> *travaux préparatoires*, the circumstances of the parties at the time the treaty was entered into, the change in these circumstances sought to be effected, the subsequent conduct of the parties in applying the provisions of the treaty, and the conditions prevailing at the time interpretation is being made, are to be considered in connection with the general purpose which the treaty is intended to serve.[35]

What the Harvard Research does not offer, in implementation of its insight about appropriate goal and necessary context, is a comprehensive and systematic set of principles of content and procedure designed effectively to assist interpreters in the economic examination of particular contexts in pursuit of their appropriate goal. Even the task of fashioning such a set of principles should not, however, be beyond the reach of contemporary scholars who enjoy the advantages both of a rich inheritance in tested principles and of access to modern studies in semantics, syntactics, and other aspects of communication.

MYRES S. MCDOUGAL

THE TERMINATION AND SUSPENSION OF TREATIES

One very important aspect of treaty law concerns the circumstances under which a party is free to regard its obligations under a treaty as terminated or suspended, and among such circumstances alleged violation by the other party is of major importance.

The United States Department of State in its brief on *The Legality of United States Participation in the Defense of Vietnam*[1] relied on acts of North Viet-Nam which it considered in violation of the Cease-Fire Agreement. It sought to justify its augmentation of military personnel and equipment in South Viet-Nam beyond that permitted in the Cease-Fire Agreement of 1954 by the "international law principle that a material breach of an agreement by one party entitles the other at least to withhold compliance with an equivalent, corresponding, or related provision until the defaulting party is prepared to honor its obligation."[2]

The United States was not a party to the Cease-Fire Agreement which was concluded between the Commander-in-Chief of the Peoples' Army of Viet-Nam under Ho Chi Minh and the French Union Forces in Indochina, which had supported Bao Dai as President of the Republic of Viet-Nam, but which had withdrawn in 1955, leaving the administration of the

[35] Harvard Research in International Law, Law of Treaties, 29 A.J.I.L. Supp. 653 at 937 (1935), Art. 19.

The American Law Institute, Restatement of the Law (Second), The Foreign Relations Law of the United States (1965) at 449, Art. 146, builds upon this model:

"The primary object of interpretation is to ascertain the meaning intended by the parties for the terms in which the agreement is expressed, having regard to the context in which they occur and the circumstances under which the agreement was made. This meaning is determined in the light of all relevant factors."

In the section which follows, a wide range of "criteria" for interpretation is itemized and no advance priorities in relevance are established among such criteria.

[1] Dept. of State, Office of the Legal Adviser, March 4, 1966, reprinted in 60 A.J.I.L. 565 (1966).

[2] *Op. cit.* 30.

southern zone to Diem, who had succeeded to Bao Dai. Nevertheless the United States and the Government of South Viet-Nam took the position that the cease-fire line was valid and constituted a quasi-international boundary, but that North Viet-Nam's infiltration of forces across it was a violation permitting the United States and South Viet-Nam to ignore the provisions of the agreement prohibiting augmentation of forces except for replacements.

In my article in this JOURNAL on the Viet-Nam situation [3] I raised the question whether the principle asserted in the United States brief would not justify Ho Chi Minh in considering the agreement as a whole suspended because of its violation by the South Viet-Nam Government, successor to the French Command, in failing to hold the elections contemplated by the agreement and in making an alliance and augmenting its forces, forbidden by the agreement. Such a suspension would permit Ho to continue the effort, in which he had been engaged since 1946, to unify Viet-Nam by civil strife.

This controversy might raise issues concerning the initial obligation, if any, of the governments of the North Viet-Nam zone, of the South Viet-Nam zone, and of the United States under the Cease-Fire Agreement, and the importance of the General Act of the Geneva Conference of 1954 as an interpretation of this agreement. All of these governments, however, seem to have assumed the initial validity and effectiveness of the Cease-Fire Agreement. Viet-Nam had been considered a single state by the Democratic Republic of Viet-Nam (Ho Chi Minh) and by the Republic of Viet-Nam (Bao Dai, supported by France) after the surrender of Japan, which had occupied the country during World War II, and also during the hostilities from 1946 to 1954 on the issue of whether Ho Chi Minh or Bao Dai should constitute the Government of Viet-Nam as a whole. The Geneva Agreement also recognized one Viet-Nam, but divided it into two zones separated by the cease-fire line, to be terminated by elections in two years. This temporary division was the basis for the assertion by Diem, successor to Bao Dai, and by the United States that South Viet-Nam and North Viet-Nam were separate political entities.

Did that agreement cease to be effective after the French, who signed it, had withdrawn from all responsibility in Viet-Nam, after their protégé, Bao Dai, his successor, Diem, and the United States had refused to sign it, had made reservations on the Final Act of the Geneva Conference, and had failed to observe its terms forbidding alliances and the augmentation of forces? The United States and the Saigon Government never accepted this view, nor did Hanoi in the first four years after the Geneva Conference. All accepted the validity of the Cease-Fire Agreement and the division of Viet-Nam into two zones, though they differed on whether the division was to be temporary or permanent.

These differences of interpretation, and particularly the significance of the Final Act of the Conference calling for an election in July, 1956, to

[3] 60 A.J.I.L. 750, 761 (1966).

determine the government of Viet-Nam, raise a number of issues of treaty law; but the international law principle concerning the effect of violation of an agreement by one party seems to have been the main legal issue on which the United States has sought to justify its actions, admittedly contrary to the terms of the Cease-Fire Agreement. How does the Draft Convention on Treaty Law by the United Nations International Law Commission express this principle, and how would it apply to the Viet-Nam Cease-Fire Agreement?

The draft includes the general principle of *Pacta sunt servanda* asserting that a treaty in force is "binding upon the parties" and "must be performed in good faith." (Article 23.) It "may be terminated or denounced or withdrawn from by a party . . . or its operation suspended" only as a result of the "application of the terms of the treaty or of the present articles" (Article 39), and such termination or suspension shall not impair obligations "embodied in the treaty" under other rules of international law (Article 40).

The latter provision suggests that if the Cease-Fire Agreement established a vested right in the parties, as would a boundary treaty, these rights would continue, even if the treaty as an operative instrument were terminated or suspended. The Geneva Agreement, however, by providing that the cease-fire line should be temporary and not in any sense an international boundary, seems to have precluded such an effect.[4]

The provision of draft Article 27 that "Any subsequent practice in the application of the treaty which establishes the understanding of the parties regarding its interpretation" shall be taken into account (par. 3 (b)) might, however, suggest that the degree of observance of the cease-fire line accorded by the two zones of Viet-Nam and the participants in the Geneva Conference for twelve years supports the United States contention that it should now be regarded as virtually an international boundary. It should be noted, however, that the cease-fire lines in Germany, Korea, Palestine, Kashmir, and the Straits of Formosa, although all older than that in Viet-Nam, and not explicitly limited to a short duration, have not been regarded by the parties on both sides as constituting an international boundary. The conversion of a cease-fire line into an international boundary by prescription is not a short or easy process, as witness the hostilities in the Middle East in 1967 over a line which had existed for eighteen years, and that in Kashmir in 1965 over a line almost as ancient.

The provision of the draft that termination or suspension of the operation of a treaty must, with some exceptions, apply to the whole treaty unless provided otherwise in the treaty itself or by agreement of the parties (Article 41) raises the question whether the United States can properly claim that the provision of the Cease-Fire Agreement on the augmentation of forces in the South Viet-Nam Zone is so separable that it can be suspended without suspending the agreement as a whole, including the cease-fire line itself. Such separability seems to be possible

[4] *Ibid.* 757, 781.

on the basis of Article 57 of the draft, which states the principle relied on by the United States in the following language:

> A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. (Article 57 (1).)

"Material breach" includes "The violation of a provision essential to the accomplishment of the object or purpose of the treaty." (Article 57 (3 b).) Was the "object or purpose" of the Cease-Fire Agreement to provide peaceful conditions for unification of Viet-Nam by an election in two years or to divide Viet-Nam into two states respectively under Communist and non-Communist governments? Adopting the first of these views, Hanoi says the United States' alliance and augmentation of forces with the object of permanently dividing the country was a major violation, while the United States, adopting the second of these views, says infiltration of North Vietnamese forces to the South with the object of uniting the two zones is a major violation.

In view of these differences of interpretation, the procedures of the draft designed to prevent abuses likely to arise from unilateral termination or suspension of a treaty are of major importance. The draft provides (Article 62) that a party alleging grounds of termination or suspension, must notify them to the other party, indicating the measures it proposes to take, and it may take these measures only after three months "except in cases of special urgency," and if there has been no objection within that period. If there are objections, the parties shall seek a solution through the means indicated in Article 33 of the United Nations Charter. In any case, the "act declaring invalid, terminating, withdrawing from or suspending the operation of a treaty" pursuant to Article 62 "shall be carried out through an instrument communicated to the other parties," signed by the Head of State, Head of Government, or Minister for Foreign Affairs, or if not so signed, by a representative with full powers (Article 63).

I am not aware that any such formalities were observed by either Saigon or Hanoi in justifying suspension of the operation of some or all of the Cease-Fire Agreement.

It is obvious that the issue whether another party to a treaty has violated a provision, whether the violation constitutes a "material breach," and whether the breached provision is separable, are generally controversial, and the freedom of one party to decide unilaterally on these questions is likely to lead to abuses. On the other hand, it would seem unjust if one party were obliged to continue observance of a treaty, when convinced that the other party is grossly violating it, for at least three months, and perhaps longer, while negotiations proceed by the means suggested in Article 33 of the Charter. This dilemma is recognized in the draft by permitting immediate unilateral action "in cases of special urgency," but the nature of these circumstances is not explained in the

draft or in the Commentary.[5] This dilemma, which is discussed in the International Law Commission's Commentary, might be solved if a clear distinction were made between a declaration of invalidity or termination of, or withdrawal from, a treaty on the one hand, and suspension of its operation on the other. Unilateral suspension of the operation of a treaty, in whole or in part, might be made permissible on notice charging violation, but with the requirement that the treaty obligation cannot be terminated or withdrawn from until agreement has been reached or the International Court of Justice has supported the claim to terminate. It might further be provided that suspension of the operation of a treaty could be for a period of no more than a year unless the Court in the meantime has supported the claim to terminate or to suspend for a longer period.

With such an arrangement the vague provision concerning "cases of special urgency" could be eliminated, as suspension would always be permissible by unilateral action on grounds recognized by treaty law, but on the other hand either party could invoke the jurisdiction of the International Court if it desired termination or a longer suspension. The Court would be given compulsory jurisdiction to determine whether circumstances permit invalidation or termination of, or withdrawal from, a treaty.

The Commentary indicates that the International Law Commission discussed such adjudication[6] but concluded that such a provision "in the present state of international practice would not be realistic," especially in view of the failure to include a compromissory clause in the Geneva Conventions on the Law of the Sea and the Vienna Conventions on Diplomatic and Consular Relations. As a substitute, the procedures of Article 33 of the United Nations Charter were required. This article leaves it to the parties to decide whether to resort to arbitration or judicial settlement or to utilize only methods facilitating agreement, such as negotiation, inquiry, mediation, or conciliation.

My proposal does not envisage a general compromissory clause covering all disputes on the interpretation or application of a treaty, but only disputes on the permissibility of unilateral declarations of invalidity or termination of, or withdrawal from, a treaty. It seems that this issue is one on which adjudication is particularly applicable and particularly important if the principle *Pacta sunt servanda* is to be honored. On the other hand, freedom to suspend the operation of a treaty for a period of time by unilateral declaration of a party with due notice of the grounds of treaty law permitting such action, including violation by the other party, would prevent the injustice of differential observance of a treaty by the parties.

This is the solution of the problem provided in 1935 in the Harvard Research Draft Convention on the Law of Treaties (James W. Garner,

[5] Draft, Art. 62, par. 2. Report of the International Law Commission on its 18th Session, May 4–July 19, 1966, General Assembly, 21st Sess., Official Records, Supp. No. 9 (A/6309/Rev. 1), pp. 89–90; 61 A.J.I.L. 438, 441 (1967).

[6] *Ibid.*

Reporter) [7] and might well be considered by the International Conference which will consider the International Law Commission's draft.

QUINCY WRIGHT

TREATIES AND INTERNATIONAL LEGISLATION

The vast bulk of relations or relationships among individuals is regulated, even in the most advanced states, by contract or quasi-contract rather than by state legislation, constitutional or statutory. Similarly the vast majority of relations among states in the international community are regulated by treaty agreement or diplomatic arrangements rather than by international legislation in the strict sense of that term, namely, laws made by less than unanimous consent. For this reason it is quite proper to include treaties and treaty-making in a consideration of the general field of international organization, in spite of the doubts and objections of some who feel that such elements are not sufficiently structural or institutional in character to be ranked with international conferences, courts, commissions and federal unions.

It is therefore not entirely surprising that there appear practically no traces of a theory of legislation in the Draft Articles on the Law of Treaties produced by the International Law Commission of the United Nations at its Eighteenth Session (May 4–July 19, 1966).[1] It also appears from the record that the Commission has never planned to consider the problem of international legislation proper, in spite of some indirect intimations in the Commentaries on the articles.[2] Nevertheless, the problem is too important and too pressing to be ignored or neglected in any effort to develop the contemporary juridical framework of international relations, international legislation constituting, as it does, one of the three or four major elements in potential international organization and government.[3] And the relations between treaty-making and international legislation must constitute the starting point for any such inquiry.

[7] "Art. 27. *Violation of Treaty Obligations.* (a) If a State fails to carry out in good faith its obligations under a treaty, any other party to the treaty, acting within a reasonable time after the failure, may seek from a competent international tribunal or authority a declaration to the effect that the treaty has ceased to be binding upon it in the sense of calling for further performance with respect to such State.

"(b) Pending agreement by the parties upon and decision by a competent international tribunal or authority, the party which seeks such a declaration may provisionally suspend performance of its obligations under the treaty *vis-à-vis* the State charged with failure.

"(c) A provisional suspension of performance by the party seeking such a declaration will not be justified definitively until a decision to this effect has been rendered by the competent international tribunal or authority." 29 A.J.I.L. Supp. 662 (1935); and elaborate commentary setting forth practice and opinion on the subject, *ibid.* 1077–1096.

[1] General Assembly, 21st Sess., Official Records, Supp. No. 9 (A/3609/Rev. 1), p. 10; 61 A.J.I.L. 263 (1967). [2] See Commentary on Art. 8.

[3] See editorial comment in 55 A.J.I.L. 122 (1961).