PEACEFUL CHANGE

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I. INTRODUCTION

The postulate and basic social function of any law, municipal or international, should be the establishment and preservation of stable and harmonious relations between the respective subjects. However, from an academic point of view this main social function of laws is disadvantageous in that it protects those who try to preserve their acquired rights and the *status quo* in general, while detrimental to those who seek changes. Essentially, the objective of any law is to preserve order. This has a tendency to maintain static relations between the subjects, unless other social functions induce changes.

Nevertheless, it is self-evident that no law has been able to maintain a given *status quo* in social relations for a long period of time. Changes in everything, and accordingly, also in law are inevitable consequences of the development of social relations in general.

For this reason it is justly held that no law can fulfil its main social function of maintaining stable relations and legal security unless it is a system open to changes, unless it embraces the means and mechanisms to constantly adapt to social changes. As Charles de Visscher rightly said : « The mark of a consolidated law is its ability to combine in the best possible way the social necessities and its adaptability to these necessities, with the indispensable firmness of legal enactment » (1).

In general, the doctrine of international law is not sensible enough to this dynamic element of the law of nations. There is an inclination among theorists to explain legal norms in the frame of a closed system of mutual rights and duties of States, with emphasis on their acquired legal rights. Following the principle *pacta sunt servanda* to its extreme consequences, the

(1) *Cf.*, Ch. de Visscher : *Théories et réalités en droit international public*, deuxième édition, Paris 1955, p. 386.

authors assume, sometimes even unconsciously, that legal rights are unchangeable and even unnegotiable.

This is an unavoidable consequence of the fact that for a long time many authors have been under the influence of different teachings — especially of positivism and normativism — and that they have been the partisans of what is called « legism » (2). A given international legal order was considered as a suitable basis for the settlement of all international controversies and problems. Since the end of the last century, the majority of international lawyers advocated the general adoption of an obligatory arbitration. They truly believed that it was possible to prevent all armed conflicts by settling controversies on the basis of existing international law. Later, many of them supported the idea of formal prohibition of the recourse to war by a solemn and general legal act. International law has certainly been deficient as a system of norms as long as it approved of the recourse to force as an expression of inherent sovereign rights of States. But the fault of this idea was in the fact that legal prohibition of the use of force by treaty was often taken as an end in itself — sufficient to deeply transform all existing international relations.

During Woodrow Wilson's time, during the creation of the League of Nations, an exaggerated importance was ascribed to world public opinion. This opinion was considered a guarantor and watchman for the implementation of all legal obligations assumed by States and even for the maintenance of world peace. In spite of the fact that the importance of peaceful change had then been realized for the first time, sufficient significance had not yet been attributed to the methods for carrying it out.

It is possible to say that out of the criticism of these tendencies the science of international relations was born. Almost without exception its founders and first representatives shared the view that all changes in relations between States — including changes in the existing legal order, are brought about as a result of modification in the balance of power between States. This means that these authors paid far greater attention to the dynamic element of international order ; however, they sought its causes in one single factor. Thus, the American professor W.W. Kulski says : « As a matter of fact, peaceful changes in the *status quo* have seldom if ever been carried out for the sake of justice. In the past the great powers were able to agree on certain changes in the *status quo* and enforce their decision by the pressure of their combined power, but they were motivated by their own national interests, not by a preoccupation with justice... » (3).

Although it would be wrong and impossible to deny the factor of force in international relations, it is equally wrong to explain all internional relations, including changes in the existing legal order, only by State interests, by

(2) We accepted this term of « legism » from W.W. Kulski : *International Politics in a Revolutionary Age*, New York-Philadelphia 1964, pp. 449-450. However, we do not share his conclusions concerning the decisive importance of power in world politics.

(3) *Op. cit.*, p. 426.

relations of power and the balance of power. If power has been and would remain the only factor in international relations, there would be no room for international legal regulations and consequently for international law as a system of rules. A progressive development of international law would be even less possible.

It is evident that world public opinion has a strong impact on the progressive development of international law, but like power, it cannot be held as a single or decisive factor in international relations. Various other social forces, which are subject to research by the science of international relations, influence these relations. After they have been identified, their relations to law, the balance of power and world public opinion must be investigated, all of which simultaneously influence the general development of relations in the world community.

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For the sake of our present explanation, we shall classify all changes in the international legal order and in the legal rights and interests of States, into two main categories.

The first category consists of all changes accomplished by some kind of use of force in the realization of the national interests of the State employing the said force. Such a change is, in fact, in opposition to the notion of peaceful change. It should be conditionally denoted « forceful change » ; however, at the same time it must be distinguished from a brute and arbitrary use of force. Our conception of forceful change takes into consideration only that use of force which leads to a change in the existing legal order or in the legal rights and interests of States and which is sanctioned by positive law, e.g. by a treaty of peace.

Peaceful change falls into our second category of changes in law. Such a change is deemed a social necessity and it is an antithesis to forceful change and to resorting to force in general. It also strives to avoid static international relations, but unlike forceful change, it is accomplished only by adapting law to social changes that have already been brought about, or by the evolution of general legal principles and legal rights, at the same time eluding the balance of power as a factor in international relations as much as possible.

Peaceful change, in fact aims to achieve a given concept of social justice, which itself is in permanent evolution. At the present time, this concept of social justice could be roughly defined as being based on the equality of States, on the equality and right of all people to self-determination, furthermore on the respect of fundamental human rights and freedom, and on other purposes which lead to more just, more peaceful and more harmonious international relations without the use of force.

The question arises as to which methods and mechanisms can be employed to adjust the legal changes to the social changes within the international legal

order. In this context we shall make an analogy with the municipal legal orders although analogies of this kind can sometimes be misleading.

It is generally assumed, however imprecisely, that the municipal legal orders of modern States employ a mechanism to induce peaceful changes. In this respect, the legislative power is of primary importance, as it can change existing laws when deemed necessary by new legal enactments. In the same sense the executive branch changes laws by enacting new orders or decrees, or by introducing special policies in executing laws. As an independent branch, the judiciary can do the same by interpreting laws in a broader or narrower sense, or by abstaining from applying some of them, although these organs are, as Hans Morgenthau said, predominantly the guardians of the *status quo* (4).

Far reaching social changes, for example the abolition of slavery in the United States in the 1860's, and in particular social revolutions cannot be achieved by the legislative or executive, and least of all by the judicial organs, each acting individually. In such cases the entire society must act which most often leads to radical changes in existing institutions where profound social conflicts cannot be eluded. It is held that if social conflict, corruption or disorganization penetrate too deeply in a society a revolution will occur.

Although the above presents a somewhat simplified picture of internal relations, we believe that it still can help us to understand the situation in international law and international relations. The present world community does not know legislative, executive or even judiciary organs in the way they developed in a modern State. In this community the sovereign rights of more than 160 independant States still exist. And all States are legally free to act in international relations in any way they please, i.e. except when they are specifically forbidden to do so by the imperative norms of international law *(jus cogens)*. And in the present international legal order there are fewer norms of this kind than in the weakest State. As the late Wolfgang Friedmann stated, the lack of positive rules in international law is partly the cause and partly the effect of the absence of international constitutional organs (5).

It is even more significant that all the rules of international law are created, modified and abrogated in relations between sovereign and legally equal States, as well as in relations between other subjects of that law. Even this small number of imperative norms could not exist without the assent of the majority of States in the world community, although we share the view that in this respect the consent of all the States taken as a whole and individually is not a prerequisite for the formation of imperative norms.

Thus, all peaceful changes in international law can be realized under conditions in which the sovereignty of States still predominates, or that is to

(4) *Cf.*, H.J. Morgenthau : *Politics among Nations*, Second Edition, New York 1956, p. 411.

(5) *Cf.*, W. Friedmann : *The Changing Structure of International Law, An Adaptation*, Bombay 1964, p. 82.

say, in relations between sovereign States. There are no changes in law without their consent and in addition, no existing rules of international law are effective without the affirmation of a majority of States, which can be expressed through actions as well as abstention.

As a result, it appears that there are no formal, institutionalized and centralized agencies for accomplishing peaceful change in the present world community which could be compared with those existing in municipal law. We shall later describe some of the attempts to create such mechanisms within the framework of collective security systems introduced in Article 19 of the Covenant of the League of Nations and Article 11 of the U.N. Charter. Hoewever, as Juraj Andrassy correctly stated : « The development thus far has not yet reached a stage which could be considered satisfactory » (6).

Nevertheless, in spite of this lack of formal mechanisms, international law is still going through a profound transformation, which started with a new incentive after World War II, and of which we are eyewitnesses. Although the factors of force, power relations and political expediency still play a primary role in these changes, the general course of this development has shown positive progress. This fact inspired us to reconsider the problem of peaceful change, which was identified as such after World War I.

A careful analysis of doctrinal views up to recent times should demonstrate that a relatively small number of scholars have paid due attention to this dynamic element in the international law of peaceful change as an antithesis to the *status quo*. This gives the impression that the sciences of international law and international politics disagree on this matter. Nevertheless, it seems to us that even the science of international relations has not yet attained satisfactory results with regard to the problem of peaceful change.

This problem has even more far reaching political effects. Perhaps the most prominent example was the South West Africa (Namibia) case in its various phases of deliberation before the International Court of Justice. A minority of judges, which in 1966 then became a temporary majority (7), considered the rights of South Africa acquired through its Mandate on South West Africa of 1919 as sacred and inviolable. These judges implied that no international organ could in any way cancel or even partly modify those rights without the consent of South Africa, in spite of numerous abuses and violations of its duties set down in the Mandate, as was proved during the proceedings before the Coust. For these judges, the rights and legal interests of the inhabitants of Namibia, including their right to self-determination were without any legal value. These people were considered to be an accessory to the territory from which South Africa acquired certain rights.

(6) J. Andrassy : *Medjunarodno Pravo*, Seventh Edition, Zagreb 1978, p. 491.

(7) The Judgment on the South West Africa Cases (Second Phase) was rendered on July 18, 1966 by the casting vote of the president, the votes being equally divided seven to seven. That Judgment was supported by all judges who voted against the previous Judgment in the same Case of 1962, concerning preliminary objections, and *vice versa*. However, the old majority was again consolidated in 1971 when was adopted the Advisory opinion on Legal Consequences for States of the Continuous presence of South Afrlca in Namibia.

As early as 1950 another group of members of the Court took this dynamic element of international law into consideration, which necessarily had to influence the subjective situations of States and their acquired rights. Although this attitude thus far has no practical effect on the present situation in Namibia, it reached its culmination in the Advisory opinion of 1971 where the Court expressly pointed out :

> «... viewing the institutions of 1919, the Court must take into consideration the changes which have occured in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain, as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this the Court, if it is faithfully to discharge its functions, may not ignore. » (8).

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After differentiating forceful from peaceful change, it is now necessary to identify different aspects in which peaceful change takes place in international law. These aspects were first discovered and explained by Maurice Bourquin in his writings published before World War II (9).

According to Bourquin, the first aspect is the transformation of impersonal norms of either general or particular international law. These norms apply in principle without discrimination to all States and other subjects when the matter is one of general international law, or to a definite number of subjects from a geographic region or a political alliance when the matter is one of particular international law. In the latter case, these impersonal norms also apply to all respective subjects in principle without discrimination.

The second aspect refers to the revision of the subjective situations of States and other subjects of international law resulting from transformation of the impersonal norms above mentioned, or from the conclusion of bilateral or multilateral treaties of contractual character, or from other transactions, e.g. unilateral acts such as recognition, renunciation, protest, notification, promise, occupation, etc. These include the revision of rights and legal interests of particular subjects of international law, first of all, of States.

At the first glance, it appears that these two aspects of peaceful change have quite different legal implications and that their ways and means of

(8) *I.C.J. Reports 1971*, pp. 31-32.

(9) *Cf.*, M. Bourquin : « Le problème de la sécurité internationale », *Recueil des Cours 1934*, t. 49, pp. 488-500 ; « Stabilité et mouvement dans l'ordre international », *Recueil des Cours 1938*, t. 64, pp. 412-413.

being carried out are essentially different. This brings us to the problem of the sources of international law which is closely connected with these means.

The notion of sources should not be reduced to forms in which legal norms appear. They must be taken in their broader sense — as various means for the creation, the modification or abrogation of law. Peaceful change can be carried out *inter alia* by making treaties, by revising existing conventions, by replacing them with new agreements, or by abrogating them. In the same sense, peaceful change is realised by the creation, modification or abrogation of customary rules, in particular when impersonal norms are involved. However, various factors work together to bring about these changes in rules of law. It should be pointed out that power relations, menace, the use of force in the broadest sense or other factors which can also lead to forceful change are other main factors contributing to these changes (10). Sometimes it is difficult to draw a line between peaceful and forceful change in concrete relations.

Before explaining the concrete methods of transforming impersonal norms and revising the subjective rights of States, it is necessary to determine their relationship with regard to the main sources of international law in the broader sense, i.e. as law creating processes.

When speaking about changes involving impersonal norms, it is very important to know whether the norms in question belong to general or to particular international law.

The main source of general international law is still general international custom. Its second source — general principles of law — are of secondary importance.

The main source of the creation, modification or abrogation of impersonal norms of particular international law are treaties. One should keep in mind that treaties in general are legally binding only on their parties. Whereas treaties cannot immediately create rules of general international law, they can indirectly influence the creation of new general customary norms. In addition to this role in the transformation of impersonal norms, treaties also play an important part in the creation and modification of subjective rights and legal interests of States, but under quite different conditions, as shall be shown.

The second method of transforming impersonal norms of particular international law is through particular custom. Impersonal norms can appear as particular customary rules in regional international law (American, African, Scandinavian, etc.), but under different conditions than general customary norms.

The problem of revising the subjective rights of States also involves the sources of international law, in the first place treaties, but also occasionally

(10) In fact, every State is free to dispose with its own legal rights. It can make transactions and alienate them by treaties. This freedom, however, can be the cause of inequal relations between very weak and very powerful States disguised in formally valid treaties. Articles 49 to 52 of the Vienna Convention on the Law of Treaties of 1969 do not prevent all such cases which occur in practice.

local customs which bind two parties as in a tacit agreement. In general it can be said that subjective rights of States evolving from their mutual relations, most often change through the conclusion of new bilateral and multilateral treaties with contractual character, through partial revision, replacement by new agreements or through their abrogation.

However, this problem has another aspect which is not entirely dependent on the procedure of treaty making and the evolution of particular customary rules. The revision of the subjective rights of States is rarely carried out peacefully, i.e. by the direct modification of treaty relations by the parties. When such a claim is made unilaterally, most often it causes a dispute and sometimes armed conflicts. Therefore, this problem is also connected to the problem of the peaceful settlement of disputes, and in the broadest sense, to enforcement measures for peace, i.e. collective security.

II. TRANSFORMATION OF IMPERSONAL NORMS

The transformation of impersonal norms encompasses the entire evolution of general customary as well as particular international law on the normative level. When considering this problem it is important to point out the social causes underlying this transformation before explaining the mechanics of their transformation itself.

Generally speaking, the main social cause of changes in international law is to be found in the development of relations of production. According to the marxist point of view, international law, like law in general, is a superstructure based on the relations of production. In view of the impact of international law on many other factors within the sphere of the superstructure, for example politics, we are of the opinion that the mutual relationships between the basis and superstructure, have not yet been sufficiently examined by the doctrine, as far as international law is concerned. The complexity of the social causes underlying the transformation of international law cannot be explained by a few general remarks as we have just attempted to do so. In order to avoid oversimplifications and to obtain acceptable results, a great deal of effort is still needed. Until now, in the so-called « socialist science of international law » there have been only a few coarse explanations of the formalistic marxist position, based on quotations from the publications of Marx, Engels and Lenin ; however, they were entirely out of context and neither explained nor proved anything except the so-called « marxist » position of their authors.

For this reason, our own explanations must be considered merely an attempt to point out some problems without the pretense of arriving at final and affirmed conclusions. Since international law is in a constant and permanent evolution, continous efforts are necessary in order to explain all of these phenomena in each particular period of time.

Two groups of factors appear to be of special importance for this evolution of international law :

1. The transformation of political principles into rules of law in most of the municipal legal systems — including those of the most advanced States. This is caused by the internal economic development of each State and in the long run must have an impact on international law.

In this respect some fundamental human rights are of particular importance, as well as the principle of equality and self-determination of peoples, which were affirmed for the first time during the American and French Revolution at the end of 18th century. After the Declaration of the Rights of Man of 1789, Maximilien Robespierre was the author of a draft Declaration of International Law which was submitted to the National Convention in 1793. Two years later, Abbé Grégoire also drafted a Declaration which is more wellknown in the history of international law. Both drafts proclaimed the brotherhood of all men and nations, without discriminating against any States, peoples or individuals.

At that time these draft Declarations certainly had no economic and social basis to be transformed into positive rules of international law. The French Revolution degenerated into Napoleon's conquests in Europe and after his defeat legitimism and absolutism were temporarily restored. Even the Declaration of the Rights of Man was not applied in French colonies where slavery remained a legal institution until 1848. In addition, these progressive and democratic principles could not prevent subsequent colonial conquests by European powers in Asia, in Africa and other countries overseas throughout the 19th century.

However, colonialism remained intrinsically contrary to the principle of the equality of human beings and other principles of bourgeois democracy on which the political and constitutional orders of the parent States were formally based.

This contradiction strongly inspired the first generations of educated people from the colonies, first of all in India, in their struggle for autonmy and later on for complete independence. The October Revolution in Russia in 1917 again affirmed that the princple of self-determination applies to all peoples without difference. It gave further impetus to national liberation movements in Asia and thereafter also in other parts of the world. Communist parties and other leftist groups in some parent States supported the claims of colonial peoples for freedom of choice. They stressed the contradictions between democratic principles and the practice of colonial oppression and exploitation. If nothing else, these forces fought against the abuses of the colonial administration. Over a long period of time they supported general public opinion in favor of new, democratic international relations.

In addition to this political struggle to a certain extent the economic development of colonial territories themselves, the appearance of national bourgeoisie in some of these territories, and the expansion of education, were among factors which were hastened by World War II and lead to a process of decolonisation. The principle of the self-determination of peoples, which was recognized as a political principle in the Atlantic Charter of 1941, was

incorporated in the U.N. Charter as a legal rule and soon thereafter became a customary rule of general international law. From a different aspect, this principle confirmed the existing legal principles of the equality of States, non-intervention in their internal affairs, and the prohibition of the use of force in international relations. In its further development it lead to the rise of some other legal principles, the most important being the right of all States to dispose of their natural resources as they saw fit.

At the same time, during the period after World War II, some of human rights were developed into the rules of positive law of nations, and were also enacted as the rules of various municipal legal systems. This process started with the Universal Declaration of Human Rights in 1948. Today it is still in progress and cannot be discontinued.

It is true that legal rules alone cannot change existing social relations. The clash between the normative sphere of international order and reality is becoming more evident in view of the fact that the world community does not have the power to enforce these principles. World public opinion is thus more effective when it comes to affirming such principles than it is in carrying them out. Nevertheless, these principles still have an impact on the evolution of the concept of justice. In the long run, all these efforts cannot remain without consequences although there are many examples of these principles being flagrantly violated.

2. The second group of factors influencing the transformation of impersonal rules of general international law concerns new *objective situations* which arise as the result of general social development and in particular development in technology, and thus are not regulated by the existing international law. Consequently, some of the existing principles of law must be greatly modified or entirely new institutions must be established. In the absence of adequate rules, general principles of law of the municipal legal systems are then applied. The States involved fill such gaps in international law with their national enactments. Afterwards, these municipal regulations become rules of customary international law. New customary rules are established in these situations more rapidly than is recognized by most text books of international law.

As was said above, a new objective situation can lead to legal enactments in one or several of the most advanced States and in those States most interested in that particular matter. These municipal rules are later adopted by other interested States and thus are transformed into international customary rules. This has been the case especially in the development of the law of the sea since the 17th century.

With the introduction of steamships in maritime transport, it was necessary to equip them with lights in order to avoid collisions at night. This had not been necessary in the case of sailboats. In 1863, the United Kingdom enacted regulations requiring steamships to be lighted in its Order in Council ; the United States followed the next year with their Act of Congress. In view of the fact that these rules were later adopted by a majority of other maritime

States, the United States Supreme Court recognized the general obligatory character of these rules in international law in the case *The Scotia* of 1872. In its Judgment the Court stated :

> « This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice... » (11).

In a similar manner, the appearance of submarines led to municipal regulations by some States on the armament of their merchant ships for their self-defense in the time of war. Although there are still opposing views, it seems that these rules are now adopted as positive international law. President Truman's proclamation of 1945 on extending the jurisdiction and control of the United States on the subsoil and sea-bed of their continental shelf, was soon followed by other States. With adoption of the Geneva Convention on the Continental Shelf in 1958, it became an institution of general international law. Recently advanced technology related to exploitation of the sea-bed has given rise to a new objective situation not regulated in the Geneva Convention. As a result, the United Nations Conference adopted a new Convention on the Law of the Sea in 1982.

The Soviet launching of the first earth satellite in 1957 was not even accompanied by a State regulation. This led to a new objective situation in space which simply bypassed the existing law on the unlimited sovereignty of States above their territory and territorial seas.

When conflicts of State interests arise as a result of progress in technology, new customary rules do not always appear so spontaneously and rapidly. In this case, the practice of particular States is not sufficient for bringing about new laws. Instead, the conflict of interests is settled after prolonged negociations by a new multilateral convention. The solutions contained in such conventions are then gradually transformed into general customary law.

After the appearence of the first aircraft at the beginning of this century, a lengthly conflict emerged ower two opposite principles : freedom in air-space (as in the open sea) and the sovereignty of States over the space above their territory. The second principle was finally adopted in the Paris Convention of 1919. In addition the problem of exploiting the sea-bed beyond 200 meters was not resolved by State practice. It was one of the causes of the above mentioned U.N. Law of the Sea Conference. The new Convention recognizes the exclusive economic zone of adjacent States and a complicated regime of the exploitation in the « zone » — the sea-bed and subsoil beyond the limits of national jurisdiction.

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(11) *Cf.*, Herbert W. Briggs : *The Law of Nations*, Second Edition, New York 1952, p. 29.

After briefly pointing out some of the economic and social causes influencing the transformation of impersonal norms, we now turn to the mechanisms by which these transformations are performed.

From our earlier explanation it follows that the main mechanism for norms of general international law is general custom.

This process is initiated with the appearance of a constant, uniform and continuous practice which is then transformed into rules of law that are accepted by States *(opinio jurissive necessitatis).* The effect of such a customary rule on international practice and its later modifications and possible extinction *(desuetudo)* in the practice of States are also a part of this process of transformation which must be conceived as a continuous, gradual and progressive social process. At the present time this social process is the only substitute for a law making process in the world community.

According to some scholars, this important role of general custom in the law making process of general international law allegedly reflects its « primitive nature ». We can either adopt or reject such an assertion, but no radical changes and improvements in this respect can be expected in the foreseeable future. This state of things expressly reflects the domination of State sovereignty in international relations, which is a fact that cannot be surmounted by arguments, motives or critics of an abstract nature.

In spite of its logical inconsistency, a large majority of scholars accepts the definition of custom found in Article 38, paragraph 1(b) of the Hague Court's Statute, according to which it is « evidence of a general practice accepted by law ». In fact this formulation puts the cart before the horse in the sense that the general practice accepted as law can be evidence of custom, and not *vice versa.* In any case, this definition includes two elements that are essential for the transformation of a given social process into customary rule of law : (i) « general practice » followed by (ii) the conviction of States that this practice is legally binding *(opinio juris),* in other words, that it is « accepted as law » as stated in the said provision.

A large number of States can take part in transforming a practice into customary rules of law, and therefore some writers consider it to be a democratic process which takes into account the principle of sovereign equality. However, as a matter of fact, such evaluations have never been justified in international practice. Namely, participation in this transformation process is not limited just to States but is open to all subjects of international law, i.e. international organizations having legal capacity and other subjects. At the same time it should be pointed out that there are very few customary rules which have been established solely through the practice of international organizations, and besides, there is a small number of important rules of this kind that have been established concurrently through the practice of competent bodies of the organizations and that of States as well. In these cases we are inclined to regard the practice of political organs of international organizations as belonging to the practice of the various member States. State representatives at least explain the policy of their respective countries, regardless of the nature of such decisions.

In fact, the practice of administrative bodies which act in the name of organizations as individual subjects can establish customary rules which are valid for the said organizations (for example in the framework of the so-called « law of the United Nations »). In addition some legal rules can be established through the practice of the U.N. Secretary General, especially rules on the receipt of instruments of ratification or accession to treaties for which he fulfils the function of depositary, or on registration and publishing conventions according to Article 102 of the U.N. Charter. On the other hand, practice of this kind can rarely be of significant importance when it concerns the sovereign rights of States.

Thus it follows that most of the general customary rules are established through the practice of States. The States are still the most important subjects in the process of establishing and modifying customary rules of general international law.

The views of some scholars on this matter are not correct when they adopt positivistic positions and demand that the express or tacit assent of all States in the world is necessary in order for a custom to become a general customary rule of law. Sir Humphrey Waldock rightly asserted that Article 38 of the Hague Court's Statute itself speaks of « general », not « universal » practice (12). Otherwise this process would be scarcely possible particularly at the present time.

As a matter of fact, due to economic reasons and the geographical positions of some countries, all the States in the world are not physically capable of taking part in establishing all of the customary rules of general international law. In the foreseeable future, a relatively small number of States will participate in outer space exploration and navigation although most of them take part in the codification of that problem. In this sense, the land locked countries are themselves not directly involved in the delimitation of territorial seas, of the contiguous zones and continental shelves, although they were very active participants at the last U.N. Conference on the Law of the Sea. The rules of the regime of the permanent frost coast are delimitations for some maritime States in the Arctic region. On the basis of these facts, Max Sorensen has reached the general conclusion that only the practice of those States which « have the chance to act in the domain concerned » should be taken in consideration (13). However, as we already pointed out, when problems about codification or the adoption of resolutions are discussed at the U.N. General Assembly, all States take part in decision making, regardless of their geographic position or special economic interests.

Furthermore, this is not the only problem. Even those countries having the chance to act, remain passive very often in questions regarding customary

(12) *Cf.*, Sir Humphrey Waldock : « General Course on Public International Law », *Recueil des Cours 1962*, t. 106, p. 44.

(13) *Cf.*, M. Sorensen : « Principes du droit international public », *Recueil des Cours 1960*, t. 101, p. 40.

rules. The reasons for this passivity are manifold. Some States can be indifferent to the practice of others or they simply do not take notice of it.

In the 19th century, before the First Hague Peace Conference of 1899, the majority of rules of general international law were created at the diplomatic conferences and congresses of the European powers only. Smaller European countries or countries overseas were not strong enough to oppose the practice of the big powers which established general customary rules of law through the conventions they adopted. They were faced with the danger of being excluded from the community of the so-called « civilized nations », which could threaten their independence and even their very existence.

This means that a general customary rule can be established even if only a limited number of States has taken part in its formation and recognition. It is important that these States have a special interest in the matter, for example in the case of the law of the sea, the biggest maritime powers. Once established, a general customary rule is binding on all countries of the world, provided that a large number of States did not oppose it.

The majority of rules of general international law do not limit State sovereignty to a great extent. In cases where there are such limitations, they relate equally and without discrimination to all States of the world community. Rules of this kind usually determine the criteria for active international cooperation. They are always based on reciprocity and at least a formal equality of States. Since no individual power has been able to impose its hegemony on the rest of the world in recent history (there were however some unsuccessful attempts of this kind), the existence of rules of general international law does not limit the fundamental rights and freedoms of States, even if all of them have not taken an active part in their creation. Rules of general international law differ greatly from those of particular international law.

In spite of this, the small, weak and developing countries have to keep in mind that all kinds of freedoms recognized by general international law are not necessarily freedoms for all States. All such freedoms — for example freedom of navigation on the high seas, freedom of fishing, freedom of launching space crafts, etc. — are freedoms only for those who are able to benefit from them.

In spite of the formal sovereign equality of all States, it would be false to conceal the unequal rôle of States in the formation and modification of general customary international law with regard to their political, economical or military power. It would be false to deny the fact that even in the present world community, a powerful State with special interests in some domain is much more capable of blocking the formation of a general customary rule which clashes with its national interests than is an isolated, small and poor country. Inversely, if a large power actively supports the formation of a new rule, this will always be more effective than the support of a small country. The underprivileged members of the world community must be fully aware of these facts.

Anyway, being a big or a small country does not necessarily depend on the size of the country, all States can oppose a practice which could lead to the formation of a customary rule by protesting. In order to have full legal effect, the protest must be expressed in an adequate manner. Verbal protest alone is not always sufficient. If a large number of States adequately opposes a certain practice, this practice will never become a rule of law.

Viewing the present-day situation, it appears that even if such rules do come into force, a particular State can be exempted from the general legal obligations contained therein, if it had opposed the said practice when it was in the process of being transformed into custom.

We can find examples of this in the law of the sea. First of all let us mention the concept of historic bays in international law. Some States that claim sovereignty over some bays which do not fulfil the conditions to be considered internal waters by virtue of prescriptive rights or similarly by historical title. These exceptional rights did not hinder the existence of a general customary law which applies to all other bays, gulfs or closed seas.

In the *Norvegian Fisheries* case before the Hague Court, the United Kingdom claimed that fjords or sounds which have the characteristic of legal straits under the regime of territorial waters cannot be less than 10 miles, and therefore Norway should prove its historic title to larger straits. The Court, however, rejected the ten-mile rule in this case. According to its view, the rule « had not acquired the authority of a general rule of international law ». Furthermore, the Court stated :

> « In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she has always opposed any attempt to apply it to the Norwegian coast » (14).

In its judgment, the Court also stressed that the international community tolerated this, which in itself was not without significance (15). Thus, even if a general customary rule has been established, as the United Kingdom asserted, Norway succeeded in exempting itself from its otherwise universal application by its constant opposition to the rule.

On the other hand, if a customary rule faced no objections, or if it succeeded in overcoming or isolating any objections, a subsequent attempt of one or more States to exempt themselves from its general application would have no legal effect. Thus, open transgression of that rule would invoke international responsibility.

At the same time, if a considerably large number of States rejects a general customary rule, this can lead to its abrogation, that is to say *desuetudo* as opposed to *consuetudo,* or to its being replaced by a new customary rule of different content. From this point of view, no general and universally applicable criteria exist. The line dividing the transgression of a customary law in force from the formation of a new law is not always clear and undisputable.

(14) *I.C.J. Reports 1951,* p. 131.

(15) *Ibid.,* p. 139.

The criteria thus can depend on the subjective appreciation of one who is called to appraise the situation.

In practice, a general custom is abrogated more frequently by the conclusion of multilateral conventions whose provisions are later transformed into new general customary rules. The Kellogg-Briand Pact of 1928 abrogated the former sovereign right of States to wage war, and thus led to the formation of a new customary rule of imperative character *(jus cogens)* which prohibited war as an instrument of national policy of States or as a means of settling disputes.

As we have said, important innovations in technology can give rise to new objective situations for which the existing general customary law is inadequate.

It is important not to overlook the nature of the general customary rule in question. If the said rule belongs to *jus dispositivum,* any derogations therefrom are permitted by special agreement or by a particular customary rule. Thus two or more States can deviate from the general customary rule by a joint express or tacit agreement, not violating it. There are many rules of this type in the law of diplomatic and consular mission and in the law of treaties itself. It should be noted, however, that they cannot transgress the rights of third States by this special practice without their acquiescence. Nevertheless, a great deal of uniform practice deviating from a general custom of this character can influence the formation of a new general customary rule of the same, or even of imperative character.

On the contrary, if a general customary rule of imperative character *(jus cogens)* comes into force, neither previous practice nor previous opposition to it will exempt any State from being subject to its application. In this case, all existing treaties which conflict with it become void and terminate (Article 64 of the Vienna Convention on the Law of Treaties) Article 53 of the Vienna Convention defines a peremptory norm of international law as « a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character ».

In spite of the fact that no derogation from this type of norm is permitted by treaty or by particular customary law, these norms could nevertheless be modified if an overwhelming majority of States in the world decline from applying it in their reciprocal relations, and if this new practice would become stable, continuous and uniform. This can be practically achieved also by adopting a new multilateral convention of general character (not however by regional or other agreements), which has been approved by a majority of States of the world community and is quickly transformed into a new general customary law.

* * *

The situation is substantially different when formation and modification of impersonal rules of particular international law are concerned. All rules which apply to a limited and definite number of subjects belong to particular international law, or as the negative definition says — all norms in force which do not belong to general international law (which are not of general scope in the world community) are a part of particular international law, and *vice versa.* In a broader sense, all treaties including bilateral agreements with contractual character and all local customary rules which are binding on just two parties, are a part of particular international law. However, in view of the subject of this paper, we shall discuss only those rules of particular international law which are impersonal in character — which in practice apply equally to all parties concerned without discrimination (16).

This group includes the so-called law making treaties *(traités-lois)* as opposed to treaties as contracts *(traités-contrats).* Some general multilateral conventions which codify a part of general international law also have a part belonging to particular law. This part is not simply a codification of the law in force, but represents the progressive development of law in that it only binds parties to such treaties until they are transformed into general customary law (17).

In addition, conventions establishing international organizations which can be regarded as « constitutions », are also a part of particular international law, even if the organization in question is to be active in the world community. The Charter of the United Nations, for example, legally obliges only its member-States, unless some of its provisions (Article 2) have codified existing general customary law, or they have been subsequently transformed into general customary law.

As we have already pointed out, countries belonging to a particular geographic region or a political alliance can regulate their mutual relations not only by treaties, but also by particular customary rules. Such rules however, rarely have a function more important than that of treaty provisions.

There are many reasons for international cooperation which is of regional character. Since the international community now embraces practically the whole world, international cooperation on a regional level is inevitably quite diverse as a result of the degree of social and economic development of the region involved, their forms of civilization, their internal political systems and external objectives and interests.

(16) We still included into this group of treaties all constitutional acts of international organizations. They usually provide for, the U.N. Charter in particular, certain special rights to some of their member States.

(17) This fact was recognized by the Hague Court in its Judgment on the North Sea Continental Shelf Cases. The Court ascertained that the « equidistance — special circumstances principle » for delimitation of continental shelves of States from Article 6(2) of the Geneva Convention of 1958 was not a general customary rule in force when embodied in that Convention, neither such a rule has came into being since the Convention came into force. Thus it did not bind the Federal Republic of Germany. *I.C.J. Reports 1969,* pp. 41 and 45.

Due to the peculiarities of their past development, the countries of some regions are interested in solving their common problems jointly. Consequently, it is possible to achieve a higher degree of cooperation on the regional level than would be possible according to general international law. Even before the last world war, members of the Pan-American Union seriously attempted to codify the norms of general international law although this was not yet possible on the world level. In addition, members of the Council of Europe succeeded in concluding a number of conventions which reflected their common interests. There are some achievements of similar importance in the framework of the Council of Mutual Economic Aid. Today we can be certain that the Arab League, the Organization of African Unity and other regional organizations have similar possibilities of establishing closer cooperation and higher degree of legal regulation that has been laid down in general international law. Due to its particular nature the Helsinki Final Act of 1975 was a specific example of laying down impersonal rules for the mutual cooperation of its signatories in various fields, which remained largely unfulfilled.

At the same time, regional cooperation can have its negative aspects. In a region or within a political alliance, the potentialities of all members tend to be less well-balanced than in the world community. In some organizations of this kind, one member State is more powerful in regard to economic and in military potentials, population or the size of its territory than the rest of the members combined. In this type of situation, it is not possible to handle the mutual affairs in the same way as in the world community. Under these conditions the impersonal rules of particular international law, regardless of whether they are to be conventional or customary, cannot equally take the interests of all parties into account. These rules can be sources of unequal rights and obligations, even then there is apparent equality and reciprocity in their application. In these cases true inaquality is manifested much more than in the world community as a whole where there has always been a balance of power among several of the most powerful States. It is exactly in these regions that the tendencies to elude the peremptory norms of general international law or to reduce their scope in favor of so-called « particular law » are strongest. Namely, they limit the sovereign rights of the member States, usually in favor of that State which is the most powerful.

For this very reason the general rule was established in international practice that no State nor any other subject can be legally bound by a particular customary rule without its express or tacit consent. The same applies to treaty provisions in general, because no treaty can make obligations for third parties without their consent. This general rule has been explicitly confirmed by the Hague Court on all occasions in its practice dealing with a particular or local custom. The most significant in this respect is its statement in the *Asylum* case concerning Columbian allegation on an alleged Latin American customary rule on diplomatic asylum :

> « The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other Party. The

> Columbian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court which refers to international custom « as evidence of a general practice accepted as law » (18).

In the context of this Judgment, the « general practice » cited in Article 38 refers more to a reciprocal rather than to a universal practice of all States.

The Court reached the conclusion that no regional customary law was established in this case due to uncertainty, contradiction, fluctuation and discrepancy in the exercising of diplomatic asylum.

In the same case the Court considered the question whether a regional customary rule codified by a regional convention is binding in a country from the respective region that did not ratify that particular convention. The Court regarded the fact that Peru did not ratify two regional conventions on this subject matter as express evidence of its rejection of that particular customary rule (19). If it had been a convention on the codification of a general customary law, the attitude of the Court would have been entirely different (20). Only the conclusion that the norm in question represents a progressive development of international law would warrant such a decision (21).

The Court took the same position in some other cases where one party insisted on the existence of a local customary rule (22). Although this is not a part of our discussion, the legal implications are the same.

Thus we can conclude that in cases involving a particular customary rule, the party which refers to it must prove that the opposite party has expressly or tacitly accepted it. A particular custom is an exception to general international law and therefore is not binding on the States in the same manner as a general customary rule which is based on the conviction of solidarity in the world community.

In this respect, particular custom is closely related and almost assimilated to tacit agreement, as has already been confirmed by some scholars. Max

(18) *I.C.J. Reports 1950,* pp. 276-277.

(19) *Op. cit.,* p. 277.

(20) Thus the Nürnberg Tribunal in its Judgment of 1946 stated that the rules of land warfare expressed in the Hague Convention No. IV of 1907, were recognized by 1939 « by all civilized nations and were regarded as being declaratory of the laws and customs of war », inspite of the general participation clause in that Convention. *Cf.,* Oppenheim-Lauterpacht : *International Law,* vol. II, London 1952, p. 234. The Court thus supported its conclusion that these laws and customs of war were binding on Germany inspite of the fact that all the belligerents in World War II were not parties to that Hague Convention.

(21) *Cf., supra,* note 17.

(22) *Cf.,* Rights of the U.S. Nationals in Morocco, *I.C.J. Reports 1952,* p. 200 ; Right of Passage, *I.C.J. Reports 1960,* pp. 39-43. The matter is here of local customary rules which create special legal rights of States and not impersonal norms. However, the Court's position is the same with regard to all particular customary rules of whatever character.

Sorensen stated that the distinction between a particular or bilateral custom and a tacit agreement can be artificial, but that this is in fact without great importance for legal consequences (23). In a very similar way, Paul Reuter remarked that the rules of regional or local custom are similar to a tacit agreement, and that the precedents from the Court tend to reflect that fact (24).

* * *

Particular custom, however, can have a useful subsidiary function in the law of treaties. For different reasons the formal revision of a treaty is sometimes not possible although it would be highly desirable in view of the changing social conditions surrounding it. This is particularly true in the case of treaties which are constitutional acts of international organizations. Under these conditions parties to these treaties can deviate considerably from the text in practice and in this manner establish a particular custom which can become binding on all parties. Thus, informal revision of treaties can be brought about through particular customary rules.

There have been similar examples in the practice of the League of Nations, and the same situation can be found in some cases, in the practice of the United Nations. Since the U.N. was founded, some of the provisions of the Charter have been applied in a manner quite different from that which is prescribed in its text.

The position of the Hague Court in this matter is expressed very clearly in its Advisory opinion on the *Namibia* case in 1971. During the course of the advisory proceedings, South Africa raised an objection, alleging that two permanent members of the Security Council had abstained from voting on the resolution in which that particular opinion was requested from the Court, and that it was not adopted by an affirmative vote of at least nine members including the concurring votes of the permanent members, as required according to Article 27, paragraph 2 of the Charter. The Court firmly rejected this objection for the following reasons :

> « ... the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolution. By abstaining, a member does not signify its objection to the approval of what is being proposed ; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization » (25).

(23) *Cf.*, M. Sorensen, *op. cit.*, p. 43.

(24) P. Reuter : *Droit international public*, Paris 1958, p. 36.

(25) *I.C.J. Reports 1971*, p. 22.

Although the Court did not expressly state that a particular customary rule was concerned, it did clearly emphasize two elements of custom contained in Article 38 of its Statute and attributed full legal effect to that practice.

It should be pointed out that in its final Draft Articles on the Law of Treaties, the International Law Commission provided the possibility of modifying a treaty through subsequent practice « establishing the agreement of the parties to modify its provisions » (Draft Article 38). This provision was nothing else but the codification of the existing law.

This provision, however, was rejected by the majority of State delegates to the Vienna Diplomatic Conference as allegedly being a threat to the stability of international treaties and to the principle *pacta sunt servanda* (26). During the discussions at the said Conference on other problems concerning the law of treaties, the State delegates expressed great concern for the stability, sanctity and inviolability of treaties, in other words for their immutability. At the same time, we are the witnesses of a great deal of evading and infringing treaty obligations in the practice of States, in particular when the so-called « vital interests » of a super power are concerned. An impartial examination of the treaty practice of the bodies of the United Nations would disclose that entire chapters of its Charter have simply not been applied for a long time. This is a real threat to the stability of treates and to world peace.

The deletion of the quoted provision from the text of the Vienna Convention is, in our view, without practical consequences. Every judicial organ will give full recognition to a practice of all the contracting parties that differs from the text of a treaty, if there is sufficient grounds on which it can be concluded that a new customary rule has been established between the parties (27). This kind of informal revision of treaties requiring the consent of all the contracting parties can only enhance its stability by introducing a dynamic element into its application. In addition, it cannot be detrimental to the principle *pacta sunt servanda* as a new agreement is involved.

From all that has been said, we can conclude that particular custom is not a very suitable source of international law for regulating relations within regional and other confined communities. It can only be useful there as a subsidiary source for applying treaty provisions. In view of the power relations in these communities, a customary rule, as was said above, can do more harm than benefit to the principle of equality based on justice. For maintaining this kind of relations, custom is not precise enough as it is unwritten and difficult to prove. Since custom presupposes practically the same conditions as does tacit agreement, unlike general custom, it is not flexible enough

(26) *Cf.*, E. De La Guardia-M. Delpech : *El Derecho de los Tratados y la Convención de Viena de 1969*, Buenos Aires 1970, pp. 360-362.

(27) Thus the Vienna Convention nevertheless provides for in its Article 31 concerning the general rule of interpretation, that together with the context shall be taken into account « any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation ». The scope of this provision is practically the same as that of the deleted draft Article 38.

to adapt to the modified conditions within the international community to which it applies.

Therefore, as far as cooperation within regional communities is concerned, written treaties have obvious advantages. It is generally assumed that even the weakest party has a chance to express its position and its interests during treaty negociations. If it is not entirely satisfied with the results, in a normal situation it can refuse to sign or ratify a treaty, or if allowed, it can accede to it with reservation. In this way, i.e. through negociations and not through practice, a careful balance of rights and obligations based on impersonal norms can be established which satisfy all parties concerned.

* * *

However, in order for a treaty to fulfil its function in regulating mutual relations in regional and other communities by impersonal norms, it must be subject to change. The purpose of any treaty cannot be that of maintaining a given *status quo* from the time of its conclusion. For the sake of its own stability and the functions it is to perform, it is necessary that all such treaties contain a mechanism for carrying out periodical adjustments to the changing social conditions in which it is to be applied.

In this respect it is necessary to harmonize the need for stability and peaceful change in the best possible way. There are no universal recipes for reaching this aim. It depends on the object and purpose of the treaty in question; however, too frequent and unnecessary revisions should not be permitted because the parties then lose their trust in such treaties, which, in turn, tends to make them less efficient in practice. On the other hand, in international affairs the conditions underlying such changes can be prescribed in such a way that some of the contracting parties have special rights to safeguard. These States are then more inclined to let a treaty quietly die out by not applying its essential provision rather than to allow necessary changes which could harm their interests.

The most instructive examples of this are treaties establishing systems of collective security : the Covenant of the League of Nations of 1919 and the U.N. Charter of 1945. Both of these treaties were supposed to maintain lasting peace and security in world affairs and to substitute the balance of power as the basis for international relations. At the same time, however, they continued the war-time coalitions of the victorious powers. By means of these systems, the principal allied powers wanted to preserve the given *status quo* and their special position in international affairs resulting from their victory.

Both of the mentioned treaties contained intrinsically oligarchic and undemocratic procedures for their revision. Article 26 of the Covenant of the League of Nations prescribed that its amendments should become effective after being ratified by all members of the Council of the League and by a

majority of the members whose representatives compose the Assembly. The Covenant thus abolished the principle of unanimity for revisions. Instead, the individual members of the Council, whether permanent or elected, could make such changes impossible. A member of the League who dissented from the adopted amendment had to abolish the League or to acquiesce to the change.

In the practice of the League, it was not these conditions for adopting amendments that caused its failure. After the unexpected abstention of the United States from the very beginning, two tendencies prevailed among the members in regard to revising the Covenant. On the one hand, essential clauses which remained unfulfilled were to be abrogated, however this would affect the very system of the collective security, i.e. Articles 10 and 16 of the Covenant (28). The opposite tendency was to enfore the existing provisions by supplementing them with new contractual obligations of the Members and thus strenthening the institutional basis of the system as a whole (29). This intention remained unfulfilled although there were also no formal abrogations of the provisions not respected in practice. After 1933 unsatisfied powers (Germany, Japan and later on Italy) abolished the Leage one after the other and began to form a coalition against it. The decisive factor causing the final failure of the League was not the impossibility of formally revising the Covenant, but rather lack of the will of its leading members — Britain and France — to uphold the system and to apply it against aggressive powers — Japan in 1932 and Italy in 1935.

The example of the League illustrates that maintaining a treaty of this kind depends not so much on the procedure for bringing about amendments as on the will of its parties to keep the treaty alive and to apply it whenever necessary.

Chapter XVIII of the U.N. Charter prescribing the procedure for its revision provides for the adoption of textual modifications by a two thirds majority of the General Assembly or by a General Conference of the member States. However, such amendments come into force only after being ratified by a two thirds majority of the member States — including all the permanent members of the Security Coucil. These amendments then apply to all member States, including those that opposed them and did not ratify

(28) As early as in 1920, at the first Session of the Assembly, the Canadian representative proposed the elimination of Article 10 concerning mutual guarantees of territorial integrity and political independence of all member States of the League. That proposal was formally rejected, but in the following year the Assembly adopted certain « rules of guidance » which had the effect to weaken the obligation of all member States to take part in economic sanctions according to Article 16. In case that a State resorts to war in disregard to the provisions of the Covenant (Articles 12, 13, 15), these sanctions against it ceased to be immediate, all-inclusive and binding to all member States, as was provided for by Article 16. And therefore they proved ineffective in the only case when they were applied, against Italy in 1935 and 1936.

(29) These new obligations for member States were included in the Draft Treaty on Mutual Assistance of 1923, and after its fail into the Geneva Protocol on Pacific Settlement of Disputes of 1924, which remained unratified.

them. This means that any of the five powers — China, the Soviet Union, the United States, France or the United Kingdom — can impede any modification and amendments to the Charter. This is the very reason for the inefficiency of this system of collective security. In this respect, the essential parts of the Charter — Chapters VI, VII and VIII — ceased to be applied a long time ago as they were inadequate under the changing political conditions. The permanent members of the Security Council oppose any essential revision of the said provisions in order to protect their special position. Thus they neglect the objective and very purpose of the collective security system.

It is true that some Charter amendments of lesser importance that came into force in 1965, 1968 and in 1973 increased the number of the members of the Security Coucil and the Economic and Social Coucil, due to the increased number of States belonging to the Organization. Throughout the practice of the organs of the Organizations, some informal modifications were brought about by particular customary law. However these changes were not sufficient to revitalize the whole system and make it efficient in practice.

The constitutional acts of some other international organizations that are not dominated by conflicting political interests but whose activities are nevertheless indispensable for international cooperation, provide for more liberal and democratic procedures of revision. For this very reason, these organizations are more efficient in international practice than their parent organization — the United Nations.

Until 1964, at their periodical congresses every five years the member States of the Universal Postal Union had passed an entirely new text of the Universal Postal Convention including all the institutional provisions of the Union and its bodies. The Convention prescribed the time limit for ratification after which it automatically came into force and was applied even by States which did not ratify it. It was even possible to amend the Convention in between congresses. Depending on the importance of the provision in question, it was necessary to obtain a certain percentage of affirmative votes. The Congress at Vienna in 1964 broke this tradition, however, and separated the Constitution of the Union from the Convention containing the rules applicable to international postal service. Today the U.P.U. thus follows the pattern of other international organizations in this respect.

It is important to point out that the principle of unanimity as a requirement for the revision of constitutional acts has been abolished by all universal organizations, especially by the specialized agencies of the United Nations. This step has made peaceful change more possible. In this process of revision, the role of the permanent organs has become more important. For example, according to the Constitution of the International Labour Organization, its amendements can be adopted by a two thirds majority of all the delgates at its General Conference. At this conference each member State is represented by two delegates appointed by the respective government, one representative of the workers' trade unions and one representative of the employers' organization. These amendments come into force by the ratification of a two thirds

majority of the member States, including the ratification of at least five of the ten leading industrial countries represented in the Administrative Council. As a result, the veto of any one of these countries is ineffective, thus establishing a balance between the strongest industrial countries and the rest of the member States.

In this respect the UNESCO Constitution is even more flexible. Namely, the proposals for amendments come into force after being adopted by a two thirds majority of votes at General Conference. Only amendments modifying the scope of the Organization or imposing new obligations on the member States must be submitted for the subsequent approval of the governments of a two thirds majority of the member States. All other amendments come into force immediately after being adopted at the General Conference.

* * *

It should be mentioned that constitutions of international organizations are neither the only important nor the most numerous treaties which lay down impersonal norms of particular international law. There are a great deal of other multilateral conventions of this kind, sometimes with a large number of contracting parties, in some cases more than a hundred. All these acts have an important function in maintaining international cooperation in various fields. Many of these conventions do not provide procedures for their revision at all. Others contain conditions under which such proposals can be made, but say nothing about the process of adopting the proposed amendments. In the second group of treaties containing rule for their own revision, only a small number of treaties require the unanimous consent of all the contracting parties for the adopting amendments. In view of the fact that many conventions have large number of contracting parties at the present time the principle of unanimity is necessarily being replaced by a specified majority, usually a two thirds majority rule. The Vienna Convention on the Law of Treaties of 1969 contains some general provisions on amending and modifying treaties, above all multilateral conventions. It is significant that the Convention recognizes the fact that no treaty is immutable. According to Article 39, which contains a general rule regarding the amendment of treaties, any treaty can be amended at any time by the agreement of all the concerned parties, regardless of the provisions on modification contained in the respective treaty. In the same way, i.e. the common agreement of all parties, a treaty can be abrogated before the expiration date laid down in the treaty, or it can be replaced or partly modified by a new agreement between the same parties. Furthermore, all interpretations of an existing treaty which have been unanimously accepted by the parties have an authoritative character of authentic interpretation. As we have said, all these changes require the consensus of all the parties, and in addition their compliance with the norms of *jus cogens* and the acquired rights of third States.

This consensus is, however, almost impossible to reach when treaties with a large number of parties are concerned. If any of the parties opposes the modification, the treaty's provisions on amendments are to be applied, i.e. provided such provisions exist. Thus, if the treaty itself provides for a qualified majority for adopting amendments, the opposition of a single party is without significance ; in some cases it can withdraw from the treaty in question.

If unanimity cannot be reached and the particular treaty does not contain any specific provisions on the adoption of amendments, two articles of the Vienna Convention on the modification of multilateraly treaties are to be applied. This means that in the case of bilateral treaties, the consensus is always necessary for the adoption of amendments unless the treaty itself provides for something more specific. These provisions of the Vienna Convention are of primary importance for treaties which contain impersonal norms for their parties.

Article 40 of the Vienna Convention requires that all other contracting parties must be notified about any proposal to amend a multilateral treaty. Thus a group of States of a contractual relationship has no right to arbitrarily change the treaty in their own relations, without informing the other parties. Each contracting State has the right to take part in deciding which action is to be taken regarding such proposals, just as it has the right to participate in the negociations and conclusion of any agreement on such amendments. Any State which has not yet become a party to the treaty is entitled to become a party to the treaty as amended.

The amending agreement, however, does not bind any party to the treaty which has not assented to the said modifications. The basic — non-amended text of the treaty — thus remains in force for its relations with the other parties. Consequently, the amended treaty is obligatory only for the parties which have adopted the modifications in question.

Article 41 of the Convention provides for the possibility to modify a multilateral treaty between certain of the parties only. Two or more of the parties may conclude such an agreement if this possibility is expressly stated in the treaty. In other cases, this type of agreement is allowed only under three cumulative conditions : (a) if the modification in question is not prohibited by the treaty ; (b) if it does not affect the rights enjoyed by the other parties ; and (c) if it does not relate to a provision, the derogation of which would be incompatible with the effective execution of the treaty as a whole.

As we have seen, in addition to general international law, the provisions of the Vienna Convention are quite flexible regarding the revision of existing treaties. The conditions could be made more rigorous only by special provisions of the treaty itself. Nevertheless, it should be pointed out that formal provisions on the modification of treaties are not sufficient for achieving peaceful change. All or at least a majority of the parties must strive to keep the treaty alive, and moreover they must have the will to undertake all the necessary steps to carry out any modifications whenever it is necessary to

adjust the treaty to the changing social conditions. This is the main condition for keeping treaties effective in international practice ; otherwise they become dead letters, i.e. instruments which formally exist but do not affect international relations.

* * *

The following general conclusions can be drawn from the above explanations :

(i) Whereas the transformation of impersonal customary norms of general international law sometimes occurs spontaneously as the consequence of general economic and social developments, the peaceful change of conventional or customary impersonal norms of particular international law is always a conscious process subject to the will of the parties themselves.

(ii) The endeavors and strivings to change impersonal norms usually do not produce international clashes and disputes, regardless of their contents. Changing norms — whether it be by concluding new multilateral conventions or revising existing ones — is a lengthy and slow process. Thanks to the long time element involved, any quarrels and aggressiveness tend to be pacified.

III. REVISION OF SUBJECTIVE LEGAL RIGHTS AND INTERESTS

Whenever a claim arises demanding that the legal rights and interests of a particular State be changed, or someone challenges the rights acquired by a certain State for some reason, such a pretention usually meets with strong opposition from the State whose rights are in question. Claims of this kind lead to disputes and sometimes even to armed conflicts. Therefore, the problem of revising the legal rights and interests of States is not strictly a legal question but also involves a very important political aspect.

From an academic point of view, claims calling for the revision of subjective legal rights and interests can be settled without controversy by direct negociations between the interested parties on a strictly peaceful basis. It would be sufficient for the party whose rights are involved to abolish them voluntarily, and thus the cause of the dispute would be extinguished. This can be accomplished by a unilateral declaration renouncing an existing right or by a bilateral or multilateral agreement between the interested States in which the basis of the rights in question can be modified. General international law grants its subjects full liberty in disposing over their subjective rights. Not only unilateral renunciations, but also transactions of various kinds are possible. The States involved can reach an agreement in which each of them renounces some of its legally protected interests in exchange for

some specific benefits from the other side. This is the basis of the art of diplomacy. The concluded agreement will be the new legal basis, i.e. the new source of mutual relations. On the other hand, it is also possible that the weaker party renounces unilaterally certain rights without compensation or passively suffers infringements of these rights under pressure from the other State that would otherwise resort to force.

However, the opposite occurs more frequently in international practice, i.e. the party in question stubbornly defends its rights, and as we have said, this is the immediate cause of a dispute which can have serious political implications. Therefore, the problem of finding adequate ways for political settlement of these disputes is of legal as well as political importance. Sometimes the peace of a specific region or even world peace depends on the ability to settle such controversies.

The motives for claims demanding changes in the existing subjective legal rights and interests of States have been of such diverse nature in history that no *a priori* evaluation is possible when deciding which party is right — the one defending its rights or the one seeking change. Such an evaluation must be made in each particular case, taking into account all the relevant circumstances.

As early as 1934, Jean Ray noticed that the revision of existing legal situations is most often demanded by parties which are bound by a special legal regime, and are the subject of discrimination, whereas other States enjoy full freedom of action (30). In 1870 Russia unilaterally repealed its obligations from the Paris Peace Treaty of 1856 on the neutralization of the Black Sea and severe limitations of its stationing arsenals and navy there. These limitations were imposed on it as a result of its defeat in the Crimean War. This unilateral cancellation of treaty obligations was not sufficient to produce legal consequences ; however, the other contracting parties to the Paris Peace Treaty agreed with Russia that the London Conference be convened the following year, at which Russia was formally released from its former obligations. At the same time, a joint declaration was issued in which it was pointed out that « no power can release itself from a treaty obligation, nor can it modify its provisions, except by the agreement of the contracting parties through an amicable arrangement » (31). This is a fine example of the peaceful change of a subjective situation achieved in a relatively conciliatory atmosphere. The real cause for the change was however a shift in the balance of power in Europe after France had been defeated in its war against Prussia.

When Austria-Hungary annexed Bosnia & Herzegovina in 1908 bringing the other parties of the Berlin Congress of 1878 to a *fait accompli,* its Foreign Minister Baron Aerenthal addressed them in a circular note and insisted that

(30) *Cf.,* J. Ray : « Des conflits entre principes abstraits et stipulations conventionnelles », *Recueil des Cours 1934,* t. 48, p. 661.

(31) Miloš Radoïkovitch : *La révision des traités et le Pacte de la Société des Nations,* Paris 1930, p. 51.

it was necessary to establish an — « unequivocally defined and normal » regime in these provinces (32). For similar reasons, China and other States from Asia claimed suppression of the regime of capitulations on their territories after World War I. This was achieved by Persia even by unilateral action. At the Versailles Peace Conference in 1919, the defeated as well as the smaller States of the victorious coalition opposed, however without success, the introduction of minority protection on their territories on the ground of discrimination, claiming insertion of such provisions in the Covenant of the League in order to be binding on all member States.

The period between the two world wars was characterized by constant pressure from the vanquished States and Italy to revise the clauses of the Peace Treaties concerning the new boundaries and limitation of armaments imposed on them. At that time the *clausula rebus sic stantibus* had often been invoked in regard to these provisions until the revisionist powers — under fascist regimes — got the power to change the *status quo* unilaterally and mainly by force. In particular, Adolf Hitler distinguished himself by cynical invocation of the principle of nationality in his strivings to annex Austria, Sudetenland and Danzig. Later on, he insolently denied that principle to entire peoples on the occupied territories, condemning them to physical extermination.

After World War II, the problem of changing the subjective legal rights of States by peaceful means acquired entirely different traits. The United Nations Charter produced a wealthy and profound transformation of impersonal norms of general international law, as was mentioned earlier. In this respect, the principle of self-determination of peoples and the right of States to dispose over their own natural resources were of primary importance.

The degree of development attained in general international law, however, has not yet achieved its full effect on the subjective rights and interests of States. In this sense, new impersonal norms are not automatically applied in cases involving the existing rights and interests. The legal affirmation of the principle of self-determination, for example, has proved to be insufficient for bringing about the immediate transformation of existing relations, for extinguishing colonialism and other kinds of hegemony over nations and States. Classical colonialism has been eliminated, however, only as the result of peoples' struggling for national liberation, not by the creation of new legal principles. As for the affirmation of the right of States to dispose over their natural resources, it cannot automaticaly extinguish neo-colonialistic relations.

In their effort to maintain and prolong the old relations, States which adhere to former subjective interests and thus oppose certain changes in general international law often invoke the principle *pacta sunt servanda* and, in addition, that of acquired rights. This leads to numerous conflicts and disputes.

(32) J. Ray, *op. cit.*, p. 661.

It should be pointed out that especially after World War I, claims demanding that subjective situations be changed peacefully, actualized the old division of disputes of so-called « legal » and « political » character. Political disputes are usually the result of a shift in power relations although the party demanding the changes resorts to all kinds of arguments in order to justify its claim. Such States appeal to justice or some general principles of law or politics, very often for demagogic purposes, as for example Hitler's insistence on the principle of nationality. For this reason, it is not just the type of argumentation that is of crucial importance for evaluating the feasibility of changes. All the aspects of each particular case must be investigated. In a dispute of political nature, it is not possible to reach a solution based entirely on existing law that would be acceptable to both parties because one of them seeks changes in the law.

On the contrary, actual disputes concerning the revision of formerly acquired rights which later conflict with transformed impersonal norms of general international law belong to the category of legal disputes. In such disputes the scope, application and interpretation of the existing law as a whole are involved.

Before 1919, the question of peaceful change was practically unknown. Until then, war had been considered to be a perfectly legitimate method of settling disputes as a part of the sovereignty of States. Thus a State which wanted a change could issue an ultimatum and wage war against the other State opposing it, and in the case of its victory, it could dictate the terms of the peace treaty (33). Every peace treaty contains numerous stipulations which modify former legal situations, in which the defeated party renounces its former rights, for the most part, in favor of the victors. In this way, the provisions of these treaties created a new legal situation and the defeated parties had no choice but to consent to such stipulations. For this very reason, every peace treaty involving winners and losers has the characteristics of forceful change.

The problem of peaceful change emerged with endeavors to limit the right of States to wage wars by establishing systems of collective security including collective measures of suppressing law-breakers, and in addition measures for the prevention of war. These prevention measures require the parties to settle their disputes peacefully before an independent judge or arbitrator, or at a conference table instead of on the battlefield as before.

Another type of measure for preventing wars is based on the realistic approach that changes are inevitable in the long run in spite of the fact that the whole system of collective security in question aimed to preserve the given *status quo*. *Status quo* relates first of all to the territorial integrity and

(33) In 19th century victorious powers should nevertheless be careful not to disturb the existing balance of power. Thus Russia was at the Berlin Congress of 1878 deprived of its gains from victory over Ottoman Empire stipulated at the San Stefano Treaty. On the contrary, Prussia was successful in isolating France from its allies in the War of 1870-1871, and thus Bismarck was able to dictate to it his terms of peace.

political independence of the member States. Instead of achieving changes by force with power relations as an essential element, as the case was before, these systems try to establish some institutionalized procedures for bringing about peaceful changes in which equality of the parties and justice would be respected as much as possible.

The first of these procedures was laid down in Article 19 of the Covenant of the League of Nations that differed from Article 10 which guaranteed the territorial integrity and political independence of all its members from external aggression (34).

During the negociations on the text of the Covenant at the Versailles Peace Conference of 1919, U.S. President Woodrow Wilson originally suggested a single provision in which the independence and territorial *status quo* of all member States would be guaranteed and the possibility of change would be provided first of all on the basis of the principle of self-determination of the nations involved or by the claim of a three quarters majority of the member States of the League. In addition, in the same draft provision, all member States should accept a principle without reservation, according to which world peace should be more important that any question of political competence or State frontiers (35).

Formulated in this way, the proposal had no chance of being adopted in view of the strong wish of the other principal allied powers to secure the achieved *status quo*. In addition to guaranteeing the territorial and political *status quo* of all member States, a British proposal also provided for the possibility of adopting necessary changes which would be proposed by the future League. States which would reject a proposal for change would lose the League's guarantee for protection from external aggression (36).

After lengthy discussions between the American and British delegates and within the narrow circle of the principal allied and associated powers, it was finally decided to completely separate the guarantee of *status quo* from the mechanism of peaceful change. The Conference thus adopted Article 19 which reads as follows :

> « The Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable, and the consideration of international conditions whose continuance might endanger the peace of the world. »

The purpose of this provision was to give the defeated powers a vague hope that it would be possible to revise the peace treaties just imposed on them by peaceful means within the League (37).

(34) Article 10 of the Covenant reads as follows : « The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression or in case of any threat or danger of such aggression the Council shall advise upon the means by which this obligation shall be fulfilled. »

(35) M. Radoïkovitch, *op. cit.*, pp. 218-219.

(36) *Ibid.*, pp. 221-222.

(37) These vague promises were expressed by the presiding officer of the Versailles Conference Georges Clémenceau in a letter addressed to the president of German delegation Count Brockdorff-Rantzau. That letter was published by M. Radoïkovitch, *op. cit.*, p. 214.

Thus, in its final wording this provision does not deviate from the classical rule that any legal rights can be changed exclusively by a new agreement between the interested States. These new agreements have all the legal effects of the revision of the existing treaty. Therefore, a State which is entitled to certain subjective rights cannot be deprived of them without its own renounciation. Consequently, the Assembly of the League acquired neither the right to determine the changes itself nor to impose its decision on the parties to a given treaty. It could act only as a result of its political authority, but its recommendations would have no binding force on anyone.

Article 19 contained other far reaching limitations. The Assembly should issue such recommendations only « from time to time », in other words not too often, only as an exception. Its suggestions should refer only to the revision of treaties which « have become inapplicable ». Therefore, all the rigorous conditions from *clausula rebus sic stantibus* should be fulfilled, and as it is generally assumed, that clausula does not relate to territorial changes (38). Concerning the question of voting, the principle of unanimity set forth in Article 5 paragraphe 1 of the Covenant could not be evaded. There were some attempts to abolish it, but the most influential States succeeded in having even the parties to dispute included in the unanimity. Consequently, Article 19 remained completely useless. Even a recommendation of advisory character suggesting that the contracting parties reconsider their agreement in force could not be adopted without the consent of both disputing parties, including the party whose rights were being challenged.

This procedure also had no importance in the practice of the League. There were some proposals for peaceful change. In 1920 Bolivia applied for the revision of a treaty with Chile that had been concluded in 1904, but later it was discretely convinced to renounce its application. In 1925 China tried to reach an agreement on the cessation of its treaty obligations concerning extraterritorial rights of foreign embassies and consulates on its soil, but also without success.

There were some changes in the obligations of the defeated States that had been laid down in peace treaties, but outside the League, the most important being the revision of the German obligations to pay reparations according the Peace Treaty of Versailles. Through the Daws plan of 1924 and the Young plan of 1925 the original estimate of the Reparations Commission totaling approximately 6,600 million pounds of sterling was considerably reduced. In the Treaty of Lausanne of 1932 it was finally decided that Germany had to pay rather a symbolic sum of 150 million pounds, an obligation that it never fulfilled. After the Nazis came to power in Germany in 1933, the obligation from the Treaty of Peace were changed by a tactic of

(38) This fact was established and approved by the International Law Commission in its Draft Article 59 concerning the fundamental change of circumstances. *Cf.*, the Comment of the Commission to its Draft Articles on the Law of Treaties, *American Journal of International Law 1967*, No. 1, pp. 428 and 434. The Vienna Convention provides for this exception to the rule of the fundamental change of circumstances in its article 62(2a).

faits accomplis, which later evolved into aggressive wars and finally into the defeat of the revisionist powers in World War II.

In addition, it should be pointed out that there were various other possibilities for peaceful change inside as well as outside the League. According to Article 15 paragraph 4 of the Covenant, within the framework of procedures for the settlement of disputes, the Council of the League is to make and publish a report containing, *inter alia,* recommendations « which are deemed just and proper in regard thereto ». This, in fact, provided for the possibility of limited quasi-legislative action, although the Council was bound by the preamble of the Covenant to scrupulously respect « all treaty obligations in the dealings of organized peoples with one another ».

A second possibility is found in Article 38 paragraph 2 of the Statute of the Permanent Court of International Justice, according to which the Court could decide cases *ex aequo et bono* if the parties agreed thereto. A large number of bilateral treaties on the settlement of disputes stipulated that this procedure was obligatory for so-called « political disputes » before the Hague Court or before arbitral tribunals, if a previous settlement procedure, usually direct negociations or mediation, had failed. The Hague Court, however, has never in its long practice had the opportunity to decide any case *ex aequo et bono.* In not a single case have the parties authorized it with such a large and vague power. In our opinion, if such a case occurs, the Court would be entitled to establish an entirely new legal situation between the disputing parties, just as a legislative organ, but in an entirely impartial manner. Thus, in doing this it would not necessarily be bound by the existing subjective rights of the parties. It would, however, be limited in its action by all the norms of *jus cogens* and by the subjective rights of third States which did not authorize it with this power (39). On the other hand, a judicial organ invested with this type of quasi-legislative procedure would hardly be able to cope with the increasing practical needs for changing the subjective rights of States peacefully.

The third possibility for peaceful settlement set forth in the same bilateral treaties provided for an obligatory procedure of conciliation of so-called « political disputes ». The shortcoming of these treaties was their rigid division of legal and political disputes on the basis of some « objective » criteria. Conciliation as a method for the pacific settlement of disputes was introduced after World War I with the support of the League of Nations ; however, except for some extraordinarily rare cases, it has otherwise not been used in practice (40). The conciliation consists of a contradictory procedure before an impartial body whose composition is determined by common agreement of the parties, just like an arbitral tribunal. It differs from arbitration in that the

(39) These are our conclusions on the basis of a larger research. *Cf.,* V.D. Degan : *L'équité et le droit international,* La Haye 1970, pp. 93-94, and 337.

(40) *Cf.,* Jean-Pierre Cot : *La conciliation internationale,* Paris 1968, pp. 239-250, and 349-351. V.D. Degan : « International Conciliation : Its Past and Future », in *Völkerrecht und Rechtsphilosophie, Internationale Festschrift* für Stephan Verosta, Berlin 1980, pp. 261-286.

report of the commission of conciliation must not necessarily be based on law and that the report is not binding on the parties. Instead, it is only a recommendation intending to help them reach a common agreement for settling their dispute.

Finally, the last possibility consisted in classical informal means of settling disputes by mediation or good offices of third States or sometimes of distinguished persons from third countries. The good offices consist in persuading the parties to gather together at a conference table in order to find a common solution of their dispute. The mediator can help them by giving advice. The parties can make transactions and renounce their rights on a basis of reciprocity. However, there were, previously, some cases in which the mediator, being a large power, dictated a solution to the parties, that was to his benefit and sometimes against the interests of both disputing parties. There is in fact very little guarantee that this type of procedure be impartial, that the disputing parties be treated equally, and consequently that a just solution of the controversy be reached.

* * *

After World War II peaceful change of the subjective rights and interests of States is viewed quite differently. Presently, conflicts of interests between the former victorious and defeated States do not predominate anymore. The actual division of States into political and military alliances has been caused for quite different reasons.

The United Nations Charter has enlarged the ban on aggressive wars to include the prohibition of any threat or use of force. In its system of collective security, the stress is on the repression of aggression, whereas preventive measures such as obliging the member States to submit their disputes to certain procedures have almost entirely been disregarded. The mechanism of collective security action against those transgressing peace has however completely failed in practice and has no significant effect on actual international relations.

Nevertheless, the problem of peaceful change has been incorporated in the United Nations Charter on a broader basis and no longer consists exclusively of revisions of treaties which are in force. In this respect, Article 14 of the Charter authorizes the General Assembly to « recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations ».

By mentioning the purposes and principles of the United Nations in this context, the founders of this world organization empowered the General Assembly with the right to examine the legal scope of the subjective rights formerly acquired by States from the aspect of these new impersonal norms.

This type of competence of the General Assembly must be linked with its general jurisdiction contained in Article 10, according to which it « may discuss any question or any matter within the scope of the present Charter... » and may make recommendations to the members of the United Nations or to the Security Council.

In fact, the competence laid down in the United Nations Charter does not surpass that of the former Assembly of the League of Nations. In the same sense, the General Assembly can issue only recommendations which are not obligatory and decisions which are not binding. Nevertheless, this formal limitation has not been the main factor influencing the activity of the General Assembly in this field. On the whole, the General Assembly is the most democratic of the United Nations organs. With its resolutions the General Assembly has accelerated the development and affirmation of impersonal norms of general international law, first of all the right to self-determination, seeking at the same time its best to have them employed in concrete international relations.

Its most far reaching decisions in this regard, i.e. the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960, was not of primary importance for its reaffirmation of these peoples' right to self-determination already in existence, but for its direct attack on the subjective rights of the colonialist powers. In an imperative way it demanded the prompt liquidation of colonialism :

> « 5. Immediate steps shall be taken, in trust and nonselfgoverning territories which have not yet attained independence, to transfer all powers to the peoples of these territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or color, in order to enable them to enjoy complete independence and freedom. »

However, even these achievements of the General Assembly have had their limitations. As an organ responsible for the maintenance of international peace and security, it was far less successful in attempting to carry out its resolutions on the prohibition of threat and the use of force, the pacific settlement of disputes, or non-interference in the internal affairs of States, although strictly speaking, all these functions do not fall within the domain of peaceful change.

Although the mechanism of peaceful change contained in Article 14 of the Charter achieved considerable progress in the process of decolonization, it in itself has thus far not been suffucient to assure the efficient exercise of new general and impersonal norms in the existing legal situations of States conflicting with them.

Nor does the procedure for the pacific settlement of disputes laid down in Chapter VI of the Charter offer much possibility for effecting peaceful change. This procedure is devoted to the main purpose of the United Nations i.e. to the maintenance of international peace and security. The Security Council has the right to recommend the terms of settlement for a dispute only if it is requested to do so by all the parties, or if it deems that the continuance

of the said dispute would be likely to endanger international peace and security. Aside from these two cases it is only entitled to act as an organ of good offices and can recommend appropriates procedures and methods of adjustment of disputes to the parties, namely : negociations, enquiry, mediation, conciliation, arbitration, judicial settlement or resorting to regional agencies or arrangements.

In view of the fact that even the most subjective rights of States are protected by treaty provisions, it is of interest to see how the Vienna Convention on the Law of Treaties of 1969 has treated the problem of peaceful change.

Article 64 of the Convention provides for the full legal effect of new peremptory norms of general international law *(jus cogens)* in existing treaty relations »: « If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates. » In the same manner Article 53 prescribes that a treaty is void if at the time of its conclusion it conflicts with an already existing peremptory norm of general international law.

However the question arises as to the legal procedures concerning the claim of a party which resorts to a *jus cogens,* challenging the legal rights acquired by another State. According to Article 65 such a party must notify the other party of its claim. If a period not less than three months (except in urgent cases) has passed and no other party has raised any objections, it can issue an act declaring the termination or invalidity of the treaty in question.

If, on the other hand, an objection has been raised, the parties shall atempt to solve their dispute in the manner indicated in Article 33 of the United Nations Charter. If no solution has been reached within twelve months, according to Article 66 of the Vienna Convention, any of the parties involved may submit a written application to have the dispute settled by the International Court of Justice, unless the parties expressly agree to submit it to arbitration. Therefore, the application or interpretation of a *jus cogens* and its effect on treaty relations are ultimately assured by an obligatory judicial or arbitral procedure. It should, however, be pointed out that these provisions apply only to the parties of the Vienna Convention, and in accordance with Article 4 of the said Convention, they apply only to treaties concluded after it has come into force with regard to such States. Thus, this procedure is not a part of general international law.

In addition, the Vienna Convention also recognizes a fundamental change in the circumstances *(clausula rebus sic stantibus)* (41), as an argument which may be invoked as the grounds for the termination of a treaty or withdrawal

(41) We agree with the motives of the International Law Commission with regard to avoiding the term « *clausula rebus sic stantibus* ». This term expresses a tacit condition implied in every « perpetual » treaty that it would disolve in the event of a fundamental change of circumstances, which is today a fiction. On the contrary, according to the Commission, the principle of fundamental change of circumstances is an objective rule of law, *Cf., AJIL 1967,* No. 1, p. 432. This term is, however, still largely used by the doctrine.

therefrom. The conditions stated in Article 62 paragraph 1 of the Convention, however, are very strict and cumulative : (i) the circumstances must undergo a change from those existing at the time of the conclusion of the particular treaty ; (ii) this change must be fundamental, i.e. essential ; (iii) at the time the treaty was concluded this change of circumstances was not foreseen by the parties ; (iv) the existence of these circumstances constituted an essential basis of the consent of the parties to be bound by the treaty ; and (v) the effect of the change is to radically transform the extent of the obligations still to be performed under the treaty.

Moreover, a fundamental change in the circumstances cannot be invoked if it is the result of a breach of treaty obligations by the party invoking it, or if the treaty in question establishes a boundary. Therefore, there can be no fundamental changes in the circumstances regarding State boundaries. These limitations are found in Article 62 paragraph 2 of the Vienna Convention.

As for declaring the termination of the treaties in question, the same procedure of notification and settlement of disputes prescribed in Article 33 of the U.N. Charter is to be followed as in the question of a controversy of the scope of *jus cogens*. If, however, a solution cannot be reached in this way, judicial and arbitral procedures are not obligatory in such disputes. The Annex of the Vienna Convention provides for an obligatory procedure of conciliation in such cases, and a list of conciliators should be at the disposal of the parties in order for them to be able to appoint a commission. The expenses of the Commission of Conciliation are to be covered by the United Nations. Again, however, the report of the Commission is not binding on the parties. Therefore, one or both parties can *mala fide* reject any given final solution. Thus, in this sense the general rule that the subjective rights of a State cannot be cancelled or modified without its consent has not been much affected until now.

The post-war practice in settling disputes has not brought about any ameliorations in achieving peaceful change. Settling disputes peacefully has generally been neglected in the practice of the organs of the United Nations. Resorting to a certain method of settlement as well as accepting the proposed solutions depends on the consent of all the parties to the dispute.

In view of the fact that at the present time the most acute question, in our opinion, still concerns the application of the newly developed rules of general international law in disputes involving the subjective rights of States, it appears that all the possibilities offered by judicial and arbitral procedures have not been fully taken advantage of. Parties to disputes of this kind should be encouraged to bring them to the Hague Court for their settlement. A larger number of these cases would probably influence its own practice and its system of precedents. On the basis of this practice, the Court would probably have a considerably more important role in reducing the gap which divides the normative sphere from reality, that is characteristic for current international relations. To this end arbitral awards can probably have a similar role.

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The above relates to claims for the revision of the subjective rights and interests of States based on the impersonal norms of general international law. Of course, it is still possible that claims be brought for changes having no justification in positive law. In this case, first of all its is necessary to eliminate all relations based on the power, inequality and arbitrariness of the parties. The only way we see for achieving changes of this kind is for the respective parties to make transactions in full liberty, equality and mutual understanding in which mutually acceptable and satisfactory solutions can be reached. Such a procedure is lengthy and painstaking ; however, any solution imposed or dictated by a stronger party would directly violate the sovereign rights of the State whose rights are challenged. This State is free to insist that its subjective rights be honored and that it is entitled to adequate and equitable compensation if it willfully decides to renounce them.

IV. CONCLUSION

As we pointed out at the beginning of this paper, there can be no stability without change. The *conditio sine qua non* of a stable international legal order is that it has to be open to change, and that all such changes be of a peaceful character. In order to achieve peaceful change, power relations, inequality and arbitrariness must be eliminated as much as possible.

In the post-war period there have been numerous cases of the political independence of weaker States being violated and of inequal relations in international affairs. The fact, however, is encouraging that unlike the pre-war period there have been very few territorial changes attained by force as of yet, not a single has been recognized by the world community. To our knowledge, these include Israel's annexation of Jerusalem and the territories at the Golan Heights and the Chinese conquests of the territories at its border with India. Nevertheless, at present we are witnessing two open armed conflicts in which one of the parties wants to gain territorial acquisitions by force.

It seems to us, however, that in the forseeable future it will be easier to eliminate the remnants of colonialism than to effectively prevent the threat and use of force and interventions in the internal and external affairs of States.

The present world community needs an efficient system for changing impersonal norms peacefully that would be closely connected with the direct application of these norms in matters involving the subjective rights and interests of States. Since, however, the entire system of the United Nations Organization would have to be thoroughly revised, in the forseeable future there will be no chance of making effective achievements in this area.

Therefore it is necessary to rely on the ways and means already in existence and thus in this way strive to reduce, instead of increasing the gap between the normative sphere and reality in international relations. Some of the results already achieved are satisfying and encouraging. However, it is ne-

cessary to constantly have in mind that changes in international legal order are a continuous and permanent process as is the evolution of justice. As in the case of the entire evolution of municipal legal systems, there is no chance of eliminating all the differences between the said normative sphere and reality in the international legal order. There must, however, be a postulate to constantly strive to bring reality and the normative order together as close as possible, parallel with its further evolution.

Certainly, one of the important tasks of the world community in the future will be protecting the fundamental human rights as a part of general international law in all countries throughout the world, including these cases where an individual's rights are violated by his own State.