THE FUNCTIONS AND DIFFERING LEGAL CHARACTER OF TREATIES.¹

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The following remarks are prompted by the belief that inadequate attention has been given by students of International Law to the widely differing functions and legal character of the instruments which it is customary to comprise under the term "treaty". It is suggested that this branch of the law would be in a more advanced state if more writers on the subject would study these essential differences and endeavour to provide for them instead of attempting to lay down rules applicable to treaties in general.² Most writers recognize and enumerate different kinds of treaties but either fail to realize, or only realize insufficiently, that these differences do not stop short at their contents but affect their legal character as well. No attempt will be made here to construct a new classification of treaties. I shall content myself with pointing out by means of a few illustrations the essential juridical character of certain types of treaties and the legal consequences which seem to me to follow.

The internal laws of the modern state provide its members with a variety of legal instruments for the regulation of life within that community: the contract; the conveyance or assignment of immovable or movable property, which may be made for valuable consideration or may be a gift or an exchange; the gratuitous promise clothed in a particular form; the charter or private Act of Parliament creating a corporation; legislation, which may be constituent, such as a written constitution, fragmentary or complete, or may be declaratory of existing law, or create new law, or codify existing law with comparatively unimportant changes. Further, though rarely, we may find a constitutional document which closely resembles the international treaty itself, for instance, Magna Carta.³

It would not be suggested that all these differing private law

¹ Based on a lecture delivered at the request of the University of London on May 7, 1930, and upon lectures delivered at the Institut Universitaire des Hautes Études Internationales at Geneva.
³ On its legal character, see McKechnie, Magna Carta (2nd ed.), pp. 104–7.
transactions are governed by rules of universal or even of general application, and yet such is the underlying assumption of international lawyers in dealing with the only and sadly overworked instrument with which international society is equipped for the purpose of carrying out its multifarious transactions. Thus, if international society wishes to enact a fundamental, organic, constitutional law, such as the Covenant of the League of Nations was intended to be and in large measure is in fact, it employs the treaty. If two states wish to put on record their adherence to the principle of the three-mile limit of territorial waters, as in the first article of the Anglo-American Liquor Convention of 1924, they use a treaty. If further they wish to enter into a bargain which derogates from that principle, again they use a treaty. If Denmark wishes to sell to the United States of America her West Indian possessions, as she did in 1916, or if Great Britain wishes to cede Heligoland to Germany in return for a recognition of certain British rights in Africa, as happened in 1890, they do so by treaty. Again, if the great European Powers are engaged upon one of their periodic resettlements and determine upon certain permanent dispositions to which they wish to give the force of "the public law of Europe", they must do it by treaty. And if it is desired to create an international organization such as the International Union for the Protection of Works of Art and Literature, which resembles the corporation of private law, it is done by treaty.

Is it likely, on the face of it, that all these multifarious types of treaties can be effectively governed by the same system of rules, whether recruited from the private law of contracts or from elsewhere? The assumption that they are so governed is responsible, I venture to think, for a number of the difficulties which this branch of law has produced and which will only be removed as and when the essential differences between certain kinds of treaties are more widely appreciated.

1. TREATIES HAVING THE CHARACTER OF CONVEYANCES.

There is a class of treaties called "transitory" (unfortunately, as Westlake points out, because their characteristic is the permanence of their effect), or "dispositive"; these are treaties whereby one state creates in favour of another, or transfers to

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1 See, for instance, Article 7 of the Treaty of Paris, 1856, which admitted Turkey to participation "in the advantages of the Public Law and System (Concert) of Europe".
another, or recognizes another's ownership of, real rights,\(^1\) rights in rem, for instance, in particular, treaties of cession including exchange. In this class we must also place a treaty like that of 1783 between Great Britain and the new United States of America, whereby the former recognized the independence and the territorial limits of the latter and relinquished "all claims to the government, propriety, and territorial rights of the same". Closely akin are treaties which confer upon one party real rights in the territory of the other, whether we choose to call those rights international servitudes or not.\(^2\) Not quite so closely akin are treaties which enable the nationals of one party to acquire, for instance, by purchase or by inheritance, or to retain, real rights in respect of land subject to the sovereignty of the other. Let us examine some of these treaties in the light of a war supervening between the two contracting parties. Great confusion—not by any means dispelled—has resulted from hasty generalizations to the effect that war abrogates all treaties between the parties. As late as 1815 we find Lord Bathurst writing to John Quincy Adams, the American Secretary of State, as follows: "Great Britain . . . knows of no exception to the rule that all treaties are put an end to by a subsequent war between the same parties", though later in the same note he admits the possibility of the existence of certain irrevocable provisions in such treaties.\(^3\) So also President Polk, in his annual message of December 7, 1847, announced that "A state of war abrogates treaties previously existing between the belligerents",\(^4\) and in 1898, upon the outbreak of the Spanish-American War, the Spanish Government announced that it held the same view.\(^5\) Phillimore\(^6\) tells us that "it was at one time an international custom that the Belligerents should, at the breaking out of war, make a public and solemn proclamation that the obligations of Treaties between them had ceased. That custom has become obsolete. In the place of it has arisen the general maxim, that War, ipso facto (von selbst), abrogates Treaties between the Belligerents".

We know now that these generalizations are incorrect and that

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\(^1\) This is not the distinction which Grotius, *De jure beli et pacis*, II, xvi, 16, makes between *pactum reale* and *pactum personale*, though there is a note by H. Cocceius on this passage, cited in *Fox v. Southack* (1815) 12 Mass. at p. 148 (Scott, *Cases on International Law* (1922) at p. 468) which comes nearer: *pactum liberatorium quo pax remissa aut transactio facta est, qua jus extinctum reviviscere non potest*.

\(^2\) See McNair in *British Year Book of International Law*, 1925, pp. 111–27.


certain kinds of treaties survive a war, though suspended in operation during the war, and that certain other kinds operate during the war. It is common to base these exceptions to the general principle upon the intention of the parties at the time of entering into the treaty.\(^1\) I am not sure whether a better test will not be found to consist in an examination of the true juridical character of the treaty in question; but in any case it will be admitted that once the juridical character of the instrument is understood it will be easier to determine the intentions of the parties. For instance, the real reason why a treaty of cession, whether or not it forms part of a treaty of peace, is not, once it has been carried out, affected by a subsequent state of war between the parties is surely that the treaty has, like a conveyance, produced its effect and has ceased to have vitality; it remains a link in the title of the new owner of the territory but that is all; it creates no outstanding obligations; it was intended to, and did, transfer certain rights *in rem* from the old owner to the new one. Could it be suggested that the outbreak of war between France and Germany in 1914 abrogated the cession of Alsace-Lorraine by France to Germany by the Treaty of Frankfort of 1871? France might well have intended that the loss of Alsace-Lorraine should not survive a future war with Germany, but it is clear from the legal character of the treaty that the cession is unaffected by the outbreak of the war of 1914. Mr. Justice Washington in the case of the *Society for the Propagation of the Gospel v. The Town of New Haven* in 1823, uses language which is pertinent here:

"There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial and other national rights, or, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. *If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning."\(^2\) (Italics mine.)

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1 See, for instance, Hurst in *British Year Book of International Law*, 1921–2, pp. 37–47.

2 United States Supreme Court, 8 Wheaton 464; Hudson, *Cases on International Law* at p. 967; Dickinson, *Cases and Readings upon the Law of Nations*, at p. 1115. For the claim of the United States to possess an interest in the overseas possessions of Germany ceded by her by the Treaty of Versailles, though not ratified by the United States, on the ground that it was an executed grant in favour of designated grantees (of which it was one) and required no formal assent by the grantees by convention, see Hyde in the *American Secretaries of State and Their Diplomacy*, Vol. X (C. E. Hughes), p. 240.
The learned judge was, however, not dealing with the effect of the war of 1812 between Great Britain and the United States upon a cession of British territory to the new Republic (though clearly he would have regarded such a cession as presenting an a fortiori case), but with its effect upon the title to lands in one of the states which a British corporation was permitted by the treaty of 1783 to retain, which was confirmed to it by a treaty of November 19, 1794, and which had not been divested by any legislative act having validity superior to those treaties. "The termination of a treaty", he says, "cannot divest rights of property already vested under it."\(^1\) We must not confuse rights of sovereignty transferred by one state to another with rights of property which one state by treaty with another state permits the nationals of the latter to acquire in the territory of the former, but there is much in common between treaties which transfer real rights from one state to another and treaties which enable the nationals of one state to acquire and hold real rights in the territory of another.

There is abundant judicial authority for the proposition last cited from Mr. Justice Washington's judgment. We need only refer here to the judgments of Sir John Leach, Master of the Rolls, in *Sutton v. Sutton*\(^2\) in 1830, of Mr. Justice Cardozo of the Court of Appeals of New York in *Techt v. Hughes*\(^3\) in 1920, and of the Supreme Court of Kansas in *State (of Kansas) v. Reardon*\(^4\) in 1926. In the last two cases reciprocal privileges of the inheritance of land conferred by treaty upon the nationals of two contracting states were held to survive the occurrence of a war between them. It will be noticed that in the *Society for the Propagation of the Gospel's* case and in *Sutton v. Sutton*, what was upheld was a proprietary right acquired before the outbreak of the war alleged to have abrogated the treaty giving rise to that right. On the other hand in *State (of Kansas) v. Reardon* the treaty dated from 1828, the war broke out in 1917, and the descent was cast in 1924; nevertheless the treaty was upheld as a continuing source of proprietary rights, namely, the right of the deceased's alien

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\(^1\) Ibid., see also Marshall, C.J., in *Chirac v. Chirac* (1817) 2 Wheaton, 259, 277 (Moore, *op. cit.*, § 780) "the treaty had its full effect the instant a right was acquired under it; it had nothing further to perform, and its expiration or continuance afterwards was unimportant".

\(^2\) 1 Russell and Mylne, 663; Scott, *Cases on International Law* (1922), p. 468.

\(^3\) 229 N.Y. 222; Hudson, *op. cit.*, p. 969.

\(^4\) 245 Pacific Reporter, 158 (1926); 120 Kansas, 614; *Annual Digest* (McNair and Lauterpacht), 1925–1926, p. 438.
(ex-enemy) heir to inherit and to sell the land and to withdraw the proceeds from the United States.¹

2. TREATIES HAVING THE CHARACTER OF CONTRACTS

We now come to an even more fundamental distinction, namely, that between treaties whose essential juridical character is that of the Contract, and treaties whose essential juridical character is that of Law-making or Legislation. This distinction is at least half a century old, but its full implications are not yet realized. Lauterpacht² tells us that it was introduced into international law by Bergbolm (in 1877) and Triepel (in 1899) and that it is Oppenheim who is mainly responsible for familiarizing British and American writers with the conception. On the one hand we have the Vertrag or contract where

"the will of one party is different from that of the other, the contract (Vertrag) being here a means for achieving different and opposite ends. Thus while the purchaser promises to pay the money, the seller undertakes to deliver the goods. On the other hand, (we have) the agreement (Vereinbarung) which serves the purpose of realizing identical aims."

I acknowledge that the Vereinbarung makes rules only binding two parties, but the modern multilateral law-making treaty, about which I have a good deal to say later, is merely the Vereinbarung raised to a higher power. The many contracting parties concur in the purpose of creating identical rules binding upon all of them.

My main point in referring to the contrast between these two types is that the old treaty which predominated until the Congress of Vienna³—treaties of peace, alliance, friendship, neutrality, guarantee, commerce, &c.—was essentially the Vertrag; whereas the modern treaty of rapidly developing importance is the multi-

¹ It appears to be the view of the United States Supreme Court that in point of permanence a treaty creating rights of personal status (e.g. of migration) is different; see Karnuth v. United States (1928) 279 U.S. 291, 49 Supreme Court, 274; Hudson, op. cit., p. 977.

² This decision presumably overrules that of the United States Circuit Court of Appeals in John B. McCandless v. United States ex rel. Paul Diabo given on March 9, 1928; see McNair, 'La terminaison et la dissolution des traités', in Hague Academy Recueil des Cours, 1928, Vol. II, at p. 505, though it is just possible that the relator's Indian status makes a difference. See also the Chinese Exclusion Case, Hudson, op. cit. p. 1121; Moore, op. cit., V, § 780; Dickinson, op. cit., p. 828.

³ I do not overlook such earlier treaties as those cited by Hyde, International Law, Vol. II, § 799, for the denomination of contraband.
lateral treaty\(^1\) which has been concluded in large numbers during the last half century and particularly since the Great War and which often creates international unions, such as the Copyright Union, or international régimes, such as that of Freedom of Transit, or partial international codes such as The Hague Conventions, and this modern type is essentially the *Vereinbarung*. I suggest that it is significant that the seed-bed of the traditional rules as to the formation, validity, interpretation, and discharge of treaties which swell the bulk of our text-books, too often written in slavish imitation of their predecessors, was sown at a time when the old conception of a treaty as a compact, a bargain, a *Vertrag*, was exclusively predominant and the dawn of the new multilateral treaty had not begun.

The legal identity of treaties and contracts\(^2\) is almost universally assumed by writers upon International Law, while recognizing, of course, certain differences such as the effect of duress in the conclusion of a treaty and the effect upon a treaty of the *rebus sic stantibus* doctrine. I do not wish to challenge that analogy, but three comments may be permitted; (a) in the matter of form, it is undeniably true; the nearest approach in private law to the treaty in point of form is the contract; and (b) there being no sovereign body above the states, it is convenient to seek in the consent of the parties either the cause, or a condition, of the binding force of a treaty, though the effect of doing this may be at once to invest the treaty with the whole panoply of contractual notions;\(^3\) but (c) we must be on our guard against the assumption that, merely because treaties have borrowed from private law contracts their form and the source of their binding force, all the rules as to formation, validity, interpretation, and discharge of contracts are equally applicable to treaties.\(^4\)

Can we find any embryo traces of the effect of a growing recognition of the distinction between our two types, the contractual treaty and the law-making treaty, upon the rules of

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\(^2\) For an examination, see Lauterpacht, *op. cit.*, § 69–79a.

\(^3\) For the purposes of my point it does not matter whether the consent of the parties is looked upon as the source of the obligation of treaties or merely as a condition essential to the operation of some other source of obligation: see Lauterpacht, *op. cit.*, § 25.

\(^4\) Réglaud in an article entitled “De la Nature juridique des Traités internationaux et du sens de la distinction des traités-lois et des traités-contrats” in *Revue du droit public et de la science politique*, XLI (1924), p. 505, asserts the necessity of regarding all treaties as contracts in order to ensure that they will be enforced by the internal law of the contracting parties.
International Law governing treaties? I think we can. I call them embryo traces, and the illustrations are still apt to be somewhat blurred, because the distinction is yet in its infancy. Let us examine some of them.

*Travaux préparatoires.* A well-known cleavage exists between the British and the Continental rules upon the interpretation of a statute, in this respect that in England the courts are not allowed "to seek the aid of parliamentary debates, reports of Royal Commissions, or other preliminary documents, when endeavouring to interpret the obscurities of a statute,"¹ whereas the general legal tradition of Europe not only does not forbid but actively encourages this practice. Broadly speaking, the same contrast between the two schools exists in the permissibility of resort to the preliminary negotiations of the parties as an aid to the interpretation of their written contract.² At the present moment international tribunals, in particular the Permanent Court, are busy deciding whether they are going to adopt the English or the Continental practice. It will suffice for the moment to say that international practice forbids resort to *travaux préparatoires* when the text of a treaty is sufficiently clear in itself, the implication being that, when the text is not clear, this source of interpretation may be invoked. At any rate, it constantly is invoked and is not ruled out in limine.³ Professor Quincy Wright⁴ detects the emergence of a distinction between contractual treaties and law-making treaties in the degree to which a tribunal called upon to interpret a treaty will resort to the study of *travaux préparatoires*. He points out that a tribunal is more ready to take this step in the case of the former kind of treaties than in the case of the latter. It is open to doubt whether this tendency has yet become conscious and defined, but it seems to me to be intrinsically reasonable. In the case of contractual treaties the number of parties is usually small and they have been in close contact during the negotiation of the treaty; it is therefore not unreasonable, when the text is not clear, to seek from their preliminary negotiations guidance as to their common under-

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standing of an ambiguous expression. In the case, however, of a multilateral law-making treaty it is common to find that only a few of the more important signatories took part in the negotiation of the treaty, which, upon signature or ratification by them, was thrown open to the world for accession; in such a case it would be unreasonable to expect acceding states to be or to make themselves familiar with "the preliminary conversations of the original negotiators". This was the argument advanced by counsel for the French Government before the Permanent Court in the discussion of their combined second and third advisory opinion upon the competence of the International Labour Organization, namely, "that Powers who took no part in the preparatory work were invited to accede to the Treaty as it stood, and did so accede", without (it may be added) having had the text of the preparatory work communicated to them.

Recognition of States and Governments by Treaty. Again it has been suggested that the question whether or not one state recognizes a new state or the new and revolutionary Government of an old state by entering into a treaty with it may depend upon the nature of the treaty. That the signature of a treaty to which these two states alone were parties would involve recognition seems probable unless recognition were expressly reserved. Professor Hudson has pointed out that the United States of America, both in signing and ratifying the International Sanitary Convention of June 21, 1926, considered it necessary to make an express declaration that in so doing they must not be regarded as granting recognition to any Government (e.g. that of the Soviets) not already recognized by them or as entering into any contractual obligation with a state having a Government unrecognized by them. But this precedent was not followed by the United States when ratifying the Peace Pact of Paris of 1928 on January 17, 1929, after the adhesion of the Union of Socialist Soviet Republics on September 6, 1928. Is it not possible that herein lies yet another distinction between the legislative and other treaties? The creation of a contractual obligation between state A and state B may be difficult to reconcile with the absence of mutual recognition, but there does not appear to be any valid reason why they should not both make a common declaration of intention or give their

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1 e.g. the Declaration of Paris, 1856.
2 Quincy Wright, op. cit., p. 104.
3 Publications of the Court, Series B, Nos. 2 and 3, p. 41.
5 Hudson in American Journal of International Law, XXIII (1929), at p. 128.
6 Ibid., at p. 130.
consent to a new rule of conventional law without according recognition to one another. Though not in diplomatic contact with one another, their mutual relations are governed by law and I see no reason why they should not add to or alter that law while maintaining their diplomatic aloofness.

**Legality and Morality of Treaties.** Most text-writers tell us that a treaty is null and void if its object is either illegal or immoral, and proceed to give somewhat speculative illustrations, such as the encouragement of piracy or slavery or an unprovoked attack upon a third state or the appropriation of part of the open sea. But I suspect that time will show that this rule is only applicable to contractual treaties and ought not to be stated in terms applicable to treaties as a whole.¹

**Obsolescence. The clausula rebus sic stantibus.** Has the development of this doctrine been influenced, or ought it to be influenced, by a correct appreciation of the distinction in legal character between the contractual treaty and the legislative treaty?² Before attempting to answer these questions it is necessary to notice that the doctrine has a double aspect, legal and political, and to consider, so far as the former aspect is concerned, to what extent an analogy exists in the realm of contract. I suspect that in origin the existence of the doctrine to-day is due to the fact that at one time it formed the subject-matter of an express term in many treaties and that that is why we speak of it as a clausula. As we have seen, Phillimore³ suggests that the now exploded maxim that war abrogates all treaties has a similar origin, namely, that upon the outbreak of a war it was at one time customary for each belligerent to issue a declaration formally repudiating all treaty obligations with its enemy—a practice which some centuries ago was doubtless a true reflection of the scientific nature of the treaty obligations then subsisting.

Fischer Williams, in his article in the *American Journal of International Law*⁴ on “The Permanence of Treaties”, examines the

¹ Réglade, *op. cit.*, p. 521 n., asserts one reason for distinguishing between *traités-lois* and *traités-contrats* to be that a *traité-loi* can be terminated by unilateral denunciation, whereas a *traité-contrat* cannot. I cannot, however, accept this view and consider that the matter is not so simple as that: see McNair, in Hague Academy’s *Recueil des Cours*, 1928, Vol. II, at pp. 528–38.

² We can dismiss from consideration treaties regarded as transfers of property, because it is clear and is generally admitted that the doctrine can only apply to those articles of a treaty which are still executory (see Oppenheim, *op. cit.*, Vol. I (3rd ed.), p. 689, n. (1)).

³ *op. cit.*, Vol. III (3rd ed.), DXXX.

juridical character of the doctrine *rebus sic stantibus* and points out the analogy to the doctrine of frustration of contract in British municipal law. "Like that doctrine it is really a device by which the rules as to absolute contracts (obligations) are reconciled with a 'special exception which justice demands' in the words of Lord Sumner. It is a legal, not a diplomatic doctrine." I am disposed to agree that, in reference to those kinds of treaties which are contractual not merely in form but in essential juridical character, the doctrine of frustration of contract affords a useful analogy upon the lines of which the *rebus sic stantibus* doctrine may be profitably developed by international tribunals.¹ But I am not so sure that for treaties which are legislative rather than contractual in character this analogy indicates the true line of advance. It may be wiser to recognize that the political or economic or social conditions which made a law-making treaty desirable have changed and that new law adapted to the new circumstances is required. In other words, it may be that the change of circumstances demands in the case of contractual treaties the exercise of the judicial function, and in the case of law-making treaties the renewed exercise of the legislative function. For instance, the Declaration of Paris of 1856 is a typical law-making treaty. The circumstances of modern maritime warfare and of modern economic life have combined to modify profoundly the last three clauses of that Declaration. The modern practice whereby a belligerent state assumes almost the whole responsibility for the feeding of its civil population as well as of its combatant forces has given to the conception of contraband a new meaning which virtually torpedoes the second and third clauses of the Declaration. Yet it is difficult to see how the analogy of the doctrine of frustration of contract would suffice to bring the Declaration of Paris into harmony with modern conditions, or would be the correct method of establishing its obsolescence if that were desired. The remedy is more likely to be a legislative one.

To pursue the municipal analogy, where is there a municipal legislature since the days of the Medes and the Persians which does not find it necessary to repeal and alter its laws? This process forms a large part of the everyday work of every legislature, and in Great Britain we have a permanent Statute Law Revision

¹ It is worth noting that in 1882 the Swiss Federal Court in dealing with the doctrine in the course of a dispute between Lucerne and Argovie mentioned the theory of an implied condition as one of its alternative bases: *Arrêts du Tribunal fédéral suisse*, 1882, Vol. VIII, p. 57. For a survey of some decisions bearing upon the doctrine, see McNair, in Hague Academy's *Recueil des Cours*, 1928, Vol. II, pp. 471–4.
Committee to deal with it in its formal and non-controversial aspect. In so far then as treaties are regarded as legislation, it is essential that international law should develop some rule, or international society some organ, whereby this process can be carried out. It is inconceivable that the codes which the League of Nations is endeavouring to produce at The Hague Conference, which opened in March 1930, upon Nationality, Territorial Waters, and the Responsibility of States for Damage done in their Territory to the Person or Property of Foreigners should be intended to last for all time without amendment.  

With regard therefore to true law-making treaties, whether the law they make is general or universal, some means of revision is an essential ingredient in an international society. But it seems to me unlikely that the *rebus sic stantibus* doctrine in its contractual form contains the germ of this means, because, as applied to the two classes of treaties above mentioned, the means required is a legislative function and is not to be deduced from the principles of the law of obligations. An attempt to apply to them the analogy of frustration of contract is not likely to produce useful results. With regard to pure law-making treaties, there can be little doubt that if the movement of piecemeal codification succeeds, the signatory states will sooner or later set up a standing commission of revision, which may perhaps receive power to make minor amendments upon its own responsibility and to prepare and submit major amendments to the signatories for their ratification. This process is already discernible in certain technical spheres.  

When, however, we turn to the contractual kind of treaties, those which embody bargains between the parties regulating their future conduct, or confer mutual rights of trading or fishing for their

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1 See the work of the Preparatory Committee discussed by Reeves in *American Journal of International Law*, XXIV (1930), pp. 52–7.  
2 For instance, the Aerial Navigation Convention of 1919 created an International Commission for Air Navigation (upon which each of the signatories has at least one representative and some of them more than one) whose duty it is *(inter alia)* to receive and make proposals for the modification or amendment of the Convention. Modifications of the articles of the Convention themselves require the formal adoption of all the contracting parties, but modifications of the Annexes to the Convention, when assented to by “three-fourths of the total possible votes” require no such adoption and become effective upon notification to all the contracting parties. Again, Article 422 of the Treaty of Versailles enables amendments of the Labour Part of the Treaty to be made by the International Labour Conference subject to ratification “by the states whose representatives compose the Council of the League of Nations and by three-fourths of the Members”. Moreover there are a number of non-political International Unions which have power to act by a majority in matters of current administration (see Sayre, *Experiments in International Administration* (1919), pp. 25, 30, 31).
respective subjects, extraterritoriality treaties, treaties creating rights in the nature of servitudes of a non-political nature, we are in the realm of different ideas. It is submitted that it is in the sphere of this kind of treaty that the *rebus sic stantibus* doctrine will find its development on the legal side.

3. LAW-MAKING TREATIES

It will be convenient to divide these treaties into two classes: (a) treaties creating Constitutional International Law, and (b) treaties creating or declaring ordinary International Law.

(i) Treaties creating Constitutional International Law. One of the many objects for which the society of nations employs the treaty is to add to its Constitutional Law. A state can have Constitutional Law before it has a Constitution. England did. The society of states has not yet got a complete Constitution, but it has a great deal of Constitutional Law, both customary and conventional, which may fairly be so described though not universally adopted. The latter branch may be illustrated by the following: Hague Convention I for the Pacific Settlement of International Disputes, the Covenant of the League of Nations, the Statute of the Permanent Court of International Justice, and the Peace Pact of Paris. Together with these treaties which create international organs and general rules, I think we are justified in placing those multilateral treaties which from time to time settle the political affairs of a group of countries in a particularly solemn and semi-dictatorial fashion which likens the arrangement to a governmental act imposed from above upon the parties affected, rather than to a voluntary bargain between them. It seems to me that these constitutional treaties of both kinds create a kind of public law transcending in kind and not merely in degree the ordinary agreements between states.

What evidence is there of the possession, by treaties of these two kinds, of this peculiar juristic quality so as to justify us in placing them in a class by themselves? There are some traces among English text-writers of a recognition of a body of international public law possessing a peculiar sanctity and degree of permanence. Phillimore\(^2\) writes of certain treaties as incorporating

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1 But for an obvious disadvantage I should prefer to call it International Public Law.
"by the common consent, express or tacit, of all states concerned in its assertion and maintenance a great public principle (italics his) into the International Code". In the writings of Westlake, although it is believed that he nowhere expressly formulates the doctrine of the existence of an "International Code" or a public law transcending in kind and not merely in degree ordinary agreements between states, there is implicit the notion of the special character of certain treaty stipulations. This is particularly so with regard to treaties establishing the neutralization of a state or of a portion of a state's territory. He speaks of such treaties as "a part of the permanent system of Europe, only liable to be affected by one of those great revolutions which disturb that system at long intervals".¹ Again in discussing transitory or dispositive treaties and the effect of the rebus sic stantibus doctrine upon treaties creating servitudes, he speaks of "the Swiss, and European because Swiss, interest secured by the neutrality of Northern Savoy, which we must therefore hold to be obligatory on France as the successor in that region".² Later he speaks of the "servitude or easement . . . created in certain districts of Savoy, as a system of permanent neutrality created for the benefit of all Europe".³ Although there have been several wars involving upon opposite sides some of the parties to the Vienna settlement of 1815, it is never⁴ suggested that the neutralization of Switzerland and of certain supporting territory not Swiss has thereby been abrogated.

I suggest that we can detect two practical consequences which flow from the recognition or nascent recognition of this principle. The first is that treaties belonging to this class are not abrogated by the outbreak of war between a large number or all the contracting parties. The second is a tendency for them to produce exceptions to the rule that a treaty cannot confer benefits or impose burdens upon third parties: pacta tertiis nec nocent nec prosunt.

(a) Effect of War. It is not suggested that the outbreak of war—even involving all the parties who sign and ratify or subsequently accede—would abrogate The Hague Conventions issuing from the Conferences of 1899 and 1907. The customary explanation of this fact, namely, that they manifest the obvious intent of the parties that they should exist during war, is inadequate

⁴ Amongst the many excuses put forward for the invasion by Germany of Belgium in 1914 (including the rebus sic stantibus doctrine) it was never, it is believed, asserted that the Austro-German or the Franco-Prussian War had abrogated the treaty of 1839 which neutralized Belgium.
because three of these Hague Conventions (Pacific Settlement, Employment of Force for the Recovery of Contract Debts, and Opening of Hostilities) contain rules applicable to a state of peace. Similarly, no one would, I think, suggest that the continued neutralization of Switzerland rests upon the happy accident that, of the parties guaranteeing it, only Spain, Sweden, and Switzerland herself were not belligerents in the Great War. Moreover, the survival *de jure* since that war of the two treaties guaranteeing the neutralization of Belgium is expressly recognized by the unratified treaty signed by Belgium, France, Great Britain, and Holland, on May 22, 1926, in which it was agreed that Austria, Germany, Hungary, and Russia should be invited to accede.

(b) *Pacta tertii*. Sweden was not a party to the Convention of 1856 between Great Britain, France, and Russia providing for the demilitarization of the Aaland Islands; yet the Committee of Jurists (Larnaude, Struycken, and Huber), appointed by the Council of the League in 1920, describe that Convention as having created "true objective law", as being "a part of European Law", and as bearing "the character of a settlement regulating European interests", so that Sweden by reason of the objective nature of the settlement of 1856 could "as a Power directly interested insist upon compliance with its provisions in so far as the contracting parties have not cancelled it", although she had "no contractual right" under it.

A similar tendency is discernible in the case of treaties which regulate the dedication to the world of some new facility for transit such as a canal or the right of navigation upon a river formerly closed. Thus the Permanent Court in the *Wimbledon* case speaks of the Kiel Canal as having become "an international waterway intended to provide under treaty guarantee easier access to the Baltic for the benefit of all nations of the world" (italics mine), although only twenty-eight states were parties to the Treaty of Versailles. Again, referring to the Suez and Panama Canals, it describes them as "illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world, such waterway is assimilated to natural straits" (for the purpose of the passage of belligerent men-of-war).

(ii) Treaties creating or declaring ordinary International Law, or pure law-making treaties. These treaties are now frequently referred to as "legislation", a term which requires some preliminary justification. The society of states has no legislative organ in the strict sense of the term, and the term "international legislation" which is becoming common, though dangerous as tending to obscure the principle of unanimity unless the person using it makes his meaning clear, nevertheless deserves to be retained. Oppenheim justified it on the grounds that "legislation is really nothing more than the conscious creation of law in contrast to the growth of law out of custom", and that conventional international law shares with the internal legislation of a state the characteristic "that in both law is made in a direct, conscious, and purposive manner, in contrast to law that originates in custom".

These treaties, like the first class discussed above, are also multilateral. Some of them have much in common with a group we shall treat separately later, namely treaties which resemble charters of incorporation by bringing into existence a new International Union. For the present we are concerned with treaties creating rules of law which may be called ordinary or private law not concerned with the constitutional relations of the members of the society of states. They are steadily increasing in number.

(a) In the first place we may mention those which, like the Declaration of Paris and most of The Hague Conventions of 1899 and 1907, contain rules governing the conduct of war. One of the latest is the Protocol of 1925 for the Prohibition of the Use in War of Asphyxiating, Poisonous, or other Gases, and of Bacteriological Methods of Warfare, which has received at least fifteen ratifications. (b) Secondly, we may point to the numerous Labour Conventions which have been negotiated by the International Labour Organization and are now in force between the states which have adopted them. They seem to me to be typical Vereinbarungen, their object being to secure identical rules upon the topics regulated by them in the different countries which adopt them. I think we may safely say that they are not abrogated by the outbreak of war between some or all of the parties bound by them, and the fact that some of them contain express power for a Government to suspend the operation of their provisions in the event of war.

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1 For instance, see Hudson in American Journal of International Law, Vol. XXII (1928), at p. 339.

2 Die Zukunft des Völkerrechts (1911), (translated by J. P. Bate and published by the Carnegie Endowment for International Peace in 1921), § 80.
or other emergency endangering the national safety\(^1\) points to this conclusion. They are in fact permanent law-making treaties, subject to a right of denunciation after the expiration of ten or five years (as the case may be) from the date of coming into force, and subject to a clause which ensures that at least once every ten years the General Conference of the International Labour Organization shall have the opportunity of considering the question of revision or modification. (c) Thirdly, we may point to a group of recent Conventions relating to transit and communications, e.g. the Conventions on Freedom of Transit (1921), Régime of Navigable Waterways of International Concern (1921), International Régime of Maritime Ports (1923), Development of Hydraulic Power affecting more than one State (1923), and extract from them an instructive article, the second half of which seems to declare not only the intentions of the parties but what we should expect to happen even if no such article appeared:

"This statute does not prescribe the rights and duties of belligerents and neutrals in time of war. The statute shall, however, continue in force in time of war so far as such rights and duties permit."

The common characteristics of all these groups may be said to be that they are multilateral, they make rules of pure law, and they are intended to be permanent (subject in certain cases to a stipulated right of denunciation). They are centuries and miles removed from the treaty of peace or of alliance or the treaty of commerce bargaining for reciprocal but different advantages.\(^2\)

4. TREATIES AKIN TO CHARTERS OF INCORPORATION

In response to needs resulting from increased international contact the last half century has seen the creation by treaty of a number of permanent international organizations for a variety of non-political purposes. These bodies are called Unions or Commissions or Institutes or by some other term, and we may conveniently describe them as Unions.\(^3\) We are not concerned now

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\(^1\) Eight Hours Convention, Article 14 ("war or other emergency"), Night Work of Young Persons in Industry Convention, Article 7 ("serious emergency").

\(^2\) Is any significance to be attached to the word "statute" to describe the system or régime set up by a Convention and used in those above mentioned, in the Protocol establishing the Permanent Court, and elsewhere? I incline to think it indicates an intention to create something permanent, be it rules of law or an international organization; it is legislative rather than contractual.

with the precise juristic character of these bodies or with the question whether any of them have attained international personality. It suffices for us that the treaties establishing them have the quality of creating more than mere contractual relationships between the parties and more than mere legislative rules binding upon the parties. They create something organic and permanent and they seem therefore to demand recognition as falling into a special category of treaty, though in fact they form a species of the law-making treaty. We may mention as types the Universal Postal Union, founded in 1874, of which at least 83 states, dominions, and colonies are members, the International Union for Protection of Industrial Property, founded in 1883, which has at least 32 members, and the Copyright Union, founded in 1886, which has at least 29 members. A score or more could be mentioned.

Unions of this character have two characteristics which are noteworthy for our present purpose:

(i) The evidence of facts and the balance of opinion are, I venture to think, in favour of the view that they are not dissolved by a war in which a very large part of their members may be involved, though of course war involves a suspension of intercourse amongst the belligerents and the Union. The fact that prudent draftsmen of treaties of peace take care to stipulate (e.g. Treaty of Versailles, 1919, Articles 283, 286) that the conventions establishing such Unions shall again be applied or "come into effect" does not to my mind militate against this view.

(ii) A second consideration of interest to us is that the constitution of some of these Unions contains machinery which avoids "as a matter of practical administration" the necessity of the unanimity of the signatories in many of their operations. Therein again these Unions remind us of the corporations of private law, which, within the limits of the charter or statute which creates


1 See Ladas, The International Protection of Industrial Property (1929), p. 727; Reinsch, Public International Unions (1916), pp. 173-5. For instance, the Supreme Court of Hamburg decided in the case of Ricordi v. Benjamin that a Copyright Convention of June 1884, to which only Germany and Italy were parties, was abrogated by the outbreak of war between them, but that the Berne Copyright Convention of September 9, 1886, establishing the Copyright Union, of which many neutral states were members, was not abrogated as between Germany and Italy.

2 See Sayre, Experiments in International Administration (1919), pp. 25, 30, 31. See also the case of the International Commission for Air Navigation created by the Convention of 1919 for the Regulation of Aerial Navigation, Art. 34.
them, may perform most of their functions by the vote of a majority of their members.

CONCLUSION

There is good reason to think that in the near future many more disputes arising upon treaties will be referred to the decision of international tribunals than has been the case in the past. My submission is that the task of deciding these disputes will be made easier if we free ourselves from the traditional notion that the instrument known as the treaty is governed by a single set of rules, however inadequate, and set ourselves to study the greatly differing legal character of the several kinds of treaties and to frame rules appropriate to the character of each kind. The few pieces of evidence which I have brought together seem to me to justify this submission.