It was agreed that the next meeting of the International Law Commission would be held in Geneva at the end of May, 1950.

The first session of the International Law Commission was a hard-working body, which, as its Report says, covered the items of its agenda. That it was able to do this much was largely due to the driving power—sometimes regarded as exerted too heavily—of its Chairman. Some of these items, or parts of them, were carried over to the next session, but this was inevitable. It would have been impossible, for example, to deal with the various topics of international criminal law and jurisdiction on which preparatory work had not been done (except for the Nürnberg principles).

It can be argued that insufficient study was given to Article 18 of the Statute, calling for systematic planning for codification of the whole field of international law, and that the three subjects for work were somewhat arbitrarily chosen. But it must be observed that the Commission is not established in such a way as to enable it to make a wide and continuous study. It is not a body remaining in continuous session with a Secretariat staff at hand to assist in its work. Its members take time out from their regular occupations, depriving themselves of an income otherwise obtainable, granted no salary, and receiving an expense account per day less than American lawyers of equal caliber charge for one hour of work. Its *rapporteurs* are widely scattered, and must prepare working papers, each of which is a potential code of international law, with no assistance further than that which can be given at a distance by an overworked Secretariat. Consideration must be given to these papers in annual meetings which cannot well last longer than two months each, since this is all the time its members can spare from the business of making a livelihood. Under the circumstances, the achievements of the first session of the International Law Commission, though not remarkable, were decidedly commendable.

CLYDE EAGLETON

REBUS SIC STANTIBUS BEFORE THE SECURITY COUNCIL: THE ANGLO-EGYPTIAN QUESTION

On July 8, 1947, the Prime Minister of Egypt, Nokrashy Pasha, alleging, *inter alia*, that the presence of United Kingdom troops in Egypt "without its free consent" constituted "an infringement of the fundamental principle of sovereign equality, and is therefore contrary to the letter and spirit of the United Nations Charter" and that the Anglo-Egyptian Treaty of August 26, 1936,[1] "cannot bind Egypt any longer, having outlived its purposes, besides being inconsistent with the Charter," brought the "dispute" before the United Nations Security Council under Articles 35 and 37 of the Charter and requested the Security Council

> to direct:
> (a) the total and immediate evacuation of British troops from Egypt including the Sudan;

[1] 173 L.N.T.S. 401; this JOURNAL, Supp., Vol. 31 (1937), p. 77.

(b) the termination of the present administrative regime in the Sudan.[2]

Although, in presenting his case orally before the Security Council, Nokrashy Pasha stated "I shall not argue the juridical position of the 1936 Treaty. . . . Whatever may have been the purport of international law in the past, we now have the Charter . . . ," [3] he felt it incumbent upon him to demonstrate the legal invalidity of a treaty by which Egypt had consented to the presence of British troops in Egypt. The Anglo-Egyptian Treaty of 1936, he argued, "had been negotiated under international conditions that no longer existed"; Egypt had signed this agreement with the understanding that its provisions were "of a purely temporary nature"; "despite the time limits provided for, the Treaty was a temporary expedient"; the war of 1939 "was the implicit term" to restrictions on Egyptian sovereignty contained in the Treaty and "no one can seriously claim that the restrictions . . . were intended to continue after the war." [4] The Treaty of 1936 had therefore "outlived its purpose"; it was obsolescent,[5] obsolete,[6] moribund,[7] dead,[8] disintegrated,[9] "an anachronism," "its political and moral force has been spent"; "it survives only as a menace to peace and security"; [10] it had lost its vitality,[11] its viability; it "stalks today as a phantom; it persists only as a relic of bygone buccaneer days, which the world is trying to forget," and "has fallen by its own weight into a state of desuetude." [12]

Despite his insistence that Egypt had "not once alluded" to "various principles of international law, such as the principles of *pacta sunt servanda* and of *rebus sic stantibus,*" but had urged the Security Council not to be "stymied by the legal commitments of the parties, which are not infrequently relied upon to justify inertia in the face of stale evils," [13] Nokrashy Pasha had recourse to various legal arguments. Only by name did he refrain from invoking *rebus sic stantibus:* the arguments marshaled above are all implicitly based upon the assumption of such a doctrine of international law. Moreover, the Egyptian representative presented other

[2] U. N. Doc. S/410, July 11, 1947; Security Council, Official Records, 2d Year, No. 59, p. 1343.

[3] Security Council, Official Records, 2d Year, No. 70, 175th meeting, Aug. 5, 1947, p. 1753. See also *id.*, No. 73, p. 1861; No. 86, pp. 2292 ff.

[4] *Id.*, No. 70, pp. 1747, 1752–1753.

[5] *Id.*, No. 73, p. 1862.

[6] *Id.*, No. 75, p. 1961.

[7] *Id.*, No. 86, p. 2293.

[8] *Id.*, No. 75, p. 1959.

[9] *Id.*, No. 82, p. 2166.

[10] *Id.*, No. 73, p. 1862.

[11] *Id.*, No. 75, p. 1959.

[12] *Id.*, No. 86, p. 2292.

[13] Security Council, Official Records, 2d Year, No. 73, p. 1861.

arguments based upon the alleged invalidity of the Treaty: "the Treaty of 1936 does not express our free consent" (in 1947); nor was that consent freely expressed in 1936:

> Egypt was not a free party in concluding the Treaty of 1936. First of all, its territory was occupied at the time by United Kingdom troops. Secondly, the Government of the United Kingdom left no doubt in the minds of the Egyptian plenipotentiaries as to the consequences of their failure to agree to the United Kingdom demands.[14]

The Treaty of 1936 was also alleged to be in conflict with a prior treaty (the Suez Canal Convention of October 29, 1888) and with a later treaty (the United Nations Charter, in particular, Article 103).[15]

However, the arguments which Egypt preferred to stress were of a different nature: The maintenance of British military bases in Egypt infringed Egypt's sovereignty and independence and conflicted with the "sovereign equality" principle of the United Nations Charter—a provision which, to employ a classic Arab saying, "makes the Members as equal as the teeth of a comb";[16] Egypt placed her reliance on the Charter; the "higher mission" of the Security Council is not "to adjudicate on the legal rights of the parties" but to preserve peace and security;[17] "its preoccupation is with political realities";[18] "no legalistic considerations," "no obsolete treaty" should "obstruct the Council's fulfillment of its high mission";[19] "between the 1936 Treaty and the Charter, we have chosen the Charter";[20] Egypt expected deliverance from the chains of history;[21] "the imperialist legend must come to an end."[22]

For the United Kingdom, Sir Alexander Cadogan replied that "the principle *pacta sunt servanda* is perhaps the most fundamental principle of international law and one on which, after all, the Charter itself depends"; to characterize the Anglo-Egyptian Treaty of 1936 as a "temporary expedient" seemed "a curious phrase to apply to a treaty duly signed and ratified"; if the Treaty of 1936 is valid, the only course open to the Security Council is to recognize this fact and remove the matter from the agenda. No aspect of the case was a threat to international peace and security, unless, indeed, "Egypt itself was contemplating measures threatening peace and security instead of accepting the provisions of a treaty which was binding on it."[23] The "one real issue before the Security

[14] *Id.*, No. 70, p. 1755.
[15] *Id.*, pp. 1755–1757.
[16] *Id.*, pp. 1747, 1753.
[17] *Id.*, No. 73, p. 1861.
[18] *Id.*, No. 86, p. 2293.
[19] *Id.*, No. 75, p. 1961.
[20] *Id.*
[21] *Id.*, No. 82, p. 2164.
[22] *Id.*, No. 73, p. 1873.
[23] *Id.*, No. 70, p. 1772. *Cf. id.*, No. 75, p. 1954.

Council, namely the validity of the 1936 Treaty," was a legal question [24] and this legal point "is at the foundation of the whole Egyptian case." [25]

Despite professions to the contrary, Sir Alexander Cadogan continued, the Egyptian argument "would appear to be an appeal to the doctrine *rebus sic stantibus.*" [26] However,

> the extent to which treaties can be held to be invalid on *rebus sic stantibus* grounds, otherwise than by agreement between the parties themselves, is certainly very limited as well as being controversial. There is no decision of an international tribunal where this doctrine has been applied in any remotely similar case, and the constant practice of States has been to insist on the doctrine that a treaty can only be revised or modified by the consent of the parties. The argument against the Treaty of 1936 on *rebus sic stantibus* lines would seem to have no legal foundation whatsoever.[27]

One of the fundamental principles of the Charter "is that international disputes are to be settled in accordance with international law and justice." The "Security Council cannot, consistently with its duty under the Charter, override treaty rights." If the Council agreed with Nokrashy Pasha, "then it is possible for any State to get rid of its treaty obligations on the ground that it dislikes them sufficiently to be prepared to endanger peace rather than accept them." [28]

The British representative then examined the Egyptian contention that

> the presence of foreign troops within the territory of a Member . . . in time of peace and without its free consent, constitutes an offense to its dignity, a hindrance to its normal development, as well as an infringement of the fundamental principle of sovereign equality, and is therefore contrary to the letter and spirit of the United Nations Charter and to the Resolution adopted unanimously by the General Assembly on December 14, 1946.[29]

The relevant portion of that Resolution read: "The General Assembly . . . Recommends the Members to undertake . . . the withdrawal without delay of their armed forces stationed in the territories of Members without their consent freely and publicly expressed in treaties or agreements consistent with the Charter and not contradicting international agreements." [30]

[24] *Id.*, No. 70, p. 1773. *Cf. id.*, No. 73, p. 1897; No. 75, p. 1954.

[25] *Id.*, No. 84, p. 2252.

[26] *Id.*, No. 70, p. 1773.

[27] Security Council, Official Records, 2d Year, pp. 1778–1779. The Egyptian argument based on "changed conditions"—that the Treaty had "outlived its purposes"—was countered by Sir Alexander with a denial that political conditions had changed sufficiently to render agreements for mutual assistance unnecessary, as witness the Treaty of Dunkirk between the United Kingdom and France and the Anglo-Soviet Treaty. *Id.*, pp. 1776, 1778.

[28] *Id.*, No. 75, p. 1955.

[29] *Cf.* U. N. Doc. S/410, July 11, 1947, cited above, footnote 2.

[30] General Assembly Resolution No. 41 (I), U. N. Doc. A/64/Add. 1, p. 66.

The Anglo-Egyptian Treaty of 1936 was such a treaty, said the British representative: it had been freely consented to by the Egyptian Parliament by a vote of 203 to 11 and the then Prime Minister of Egypt had informed the Egyptian Chamber of Deputies: "This alliance, gentlemen, has been concluded on a footing of real equality."[31] Treaties or agreements by which the United States enjoys the right to station troops in British, Panamanian or Philippine territory—and these examples are not exhaustive —indicate that there is no violation of the Charter, "no infringement of the principle of sovereign equality in the fact that one State, by virtue of a treaty, stations forces in the territory of another in peacetime."[32] Nor were agreements for mutual defense incompatible with the Charter.[33]

During the discussion of the question by the Security Council, the Brazilian representative (M. Muñiz) pointed out that, despite Nokrashy Pasha's professions that Egypt was not basing her claim on juridical arguments, the Egyptian case was really based on an assertion of the invalidity of a treaty on grounds of duress and *rebus sic stantibus*.[34] "If the Security Council were to accede to the request of the Egyptian Government, disregarding provisions of a treaty still in force, it might establish a dangerous precedent, likely to subvert the principle of respect for treaty obligations on which international society is based."[35] However, the Egyptian Government very properly "did not take upon itself unilaterally the decision not to comply with a treaty which in its opinion had outlived its purpose," but had "sought to settle the differences by direct negotiation with the United Kingdom." The failure of those negotiations[36] presented no immediate danger to peace. Where no urgent question of peace or security was involved, the Security Council should recommend the peaceful adjustment of conflicts by the traditional methods of international law. He therefore proposed that, without passing on the merits of the case, the Security Council recommend to the parties "to resume direct negotiations and, should such negotiations fail, to seek a solution of the dispute by other peaceful means of their own choice," while keeping the Security Council informed.[37] The representative of Beligum (M. Nisot) suggested that the draft be amended so as to read: ". . . to seek a solution of the dispute by other peaceful means of their own choice, *including the reference to the*

[31] Security Council, Official Records, 2d Year, No. 70, pp. 1780 ff.

[32] *Id.*, p. 1782.

[33] *Id.*, p. 1778.

[34] *Id.*, No. 80, pp. 2106 ff.

[35] *Id.*, p. 2108.

[36] *Cf.*, Papers regarding the Negotiations for a Revision of the Anglo-Egyptian Treaty of 1936, United Kingdom, State Papers, 1946–47, XXVI, Egypt No. 2 (1947), Cmd. 7179.

[37] Security Council, Official Records, 2d Year, No. 80, p. 2109.

International Court of Justice of disputes concerning the validity of the Treaty of 1936." [38]

Colonel Hodgson (Australia), in supporting the Brazilian draft resolution, observed that the Security Council "must be careful . . . to do nothing which will undermine the sanctity of international obligations" or permit itself to be made "the instrument whereby any State could divest itself of an international obligation because the provisions of that obligation were onerous or burdensome, on the plea that the consequences of the treaty gave rise to a threat to international peace and security." [39] Mr. López (Colombia) thought "the unilateral declaration that the Anglo-Egyptian Treaty of 1936, having outlived its purpose, and being, moreover, inconsistent with the Charter, cannot bind Egypt any longer, appears to us to strike at the root of the universally accepted principles of international order." [40] M. de la Tournelle (France) remarked that, although Egypt alleged the invalidity of a treaty, "no legal considerations have been invoked but only political ones; . . . such language and such reasons for withdrawing from obligations only just entered into were familiar to some of us in Europe between 1935 and 1941." [41] For the United States, Mr. Johnson said:

> If a treaty which has not yet technically expired, which was valid at the time it was signed, and which still has a term to run, is an impediment to international understanding, and if one side claims that it no longer possesses the vital element which produced it, there is no reason why that matter should not be referred to the International Court of Justice, and there is no reason why it should be expected that the International Court of Justice would necessarily take an entirely technical view.[42]

On the other hand, M. Faris El-Khouri (Syria), while admitting that "a treaty, according to international law, always continues in force unless it is repudiated or abolished in some legal way," [43] expressed his sympathy for the "national aspirations" of Egypt, observed that "the validity or non-validity of the Treaty in the face of the existing threat to peace, may be termed purely academic," and denied that the dispute was a legal dispute suitable for the International Court of Justice, since that Court could only "be seized of disputes which are exclusively legal, but . . . has no jurisdiction in political disputes." [44] Mr. Gromyko (U.S.S.R.), stressing the point that since the Treaty of 1936 was concluded "conditions have

[38] *Id.*, p. 2115.
[39] *Id.*, No. 84, p. 2244.
[40] *Id.*, No. 86, p. 2287.
[41] *Id.*, p. 2290.
[42] *Id.*, p. 2296.
[43] *Id.*, No. 87, p. 2334.
[44] *Id.*, No. 84, pp. 2242–2243.

changed fundamentally'' through the creation of the United Nations,[45] supported the Egyptian request and urged the United Nations to ''extend . . . a helping hand'' to the ''peoples who are trying to cast off the last shackles of colonial subjection.'' [46] In similar vein, M. Katz-Suchy (Poland), observing that conquest no longer conferred a valid title, thought the 1936 Treaty inconsistent with the changed conditions created by the United Nations Charter,[47] and warned that ''no resolution of this Council will be able to hinder'' the ''big movement'' of peoples struggling to remove the last fetters of colonial status.[48]

Nokrashy Pasha, insisting that the evacuation of British troops from Egypt and the Sudan must precede any resumption of direct negotiations, vigorously opposed the Brazilian draft resolution. When the Belgian amendment specifying a possible reference of questions concerning the validity of the 1936 Treaty to the International Court of Justice failed of adoption,[49] the British also found the Brazilian resolution unsatisfactory in failing to endorse the validity of the 1936 Treaty. Although seven members of the Security Council accepted in principle the Brazilian resolution calling for a resumption of direct negotiations by the parties, the abstention of the Colombian representative on the formal vote was decisive: only six states voted for the draft resolution, which thus failed of adoption.[50] Subsequent proposals by the Colombian and Chinese representatives also failed to secure seven votes, and on September 10, 1947, the Security Council adjourned further discussion of the question while technically retaining it on the agenda.[51]

To the student of international law it is not surprising that Egypt preferred not to rest her case on juridical arguments: she had no legal case. Had she taken the question before the International Court of Justice, that Court could only have concluded (1) that by Articles 8 and 11 of the Anglo-Egyptian Treaty of 1936, Egypt had authorized the British to station troops in certain portions of Egyptian territory and the Sudan; (2) that the Treaty was still in force; and (3) that it could lawfully be terminated only by agreement between the parties.

Realizing the weakness of their legal case, the Egyptians sought to stress the political and emotional aspects of the question and, on the pretense that the dispute endangered the maintenance of international peace and

[45] *Id.*, No. 80, p. 2110.

[46] *Id.*, No. 86, p. 2285.

[47] *Id.*, No. 75, pp. 1964–1965.

[48] *Id.*, No. 84, pp. 2250–2251.

[49] Only Australia, Belgium, France, and the United States voted for it, the others abstaining. *Id.*, No. 86, pp. 2302–2303.

[50] Votes *for:* Australia, Belgium, Brazil, China, France, United States; vote *against:* Poland; *abstentions:* Colombia, Syria, U.S.S.R.; in accordance with Art. 27 of the Charter, the representative of the United Kingdom did not participate in the voting. *Id.*, pp. 2304–2305.

[51] See *id.*, Nos. 86, 87, 88.

security, sought release from the obligations of the Treaty before a political body.

Several factors militated against their success. At San Francisco, the drafters of the Charter had deliberately refrained from conferring in express words the power of revising treaties upon any organ of the United Nations. If, conceivably, authority to revise or set aside treaty provisions might be exercised by the Security Council in maintaining international peace, the Security Council found no situation endangering peace in the Egyptian question. Although many members of the Security Council expressed sympathy for the political aspirations of Egypt, the Security Council never seriously considered complying with the Egyptian request to direct the evacuation of British troops. The only draft resolutions considered by the Council envisaged a settlement between the parties by direct negotiation. Despite some rather fanciful and specious arguments by which Egypt and her supporters sought, in effect if not in name, to demonstrate the existence and applicability of a doctrine of *rebus sic stantibus,* at no time was the Security Council prepared to deny the continuing validity of the treaty because of "changed conditions."

To the student of international politics the failure of the Security Council to agree upon any resolution in this case may be more discouraging than it is to the student of international law. The latter may take comfort in the fact that the Security Council did nothing to undermine the legal obligation of treaties. Nevertheless, the political problem remains. The possible inertia [52] of one of the parties "in the face of stale evils," grounded as it is on legal right, suggests once again the need for more adequate international procedures for dealing with problems of peaceful change and treaty revision. To leave the problem exclusively to the parties may place a premium on power. Hypothetically, the abuse of power by the stronger state may cause the other party to resort to violence. Conceivably, in such a case, the Security Council might direct a political settlement based in part upon a revision of treaty commitments. It would be wiser for the Security Council to forestall resort to violence by assuming responsibility for a reëxamination by the parties of their legal commitments and political aspirations under the general guidance of the Security Council.

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[52] The Egyptians, in presenting their case to the Security Council, misrepresented British willingness to compromise. The 1946 negotiations between the United Kingdom and Egypt had led to the initialing of draft agreements by which Britain had renounced the 1936 Treaty of Alliance in favor of an agreement for mutual defense and had agreed "that the complete evacuation of Egyptian territory (Egypt) by the British Forces shall be completed by 1st September, 1949." The negotiations broke down and the draft agreements never came into force because the Egyptians refused to consider self-determination and possible independence for the Sudan, insisting that the Sudan was Egyptian. See Papers regarding the Negotiations for a Revision of the Anglo-Egyptian Treaty of 1936, Cmd. 7179, cited above.