THE MODIFICATION OF COLLECTIVE TREATIES
WITHOUT THE CONSENT OF ALL THE
CONTRACTING PARTIES

by MAX SORENSEN

One of the most characteristic features of the development of international law in the past few years is undoubtedly the definite weakening of the political collective systems, which had been created after the War for the purpose of securing peace. This flight from systems of collective security is due to a number of events in world politics which are well-known but, whether it is merely the outcome of a general mistrust of the effectiveness of such systems or is due to the rise of the new political ideologies, its consequences in the field of international law are the same, although we must lay different weight on these two different causes in trying to judge of its permanent influence on the future development of international law and international organisation. One circumstance which indicates that it is more than a passing phenomenon created by an actual crisis, is that the predominant political doctrine in the so-called totalitarian states is declared to be opposed in principle to the collective organisation of the international community¹). The policy which these states consider best suited for dealing with differences between states, is first and foremost the formation of bilateral agreements concluded between the parties directly concerned, as the events of the last few years have shown.

Other states, which do not hold political principles of this kind but yet — at any rate for the time being — do not consider a universal system of collective security as possible or compatible with their interests, try to achieve through regional co-operation the objects which a universal system has shewn itself unable to realise. The development in pan-American co-operation, which has taken place in the last few years, may be the most important of many instances of successful efforts in this direction.

Apart from the many political problems created by these tendencies there are also certain juridical questions which arise or which acquire renewed interest because of them. One of these questions, which might of course have arisen as soon as the first collective treaty was signed but which has acquired actual importance in view of the events of later years, is whether a collective treaty can be varied by a new agreement which is not acceded to by all parties to the original treaty. This question arises not merely when two states enter into a bilateral treaty, the contents of which are incompatible with an earlier collective treaty, to which both states were parties, but also when a new collective treaty, departing from what has been laid down by an earlier collective agreement, is entered into without the accession of all parties to the earlier agreement. In both these cases the question of principle is the same viz: whether the conclusion of the new agreement is incompatible with the rights of those states, which are not parties to it, and in particular whether each of the original contracting parties can be said to have an independent right to claim that the provisions of the earlier treaty should be carried out not merely between itself and the other parties but also between these other parties themselves. Any such right would only be infringed in the former sense, if the new agreement was restricted to the relations of the contracting parties inter se, but the rights of third parties would also be infringed in the latter sense if the agreement was intended to dissolve the earlier treaty completely. But agreements would rarely go as far as this, particularly if a considerable number of the original parties were excluded from the negotiations leading up to the new agreement, but the subject-matter of a treaty might be of such a character as to prevent some of the parties to it from entering into a fresh agreement dealing merely with their relations inter se. For example if there was a convention providing for the demilitarisation of a certain part of land territory then any agreement between particular parties terminating the demilitarisation would either have no effect at all or would apply to all the parties to the earlier treaty). Similarly no particular agreement could vary a collective agreement for the limitation of armaments without an increase in armaments in fact affecting all the original contracting parties).

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2) See post as to the relation between the Lausanne and Montreux Conventions relating to the Turkish Straits.

3) In his dissenting judgment in the Oscar Chinn case Jonkheer van Eysinga puts forward this view with respect to the neutralisation of the Congo Basin: