? Case histories are presented in other sections of this study.

SANCTIONS IN LEGAL THEORY

Webster's New International Dictionary, Unabridged (Second Edition, 1959), defines sanctions, in the general sense with which we are concerned, as "the detriment, loss of reward, or other coercive intervention, annexed to a violation of a law, as a means of enforcing the law. This may consist in the direct infliction of injury or inconvenience, as in the punishments of crime (punitive sanctions) or in mere coercion, restitution, or undoing of what was wrongly accomplished, as in the judgments of civil actions (civil sanctions). A sanction may take the form of a reward (remuneratory sanctions) that is withheld for failure to comply with the law."

In their recent pioneering work on sanctions law, Arens and Lasswell note simply, from a socio-legal point of view, that "sanctions are patterns of conduct employed in a social context with the expectation of influencing conformity to a norm of the context."[1] Properly chosen sanctions are selected "according to objectives which are intended to narrow the gap between the ideal goals of the public order system and the

current or anticipated state of affairs," and these objectives include prevention, deterrence, restoration, rehabilitation and reconstruction.[2]

In slightly different terms, sanctions may be considered deterrent, preventive, or punitive--all being measures taken in support of law. Deterrent sanctions involve postures that prevent a breach from being conceived of or brought close to occurrence. The policeman on the beat or the threat of nuclear annihilation, for example, are deterrents to any outbreak of violence. Preventive sanctions, such as the arrest of one about to breach the law, seek to ensure, by bringing the legal order to bear on a potential offender, that disputes shall be settled, or law breaking dealt with, by collective legal action. Punitive sanctions enforce the law after a breach. Presumably the knowledge of certain punishment also acts as a deterrent, so a stated sanction becomes punitive only after the violation. Retribution is often discussed as an independent factor; that is, the need to punish others and the pleasure, in the Benthamite sense, of seeing others punished are considered psychologically important factors, at least in criminal codes and perhaps in such proceedings as the Nuremburg Trials.[3]

The inclusion of the concept of sanctions in definitions of law has led to difficulties in the field of international law, since this law is still decentralized and primitive in comparison with internal systems. There seems little point in restating the oft-discussed role of sanctions in the philosophy of law.[4] But international lawyers have either pointed to the existence of war and reprisals as the sanctions of international law or have insisted, in what many consider a contradiction in terms, that international law is a "law without force."[5]

From the international juridical point of view, Josef L. Kunz has recently expressed the role of sanctions in these terms:

> Human conduct is regulated by a plurality of normative systems--religious, ethical, conventional and legal norms. Religious and ethical rules embody higher values and are sometimes more effective than legal rules. Yet, up to now, law has proved to be indispensable to the relatively peaceful living together of human beings, and the relatively peaceful living together of nations is no exception. Law, to speak with Kelsen, is essentially a coercive order, an organization of force, a system of norms providing for sanctions. Legal sanctions constitute the reaction of the legal community against a delict. In contrast to

> disapproval by the members of a community as a moral sanction, legal sanctions are socially organized measures; in contrast to the transcendental sanctions of religious norms, they are to be applied on this earth; they are to be applied against or without the will of the person against whom they are directed; they are, finally, to be applied by physical force, if necessary.[6]

To a positivist, the character of being legally binding means that conduct contrary to that prescribed by a norm is put under a sanction that shall be executed, by physical force if needed. A condition of the validity of a legal norm is that it is, by and large, effective.[7] It must contain a sanction. The importance of self-restraint, of good faith, of negotiated settlements, and the like is of course obvious in international systems, as in national systems, but an effective legal order seems to require enforceable sanctions.

Under the UN system, use of force and even the threat of the use of force can call forth collective sanctions involving nonmilitary and military measures. Collective sanctions, for UN members, replace war and reprisals in the system, but this is only for breaches of international law involving the threat or use of force. With the sole exception of Article 94 (2) of the Charter, which permits the Security Council to decide on sanctions to give effect to the judgment of the International Court of Justice against a state failing to perform its obligations under the judgment, the UN system does not provide sanctions for other breaches of international duties. Interestingly, the Treaty of Versailles also added one area to permissible collective sanctions action. If a state violated a Labour Convention concluded through the machinery of the International Labour Conference, the governing body of the International Labour Organisation might "recommend" measures of "an economic nature" designed to secure the fulfillment of the state's obligations.[8]

SANCTIONS IN PRACTICE (AND THEORY OF PRACTICAL SANCTIONS)

Without attempting in this section the detailed analysis that will come later, it can be suggested that sanctions for treaty violations run the gamut from simple termination of the arrangement after breach by one party to war and to the pains and penalties made legally available to the international collectivity under the League of Nations Covenant and the UN

Charter. Each subsection hereunder could, of course, be expanded into a more adequate treatise. We will first consider sanctions as embodied in the League Covenant and the UN Charter and then turn to a more general analysis.

Sanctions in Covenant and Charter Theory

The types of measures anticipated under the Covenant and the Charter are probably most properly conceived of as deterrent and remedial rather than punitive. They operate first by threat; that is, they are intended to indicate to a member contemplating a breach of its obligations that it will be subjected to pains and penalties designed to thwart its aims and that, if it still proceeds, it will not be permitted to retain the fruits of its illegal activity. Second, if a breach occurs, they seek to prevent gain arising from illegal activity. Essentially, the sanctions are designed to preserve or to restore the status quo. The acceptance by the UN General Assembly of the principles of the Nuremburg judgments may in time add a punitive side to sanctions measures, but, in the criminal law sense which we are used to, punishment thus far has not normally been an element of sanctions under international arrangements in concept or practice. This may be changing.

It is, for example, the function of criminal sanctions to offer retribution, deterrence, reformation, and education. "The criminal law safeguards human rights . . . by punishing, and therefore seeking to deter, infringements of human rights. . . ."[9] In this vein, the problem of international sanctions against individuals needs detailed investigation; we can here only suggest the possibility. Payson Wild has touched on the subject in his pioneer work, Sanctions and Treaty Enforcement. Even before 1914, a few entities--the European River Commissions, for example--had the power to make rules binding on individuals and had courts and a river police. Piracy has long been treated as an international crime. The laws of war are enforced against individuals. And today there is at least the beginning of a law of personal responsibility for war criminals in a broader sense. The theory is familiar. Sanctions are deterrents and, if necessary, are punitive, but, since it can be argued that states can act only through individuals, it is senseless to permit the individuals who move the states to illicit acts to escape direct punishment. Fear of punishment or loss then can act directly on an individual. As noted, this concept is not unknown in international practice but its scope for our purposes is probably limited and needs a careful evaluation which cannot be given here.

The actual use of sanctions by international organizations is considered in detail in Annexes II-A to II-I of this study. Nevertheless, this introduction to the concept of international sanctions by organizations seems in order at this point.

The conception of sanctions envisaged in the Covenant of the League of Nations was itself not entirely new. The Treaty of Munster, part of the settlement of Westphalia of 1648, provided in Articles 123 and 124:

> . . . all parties /are/ to defend and protect all and every article of the peace against any one . . . and if it happens any point shall be violated, the offended shall before all things exhort the offender not to come to any hostility, submitting the cause to a friendly composition, or the ordinary proceedings of justice.
>
> . . . . . .
>
> Nevertheless, if for the space of three years the difference cannot be terminated by any of those means, all and everyone of those concerned in this transaction shall be obliged to join the injured party, and assist him with counsel and force to repel the injury. . . .[10]

Later, in dealing with the question of the slave trade in the early 19th Century, Castlereagh made the direct suggestion of a collective boycott of the colonial products of any nation failing to prohibit the trade effectively.[11]

Moving on to more recent illustrations, if we look primarily at the League and the United Nations, we find that the Covenant and Charter do not use the term sanctions at all, yet measures to keep or restore the status quo have always been so termed in practice. It is apparent that the League especially looked upon sanctions essentially as of a nonmilitary nature. Clearly, the distinction between military and nonmilitary measures is as blurred here as in all other areas. Would such acts as closing the Suez Canal in 1935-1936, or blockading Italy in that period, have been nonmilitary in nature? In any case, while Article 16 of the Covenant spoke, in Paragraph 2, of "the duty of the Council . . . to recommend . . . what effective military, naval, or air force the Members of the League shall severally contribute to the armed forces to be used to protect the covenants of the League," it is clear that it was Paragraph 1 of that Article which was intended as the chief threat.

Article 16 (1), it will be recalled, provides:

> Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13, or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State, and the prevention of all financial, commercial, or personal intercourse between the nationals of the covenant-breaking State and the nationals of any other State, whether a Member of the League or not. /Emphasis added./

With the lessons (however misunderstood) of the grinding economic blockade enforced by the Allies in World War I before them,[12] it is obvious why the founders of the League placed such reliance on this "terrible" economic weapon. Moreover, as the Covenant is written, its language indeed calls for the most absolute isolation of an offending state--a grim thought in this interdependent world. In President Wilson's words, in a speech in 1919:

> Suppose somebody does not abide by these engagements, then what happens? An absolute isolation, a boycott! The boycott is automatic. There is no "but" or "if" about that in the Covenant. . . . When you consider that the League is going to consist of every considerable nation in the World except Germany, you can see what the boycott would mean. No goods can be shipped in or out, no telegraphic messages can be exchanged, except through the elusive wireless perhaps; there should be no communication of any kind between the people of the other nations and the people of that nation. . . . It is the most complete boycott ever conceived in a public document.

Again, as M. Augustin Hamon described an aggressor's plight with sanctions in effect:

> No more vessels landing at, or sailing from, its ports, no more trains crossing its frontiers, no exports, nor imports, nor correspondence . . . an isolation that is complete, absolute . . . a revival of medieval excommunication.

Why sanctions as practiced bore little relation to sanctions as conceived is the subject for Annex II-D of this study.

After the actual experience of the League from 1920 through 1939, the UN Charter dropped the formal elements of certainty, immediacy, totality, and universality from its sanctions provisions. Also dropped was the need to determine who was right and who was wrong at the outset. Instead, the Charter provides for Security Council action in the event of a "threat to the peace, breach of the peace, or act of aggression" (Article 39). This action was to be nonmilitary, military, or both. Thus, Articles 41 and 42 provide:

> Article 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.
>
> Article 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

The action of the United Nations under these sections, and through the General Assembly, is described in Annex II-E. In theory, the great powers, the possessors of overwhelming power in the world, were, by agreement, to wield that power as needed and to direct the actions of other states to the same ends through the United Nations. In practice, the distinction between the League and Charter systems for peace-keeping has in many ways become blurred.[13]

Specific Sanctions Available to States and Organizations

In the broader theory of the practice of sanctions, what measures are available to meet a breach of an international obligation, and what is it anticipated that the measures will achieve? This problem has been explored unofficially by several authors and by such organizations as the British Royal Institute of International Affairs. It has also been considered

by organs of the League of Nations and of the United Nations. As a basis for future discussion, it again seems appropriate to set out here the practical sanctions available to a state or to the international community to prevent a breach of an arrangement or to restore the status quo.

General Sanctions

Rescission (Termination) of the Agreement. In domestic law, the breach by one party to a bilateral agreement of an important part of the agreement leads to the right of rescission on the part of the aggrieved party. Whatever other rights he may also have, it is clear that he has the right to consider the arrangement terminated. In international bilateral dealings, the same right and expectation are generally considered to follow, though the matter is by no means as clear.[14] Furthermore, a multipartite treaty is certainly not necessarily ended for all parties vis-á-vis each other because of a violation by one party, though it may be appropriate to consider it legally terminable with respect to the rights and obligations of the offending state. The problem is sometimes dealt with diplomatically by express language in the convention dealing with the case of a party's breach of treaty-imposed obligations. The theory is, of course, that under the agreement benefits are flowing to each side, so that a party will continue to perform in order to keep the other party performing. "Clearly, one prerequisite of voluntary support of preventive measures is the expectation on the part of significant figures that they will be better off--in terms of all their value goals--by giving, not withholding, support."[15] At some point, of course, a party may consider that he has more to gain than to lose by, in effect, terminating the agreement, if no other penalty follows. The informal nuclear test ban moratorium of recent years and the Antarctic Treaty of 1959 are examples of the prospective use of this type of sanction, if it can be so called. Similarly, this type of sanction--the knowledge that a breach by one party will permit the other(s) to consider the agreement terminated--is the prime sanction supporting treaties of friendship and commerce, and, indeed, most existing bilateral and many multilateral arrangements.

It may also be appropriate for a party to consider a treaty suspended or terminated in part rather than terminated in toto. The American Law Institute, Restatement of the Foreign Relations Law of the United States, therefore provided, in a draft:

143. Suspension or Termination on the Ground of Violation of the Agreement.

(1) Upon the violation of a provision of an international agreement by one of the parties and in the absence of a contrary provision in the agreement, any other party may:

(a) Suspend the performance of such of its obligations towards the defaulting party as bear a reasonable relationship to the provision violated by the defaulting party, so long as the defaulting party fails to perform its corresponding obligations; or

(b) Terminate the agreement as between itself and the defaulting party if the provision violated was an essential part of the inducement to the aggrieved party to enter into the agreement, and the violation, when considered in relation to all the obligations of the parties including those already performed, has the effect of depriving the aggrieved party of a substantial benefit under the agreement; or

(c) Terminate only such obligations or portion of its obligations as cannot reasonably be considered as separate and independent from the obligations violated by the defaulting party because the one was clearly intended to be the counterpart of the other.

(2) An aggrieved party may seek further remedies, including damages, whether or not it avails itself of the right to suspend or to terminate the agreement under Subsection(1), of this section.

The Restatement thus also brings in, as in domestic law, the concept of damages for a breach. Damages have been awarded by arbitrators in international matters and have also been awarded by the International Court of Justice in such cases as the Corfu Channel matter. As in domestic law, damages may be used to make a party whole or to punish for a transgression. Systems of fines and forfeits have also been suggested in the arms control sphere but can only be mentioned as an area for research here.

Denial of the Benefits of an Agreement. A form of remuneratory sanction is typically employed in international functional organizations and this has been true since the first, the Universal Postal Union, was created in 1874. The theory is patent. Participation in this type of arrangement is presumed of great benefit to a participating state and denial of the privileges of membership and the services of the organization are the prime sanctions for a breach of one's own obligations, such as nonpayment of an assessment.

Examples are legion. For example, Article 19 of the UN Charter, provides:

> A Member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years.

Difficulties in applying this sanction, in a political international organization, are also apparent as the current UN financial problems indicate.

Denial of benefits can itself range from a suspension of voting rights in one organ of an organization (UN Charter, Article 19), through suspension of all rights and privileges in the organization (UN Charter, Article 5), to expulsion from the organization (UN Charter, Article 6).

Publicity. This term is used to denote the focusing of local, national, or international attention on a delict. In the somewhat naive climate of 1919-1920, it was often asserted that fear of the mere bestowal of the name aggressor on an offending state would normally be enough to prevent an illegal act. Aroused world public opinion was to be the basic strength of the League. In a practical sense, too, it might serve to cut down tourism to the disgraced country, lead to private boycotts of its goods, and the like.

This technique is not unknown to private law. In many areas involving foods and drugs, securities, and the sale of goods, for example, it is assumed in this country that exposure to the bright light of publicity is all that is needed in many cases to prevent or stop an unlawful act.[16] The technique of publicity has also been used domestically in recent years, for better or worse, by governmental, including Congressional, committees to expose and cure evils which the law does not otherwise reach.

Internationally, it is questionable that publicity has ever, by itself, thwarted a determined aggressor--a point discussed at length in the sections on public opinion and on the League in other parts of this study. International condemnation has also, repeatedly, been used to consolidate opinion at home. Nevertheless, exposure to the light of public debate has been given credit, at least in part, for such withdrawals as that of Soviet forces from Iran in 1945. It is a sanction that cannot be ignored but, in its general form, cannot be relied on to have the intended effects. Indeed, Arens and Lasswell say flatly that "research has already shown that exposure to the condemnation sanction does not always have a moralizing effect; on the contrary, in circumstances some of which can be generalized, the impact is to encourage immorality."[17]

Diplomatic Sanctions

All international sanctions involve political decisions. There are some measures nevertheless which are aimed expressly at the political status of a nation or area and are grouped here for convenience. It is generally assumed, too, that these measures are less stringent than economic or military measures. Throughout this paper, examples are offered but not analyzed. Such analysis comes in Annexes II-C and III of this study.

Protests. This is the simplest form of diplomatic sanction. Its efficacy obviously depends on the seriousness with which the addressed state regards the power and intent of the protesting state. The protest is often used, of course, not as a sanction but rather in an effort to keep the legal record clear. It may be made by a single state or by several acting together. It may be used also to bring the matter to public attention.

Where an international organ, such as the League or the United Nations, is taking the action, a preliminary step may involve an appeal to the party or parties to settle a dispute peacefully, or by a specific method, or to refrain from improper activities, or to comply with provisional measures if these have been ordered. There is again the focusing of attention on the problem and the creation of a feeling that more drastic measures may follow.

Withdrawal of a Chief of Mission.* This measure also serves to focus attention on the disputed matters and to some extent inconveniences the offending state, which must seek a more circuitous way of dealing with the withdrawing state. Unfortunately, the inconvenience is mutual. The state or states applying the sanction also lose contact in part with the offending state. It is also possible to withdraw trade missions, consular officers, or other representatives.

Withdrawal of Diplomatic Staff.* This more severe measure breaks all official contact with the sanctioned state. As noted, the diplomatic inconvenience is mutual. If the sanction involves a technical nonrecognition, it also implies additional discomforts. In general practice, for example, the acts of a nonrecognized state or government are not considered to have juridical validity under many circumstances in the courts of many states. Moreover, the unrecognized state and sovereign are usually denied the right to institute proceedings in local courts.[18]

A collective withdrawal of diplomatic missions was endorsed as a sanction against Spain by the United Nations in 1946 (see Annex II-E). It was unsuccessful in causing any change in the Spanish government, its avowed aim.

Nonrecognition of the Results of Treaty Violation. It has been suggested that if the violator of a treaty is not permitted to enjoy fully the fruits of its illegal acts, the acts may be prevented. The policy of nonrecognition of rights to territory illegally acquired is often linked with the name of Henry L. Stimson (US Secretary of State, 1929-1933). The policy was invoked by the United States and by the League powers with respect to Japanese inroads in Manchuria in the 1930s and the establishment of the puppet state Manchukuo. In 1936, too, after Italy's formal absorption of Ethiopia, the League continued, briefly, to seat the Ethiopian delegation. A prime problem with this form of sanction, of course, is that it is available only after the successful breach of an international arrangement and inevitably runs up against what we will repeatedly be forced to take note of, the persuasive force in international relations of the fait accompli.

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* For a slightly different treatment of these sanctions, see p. 24 of the "Riposte" Final Report.

Economic and Financial Sanctions

In the modern world, it is not really useful to attempt too narrow a set of distinctions between economic and financial measures. In principle, both types seek to cripple or at least to interfere with the economy of the sanctioned country by denying it strategic goods from abroad, or all goods from abroad; by preventing it from obtaining foreign exchange through sale of its goods abroad and the like; by, in fact distorting its economy so greatly that shortages, inflation, unemployment, and other economic ills will force it either not to move (if the threat of sanctions is believed), or not to attain its illicit goals (if it has already committed aggression) or to yield up its gains (if a victim has already succumbed). Moreover, while it is clear that economic and financial sanctions involve costs both to the sanctioned state and the sanctioners, sanctions theory assumes that the collective cost, spread over many states, will be bearable by each while the sanctioned state feels the full weight. Sanctions in history and an evaluation of this type of sanction are to be considered in other sections of this study, but it must be noted that it has always been reasonably clear that these measures were of at most doubtful utility, even if widely pursued, against a relatively self-sufficient, continent-sized nation such as the United States or the Soviet Union.[19] The embargo on strategic East-West trade in the post-World War II period, though not a treaty sanction, may provide important data on the effects of this type of measure.

Exports to the Offending Country. Sanctions action may involve depriving the sanctioned state of imports in order to make it difficult or impossible for it to breach, or to continue to breach, its obligations, or in fact to carry on the daily work of an industrial state. Export embargoes include (1) total embargo; (2) selective embargo; and (3) arms embargo--arms, ammunition, and implements of war. Nothing approaching a total embargo has been applied by a collectivity of states except in major wars. The United States now unilaterally employs such a total embargo against China.

Selective embargoes, including an arms embargo, have been used collectively against Italy by the League in 1935-1936 and by the Western powers as a strategic, rather than a law-enforcing, device against the Communist bloc in recent years.

Arms embargoes alone have been employed unilaterally by states (e.g., the United States in the 1930s), by members of the League and also the US in the Chaco dispute, by the United Nations in the Palestine crisis of 1948, and in other cases as well.

Imports from the Offending Country. An embargo on exports to an offending nation seeks directly to prevent it from having the needed items, or raw materials to make the items, necessary for conflict and even for survival. An embargo on imports from that nation attacks it indirectly by trying to cut off what is normally the chief means of financing foreign purchases. Such a measure was used in the World Wars, in the League action against Italy, and in multilateral and unilateral action against China from 1950 on.

Severance of Financial Relations. Without attempting to distinguish between the various forms, the severance of financial relations is in principle designed also to cut off supplies to the offending state by making purchasing by it difficult or impossible, at least after that state has exhausted its own supply of foreign exchange and gold. These measures would normally be used together with other economic sanctions and have been used in the cases noted just above. Action in this field might include withholding of loans and credits, suspension of payments on balances due, blocking and freezing of gold and other assets, forbidding the floating of shares, forbidding the remitting of funds for any purpose, applying such rules to private persons and legal entities as well as to the government involved, and sequestration of the property of nationals of that state. Such measures are used during war and some of them were used by the League in 1935.

Where a nation is heavily dependent on another, the threat of such sanctions alone may be quite effective. One of the prime reasons assigned by the Israelis in 1957 for their withdrawal from Egypt was the action of the United States in suspending aid talks then in progress and threatening to ban aid, loans, and private aid payments and remittances to Israel as well.

This experience raises the possibility of a new sanction available at least against some states--the suspension of aid and assistance either by a state or by such international organizations as the United Nations and the World Bank (IBRD). To a state heavily dependent on such assistance, the threat of a

cutoff might prove quite serious. We ignore here, as in all these cases, the question of the political feasibility of imposing such a sanction.

Severance of Transport and Communications. Another technique for isolating an offending nation is the denial of ships and shipping service, railroad service, air service, and the like to that state. International and national waterways, airports, and other facilities could be closed to nationals of that state. Telephone, wire, postal, and radio communications could be severed. Measures of this type if widely adopted would presumably do direct harm to a nation's ability to survive and would also bring home the fact of sanctions to the populace.

Military Sanctions

Without considering initially the effect of the existence of the UN Charter, military sanctions may be broken down into categories of measures short of war and warlike, including war. The categorization obviously depends on the good will of the sanctioned state; that is, if it resists a measure short of war with force, the nations are at war in the de facto sense.

Traditionally measures short of war have included military displays, massing of troops on the border, mobilization, naval demonstrations, and pacific blockade. This last, in history, has implied a close blockade limited to ships of the blockaded state. Perhaps today we should add the status of quarantine. These all imply the threat of or use of at least some force. It seems unnecessary to describe further the use of force as a sanction. Except as barred by the Charter, it remains in practice the basic sanction supporting the international legal structure.

Sanctions Involving Assistance

A form of sanctions action which differs from the above and yet might serve the same goals involves the furnishing of assistance and support--economic, financial, and military--to a state which is the victim of a breach of an international obligation. Such aid would presumably make it more difficult for the violator to gain from his breach. This type of sanction seems more suited to the collectivity of states than to a bilateral arrangement.

In 1935-1936, the League refused all Ethiopian requests for aid of any kind. From 1950 on the United Nations furnished all forms of aid to the Republic of Korea. (Economic aid had been furnished on a different basis even earlier.) In a hypothetical arms control case, if States A, B, and C agreed to refrain from the use of nuclear weapons, and State B threatened State C with the use of such weapons, State A might give or threaten to give to State C an additional number of such weapons, or threaten to use them directly. An international collectivity might perform the same function.

Notes

1. Richard Arens and Harold D. Lasswell, In Defense of Public Order: The Emerging Field of Sanction Law (New York: Columbia University Press, 1961), p. 171. This volume contains a new analysis in terms of US domestic law. It is highly recommended, however, to anyone interested in a perceptive re-examination of the theory and role of sanctions, especially for the theoretical analysis beginning at p. 171. It should also be read for sanctioning strategy, in the theoretical sense (pp. 198 ff.).

2. Ibid., pp. 199-203.

3. Compare Carlyle on the death penalty as consistent with Nature's dictates of "natural wrath" which is "planted . . . against /the criminal/ in every God-created human heart. . . . 'Caitiff, we hate thee; . . . not with a diabolic but with a divine hatred. . . . As a palpable deserter from the ranks where all men, at their eternal peril, are bound to be: . . . we solemnly expel thee from our community; and will, in the name of God, not with joy and exultation, but with sorrow stern as thy own, hang thee on Wednesday next . . . .'" Thomas Carlyle, Works (London, 1907), XX (Latter Day Pamphlets), 75-77. See also Julius Stone, Province and Function of Law (1950), pp. 683 ff.

4. See Josef L. Kunz, "Sanctions in International Law," American Journal of International Law, LIV (1960), 324-47; Myres S. McDougal and Florentino Feliciano, Law and Minimum World Public Order (New Haven: Yale University Press, 1961) (see especially chap. iv, "International Practice"); Stone, op. cit., pp. 97-98, 285, 651-52, 683 ff., 717-27; Arens and Lasswell, op. cit.; Miriam Rooney, Lawlessness, Law and Sanction, dissertation, Catholic University of America, Washington, D. C. (1937) (especially on the theories of Bentham, Maine, and Holmes); Mo, "The Sanctions of International Law," Grotius Society Transactions, XXXV (1949), 4-23; J. L. Brierly, "Sanctions," Grotius Society Transactions, XVII (1932), 67-82; Payson Wild, Jr., Sanctions and Treaty Enforcement (Cambridge: Harvard University Press, 1934).

5. See, e.g., Gerhart Niemayer, Law Without Force (1941), passim.

6. Op. cit., p. 324.

7. See, e.g., Kunz, op. cit., p. 346.

8. Treaty of Versailles, Part XIII, Art. 414.

9. 1960 Seminar on the Role of Substantive Criminal Law in the Protection of Human Rights and the Purposes and Legitimate Limits of Penal Sanctions, United Nations (1960), p. 8.

10. Cited by Francis Sayre, Experiments in International Administration (1919), p. 173.

11. Royal Institute of International Affairs, International Sanctions (London, 1938), p. 11.

12. There are some excellent studies of this period. See, e.g., Bell, A History of the Blockade of Germany and of the Countries Associated with Her in the Great War . . . (London, 1937; released May 1961); Siney, "British Official Histories of the Blockade," American Historical Review, LVIII (1963), 392 ff., and books cited therein. On World War II, see Medlicott, "The Economic Blockade" (in History of the Second World War, 2 vols., 1952-1959).

13. Following is a partial bibliography on League and UN system and practice: On the League, see: League of Nations, Assembly, Reports and Resolutions on the Subject of Article 16 of the Covenant, Doc. A. 14, 1927; Rutgers, "Memorandum on Articles 10, 11, and 16 of the Covenant," League of Nations, Official Journal, 1928, pp. 670-86. See also E. Atwater, Administration of Export and Import Embargoes, 1935-1936 (Geneva Special Study, Geneva Research Center, 1938); Edward Borchard, "The 'Enforcement' of Peace by Sanctions," American Journal of International Law, XXVII (1933), 518-25; Bradley, "Some Legislative and Administrative Aspects of the Application of Article XVI of the Covenant," Grotius Society Transactions, XXII (1937), 13-29; R. L. Buell, The Suez Canal and League Sanctions (Geneva Special Study, Vol. VI, No. 3, 1935); Herbert Feis, Seen from E. A. (New York: Knopf, 1947); Greibal, Peut-on fermer le canal de Suez? (1937); A. E. Highly, The First Sanctions Experiment (Geneva: Geneva Research Center, 1938); Hogan, International Violence and Third States Since the World War, dissertation, University of Chicago (1939); R. A. Levitch, La collaboration dans l'application des sanctions prevues a l'article 16 du Pacte de la Societe des Nations (Paris: A. Pedone, 1938); Ernest Ralph Perkins, The Non-Application of Sanctions Against Japan, 1931-1932 (in Lee, Essays in History and International Relations, 1949); Royal Institute of International Affairs, International Sanctions (London, 1938).

On United Nations theory and practice, see, e.g., Report of the Collective Measures Committee, UN Doc. A/1891; Leland M. Goodrich and Anne P. Simons, The United Nations and the Maintenance of International Peace and Security (Washington: Brookings

Institution, 1955); Cavare, "Les sanctions dans le cadre de l'O.N.U.," Hague Academy, Recueil des cours, Vol. LXXX (1952); Cavare, "Les sanctions dans le pacte de la S.D.N. et dans la charte des N.U.," Revue générale de droit international public, LIV (1950), 647-74; Hans Kelsen, "Sanctions in International Law under the Charter of the United Nations," Iowa Law Review, XXXI (1946), 499-543.

14. Green Haywood Hackworth, Digest of International Law (Washington: Government Printing Office, 1940), V, 342-46; Charles Cheyney Hyde, International Law, Chiefly as Interpreted and Applied by the United States, 2nd. ed. (Boston: Little, Brown and Co., 1945), II, 1541-46; Ware & Hylton, 3 Dallas 199, 261 (1796); In re Thomas, 23 Fed. Cas. 927 (1874); Charlton & Kelly, 229 U. S. 447, 473 (1913); The Blonde /1922/, 1, A.C. 33 (Privy Council); Harvard Research Draft Convention on the Law of Treaties (1935), pp. 1081-84.

15. Arens and Lasswell, op. cit., p. 200.

16. Ginsberg, Publicity as a Sanction in Administrative Law (Microfilm, Cambridge, Mass., Harvard Law School, 1941).

17. Op. cit., p. 203.

18. See William Bishop, International Law (Boston: Little, Brown and Co., 1962), pp. 303-38; Herbert Briggs, The Law of Nations (2nd ed., 1952), pp. 133-91.

19. On economic warfare, see Einzig, Economic Warfare (1940); Yuan Li Wu, Economic Warfare (New York: Prentice-Hall, 1952); remarks of Prof. R. L. Allen, "Foreign Economic Policy," Hearings Before the Subcommittee on Foreign Economic Policy, Joint Economic Committee, US Congress, December 4-14, 1961, pp. 199-200.

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