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Schachter, Oscar (U.N. Legal Counsel)

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INTEROFFICE MEMORANDUM

TO: The Secretary-General

Date: 8 June 1956 195

THROUGH:

FILE NO.: \_\_\_\_\_

FROM: Oscar Schachter 

SUBJECT: Judge Lauterpacht's comments regarding separability  
of treaty provisions

The passage in Judge Lauterpacht's opinion which I mentioned this morning as being relevant to your conclusions on the separability of the Palestine armistice agreements is as follows:

"It is just because the régime established by them constitutes a unity that, in relation to instruments of this nature, the law--the existing law as judicially interpreted--finds means for removing a clog or filling a lacuna or adopting an alternative device in order to prevent a standstill of the entire system on account of a failure in any particular link or part. This is unlike the case of a breach of the provisions of an ordinary treaty--which breach creates, as a rule, a right for the injured party to denounce it and to claim damages. It is instructive in this connection that with regard to general texts of a law-making character or those providing for an international régime or administration the principle of separability of their provisions with a view to ensuring the continuous operation of the treaty as a whole has been increasingly recognized by international practice. The treaty as a whole does not terminate as the result of a breach of an individual clause. Neither is it necessarily rendered impotent and inoperative as the result of the action or inaction of one of the parties. It continues in being subject to adaptation to circumstances which have arisen." \*

I am also appending the text of the advisory opinion.

\* Sep.Op. Sir Hersch Lauterpacht on Admissibility of Hearings, etc., I:C.J., 1956, pp. 48, 49.

UNITED NATIONS  NATIONS UNIES

INTEROFFICE MEMORANDUM

TO: The Secretary-General

Date: 26 June 1956

THROUGH:

FILE NO.: \_\_\_\_\_

FROM: Oscar Schachter, Acting Legal Counsel *OS.*

SUBJECT: Separability of Treaty Provisions -  
Dr. Robinson's memorandum to Mr. Kidron  
re Sir Hersch Lauterpacht's separate  
opinion, ICJ Reports 1956, pp. 48-49

1. While you may not wish to enter into any discussion of Dr. Robinson's memorandum to Mr. Kidron with the Delegation of Israel, I believe the following observations may be of interest to you.

2. There would appear to be two principal points in Dr. Robinson's comments. First, Dr. Robinson considers that the passage cited from Sir Hersch Lauterpacht's opinion is not applicable to the Armistice Agreements between Israel and the Arab States because these Agreements are "neither law-making treaties nor texts providing for an international regime or administration but bilateral instruments." Secondly, Dr. Robinson appears to question the correctness of Lauterpacht's conclusion by noting lack of substantiating evidence in the opinion.

3. With respect to the first point, it is of course true that there is a difference between multilateral and bilateral agreements which cannot be completely ignored in the context of the present question. However, the fact that agreements are bilateral does not exclude the possibility of their establishing or being a part of an international regime, nor does it exclude the possibility that the interest in the maintenance of that regime may transcend the purely contractual interests of the parties. While the situation specifically discussed by Lauterpacht is not exactly the same as that under the Armistice Agreements, it does not seem unreasonable, in the light of the United Nations interest in the Armistice regime, to consider the principle to be relevant.

4. The Armistice Agreements themselves state that they were concluded by the Parties in response to the Security Council resolution of 16 November 1948. The roles which they give, not only to the United Nations Truce Supervision Organization, but also to the Security Council are more substantial than those of a mere umpire referred to by Dr. Robinson. For example, under certain circumstances either party may bring the matter of reviewing, revising or suspending any of the provisions of the Agreements other than Articles I and II before the Security Council for the relief sought on the grounds that the Agreement in question "has been concluded in pursuance of Security Council action toward the end of achieving peace in Palestine." It may also be noted from the foregoing that the possibility of severability of the provisions in certain circumstances and in accordance with certain procedures is specifically envisaged by the Agreements themselves.

5. Furthermore, the Security Council in its resolution of 11 August 1949 considered that the Armistice Agreements superseded the truce provided for in previous resolutions of the Security Council. In its resolution of 1 September 1951 concerning the Suez Canal the Security Council referred to "the Armistice regime", and has in a number of resolutions evidenced its interest in the maintenance and in the observance of the Armistice Agreements. Dr. Robinson does note that his comments deal only with the General Armistice Agreements and not with Security Council resolutions or assurances given by the parties to the Secretary-General. But such a distinction appears to some extent artificial, since the Agreements are very much a part of the whole system.

6. With respect to the second point as to whether the principle of separability in the circumstances suggested by Sir Hersch Lauterpacht is in fact recognized by international practice, considerable research would be necessary. The question of separability has not as yet been dealt with by the International Law Commission in connexion with its study of the Law of Treaties. However, a recent example in support of Lauterpacht's position may be noted -- an example which also appears in point on the question of applicability.

7. The United Nations Command in ordering the withdrawal from the Republic of Korea of the Neutral Nations Supervisory Commission and its inspection teams acted on the theory of separability of provisions of the Armistice Agreement. The United Nations Command in its statement to the other side said that it would "provisionally suspend, during the time that your side continues in default, performance on its part of those provisions of the Armistice Agreement governing the operations in the area under the control of the United Nations Command of the N.N.S.C. and N.N.I.T.'s." However, the United Nations Command stated that it continued "to regard the Armistice Agreement as in force and limits its action to the particular suspension described above."

*OSchlachter*