ABHANDLUNGEN

The Settlement of Treaty Disputes under the Vienna Convention of 1969

Shabtai Rosenne *)

I

Throughout the process of the codification of the law of treaties attempts have been made to link at least some parts of the law, if not the whole of it, with the compulsory third-party dispute-settlement procedures available in the international community. These attempts have as a minimum had in mind certain types of disputes arising in connexion with treaties to which the codified law of treaties would apply. Those parts of the law mostly envisaged as being appropriate for a link if this character are, above all, the sections concerning the invalidity and the termination or suspension of the operation of treaties otherwise than with the consent of all the parties, *i. e.* provisions such as those which are found throughout Part V, namely articles 42 to 72, of the Vienna Convention on the Law of Treaties of 23 May 1969 and its Annex [1]). As far back as 1926, the League of Nations predecessor of the International Law Commission (I. L. C.), the Committee of Experts for the Progressive Codification of International Law, when it conducted a general survey of international law for the purpose of choosing topics ripe for codification, encountered this problem at the outset. Its existence was one of the reasons, although not the only one, which led that

*) Member of the International Law Commission, Associate of the Institute of International Law, Member of the Israel Foreign Service. This article is partly based on lectures and seminars given to the Geneva Seminar on International Law held in connexion with the International Law Commission in 1968 and 1969. The views expressed in it are personal to the writer.

[1]) For the full text and notes on the legislative history, see Sh. Rosenne, Law of Treaties: Guide to the Legislative History of the Vienna Convention (1970). For the final text of the draft articles and the commentaries of the I.L.C., see also [1966] 21 UN GAOR Sup. 9, 2 Yearbook of the International Law Commission [hereinafter Y.B.] at 172, doc. A/6309/Rev. 1. The text of the Convention (in English and French) can also be found in ZaöRV, vol. 29 at 711—60 (1969).

Committee of Experts, as well as the Council and Assembly of the League, in effect to drop all idea of codifying any part of the law of treaties [2]). That is one of the explanations for the fact that in the codification work of the League of Nations, nothing to do with the law of treaties appears.

Turning to the work effected under the auspices of the United Nations and more particularly the International Law Commission, perusal of the reports submitted to the Commission by the special rapporteurs on the law of treaties who preceded Sir Humphrey Waldock discloses that (inspired no doubt by the approach adopted by the Research in International Law of the Harvard Law School [3]), to the extent that they dealt at all with questions of the invalidity and termination of treaties, particularly those of Sir Hersch Lauterpacht [4]) and Sir Gerald Fitzmaurice [5]), each took as his point of departure the idea that a link of this character should be created *de lege ferenda* if it did not exist *de lege lata.* The details will be described later (*infra,* Sect. VII). At this stage the basic concept can be simply stated. It is, in the current terminology, that a party invoking a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending the operation of the treaty, and the claim is disputed by another party to the treaty [6]) should undertake compulsory settlement of the dispute. Those two special rapporteurs were both thinking of compulsory judicial settlement by the International Court of Justice as the residual instance, with a presumption — this is the important element of this approach — that if the party concerned did not consent to have resort to it that fact in itself would be an indication that it was not acting in good faith and that the claim or (by

---

[2]) See *op. cit.* in note 1 *supra* at 30—1. Also Committee of Experts for the Progressive Codification of International Law, Procès-verbaux de la Deuxième Session, 115—16, 129—32, doc. C.P.D.I./2me Session/P.V. (French only) (1926); paragraph relating to the Permanent Court of International Justice in the letter of 30 January 1926 from the Committee's Chairman (Hj. L. Hammarskjöld) to the Secretary-General of the League of Nations, doc. C. 96. M. 47. 1926. V. [C.P.D.I. 63], Publ. 1926. V. 11, at 2; also League of Nations documents C. 196. M. 70. 1927. V. [C.P.D.I. 95(2)], Publ. 1927. V. 1 at 105, 271; C. 198. M. 72. V. [C.P.D.I. 94(1)], Publ. 1927. V. 3; A. 18. 1927. V, Publ. 1927. V. 15, Official Journal Sp. Sup. 55, 41 at 47 (1927); A. 105. 1927. V., Publ. 1927. V. 21 at 2, Official Journal Sp. Sup. 54, 484 at 488 (1927).

[3]) 29 A.J.I.L. 653 (Sup. 1935).

[4]) Sir Hersch Lauterpacht, [First] Report on the Law of Treaties, Second Report on the Law of Treaties, [1953] 2 Y.B. 90 doc. A/CN.4/63 and [1954] 2 *id.* 123 doc. A/CN. 4/87 [hereinafter Lauterpacht I and Lauterpacht II respectively].

[5]) Sir Gerald Fitzmaurice, Second, Third and Fourth Reports on the Law of Treaties, [1957] 2 Y.B. 16 doc. A/CN. 4/107, [1958] 2 *id.* 20 doc. A/CN. 4/115 and [1959] 2 *id.* 37 doc. A/CN. 4/120 [hereinafter Fitzmaurice II, III and IV respectively].

[6]) As distinct from a third party whose rights or obligations may be affected.

implication) the objection to it was not really substantial [7]). Traces of this idea also appear in the first draft of what is now article 65 of the Vienna Convention, submitted as article 25 of Sir Humphrey Waldock's second report in 1963 [8]) — traces, because he had already started retreating from the rather far-reaching propositions entailed in the proposals of his predecessors and, without referring exclusively to judicial settlement through the International Court of Justice, had picked out three or four of the procedures listed in Article 33 of the United Nations Charter as being appropriate for the settlement of this type of dispute. The I. L. C. was unwilling to go so far and adopted what in 1963 was paragraph 3 of draft article 51 [9]) and in 1966 draft article 62, in a form which stopped short of favouring any particular dispute-settlement procedure and left the choice to the parties, in accordance with Article 33 of the Charter. Moreover, the thrust of that provision, and of the related discussion in the I. L. C., was more in the direction of regulating the diplomatic procedures in connexion with the termination and the invalidity of treaties than with the solution of those disputes as such: indeed, it might be said that those procedures themselves could facilitate the crystallization and formulation of disputes of that kind — if they did not lead to their dissipation entirely.

Behind this lies a real dilemma. Partly it has to do with the concept of the equality of States, which is one of the basic principles, one of the cornerstones indeed, of international law, especially under the regime of the United Nations Charter. But there are other reasons which may be more obstinate. There may be mentioned, as one example, which is perhaps less frequently articulated, the artificiality and arbitrariness of denominating one State the claimant or applicant State and another the defendant or respondent State simply on the basis of which State took the first formal action to claim the invalidity or the termination of the treaty [10]). There is no logical reason, given the structuring of international relations today,

---

[7]) Note, however, that on more general grounds there may be limits in international law on how far a judicial organ may go in the matter of the termination of a treaty, at least in theory. Thus Judge G. Morelli has written: «[U]n arrêt de la Cour internationale de Justice ou de tout autre organe judiciaire ne pourrait produire non plus ni l'extinction ni la suspension d'un traité. L'arrêt ne pourrait faire autre chose que constater qu'une certaine cause d'extinction (ou de suspension) a opéré dans un cas concret», 52 Annuaire de l'Institut de Droit International, t. 1 at 293 (Session de Nice, 1967) [hereinafter Annuaire]. With respect, we do not share that view.

[8]) Sir Humphrey Waldock, Second Report on the Law of Treaties, [1963] 2 Y.B. 36 at 86, doc. A/CN. 4/156/Add. 2 [hereinafter Waldock II].

[9]) [1963] 18 UN GAOR Sup. 9, 2 Y.B. 188, doc. A/5509.

[10]) Cf. paragraph (2) of the I.L.C.'s Commentary on article 62 as adopted in 1966. *Supra* note 1.

why equal regard should not be had for the substance as for the form and why the other State should not substantively be the claimant. It is a well-known aspect of litigation in the International Court of Justice itself that the procedure tends to avoid pushing to extremes any idea that the litigating parties are in some sort of plaintiff/defendant or applicant/respondent relationship, and to draw from those procedural positions any consequences other than those for which the Statute of the Court and its Rules, or the title of jurisdiction, or the final concretization of the dispute in the pleadings, make specific provision [11]). As Sir Humphrey told the Commission in 1963:

> "Nor was it correct to assume, as had been done by some members, that the claimant would necessarily be the injured party. In fact, the claimant might well be trying to force termination on the other party on other grounds" [12]).

The draft articles of the I. L. C. and in their wake the Vienna Convention contain two other sections in which the possibility of disputes over their application is definitely to be envisaged, and for which no specific settlement procedures are included at all. The first relates to reservations to multilateral treaties, with the possibility of disputes over the admissibility or the application of reservations. In the broader context of the general scheme of the codified law of treaties submitted by the I. L. C. and adopted by the Vienna Conference, this is perhaps more of a theoretical possibility than a real one, although it should be recalled that such questions occupied both the Council and the Assembly of the League of Nations, particularly in the years 1925—27 and 1931, and the General Assembly of the United Nations in the years 1950/51 and 1959 [13]). A second segment of the law in which a definite reference to a "difference" will be found is that relating

---

[11]) 2 Sh. Rosenne, The Law and Practice of the International Court 526 (1965).

[12]) [1963] 1 Y.B. 181.

[13]) For discussions in the Council of the League, see 6 League of Nations Official Journal 1671 (1925); 7 *id.* 521—22, 612—13, 1022 (1926); 8 *id.* 770—72, 800—04 (report of the Committee of Experts) (1927). For discussion in the Committee of Experts for the Progressive Codification of International Law, see Procès-verbaux de la Deuxième Session, *supra* note 2 at 135; Minutes of the Third Session 26—28, doc. C.P.D.I./3rd Session/P.V. (1927). For the Report of its Subcommittee, submitted unchanged to the Council, see also doc. C.P.D.I. 81 (mimeographed only), 18 March 1927. For discussion in the Twelfth Assembly, see Official Journal Sp. Sup. 93, 137—39; Sp. Sup. 94, 57—59, 135—39 (1931). For a summary of discussions in the General Assembly of the United Nations, see Resolutions of the General Assembly concerning the Law of Treaties: Memorandum prepared by the Secretariat, paragraphs 106 ff., [1963] 2 Y.B. 1 at 18, doc. A/CN. 4/154, with references also to the Advisory Opinion on Reservations to the Convention on Genocide, [1951] I.C.J. 15. Note also Lauterpacht I, article 9, alternative draft D, *supra* note 4.

to the depositary of multilateral treaties [14]). In the Vienna Convention, as in the International Law Commission's draft, these are open-ended provisions from the point of view of the settlement of disputes. It is believed that close inspection of other parts of the codified law, for example the provisions relating to treaties and third States or the amendment of treaties (and possibly others) will disclose similar possibilities, but the two aspects mentioned are outstanding, because direct or implied mention of differences or disputes could not be avoided either in the text itself or in the preparatory discussions.

In the I. L. C. suggestions were made that disputes regarding the admissibility of reservations and disputes regarding the application of successive treaties relating to the same subject-matter should be brought within the scope of what is now article 65 of the Vienna Convention (at that time article 51) [15]). The Commission chose not to follow that course, however, and article 65 remained confined within the context of the general concept of the invalidity and termination of treaties, and was not drafted as a general "disputes article" for the whole of the codified law of treaties [16]). Nor indeed is it the only article governing the diplomatic processes connected with treaty law. That task is performed by article 78 of the Vienna Convention to which, as will be seen (*infra*, p. 36 f.), article 65 is tied.

In one respect only, albeit one the significance of which must not be minimized, that provision may represent an important modification of the somewhat minimal position as regards the settlement of disputes which is considered by many to be characteristic of Article 33 of the Charter of the United Nations, on which article 65 of the Vienna Convention is aligned. In its context in the Charter, Article 33 refers to disputes of a special and

[14]) Vienna Convention, articles 76—78. See also Sh. Rosenne, The Depositary of International Treaties 61 A.J.I.L. 923 (1967) and More on the Depositary of International Treaties 64 *id.* 838 (1970).

[15]) On reservations, see 779th meeting, paragraph 7 [1965] 1 Y.B. 148. An earlier enquiry along similar lines had been made by Tunkin at the 698th meeting, [1963] 1 *id.* 168. On the application of successive treaties, see 743rd meeting, paragraph 42 [1964] 1 *id.* 130.

[16]) H. Briggs, *supra* note 7 at 375. Note also the observation of Sir Humphrey Waldock that if what became article 65 was "procedural in character, it ought to be transferred to the end of the draft as a general 'disputes' article and might then suffer excision at the diplomatic conference. If the article was to survive at all, the Commission would be unwise to press for independent adjudication, and in its present place article [65] should certainly provide a safeguard against abuse in respect of a particular series of provisions in the draft. Therefore, albeit reluctantly, he had come round to the view that caution was essential and that, generally speaking, the article should be handled in the way decided upon at the fifteenth [1963] session". [1966] 845th meeting, 1 Y.B. Part II 8. The argument regarding the place of the article is not convincing, since every proposed article required a two-thirds majority at the Vienna Conference.

defined kind, namely disputes which are likely to endanger international peace and security as is set forth in chapter VI of the Charter. (It assumes, therefore, that this is an identifiable category of international disputes, despite the fact that theoretically any international dispute could easily be brought within this classification under given political circumstances.) Furthermore, Article 33 recognizes the freedom of choice of the parties to the dispute as to the procedure for pacific settlement which they will employ [17]). *Grosso modo* article 65 of the Vienna Convention may go fur-

---

[17]) This aspect was closely considered by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. See in particular the Report of the 1966 Special Committee, 21 UN GAOR Annexes agenda item 87 paragraphs 157—272, doc. A/6230 (1966); and Report of the 1970 Special Committee 25 UN GAOR Supp. 18, doc. A/8018, paragraph 83 (1970). The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered is formulated in the following terms in the Declaration on the topic adopted by the General Assembly in resolution 2625 (XXV), 24 October 1970:

"Every State shall settle its international disputes with other States by peaceful means, in such a manner that international peace and security, and justice, are not endangered;

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute;

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them;

States parties to an international dispute, as well as other States, shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations;

International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality;

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes".

We have elsewhere welcomed this text, despite its generality, as introducing some precision into the practical application of Article 33 of the Charter. It contains several new progressive elements, notably paragraphs 3 and 5. «Terminaison des Traités: Rapport Provisoire», 52 Annuaire t. 1 at 237 (1967). Paragraph (4) of the final Commentary of the I.L.C. on article 62 of its 1966 text indicates that the Commission had the 1966 formulation of that principle in mind when preparing the final version of its draft articles on the law of treaties.

ther and, for the parties to it [18]), may impose, as regards the treaties to which it applies, an obligation which extends to all disputes relating to the application to a given treaty of the provisions of the Vienna Convention regarding the invalidity or termination of the treaty, regardless of whether the dispute would be one likely to endanger international peace and security [19]). That clarification must be regarded as an element of progressive development.

It became clear from the debates in the Sixth Committee of the General Assembly from 1963 onwards, when the first draft of those provisions was put forward, and even more so from the debates on the final text of the draft articles in the sessions of the General Assembly of 1966 and 1967, that the question of including in the final text of the Convention-to-be more sharply drawn provisions for the settlement of disputes arising out of Part V (Invalidity, Termination and Suspension of the Operation of Treaties) had become from the political point of view the most sensitive issue which the diplomatic conference would have to face. Indeed, the existence of this problem was one of the factors which weighed in the proposal to divide the Conference into two sessions, separated by a relatively long period of time, in order to make it easier to identify the political issues on which the diplomatic endeavours of the interested States would have to concentrate. As the discussion progressed, however, it became more confused over a number of cardinal issues. These issues can be divided into two broad categories. The first concerned the question of what type of third-party settlement should be envisaged — legally-orientated binding judicial settlement through the International Court of Justice or arbitration through *ad hoc* arbitration tribunals (or possibly the creation of standing arbitration panels), or more politically-orientated settlement in the form of non-binding recommendations through some conciliation machinery. The second concerned the question on which the I. L. C. had expressed itself more by implication than expressly and which had occupied the Institute of International Law at its session at Nice in September 1967 [20]), namely

[18]) For the treaties to which the Vienna Convention applies, see articles 1, 4 and 84 of the Convention.

[19]) Sir Gerald Fitzmaurice in the Institute of International Law, *supra*, note 7 at 275. There is another view, which we share, according to which this procedure, based on Article 33 of the Charter, represents the received law *(lex lata)*, one of the objects of article 65 of the Vienna Convention being to bring the law of treaties into harmony with that received law.

[20]) *Supra*, note 7, pp. 5—401; vol. 2, pp. 317—399, 556—7, 561—2. In its resolution of 14 September 1967, the Institute expressed itself in cautious terms, merely indicating its desire that there should be included in an appropriate form in the codification of the law of treaties the obligation for a party claiming that a treaty has terminated, or

whether a single form of third-party settlement would be appropriate for each disputed ground of invalidity or termination, or whether the nature of some of those grounds would impose variations in settlement procedures for disputes arising out of them (for instance, to take one example, the application of the principle *inadimplenti non est adimplendum* in relation to article 60 of the Vienna Convention [Termination or suspension of the operation of a treaty as a consequence of its breach]) [21]). The final text of the Vienna Convention, particularly articles 42 (Validity and continuance in force of treaties), 65 (Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty), 66 (Procedures for judicial settlement, arbitration and conciliation) and its Annex, and 69 (Consequences of the invalidity of a treaty), reflects delicate political compromises on these cardinal issues. The legal implications of those texts will be examined further in the course of this article.

At the Vienna Conference, broadly speaking three types of proposals for adding to the I. L. C.'s text were advanced. They are to be appreciated in a context which, as a result of the proceedings at the first session, included general acceptance of the detailed provisions regarding the different grounds for the invalidity and termination of treaties, for the most part substantially in the form submitted by the I. L. C., as well as agreement to the main procedural provisions embodied in the I. L. C.'s draft article 62 [22]). For many delegations represented at the Conference, the Convention could have been accepted in that form. Many others, however, would have opposed the Convention a s a w h o l e had not some attempt been made to meet them, both as regards changes in the formulation of some of the

---

intending to terminate it or withdraw from it, to notify in accordance with the prescribed forms the other parties of its position and the grounds therefore *[sic];* in the event of disagreement between the parties they should have recourse to the methods for the pacific settlement of disputes. There is little doubt that the date of that discussion (limited to the termination of treaties) and a desire not to enter into open controversy with the I.L.C. at a delicate stage of the codification of the law of treaties, restrained the Institute in its examination of this topic.

[21]) For a study of the I.L.C.'s proposals on this topic, see E. S c h w e l b , Termination or Suspension of the Operation of a Treaty as a consequence of its Breach, 7 Indian J. Int'l L. 309 (1967). For a fuller study of breach in the light of article 60 of the Vienna Convention, see B. S i m m a , Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law, 22 Österreichische Zeitschrift für öffentliches Recht 5—83 (1970).

[22]) Nevertheless, as Judge M o r e l l i has correctly pointed out: «Il s'agit, en réalité, de dispositions ayant une importance non seulement procédurale mais aussi substantielle parce qu'elles impliquent ou supposent la détermination exacte des faits produisant l'extinction (ou la suspension) des traités». *Supra* note 7 at 298. Indeed, this epitomizes the transformation that takes place when the direction of the "procedure" is changed from the diplomatic to the judicial sphere.

substantive articles of Part V, and as regards additional procedural safeguards pointing in the direction of dispute-settlement rather than diplomatic procedures and, to some extent, courtesies.

One approach involved a return to the Lauterpacht-Fitzmaurice concept, by which the good faith of the claimant State would be made to depend upon its willingness to have resort to binding third-party settlement of a definitely legal character, the most far-reaching, naturally, establishing the International Court of Justice as the instance of last resort for all disputed grounds of invalidity or termination. Other proposals suggested the creation of new organs of arbitration, but with the same underlying philosophical approach. Their authors seemed to have been guided to a large extent by two considerations. The first was the accentuated degree of reserve felt by many delegations from all continents towards the International Court of Justice as an institution, especially in the light of the serious political controversies engendered by its handling of several recent cases, above all that relating to South West Africa [23]). The second was the appreciation that not every dispute likely to arise would be of sufficient gravity to warrant setting the heavy international judicial machinery in motion for their settlement [24]).

The second type of proposal tried to remove the pejorative element of testing the good faith of the claimant party by reference to its willingness to have resort to these procedures. Ostensibly these proposals were cast in somewhat more objective language, and as for the machinery, they envisaged something more political in character. They required that in the event of a dispute of the kind envisaged, recourse should be had to some existing machinery such as conciliation bodies or to special permanent or *ad hoc* treaty-dispute commissions [25]). The superficial difference between these proposals and those in the first group, apart from the general characteristic of the organ vested with the power of decision, is that in these, the psychological factor of the testing of the good faith of the claimant State was for-

---

[23]) [1966] I.C.J. 6.

[24]) Proposals by Japan and Switzerland, docs. A/CONF. 39/C. 1/L. 339 and L. 377. For details of their disposal, see our work cited in note 1, *supra* at 345.

[25]) Proposals by Central African Republic and Gabon, A/CONF. 39/C. 1/L. 345; Colombia, Finland, Lebanon, Netherlands, Peru, Sweden and Tunisia, L. 346; Austria, Bolivia, Central African Republic, Colombia, Costa Rica, Dahomey, Denmark, Finland, Gabon, Ivory Coast, Lebanon, Madagascar, Malta, Mauritius, Netherlands, Peru, Sweden, Tunisia and Uganda, L. 352/Rev. 3 and Add. 1 and 2; Spain, L. 391; United States of America, L. 355. The nineteen-Power proposal was adopted in the Committee of the Whole by 54 votes to 34, with 14 abstentions, but in the Plenary meeting, where the voting was 62 votes in favour, 37 against and 10 abstentions, the requisite two-thirds majority was not obtained.

mally avoided. But this difference, which is a matter of interpretation by the sponsors of the proposals on the record of the Conference, may be more apparent than real, especially so long as the provisions on settlement procedure were accompanied by others to the effect that the invalidity or termination of the treaty would become effective only after the competent organ had pronounced itself on the matter. It might be noted that only one proposal went so far as to differentiate between different grounds of invalidity or termination, singling out breach for special treatment [26]).

The third type of proposal, quite different in character, would have added a general compromissory clause to the Convention as a whole (in addition to the specific provisions for the settlement of disputes arising out of Part V of the Convention). The effect of this would, of course, have been that all disputes arising out of the interpretation or application of the whole of the codified law of treaties as embodied in the Vienna Convention, and that means in effect every dispute concerning the interpretation or the application of any treaty to which the Convention would apply, would come within the compulsory jurisdiction of the International Court of Justice which could be invoked unilaterally in the prescribed manner [27]). There is no doubt that the international community is not ready for so sweeping a change in accepted modalities for the transaction of international business.

---

[26]) Proposal by Uruguay, submitted at the first session of the Conference and withdrawn. Doc. A/CONF. 39/C. 1/L. 343. The proposal was not resubmitted at the second session. From the carefully enunciated statement of the representative of Uruguay, Sr. Jiménez de Aréchaga (now a member of the International Court of Justice), at the 68th meeting of the Committee of the Whole, it is clear that this amendment was inspired by the proceedings in the Institute of International Law. 1 United Nations Conference on the Law of Treaties, Official Records [hereinafter UNCLTOR] 403.

[27]) Proposal by Switzerland, A/CONF. 39/C. 1/L. 250. Note also the similar proposal by Spain in doc. L. 392. The proposal was rejected in the Committee of the Whole, but the Swiss delegation reintroduced it in the Plenary meetings, doc. A/CONF. 39/L. 33; and see the discussion at the 29th and 30th Plenary meetings, when the requisite two-thirds majority was not obtained and the proposal was accordingly again not adopted. 2 UNCLTOR 160—65. There is no doubt that the introduction of a general compromissory clause of this character and scope into the Vienna Convention would give rise to a number of difficult technical problems, for example, as regards the time from which the termination of a treaty would take effect, none of which had been examined by the I.L.C. Cf. H. Briggs in the Institute of International Law, *supra* note 7 at 323, and in 61 A.J.I.L. 976 at 989 (1967). Some other difficulties are indicated elsewhere in this article. On the question of the relationship between such a general compromissory clause and a provision such as article 66 of the Vienna Convention, see the representative of Switzerland, Bindschedler, at 2 UNCLTOR 330—1.

In this connexion, note the "declaration" made by the United Kingdom and other Commonwealth countries when signing the Convention: [T]he Government ... declare their understanding that nothing in article 66 ... is intended to oust the jurisdiction of

II

The issue of the settlement of treaty disputes — whether in general or in the more limited sense in which it appears in the Vienna Convention — should not be considered only as a matter relating to the codified law of treaties. The problems which it poses must also be viewed from the perspective of the accepted concepts of international dispute-settlement procedures and the organs through which they are applied. Here the general and the specific questions posed by the law of treaties have to be brought within the focus of matters pertaining to the establishment and activation of the organs specially devoted to the settlement of international disputes — especially those envisaging the settlement of the disputes by the application of international law (judicial settlement or arbitration) — and the law governing them. Questions of that character, situated within those terms of reference, arose and were considered very thoroughly on the official intergovernmental level apparently only once during the present century. That occurred in the course of the second Hague Peace Conference of 1907. It will be recalled that at the first Hague Peace Conference of 1899 tentative steps were taken for the establishment of international arbitration procedures and their institutionalization [28]). At the Conference of 1907, which in this respect aimed at revising and completing the work of the first Conference, the steps then taken were submitted to close scrutiny [29]). In both Conferences, but especially in that of 1907, the question of instituting compulsory international arbitration processes was the central theme of the discussion, and the debate was conducted with particular reference to the

---

the International Court of Justice where such jurisdiction exists under any provisions in force binding the parties with regard to the settlement of disputes. In particular, and in relation to States parties to the Vienna Convention which accept as compulsory the jurisdiction of the International Court of Justice, the Government ... declare that they will not regard the provisions of sub-paragraph *(b)* of article 66 of the Vienna Convention as providing 'some other method of peaceful settlement' within the meaning of sub-paragraph (i) *(a)* of the Declaration of the Government ... accepting as compulsory the jurisdiction of the International Court of Justice which was deposited with the Secretary-General of the United Nations on the 1st of January 1969.

For this and other reservations and declarations, see Multilateral Treaties in respect of which the Secretary-General performs depositary functions, Chapter XXIII (ST/LEG/SER.D/4, and subsequent issues).

[28]) Hague Convention for the Pacific Settlement of International Disputes, No. I of 1899. Reichs-Gesetzblatt, No. 44, 393 (9 November 1901). Twenty-six States were represented at that Conference.

[29]) Hague Convention for the Pacific Settlement of International Disputes, No. I of 1907. Reichs-Gesetzblatt, No. 2, 5 (26 January 1910). Forty-four States were represented at that Conference. For the proceedings, see Netherlands Ministry for Foreign Affairs, Deuxième Conférence Internationale de la Paix, La Haye, 15 juin — 18 octobre 1907, Actes et Documents (1908) [hereinafter Actes].

settlement of international disputes relating to the interpretation and application of international treaties. In that context, the Conference sought ways to define in acceptable terms the jurisdiction of the proposed arbitral machinery [30]), jurisdiction, as always, being the crux of the matter.

So as to place in perspective these two Conferences, and the objectives being pursued by the States which initiated them, it has to be kept in mind that in the framework of the international legal order then existing, war and the use of force held a recognized place *intra legem*. There was nothing yet to correspond to the Covenant of the League of Nations or the Charter of the United Nations, or even the General Treaty for the Renunciation of War as an Instrument of National Policy [31]), nor was any so far-reaching step yet contemplated. In the minds of many who took a prominent part in the diplomatic activities connected with the Conferences of 1899 and 1907, the conception of standing international arbitration machinery and the institution of compulsory dispute-settlement procedures applying international law were closely associated with enlightened and foreward-looking pacifism (freed from any defined ideological strain and therefore having no resemblance to the peace-movements current today). That kind of pacifism, which was much influenced by the coincidence in point of time of the Franco-Prussian War and the *Alabama* arbitration [32]), also released the energies necessary for fruitful international co-operation for the codification of international law and its progressive development, symbolized today by Article 13 of the Charter of the United Nations and the I. L. C. [33]), in the aspirations of which a codified law of treaties has always occupied a cherished place. To put the matter in simple terms, there was — and probably still is — an underlying feeling that to the extent that the law, and particularly international law, and the machinery for its interpretation and application could be reinforced, so would the cause of international peace as the desirable and normal state of international relationships be strengthened and the maintenance of international peace facilitated. In the framework of general international law as it existed at the beginning of the twentieth century, peace appeared as an alternative to a fully recognized legal institution denominated war, or to the unrestricted use of force then not placed

[30]) It must be remembered that in accordance with the diplomatic usage then current, the unanimity rule was applied at these Conferences for the adoption of decisions, including the texts of the Conventions. Modern United Nations practice usually requires a majority of two thirds of those present and voting. Cf. article 9 of the Vienna Convention.

[31]) Signed at Paris on 27 August 1928. 94 LNTS 57 (1928).

[32]) 62 British & Foreign State Papers (1871—1872) 189—239 (1877).

[33]) Cf. S. Torres-Bernárdez, Desarrollo progresivo y codificación del Derecho internacional, ONU: año XX, 1946—66 (Ed. Tecnos, 1966).

within the legal constraints of the Charter. Today, of course, the legal concept of peace and the legal conditions justifying the use of force and the breaching of international peace are found in quite a different legal construction and context, which the principles and purposes and the concrete obligations of the United Nations Charter impose. There is no need to labour this point which is now well understood [34]). However, if it is recalled here, that is to place what follows in its context.

It is therefore not surprising that the major question which arose in 1899 and more acutely in 1907, and which indeed always arises whenever the establishment of international dispute-settlement organs is contemplated regardless of the degree of compulsiveness incorporated in them, related to the issue of the compulsory jurisdiction of the new machinery. Almost the only problem examined in depth by that part of the 1907 Conference which was responsible for the issue of the pacific settlement of international disputes was that of the relationship of the proposed new system of compulsory arbitration to the law of treaties as it was then generally conceived. Different delegations at the Conference put their fingers on a whole series of major problems, some of which certainly reflected preoccupations of a genuinely juridical character prompted by disinterested professional analysis of the legal difficulties. Others, however, although couched in juridical or legalistic terms (and not for that reason devoid of technical merit) were a cover for political objections to the very concept of compulsory arbitration, based on conceptions of *Realpolitik* not essentially very different from those advanced today by the major Powers against endowing international organizations with too extensive competence and jurisdiction to decide international disputes. In this respect, the undertones of the debate at The Hague in the first decade of the present century are strikingly similar to those heard at the end of the sixth decade of the present century at Vienna, although of course the details of the formulations and the roles of different States were to change very much, another matter altogether. Indeed, it is most striking to compare the approach and role of the delegations of Imperial Germany with the approach and role now of the delegation of the Federal Republic of Germany, on this particular issue.

The delegations represented at the Hague Conference displayed awareness of the difference in substance between the manner in which a compromissory clause in a bilateral treaty works and that of a similar clause in a multilateral treaty even where the language of the clause is identical.

---

[34]) The relation of this development to the general institution of international judicial procedures is well brought out, for example, in C. W. Jenks, The Prospects of International Adjudication *(passim)* (1964).

This point does not seem to have been considered at the Vienna Conference at all although, thanks to the uniform presentation of the law for bilateral and multilateral treaties by the I.L.C., of all the broad issues of this character which arose at The Hague it was probably the most relevant to the question of the compulsory settlement of treaty disputes. The records of the Hague Conference contain several warnings against assuming that what two States might write in a treaty binding themselves alone regarding the settlement of disputes between them arising out of that treaty would be automatically transferrable to a multilateral treaty and produce exactly the same results should a dispute arise between two or more parties to that treaty [35]).

It was accepted at the earlier Conferences, as *grosso modo* it still is (regardless of personal or ideological predelictions), that a State's so-called vital interests subjectively determined by that State alone, whatever the expression "vital interests" might embrace, were to be excluded from the scope of any general compulsory international arbitration. In the view of some, this is even an inherent limitation on the scope of the compulsory jurisdiction of all international tribunals deciding international disputes through the application of international law, at all events unless clearly excluded by the constituent instrument of the tribunal in question. As far back as 1907 the question was raised — foreshadowing later debates on the so-called Connally amendment, for example [36]) — whether this vital interests aspect could be a matter for objective decision by any competent third party organ, or whether it was in the nature of things always a subjective matter. Seven years before the outbreak of the First World War, and shortly before the Agadir incident of 1911, there was evident a sensitive awareness of the relationship of disputes said to be disputes arising out of the interpretation or application of treaties with the major preoccupations of national security and the maintenance of international peace. The question was asked whether in fact it was possible to foresee that in no circumstances would an arbitral award impinge upon the national security, a question obviously answered in the negative. The problem was illustrated by refer-

[35]) 1 Actes 459. This issue must not be confused with another one which, as stated, the I.L.C. did face, namely, whether there is a single unitary law of treaties applicable indifferently, subject to specified alterations of detail, to bilateral and to multilateral treaties alike. For an analysis of this, see 1 Annuaire, *supra*, note 7 at 98—105, 213—218, 2 *id.* 381—2.

[36]) See our work *supra* note 11 at 395 and the literature there cited. The following appears in the records of the I.L.C.: "Under Islamic law States were forbidden to submit issues affecting their vital national interests to the decision of irresponsible parties, and he would apply that term to an arbitral tribunal in the sense that it was not answerable to any other body". Faris el-Khoury, 152nd meeting, [1952] 1 Y.B. 85.

ence to the European agreements relating to overland transport by rail. It was suggested that disputes arising out of those agreements (which at the time were of an importance comparable to that of the modern air transport agreements) would be inherently suitable for inclusion in the proposed new scheme for compulsory arbitration. However, after reply was made that most of the railway lines concerned had been planned and laid for strategic reasons so that disputes connected with them would necessarily have a political character and bear upon military considerations, any idea that disputes relating to the interpretation or application of that kind of treaty were inherently justiciable was dropped [37]).

Amongst the questions of a more pronounced legal character, it was asked what would be the true scope and effect of an international arbitral award interpreting a multilateral treaty. Displaying a fine juridical sensitivity, the question was posed how the element of *res judicata* as between the parties to the arbitration itself could be balanced with the element of *res inter alios acta* as regards the other parties to the treaty which were not parties to the arbitration [38]). With very pointed relationship to the law of treaties itself, it was asked what would be the implications of an arbitral award interpreting a treaty, to the effect that a given State party to the award and to the treaty had acted in a manner incompatible with its obligations under the treaty, when the award would require legislative action in that State for its implementation [39]). In this connexion, it could be recalled that in many countries duly ratified treaties become part of the law of the land, whether by virtue of the law which ratifies the treaty in the sense of domestic ratification, or by virtue of an independent law which permits the ratification to take place and the obligations of the treaty to be performed, according to another domestic constitutional system [40]). The question was put again in a somewhat different way but with the same general intent, namely, what would be the effect of an arbitral award rendered in a dispute arising out of the interpretation or application of a treaty when the substance of the award related to a matter which, by virtue of the domestic legal system of the party in question, came within the competence not of the executive branch of the government but of the judicial branch [41]).

Replies to all these, and other, questions appear in the records of the Conference of 1907. However, it proved impossible to frame any answers

[37]) 1 Actes 466.
[38]) *Id.* 465.
[39]) *Id.* 468.
[40]) For a recent survey of constitutional practices in this matter, see K. Holloway, Modern Trends in Treaty Law 105—463 (1967).
[41]) 1 Actes 469.

in the form of acceptable treaty provisions to be inserted in the constituent instrument of the new system of the pacific settlement of international disputes and even less in the provisions relating to arbitration, and the attempt was in effect abandoned. Even the Statute of the Permanent Court of International Justice, and following it the Statute of the International Court of Justice, have preferred on the whole to leave these somewhat elusive matters to future developments, which in fact have been meagre. And if it is arguable that these questions are really of only peripheral concern to those trying to establish compulsory international dispute-settlement procedures, that same can hardly be said when what is at issue is the relationship of the codified general law of treaties itself to compulsory adjudicative procedures. Yet significantly, neither in the I. L. C., nor in the Vienna Conference, was any serious attempt made to identify and resolve the major juridical problems which would naturally come into prominence should a formal point of contact be deliberately created between the codified law of treaties and compulsory judicial or arbitral procedures and appropriate provisions be included for the settlement even of a limited class of disputes arising from the codified law of treaties.

The Conference of 1907 proceeded to a detailed examination of different types of treaties by reference to their subject matter to see if it would be practical to classify treaties and draw up a list of those types which by their nature would be suitable for inclusion in a scheme of compulsory arbitration. Some twenty different categories of treaty, from this point of view, were identified. However, not a single one of them attracted a sufficient majority in the committee to make it feasible to bring it before the Conference itself [42]). Under the traditional unanimity rule as applied at the Conference, abstentions did not affect the unanimity in the formal sense. But in this part of the discussion what was significant and really decisive was not the existence of abstentions but the large number of negative votes that were cast, and their political weight. The question was even discussed whether all treaties — a concept which must, it is to be assumed, embrace a treaty on the law of treaties itself — were amenable to compulsory judicial or arbitral settlement, a question which was answered in the negative [43]). In this connexion, the language of Article 36, paragraph 2, of the Statute of the International Court of Justice may be recalled. Copied from Article 13 of the Covenant of the League of Nations from which it originated, and differing from a corresponding formula found in the two Hague Conventions on the Pacific Settlement of International Disputes which

[42]) *Id.* 480.
[43]) *Id.* 479.

provided the basic inspiration, that provision does not refer to disputes concerning the interpretation of t r e a t i e s , but the actual words used are "the interpretation of a t r e a t y ". That formulation is not accidental. Even in 1919/20 and again in 1945 when the Statute was drafted and revised, there was never any question, as a matter of practical politics, of establishing the so-called compulsory jurisdiction of the Court for a l l treaties even on the optional basis provided by the Statute of each Court. Compulsory jurisdiction was conceived for "a treaty", apparently leaving some element of choice on the part of each State accepting the compulsory jurisdiction [44]). In that sense it might be said that the jurisdiction of the Court under paragraph 2 of Article 36 of the Statute is, as far as concerns disputes relating to the interpretation of a treaty, strikingly similar to the jurisdiction based on a compromissory clause in a given treaty and paragraph 1 of Article 36 of the Statute [45]).

Indeed, the kind of atmosphere which prevailed at The Hague in 1907 is well illustrated by a quotation attributed in the records of the Conference to one of the leading international lawyers from South America at that time, Sr. D r a g o of Argentina, who is recorded as having said that he could not «accepter, au nom de son pays, que les lois qu'on édite pour se défendre contre les épizoöties ou autres maladies des animaux ou des plantes, puissent être soumises à l'arbitrage obligatoire» [46]). Such was the conclusion! Not even treaties dealing with animal sickness or plant disease were, from the political or security point of view, anodyne enough that compulsory international arbitration could be conceived for disputes arising out of their interpretation or application.

Issues of this nature, the significance of which can hardly be avoided as a matter of law or as one of political realism, were not discussed publicly and on the record in connexion with the recent codification of the law of

---

[44]) Cf. in the Permanent Court of International Justice, *German Interests in Polish Upper Silesia* [1926] P.C.I.J. Series A No. 7 at 18. By article 16 of the Hague Convention No. 1 of 1899: «Dans les questions d'ordre juridique, et en premier lieu dans les questions d'interprétation ou d'application des conventions internationales, l'arbitrage est reconnu par les puissances signataires comme le moyen le plus efficace et en même temps le plus équitable de régler les litiges qui n'ont pas été résolus par les voies diplomatiques». This was retained unchanged in article 38 of the corresponding Convention No. I of 1907. The change from the plural language of these two texts to the singular language of the Covenant of the League of Nations and the Statute of the Permanent Court of International Justice does not appear to have attracted unusual attention.

[45]) We have elsewhere expressed the view that there is no difference of substance between the jurisdiction under paragraph 1 and that under paragraph 2 of Article 36 of the Statute of the International Court. See our work *supra* note 11 at 302—04.

[46]) 2 Actes 460. This revealing statement was made in the tenth meeting of Committee of Examination A of the First Commission, on 19 August 1907.

treaties. Nevertheless they cannot be easily dismissed from sight, and there can be little doubt that now that the law of treaties has been codified, they, and probably others, will have to be given the closest attention whenever the international society decides that it is ready to advance further along the path that will take it to compulsory third-party settlement of international disputes through the application of international law.

III

At this point it is appropriate to consider briefly some of the main general characteristics and qualifications of international disputes to the extent that they can be identified, and of treaty disputes in particular — what might be termed the physiognomy of international disputes. A few quotations are sufficient to illustrate how this kind of issue, which is not easily given to the type of scientific analysis which the law customarily exacts from its exponents, presented itself in connexion with the codification of the law of treaties. But at the outset it must be emphasized that here the broad issues which have to be faced are infinitely more political and sociological in character than they are legal.

According to an influential American view:

> "Many disputes which appear to be disputes about the correct interpretation of a treaty or customary law have hidden motivation. Judicial resolution in terms of legal issues presented would not touch the real source of the difficulty, the real problems and policies that are involved" [47]).

The I. L. C. was, of course, fully aware of this, and it is probably reasonable to assume that underlying thoughts such as those were shared by very many of its members, even if they disputed between themselves whether that philosophy in itself was sufficient justification for discarding compulsory settlement machineries from the codified law of treaties. The following quotations, which were never contradicted on the record, illustrate what was widely appreciated by its members (each in his own way, of course). For instance, during the first reading in 1963 of article 25 of the Second Report of Sir Humphrey W a l d o c k [48]) one member, who explained that he did not subscribe to the view that a dispute relating to the interpretation or the application of a treaty was inherently different from any other international dispute or that it was in some way more amenable to judicial settlement, went on to say that it was essential to consider the real-

[47]) M. A. Kaplan & N. de B. Katzenbach, The Political Foundations of International Law 278 (1961).

[48]) *Supra* note 8.

ities underlying a dispute; most disputes could be reduced to a question of interpretation of treaties, but that did not make them any more amenable to judicial settlement[49]). Another member, addressing himself more particularly to the question of the judicial settlement of disputes relating to the invalidity or termination of treaties although his remarks are probably of more general application, said that when a dispute was political, what was sought was not the application of the law but a change in it[50]) (this of course is not a new thought, but it was useful to have it recalled). During the second reading in 1966 of what had by then become article 51 (now article 65 of the Vienna Convention), the same member said:

> "All international disputes were both legal and political. There was not a dispute that was not amenable to settlement in accordance with rules of law. At the same time, any dispute could be charged with political implications, even one relating to a purely technical matter. It was for the State concerned to decide whether any particular dispute had political implications and whether it was or was not prepared to submit it to judicial settlement or arbitration"[51]).

The implications in political terms of this line of thought can easily be demonstrated by reference to the major centres of international tension today, such as the general situation regarding Berlin, or the crises in the Middle East and in the Far East. Each one of these, and probably nearly every other current international dispute major or minor, could easily be brought within the framework of the law of treaties or of some provision or other of the Vienna Convention should all the parties wish to depoliticize it and treat it, or have it treated, that way. But in each of those situations the harsh fact is that the elements of the law of treaties are completely overshadowed by the graver clashes of interests — even vital interests — not merely of the States immediately and directly concerned but of others as well. It is a tendentious and misleading oversimplification to treat them as disputes of an exclusively legal character.

Against such a background the narrower question of the nature of treaty disputes in a more orthodox sense may be approached.

It is undeniable that a great number of routine and legitimate differences of opinion, even disputes as technically defined[52]), continuously arise

---

[49]) Rosenne, 699th meeting, para. 34, [1963] 1 Y.B. 173.

[50]) De Luna, 699th meeting, para. 52, *id.* 174.

[51]) 845th meeting, para. 46, [1966] 1 *id.* Part II 7. Quoted at the Vienna Conference by the representative of Syria (Nachabe), 69th meeting of the Committee of the Whole, 1 UNCLTOR 410.

[52]) The Permanent Court of International Justice defined the word "dispute" in a compromissory clause in a treaty in force as a "disagreement on a point of law or fact,

out of the normal application of international treaties; and it is likely that the increase in the number of international treaties will be accompanied by a similar increase in the number of these disputes. They are not especially grave disputes, although their persistence may become an irritant if not worse on the general international situation. They are what one representative at the Vienna Conference called the minor, technical differences which occur in the daily work of the legal staffs of the Ministries for Foreign Affairs, for which "a rigid and cumbersome procedure might be inappropriate" [53]). To deal with such matters is bread-and-butter work for Ministries for Foreign Affairs and other government departments: indeed it is a normal feature of public administration in general. So much is this so that when this kind of matter occurs in international relations, there is as little *a priori* question of setting in motion formal dispute-settlement procedures as there is of litigation in ordinary human relations. Indeed, it is believed that in the half century that has elapsed since the Permanent Court of International Justice was established, only one case of this nature and magnitude ever reached the supreme international praetor [54]). Considering the large and growing number of compromissory clauses in the thousands of multilateral and bilateral treaty relationships in force, the extreme rarity of the invocation of the international judicial and arbitration and conciliation processes in this kind of situation is not only noteworthy, but also cannot be explained away by glib citation of a maxim such as *De minimis non curat praetor* [55]). It is a normal feature of the conduct of foreign affairs as of public administration in general to seek agreed solutions to problems of this nature unless overriding political considerations dictate otherwise. The diplomatic temperament, with its emphasis on negotiation and the adjustment of differences on a basis of mutual concession, does not easily contemplate binding solutions in the form of decisions imposed by some outside organ, much in the same way that the experienced advocate will only reluctantly advise his client to utilize court procedures to settle intractable problems, and when he is satisfied that a formal decision in his favour will not be a Pyrrhic victory.

---

a conflict of legal views or of interests between two persons". *Mavrommatis* case (preliminary objections), [1926] P.C.I.J. Ser. A No. 2 at 11. This has been repeated several times by the International Court of Justice, see our work cited *supra* note 11 at 292 ff.

[53]) The representative of Uruguay, Jiménez de Aréchaga, 1 UNCLTOR 403.

[54]) The *Guardianship Convention* case [1958] I.C.J. 55.

[55]) See the remarkable survey by C. W. Jenks, Compétence obligatoire des instances judiciaires et arbitrales internationales, 47, Annuaire t. I 34 at 50—118 (Session d'Amsterdam, 1957).

Sometimes solutions reached through the complex processes of diplomacy may go much further and lead to an ostensibly unilateral denunciation of a treaty, possibly even accompanied by charges that the other party is in breach of it. Many treaties exist in which permanent machinery is set up, to deal with the adaptation of the treaty to new conditions when circumstances warrant. That machinery may take many forms, including ostensibly judicial forms. But that is a different situation, because here it was envisaged, already at the negotiating stage, that in the application of the treaty difficulties would arise and machinery was created in advance to deal with these. Frequently the kind of difference which the parties had in mind are those of the nature provoked by some fundamental change of circumstances now governed by article 62 of the Vienna Convention, the parties have foreseen the possibility and agreed that notwithstanding the fundamental change of circumstances the treaty should nevertheless continue to be applicable but would require modification [56]). This is common, for instance, in commercial and trade and commodity agreements, where standing mixed committees are frequently established.

This notwithstanding, as soon as the routine is left the area of major political confrontation is encountered. Here, as stated, the element of the law of treaties is only one factor, and not the most prominent one at that. It is because of this that the introduction of compulsory dispute-settlement procedures into the framework of the law of treaties codified on the universal scale could have so far-reaching an impact on the current processes of international diplomacy.

IV

As work on the codification of the law of treaties progressed, both in the I. L. C. and subsequently at the Vienna Conference itself (where a variety of political factors became more pressing), one major question of principle came into prominence. It was posed with great insistence particularly in relation to the group of articles formulating, for the first time, the concept of *jus cogens* and its impact on the law of treaties [57]), but from many

[56]) Article 62 of the Vienna Convention, following article 59 of the draft articles submitted by the I.L.C., probably takes account of this eventuality through the expression "which was not foreseen by the parties" in paragraph 1. See paragraph (9) of the I.L.C.'s Commentary. Nevertheless, the question of the effect of the fundamental change of circumstances on that regulatory machinery itself could always arise.

[57]) Draft articles on the law of treaties, articles 50 and 61, adopted after amendment as articles 53 and 64 of the Vienna Convention. They are contained in Part V, devoted to the invalidity, termination and suspension of the operation of treaties. In the words of the representative of Czechoslovakia, Myslil, that Part marks the limits of the *pacta sunt servanda* rule. 1 UNCLTOR 219.

points of view it can be said that the issue of principle arises more generally as regards certain other aspects of the rules governing the invalidity of treaties or the termination of treaties, rules containing elements of novelty. The question is the familiar one of the relationship between substantive and procedural rules. On this issue, an important statement was made in the Commission by Professor A g o, subsequently President of the Vienna Conference, who said:

> "In international law ... there were rules of substance and rules of procedure. The latter were certainly far from satisfactory, but they did exist; and any effort to combine the two kinds of rule might lead to dangerous confusion. The Commission tended too often, perhaps, to think that it was breaking new ground: in fact, some of the rules incorporated in the draft were as old as the law of treaties itself, and no one had ever contested them on the ground that there was no established means of settling disputes relating to their application. Moreover, even when the Commission affirmed the existence of mandatory rules or *jus cogens*, it was only defining a principle which already existed and had been recognized by the conscience of States. Thus rules of substance did not lose any of their validity merely because there were no corresponding rules of procedure, even though the development of substantive international law was bound to demonstrate more clearly the need for parallel development of the international law of procedure. Hence, it was not only for practical reasons that he was in favour of retaining the text adopted in 1963, but also for reasons of principle, since the draft under consideration stated rules of substance and was not the place for settling questions of procedure" [58]).

This may be contrasted with the opposite point of view expressed by the representative of the Federal Republic of Germany at the Vienna Conference — echoing thoughts expressed in the I.L.C. and by other representatives at Vienna — as follows: "[T]he ideas put forward by the International Law Commission might perhaps be in advance of developments in the international world" so that it would be "unwise to adopt the proposed provisions [regarding invalidity or termination] without setting up a system for settling disputes" [59]). Reduced to its fundamentals, the basic issue thus joined was whether to subordinate the development of the sub-

[58]) 845th meeting, [1966] 1 Y.B. Part II 6. It is frequently argued by the proponents of a strengthened system of compulsory jurisdiction that the formulations of the I.L.C. introduce (or perpetuate) subjective conceptions regarding the invalidity and termination of treaties, and that these subjectivities cannot be adequately controlled merely by reference to the general obligation to apply the Vienna Convention in good faith. For the opponents of this point of view it is believed that this is a general characterization of modern international law which, if it is to be properly dealt with, must be treated independently of the codification of some other branch of the law.

[59]) T h i e r f e l d e r, 1 UNCLTOR 225.

stantive rules of the international legal order to the development of its institutions [60]) or its procedural rules [61]) (which is not necessarily the same thing). Apart from the broad topic of *jus cogens* this issue became particularly acute in the discussion of the proposals regarding the invalidity of treaties concluded through the use of force [62]) and a fundamental change of circumstances (the so-called doctrine of *rebus sic stantibus*) as an invocable ground for the termination or suspension of the operation of a treaty [63]). Indeed, whenever it has to be determined whether a given proposal advanced by the Commission in connexion with the law of treaties was a piece of codification pure and simple *(lex lata)* or whether, and if so to what extent, it also contained elements of progressive development *(lex ferenda)*, the same underlying issue of principle makes its presence felt [64]). As the representative of New Zealand put it at the Vienna Conference, the rules adopted by the Conference "would inevitably be governed by the laws of space and time and it was not easy to foresee the effect which some rules might have in the future, however attractive they might at present appear" [65]).

[60]) The representative of Iraq, Yasseen, *id.* 296. The same speaker had expressed similar views in the I.L.C., especially at its 699th meeting, [1963] 1 Y.B. 175.

[61]) The representative of Israel, Rosenne, 1 UNCLTOR 310.

[62]) Article 52 (formerly article 49). And see Julius Stone, De Victoribus Victis: The International Law Commission and imposed Treaties of Peace, 8 Virginia J. Int'L L. 356 (1968).

[63]) Article 62 (formerly article 59). And see O. J. Lissitzyn, Treaties and Changed Circumstances (Rebus sic stantibus), 61 A.J.I.L. 895 (1967); E. Schwelb, Fundamental Change of Circumstances: Notes on Article 59 of the Draft Convention on the Law of Treaties as recommended for Adoption to the United Nations Conference on the Law of Treaties by its Committee of the Whole in 1968, 29 ZaöRV 39 (1969).

[64]) With regard to the law of treaties, the I.L.C., following what is now its normal practice, reported that its work constituted both codification and progressive development, but that it was not practicable to determine into which category each provision fell. See the Commission's final report, *supra* note 1, at paragraph 35. (In some cases the Commentary indicates that the Commission was proposing a new rule.) This gave rise to some difficulty at the 35th Plenary meeting of the Conference over the proposal by Switzerland (A/CONF. 39/L.45) to introduce what was adopted as the eighth paragraph of the preamble of the Convention.

In 1968, in the course of a general review of its work, the Commission noted that as a methodological standard the distinction between codification and progressive development has not been maintained in practice. Report of the Commission on the work of its twentieth session, Annex, para. 41, [1968] 23 UN GAOR Sup. 9, 2 Y.B. 191 at 240, doc. A/7209/Rev. 1. However, the impossibility of determining whether a proposal by the Commission belongs to one or other category signifies much more than the mere abandonment of a somewhat arbitrary methodological standard. See in general H. Briggs, The International Law Commission 129 (1965). In so far as concerns the law of treaties, the matter may be found to have a direct impact on the question of the retroactivity of the provisions of the Vienna Convention.

[65]) Small, 1 UNCLTOR 219.

While all due allowances must be made for the differences in the nature of the material, it seems that a similar question had been discussed in the I. L. C. ten years earlier, in connexion with its final report on the law of the sea [66]). Then, too, the issue had been posed of whether a role for the international judicial process in the formulation of rules of law or legal principles ought to be envisaged, at least in the preparatory stage of examination and report by the I. L. C. In 1956 the Commission had run into great difficulties on the question of the breadth of the territorial sea. The suggestion was then made that since the Commission had not been able to resolve the problem and formulate it in terms of a statement of legal rule, the rule should be framed in terms which would enlist the International Court of Justice in solving the problem. However, the Commission rejected an approach of that nature, and in the Commentary to article 3 of the draft articles on the law of the sea it included the following passage:

> "The Commission considered the possibility of adopting a rule that all disputes concerning the breadth of the territorial sea should be submitted to the compulsory jurisdiction of the International Court of Justice".

After this introduction to the problem, the Commentary went on:

> "The majority of the Commission, however, were unwilling to ask the Court to undertake the settlement of disputes on a subject regarding which the international community had not yet succeeded in formulating a rule of law. It did not wish to delegate an essentially legislative function to a judicial organ which, moreover, cannot render a decision binding on States other than the parties" (emphasis supplied) [67]).

We have little doubt that in the context of 1956, the I. L. C. correctly answered the question of principle.

That discussion is significant for demonstrating in a practical way how the line is drawn between the law-making function which is reserved to the States and the special agencies which they have established for that purpose, and the law-applying third-party organs empowered by the States to decide disputes on the basis of the law made by the States. It does not mean that the law cannot be expounded, developed and refined by an organ such as the International Court of Justice or that the I. L. C. is barred from proposing the inclusion of a compromissory clause to resolve disputes aris-

---

[66]) [1956] 11 UN GAOR Sup. 9, 2 Y.B. 253, doc. A/3159.

[67]) *Id.* at 266. And see the discussion at the 361st—363rd meetings, [1956] 1 Y.B. 161—182.

ing out of draft articles which it prepares [68]). The thrust of the discussion is different. It indicates that as a matter of technique the I. L. C., when it is unable to formulate a proposition in the language of a draft article, should not look for an easy way out by formulating a purported rule of law in question-begging terms which invite referral of the matter to the International Court of Justice. In 1956 many thought that the determination of the breadth of the territorial sea was a typical legal question for determination by the Court, and indeed a few years earlier by the submissions of the United Kingdom in the *Fisheries* case against Norway the Court was actually requested to make a determination of the extent of Norway's territorial sea [69]). It was only at the United Nations Conference on the Law of the Sea of 1958, the first of the modern codification conferences convened by the United Nations at which the basic text was provided by the I. L. C., that it was at last appreciated that a question such as this was a political one of high magnitude and not, at least when framed in generalized and universalist terms, a "legal" question (whatever that categorization might mean).

In its work on the law of treaties, the I. L. C. seems to have stood its ground behind the line thus drawn. It decided not to subordinate the formulation of the substantive rules of the international law of treaties, even when these admittedly were proposals for the progressive development of the law, to the obligation to accept defined dispute-settlement procedures. It reached that decision of principle in 1963 in the context of the invalidity and termination of treaties. It contented itself then with inserting in what has become article 65 of the Vienna Convention, previously article 62 of the draft articles, a general reference to the means indicated in Article 33 of the Charter of the United Nations. As stated, that reference is itself limited to Part V of the Vienna Convention, and is concerned more with the diplomatic than with the judicial-procedural aspects [70]).

At the Vienna Convention, however, things took a different turn. With slight regard for the underlying lesson of the discussion of 1956 on the breadth of the territorial sea, a number of delegations insisted that for them

---

[68]) Cf. article 73 of the draft articles on the law of the sea, *supra* note 66; and article 45 of the draft articles on diplomatic intercourse and immunities, Report of the ... Commission on the work of its tenth session, Chapter III, [1958] 13 UN GAOR Sup. 9, 2 Y.B. 78 at 89, doc. A/3859.

[69]) [1951] I.C.J. 116 at 126. The Court found that put in those terms the question was not the subject of the dispute then before it.

[70]) When the Institute of International Law discussed the termination of treaties in 1967, it seems to have reached a similar conclusion, although reluctantly. No formal proposal for compulsory settlement was put to the vote. *Supra* note 20.

the acceptability of the Convention would depend, *inter alia*, upon recognition of some role for a law-applying organ such as the International Court of Justice or arbitration tribunals for some of the foreseeable disputes relating to Part V of the Convention, especially those relating to the interpretation or the application of the articles relating to *jus cogens*. The line of argument advanced by the proponents of this point of view may be exemplified by two quotations. For the representative of the United States, the draft articles contained many provisions couched in the most general terms. For States to know what they could and could not do with respect to treaties, some better means of interpretation were needed than purely *ad hoc* conciliation groups or arbitration panels [71]). For the representative of Japan, questions of *jus cogens* involved the interests of the entire community of nations, and the question whether a provision of a treaty was in conflict with a rule of general international law, and whether that rule was to be regarded as a peremptory norm, could be settled authoritatively o n l y (emphasis supplied) by the International Court of Justice. The Japanese delegation could not agree that "a dispute of that kind should be left to p r i v a t e s e t t l e m e n t b e t w e e n t h e p a r t i e s t h r o u g h p r o c e d u r e s e s t a b l i s h e d o n a n *ad hoc* b a s i s" (emphasis supplied) [72]).

The point of view exemplified by those two quotations in the end partly prevailed, and is incorporated in article 66 of the Vienna Convention. Taking as its starting point the obligation of the parties to seek a solution of a dispute through the means indicated in Article 33 of the Charter, laid down in article 65, paragraph 3, of the Vienna Convention, article 66 goes on to provide that if no solution has been reached within twelve months, one of two procedures shall be followed. If the dispute concerns the application or the interpretation of the *jus cogens* provisions (articles 53 or 64, the latter relating to *jus cogens superveniens)*, either party may unilaterally submit that dispute to the International Court of Justice unless by common consent the parties agree to submit it to arbitration. If the dispute concerns the application or the interpretation of any of the other articles of Part V of the Convention, any party to the dispute may set in motion a special conciliation procedure, the details of which are set forth in the Annex to the Convention, by means of a unilateral request to the Secretary-General of the United Nations. The essential feature of that conciliation process is that the Conciliation Commission is empowered to make proposals to the parties with a view to reaching an amicable settlement of the dispute, and its re-

[71]) W o z e n c r a f t, 1 UNCLTOR 407.
[72]) F u j i s a k i, *id.* 402.

port, which may include conclusions regarding the facts or questions of law, "shall not be binding on the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute".

The singling out of the *jus cogens* provisions for this special and not entirely consistent treatment (since if the parties consent the arbitration may be both *ad hoc* and secret) is superficially based on an unproved assumption, which is extremely unlikely to be ever realized in practice, namely that States are likely to enter into that kind of public commitment which is an international treaty, violative of a rule of *jus cogens*, or even of a rule of *jus cogens superveniens*. But as Judge Eduardo Jiménez de Aréchaga has written:

> "[T]his concept ... *[jus cogens]* although comparatively new in the international field, is based on the existence of very few fundamental principles, affecting so seriously the essential interests and the basic moral concepts of the international community as a whole, that it is not sufficient to repress their actual violation consummated by a State. It is necessary to go beyond that, and to sanction also with invalidity even the preparatory act, the conspiracy by which two or more States contemplate and envisage in a treaty the performance in the future of acts in violation of such basic principles. It belongs, however, to the nature of things that such an open and undisguised conspiracy and challenge to basic principles and moral rules will not occur frequently in practice, and, therefore, the hypothesis of treaties in conflict with a rule of *jus cogens* will be very rare indeed" [73]).

While it is difficult to avoid the impression that paragraph 1 of article 66 was inserted into the Convention above all for political purposes, and that its practical importance may not be very great, it is nevertheless probably a salutary development that this provision was in the end adopted by the Vienna Conference.

V

It now becomes all the more necessary to note certain features of the modern international judicial organization and of international litigation in general — matters which, it seems, neither the I. L. C. nor the Vienna Conference adequately considered. That fact in itself is not without interest, considering that in contrast to the difficulties faced by the Peace Conferences of 1899 and 1907, now the Statute of the International Court of Justice has been in existence for nearly half a century, and there is con-

[73]) Annuaire, *supra* note 7 at 378.

siderable experience, both forensic and political, of its working. There are several features of the normal patterns of present-day international litigation, especially in the International Court of Justice (although possibly they are or may become of more general application) [74]), which have to be kept in mind, and their application to the codified law of treaties ascertained. The existence of these features will undoubtedly affect the application of articles 65 and 66 of the Vienna Convention, at least to the extent that they involve the International Court of Justice directly or indirectly.

The international regulation, in the Statute of the Court, of the right of intervention brings into the open a problem of considerable gravity. As we have seen (*supra*, sect. II) the relativity of arbitral awards and the problematic extent of the *res judicata* as regards awards involving the interpretation of multilateral treaties were found to be obstacles to the creation of compulsory arbitration processes at The Hague Conference. To some extent it may be said that with the establishment of the Permanent Court of International Justice and the International Court of Justice, and the inclusion in their respective Statutes of formal provisions regarding the right of intervention in pending proceedings and the extent of the *res judicata* in those cases, some difficulties may have been overcome. Thus, by Article 62 of the Statute [75]):

> "1. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
>
> 2. It shall be for the Court to decide upon the request".

And by Article 63 [76]):

> "1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
>
> 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it".

Since a dispute arising out of the interpretation or application of a bilateral treaty between two States which are also parties to the Vienna Con-

---

[74]) The close interaction of the Statute and Rules of the International Court of Justice on other patterns of international arbitration procedures is well illustrated by the Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its Fifth Session, prepared by the United Nations Secretariat, doc. A/CN. 4/92, Publication Sales No. 1955. V. 1.

[75]) To be read together with Articles 64 and 65 of the Rules of Court.

[76]) To be read together with Article 66 of the Rules of Court.

vention, or a dispute between two States of a kind to which articles 65 and 66 of the Vienna Convention refers, would probably put into question the construction of the Vienna Convention itself, unexpected consequences may follow from the inter-action of the Vienna Convention and the law relating to the international judicial process before the International Court.

As regards international arbitral processes, the position seems to be more complicated. Article 84 of the First Hague Convention of 1907, in a provision similar to that found in Article 63 of the Statute of the Court, provided that:

> "The award is binding only on the parties in dispute.
>
> When there is a question as to the interpretation of a convention to which Powers other than those in dispute are parties, the latter shall inform all the signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the award is equally binding on them" [77]).

When the I. L. C. discussed the question of arbitral procedure, its Special Rapporteur, Professor Georges S c e l l e , was hesitant about the inclusion of provisions regulating the right of intervention in arbitration proceedings [78]). On that occasion the United Nations Secretariat submitted a memorandum in which the following points were made:

> "The award of an arbitral tribunal can be binding only upon the parties which have agreed to submit to the decision of the tribunal, and it has been observed above that tribunals are very careful in their awards not to trespass upon the rights of third States. The decision of such a tribunal may, however affect the rights of third parties, and this state may wish to intervene in order to protect its rights, or it may be asked *(appel en cause)* by a party to participate in order to obtain a more perfect answer to the problem before the tribunal".

The memorandum pointed to the differences between permanent and *ad hoc* tribunals in matters such as the terms of the *compromis* or the selection of the judges. It continued that in the case of an *ad hoc* tribunal the intervention of a third State is rarely provided for, and diplomatic negotiations may be needed to arrange for such intervention on terms which will protect the rights of all concerned [79]). A brief discussion on the matter took place at the 154th meeting of the I. L. C. on the basis of a proposal by Mr.

---

[77]) J. B. S c o t t , The Reports to the Hague Conferences of 1899 and 1907 at 306 (1917).

[78]) [First] Report on Arbitral Procedure, [1950] 2 Y.B. 114 at 138 (French only), doc. A/CN. 4/18 (English and French), para. 80.

[79]) Memorandum by the Secretariat, *id.* 157 at 171, doc. A/CN. 4/35, paras. 71 and 71 a.

Yepes, and it was decided not to include any provision on intervention in the Commission's proposals on the topic, and in fact none appears [80]).

As far as conciliation is concerned, the Revised General Act in the Pacific Settlement of International Disputes [81]) does not mention intervention as such: however by paragraph 3 of article 11, a Conciliation Commission is entitled to request oral explanations from "all persons it may think desirable to summon with the consent of the parties". It is believed that this kind of provision may give a limited opening to third States to acquaint the Conciliation Commission with their position, at least (subject to the consent of the parties) to the extent that they may feel that they are likely to be specially affected by the conciliation proceedings.

It seems that in the case of a dispute of the type mentioned between State A and State B arising out a bilateral treaty between those States, the existence of the parallel issue of construction of the Vienna Convention (perhaps itself of only peripheral interest in relation to the original bilateral dispute) could open the way to the multilateralization of the original bilateral dispute. This would happen through the certain right of other parties to intervene in proceedings before the International Court of Justice, and their more dubious right to intervene in other arbitral proceedings, especially should the Hague Convention of 1907 be relevant, and the same can be said regarding proceedings before the Conciliation Commissions, having regard to article 3 of the Annex to the Vienna Convention. This, indeed, may be more than intervention in the technical sense — itself sometimes ambiguous — and become true interference in what started off by being a bilateral dispute, and possibly one of some intimacy to the parties to it [82]).

---

[80]) [1952] 1 Y.B. 96. For the Commission's proposals, see Draft Convention on Arbitral Procedure, Report of the ... Commission covering the work of its fifth session, Chapter II, [1953] 8 UN GAOR Sup. 9, 2 Y.B. 201 at 208, doc. A/2486; Model Rules on Arbitral Procedure, Report of the ... Commission covering the work of its tenth session, Chapter II, *supra* note 68. For a fuller analysis, see also United Nations [Secretariat], Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928—1948, Sales No. 1949. V. 3.

[81]) Adopted by the United Nations General Assembly on 28 April 1949. 71 UNTS 101. On conciliation more generally, see 48 Annuaire, t. 1, 5—130 (Session de Neuchâtel, 1959), 49 *id.* t. 2, 193—291, 374 ff. (Session de Salzbourg, 1961); J.-P. Cot, La conciliation internationale (1968); and the United Nations publication mentioned in previous note.

[82]) As a theoretical possibility, take the case of a dispute on the territorial application of a bilateral treaty which would also raise an issue of the construction of article 29 of the Vienna Convention, on the territorial scope of treaties, when the bilateral dispute relates to a politically sensitive area such as Berlin or Jerusalem. For a domestic case of this nature in the English courts (Divisional Court, Queen's Bench Division and

The intermixture of third parties in the evolution of an international dispute is a relatively common feature of the international diplomatic process, but hitherto it has been for the most part discreet, especially when the third State may have its own reasons for trying to prevent any exacerbation of the original dispute. As article 3 of the Hague Convention of 1907 put it, Powers stranger to a dispute have the right to offer good offices or mediation, even during the course of hostilities; and the exercise of their right should never be regarded by either of the parties to the dispute as an unfriendly act. On the other hand, intervention is extremely rare in international litigation. The provisions of the Statute of the Court regarding intervention and the introduction of any too far-reaching dispute-settlement procedures into the general law of treaties would, however, formalize the position and open the way to new and unpredictable developments. It is open to question whether such an evolution would be conducive to international peace and stability, or even whether it is compatible with the broader aims which lie behind the general support for the codification and progressive development of the law.

The existence of this right of intervention, even in the fragmentary and ambiguous form in which it is now found, may also give rise to the question whether, in a dispute involving simultaneously the interpretation and application of the Vienna Convention and another treaty, the tribunal seised of the case, the International Court of Justice or an *ad hoc* tribunal, would not be hampered in the exercise of its jurisdiction should not all the parties to the Vienna Convention at the relevant time as well as all the parties to the other treaty not also participate in the litigation. (As a matter of fact, the same question can arise even without the Vienna Convention as far as concerns the interpretation of any multilateral treaty in the International Court of Justice) [83]). The delicacy of a question such as this may be illus-

---

House of Lords), which could have given rise to an issue of this character, cf. *Reg.* v. *Governor of Brixton Prison, ex parte Schtracks*, L.R. [1963] 1 Q.B. 55; [1962] 2 All E. R. 176; 33 International Law Reports 319 (1967). That extradition case related to alleged perjury committed in an Israeli court in Jerusalem, and parallel criminal litigation took place in Jerusalem, Israel.

[83]) In the *Continental Shelf* cases, which concerned *par excellence* the construction of a multilateral convention drawn up on the basis of proposals by the I.L.C. and to which States other than those concerned in the case were parties, no reference appears, neither in the judgment nor in the pleadings, to Article 63 of the Statute or to the notifications required to be made by the Registrar. On the other hand, before the opening of the hearing, the pleadings had been made available to the public [1969] I.C.J. 3 at 8. For the normal practice of the Court in a case involving Article 63 of the Statute, cf. *U.S. Nationals in Morocco* case, [1952] I.C.J. 176 at 178.

trated by a case such as the *Monetary Gold* case [84]) which seems to indicate that much would depend not so much on whether the legal interests of a non-intervening State would be affected by the decision, as on whether they would form the subject-matter of the decision. The I. L. C. itself seems to have been of the view that, at least as far as concerns breach, all the parties to a multilateral treaty are in the same interest as regards that treaty [85]).

The question of intervention became a political issue at the Vienna Conference in the context of strengthening the procedural safeguards surrounding the provisions dealing with the invalidity and the termination of treaties. Indeed, its existence was one of the factors unfavourable to the inclusion of institutionalized judicial or arbitral procedures in the Convention. As part of a compromise it was ultimately agreed that the Conciliation Commission established under the Annex would be empowered to invite any party to the treaty to submit to it its views orally or in writing, but only with the consent of the parties to the dispute. This now appears in paragraph 3 of the Annex. Containing no criteria of a legal character, however general, it is doubtful if this can be termed "intervention" in any legal sense; and it may be assumed that practical requirements rather than a sense of developing jurisprudence will condition the application of that paragraph.

A second aspect, that of the relativity of the *res judicata* even of the International Court of Justice (and *a fortiori* of an *ad hoc* tribunal), which preoccupied the Hague Conference in 1907, remains acute, especially as regards the uniform interpretation and uniform application of a multilateral treaty on the law of treaties. Neither Articles 59 and 63 of the Statute of the International Court of Justice, nor corresponding provisions governing the operation of *ad hoc* tribunals, are adequate.

The relativity of the *res judicata* subsists alongside another facet which has come to the fore only recently, namely that of the possible non-finality of the *res judicata*, statutory and conventional provisions notwithstanding. The judgment or award is of course final as regards the formal dispute decided by it. That does not mean that it is necessarily final as regards the r e a l dispute dividing the States. This is an aspect which becomes particularly evident and pressing when the international judgment is limited to deciding questions of the jurisdiction of the tribunal seised of the dispute,

---

[84]) [1954] I.C.J. 19. In the phase of arbitration, however, the absence of Albania merely led to the consequences envisaged in the *compromis*. See arbitral advice of G. S a u s e r - H a l l, 20 February 1953, 12 Reports of International Arbitral Awards 13 at 35 (1963); 20 International Law Reports 441 at 458 (1957).

[85]) See discussion at the 831st and 832nd meetings, [1966] 1 Y.B. Part I 57—67.

or the admissibility of the case. The concept of dispute for purposes of international litigation, as mentioned earlier (note 52), has become highly technical, and in the view of some may be even artificial and arbitrary [86]). A settlement of what the international tribunal defines as being the dispute before it may contribute little or nothing to the settlement of the real controversy dividing the two States. An interesting illustration of the way in which the formal judgment of the International Court of Justice opened the way to a large quantity of repetitive litigation in domestic courts of different countries is provided by the *Anglo-Iranian Oil Co.* case [87]). Here the international judgment related exclusively to extremely technical issues of the Court's jurisdiction, on the basis of which the Court declined jurisdiction [88]). It decided nothing about the disputed ownership of the property of the nationalized company, and consequently litigation on that issue continued in the domestic tribunals, with contradictory decisions from one jurisdiction to another. Another illustration can be seen in the *U. S. Nationals in Morocco* case [89]) which contained certain interpretations of some long-standing international treaties. Later, and before the independence of Morocco, domestic courts in different parts of the territory concerned proceeded to give different interpretations of those treaty provisions.

In relation to the codified law of treaties, the question of exactly what was decided by an international judgment or arbitral award may be a matter of some moment. The maxim *Interest reipublicae ut sit finis litium* is well-known, but in international diplomatic practice its invocation may appear to beg the question. Much more thorough consideration of what is meant in international practice by bringing disputes to an end is required before the wholesale extension of compulsory dispute-settlement procedures into the vast area covered by the law of treaties could be contemplated with any confidence.

It is one thing to invoke international judicial or arbitral procedures, or other forms of third party settlement procedures, by agreement between the States in dispute, as envisaged in Article 33 of the Charter. It is quite another matter to invoke any of those procedures generally and unilaterally, without knowing in advance who the other party will be or how it will react. Many legal systems, and more importantly many societies, view going to Court or being taken to Court as involving an element of disgrace,

[86]) Cf. the dissenting opinion of Judge Morelli in *South West Africa* cases, Preliminary Objections [1962] I.C.J. 319 at 564 ff.

[87]) [1952] I.C.J. 93.

[88]) Nevertheless, that judgment did have some forward reach into a private-law area. See our work cited *supra*, note 11 at 641—43.

[89]) *Supra* note 83.

and something of this has undoubtedly rubbed off into the international society. In 1959 the Institute of International Law adopted a resolution which went so far as to say that recourse to the International Court or to another international court or arbitral tribunal could never be regarded as an unfriendly act by the respondent State [90]). In the United Nations Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, the proposition was limited to a statement that recourse to dispute-settlement procedures freely agreed to by the parties should not be regarded as incompatible with the sovereign equality of States [91]). The fact remains — and this is transparent in the records of the Vienna Conference — that in many cases unilateral recourse to these procedures, even when the jurisdiction exists, will be regarded as an unfriendly act. There is thus a real danger that reliance on this kind of dispute-settlement procedure for many treaty disputes may convert what started out by being a routine difference of opinion into a serious political controversy, regardless of whether the parties want to politicize it to that extent.

VI

The principal technical discussions on what became article 65 of the Vienna Convention took place during the fifteenth (1963) and eighteenth (1966) sessions of the I. L. C. and in the Committee of the Whole during the first session of the Vienna Conference [92]). On the other hand, article 66 and the Annex were introduced together with other proposals as part of a "package deal" and adopted at the 34th Plenary meeting during the second session of the Conference, and they were not, therefore, subjected to the same close technical scrutiny as article 65 [93]). The justification contained in

---

[90]) 48 Annuaire t. 2, 380 (Session de Neuchâtel, 1959).

[91]) *Supra* note 17.

[92]) Waldock II, article 25, *supra* note 8; 698th, 699th, 700th, 714th, 720th and 721st (Commentary) meetings (1963). Adopted then as article 51. Reviewed in his Fifth Report, [1966] 2 Y.B. 1 at 46, doc. A/CN. 4/183/Add. 4 [hereinafter Waldock V]; 845th, 864th, 865th, 891st (Commentary) and 893rd meetings (1966). Adopted then as article 62. Discussed at 68th, 69th, 70th, 71st, 72nd, 73rd, 74th, 80th and 83rd meetings of the Committee of the Whole at the first session of the Vienna Conference and at the 25th Plenary meeting at the second session.

[93]) Introduced as doc. A/CONF. 39/L. 47/Rev. 1. 2 UNCLTOR 187—194, 198—203. The previous discussion on what had been proposed as article 62 *(bis)* had led to no result. *Supra* notes 24, 25, 26 and 27. Rule 30 of the Rules of Procedure of the Vienna Conference provided that, as a general rule, no proposal should be discussed or put to the vote at any meeting of the Conference unless copies of it had been circulated to all delegations not later than the day preceding the meeting. The President might, however,

the I. L. C.'s Commentary on its draft article 62 needs to be supplemented by authoritative statements [94]) appearing in the records of the I. L. C. and the Conference. The following comments relate to the more salient points, and are not exhaustive.

> **"A party which, under the provisions of the present Convention, invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty, terminating it, withdrawing from it or suspending its operation":**

The corresponding phrase in draft article 62 proposed by the I. L. C. read:

> "A party which claims that a treaty is invalid or which alleges a ground for terminating, withdrawing from or suspending the operation of a treaty under the provisions of the present articles".

The revision was proposed by France [95]), whose representative explained that without certain rephrasing of article 39 (now article 42 of the Vienna Convention) [96]) it was arguable that paragraph 1 of article 62 only covered grounds of invalidity referred to in the articles which became 46 to 50 of the Convention, that no recourse to article 65 was provided in the cases of invalidity *ab initio* covered by articles 51, 52, 53 and 64 of the Convention, and that those grounds of invalidity could be invoked without reference to the procedure of article 65, and even without the intervention of the parties [97]). The representative of France found corroboration for this in other provisions of the draft which used different formulations when referring to relative invalidity and invalidity *ab initio*. The possible consequence of that anomaly would be to enable any party to a treaty unilaterally to claim invalidity on the very grounds which were most difficult to establish, and

---

permit the discussion and consideration of amendments or motions of procedure even though they had not been circulated or had only been circulated the same day. 1 UNCLTOR xxvi. The text of the "package deal" proposal had been circulating informally among the delegations before the 34th Plenary meeting, and it had been the object of intensive discussions at Vienna as well as in a number of capitals.

[94]) Of Sir Humphrey Waldock, as Special Rapporteur of the I.L.C. and as Expert Consultant at the Conference, of the chairmen of the Drafting Committees of the Commission and of the Conference, and of the sponsors of amendments adopted by the Conference. For reserves at the use of the records of the I.L.C. as *travaux préparatoires* of the Vienna Convention, see our work cited *supra* note 1 at 37.

[95]) A/CONF. 39/C. 1/L. 342, adopted by 39 votes to 31, with 20 abstentions.

[96]) This rephrasing was also accepted by the Conference. *Infra* sect. VII.

[97]) During the discussions in the Commission the question had been raised several times whether in cases of invalidity on the ground of coercion third parties could invoke the invalidity in appropriate organs. A similar question had been asked in connexion with the concept of *jus cogens*. The Commission had probably left this matter open in order to permit third States to test "void" treaties in a political organ such as the Security Council or the General Assembly, and it is not easily seen where th amended version changes this. Cf. *infra* note 168.

to open the way to States other than the parties to benefit by the invalidity provided for by those articles. The French delegation considered that no ambiguity should be allowed to remain on the question of the application of the article to all the provisions of Part V [98]). This point was taken up by Sir Humphrey Waldock who explained that the Commission had intended the procedures prescribed in the article to apply to all the grounds of invalidity, termination and suspension of the operation of a treaty, including those in the articles mentioned by the French representative. The opening words of the article were designed to cover both cases in which a State invoked a defect of consent and cases in which it alleged invalidity on grounds of *jus cogens*. He regarded the French amendment as an improvement in making the point entirely clear [99]).

"notify": The procedure for notifications and the rules governing the time of their receipt are laid down in article 78 of the Vienna Convention [100]) which reads:

"Article 78
Notifications and communications

Except as the treaty or the present Convention otherwise provide, any notification or communication to be made by any State under the present Convention shall:

(a) if there is no depositary, be transmitted direct to the States for which it is intended, or if there is a depositary, to the latter;

(b) be considered as having been made by the State in question only upon its receipt by the State to which it was transmitted or, as the case may be, upon its receipt by the depositary;

(c) if transmitted to a depositary, be considered as received by the State for which it was intended only when the latter State has been informed by the depositary in accordance with article 77, paragraph 1 (e) [under which the depositary is under the duty to inform the parties and the States entitled

---

[98]) De Bresson, 1 UNCLTOR 403. He suggested that the amendment was a drafting matter on which no vote was required, but objection was made on the ground that it involved the disappearance of the word "invalid" in paragraph 1. The French representative also explained that it was not a matter of questioning the possible difference in character between invalidity *ab initio* and relative invalidity, but of clarifying the wording which was in some respects ambiguous. Similar criticism had been made in the Institute of International Law at the Nice session, *supra* note 20 *passim*.

[99]) 1 UNCLTOR 441. He had expressed a similar view at the 714th and 860th meetings of the I.L.C. [1963] 1 Y.B. 278, and [1966] 1 *id.* Part II 158. This probably answers the doubts expressed by Sir Gerald Fitzmaurice in Annuaire, *supra* note 7 at 269—71.

[100]) This probably answers the criticism expressed by Jenks, *id.* 283.

to become parties to the treaty of acts, notifications and communications relating to the treaty]".

"notification": Article 25 of Sir Humphrey W a l d o c k's Second Report had contained detailed proposals regarding the notice of the claim by the party wishing to take action with regard to the treaty, and its communication to the other party or parties to the treaty. These proposals carried the implication that in the hypothesis contemplated by what has become paragraph 3 of article 65, a dispute would rapidly come into existence. However, in the discussion in the I. L. C. in 1963 criticism was voiced at the idea that the language of this provision should be close to that found in the texts governing international litigation. As a result, this part of the article was substantially recast, and practically reached its present form (subject to certain textual revisions introduced in 1966). In this connexion, it will be noted that the excision of the element of "dispute" from article 65 was further emphasized at Vienna by the fact that this concept which, as we have seen [101]), has a certain technical configuration in modern international law, makes its first and indeed only appearance in article 66. Article 65 is thus firmly placed within the framework of the diplomatic processes, and the use of the word "notification" instead of "notice of claim" or the like gives added stress to this.

"measure": At the 864th meeting of the I. L. C., Sir Humphrey W a l d o c k explained that this term was intended to refer to a step or legal act performed with respect to the treaty. He gave as an example the case of a real impossibility of performance, where there was nothing to prevent the State concerned from raising the question of the continued validity of the treaty on its own responsibility [102]).

"after the expiry of a period which... shall not be less than three months": In 1966, in reply to a "technical question" put to him by a member of the I. L. C. enquiring who was authorized to fix the period of three months and in particular was it the party which made the notification, Sir Humphrey W a l d o c k explained that the concern of the Drafting Committee of the I. L. C. had been to ensure that the time-limit fixed by the State making the notification should not be unreasonable; and in order to escape the kind of objections to which such wording as "within a reasonable time" gave rise, it had decided on the present formula [103]).

"except in cases of special urgency": On the same occasion, replying to a specific question concerning who was to decide when a case was "of special

[101]) *Supra* note 52. But see also note 86.
[102]) [1966] 1 Y.B. Part II 150—51.
[103]) *Id.* 158.

urgency", Sir Humphrey explained that difficulties arose because there was no compulsory international jurisdiction. He continued:

> "There could be cases of special urgency, particularly in situations involving breach, which as Special Rapporteur he had always considered should not be overlooked. The only answer he could give was that all the draft articles had to be interpreted and applied in good faith. At the present stage in the development of international law the Commission could not go further, and problems of the kind ... had in mind could only be resolved by reference to an objective criterion of good faith" [104]).

Sir Humphrey was even more emphatic in an explanation he gave at the Vienna Conference, in reply to a similar question. On that occasion he said:

> "Those words had been intended by the International Law Commission to provide for cases of sudden and serious breach of a treaty which might call for prompt reaction by the injured party to protect itself from the consequences of the breach" [105]).

Taking these two explanations together, it appears that while the principal preoccupation of the draftsmen of this text was the case of sudden and serious breach [106]), that was not the only situation which can be envisaged as coming within the scope of this exception.

"objection": Apparently no explanation for this word appears in the records of either the I. L. C. or the Vienna Conference. That being so, the interpretative process is not confined by anything appearing in the *travaux préparatoires*. Following article 31 of the Vienna Convention, the interpretation must be one made in good faith in accordance with the ordinary meaning to be given to the terms used in their context and in the light of the object and purpose of the treaty. As is clear from the preamble to the Convention, one of its objects is to facilitate the transaction of legitimate international business and the settlement of international disputes. On such

---

[104]) *Id.*

[105]) 1 UNCLTOR 441.

[106]) At the same time it has to be stressed that this refers to the law of treaties and not to other branches on international law. "The Commission considered that the action open to the other party in the case of a material breach is to invoke either the termination or the suspension of the operation of the treaty, in whole or in part. The right to take this action arises under the law of treaties independently of any right of reprisal, the principle being that a party cannot be called upon to fulfil its obligations under a treaty when the other party fails to fulfil those which it undertook under the same treaty. This right would, of course, be without prejudice to the injured party's right to present an international claim for reparation on the basis of the other party's responsibility with respect to the breach" [emphasis supplied]. From paragraph (6) of the Commission's Commentary on draft article 57.

a basis, it is suggested that in the present context the word should normally be construed as referring to an objection to the measures proposed rather than to an objection to the reasons given in justification for the measures proposed. It may be noted that the same word appears in articles 19 to 23 of the Vienna Convention on reservations. There it is clear that a conceptual distinction is very carefully drawn between an objection to a reservation, made as a statement of policy not intended to produce legal consequences in terms of precluding the entry into force of the treaty as between the objecting State and the reserving State, and an objection made as a statement of legal implication, tending to produce precisely that result [107]). The International Court of Justice, in its advisory opinion on Reservations to the Genocide Convention stated that the appraisal of the effect of an objection to a reservation must depend upon the particular circumstances of each individual case [108]).

It is believed that somewhat similar considerations would apply in interpreting the concept of objection in the present context. It is easy to envisage a situation in which a State may wish to make an objection to some action proposed to be taken in reliance or purported reliance on article 65 of the Vienna Convention as a matter of policy, while nevertheless acquiescing in the measure proposed as a matter of fact. Indeed, this is a relatively common feature of the diplomatic process in these delicate matters. That being so, little advantage is perceived in attributing to this word in this context too inflexible an interpretation which could have the effect of thwarting the real intentions of the State or States concerned. A none too rigid interpretation of this kind is borne out by a portion of paragraph (3) of the Commentary of the I. L. C. to article 62, in which the Commission explained that it thought that its proper course was first to provide a procedure requiring the invoking party "to notify the other parties and give them a proper opportunity to state their views" and only in the event of an objection to call for a solution through the application of the means indicated in Article 33 of the Charter. A statement of views, even if critical, is not necessarily an "objection" [109]).

"may carry out in the manner prescribed in article 67": Article 67, which has to be read in conjunction with article 78 *(supra)*, provides:

---

[107]) Vienna Convention, article 20, paragraph 4 (c).

[108]) [1951] I.C.J. 15 at 26.

[109]) Note recognition of acceptance of an invalid notice as a process of treaty termination in Fitzmaurice II, articles 24, 27 and 31. *Supra* note 5.

"Article 67
Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty

1. The notification provided for under article 65, paragraph 1 must be made in writing.

2. Any act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty pursuant to the provisions of the treaty or of paragraphs 2 or 3 of article 65 shall be carried out through an instrument communicated to the other parties. If the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers".

At the 865th meeting of the I. L. C., the Chairman of the Drafting Committee introduced a text which exempted from the provision for mandatory communication an act provided for in paragraph 1 of what became article 65 [110]). In that form the previous draft article 63 was adopted unchanged by the Committee of the Whole of the Vienna Conference, and came before the Plenary Conference [111]). At this point, however, the delegation of the Federal Republic of Germany proposed [112]) replacing that paragraph by the present text of what became article 67 with the object of making the written form mandatory for the notification provided for under paragraph 1, instead of only for instruments in pursuance of paragraphs 2 and 3, of what is now article 65. The representative explained that a proposal along those lines had been made in the Committee of the Whole by Switzerland [113]) but had been rejected after Sir Humphrey had confirmed that the notifications under paragraph 1 should be carried out in accordance with what is now article 78 [114]). However, the delegation could find no express provisions to the effect that these notifications must be made in writing: moreover, international practice had shown that there had been cases in which oral notifications had created difficulties and uncertainties for all the parties concerned. As an illustration, he referred to the well-known Ihlen declaration [115]). He pointed out that the utmost clar-

---

[110]) Briggs, [1966] 1 Y.B. Part II 159.

[111]) 2 UNCLTOR 132—3.

[112]) A/CONF. 39/L. 37, adopted by 68 votes to one, with 29 abstentions.

[113]) A/CONF. 39/C. 1/L. 349 and Corr. 1, rejected by 43 votes to 11, with 33 abstentions. That amendment was less clear than the one subsequently adopted.

[114]) 1 UNCLTOR 445.

[115]) *Legal Status of Eastern Greenland*, Permanent Court of International Justice, [1933] Series A/B No. 53.

ity was required in the situation brought about by the invocation of a defect in consent to be bound by a treaty or a ground for the termination of a treaty — certainty as much for the State directly concerned as for the depositary and the State receiving the notification. "The very principle of *pacta sunt servanda* called for the greatest caution and the manifold political, financial, economic and technical interests which were at stake... made it unthinkable that any doubts should be permitted as to whether that procedure had been initiated, and, if so, on what precise grounds". On the other hand, for the initial stage any written form should be allowed — *note verbale*, memorandum or other instrument even without the formal signature of one of the three dignitaries, and specific full powers should not be required. Consequently, the Federal Republic of Germany proposed an amendment which simply required that the notification must be made in writing, leaving the precise form to the State concerned [116]). By article 68 of the Convention, a notification or instrument provided for in articles 65 or 67 may be revoked at any time before it takes effect.

"seek a solution": At the 864th meeting of the I. L. C. Sir Humphrey Waldock, in response to a suggestion that it would be more accurate to speak of a "settlement of the dispute", said that the expression solution of the question was satisfactory and did not prejudge the technical question whether a dispute would actually arise [117]). This is another illustration of the essentially diplomatic character of the procedure at the stage of article 65.

"through the means indicated in Article 33 of the Charter": Article 33 of the Charter provides:

> "1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.
>
> 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means".

At the 700th meeting of the I. L. C., Sir Humphrey Waldock explained that he had not followed the wording exactly of Article 33 because the Article was expressly concerned with disputes likely to endanger the maintenance of international peace and security [118]). The expression the means indicated in reflects this.

---

[116]) Fleischhauer, 2 UNCLTOR 156.
[117]) [1966] 1 Y.B. Part II 151.
[118]) [1963] 1 *id.* 181.

"Paragraph 3": In the original proposals contained in article 25 of Sir Humphrey Waldock's Second Report, the effects of an objection were set forth as follows:

> "4. If ... objection has been raised by any party, the claimant party shall not be free to carry out the action specified ... but first must —
>
> (a) seek to arrive at an agreement with the other party or parties by negotiation;
>
> (b) failing any such agreement, offer to refer the dispute to inquiry, mediation, conciliation, arbitration or judicial settlement by an impartial tribunal, organ or authority agreed upon by the States concerned.
>
> 5. If the other party rejects the offer provided for in paragraph 4 (b), or fails within a period of three months to make any reply to such offer, it shall be considered to have waived its objection; ...
>
> 6. If, on the other hand, the offer ... is accepted, the treaty shall continue in force pending the outcome of the mediation, conciliation, arbitration or judicial settlement of the dispute; provided always, however, that the performance of the obligations of the treaty may be suspended provisionally —
>
> (a) by agreement of the parties; or
>
> (b) in pursuance of a decision or recommendation of the tribunal, organ or authority to which the mediation, conciliation, arbitration or judicial settlement of the dispute has been entrusted".

In spite of a somewhat optimistic summing up of the initial debate in the I. L. C., to the effect that there seemed to be general agreement on the need to include some such provisions although in a modified form [119]), in fact nothing of this survived the scrutiny of the Drafting Committee, which contented itself with redrafting paragraph 3 substantially in its present form. When the Drafting Committee's report came before the Commission, Sir Humphrey gave the following justification for its proposals:

> "If the parties were unable to agree on the choice of the means of settlement of the dispute or if they agreed, for example, on arbitration, but were unable to agree on the text of the *compromis*, under the new article each would have the right to resort to the General Assembly, the Security Council, the competent regional organization or other competent body under the Charter. In view of the division of opinion in the Commission and the strong objections to anything that might involve compulsory jurisdiction in any form, it was clear that the question of procedure could not be carried beyond the point reached at the end of the provisions of paragraph 3" [120]).

---

[119]) See his statement at the 700th meeting of the I.L.C., *id.* 181.
[120]) *Id.* 278.

It was on this point that all subsequent attention became focused, and indeed the success or failure of the Vienna Conference came to depend upon whether any acceptable answer could be found to that dilemma. Sir Humphrey reverted to this at the Conference when he said:

> "Paragraph 3 had been the subject of a great deal of criticism. In it the Commission had stipulated that, in the event of a dispute, the parties should seek a solution through the means indicated in Article 33 of the United Nations Charter. Although the Commission had not thought that it would [*sic: quaere* could?] go beyond Article 33, it had nevertheless considered the possibility of the parties reaching a deadlock, in which case it would be for each Government 'to act as good faith demands', as stated in paragraph (5) of the commentary. Many delegations thought the provisions insufficient: that was a matter for the Conference to decide. It was to be hoped that [it] would succeed in working out a procedure acceptable to all States" [121]).

The issue was thus placed squarely in the political arena.

The political problem could be divided into two facets, namely (a) what kind of organ should be entrusted with the settlement procedure after the parties had reached the deadlock, a matter which we have discussed earlier (*supra*, sect. IV), and (b) what would be the fate of the obligations of the parties under the treaty pending the completion of the settlement process. That aspect will now be considered briefly.

A proposal by Switzerland would have provided that throughout the duration of the dispute, in the absence of any agreement to the contrary between the parties or of provisional measures ordered by the court of jurisdiction, the treaty should remain in operation between the parties to the dispute [122]). A similar concept was embodied in a proposal by Japan [123]). Similar ideas were also contained in a proposal by the United States of America, except that they differentiated between certain of the grounds for invalidity and termination, with special provisions regarding breach [124]). A proposal by Uruguay, although silent on this particular aspect, nevertheless also recognized that breach might require special treatment in the broader context of treaty termination [125]). On the other hand, the nineteen-Power proposal which was adopted by the Committee of the Whole (and

---

[121]) 1 UNCLTOR 441.

[122]) A/CONF. 39/C. 1/L. 347, replaced at the second session by A/CONF. 39/C. 1/L. 377, rejected by 47 votes to 28, with 27 abstentions.

[123]) A/CONF. 39/C. 1/L. 339, rejected at the second session by 51 votes to 31, with 20 abstentions.

[124]) A/CONF. 39/C. 1/L. 355, withdrawn and not resubmitted at the second session.

[125]) *Supra* note 26.

rejected by the Plenary meeting) [126]) was completely silent on this aspect, and it is clear from the records of the Vienna Conference, that this was not an oversight but a matter of political determination. The final compromise decision embodied in article 66 of the Vienna Convention, basing itself on the trends which had become apparent in the earlier debates, likewise leaves this matter alone.

That being so, and in the light of the combined provisions of articles 42 together with 69, 70 or 71 as the case may be, it must be assumed that technically the treaty will remain in force until the completion of the procedures of article 66. There is no doubt where the case is before the International Court of Justice, that that Court can deal with this question as a matter of course through its general power to indicate provisional measures of protection under Article 41 of the Statute, and that could even involve the Security Council. A regularly constituted arbitral tribunal would also be granted similar power [127]).

As for the Conciliation Commissions operating by virtue of the Annex to the Vienna Convention, as will be seen they, too, have a power to deal with this matter in an interim manner pending their final recommendations. Nevertheless, it is believed that as a practical matter the significance of this "gap" should not now be exaggerated, owing to the refinement of the concept of the "suspension of the operation of a treaty" introduced by the I. L. C. and adopted by the Vienna Conference [128]).

"Paragraph 4": The somewhat checkered history of this provision throws light both on its interpretation, which is not free from difficulty, and on its place in the general scheme of things.

In the first reading in 1963, a proposal was made to the effect that, when the treaty itself provides that any dispute arising out of its interpretation or application should be referred to arbitration or to the International Court of Justice, such provision, to the extent that there may be any conflict, should prevail over the provisions of the present article [129]). Modified as a result of the discussion, the proposal was then adopted by the Commission substantially in the form in which it now appears in article 65 of the Convention [130]). At the same time the Commission inserted into the article on breach a statement to the effect that

---

[126]) *Supra* note 25. Cf. Richard D. Kearney and Robert E. Dalton, The Treaty on Treaties, 64 A.J.I.L. 495 at 555 (1970).

[127]) Cf. article 20 of the Model Rules on Arbitral Procedure, *supra* note 80.

[128]) Cf. Annuaire, *supra* note 20, t. 1, pp. 126—138, 223—226, 387.

[129]) Waldock II, article 25, paragraph 7, *supra* note 8.

[130]) Article 51, paragraph 4, of the draft articles adopted in 1963, *supra* note 9.

the foregoing paragraphs of that article were subject to any provisions in the treaty or in any related instrument which might regulate the rights of the parties in the event of a breach [131]). The Commentary explained that this provision, which had not appeared in the original proposal of the Special Rapporteur [132]), merely reserved the rights of the parties under specific provisions of the treaty or of a related instrument which were applicable in the event of a breach. That passage was retained during the second reading, except that it was rendered slightly narrower in scope, by being limited only to provisions in the treaty itself [133]). In that form, it now appears as paragraph 4 of article 60 of the Vienna Convention.

At the Vienna Conference, no problem arose with regard to that aspect of the article relating to breach. Likewise, no problem of principle arose with regard to paragraph 4 of what became article 65 of the Convention, as such. However, at the first session, Switzerland proposed a new article to be inserted between articles 62 and 63 (1966 numbering) stating that "nothing in the preceding article [article 62] shall affect the rights or obligations of the parties under any provision in force between them concerning the settlement of disputes" [134]). At the same time it was proposed to remove the corresponding provision from article 62 [135]). Introducing the proposal at the 92nd meeting of the Committee of the Whole at the second session, the representative of Switzerland explained that this was of a purely formal nature, and that his intention was that there should be a single article covering both article 62 and the proposed new article 62 *(bis)* [136]). The proposal was adopted by the Committee of the Whole as article 62 *(quater)*. The Drafting Committee, however, decided that "in the interests of symmetry" this provision should be repeated as paragraph 2 of article 62 *(bis)* as adopted by the Committee of the Whole [137]). Although the representative of Switzerland, joined by the representative of Turkey, protested that the matter should become a separate article, no formal proposal was introduced, and the proposal was reported to the Plenary Conference in the form recommended by the Drafting Committee [138]). At the 27th Plenary

[131]) Article 42, paragraph 5, of the draft articles adopted in 1963, *id.*

[132]) Waldock II, article 20, *supra* note 8.

[133]) Drafting Committee's text, adopted at the 842nd meeting. [1966] 1 Y.B. Part I 127—129.

[134]) Doc. A/CONF. 39/C. 1/L. 348 (proposed new article 62 *(bis)*). Reintroduced in a slightly revised form at the second session of the Conference in doc. A/CONF. 39/C. 1/L. 393 and Corr. 1 (proposed new article 62 *(quater)*).

[135]) Doc. A/CONF. 39/C. 1/L. 347.

[136]) Bindschedler, 2 UNCLTOR 257.

[137]) Yasseen, Chairman of the Drafting Committee, at the 105th meeting, *id.* 347.

[138]) *Id.* 348.

meeting that proposal failed to obtain the required two-thirds majority, and when the final compromise proposal, in the form of a "package deal", was introduced at the 34th Plenary meeting, this particular aspect was not mentioned any further.

Both in the light of this history, and more generally, the text of paragraph 4 gives rise to certain doubts. At the first session of the Conference it was indicated by one representative that such a provision could not and should not apply solely to Part V, but it should be worded more generally in order to be included in another part of the Convention. The justification offered was that the Convention should not override the will of the parties as expressed in their treaties and impose upon them settlement procedures to which they had not agreed or which they had even rejected in certain cases. Placing the provision in a separate article would bring out clearly the fact that an external element, in this case the Vienna Convention, could not override an autonomous decision of the parties to treaties in respect of the settlement of problems primarily affecting them [139]). But as it stands, the provision remains limited to Part V. Moreover, its application will have to run the gauntlet of various provisions in the Convention dealing with the relativity of treaties, such as article 30, on the application of successive treaties relating to the same subject-matter and possibly article 59, which appears in PartV, dealing with the termination or suspension of the operation of a treaty implied by the conclusion of a later treaty. The legislative history of this aspect of the Vienna Convention may be interpreted as throwing some doubt on the extent to which the doctrine of the accumulation of titles of jurisdiction applied by the International Court of Justice would be applicable [140]): for it is certainly arguable that in the light of their history and on a proper construction of their provisions, articles 65 and 66 of the Vienna Convention, which are *lex specialis* (and in many cases will also be *lex posterior*), are exclusive as regards the subject-matter with which they deal.

"Paragraph 5": This paragraph is framed in such a way as to prevent an interpretation to the effect that the party invoking the nullity or grounds for termination could at once act as though the treaty were invalid or terminated [141]). The paragraph has been included in order to avoid creating a situation in which a State, merely because a notification had not been made, might be prevented from raising some self-evident grounds of termination

---

[139]) The representative of Israel, Rosenne, 1 *id.* 414.

[140]) See our work cited *supra* note 11 at 475.

[141]) Waldock V, Observations and Proposals of the Special Rapporteur on article 51, paragraph 8; 845th meeting of the I.L.C., [1966] 1 Y.B. Part II 3.

such as impossibility of performance [142]). At the Vienna Conference, the amendments of Uruguay [143]) and Switzerland [144]) would have deleted paragraph 5, the criticism being, in the words of the representative of Switzerland, that it did not seem to be in conformity with the guarantees laid down in paragraph 1 [145]). According to Sir Humphrey Waldock, that question had not been raised during the examination of the matter in the Commission, and he thought that the criticism, justified to some extent, deserved consideration [146]). However, the matter was not pursued further.

Article 45 which is mentioned in paragraph 5 provides:

"Article 45

Loss of a right to invoke a ground for invalidating terminating, withdrawing from or suspending the operation of a treaty

A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be".

The principle *Allegans contraria non audiendus est*, sometimes given the confusing title of estoppel in international law, and its application to treaty termination, raises a wide series of problems which cannot be considered here.

Article 66: This article does not seem to give rise to serious problems of interpretation. When the corresponding proposal was introduced in the Committee of the Whole at the second session of the Vienna Conference, it was explained on behalf of the co-sponsors that it in no way impaired paragraphs 3 and 4 of article 65, and that the sponsors' intention was to offer a procedure for the final solution of the dispute which would come into operation only in the event of failure to reach a solution through the means set out in Article 33 of the United Nations Charter or through any other provisions binding between the parties [147]). More specifically, it left article 65 intact; it was subsidiary to any other procedure which the parties

[142]) *Id.* 151.
[143]) *Supra* note 26.
[144]) *Supra* note 122.
[145]) Bindschedler, 1 UNCLTOR 404.
[146]) *Id.* 441.
[147]) 2 *id.* 255. The representative of the Netherlands, Eschauzier.

might be obliged to use under other instruments; and the parties would be free to provide in a new treaty that the procedure in article 66 would not be applicable to that instrument [148]). It was also clarified that the two articles dealt only with the preliminary question whether a treaty was or was not valid [sc. or in force], and did not regulate the interpretation or application of future treaties [149]). In this connexion, the general limitation of article 66 needs to be carefully noted: it refers only to disputes concerning the application or the interpretation of given articles of the Vienna Convention. If the dispute concerns the application or interpretation of another treaty, or other provisions of the Vienna Convention, it does not, as such, come within the scope of article 66.

Annex: By virtue of Article 31 of the Vienna Convention and on more general grounds of principle, the Annex is an integral part of the Convention. In this respect it is to be distinguished from the Final Act of the Conference [150]) which is a separate instrument and, moreover, one possessed of no binding legal force [151]).

Although, as stated, the Annex was introduced and adopted, as part of a package deal, at the 34th Plenary meeting and did not have the same close scrutiny as the other provisions of the Convention, in many respects it follows the annex of the former proposed new article 62 *(bis)* which was adopted by the Committee of the Whole and had been scrutinized in the Drafting Committee but failed to obtain the required two-thirds majority in the Plenary [152]). The Drafting Committee had made a number of changes which had been approved by the Committee of the Whole, but had decided that it would report to the Plenary Conference on whether certain further provisions would be required [153]). It is believed that the explanations given by the Chairman of the Drafting Committee of the Vienna Conference to passages in that Annex which are identical with passages in the Annex actually adopted may be used in interpreting the Annexes finally adopted.

---

[148]) *Id.* 272. The representative of Sweden, Blix.

[149]) *Id.* 304. The representative of the Netherlands, Eschauzier.

[150]) Doc. A/CONF. 39/26, in which the text of the Convention is incorporated. The Final Act is deposited separately from the original text of the Convention: moreover, the communication of that text to the Governments, following article 72, 1 *(b)* of the Convention, comprises the text of the Convention (with its Annex) only, and not the Final Act or the declarations and resolutions incorporated in it.

[151]) Report of the I.L.C. on the work of its 22nd session, Chapter II, article 88, Commentary, para. (3). 25 UN GAOR Supp. 9, doc. A/8010/Rev. 1 (1970).

[152]) *Supra* note 25.

[153]) Statement of the Chairman of the Drafting Committee, Yasseen, at the 105th meeting of the Committee of the Whole, 2 UNCLTOR 349.

Annex paragraph 1: The assumption of this paragraph is that the only disputes likely to involve Conciliation Commissions will be disputes between States which are either Members of the United Nations, or parties to the Vienna Convention. The possibility that only one of the parties to such a treaty-dispute will come within one or other of these categories is not contemplated. This may not be a theoretical matter. States not members of the United Nations which took part in the Vienna Conference included the Federal Republic of Germany, the Holy See, Monaco, the Republic of Korea, the Republic of Viet-Nam, San Marino and Switzerland. Of these, the Republic of Korea, the Republic of Viet-Nam, the Federal Republic of Germany and Monaco abstained on the vote on article 66 and the Annex, and Monaco and Switzerland abstained on the final vote on the Convention as a whole. Furthermore, at the 34th Plenary meeting the Representative of Switzerland placed on record that "should Switzerland sign the Convention on the law of treaties, it would do so subject to the reservation that the provisions of all the articles in Part V would only apply in the relations between Switzerland and those States parties which, like Switzerland, accepted the compulsory jurisdiction of the International Court of Justice or compulsory arbitration for the settlement of any dispute arising from the application or the interpretation of any of those articles" [154]).

It will be noted that all members of the United Nations, whether or not they are parties to the Vienna Convention, and all other States which are parties to the Vienna Convention, may nominate qualified jurists as conciliators. This list resembles the panel of the members of the Permanent Court of Arbitration, in the sense that it contains the names of available jurists, while not in itself being of decisive importance in the event of a dispute being brought before a Conciliation Commission.

Paragraph 2: The assumption of this paragraph is that, although disputes may exist involving more than two States, it will always be possible to determine on which side a given State falls, and that a multiplicity of States will nevertheless always be made to fit the designation of "one of the parties to the dispute". This is an unlikely assumption; what is more, no machinery is envisaged for determining the preliminary question of whether a group of States do constitute one of the parties to the dispute.

---

[154]) Bindschedler, 2 UNCLTOR 194. In its application to multilateral treaties this may have an effect similar to that of the so-called Connally amendment of the United States Senate. *Supra* note 36. At the same meeting, the Conference decided not to include a clause prohibiting reservations, preferring to leave the matter to be governed by articles 19—23 of the Vienna Convention. *Id.* 195—196. Cf. the declaration *supra* note 27.

In the practice of the International Court of Justice, where the question can arise in the conceptually somewhat analogous matter of the designation of judges *ad hoc*, a formal decision of the Court is required to determine whether several States constitute a "party in the same interest" [155]).

Paragraph 2 also does not coincide with paragraph 1 in that it does not limit the conciliation procedure only to the States mentioned in paragraph 1 as entitled to nominate conciliators for the Secretary-General's list. Presumably, keeping in mind the general principle of the sovereign equality of States [156]), should a dispute involving a State which is a party to the Vienna Convention and one which is not come before a Conciliation Commission, the State which is not a party to the Vienna Convention (and not a member of the United Nations) would nevertheless be entitled to nominate one conciliator of its own nationality and one other conciliator, in accordance with this paragraph.

In applying the paragraph in the various hypotheses which it does not envisage, it is clear that considerable flexibility will be required. What appears to be essential is that a given Conciliation Commission should not be too large, that it should consist of an uneven number of persons, and

---

[155]) Statute, Article 31 (5), Rules of Court, Article 3 (2). And see our work cited *supra* note 11 at 208. The original version of what became the nineteen-Power proposal *(supra* note 25) more accurately referred to the right of each party to appoint a conciliator. Doc. A/CONF. 39/C. 1/L. 352. However, the final version (A/CONF. 39/C. 1/L. 352/Rev. 3) of the proposed new article 62 *(bis)* contains the present formula, apparently in order to clarify that the Annex applies to multilateral as well as to bilateral treaties. The representative of the Netherlands, Eschauzier, on behalf of the co-sponsors at the 92nd meeting of the Committee of the Whole. 2 UNCLTOR 255. If that was its purpose, there is no need to interpret it too literally as regards other aspects: moreover it is particularly in connexion with multilateral treaties that this problem is likely to arise.

[156]) The principle of the sovereign equality of States has been formulated in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (*supra*, note 17) as follows:

"All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

(a) States are juridically equal;

(b) Each State enjoys the rights inherent in full sovereignty;

(c) Each State has the duty to respect the personality of other States;

(d) The territorial integrity and political independence of the State are inviolable;

(e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;

(f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States".

that the number of its members who are not nationals of the parties to the dispute should outnumber those who are. Observance of some such criteria as these will, it is submitted, be in conformity with the intentions underlying this Annex.

It will also be noted that paragraph 2 is drawn up in such a way as to overcome the difficulties which were experienced in connexion with the Treaty Commissions established under certain of the Peace Treaties of 1947 [157]), and which in the view of some led to the frustration of the intentions of the parties. However, the inclusion of the members of the I. L. C. as possible candidates for the post of chairman of a Conciliation Commission, while no doubt flattering to the members of the I. L. C., does not appear to be fully warranted. The Commission itself has taken no decision in the matter, nor has it been requested to consider it.

Paragraph 3: Although the question of the right of intervention does not appear to have been raised on the record, the statement of the representative of the Netherlands introducing the nineteen-Power proposal at the 92nd meeting of the Committee of the Whole indicates that in the consultations, the important question of the rights of third parties had been raised. Some delegations had been in favour of granting third parties the right to submit written or oral statements before the Conciliation Commissions if they considered that their interests were affected, while others had preferred to make third party intervention dependent on the consent of the parties to the dispute. After due consideration and in a spirit of compromise the sponsors had decided to include the condition of the consent of the parties to the dispute [158]), and in that form it appears in the final text. However, even with the consent of the parties the intervention remains within the discretion of the Conciliation Commission.

This notwithstanding, the inclusion even of this ambivalent notion of intervention in the conciliation procedure is relatively novel, although it is not entirely unknown [159]).

Paragraph 4: It appears that some members of the Drafting Committee suggested adding a clause to specify that attention might be drawn to the measures in question at any time before the Commission's report was deposited. But the Drafting Committee concluded that that was self-evident and

---

[157]) Cf. [1950] I.C.J. 65 and 221. Nevertheless, the ability of a Conciliation Commission to function in the absence of the members designated by one of the parties to a dispute must, in the present state of international relations, be regarded as questionable.

[158]) Eschauzier, 2 UNCLTOR 255. For the views of the Federal Republic of Germany, see *id.* 298, Fleischhauer.

[159]) *Supra* note 81.

that there was no need for an explicit statement [160]). It is this which, it seems, grants the Conciliation Commissions authority to recommend interim steps.

Paragraph 7: Already in the Committee of the Whole the Drafting Committee had noted that such a paragraph could not be implemented until it had been approved by the General Assembly of the United Nations, in accordance with the financial rules of the Organization [161]). This was confirmed by the representatives of the Secretary-General, who indicated that if the Annex were adopted it would be necessary to place an item on the agenda of the next session of the General Assembly, either through a resolution of the Conference or on the initiative of the Secretary-General [162]). An appropriate resolution was adopted, and the matter thus came before the twenty-fourth session of the General Assembly. Neither the Annex, nor the resolution adopted by the General Assembly, differentiates between States which are members of the United Nations and those which are not [163]). Therefore, for the States which are not members of the United Nations invocation of these procedures produces consequences, in terms of financial liabilities, which differ from the corresponding consequences when they are involved in duly invoked contentious proceedings in the International Court of Justice.

VII

Despite the intended unitary character, at all events as a matter of the law of treaties, of the diplomatic procedure applicable to all the grounds for the invalidity or the termination of a treaty recognized in the Vienna Convention, when those grounds or their invocation are disputed by other parties to the treaty in question, some obstinate organic and conceptual difficulties remain. As a jurisprudential matter, the grounds for the invalidity of a treaty may be placed in one of two generic classes at least — those which produce a relative invalidity or voidability, and those which produce absolute nullity or nullity *ab initio*. In the Vienna Convention, the nullity occasioned by the defect of consent engendered by coercion in either

---

[160]) The Chairman of the Drafting Committee, Yasseen, 2 UNCLTOR 133.
[161]) The Chairman of the Drafting Committee, Yasseen, *id.* 349.
[162]) Stavropoulos, *id.* 149—150; Wattles, *id.* 203.
[163]) General Assembly resolution 2534 (XXIV), 8 December 1969. And see the reports of the Fifth and Sixth Committees, 24 UN GAOR annexes, agenda items 74, 94 (a) and 94 (c), docs. A/7832 and A/7797 respectively (1969). Nor is this aspect mentioned in the important note by the Secretariat on the financial and administrative implications of the conciliation procedure, doc. A/C. 6/397, *id.*

of its two forms, or by the illegality of the object of the consent for violation of a rule of *jus cogens* (arts. 51, 52 and 53) come within the second category. Similarly, the grounds for the termination of a treaty fall into two generic classes at least — those in which the will of the parties is implicated (and this can take various forms), and those which operate autonomously if not automatically [164]). The latter category includes particularly impossibility of performance and breach (at all events so long as the breach and its consequences are seated within the law of treaties but there may be another way of looking at the matter if the consequences of the breach are seated in the framework of the law of State responsibility or in the doctrine of reprisal), and possibly *jus cogens superveniens* (articles 60, 61 and 64), and it is possible that some of the other grounds envisaged in the Vienna Convention may defy easy classification from this point of view.

Before considering the implications of this double classification for the disputes-settlement provisions of the Vienna Convention, it is appropriate to take note of the approaches of the various Special Rapporteurs to this problem. These illustrate *a contrario*, what the Vienna Conference did not decide.

Sir Hersch Lauterpacht, whose reports on the law of treaties were never completed, proposed that an instrument would be void as a treaty if concluded in disregard of the international limitations upon the capacity of the parties to conclude treaties: however, no indication was given there of how this invalidity was to be established [165]). On the question of non-compliance with the provisions of internal law regarding competence to conclude treaties, according to his proposals any party asserting this ground of invalidity would be bound to submit the dispute (or the question of damages [166])) to the International Court of Justice or to any international tribunal agreed by the parties [167]). Sir Hersch concluded his commentary on this point with the following statement: "Provision for and recognition of the compulsory jurisdiction of an international tribunal must in this case — as indeed in other cases of allegation of the nullity of a trea-

[164]) A clear exposition of this aspect of jurisprudential analysis is found in Fitzmaurice II, *supra* note 5. See also the written observations and oral statements of Judge Morelli in the Nice Session of the Institute of International Law, *supra* note 7, t. 1 at 292 ff., t. 2 at 325 ff.

[165]) Lauterpacht I, article 10, *supra* note 4. Summarized in Waldock II, article 5, paragraph (3), *supra* note 8.

[166]) The present writer wishes to reserve his position on the question whether the conclusion of a treaty under these circumstances can give rise to an issue of State responsiblity and "damages".

[167]) Lauterpacht I, article 11. Summarized in Waldock II, article 5, Commentary, paragraph (5).

ty — constitute an integral part of any rule of international law on the subject". In the case of coercion he proposed that a treaty imposed by or as a result of the use of force or threats of force against a State in violation of the United Nations Charter would be "invalid if so declared by the International Court of Justice at the request of any State" (emphasis supplied) [168]). Here his commentary was even more explicit:

> "In relation to a treaty concluded in these circumstances [by force] it is impracticable and contrary to principle to confer upon an international tribunal the power of scrutinizing whether it is 'intrinsically reasonable' [169]). The governing consideration is that a treaty concluded under duress — following upon unlawful recourse to force — is not only vitiated by the absence of consent but also that its conclusion and continuation are contrary to international public policy ... [U]nder the present article no party to a treaty is entitled to declare it invalid on the ground that it has been concluded under duress. What it, or any other State [emphasis supplied], may do is to request the International Court of Justice, by a unilateral application, to declare, in contentious proceedings, that the treaty is invalid. The consent of the other party to, or its participation in, the proceedings are not required — although it is to be expected that if it has a good case it will elect to defend it before the Court" [170]).

Following a similar line of thought, the voidability of a treaty procured by fraud would have to be asserted before a tribunal by the injured party [171]); the party adversely affected by a mistake would have to initiate proceedings for the avoidance of the treaty [172]); and it was implicit in an article dealing with the legality of the object of a treaty that the party invoking that ground of nullity would be willing to abide by the decision of an international tribunal upholding the allegation of invalidity or making, *proprio motu,* a finding to that effect [173]). In the view of that Special Rapporteur, this was a principle of the received law *(de lege lata)* on the ground that any acknowledgement of the right of a party unilaterally to

---

[168]) Lauterpacht I, article 12. Although this idea may not be followed in the Vienna Convention, attention is called to the following statement in the I.L.C.'s Commentary to draft article 49: "(4) ... [E]ven if sometimes a State should initially be successful in achieving its objects by a threat or use of force, it cannot be assumed in the circumstances of today that a rule nullifying a treaty procured by such unlawful means would not prove meaningful and effective. The existence, universal character and effective functioning of the United Nations in themselves provide for the necessary framework for the operation of the rule formulated in the present article".

[169]) A reference to the Harvard Draft, *supra* note 3.

[170]) *Loc. cit.* in note 167, Commentary, paragraphs (2) and (3).

[171]) *Id.* article 13.

[172]) *Id.* article 14.

[173]) *Id.* article 15.

terminate a treaty on the ground of error, or generally of any other allegation of absence of reality of consent, would be tantamount to a denial of the binding force of the treaty [174]).

The Commission did not discuss any of these proposals, Sir Hersch having resigned on his election as a member of the International Court of Justice.

Sir Gerald Fitzmaurice devoted Part III of the First Chapter of his proposed Code to the temporal validity (duration, termination, revision and modification of treaties) [175]). His point of departure was expressed in article 3 of this Part, to the effect that once a treaty had been duly concluded and come into force, there was no inherent or automatic right of the parties to withdraw from it except on grounds recognized by international law, which were termed (article 4) "grounds operating by operation of law". In the case of fundamental breach of the treaty (articles 18—20), Sir Gerald proposed requiring a formal statement of claim to be submitted to the other party, and if that party did not reply within a reasonable time either accepting or contesting the claim, or if it contested the claim, the complaining party might then offer to refer the matter to an appropriate tribunal to be agreed between the parties or failing that to the International Court of Justice; and only if such offer was made but declined, or not accepted within a reasonable time, could the complaining party declare the treaty definitely at an end [176]). A similar approach is incorporated in the articles on *rebus sic stantibus* (articles 21—23). In this connexion, and relevant to article 65, paragraph 4, of the Vienna Convention, Sir Gerald also dealt specifically with the effect of disputes-settlement provisions in the impugned treaties on the termination process. Thus, elsewhere he proposed that whenever the treaty itself or any other applicable agreement contained a provision for reference to arbitration or judicial settlement of any dispute concerning the interpretation, application or execution of a treaty, and any party did not admit that circumstances had arisen terminating or suspending or giving a right to terminate or suspend the treaty on grounds of operation of law, reference to arbitration or judicial settlement in accordance with the terms of the treaty or other agreement was necessarily a condition precedent of any termination or suspension [177]).

---

[174]) *Id.* article 14, Commentary, paragraph (4).

[175]) Fitzmaurice II, *supra* note 5, from which the following summary has been prepared. Summarized in Waldock II, *supra* note 8, article 25, Commentary, paragraph (4).

[176]) Fitzmaurice II, article 20, paragraph 2.

[177]) *Id.* article 16, paragraph 5.

Sir Gerald devoted Part II of the First Chapter of his proposed Code to the essential validity (intrinsic legality and operative force of treaties) [178]). Integrated with the previous articles, it was postulated that lack of essential validity must be established. Hence, although such lack of validity avoided or nullified the treaty — in some cases *ab initio* — the avoidance or nullification was not automatic but subjected to the procedures set forth in later articles [179]). That approach, as a matter of drafting technique, made it possible to formulate the different "requirements of essential validity" [180]) in terms of relevant principle, much as was done later, although in quite a different form, in the Vienna Convention, and concentrate the procedure for establishing the claim of lack of essential validity in a single article. Broadly speaking, the procedure for establishing the claim of lack of essential validity laid down in some detail in article 23 was based upon the same approach as had been evinced a year earlier in dealing with breach and *rebus sic stantibus*. In the Commentary, Sir Gerald expressed the opinion that in principle it should not be possible for any party to a treaty simply to d e c l a r e its invalidity unilaterally, since otherwise the plea of lack of essential validity might well be made the pretext for what would really be a disguised termination of an unwanted treaty [181]).

The Second Chapter of this proposed Code dealt with the effect of treaties, Part I concentrating on the effects as between the parties (operation, execution and enforcement) [182]). A long Division (articles 34—39) dealt with the consequences of and redress for breach, and apart from referring back to the articles of Part III of Chapter One previously mentioned, it also, in article 37, envisaged certain retaliatory action in the territory of the injured State against the recalcitrant State, or even reprisals. This too was, under article 39, integrated with international jurisdiction, although in the nature of things this was a more complicated proposal. It was recognized that since certain counter-measures, in order to be effective, might

[178]) F i t z m a u r i c e III, *supra* note 5, from which the following summary has been prepared.

[179]) *Id.* article 5.

[180]) It might be noticed also that W a l d o c k II was originally entitled T h e e s s e n t i a l v a l i d i t y , d u r a t i o n a n d t e r m i n a t i o n o f t r e a t i e s . In reporting the change of title, the Commission stated that it had come to the conclusion that it was more convenient to formulate the articles upon "essential validity" in terms of the various grounds on which treaties might be affected with invalidity, and the articles on "duration and termination" in terms of the various grounds on which the termination of a treaty might be brought about. Report for 1963, *supra* note 9, Chapter II, paragraph 11.

[181]) F i t z m a u r i c e III, Commentary, paragraph (100).

[182]) F i t z m a u r i c e IV, *supra* note 5, from which the following summary has been prepared.

have to be taken at very short notice, it would not be possible to make them conditional upon a prior offer or acceptance of arbitration or judicial settlement. But it could be laid down that they must be accompanied by an offer to that effect, or that an offer made by the other party must be accepted, as a condition of their continued validity [183]).

The Commission did not discuss any of these proposals, Sir Gerald having resigned on his election as a member of the International Court of Justice.

The last of the Special Rapporteurs and the architect of the Vienna Convention, Sir Humphrey Waldock, adopted a somewhat different approach in his Second Report, one which if, on the one hand, it may appear to be less rigorous than those of either of his predecessors, on the other is probably nearer the living Charter of the United Nations. It consisted of a number of composite elements which were, furthermore, progressively refined by the I. L. C. and later by the Vienna Conference.

At the beginning there was laid down a presumption in favour of the validity of a treaty once brought into force. This was posed as the primary rule in the section on the invalidity and termination of treaties [184]). After considerable discussion, in the course of which the article was completely reformulated not as a presumption but as a firm rule of law, this now appears as article 42 of the Vienna Convention, where it performs the function of the introduction to Part V, but in the following forceful terms (which are now echoed in article 65):

"Article 42

Validity and continuance in force of treaties

1. The validity of a treaty or of the consent of a State to be bound by a treaty may be impeached only through the application of the present Convention.

2. The termination of a treaty, its denunciation or the withdrawal of a party, may take place only as a result of the application of the provisions of the treaty or of the present Convention. The same rule applies to suspension of the operation of a treaty".

Sir Waldock followed this immediately with a reminder that the right to avoid or denounce a treaty arising under these provisions could be exercised only in conformity with the procedure laid down [185]) — a draft

[183]) *Id.* Commentary, paragraphs (176) ff. This, of course, is based upon the precedent which was brought to the test in the *Monetary Gold* case, *supra* note 84.

[184]) Waldock II, *supra* note 8, article 2.

[185]) *Id.* article 3. For the abandonment of that article, see 700th meeting, [1963] 1 Y.B. 182.

article which became unnecessary after the Commission had adopted the main procedural safeguard submitted in article 25 of that Report, subsequently approved as article 65 of the Vienna Convention. That procedural article too, as has been seen, was made to apply to all the articles in Part V, and any doubt remaining was removed at the Vienna Conference [186]). In addition, already in 1963 a new article was added on the proposal of the Drafting Committee, dealing with the effects of the suspension of the operation of the treaty, which now appears as article 72 of the Vienna Convention [187]). Examination of the proceedings in the I. L. C. shows that this was very much prompted by concern over the problem of the position of the injured State in case of breach. Finally, as already indicated, the procedural article itself was adopted in a more neutral form which on the one hand aims at remaining within the framework of the United Nations Charter *de lege lata,* and on the other does not prejudge the position of any of the States concerned, in terms of claimant and respondent. It is above all in this last respect that Sir Humphrey, and following him the Commission and the Vienna Conference, broke with the two previous Special Rapporteurs.

At the same time, article 73 of the Vienna Convention contains a general reservation to the effect that the provisions of the Convention shall not prejudge any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities. Although an article to this effect was inserted by the I. L. C. only at a very late stage, the reservations had been made in earlier reports, as the work progressed [188]) and indeed it was largely out of a feeling that the matter could not be left to be treated by implication that the Commission was finally moved to draft an article on the subject [189]). In addition, another formal reservation regarding State responsibility, although in a more limited way, is included in article 30, paragraph 5, of the Vienna Convention, on the application of successive treaties relating to the same subject matter; and formal reservations in the same sense were included by the I. L. C. in its Commentaries on what became articles 60, 69, 70 and 72, of the Vienna Convention, on breach, and the consequences of the invalidity, termination and suspension of the operation of a treaty.

---

[186]) *Supra* note 99.

[187]) See discussion at the 709th and 714th meetings, [1963] 1 Y.B. 242—3, 282—3.

[188]) See our work cited *supra* note 1, on article 73, with details of the earlier reservations, and of the Commission's subsequent discussions, on these topics.

[189]) See discussion on the Commentary to article 30 [39] (A/CN. 4/L. 116/Add. 1) at the 888th, 889th and 890th meetings, [1966] 1 Y.B. Part II, 297—9, 300—3, 307.

In the course of the examination of the problem of the termination of treaties in the Institute of International Law, the question was posed whether the draft articles of the I. L. C. cover all the grounds for the lawful termination of a treaty (leaving aside those grounds which are seated elsewhere than in the law of treaties) [190]). This problem, it was subsequently explained [191]), was presented essentially as one of juridical technique, and in that respect the replies were seriously divided, above all on whether for the purposes of the Convention fuller treatment should not have been accorded to the three topics specifically reserved — State succession, State responsibility and the effect of the outbreak of hostilities on treaties. However, one of the members thought it would be unwise to prejudice any question which might arise subsequent to the Vienna Conference as to the validity of any alleged ground for termination not mentioned in the Convention. At the same time he recognized that after the Convention had been adopted there would, of course, be a strong presumption against the validity of any such new alleged ground, but the question could not be prejudged [192]). The conclusion was reached that on this basis, the question would lose much of its importance so long as the close inter-relationship between substance and procedure as laid down by the I. L. C. was retained intact [193]). The strengthening of that relationship in the Vienna Convention, it is submitted, may legitimately be interpreted in that sense also.

The outcome would seem to be that the differences between the jurisprudential characteristics of the various grounds for the invalidity or the termination of a treaty are not in themselves sufficiently serious to affect the operation of the procedure laid down in the Vienna Convention, as far as concerns the life of the treaty itself. However, it is to be hoped that in the course of its work now in progress on the topics of State succession and State responsibility [194]) the I. L. C. will also clarify further the treaty-terminating implications of these two topics, and integrate more closely those aspects which have their seat in the law of treaties, with those which have their seat in those other branches of international law.

We can now see that the final report on the Law of Treaties of the International Law Commission left, apart from its substantive opening due to the reservations just mentioned, a procedural gap in the event of the failure of paragraph 3 of draft article 62, applied in good faith, to lead to a solu-

---

[190]) Annuaire, *supra* note 7, t. 1 at 259.
[191]) *Id.* 388.
[192]) C. Wilfred Jenks, *id.* at 259.
[193]) *Id.* 389.
[194]) For details, *supra* note 188.

tion of the question. The final point to be considered now is to what extent the changes made at the Vienna Conference may have modified this conclusion.

There is no doubt that for the treaties which will come within the regime of the Vienna Convention [195]), from the formal point of view complete third-party settlement procedures operating independently of the treaty itself are instituted for disputes concerning the application or the interpretation of the two *jus cogens* articles of the Vienna Convention, and probably, by a necessary extension, of article 71 on the consequences of the invalidity of a treaty which conflicts with a peremptory norm of general international law, since that article mentions specifically the two *jus cogens* articles delineating separately their individual consequences. This third-party settlement is vouchsafed in the first place by the International Court of Justice which may be seised by unilateral application. However, this is not absolute, and the parties (sc. to the dispute) may by common consent agree to submit the dispute to arbitration.

In all other disputes concerning the application or the interpretation of any of the other articles on the invalidity or the termination of treaties contained in Part V of the Convention, any one of the parties to that dispute may set in motion, by submitting a request to that effect to the Secretary-General of the United Nations, the conciliation procedure specified in the Annex to the Vienna Convention. That procedure may lead to a report by the Conciliation Commission including any conclusions regarding the facts or questions of law, but that report shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute. Despite the obvious political colorization

---

[195]) There is a double relativity here. *Ratione temporis,* by article 4 of the Vienna Convention, without prejudice to the application of any rules set forth in the Convention to which treaties would be subject under international law independently of the Convention, the Convention only applies to treaties which are concluded by States after the entry into force of the Convention with regard to such States. This has been interpreted by one of the sponsors to mean, in the case of a multilateral treaty, that the Convention would be applicable between States which participated in the conclusion of a multilateral treaty after the Convention had come into force for them, although there might be other parties to the same multilateral treaty for which the Convention had not come into force. The representative of Sweden, Blix, 2 UNCLTOR 167. By article 84, the Convention shall enter into force on the thirtieth day following the deposit of the thirty-fifth instrument of ratification or accession, and thereafter, for every State ratifying or acceding to the Convention, on the thirtieth day after the deposit of its instrument of ratification or accession. *Ratione materiae,* the admissibility of reservations possibly also to article 66 will be determined by the provisions of the Convention relating to reservations. *Supra* note 154.

given to this provision, it may be assumed that in the great majority of cases a report of a Conciliation Commission will carry great weight and will in fact lay the basis for an agreed or accepted settlement of the dispute. Article 66 of the Vienna Convention should be judged, it is submitted, on a scale of political values and not through a process of excessively acute legal analysis, which might yield meagre results.

Article 66 did more than "save" the Vienna Conference when it was on the point of disintegration [196]). It has taken halting steps to create new politically orientated dispute-settlement procedures in what may well be an extremely sensitive area of international law and relations, operating alongside the more traditional legally orientated dispute-settlement organs, the ability of some of which to cope with current problems is being seriously questioned. If weaknesses undoubtedly exist in the Vienna system, this is not only due to the political factors which necessarily and correctly influenced the debates at the conference of plenipotentiaries convened to put the finishing touches on the codification of the law of treaties. Another reason can be found in the fact that many of the articles of the Vienna Convention only deal with the treaty-law aspect of a given hypothesis which itself may have points of contact with other topics. The provisions of the Vienna Convention on breach provide a useful illustration of this. A comprehensive statement of the law governing these different hypotheses will in the nature of things have to take into account the doctrines of these other topics, including also procedures for dispute-settlement which the international society will have to evolve to deal with them. Viewed from that point of view, it is believed that the Vienna Conference has introduced patterns of international institutional evolution of major significance.

A realistic approach to the issues posed by the compulsory settlement of treaty disputes in a codified law of treaties — using the word "compulsory" to refer to the procedures, not to their outcome — would take into account that as a practical matter, if political relations between the States concerned are deteriorating or are bad, major disputes between those States are unlikely to be confineable within a treaty-law context. In such circumstances it is doubtful if anything other than straightforward political action would be able to resolve the differences. On the other hand, when political relations are normal, the routine quality of many treaty disputes will assert its primacy, and the habitual diplomatic and administrative processes will be able to find solutions to them. For major cases of international tension and disturbance, the Charter of the United Nations provides

[196]) See our work cited *supra* note 1 at 85.

the only generally accepted institutional framework within which solutions can be sought — and Article 33 of the Charter correctly places negotiation at the head of the list of the acceptable procedures. Considering the very wide scope of the matters covered by present-day treaties and treaty-law and the correspondingly wide scope of the Vienna Convention on the Law of Treaties, the introduction into the general law of treaties of generalized compulsory dispute-settlement procedures based on existing institutions such as the International Court of Justice would have meant profound modification of existing patterns of international conduct, in fact a major alteration not merely of the United Nations Charter as an instrument, but of the United Nations itself as an institution. The codification of the law of treaties did not look like promising ground for innovations of that character, and the proceedings at the Vienna Conference confirmed that the international society is not yet willing to go along that road.