THE EFFECT OF MEASURES SHORT OF WAR ON TREATIES*

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ON JANUARY 3, 1961, President Eisenhower instructed his Secretary of State to deliver a note to the Chargé d'Affaires ad interim of Cuba in Washington, which stated that the Government of the United States hereby formally terminated diplomatic and consular relations with the Government of Cuba.¹ The next day White House Press Secretary Hagerty stated in a release that: "The termination of our diplomatic and consular relations with Cuba has no effect on the status of our naval station at Guantanamo. The treaty rights under which we maintain the naval station may not be abrogated without the consent of the United States."²

The concern demonstrated by the Government of the United States over the effect that a severance of diplomatic relations could have on its treaty rights vividly illustrates one of the uncertainties of public international law in a period when hostilities rarely take the form of traditional warfare. The course of the Cold War may cast doubt on the validity of some international agreements in such a way as to provide either the grounds, or the excuse, for the outbreak of full-scale hostilities. However, the adoption of the Charter of the United Nations and the evolution of a "new international law" can play a role in clarifying the effect of modern hostilities on treaties in the absence of a state of war.

For many years resort to force has tended to fall short of that state technically recognized as war.³ To some extent this is true because of more recent

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¹ See 44 DEP'T. STATE BULL. 103 (1961).

² *Ibid.*

³ See generally HINDMARSH, *FORCE IN PEACE* (1933); WRIGHT, *LEGAL PROBLEMS IN THE FAR EASTERN CONFLICT* 92 (1941), where it is noted that: "During the twentieth century most states accepted legal obligations not to resort to war, or, in some cases, not to use armed force for the solution of international controversies. As a consequence, states, while continuing to resort to the use of armed force, have been reluctant to acknowledge that they are resorting to war."

efforts in the international community to outlaw war as an acceptable means of implementing national policy.⁴ This is reflected in the evolution of a terminology based on perpetuation of a continued state of peace.⁵ It must be realized, however, that while the terminology applicable to the resort to force has changed, the intensity of coercive forces being employed in the international community may not have diminished at all. Nevertheless, in view of the present movement away from a war-peace dichotomy, it is necessary to examine the effects of a resort to force in time of technical peace upon a variety of legal relationships.⁶ This article attempts to analyze the effects of the use of measures short of war upon treaty obligations between nations.

I. THE NATURE OF THE PROBLEM

Over many years international law developed clear concepts of the legal effects produced upon the outbreak and termination of war. Originally it was thought that the outbreak of war ipso facto abrogated all treaty obligations between opposing belligerents, with only a few clearly defined exceptions.⁷ The rationale for this doctrine apparently was the belief that the existence of a state of war between two or more states was logically incompatible with the

⁴ While the restrictions and prohibitions imposed by the Covenant of the League of Nations were limited to resort to war, they left open the question of resort to force short of war. 2 OPPENHEIM, *INTERNATIONAL LAW* 152 (7th ed. Lauterpacht 1952) (hereinafter cited as OPPENHEIM); HINDMARSH, *op. cit. supra* note 3, at 111-44; McNair, *The Legal Meaning of War, and the Relation of War to Reprisals*, 11 *TRANSACTIONS OF THE SOCIETY OF GROTTOLOGISTS* 39, 40-46 (1927). The Charter of the United Nations clearly proscribes recourse to force short of war:

"Article 2(3). All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

"Article 2(4). All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

Significantly, the Charter applies this duty to refrain from the use of force to States not Members of the Organization (art. 2, ¶ 6).

⁵ GROB, *THE RELATIVITY OF WAR AND PEACE* 189 (1949); HINDMARSH, *op. cit. supra* note 3, at 90-91. For an examination of the controversy concerning determination of the point in time when a legal state of war may be said to exist, see McDougal & Feliciano, *The Initiation of Coercion: A Multi-Temporal Analysis*, 52 *AM. J. INT'L L.* 241 (1958).

⁶ See JESSUP, *A MODERN LAW OF NATIONS* 152 (1948): "In a well-organized world system operating under a modernized law of nations, war in its old sense will no longer escape legal regulation, and the consequences of war upon treaties as well as upon other legal relationships would stand in need of redefinition." HINDMARSH, *op. cit. supra* note 3, at 92, notes: "Since warlike acts do not, under prevailing international law, necessarily produce a state of war, it is important to examine the criteria by which the use of force in time of peace has been differentiated from war." See also, WRIGHT, *op. cit. supra* note 3, at 92.

⁷ McNair, *THE LAW OF TREATIES, BRITISH PRACTICE AND OPINION* 530-52 (1938); 2 HYDE, *INTERNATIONAL LAW, CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* § 547 (1945) (hereinafter cited as HYDE); 2 VATTTEL, *LE DROIT DES GENS*, bk. II, ch. XII, §§ 153, 192 (1916 ed.); 3 PHILLIMORE, *INTERNATIONAL LAW* 794 (3rd ed. 1882); Harvard Research in International Law, *Draft Convention on the Law of Treaties with Comment*, 29 *AM. J. INT'L L.* 1184 (Supp. 1935) (hereinafter cited as Harvard Research); Comment, *Effect of War on Bilateral Treaties: A Comparative Study*, 51 *MICH. L. REV.* 566 (1953); 5 MOORE, *DIGEST OF INTERNATIONAL LAW* § 779 (1906).

maintenance of their treaties.⁸ Over the years the exceptions to the doctrine have expanded to the point where it may be said that the outbreak of war does not necessarily terminate treaty obligations.⁹ This development resulted from the increased interdependence and interrelationship of states, which would be continually upset by a concept of automatic abrogation, and from the realization by decision-makers that there is no necessary incompatibility between the existence of a state of war and the suspension or even the performance of certain types of obligations.¹⁰

Some writers have assumed that resort to force short of war has little, if any, effect upon treaty obligations,¹¹ and that this phenomenon constitutes one of the advantages of the use of such measures. There is room for re-appraisal of this assumption.

For present purposes the phrase "measures short of war" includes that category of international processes whereby states, in order to settle their international differences, use varying degrees of coercion, ranging from withdrawal of diplomatic relations, retortion or retaliation, and the display of force, to war-like acts such as reprisals, blockades, embargoes, suspensions of commercial intercourse and, finally, the extensive use of armed forces without formal declaration of war.¹²

⁸ Harvard Research 1185. Comment, *supra* note 7, at 566. The absence of any causal connection between the two events is suggested in 2 HYDE 1547.

⁹ See MCINTYRE, *THE LEGAL EFFECT OF WORLD WAR II ON TREATIES OF THE UNITED STATES* 340 (1958) (hereinafter cited as MCINTYRE), where it is concluded that: "There is no instance in which the evidence is conclusive that the United States regarded any treaty as terminated by World War II." See MCNAIR, *THE LAW OF TREATIES* 530-32 (1938); Hurst, *The Effect of War on Treaties*, 2 BRIT. YB. INT'L L. 38 (1921-22); 2 OPPENHEIM 302; 2 HYDE 1546-47; TOBIN, *THE TERMINATION OF MULTIPARTITE TREATIES* 22 (1933); Harvard Research 1185; BRIGGS, *THE LAW OF NATIONS* 942 (2d ed. 1952).

¹⁰ Harvard Research 1185-86. Judge Cardozo, in applying his principle "that provisions compatible with a state of hostilities, unless expressly terminated, will be enforced, and those incompatible rejected," looked to three factors in order to determine compatibility: (1) the policy of the government; (2) the safety of the nation; and (3) the maintenance of the war. *Techt v. Hughes*, 229 N.Y. 222, 241, 128 N.E. 185, 191, *cert. denied*, 254 U.S. 643 (1920).

¹¹ HINDMARSH, *op. cit. supra* note 3, at 96: "The occurrence of warlike acts in time of peace is paradoxical and leads to contrary situations. Execution of such measures is governed by restraining rules of war so far as those rules are deemed applicable by the enforcing state. In practice persons have not been detained and private property has rarely been confiscated. Diplomatic relations between the disputant states usually continue; treaties remain in force, and trade, commerce, and communication between the disputant states are allowed to continue." *Id.* at 87-88: "It was stated that reprisals, being limited in scope, were less likely than war seriously to affect international relations . . . Again, resort to reprisals does not terminate existing treaties, does not affect private interests beyond the scene of operations, and raises no questions of neutral rights and duties."

¹² Various descriptive tags have been applied to these processes by writers, with only minor differences as to subjects which are included and excluded. Professor Hyde uses the phrase "non-amicable modes of redress," and includes withdrawal of diplomatic relations and suspension of commercial intercourse. 2 HYDE, §§ 586-595A. See also 6 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 151 (1943). Sir Hersch Lauterpacht excluded these subjects

The question is the extent to which the rules governing the effect of war apply to measures short of war. In seeking an answer, it will be necessary to examine those situations where in the past some concern has been manifested by the authorities of the states involved, through diplomatic correspondence, executive acts, legislative debates or court decisions. In addition, it may prove useful, as giving rise to a negative inference, to note those situations where hostilities took place, but no concern over possible effects on treaties was shown and performance of obligations continued unaffected.

In general, the effect of international incidents upon treaties may be said to be determined by the actions of the executive within a particular government,¹³ with some light being shed by the activities of the legislature. On the whole, the role of the courts in this sphere has been slight.¹⁴ At the same time, it may be noted that the executive branch of a government is reluctant to state its position in legal terms since an unnecessarily definite position may prove embarrassing at a later time under changed conditions.¹⁵

In approaching the problem it will be useful first to examine briefly the attitude of states prior to formation of the League of Nations. Consideration will then be given to the effect of the Covenant, to episodes during the life of the League, and most important for practical reasons, to the situation created by the adoption of the Charter of the United Nations. No attempt will be made to examine all instances of the use of measures short of war.

II. THE PERIOD PRIOR TO THE LEAGUE

For many years international law provided rules for the use of lesser measures of force by a state attempting to secure compliance with the alleged international obligations of a weaker state.¹⁶ The extent to which the measures

by employing the phrase "compulsive settlement of state differences." 2 OPPENHEIM 133; see BRIGGS, *op. cit. supra* note 9, at 947 (hostile measures short of war). An observation of Professor Moore is noteworthy: "In describing these measures as being 'short of war' it is not meant that they do not involve acts of war. What is actually meant is that, if not opposed, they may not result in the legal condition of things called a state of war." Letter to Hon. Hamilton Fish, M.C., N.Y. Times, Feb. 18, 1937, p. 16, quoted in 2 HYDE 1654.

¹³ McIntyre has said that: "the trend of the recent jurisprudence is for the courts to rely upon the determination of the executive in cases involving the effect of war on treaties." McINTYRE 2. The English courts "have consistently from early times adhered to the view that war is a matter peculiarly within the prerogative of the Crown, and that they ought to look to the Crown to give some indication of the existence of war, as indeed it usually does, by proclamation." McNair, *supra* note 4, at 29. See *Techt v. Hughes*, 229 N.Y. 222, 128 N.E. 185 (1920).

¹⁴ As to the effect of war and hostilities in general, it has been observed that, "Court decisions in point are few and usually deal with the question of the effect of the agreement as domestic law, rather than with the question of the status of the agreement under international law." RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 142, comment *a* (Tent. Draft No. 3, 1959).

¹⁵ McINTYRE 2.

¹⁶ See JESSUP, *op. cit. supra* note 6, at 158, 174. *Cf.* U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS, 56, 57, 60-62, 85 (1938).

of that day—reprisal, siege, pacific blockade—affected treaties, was related to the need to take such actions in order to preserve the state itself. Legal form was given to such actions by reference to the concept of “emergency,” which temporarily suspended the obligation of the treaty.¹⁷

The “pacific” blockade of Venezuelan ports in 1902 affords a representative example. As the result of the refusal of the Venezuelan Government to pay reparations for a series of seizures of British ships, injuries to British subjects¹⁸ and unpaid commercial claims to several nations, Great Britain joined Germany and Italy in seizing several Venezuelan warships and shelling two forts,¹⁹ and then, on the failure of these efforts, in the institution of a blockade. More than a year later, agreements were concluded for payment of the claims of the blockading powers, and the blockade was raised.²⁰ Although no declaration of war was made, considerable doubt existed at the time as to whether the entire situation constituted a state of war. Later commentators have also disagreed on the question.²¹ Article VII of the protocol between Great Britain and Venezuela resolved the matter as follows:

The Venezuelan and British Governments agree that, inasmuch as it may be contended that the establishment of a blockade of Venezuelan ports by the British naval forces has ipso facto created a state of war between Venezuela and Great Britain, and that any treaty existing between the two countries has been thereby abrogated, it shall be recorded in an exchange of notes between the undersigned that the Convention between Venezuela and Great Britain of October 29, 1834, which adopted and confirmed *mutatis mutandis* the treaty of April 18, 1825, between Great Britain and the State of Colombia, shall be deemed to be renewed and confirmed or provisionally renewed and confirmed pending conclusion of a new treaty of Amity and Commerce.²²

¹⁷ See, for example, the language used by British legal advisers in referring to this concept on various occasions during the first half of the nineteenth century: Report by the King's Advocate, February 6, 1835 (concerning the right of British vessels to enter certain blockaded Spanish ports), reprinted in MCNAIR, *THE LAW OF TREATIES* 234 (1938); Report by the Queen's Advocate, December 31, 1845 (travel restrictions imposed on British subjects not to return to site of siege), reprinted, *id.* at 237; Report by the Queen's Advocate, January 10, 1863 (search of houses of British subjects in time of siege), reprinted, *id.* at 238–39; Report by the Queen's Advocate, August 29, 1866 (prohibition of exports during famine despite agreements) reprinted, *id.* at 239–40.

¹⁸ For details, see HOGAN, *PACIFIC BLOCKADE* 149–152 (1908); for background correspondence, see *British Parliamentary Papers*, Cd. 1372 (1902), Cd. 1399 (1903).

¹⁹ *Id.* Cd. 1399 (1903), at 167.

²⁰ February 13, 1903. *Id.* at 225–27; HOGAN, *op. cit. supra* note 18, at 155–56.

²¹ 2 HYDE § 592, at 1669; 2 OPPENHEIM 146, n.1; Holland, *War Sub Modo*, 19 L.Q. REV. 133 (1903); HOGAN, *op. cit. supra* note 18, at 156–57; see also MCNAIR, *THE LAW OF TREATIES* 536 (1938).

²² *Brit. Parl. Papers*, Cd. 1399 (1903), at 226–27; RALSTON, *VENEZUELAN ARBITRATION OF 1903*, at 293 (1904).

The ensuing Exchange of Notes,²³ employing language almost identical to that of the protocol, explained that under the circumstances the treaty in question "shall be deemed to be renewed and confirmed."

Apparently Great Britain was concerned that the occurrence of these hostilities, not dignified by the formal status of war, might give Venezuela the opportunity to seize upon the then accepted principle that war abrogates all treaties in order to avoid the obligations of the 1834 commercial agreement.²⁴ Whatever their reasoning, the parties undoubtedly recognized that the blockade might be said to have affected the treaty. The later decision of the Permanent Court of Arbitration on the claims of the blockading powers for preferential treatment in the payment of claims by Venezuela avoided ruling on the legal status of the hostilities, used conflicting terminology in describing their nature, and unfortunately is not helpful in ascertaining what effect, if any, the hostilities had upon prior treaties.²⁵ The treaty of 1834 between Great Britain and Venezuela appears still to be considered in force between the parties.²⁶

III. EFFECT OF MEASURES SHORT OF WAR DURING THE PERIOD OF THE LEAGUE

The actions of a state that initiates hostilities will produce certain results on its relations with the state against which the action is taken and also upon third states. However, with the organization of the world community the problem of the effects on treaties produced by hostile acts acquires a new dimension: The international organization becomes entitled, once it decides the hostilities are of a defined nature, to employ economic and military sanctions, which may affect any number of existing treaty relationships.

A. *Machinery of the League*.—The machinery provided by the Covenant of the League of Nations for the application of organized measures short of war to a Covenant-breaking state was contained in Article 16. This article, and the major design of the entire Covenant, was keyed to the unfortunate²⁷ touchstone of a "resort to war" in the contemporary context of the meaning of that phrase. Although it was expected that a centralized decision by the

²³ Reprinted in McNAIR, *THE LAW OF TREATIES* 537 (1938).

²⁴ In each of the years 1841, 1843, 1879 and 1897, the Government of Venezuela had notified Great Britain that it wished to terminate the Treaty of Amity, Commerce and Navigation, which it had adopted in 1834. McNAIR, *THE LAW OF TREATIES* 366-67 (1938). On each occasion the British Government declined to accept such unilateral termination.

²⁵ In this award, the following characterizations were given to the blockade and hostilities: "military operations," "war," "warlike operations." *Award of the Tribunal of Arbitration Between Germany, Great Britain, and Italy, on the One Hand, and Venezuela on the Other Hand*, Cmd. No. 1949 (1904).

²⁶ LIST OF TREATIES, ETC., RELATING TO COMMERCE AND NAVIGATION BETWEEN GREAT BRITAIN AND FOREIGN POWERS 38 (1927).

²⁷ HINDMARSH, *op. cit. supra* note 3, at 138, 157.

Council of the League would be made to determine the proper application of the article, the Assembly early adopted a resolution stating:

It is the duty of each Member of the League to decide for itself whether a breach of the Covenant has been committed. The fulfilment of their duties under Article 16 is required from Members of the League by the express terms of the Covenant, and they cannot neglect them without breach of their treaty obligations.²⁸

For a variety of reasons the League's machinery for application of the collective economic sanctions under Article 16 against a nation employing armed force was not used on the occurrence of major instances of resort to force short of war, *i.e.*, the Italian bombardment of Corfu in 1923, the Greco-Bulgarian disturbance of 1925, and the Sino-Japanese hostilities of the thirties.²⁹ There was sufficient concern in the League over the legality of using the economic sanctions of Article 16 during a period of technical peace for the Council to request the opinion of its Secretary General. His report concluded that the Covenant contemplated the use of collective economic and military sanctions without requiring a declaration of war or even without being inconsistent with a state of peace.³⁰

In upholding the duty of a League member, once it considers Article 16 to be applicable, to take action against the aggressor and also to "recognize the lawfulness of measures of economic pressure taken . . . by other Members of the League,"³¹ the report noted that:

As regards the possible effect of treaty stipulations between Members of the League, more particularly stipulations of transit conventions and conventions establishing international unions or other methods of international cooperation by which in time of peace a Member of the League is bound to facilitate intercourse between another Member and the aggressor State, it may be pointed out that the clear intention of the Covenant is that its provisions shall not be defeated by those of other treaties (Article 20).³²

²⁸ *Resolutions Regarding the Economic Weapon, Adopted by the Assembly on October 4, 1921*, Annexes I, LEAGUE OF NATIONS OFF. J. (pt. II) 8th Ass. 840 (C.2411/M.116) (1927).

²⁹ In connection with the *Corfu* incident, the League Council questioned a special committee of jurists for an opinion: "The answer given by the Special Committee of jurists to the question of the compatibility of measures short of war with the terms of the Covenant was diffuse and noncommittal. In effect, it made the legality of such measures depend on the particular circumstances of each case and left it to the Council to determine in each case the issue after the fact." HINDMARSH, *op. cit. supra* note 3, at 135.

³⁰ Report by the Secretary General, *Legal Position Arising from the Enforcement in Time of Peace of the Measures of Economic Pressure Indicated in Article 16 of the Covenant, Particularly by a Maritime Blockade*, LEAGUE OF NATIONS OFF. J., (pt. II) 8th Ass. 834 (C. 2411/M.116) (1927).

³¹ "The conclusion is that strict application of the economic sanctions of the article without resort to war is possible without violating legal rights of the Members applying the sanctions or (probably) of Members which do not consider the Covenant to have been broken." *Id.* at 836.

³² *Ibid.*

Article 20, referred to as authority for the subordination of pre-existing treaties to obligations under the Covenant, reads as follows:

1. The Members of the League severally agree that this Covenant is accepted as abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof, and solemnly undertake that they will not hereafter enter into any engagements inconsistent with the terms thereof.

2. In case any Member of the League shall, before becoming a Member of the League, have undertaken any obligation inconsistent with the terms of this Covenant, it shall be the duty of such Member to take immediate steps to procure its release from such obligations.³³

The use of the term "abrogate" is significant. It may be inferred from its use, and the citation of Article 20 in connection with the invocation of the sanctions of Article 16, that as each member state considers the *casus foederis* to have arisen, those treaties between it and the aggressor state, and those between any other member and the aggressor, which are inconsistent with enforcement of the sanctions are ipso facto terminated. Particular attention was called to transit conventions or other treaties which could be relied upon to aid the movement of troops and supplies to the aggressor.

The major practical difficulty in applying these prescriptions was the determination of which obligations were *inconsistent* with sanctions under Article 16. Once the formula of leaving such matters to the decision of individual members was employed, the effectiveness of the entire scheme was weakened. One may speculate that the choice of the abrogation formula by the architects of the Covenant was influenced by the prevalence at that time of the older doctrine that war—and the machinery of the League was keyed to the concept of war—abrogated most treaties.

As to states not members of the League, and bound only by the ordinary rules of international law, the report expressed doubt whether these were under a legal obligation to acquiesce in the implementation of the sanctions under Article 16, but hoped that they would take a "benevolent attitude" toward the policy of members, and suggested they would be incurring a great moral responsibility if they frustrated such efforts.³⁴ The non-membership of such powerful states as the United States and Soviet Russia in the League may have been a factor in this extremely cautious approach.³⁵

B. *State-Initiated Measures Short of War Under the League*.—During the period of the League, several major instances of armed hostilities occurred; however, only two—the Italo-Ethopian and the Sino-Japanese "wars"—will be examined here. To varying degrees the League attempted to deal with, or

³³ Comparable to U.N. CHARTER art. 103.

³⁴ Report by the Secretary-General, *supra* note 30, at 837.

³⁵ For definition of "third States" see *ibid.*

ignored, these outbreaks. Finally, the approach of World War II came at a time when the League was, for most practical purposes, defunct.

1. *Italy v. Ethiopia*.—Between 1900 and 1908, Italy and Ethiopia had concluded various treaties defining the frontiers between Ethiopia and the Italian colonies as well as the status of Italian nationals and protected persons in Ethiopia.³⁶ Further, Italy had entered into numerous treaties with Britain and France demarking respective spheres of influence in Ethiopia.³⁷ Ethiopia was unanimously admitted to the League in 1923 with Italy's support. In 1928, Italy and Ethiopia signed a treaty designed to maintain peace and friendship between the two countries and providing for arbitration of any disputes; and in 1930, Britain and France joined with them in a treaty for the regulation of arms importation into Ethiopia.³⁸

In October of 1935, military hostilities broke out between Italy and Ethiopia. A committee of the League Council found that "the Italian Government has resorted to war in disregard of its covenants under Article 12 of the Covenant of the League of Nations,"³⁹ and upon the invocation by Ethiopia of Article 16, a Co-ordination Committee was formed to direct the imposition of economic sanctions against Italy.⁴⁰ This Committee instituted a complex of sanctions against Italy to be carried out by League members, among which were (1) an arms embargo, (2) a credit embargo, (3) an import boycott and (4) an export embargo on certain key products.⁴¹ The Committee further recommended that co-operating members increase their imports in favor of countries which suffered by loss of Italian markets and that they assist generally in organization of the international marketing of goods with a view to offsetting any loss of Italian markets that the application of sanctions may have involved.⁴²

³⁶ Treaty of July 10, 1900, TRATTATI E CONVENZIONE FRA IL REGNO D'ITALIA E GLI ALTRE STATI, V. 16, p. 184 (1899-1902); Anglo-Ethiopian Treaty of May 15, 1902, Cmd No. 1370 (1902 CXXX 397); Convention of May 6, 1908, TRATTATI E. CONVENZIONE FRA IL REGNO D'ITALIA E. GLI ALTRE STATI, V. 20-21, p. 32 (1908-11); Franco-Ethiopian Treaty of January 10, 1908 (Klobukowski Treaty). See *Official Documents*, 30-31 SUPP. AM. J. INT'L L. 17 (1936-37).

³⁷ Italo-British Protocols of March 24, 1891, April 15, 1891, Cmd. No. 5924 (1890-91 LXXXI, 749); Italo-Franco-British Agreement, December 13, 1906, Cmd. No. 3299 (1907 XCIX 309); Italo-British Exchange of Notes, December 1925, Cmd. No. 2472 (1924-25 XXX 643); Franco-Italian Agreement of January 7, 1935. See *Official Documents*, *supra* note 41, at 17-18.

³⁸ See *Official Documents*, *supra* note 41, at 21-22.

³⁹ Declaration of Nine Power Conference, LEAGUE OF NATIONS DOC. A. 78. VII, 7-9 (1935).

⁴⁰ The Council Report stated, "it is not necessary that war should have been formally declared for Article 16 to be applicable." On October 5, 1935, the President of the United States had recognized war as existing for the purpose of applying the Neutrality Act of August 31, 1935. 2 OPPENHEIM 152.

⁴¹ *Official Documents*, *supra* note 41, at 42-46.

⁴² *Id.* at 47.

A legal subcommittee submitted a report on the application of sanctions to private contracts, commercial treaties, treaties of friendship and non-aggression, and the most-favored-nation clause. The report contained certain significant conclusions: (1) an action brought by an Italian on a contract with a national of a sanction-participating state for non-performance would fail in the courts of that state; and if brought in an Italian court, any judgment could not be executed in the defendant's country since to do so would override the effect of Article 16; (2) the non-performance of a commercial treaty with Italy would give Italy no legal rights; however, Italy would not have the right to withhold performance of her obligations under a treaty or to annul or suspend the performance of contracts in process since the Covenant—by virtue of which the sanctions were taken—bound both Italy and League members; (3) the application of economic and financial sanctions against Italy by a party to a treaty of friendship and non-aggression which provides against participation in any international *entente* preventing purchase or sales of goods or granting of credits would not violate such a treaty since the contracting parties were members of the League and their agreements were subject to Articles 16 and 20 of the Covenant; (4) similarly, the most-favored-nation clause was interpreted so as not to deprive co-operating states of benefits they would receive had sanctions not been imposed against Italy.⁴³ As to the conflicting obligations created by transit or communications conventions previously concluded with states not members of the League, the subcommittee reasoned that "the League is entitled to hold that no individual member can release itself from the obligations which result from Article 16 of the Covenant by invoking obligations assumed towards a country not belonging to the League."⁴⁴ The sanction-participating states further agreed to consider those agreements under which Italy owed debts payable to them as valid and only temporarily suspended.⁴⁵

2. *Japan v. China*.—The Sino-Japanese hostilities of the thirties took place against a background of multilateral political alliances which were designed to preserve a political status quo and prevent the very occurrences which transpired. For their own reasons the opposing belligerents refused to admit the existence of a state of war at the time,⁴⁶ and they maintained many outward manifestations of peaceful status.

⁴³ *Id.* at 48–49.

⁴⁴ *Id.* at 51.

⁴⁵ *Id.* at 54. As a result of the sanctions imposed under Article 16, Italy announced that she did not consider herself bound by a number of the agreements she had entered into prior to the Ethiopian affair. Compare *Letter from Italian Government to Secretary-General of the League Council*, LEAGUE OF NATIONS OFF. J. (pt. II) 16th Ass. 1627 (C. 418/M. 212) (1935), with LEAGUE OF NATIONS OFF. J. (pt. II) 16th Ass. 1137 (1935). During the course of League consideration of the Italo-Ethiopian situation, the Italian representative, Baron Aloisi, often relied on the treaties between Italy and Ethiopia, and third powers, to justify Italy's actions. *Id.* at 34; Wright, *The Test of Aggression in the Italo-Ethiopian War*, 30 AM. J. INT'L L. 45, 53 (1936).

⁴⁶ HINDMARSH, *op. cit. supra* note 5, at 129.

The Nine Power Treaty,⁴⁷ to which both Japan and China were signatories, was one of the series of political alliances resulting from the Washington Conference of 1921. The contracting parties agreed to respect "the sovereignty, the independence, and the territorial and administrative integrity of China." In 1931 Japan occupied Manchuria as part of her national policy of bringing about a "new order" in Asia.

The United States early in 1932 indicated to the Japanese and Chinese Governments that it considered the Nine Power Treaty in full force and effect.⁴⁸ Secretary of State Stimson asserted that:

[I]t is clear beyond peradventure that a situation has developed which cannot, under any circumstances, be reconciled with the obligations of the covenants of these two treaties; and that if the treaties had been faithfully observed such a situation could not have arisen. The signatories of the Nine Power Treaty and of the Kellogg-Briand Pact who are not parties to that conflict are not likely to see any reasons for modifying the terms of those treaties.⁴⁹

The Japanese Government did not deny the continued validity of the treaty, but argued that its action in China was a measure of self-defense.⁵⁰ It considered the treaty outmoded, but not abrogated.⁵¹ The other signatories appeared to agree that the treaty was in force but asserted that Japan was not living up to her obligations under it.⁵²

These events are significant when placed in the context of a political rather than a commercial treaty in which the effect of hostilities is not necessarily incompatible with performance of the obligations imposed. It has been observed that the commercial treaties concluded among the powers with interests in the Far East were not affected by the Japanese aggressions.⁵³ Placed in context, the use of coercion by Japan represented an attempt to modify the status quo in the Far East in order to secure for itself a larger share of power.⁵⁴ The very actions proscribed by the Nine Power Treaty were the actions which

⁴⁷ 44 Stat. 2113 (signed Feb. 5, 1922, effective Aug. 5, 1925).

⁴⁸ I FOREIGN RELATIONS OF UNITED STATES, JAPAN: 1931-1941, pp. 76, 83-87 (1943) (hereinafter cited as FOR. REL., JAPAN).

⁴⁹ Letter from Secretary of State Stimson to Senator Borah, Chairman of the Sen. Comm. on Foreign Relations, Feb. 23, 1932, *id.* at 85, 376.

⁵⁰ I FOR. REL., JAPAN 400, 411; McINTYRE 58; II FOR. REL., JAPAN 764.

⁵¹ I FOR. REL., JAPAN 400, 410; II FOR. REL., JAPAN 754.

⁵² McINTYRE 58; Declaration Adopted by Nine Power Conference at Brussels, Nov. 15, 1937, 17 Dept. of State Press Releases No. 425, Nov. 20, 1937. For similar statements by League committees, see I FOR. REL., JAPAN 394, 399.

⁵³ WRIGHT, LEGAL PROBLEMS IN THE FAR EASTERN CONFLICT 112 (1941).

⁵⁴ McDougal & Feliciano, *The Initiation of Coercion: A Multi-Temporal Analysis*, 52 Am. J. INT'L L. 241, 248-49 (1958).

Japan undertook; hence there exists no reasonable ground for asserting that this political alliance was suspended temporarily; similarly, a claim that the treaty was abrogated by the hostilities would of necessity be a unilateral determination opposed by the remaining signatories.

In the context of a power struggle a state may advance varying, and sometimes conflicting, legal justifications for political and military actions it is determined to take for various unrelated internal economic or political reasons. The actions of Japan with respect to the Nine Power Treaty may be so characterized. While officially taking various legal positions—*i.e.*, that the treaty was outmoded, inapplicable to a purely Sino-Japanese matter, and had been violated by its opposing belligerent—her representatives in informal diplomatic discussion admitted that promises under the treaty had been broken. They maintained that the aggressive actions of the government were compelled by the demands of certain internal political factions.⁵⁵

The officials of other States, however, recognized that Japan had ignored the treaty⁵⁶ and gave their understanding of the legal situation as one “where one party to an international treaty maintains against the views of all the other parties that the action which it has taken does not come within the scope of that treaty, and sets aside provisions of the treaty which the other parties hold to be operative in the circumstances.”⁵⁷ In 1937, the League of Nations indicated that Japan had violated the Nine Power Treaty and could not justify her actions on legal grounds,⁵⁸ but failed to employ enforcement measures against her.

It may be concluded that when a state ignores the obligations of a multi-lateral political alliance by employing force, the treaty may be said technically to have remained in effect as to the remaining parties, but since its purpose was preservation of a political status quo, such a conclusion would appear to be of small comfort to anyone.⁵⁹

3. *The Effect of the Approach of War: 1939–1941.*—The outbreak of war in Europe in 1939 presented many legal problems to the United States since, on the one hand, its long-established attitude of isolation from European political affairs had resulted in an elaborate complex of internal neutrality

⁵⁵ I FOR. REL., JAPAN 88.

⁵⁶ II *id.* at 55.

⁵⁷ Declaration Adopted by Nine Power Conference, *supra* note 39.

⁵⁸ LEAGUE OF NATIONS OFF. J., 18th Ass., Spec. Supp. No. 117, at 42 (1937); I FOR. REL., JAPAN 394; WRIGHT, *op. cit. supra* note 53, at 107.

⁵⁹ The question of revival of the ignored obligation is not relevant to a treaty of political alliance designed to preserve a status quo. It has been pointed out that treaties providing for membership in international unions were, however, not affected by the conflict. WRIGHT, *op. cit. supra* note 53, at 107–08. As to the binding nature of the Pact of Paris during the course of the Far Eastern conflict, see *id.* at 98–100.

legislation,⁶⁰ and, on the other hand, the Roosevelt Administration had slowly adopted a policy of supplying considerable aid to the allies short of entering the war.⁶¹ During the years 1939–1941, this policy brought about many controversial interpretations of internal legislation in order to implement a policy of partisan neutrality.⁶²

The increasingly intense hostile actions of the Axis Powers caused the United States to seek avoidance of international obligations that restricted its policy of aid to the belligerents with whom its sympathies lay. The Administration desired to escape the tonnage limitations on vessels, particularly oil tankers, imposed by the International Load Lines Convention.⁶³ The then Acting Attorney General of the United States relied upon the absence of normal peacetime relations, which he asserted were a basic condition on which the convention was founded, to advise President Franklin Roosevelt that the treaty could be suspended by the United States even though, as to it, a state of war did not exist.⁶⁴ His opinion stated:

In short, the implicit assumption of normal peacetime international trade, which is at the foundation of the Load Line Convention, no longer exists. . . . The fundamental character of the change in conditions underlying the treaty, however, leaves the Government of the United States entirely free to declare the treaty inoperative or to suspend it for the duration of the present emergency.⁶⁵

The technical rule of international law cited as a justification for the action was the doctrine of *rebus sic stantibus*,⁶⁶ since the traditional rule of treaty abrogation on the occurrence of war was not factually available. Interestingly, the opinion gave the President a choice: suspension or termination. It is questionable whether *rebus sic stantibus* can logically produce a result other than

⁶⁰ DEENER, THE UNITED STATES ATTORNEYS GENERAL AND INTERNATIONAL LAW 358–62 (1957); PADELFORD, INTERNATIONAL LAW AND DIPLOMACY IN THE SPANISH STRIFE (1939); Jessup, *The Neutrality Act of 1939*, 34 AM. J. INT'L L. 95 (1940).

⁶¹ DEENER, *op. cit. supra* note 60, at 360; BURNS, ROOSEVELT: THE LION AND THE FOX (1956); 2 THE MEMOIRS OF CORDELL HULL 1046 (1948).

⁶² 39 OPS. ATT'Y GEN. 484 (1940) (destroyers-for-bases exchange with Great Britain); 39 OPS. ATT'Y GEN. 402 (1939); 39 OPS. ATT'Y GEN. 539 (1940); 40 OPS. ATT'Y GEN. 135 (1941); 40 OPS. ATT'Y GEN. 130 (1941); 39 OPS. ATT'Y GEN. 337 (1939); 40 OPS. ATT'Y GEN. 58 (1941).

⁶³ 47 Stat. 2228 (1933); BENDINER, THE RIDDLE OF THE STATE DEPARTMENT 190 (1942); DEENER, *op. cit. supra* note 60, at 142.

⁶⁴ 40 OPS. ATT'Y GEN. 119 (1941).

⁶⁵ *Id.* at 121, 123.

⁶⁶ For criticism of the use of this doctrine under the circumstances, see Briggs, *The Attorney General Invokes Rebus Sic Stantibus*, 36 AM. J. INT'L L. 89 (1942). It has been noted that the Legal Adviser of the State Department objected to the unilateral nature of this suspension of a treaty. DEENER, *op. cit. supra* note 60, at 142, 360. However, the President did secure the agreement of the American states which were parties to the Convention. 5 DEP'T STATE BULL. 114 (1941).

complete termination. The President chose to proclaim the suspension of the convention⁶⁷ for the duration of the emergency,⁶⁸ and upon cessation of hostilities announced that it was once more binding upon the United States.⁶⁹

IV. THE SITUATION UNDER THE CHARTER OF THE UNITED NATIONS

In the major armed conflicts that have taken place since World War II formal declarations of war have not been issued. The prospects are that this tendency will continue. The Charter of the United Nations is not dependent on a finding of a "resort to war" by a state in order to activate its peace-protecting machinery. To a large extent the doctrine of legal, or justifiable, war has been outlawed in the international community.⁷⁰ The Charter directs itself to "threats to the peace, breaches of the peace, and acts of aggression."⁷¹ In a sense, past concern over the effect of war on treaties may be said to be obsolete. Of course, many of the concepts employed in that inquiry are directly analogous and, provisionally at least, authoritative as to the conse-

⁶⁷ 6 Fed. Reg. 3999.

⁶⁸ MCINTYRE, *LEGAL EFFECT OF WORLD WAR II ON TREATIES OF THE UNITED STATES* 26 (1958) [hereinafter cited as MCINTYRE].

⁶⁹ 10 Fed. Reg. 15365. Although not a member of the League of Nations, the United States appeared to recognize the obligations of collective resistance to actions deemed aggressive in nature by refusing to allow older concepts of neutrality to prevent assistance to peaceful states. This attitude was clearly expressed by Attorney General Jackson, who stated: "Present aggressive wars are civil wars against the international community. Accordingly, as responsible members of the community, we can treat victims of aggression in the same way we treat legitimate governments when there is civil strife and a state of insurgency—this is to say, we are permitted to give to defending governments all the aid we choose." Address delivered to Inter-American Bar Association, Havana, 1941, reprinted in 35 AM. J. INT'L L. 348, 353 (1941).

⁷⁰ Clearly the dichotomy between the legal states of war and peace still remains all-important for many non-international purposes. The determination of whether a state of war exists is made by many different parties for a variety of different purposes and in order to achieve separate goals. McDougal & Feliciano, *supra* note 54, at 241. An example of a commentator who fails to differentiate between the different purposes for which the decision is made is found in Pye, *The Legal Status of the Korean Hostilities*, 45 GEO. L.J. 45 (1956), wherein the author concludes on the basis of internal military tribunal decisions and cases interpreting life insurance policies and statutes of limitations, that the Korean hostilities "did in fact constitute a state of war. . . ." *Id.* at 59. He takes issue with Professor Hersch Lauterpacht, who wrote: "Although hostilities waged for the collective enforcement of International Law—in particular, of the Charter of the United Nations—are calculated to exhibit the normal characteristics and manifestations of war, it is probably inaccurate and undesirable to describe them as war in the accepted sense of the word. Thus when in 1950 the forces of the United Nations were engaged, in pursuance of a decision of the Security Council, in repelling the invasion of South Korea by North Korea, there was no disposition on the part of either of the United Nations as a whole or of the participating States to treat as war in the formal sense of the word what Chapter VII of the Charter describes as enforcement action." 2 OPPENHEIM 224. It is believed that Professor Lauterpacht's description of what takes place under an application of Chapter VII cannot be refuted by a single-purpose characterization of these same events based on domestic laws, domestic court decisions, and for the purpose of domestic legal certainty.

⁷¹ U.N. CHARTER ch. VIII.

quences which may be expected from the outbreak of major hostilities no longer termed war.⁷² Particularly significant is the manner in which the organized international community contemplates dealing with the outbreak of hostilities it considers a threat to, or breach of, the peace, or an act of aggression.⁷³

A. *Enforcement Measures Initiated by the Organization.*—The Charter of the United Nations, as originally conceived, placed the responsibility for maintenance of the peace on the Security Council. Hence, most discussions on this subject at the San Francisco Conference centered on actions that might be taken by the Security Council. Under Article 41:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Under Article 42 where the Council concludes that measures not involving force will not prove, or have not proven, effective,

it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

The question then arises as to what effect the initiation of such unarmed and armed coercion will have upon existing treaties that impose duties incompatible with the measures taken, and also on treaties that in no manner interfere with the United Nations action.

1. *Article 103: The San Francisco Conference.*—Among the amendments to the Dumbarton Oaks proposals submitted by other participating governments at the San Francisco Conference, Norway proposed as an addition to the section which eventually became Article 41 of the Charter, the following paragraph:

In the relations between members of the organization this obligation [the taking of diplomatic, economic, or other measures not involving the use of armed force necessary to give effect to a Security Council decision] takes precedence over the execution of stipulations contained in commercial or other treaties; and in their relations with States not members of the Organization, member States should in the manner provided for in such treaties take steps to regain the necessary freedom of action.⁷⁴

⁷² WRIGHT, *op. cit. supra* note 53, at 92; McDougal & Feliciano, *supra* note 54, at 241.

⁷³ See Eagleton, *The Attempt to Define Aggression*, INT'L CONCILIATION, No. 264 (1930); WRIGHT, HAGUE ACADEMY LECTURES (1959) (definition of aggression).

⁷⁴ U.N. Doc. No. 289, III/3/11, 12 U.N. CONF. INT'L ORG. DOCS. 607 (1945).

The reason advanced by Norway for this addition was that:

The rules of International Law continue to bind States in so far as the Charter does not derogate from them. An express stipulation seems necessary even if a clause is inserted in the Charter to the effect that all treaties or treaty clauses incompatible with its terms are annulled as between the members.⁷⁵

The Norwegian Delegate was asked to agree to reserve discussion of this amendment "until [the Committee on Legal Problems] had acted upon a broader proposal relative to treaty obligations incompatible with the provisions of the Charter."⁷⁶ That Committee had been engaged in the drafting of eventual Article 103, which now provides:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.⁷⁷

In drafting Article 103, the Committee on Legal Problems (Committee 2) clearly was aware of the type of problem of conflicting treaty obligations that might arise from a Security Council request for application of "measures not involving the use of armed force" pursuant to Article 41. The report of the Committee explained the type of conflicting obligations foreseen by its suggested text, as follows:

The nature of such a conflict has not been defined, but it would be enough that a conflict should arise from the carrying out of an obligation of the Charter. It is immaterial whether the conflict arise because of intrinsic inconsistency between the two categories of obligations or as a result of the application of the provisions of the Charter under given circumstances: e.g., in the case where economic sanctions were applied against a state which derives benefits or advantages from previous agreements contrary to said sanctions.⁷⁸

It must be noted for later inquiry that the reference to economic sanctions is not specifically limited to Article 41 and hence the Security Council, but it is in general terms and potentially applicable to the General Assembly.

Of further significance is the interpretation of Article 103 as not providing for automatic abrogation of conflicting treaties, but rather as requiring that obligations under the Charter "shall prevail." "Moreover it [the Committee]

⁷⁵ U.N. Doc. No. 2, G/7 (n)(1), 3 U.N. CONF. INT'L ORG. DOCS. 371 (1945).

⁷⁶ U.N. Doc. No. 539, III/3/24, 12 U.N. CONF. INT'L ORG. DOCS. 355 (1945).

⁷⁷ The Committee on Enforcement Arrangements later adopted the original language and deferred the Norwegian amendment on the ground that a broader proposal was being considered elsewhere. *Id.* at 431.

⁷⁸ *Report of the Rapporteur of Committee IV/2*, U.N. Doc. No. 933, IV/2/42, 13 U.N. CONF. INT'L ORG. DOCS. 707-08 (1945).

has decided that it would be inadvisable to provide for the automatic abrogation by the Charter of obligations inconsistent with the terms thereof. It has been deemed preferable to have the rule depend upon and be linked with the case of a conflict between the two categories of obligations. In such a case, the obligations of the Charter would be pre-eminent and would exclude any others."⁷⁹ As to conflicting obligations with non-members of the United Nations, the Committee was of the opinion that:

In the event of an actual conflict between such obligations and the obligations of members under the Charter, *particular in matters affecting peace and security*, the latter may have to prevail. The Committee is fully aware that as a matter of international law it is not ordinarily possible to provide in any convention for rules binding upon third parties. On the other hand, it is of the highest importance for the Organization that the performance of the members' obligations under the Charter in specific cases should not be hindered by obligations which they may have assumed to non-member States. . . . The suggested text is accordingly not limited to pre-existing obligations between members.⁸⁰

2. *The Security Council*.—In view of the history of the Norwegian suggestion, the context in which Article 103 was created, and the specific language of the Report of Committee 3, there appears little question that existing treaty obligations between member states inconsistent with enforcement measures taken pursuant to a Security Council decision⁸¹ need not be observed by co-operating member states. This opinion is supported by writers.⁸² The reference to factual consequences in Article 103 leads to the conclusion that inconsistent agreements do not ipso facto come to an end, but that the inconsistent performance required under their terms is temporarily excused. The formula employed evidences no intent to terminate such treaties, but rather the desire to avoid the hindering requirements of their terms. It is presumed that upon cessation of the emergency situation their terms, if no longer inconsistent with Charter obligations, would be once more binding. However, revival of the ob-

⁷⁹ *Id.* at 707.

⁸⁰ *Id.* at 708 (emphasis added); for the Subcommittee Reports, see *id.* at 805-07, 811-13.

⁸¹ A Security Council decision plainly creates a legal obligation by virtue of Article 25.

⁸² Jessup states that "under Article 41 of the Charter of the United Nations the Security Council may call upon the Members to apply such measures as complete or partial interruption of economic relations and of international communications, and the Members are under a duty to comply. It cannot be doubted that action taken by a Member in compliance with such directions of the Security Council would constitute justification for any incidental breach of a treaty obligation calling for freedom of commercial intercourse or of communications." JESSUP, A MODERN LAW OF NATIONS 153 (1948). GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 278 (1949), notes that "it may happen that . . . other international agreements such as trade agreements and postal conventions will be violated by the action required to give effect to the Council's decision [under Article 41]. . . . The . . . situation is squarely faced by the Charter. Article 103 provides that in case of conflict between the obligations of Members under the Charter and under international agreements, the former will prevail."

ligations would afford a complaining state no legal claim arising from damage caused by the previously suspended performance.

As to treaties with non-members, it is also believed that when their obligations conflict with legal duties created by Security Council decisions under the Charter, such obligations become legally inoperative.⁸³ This principle is accurate to the extent that adoption of the Charter, and in particular Article 2(6), created a new international law for the world community, which all states, non-members as well as members, must respect. The position taken by the framers of Article 103 toward non-members is considerably stronger than the attitude of the League toward the same problem, possibly due to the almost universal membership of the United Nations.

A significant problem with the Charter formula lies in the determination of when a "conflict" between the two sets of obligations arises. Noteworthy is the decision taken at San Francisco not to assign this task to any particular organ of the organization. The problem raised by absence of interpretation by a supra-national organization is one beyond the scope of this paper. However, it is significant for present purposes that "conflicting" or "inconsistent" obligations are used as the touchstone. The inference may be drawn that those treaties that in no way are inconsistent with the measures taken under the Charter remain unaffected by the occurrence of hostile acts. Thus, a causal link is required between the use of coercion and the excuse from treaty performance. Under the old doctrine that "war ipso facto abrogates treaties," no necessary connection existed between the two events. It has been suggested that only from the repeated simultaneous occurrence of coercion and excuse from treaties was the general rule as to abrogation deduced.⁸⁴ The evolution of the "abrogates some, suspends some, leaves others intact" rule was basically founded on the rational connection requirement of Judge Cardozo's "incompatibility" doctrine in *Techt v. Hughes*.⁸⁵ Thus the Charter has expanded the applicability of the rational connection test.

3. *The General Assembly*.—The recent difficulties of the Security Council as keeper of the peace have directed attention toward the powers of the General Assembly.⁸⁶ The absence of the Soviet representative from the Security Council upon the outbreak of the Korean hostilities allowed the Council to initiate enforcement measures and to recommend to members the use of armed force to resist aggression. With the return of the U.S.S.R. to the Council, the General Assembly passed the Uniting for Peace Resolutions and others, which allowed it to direct the major efforts of the United Nations throughout the crisis.⁸⁷

⁸³ See JESSUP, *op. cit. supra* note 82, at 153.

⁸⁴ 2 HYDE § 547.

⁸⁵ 229 N.Y. 222, 128 N.E. 185 (1920), *cert. denied*, 254 U.S. 643 (1920).

⁸⁶ Vallat, *The Competence of the United Nations General Assembly*, 97 RECUEIL DES COURS 207, 246, 250-51 (1959).

⁸⁷ *Id.* at 258-67.

By a resolution entitled "Intervention of the Central People's Government of the People's Republic of China in Korea," the General Assembly called upon "all States and authorities to continue to lend every assistance to the United Nations action in Korea"; and also called upon "all States and authorities to refrain from giving any assistance to the aggressors in Korea."⁸⁸

The General Assembly further recommended⁸⁹ that every state apply an embargo on shipment of military and strategic materials to areas under North Korean or Communist Chinese control, co-operate with other states in carrying out the embargo, and report to the Additional Measures Committee on the steps taken. Soviet Russia and Poland had unsuccessfully contended that the question of embargo came under Chapter VII and, therefore, that it was the duty of the General Assembly under Article 11(2) to refer the matter to the Security Council, especially since the sanctions were in reality Article 41 measures.⁹⁰

These events raise the question of the effect on treaties produced by a recommendation of the General Assembly rather than by a decision of the Security Council.

4. *Background of the Economic Measures Taken in Korea.*—In preparing a report for the General Assembly, the Collective Measures Committee, established by the Uniting for Peace Resolution,⁹¹ discussed subcommittee reports concerning the effect of collective measures on the legal obligations of states.⁹²

Its Subcommittee on Economic and Financial Measures had concluded that states should not be subject to legal liabilities under other treaties as a result of carrying out United Nations collective measures. The report of the Subcommittee for the Study of Political Measures had merely noted that the possible effects, under Article 103, of recommendations or decisions of UN organs could be dealt with only in the light of the circumstances surrounding individual cases.⁹³ In discussing the language to be adopted, the United States representative explained that the Economic and Financial Measures

⁸⁸ 1 REPERTORY OF UNITED NATIONS PRACTICE 50 (1955). The Moscow Agreement of 1945, designed to ensure the independence of Korea, was invoked in the attempt to preclude discussion of the Korean question by the General Assembly on the ground that it was a treaty concerned with liquidating the consequences of World War II and hence beyond the competence of the Assembly under Article 107. The opposing argument asserted that the General Assembly was not precluded by Article 107 but should take the Moscow Agreement into consideration in determining the future of Korea. Action was taken by the General Assembly despite continued objection by the U.S.S.R., Poland, and Czechoslovakia. See 5 *id.* at 388-89.

⁸⁹ Resolution 500(V), U.N. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20, at 2 (A/1775/Add. 1) (1951); adopted May 18, 1951, by 47 votes to none, with eight abstentions.

⁹⁰ 1 REPERTORY OF UNITED NATIONS PRACTICE 324 (1955).

⁹¹ Resolution 377(V), U.S. GEN. ASS. OFF. REC. 5th Sess., Supp. No. 20, at 10 (A/1775) (1950).

⁹² Collective Measures Committee, *Summary Record*, U.N. Doc. No. A/AC. 43/SR. 6 (1951).

⁹³ *Ibid.*

Subcommittee intended that a state should not be held responsible for treaty violations resulting from the application of collective measures recommended by either the Security Council or the General Assembly.⁹⁴ He pointed out that the report had not simply relied upon Article 103 because there was some question whether that article applied to *recommendations* of the Security Council and the General Assembly as well as to *decisions* of those organs.⁹⁵ But, he continued, the Subcommittee had chosen its language in the light of the Article 103 problem and had desired to introduce the principle into international law if it did not already exist.⁹⁶

The opposing view, expressed by the representative of Belgium, was that unless Article 103 was invoked the General Assembly and the Security Council should not adopt resolutions that the members could not implement without violating their contractual obligations.⁹⁷ He also noted the danger of a general statement that would not take into consideration "the fact that Article 103 could not apply to legal obligations assumed in respect of non-Member states."⁹⁸

Following a discussion in which it was pointed out that the wiser course was to avoid direct reference to the primacy of Security Council and General Assembly recommendations over conflicting treaty obligations,⁹⁹ the Committee adopted the following language:

In the event of a decision *or recommendation* of the United Nations to undertake collective measures, the following guiding principles should be given full consideration by the Security Council or the General Assembly and by States:

. . . .

It is of importance that States should not be subjected to legal liabilities under treaties or other international agreements as a consequence of carrying out United Nations collective measures.¹⁰⁰

The General Assembly took note of this report and its conclusions in a resolution¹⁰¹ that led to the undertaking of economic measures in Korea.

There thus appears to be general agreement that the implementation of collective measures, whether authorized by recommendation or decision, should not be hampered by the concern of states with possible violation of other international obligations.¹⁰² However, while attempting to insure that collec-

⁹⁴ *Id.* at 7.

⁹⁶ *Ibid.*

⁹⁵ *Id.* at 8.

⁹⁷ *Id.* at 7.

⁹⁸ *Ibid.*

⁹⁹ Collective Measures Committee, *Summary Record*, U.N. Doc. No. A/AC. 43/SR. 8, at 2-3 (1951).

¹⁰⁰ Collective Measures Committee, *Report*, U.N. GEN. ASS. OFF. REC. 6th Sess., Supp. No. 13, at 33 (A/1891) (1951). (Emphasis added.)

¹⁰¹ Resolution 503A(VI), U.N. GEN. ASS. OFF. REC. 6th Sess., Supp. No. 20, at 2 (A/2119) (1952).

¹⁰² In this connection it is also helpful to recall the conclusions of the Legal Subcommittee in the Italo-Ethiopian dispute. See text accompanying note 43 *supra*.

tive measures may be carried out with minimal difficulty, member states are very reluctant to suggest that recommendations of the organization have compulsory legal effect. That they are not without some legal effect would, however, seem difficult to deny.¹⁰³

On this question, the opinion of Judge Lauterpacht in the *South-West Africa-Voting Procedure* case merits particular attention:

It would be wholly inconsistent with sound principles of interpretation as well as with highest international interest, which can never be legally irrelevant, to reduce the value of the Resolutions of the General Assembly—one of the principal instrumentalities of the formation of the collective will and judgment of the community of nations represented by the United Nations—and to treat them, for the purpose of this Opinion and otherwise, as nominal, insignificant and having no claim to influence the conduct of the Members. International interest demands that no judicial support, however indirect, be given to any such conception of the Resolutions of the General Assembly as being of no consequence.¹⁰⁴

The proper approach to the nature of Assembly recommendations has been ably summarized by F. A. Vallat, Deputy Legal Adviser to the British Foreign Office:

Whether the Assembly is entitled to make legal acts which would otherwise be breaches of a treaty is a moot point, but there is always likely to be a strong presumption that action taken by a State in accordance with a recommendation of the General Assembly is lawful. The legal effect of a resolution in this respect may be of the greatest significance in the context of the maintenance of peace and security, if the Security Council fails to take any action to deal with a breach of the peace, and the Assembly recommends measures, for the purpose of restoring the peace, to be taken by Member States against one and in support of the other party to the conflict.¹⁰⁵

B. *State-Initiated Acts of Aggression*.—Although the main concern here is with the effects produced on treaties by collective enforcement measures, some brief observations should be made concerning the Charter and state-initiated acts of aggression or coercion.

By virtue of Article 2, paragraphs 3 and 4, of the Charter, members of the United Nations are enjoined against the threat or use of force in the settlement of international disputes. The use of force by a state against a member, in violation of the Charter and before the organization can take responsive action, makes permissible retaliatory measures in the exercise of the "right" of

¹⁰³ Vallat notes that: "To say that recommendations of the General Assembly are not as a rule binding on States, does not mean that they are of no legal effect whatever." Vallat, *supra* note 86, at 231.

¹⁰⁴ [1955] I.C.J. Rep. 67, 122 (separate opinion of Lauterpacht, J.).

¹⁰⁵ Vallat, *supra* note 86, at 231.

self-defense.¹⁰⁶ For an innocent state a clearly legitimate measure would be to suspend obligations that were inconsistent with the right of self-defense. The question subject to later review by a third-party decision-making organ would be twofold: whether the initial use of force was a violation of the Charter, and whether non-performance of the treaty was a reasonable measure taken in the exercise of the right of self-defense. This privilege of non-performance would apply as well against non-members rendering assistance to an aggressor. The same reasoning would apply to non-performance of treaties with (1) a non-member state that initiated coercion, and (2) non-member states rendering assistance to the peccant state, under the authority of Articles 2 (6) and 103.

Few instances have come to attention where treaty obligations have been affected by state-initiated coercion during the life of the United Nations. The Suez situation is, however, worthy of mention. Following the Egyptian revolt of 1952, Great Britain and Egypt concluded the Suez Canal Base Agreement of 1954¹⁰⁷ providing for withdrawal of British forces from Egypt within twenty months. The agreement, which was intended to endure for seven years, provided that in the event of attack on any member of the Arab League by an outside power, excluding Israel,¹⁰⁸ Egypt would allow the return of British forces to the Suez Canal Base. Subsequent to Egyptian nationalization of the Suez Canal Company, and the Israeli attack on Egypt,¹⁰⁹ Britain and France launched an aerial bombardment on November 1, 1956, and shortly thereafter landed armed forces. On termination of hostilities the parties to the dispute entered into a series of agreements¹¹⁰ to settle their differences.

Egypt later asserted that the British attack of 1956 violated the 1954 Base Agreement, and relieved her of its obligations;¹¹¹ by decree of January 1, 1957, Egypt denounced the treaty.¹¹² This decree rested upon the doctrine that breach by one state of the terms of an agreement affords the non-culpable state the right of denunciation. If the doctrine was correctly applied, the treaty came to an end because of the violation of its terms, rather than because of an inconsistency between its performance and the hostilities. It is therefore difficult to draw relevant conclusions from the incident. However, among the settlement documents agreed to by the parties in 1959 was the Anglo-Egyptian Agreement¹¹³ designed to re-establish normal relations, whereby the parties

¹⁰⁶ U.N. CHARTER art. 51.

¹⁰⁷ 210 U.N.T.S. 3, 24 (No. 2833, 1955).

¹⁰⁸ Mostofi, *The Suez Dispute*, 10 WESTERN POL. Q. 23, 35 (1957).

¹⁰⁹ Oct. 29, 1956.

¹¹⁰ See THE SUEZ CANAL SETTLEMENT—A SELECTION OF DOCUMENTS (Lauterpacht ed. 1960).

¹¹¹ Mostofi, *supra* note 108, at 37.

¹¹² Termination was recorded by the United Nations Secretariat June 12, 1957. 269 U.N.T.S. 566 (No. 2833, 1957).

¹¹³ Reprinted in THE SUEZ CANAL SETTLEMENT, *op. cit. supra* note 110, at 48–59.

agreed that a pre-existing commercial agreement between them "shall be deemed to be in force as from the date of the signature of the present Agreement."¹¹⁴ As in the situation that arose on termination of the 1902 Venezuelan blockade,¹¹⁵ the parties were apparently unsure as to the legal effects of the hostilities upon the treaty. It is believed that in order to remove any doubts as to its binding character, they resorted to the familiar formula that the agreement shall be "deemed" in force.

As indicated at the outset, the United States, in breaking diplomatic relations with Cuba, asserted that the action had no effect upon its treaty rights with respect to the Guantanamo Naval Base. In view of the membership of both countries in the United Nations, the diminishing legal effect of measures short of war on treaties, and the absence of any incompatibility between performance of obligations under that treaty and the severance of diplomatic relations, it would appear that the American position is well-founded.

V. CONCLUSIONS

It might have been expected that measures short of war would bring about legal consequences proportionately less than those caused by war in the technical sense of the word. This has proven to be the case. No instance has been discovered where measures short of war abrogated a treaty solely because of the occurrence of the measures themselves,¹¹⁶ although often the performance required by a treaty will be ignored by a state involved in hostilities.¹¹⁷

The general rule which began emerging during the pre-League years—during the ascendancy and decline of the "war ipso facto abrogates all treaties" doctrine—was that measures short of war would rarely, if ever, abrogate a treaty, but rather would suspend its application, or more commonly, merely suspend performance of certain of its obligations. After cessation of hostilities, the treaty, or its obligations, would once more be binding either automatically, or upon announced revival.

While the language of Article 20 of the League Covenant referred to abrogation of conflicting agreements, the practice of the League, and its interpretations of Article 16, did not support the ipso facto rule as to abrogation of treaties.

The adoption of the Charter, with its non-recognition of war in the formal sense, and the formula of Article 103, extend the potential treaty-effects of a

¹¹⁴ *Id.* at 56-57 Annex D (1). This treaty, the Provisional Commercial Agreement of June 5-7, 1930, had been renewed by an exchange of notes of October 19, 1952, and was by its terms to remain in force indefinitely, subject only to a provision for abrogation on three months notice. 158 U.N.T.S. 423 (No. 2075, 1953).

¹¹⁵ See text accompanying notes 18-24 *supra*.

¹¹⁶ Alleged violations of the terms of a political or military agreement was the reason given for denouncing the Suez Base Agreement. See text accompanying notes 111-12 *supra*.

¹¹⁷ *E.g.*, Nine Power Treaty, 44 Stat. 2113 (1922). See text, Section III(B)2, *supra*.

resort to hostilities. The pattern of the Charter is to legitimize the co-operation of a state with collective enforcement measures when the action required involves *non-compliance with inconsistent treaty terms*. The concern is not only to facilitate the enforcement measures, but also to minimize the disruption of existing international relationships to the greatest possible extent; the result has been the disappearance of the abrogation formula.

Few generalizations that have not already been made in commentaries on the effects of war¹¹⁸ can be made as to the types of treaties most affected by the *incidence of hostile acts*. It is believed that for the most part certain bilateral technical, administrative and commercial agreements are less affected by hostilities than treaties of a more political or military nature. The same may be said for international multilateral agreements on technical subjects. However, further generalizations do not appear appropriate. State officials react to particular crises with a concern for immediate practicalities and a tendency to disregard accepted doctrinal generalizations.

With the further turning away from traditional conceptions of war has come a realization of the greater need for stability of international agreements—technical, commercial and political—in order to minimize the disruptive effects of the recurring outbreak of hostilities. This realization has been demonstrated over the years in the pragmatic approach of states seeking to minimize the legal effects of hostile acts.

¹¹⁸ See McINTYRE at Conclusions, and literature cited on that subject in notes 7–9 *supra*.