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REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/9610/Rev.1

Report of the International Law Commission on the work of its twenty-sixth session
6 May-26 July 1974

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ABBREVIATIONS

BENELUX  Customs and economic union between Belgium, Netherlands and Luxembourg
BIRPI  United International Bureaux for the Protection of Intellectual Property
CMEA  Council for Mutual Economic Assistance
EEC  European Economic Community
EFTA  European Free Trade Association
EURATOM  European Atomic Energy Community
FAO  Food and Agriculture Organization of the United Nations
GATT  General Agreement on Tariffs and Trade (also the Contracting Parties and the Secretariat)
IAEA  International Atomic Energy Agency
ICAO  International Civil Aviation Organization
I.C.J.  International Court of Justice
I.C.J. Pleadings  I.C.J., Pleadings, Oral Arguments, Documents
I.C.J. Reports  I.C.J., Reports of Judgments, Advisory Opinions and Orders
ILO  International Labour Organization
IMCO  Inter-Governmental Maritime Consultative Organization
ITU  International Telecommunication Union
LAFTA  Latin American Free Trade Association
OAS  Organization of American States
OAU  Organization of African Unity
P.C.I.J.  Permanent Court of International Justice
P.C.I.J., Series A  P.C.I.J., Collection of Judgments
P.C.I.J., Series A/B  P.C.I.J., Judgments, Orders and Advisory Opinions
P.C.I.J., Series C  P.C.I.J., Pleadings, Oral Statements and Documents
UNCITRAL  United Nations Commission on International Trade Law
UNCTAD  United Nations Conference on Trade and Development
UNESCO  United Nations Educational, Scientific and Cultural Organization
UNITAR  United Nations Institute for Training and Research
UPU  Universal Postal Union
WHO  World Health Organization

EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Commission.
Chapter I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, in accordance with its Statute annexed thereto, as subsequently amended, held its twenty-sixth session at the United Nations Office at Geneva from 6 May to 26 July 1974. The work of the Commission during this session is described in the present report. Chapter II of the report, on succession of States in respect of treaties, contains a description of the Commission's work on that topic, together with 39 draft articles and commentaries thereto, as finally approved by the Commission. Chapter III, on State responsibility, contains a description of the Commission's work on that topic, together with nine draft articles provisionally adopted by the Commission at its twenty-fifth and twenty-sixth sessions, as well as commentaries to three articles provisionally adopted at the twenty-sixth session. Chapter IV, on the question of treaties concluded between States and international organizations or between two or more international organizations, contains a description of the Commission's work on that question together with five draft articles and commentaries thereto, as provisionally adopted by the Commission. Chapter V is devoted to the law of the non-navigational uses of international watercourses, and the report of the Sub-Committee on that subject is annexed to it. Chapter VI is concerned with the organization of the Commission's future work and a number of administrative and other questions.

A. Membership and attendance

2. The Commission consists of the following members:

- Mr. Robert AGO (Italy);
- Mr. Mohammed BEDJAOUI (Algeria);
- Mr. Ali Suat BILGE (Turkey);
- Mr. Juan Jose CALLE y CALLE (Peru);
- Mr. Jorge CASTANEDA (Mexico);
- Mr. Abdullah EL-ERIAN (Egypt);
- Mr. Taslim O. ELIAS (Nigeria);
- Mr. Edvard HAMBRO (Norway);
- Mr. Richard D. KEARNEY (United States of America);
- Mr. Alfredo MARTINEZ MORENO (El Salvador);
- Mr. C. W. PINTO (Sri Lanka);
- Mr. R. Q. QUENTIN-BAXTER (New Zealand);
- Mr. Alfred RAMANGASOVINA (Madagascar);
- Mr. Paul REUTER (France);
- Mr. Zenon ROSSIDES (Cyprus);
- Mr. Milan ŠAHÓVIĆ (Yugoslavia);
- Mr. José SETTE CÂMARA (Brazil);
- Mr. Abdul Hakim TABIBI (Afghanistan);
- Mr. Arnold J. P. TAMMES (Netherlands);

- Mr. Doudou THIAM (Senegal);
- Mr. Senjin TSURUOKA (Japan);
- Mr. N. A. USHAKOV (Union of Soviet Socialist Republics);
- Mr. Endre USTOR (Hungary);
- Sir Francis VALLAT (United Kingdom of Great Britain and Northern Ireland);
- Mr. Mustafa Kamil YASSEEN (Iraq).

3. On 6 May 1974, at its 1250th meeting, the Commission observed one minute's silence in tribute to the memory of Mr. Milan Bartos, who had served as a member of the Commission since 1957, and decided to hold a special meeting to honour his memory. The Commission devoted its 1276th meeting, held on 12 June 1974, to tributes to the memory of Mr. Bartos, former Chairman, Vice-Chairman, Rapporteur and Special Rapporteur of the Commission.

4. On 9 May 1974, the Commission elected Mr. Milan Šahović (Yugoslavia) to fill the vacancy caused by the death of Mr. Milan Bartos.

5. With the exception of Mr. Rossides, all members attended meetings of the twenty-sixth session of the Commission. The newly elected member, Mr. Šahović, attended from 20 May 1974.

B. Officers

6. At its 1250th meeting, held on 6 May 1974, the Commission elected the following officers:

- Chairman: Mr. Endre Ustor
- First Vice-Chairman: Mr. José Sette Câmara
- Second Vice-Chairman: Mr. Abdul Hakim Tabibi
- Chairman of the Drafting Committee: Mr. Edvard Hambro
- Rapporteur: Mr. Doudou Thiam

C. Drafting Committee

7. On 20 May 1974, at its 1260th meeting, the Commission appointed a Drafting Committee composed of the following members: Mr. Roberto Ago, Mr. Juan José Calle y Calle, Mr. Taslim O. Elias, Mr. Abdullah El-Erian, Mr. Richard D. Kearney, Mr. Alfredo Martinez Moreno, Mr. R. Q. Quentin-Baxter, Mr. Paul Reuter, Mr. Abdul Hakim Tabibi, Mr. N. A. Ushakov, and Sir Francis Vallat. Mr. Edvard Hambro was elected by the Commission to serve as Chairman of the Drafting Committee. Mr. Doudou Thiam also took part in the Committee's work in his capacity as Rapporteur of the Commission.
D. Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses

8. At its 1256th meeting, held on 14 May 1974, the Commission set up a Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses composed as follows:

Chairman: Mr. Richard D. Kearney;
Members: Mr. Taslim O. Elias, Mr. Milan Šahović, Mr. José Sette Câmara and Mr. Abdul Hakim Tabibi.

E. Secretariat

9. Mr. Erik Suy, Legal Counsel, attended the 1250th to 1255th, 1265th, 1267th and 1269th meetings, held on 6 to 10 May, 27 May, 29 May and 31 May respectively, and represented the Secretary-General on those occasions. Mr. Yuri M. Rybakov, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General at the other meetings of the session and acted as Secretary to the Commission. Mr. Nicolas Teslenko and Mr. Santiago Torres-Bernárdez acted as Deputy Secretaries to the Commission and Mr. Eduardo Valencia-Ospina and Mr. Larry D. Johnson served as Assistant Secretaries to the Commission.

F. Agenda

10. The Commission adopted an agenda for the twenty-sixth session, consisting of the following items:

2. Commemoration of the twenty-fifth anniversary of the opening of the Commission’s first session.
3. State responsibility.
4. Succession of States in respect of treaties.
5. Succession of States in respect of matters other than treaties.
7. Question of treaties concluded between States and international organizations or between two or more international organizations.
8. Long-term programme of work, including:
   (a) Consideration of recommendation concerning commencement of the work on the law of non-navigational uses of international watercourses (para. 4 of General Assembly resolution 3071 (XXVIII));
   (b) Consideration of recommendation concerning undertaking at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts (para. 3 (c) of General Assembly resolution 3071 (XXVIII)).
10. Co-operation with other bodies.
11. Date and place of the twenty-seventh session.
12. Other business.

11. In the course of the session, the Commission held 52 public meetings (1250th to 1301st meetings) and one private meeting (on 9 May 1974). In addition, the Drafting Committee held 26 meetings and the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses held three meetings. Also, the Expanded Bureau of the Commission held four meetings. Pursuant to the recommendations made by the General Assembly in paragraph 3 of resolution 3071 (XXVIII) of 30 November 1973, the Commission concentrated on agenda item 4 (Succession of States in respect of treaties) in order to complete the second reading of the draft articles on the topic, and continued on a priority basis its work on agenda item 3 (State responsibility) with a view to the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts. The Commission also continued its study of agenda item 7 (Question of treaties concluded between States and international organizations or between two or more international organizations) and prepared initial draft articles on the topic. In spite of the great difficulty of completing a final set of draft articles on agenda item 4 and of proceeding with the preparation of draft articles on agenda items 3 and 7 during the time at its disposal, the Commission considered all the items in its agenda with the exception of items 5 (Succession of States in respect of matters other than treaties) and 6 (Most-favoured-nation clause).

G. Visit by the Secretary-General

12. The Secretary-General of the United Nations addressed the Commission at its 1288th meeting held on 2 July 1974.

13. The Secretary-General, recalling that at its present session the Commission was commemorating the twenty-fifth anniversary of its first session, stressed that during its twenty-five years of existence, the Commission had made an admirable contribution to the codification and progressive development of international law and thus to the fostering of friendly relations and co-operation among States and to the strengthening of international peace and security. The importance and difficulties of the continuing process of the codification and progressive development of international law were illustrated by the items included in the agenda of the Commission’s present session in accordance with the recommendations of the General Assembly. He called attention to the important and difficult tasks before the Commission in its work on the topics of State responsibility, succession of States, most-favoured-nation clause and the question of treaties concluded between States and international organizations or between two or more international organizations. In conclusion, he emphasized that the Commission’s work on those topics, as well as on the topics contained in the programme of its future work, represented a substantial contribution to the strengthening of the legal basis of world-wide co-operation, which was especially important at a time when the trend towards international détente was dominant in international relations.

14. In reply, the Chairman said it was gratifying that that was the second occasion that the Secretary-General had found time to address the Commission since the beginning of his term of office. The Commission was,
H. Commemoration of the twenty-fifth anniversary of the opening of the Commission’s first session

15. Pursuant to a decision taken by the Commission at its twenty-fifth session in 1973, the Commission at its present session commemorated the twenty-fifth anniversary of the opening of its first session (12 April to 9 June 1949). The 1265th meeting, held on 27 May 1974, was devoted to a solemn commemoration of that occasion. The Commission was addressed by Mr. Erik Suy, Under-Secretary-General, the Legal Counsel, who spoke on behalf of the Secretary-General; by Sir Humphrey Waldock, Judge of the International Court of Justice; by Mr. Roberto Ago, Mr. Mustafa Kamil Yasseen, Mr. N. A. Ushakov, Mr. Taslim O. Elias, Mr. Senjin Tsuruoka, and Mr. Richard D. Kearney, former Chairman of the Commission; and by Mr. Endre Ustor, Chairman of the Commission at its present session. The ceremony was also attended by former members of the Commission, high government officials of the host country and city, high officials of the United Nations and other international organizations, diplomatic and academic personalities and members of the International Law Seminar.

16. The statements made highlighted the importance for international law of the work accomplished by the Commission over a quarter of a century. During the twenty-five years of its existence the Commission, acting in accordance with recommendations of the General Assembly, had submitted final drafts or reports on the following eighteen topics: draft declaration on rights and duties of States; ways and means for making the evidence of customary international law more readily available; formulation of the Nürnberg principles; question of international criminal jurisdiction; reservations to multilateral conventions; question of defining aggression; draft codes of offences against the peace and security of mankind; nationality, including statelessness; law of the sea; arbitral procedure; diplomatic intercourse and immunities; consular relations; extended participation in general multilateral treaties concluded under the auspices of the League of Nations; law of treaties; special missions; relations between States and international organizations; the question of the protection and inviolability of diplomatic agents and other persons entitled to special protection under international law; and succession of States in respect of treaties, on which work would be completed at the present session.

17. The number and the importance of the international instruments which had resulted from the Commission’s final drafts or reports during its first twenty-five years was truly impressive, especially in the three major works of codification undertaken, namely, diplomatic and consular law, law of the sea, and the law of treaties. In these three fields alone nine conventions had been adopted by the General Assembly or plenipotentiary conferences on the basis of the drafts prepared by the Commission. The Commission’s success, however, was not to be measured simply by those instruments. The Commission’s work had exercised a definite influence on the formation of legal opinion throughout the international community, in the International Court of Justice, in the decisions of national Courts, in the offices of legal advisers to Governments, in the writings of jurists, and in universities and learned institutions where international law was studied. Also, the Commission participated directly in helping to disseminate international law through the International Law Seminar.

**Chapter II**

**SUCCESSION OF STATES IN RESPECT OF TREATIES**

**A. Introduction**

18. At its first session, held in 1949, the International Law Commission listed the topic “Succession of States and Governments” among the fourteen selected for codification but did not give priority to its study. At its fourteenth session, held in 1962, the Commission decided to include that topic on its programme of work,
in view of the fact that by paragraph 3(a) of General Assembly resolution 1686 (XVI) of 18 December 1961 entitled "Future work in the field of codification and progressive development of international law", the General Assembly had recommended that the Commission should include "on its priority list the topic of Succession of States and Governments".  

19. During its fourteenth session, at the 637th meeting, held on 7 May 1962, the Commission set up a Sub-Committee on the Succession of States and Governments, which it requested to submit suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation. The Sub-Committee consisted of the following ten members: Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The Sub-Committee held two closed meetings, on 16 May and 21 June 1962. In the light of the Sub-Committee’s suggestions, the Commission took some procedural decisions at its 668th and 669th meetings, held on 26 and 27 June 1962. It decided, inter alia, that the Sub-Committee should meet at Geneva in January 1963 to continue its work, the Secretariat should undertake specific studies, and the agenda for the Commission’s fifteenth session should include the item “Report of the Sub-Committee on Succession of States and Governments”. 

21. The Secretary-General sent a circular note to the Governments of Member States, in accordance with the relevant provisions of the Commission’s Statute, inviting them to submit the text of any treaties, laws, decrees, regulations, diplomatic correspondence etc., concerning the procedure of succession relating to the States which had achieved independence after the Second World War. 

22. By its resolution 1765 (XVII) of 20 November 1962, the General Assembly recommended that the Commission should continue its work on the succession of States and Governments, taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on the Succession of States and Governments, with appropriate reference to the views of States which have achieved independence since the Second World War.

23. The Sub-Committee on the Succession of States and Governments met at Geneva from 17 to 25 January 1963 and again on 6 June 1963, at the beginning of the International Law Commission’s fifteenth session. On concluding its work, the Sub-Committee approved a report by its Chairman, which was annexed to the report of the International Law Commission on the work of its fifteenth session. The Sub-Committee’s report contains its conclusions on the scope of the topic of succession of States and Governments and its recommendations on the approach the Commission should adopt in its study. In the Yearbook of the International Law Commission, 1963, the Sub-Committee’s report is accompanied by two appendices, reproducing respectively the summary records of the meetings held by the Sub-Committee in January 1963 and on 6 June of the same year, and the memoranda and working papers submitted to the Sub-Committee by Mr. Elias, Mr. Tabibi, Mr. Rosenne, Mr. Castrén, Mr. Bartoš, and Mr. Lachs (Chairman of the Sub-Committee). 

24. The report of the Sub-Committee on the Succession of States and Governments was discussed by the Commission during its fifteenth session (1963), at the 702nd meeting, after being introduced by the Chairman of the Sub-Committee, who explained the Sub-Committee’s conclusions and recommendations. The Commission unanimously approved the Sub-Committee’s report and gave its general approval to the recommendations contained therein. The Sub-Committee proposed that the Commission should remind Governments of the Secretary-General’s circular note, and the Commission gave instructions to the Secretariat with a view to obtaining further information on the practice of States. At the same time, the Commission appointed Mr. Lachs as Special Rapporteur on the topic of the succession of States and Governments. 

25. The Commission endorsed the Sub-Committee’s view that the objectives should be “a survey and evaluation of the present state of the law and practice in the matter of State succession and the preparation of draft articles on the topic in the light of new developments in international law”. Several members emphasized that in view of the modern phenomenon of decolonization, “special attention should be given to the problems of concern to the new States”. The Commission considered that “the priority given to the study of the question of State succession was fully justified” and stated that the succession of Governments would, for the time being, be considered “only to the extent necessary to supplement the study on State succession”. Likewise, the Commission considered it “essential to establish some degree of co-ordination between the Special Rapporteurs on, respectively, the law of treaties, State responsibility, and the succession of States”. The Sub-Committee’s opinion that succession in the matter of treaties should be “considered in connexion with the succession of States rather than in the context of the law of treaties” was also endorsed by the Commission. The broad outline, the order of priority of the headings and the detailed division of the topic recommended by the Sub-Committee were agreed to by the Commission, it being understood that the purpose was to lay down “guiding principles to be followed by the Special Rapporteur” and that the Commission’s approval was “without prejudice to the position of each member with regard to the substance of the questions included in the

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5 Ibid., p. 190, para. 54. 
6 Ibid., pp. 189-190 and 191, paras. 55 and 70-71. 
7 Ibid., pp. 191-192, para. 72. 
8 Ibid., p. 192, para. 74. 
9 Ibid., p. 192, para. 73. 
12 See para. 21 above. 
programme". The headings into which the topic was divided, were as follows: (a) succession in respect of treaties; (b) succession in respect of rights and duties resulting from sources other than treaties; (c) succession in respect of membership of international organizations.

26. In its resolution 1902 (XVIII) of 18 November 1963, the General Assembly, noting that the work of codification of the topic of succession of States and Governments was proceeding satisfactorily, recommended that the International Law Commission should continue its work on the topic, taking into account the views expressed at the eighteenth session of the General Assembly, the report of the Sub-Committee on the Succession of States and Governments and the comments which may be submitted by Governments, with appropriate reference to the views of States which have achieved independence since the Second World War.

27. At its sixteenth session, in 1964, the Commission adopted its programme of work for 1965 and 1966 and decided to devote its sessions during those two years to the work of codification then in progress on the law of treaties and on special missions. That decision was taken having regard, in particular, to the fact that the term of office of the members of the Commission would expire at the end of 1966 and that some considerable time would be needed to complete the work on both topics. Succession of States and Governments would be dealt with as soon as the study of those two other topics and of relations between States and intergovernmental organizations had been completed. Consequently, the Commission did not consider the topic of succession of States at its sixteenth (1964), seventeenth (1965/1966) and eighteenth (1966) sessions. In 1966, the Commission decided to place the topic of the succession of States and Governments on the provisional agenda for its nineteenth session (1967).  

28. In its resolutions 2045 (XX) of 8 December 1965 and 2167 (XXI) of 5 December 1966, the General Assembly noted with approval the Commission’s programme of work referred to in the reports on its sixteenth, seventeenth and eighteenth sessions. In resolution 2045 (XX) the Assembly recommended that the Commission should continue, “when possible”, its work on succession of States and Governments, “taking into account the views and considerations referred to in General Assembly resolution 1902 (XVIII)”. Resolution 2167 (XXI) in turn recommended that the Commission should continue that work, “taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVII)”.  

29. At its nineteenth session, in 1967, the Commission made new arrangements for the work on succession of States and Governments. In doing so it took account of the broad outline of the subject laid down in the report submitted by its Sub-Committee in 1963, and of the fact that Mr. Lachs, the Special Rapporteur on the topic had ceased to be a member of the Commission, upon his election to the International Court of Justice in December 1966. Acting on a suggestion previously made by Mr. Lachs and in order to advance its study more rapidly, the Commission decided to divide the topic of succession of States and Governments among more than one Special Rapporteur. On the basis of the division of the topic into three headings originally proposed in the report of the Sub-Committee, which was agreed to by the Commission, it decided to appoint Special Rapporteurs for two of these. Sir Humphrey Waldock, formerly Special Rapporteur on the law of treaties, was appointed Special Rapporteur for “succession in respect of treaties” and Mr. Mohammed Bedjaoui, Special Rapporteur for “succession in respect of rights and duties resulting from sources other than treaties”. The Commission decided to leave aside, for the time being, the third heading in the division made by the Sub-Committee, namely, “succession in respect of membership of international organizations”, which it considered to be related both to succession in respect of treaties and to relations between States and intergovernmental organizations. Consequently, the Commission did not appoint a Special Rapporteur for this heading.

30. With regard to “succession in respect of treaties”, the Commission observed that it had already decided in 1963 to give priority to this aspect of the topic, and that the convocation by General Assembly resolution 2166 (XXI) of 5 December 1966 of a conference on the law of treaties in 1968 and 1969 had made its codification more urgent. The Commission therefore decided to advance its work on that aspect of the topic as rapidly as possible as from its twentieth session in 1968. The Commission considered that the second aspect of the topic, namely, “succession in respect of rights and duties resulting from sources other than treaties”, was a diverse and complex matter which would require some preparatory study. At its twentieth session, in 1968, the Commission deemed it...
desirable to complete the study of succession in respect of treaties during the remainder of the Commission's term of office in its present composition.19

31. The Commission's decisions referred to in paragraphs 29 and 30 above received general support in the Sixth Committee at the General Assembly's twenty-second and twenty-third sessions. The Assembly, in its resolution 2272 (XXII) of 1 December 1967, noted with approval the International Law Commission's programme of work for 1968, and, repeating the terms of its resolution 2167 (XXI), recommended that the Commission should continue its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)". At the General Assembly's twenty-third session, it was noted with satisfaction that the International Law Commission, following the recommendation of the General Assembly, had begun to consider in depth the topic of succession of States and Governments, and that some progress had already been achieved at the Commission's twentieth session. Once again, the General Assembly, in its resolution 2400 (XXIII) of 11 December 1968, noted with approval the programme of work planned by the International Law Commission and recommended that the Commission continue its work on succession of States and Governments, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)". Subsequently, the same recommendation was made by the Assembly in its resolution 2501 (XXIV) of 12 November 1969.

32. Sir Humphrey Walcock, the Special Rapporteur on succession in respect of treaties, submitted five reports in the period 1968-1972. The first report, 20 which was of a preliminary character, was considered by the Commission at its twentieth session in 1968. Following the discussion of the report, the Commission concluded that it was not called upon to take any formal decision.21 The Commission noted the Special Rapporteur's interpretation of his task as strictly limited to succession in respect of treaties, i.e. to the question how far treaties previously concluded and applicable with respect to a given territory might still be applicable after a change in the sovereignty over that territory; and his proposal to proceed on the basis that the present topic is essentially concerned only with the question of succession in respect of the treaty as such. A summary of the views expressed was included for information in the Commission's report on the session.22 It was also agreed that it would be for the Special Rapporteur to take account, in so far as they might also have relevance to succession in respect of treaties, of the aspects of the general debate on succession in respect of matters other than treaties, held at the same session of the Commission.23

33. At its twenty-first session, in 1969, the Commission, owing to the lack of time, did not consider the second report submitted by the Special Rapporteur.24 At its twenty-second session, in 1970, the Commission considered, together, in a preliminary manner, the draft articles in the second and third reports, submitted by the Special Rapporteur in 1969 and 1970.25 The four articles of the second report deal with the use of certain terms, the area of territory passing from one State to another (principle of "moving treaty frontiers"), devolution agreements, and unilateral declarations by successor States. The third report contains additional provisions on the use of terms, eight draft articles concerning treaties providing for the participation of "new States" the general rules governing the position of "new States" in regard to multilateral treaties and a note on the question of placing a time-limit on the exercise of the right to notify succession.

34. Having regard to the nature of the discussion, the Commission confined itself to endorsing the Special Rapporteur's general approach to the topic and did not take any formal decision on the substance of the draft articles considered. The Commission did, however, include in its 1970 report to the General Assembly extensive summaries both of the Special Rapporteur's proposals and of the views expressed by members who took part in the discussion.26 By resolution 2634 (XXV), of 12 November 1970, the General Assembly recommended that the Commission should continue its work with a view to completing the first reading of the draft articles on succession of States in respect of treaties.

35. At the Commission's twenty-third session, in 1971, the Special Rapporteur submitted his fourth report 27 containing an additional provision on the use of terms and five more draft articles on the general rules governing the position of "new States" in regard to bilateral treaties. Occupied with the completion of its draft on the representation of States in their relations with international organizations, the Commission, owing to lack of time, did not consider the topic of the succession of States in respect of treaties. It decided, however, to include in chapter III of its report on the session a section, prepared by the Special Rapporteur, containing an account of the progress of work on the topic.28

36. At the Commission's twenty-fourth session, in 1972, the Special Rapporteur submitted his fifth report 29 designed to complete the series of draft articles in his second, third and fourth reports. The report is devoted to the rules applicable to particular categories of succession

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21 Ibid. p. 221, document A/7209/Rev.1, paras. 80-81.
22 Ibid., pp. 221-222, document A/7209/Rev.1, paras. 82-91.
23 Ibid., pp. 216-221, document A/7209/Rev.1 paras. 45-79.
42. At its present session the Commission re-examined which summarized the written comments and Add. 1-6) of the provisional draft. At its 1176th, 1177th, 1181st, 1187th, 1196th and 1197th meetings, the Commission considered the reports of the Drafting Committee which was also entrusted with the task of preparing the text of certain general provisions. At its 1197th meeting the Commission adopted a provisional draft on succession of States in respect of treaties as recommended by the General Assembly in its resolution 2780 (XXVI) of 3 December 1971.

38. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit the provisional draft articles, through the Secretary-General, to Governments of Member States for their observations. In view of the time required for the preparation of the observations of Governments and for their study by the Special Rapporteur, the Commission decided not to consider at its twenty-fifth session the topic of succession of States in respect of treaties.

39. The General Assembly, in part I of resolution 2926 (XXVII) of 28 November 1972, recommends that the Commission should “proceed with further consideration on succession of States in respect of treaties in the light of comments received from Member States” on the provisional draft.

40. At its twenty-fifth session (1973), the Commission decided, in view of the fact that Sir Humphrey Waldock, Special Rapporteur on the topic of succession of States in respect of treaties, had resigned from membership of the Commission upon being elected to the International Court of Justice, to appoint Sir Francis Vallat as the new Special Rapporteur for the topic.

41. The General Assembly, by resolution 3071 (XXVIII) of 30 November 1973, recommended that the Commission should complete at its twenty-sixth session, in the light of comments received from Member States, the second reading of the draft on succession of States in respect of treaties.

42. At its present session the Commission re-examined the draft articles in the light of the comments of Governments. It had before it the first report submitted by the new Special Rapporteur, Sir Francis Vallat (A/CN.4/278 and Add.1-6) which summarized the written comments of Governments and also those made orally by delegations in the General Assembly, and contained proposals on the revision of the articles.

43. The Commission considered the first report of the Special Rapporteur at its 1264th, 1266th to 1273rd, 1279th to 1284th and 1286th to 1290th meetings. At its 1285th, 1286th, 1290th and 1293rd to 1296th meetings it considered the reports of the Drafting Committee. At its 1301st meeting, the Commission adopted with one abstention, the final text in English, French and Spanish of its draft articles on succession of States in respect of treaties, as a whole. In accordance with its Statute it submits them herewith to the General Assembly, together with a recommendation.44

44. Since 1962, the Secretariat has prepared and distributed, in accordance with the Commission’s requests, the following documents and publications relating to the topic: (a) a memorandum on “The succession of States in relation to membership in the United Nations”; (b) a memorandum on “Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary”; (c) a study entitled “Digest of the decisions of international tribunals relating to State succession” and a supplement thereto; (d) a study entitled “Digest of decisions of national courts relating to succession of States and Governments”; (e) seven studies in the series “Succession of States to multilateral treaties”, entitled respectively “International Union for the Protection of Literary and Artistic Works: Berne Convention of 1886 and subsequent Acts of revision” (study I), “Permanent Court of Arbitration and The Hague Conventions of 1899 and 1907” (study II), “The Geneva Humanitarian Conventions and the International Red Cross” (study III), “International Union for the Protection of Industrial Property: Paris Convention of 1883 and subsequent Acts of revision” and special agreements” (study IV), “The General Agreement on Tariffs and Trade (GATT) and its subsidiary instruments” (study V) “Food and Agriculture Organization of the United Nations; Constitution and multilateral conventions and agreements concluded within the Organization and deposited with its Director-General” (study VI), “International Telecommunication Union: 1932 Madrid and 1947 Atlantic City International Telecommunication Conventions and subsequent revised Conventions and Telegraph, Telephone, Radio and Additional Radio Regulations” (study VII); (f) three studies in the series “Succession of States in respect of bilateral treaties”, entitled respectively “Extradition treaties” (study I), “Air transport agreements” (study II) and “Federal unions of States, dissolutions of a union of States and other dismemberments of a State into two or more States. It includes also a definition of “union of States” as well as an excursus on States, other than unions of States, which are formed from two or more territories. It also includes a definition of “union of States” as well as an excursus on States, other than unions of States, which are formed from two or more territories.
(study II), and "Trade agreements" (study III); a volume of the United Nations Legislative Series entitled Materials on succession of States, containing the information provided or indicated by Governments of Member States in response to the Secretary-General’s request; and a supplement to the foregoing volume.

2. STATE PRACTICE

45. The General Assembly in its resolutions 1765 (XVII), of 20 November 1962, and 1902 (XVIII), of 18 November 1963, recommended that the Commission should proceed with its work on succession of States "with appropriate reference to the views of States which have achieved independence since the Second World War". The case of those new States, most of which emerged from former dependent territories, is the commonest form in which the issue of succession has arisen during the past twenty-five years and the stress laid on it by the General Assembly’s recommendations needs neither justification nor explanation at the present moment in history. The Commission has therefore given due attention throughout the study of the topic to the practice of the newly independent States referred to in the above-mentioned resolutions of the General Assembly, without, however, neglecting the relevant practice of older States. On the emergence of a newly independent State, the problems of succession that arise in respect of treaties are inevitably problems which by their very nature involve consensual relations with other existing States which, in the case of some multilateral treaties, are very large in number. Today, moreover, on the emergence of a new State, the problems of succession will touch as many recently emerged new States as it will old States.

46. It is in the nature of things that more recent practice must be accorded a certain priority as evidence of the opinio juris of today, especially when, as in the case of succession of States in respect of treaties, the frequency and extensiveness of the modern practice tends to submerge the earlier precedents. No purpose would, however, be served by distinguishing sharply between the value of earlier and later precedents, since the basic elements of the situations giving rise to the questions of succession in respect of treaties in the earlier precedents were much the same as in modern cases. Moreover, if recent practice is extremely rich in matters relating to new States emerging from a dependent territory, the same cannot be said for other cases, such as, for instance, secession, dismemberment of an existing State, the formation of unions of States and the separation of parts of a union of States. Nor can the Commission fail to recognize that the era of decolonization is nearing its completion and that it is in connexion with these other cases that problems of succession are likely to arise in future. The Commission has therefore taken into account, as appropriate, earlier precedents that throw light on these cases. In considering the various precedents, the Commission has tried to discern with sufficient clearness how far the State practice was an expression simply of policy and how far and in what points an expression of legal rights or obligations.

47. In addition, the Commission has borne in mind that new factors have come into play that affect the context within which State practice in regard to succession takes place today. Particularly important is the much greater interdependence of States, which has in some measure affected the policy of successor States in regard to continuing the treaty relations of the territory to which they have succeeded, and the fact that the modern precedents reflect the practice of States conducting their relations under the régime of the principles of the Charter of the United Nations. Important also is the enormous growth of international organizations and the contribution which they have made to the development of depositary practice and the collection and dissemination of information regarding the treaty relationships of successor States.

3. THE CONCEPT OF "SUCCESSION OF STATES" WHICH EMERGED FROM THE STUDY OF THE TOPIC

48. Analogies drawn from municipal law concepts of succession are frequent in the writings of jurists and are sometimes also to be found in State practice. A natural enough tendency also manifests itself both among writers and in State practice to use the word "succession" as a convenient term to describe any assumption by a State of rights and obligations previously applicable with respect to territory which has passed under its sovereignty without any consideration of whether this is truly succession by operation of law or merely a voluntary arrangement of the States concerned. Municipal law analogies, however, suggestive and valuable in some connexions, have to be viewed with caution in international law, for an assimilation of States to individuals as legal persons neglects fundamental differences and may lead to unjustifiable conclusions derived from municipal law.

49. The approach to succession adopted by the Commission after its study of the topic of succession in respect of treaties is based upon drawing a clear distinction between, on the one hand, the fact of the replacement of one State by another in the responsibility for the international relations of a territory and, on the other, the transmission of treaty rights and obligations from the predecessor to the successor State. A further element in the concept is that a consent to be bound given by the predecessor State in relation to a territory prior to the succession of States, establishes a legal nexus between the territory and the treaty and that to this nexus certain legal incidents attach.

50. In order to make clear the distinction between the fact of the replacement of one State by another and the transmission of rights and obligations, the Commission inserted in article 2 a provision defining the meaning of the expression "succession of States" for the purpose of the draft. Under this provision the expression "succession of States" is used throughout the articles to denote simply a change in the responsibility for the international relations of territory, thus leaving aside from the definition all
questions of the rights and obligations as a legal incident of that change. The rights and obligations in respect of treaties deriving from a "succession of States", as defined in the draft, are then to be ascertained from the specific provisions of the articles themselves.

4. RELATIONSHIP BETWEEN SUCCESSION IN RESPECT OF TREATIES AND THE GENERAL LAW OF TREATIES

51. A close examination of State practice afforded no convincing evidence of any general doctrine by reference to which the various problems of succession in respect of treaties could find their appropriate solution. The diversity in regard to the solutions adopted makes it difficult to explain this practice in terms of any fundamental principle of "succession" producing specific solutions to each situation. Nor is the matter made any easier by the fact that a number of different theories of succession are to be found in the writings of jurists. If any one specific theory were to be adopted, it would almost certainly be found that it could not be made to cover the actual practice of States, organizations and depositaries without distorting either the practice or the theory. If, however, the question of succession in respect of treaties is approached more from the point of view of the law of treaties some general rules are discernible in practice.

52. The task of codifying the law relating to succession of States in respect of treaties appears, in the light of State practice, to be rather one of determining within the law of treaties the impact of the occurrence of a "succession of States" than vice versa. It follows that, in approaching questions of succession of States in respect of treaties, the implications of the general law of treaties have constantly to be borne in mind. As today the most authoritative statement of the general law of treaties is that contained in the Vienna Convention on the Law of Treaties (1969), the Commission felt bound to take the provisions of that Convention as an essential framework of the law relating to succession of States in respect of treaties.

53. Indeed, the question of the treatment to be accorded to succession of States arose during the codification of the law of treaties and the commentaries of the Commission to its draft articles on the law of treaties contained several references to the matter. It was for reasons of convenience, linked mainly to the need not to delay further the conclusion of the codification of the general law of treaties, that the Commission decided finally to insert in its draft a similar general reservation with regard to the problems arising from a succession of States to that which is embodied today in article 73 of the Vienna Convention with respect to the law of treaties generally.48

54. Accordingly, the draft articles now submitted presuppose the existence of the provisions, wording and terminology of the Vienna Convention. Several of the introductory provisions of the present draft—such as those concerning its scope, the use of terms, ceases not within the scope of the draft, treaties constituting international organizations or adopted within them, and obligations imposed by international law independently of a treaty (articles 1-5)—follow closely the language of the corresponding provisions of the Vienna Convention. In one instance, article 19 (reservations), an express cross-reference is made to the relevant articles of the Vienna Convention; in other instances, as in article 21 (notification of succession), certain provisions of the Vienna Convention are reproduced with the adjustments necessary to fit them into the context of the present topic.

55. Having regard to the approach indicated in the foregoing paragraphs, the Commission has prepared the draft articles on the basis of the principle that they should deal only with the effects of a succession of States as such on the treaties of the predecessor State. So far as possible the Commission has avoided re-stating in the present draft articles general rules applicable to treaties. It has left questions falling outside the scope of the effects of a succession of States in respect of treaties to be governed by whatever rules of international law may otherwise be applicable in respect of treaties. In some instances, however, for example as regards devolution agreements (article 8) and unilateral declarations (article 9) it has been considered necessary to clarify the legal position because of the direct relevance to the question of the effects of a succession of States in respect of treaties. Nevertheless, such provisions have, in accordance with the general approach of the Commission, been limited to those aspects of the matter which fall within the scope of that question. Other aspects of such matters are left to be governed by the pertinent rules of international law, and in particular those rules as stated in the Vienna Convention.

56. It also follows from the approach adopted that the Commission has similarly proceeded on the basis of the principle that the articles will be interpreted and applied in accordance with the rules of interpretation as stated in the Vienna Convention, and in particular taking into account the relevant rules of international law applicable in the relations between the parties, as provided in article 31, paragraph 3 (c) of the Convention. However, it has been considered necessary to include certain provisions of a general character, such as article 13 (questions relating to the validity of a treaty), so as to remove the possibility of misunderstanding as to the implications of the articles.

5. THE PRINCIPLE OF SELF-DETERMINATION AND THE LAW RELATING TO SUCCESSION IN RESPECT OF TREATIES

57. The Commission has taken account of the implications of the principles of the Charter of the United Nations, in particular self-determination, in the modern law concerning succession in respect of treaties. For this reason it has not felt able to endorse the thesis put forward by some jurists 49 that the modern law does, or

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48 See also foot-note 15 above.

ought to, make the presumption that a "newly independent State" consents to be bound by any treaties previously in force internationally with respect to its territory, unless within a reasonable time it declares a contrary intention. Those who advocate the making of that presumption are no doubt influenced by the ever-increasing interdependence of States, the consequential advantages of promoting the continuity of treaty relations in cases of succession and the considerable extent to which in the era of decolonization newly independent States have accepted the continuance of the treaties of the predecessor States. The presumption, however, touches a fundamental point of principle affecting the general approach to the formulation of the law relating to the succession of a newly independent State.

58. The Commission, after a study of State and depositary practice, concluded that in modern international law, having regard to the need for the maintenance of the system of multilateral treaties and of the stability of treaty relationships, as a general rule the principle of de jure continuity should apply. On the other hand, the "traditional" principle that a "new State" begins its treaty relations with a clean slate, if properly understood and limited, was in the opinion of the Commission more consistent with the principle of self-determination as it is applicable in the case of newly independent States. The clean slate principle was well-designed to meet the situation of newly independent States, namely, those which emerge from former dependent territories. Consequently, the Commission was of the opinion that the main implication of the principle of self-determination in the law concerning succession in respect of treaties was precisely to confirm the traditional clean slate principle as the underlying norm for cases of newly independent States or for cases that may be assimilated to them.

59. The "clean slate" metaphor, the Commission wished to emphasize, is merely a convenient and succinct way of referring to the newly independent State's general freedom from obligation in respect of its predecessor's treaties. But that metaphor is misleading if account is not taken of other principles which affect the position of a newly independent State in relation to its predecessor's treaties. In the first place, as the commentaries to articles 16 and 17 make clear, modern treaty practice recognizes that a newly independent State has the right under certain conditions to establish itself as a "party" or as a "contracting State" to any multilateral treaty, except one of a restricted character, in regard to which its predecessor State was either a "party" or a "contracting State" at the date of the succession of States. In other words, the fact that prior to independence the predecessor State had established its consent to be bound by a multilateral treaty and its act of consent related to the territory now under the sovereignty of the newly independent State creates a legal nexus between that territory and the treaty in virtue of which the newly independent State has the right, if it wishes, to participate in the treaty on its own behalf as a separate party or contracting State. In the case of multilateral treaties of a restricted character and bilateral treaties, the newly independent State may invoke a similar legal nexus between its territory and the treaty as a basis for achieving the continuance in force of the treaty with the consent of the other State or States concerned. Accordingly, the so-called clean slate principle, as it operates in the modern law of succession of States, is very far from normally bringing about a total rupture in the treaty relations of a territory which emerges as a newly independent State. The modern law, while leaving the newly independent State free under the clean slate principle to determine its own treaty relations, holds out to it the means of achieving the maximum continuity in those relations consistent with the interests of itself and of other States parties to its predecessor's treaties. In addition, the clean slate principle does not, in any event, relieve a newly independent State of the obligation to respect a boundary settlement and certain other situations of a territorial character established by treaty.

60. The principal new factor which has appeared in the practice regarding succession of States during the United Nations period has been the use of agreements, commonly referred to as "devolution" or "inheritance" agreements, which are concluded between a predecessor and successor State and provide for the continuity of treaty rights and obligations or, alternatively, "unilateral declarations" by a successor State designed to regulate its treaty position after the succession of States. As to devolution agreements, quite apart from any question that may arise concerning their legal validity under the general law of treaties, it is clear that a devolution agreement cannot by itself alter the position of a successor State vis-à-vis other States parties to the predecessor State's treaties. The same is true a fortiori of purely unilateral declarations. In short, however useful such instruments as devolution agreements and unilateral declarations may be in promoting continuity of treaty relations, they still leave the effects of a succession of States to be governed essentially by the general law concerning succession in respect of treaties.

6. GENERAL FEATURES OF THE DRAFT ARTICLES

(a) Form of the draft

61. As recommended by the General Assembly, the Commission cast its study of the succession of States in respect of treaties in the form of a group of draft articles. The draft articles have been prepared in a form to render them capable of serving as a basis for the conclusion of a convention should this be the decision taken by the Assembly. The Commission was in any event of the view that the preparation of draft articles was the most appropriate and effective method of studying and identifying the rules of international law relating to succession of States in respect of treaties.

62. At its present session, the Commission, in the light of the comments of Governments, re-examined the question whether or not the final form of the codification of the law relating to succession of States in respect of treaties should be effected in the form of a convention. As indicated in the introduction to the 1972 draft, the question may be raised as to the value of codifying the law of the succession of States in respect of treaties in the

form of a convention, in view of the fact that under the general law of treaties a convention is not binding upon a State unless and until it is a party to the convention. Moreover, under a general rule, now codified in article 28 of the Vienna Convention, the provisions of a treaty, in the absence of a contrary intention “do not bind a party in relation to any act or fact which took place . . . before the date of the entry into force of the treaty with respect to that party”. Since a succession of States in most cases brings into being a new State, a convention on the law of succession in respect of treaties would ex hypothesi not be binding on the successor State unless and until it took steps to become a party to that convention; and even then the convention would not be binding upon it in respect of any act or fact which took place before the date on which it became a party. Nor would other States be bound by the convention in relation to the new State until the latter had become a party. The Commission recognized that participation by successor States would involve problems relating to the method of giving, and the retroactive effect of, consent to be bound by the convention given by the successor State. Article 7 (non-retroactivity of the present articles) raises an aspect of the latter problem, but otherwise the Commission considered that these were questions to be answered by Governments when drafting the final clauses for inclusion in the Convention.

63. In the Commission’s view, the consideration mentioned in the preceding paragraph does not detract substantially from the value of a codifying convention as an instrument for consolidating legal opinion regarding the generally accepted rules of international law concerning succession of States in respect of treaties. A new State, though not formally bound by the convention, would find in its provisions the norms by which to be guided in dealing with questions arising from the succession of States. Although much the same might be said of a declaratory code or a model, experience has shown that a convention is likely to be regarded as more authoritative in character, and accordingly, to be more effective as a guide. Moreover, such a convention has important effects in achieving general agreement as to the content of the law which it codifies and thereby establishing it as the accepted customary law on the matter. The extent to which this might in fact prove to be the case would depend, of course, on the intrinsic merit of the draft articles, as reflecting customary international law or as providing sensible and acceptable solutions in areas of doubt, and on the support consequently given by States to the convention. If the majority of States became parties to the convention within a reasonable period of time, the establishment of a convention would have proved worthwhile. On the assumption that a convention on succession of States in respect of treaties would receive wide support, the contribution to the development of customary international law does appear to be a good reason for adopting this form. Besides, there has been general support for the view that the draft articles on succession of States in respect of treaties should be drafted on the basis of and in parallel with the provisions of the Vienna Convention. This being so, it seems right to regard the articles on succession of States in respect of treaties as supplementary to the provisions of the Vienna Convention. Accordingly, it would be appropriate to give these articles the same status as the Vienna Convention, i.e., to establish them in the form of a convention. If satisfactory provision was made in the final clauses for the participation of a successor State in the convention with effect from the date of the succession, the convention would have the merit of making possible the regulation by treaty of the effects for the successor State of the succession of States in respect of the treaties of the predecessor State. A convention would also regulate and clarify the relevant treaty relations between the predecessor State and other States parties to the treaties in question on the assumption that they were all parties to the convention. Thus, to this extent a convention would have direct legal value for the parties to it.

64. In submitting the final text of the draft articles on the succession of States in respect of treaties the Commission reaffirms the view which it accepted at the outset of its work on the topic and which it expressed when submitting its provisional draft to the consideration of Governments. A corresponding recommendation is made below.51

(b) Scope of the draft

65. The draft articles, as the title to the present chapter indicates, are limited to succession of States in respect of treaties. The topic of succession on the Commission’s programme was entitled “Succession of States and Governments”. But in 1963 the Commission decided that priority should be given to succession of States and that succession of Governments should be studied “only to the extent necessary to supplement the study on State succession”.62 This decision having been endorsed by the General Assembly, the Commission has limited its draft on succession in respect of treaties to questions arising in connexion with the succession of States. It also follows that the draft does not deal with any questions concerning the succession of subjects of international law other than States, in particular international organizations.

66. At its present session the Commission, in the light of the comments of Governments, considered the question whether or not to include any form of social revolution among the circumstances giving rise to a succession of States for the purposes of the articles on succession of States in respect of treaties. The Commission concluded that it was appropriate to exclude from the scope of the draft articles problems of succession arising as a result of changes of régime brought about by social or other forms of revolution. In its view, in the majority of cases, a revolution or coup d’état of whatever kind brings about a change of government while the identity of the State remains the same. The problem of the effect of a revolution, as regards the question of succession in respect of treaties, then falls within the scope of “succession of governments” rather than within that of “succession of States”. It might be argued that a distinction should be drawn between different kinds of revolution; but such a

51 See para. 84.
52 See para. 25 above.
course would involve very difficult questions of definition which would not be solved simply by describing a particular kind of change of régime as a "social revolution". Moreover, such questions go beyond the realm of succession and relate to the very conception of what a State is, and are, therefore, inevitably charged with overtones of a political and philosophical character which make them more appropriate to be dealt with by other bodies.

67. The limitation of the draft articles to succession in respect of treaties is the consequence of the Commission’s decision in 1967 to study succession in respect of treaties as a distinct part of the topic of succession of States. The scope of the draft articles is also narrowed by the meaning given to the term “treaty” in article 2, paragraph 1 (a), which confines the treaties covered by the draft to treaties “concluded between States” and “in written form”. This provision excludes from the scope of the draft succession of States in respect of: (a) treaties concluded between States and other subjects of international law; (b) treaties concluded between such other subjects of international law; and (c) international agreements not in written form. The Commission decided to limit the scope of the draft in these respects for several reasons. First, the considerations which led the Commission and the United Nations Conference on the Law of Treaties held at Vienna in 1968 and 1969 to exclude these three categories of international agreements from the scope of the codification of the general law of treaties in the Vienna Convention appear to apply with equal force to the codification of the present topic. Secondly, since the present articles are designed to supplement the Vienna Convention by codifying the general law governing succession in respect of treaties, it seems desirable in the interests of uniformity in codification that they should cover the same range of treaties as that Convention.

68. With reference, in particular, to treaties concluded by international organizations, their exclusion from the scope of the draft was criticized in the Sixth Committee by one delegation. In the opinion of that delegation, such exclusion would leave outside the scope of the draft cases of succession resulting from the participations of States in certain hybrid unions, like customs unions and common markets. Such unions might obtain an exclusive right to enter into certain types of agreement, as in the case of the European Economic Community under the Treaty of Rome. Parties to trade agreements concluded, before the establishment of the union, with States which later became members of the union, might not be adequately compensated by a provision entitling them to claim damages from the State entering the union. They might have a real interest in obtaining some legal relationship with the successor organization. In such a context, a sharp distinction between treaties made by States and treaties made by international organizations would seem objectionable. The Commission, however, was not able to agree with that position. In addition to the considerations made in the preceding paragraph, which are also applicable to the instant case, the Commission noted that its study of the question of treaties concluded between States and international organizations or between two or more international organizations was still in its early stages.

Besides, it would not be consistent with reliance on the Vienna Convention “as an essential framework” to extend the draft articles so as to comprise cases of succession of international organizations in respect of treaties. 69. Finally, there are difficulties of principle in the way of the above suggestion. The kind of “succession” contemplated would be different in character from the kind of “succession” contemplated in the draft articles. According to article 2, paragraph 1 (b) "succession of States" means "the replacement of one State by another in the responsibility for the international relations of territory". "Replacement" contemplates complete replacement and not partial transfer or conferment of powers to conclude treaties. The fact of succession by replacement is one thing: the conferment of exclusive powers in a limited field is something quite different. The legal consequences of giving an international organization exclusive powers to negotiate and conclude treaties either on its own behalf or on behalf of its members are likely to be regulated by the international instrument by which they are given. These consequences may vary from case to case. The mere fact that exclusive powers in a certain field are conferred on an international organization will not necessarily mean that the existing treaty obligations of the member States will be immediately and automatically terminated, or indeed that they will necessarily be terminated otherwise than through negotiation. This will depend on the terms of the treaty establishing the organization or conferring the relevant powers on it. In principle, it is in that context that the States concerned should safeguard the legal position with respect to the other parties to any treaty that may be affected.

70. The Vienna Convention in article 73, excluded specifically from its purview “any question that may arise in regard to a treaty from a succession of States or from the international responsibility of a State or from the outbreak of hostilities between States”. Clearly, the exclusion of questions of succession of States is out of place in the present draft. But this is not so with the exclusion of questions concerning State responsibility and the outbreak of hostilities. The Commission therefore, as in the case of the general law of treaties and for the same reasons, decided to insert a provision (article 38) in the draft articles including a general reservation in regard to these questions. In addition, the Commission decided to make a similar reservation excluding from the purview of the present draft any question that may arise in regard to a treaty from a military occupation. Although military occupation would

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84 This topic has been taken up by the Commission in accordance with the recommendation of the General Assembly in resolution 2501 (XXXIV), of 12 November 1969, following upon the resolution adopted by the United Nations Conference on the Law of Treaties entitled “Resolutions relating to Article 1 of the Vienna Convention on the Law of Treaties" (Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (op. cit.), p. 285). For an account of the work accomplished on the topic see chapter IV, below.

not constitute a “succession of States” within the meaning given to that term in article 2 of the present draft, it may raise analogous problems.54

(c) Scheme of the draft

71. The topic of succession of States in respect of treaties has traditionally been expounded in terms of the effect upon the treaties of the predecessor State of various categories of events, notably: annexation of territory of the predecessor State by another State; voluntary cession of territory to another State; birth of one or more new States as a result of the separation of parts of the territory of a State; formation of a union of States; entry into the protection of another State and termination of such protection; enlargement or loss of territory. In addition to studying the traditional categories of succession of States, the Commission took into account the treatment of dependent territories in the Charter of the United Nations. It concluded that for the purpose of codifying the modern law of succession of States in respect of treaties it would be sufficient to arrange the cases of succession of States under three broad categories: (a) succession in respect of part of territory; (b) newly independent States; (c) uniting and separation of States.

72. In dealing with the various cases of succession of States the Commission found it necessary in a number of instances to distinguish between three categories of treaties: (a) multilateral treaties in general; (b) multilateral treaties of a restricted character; and (c) bilateral treaties. The distinction between multilateral treaties in general and multilateral treaties of a restricted character was also made in article 20, paragraph 2, of the Vienna Convention in connexion with the acceptance of reservations. In the present articles, the Commission found it necessary to include a separate provision for multilateral treaties of a restricted character in several places, and in doing so it used language modelled on that used in the above-mentioned provision of the Vienna Convention.

73. The Commission further found it necessary to distinguish a particular category of treaties by reference to the particular substance and effect of their provisions; or, more accurately, to distinguish the régimes established by such treaties as constituting particular cases for purposes of the law of succession of States. These particular cases concern boundaries and régimes of a territorial character established by treaty and are covered in part I of the draft articles.

74. Part V contains two “miscellaneous” provisions which make a general reservation concerning any question that may arise in regard to a treaty from State responsibility or the outbreak of hostilities and from military occupation of a territory.

75. Late in the session, two proposals were submitted by members of the Commission. The first was a draft “article 12 bis” entitled “Multilateral treaties of universal character” which was submitted together with an explanatory note. The second was a draft “article 32” entitled “Settlement of disputes”. As there was not sufficient time to discuss these proposals, it was decided that they should be mentioned and reproduced in the introductory part of the present report.

Multilateral treaties of universal character 57

76. The purpose of the proposed draft article is to ensure that certain treaties which are of a “worldwide scale, open to participation by all States” should continue in force for a newly independent State until such time as the newly independent State gives notice of termination. As may be seen from paragraphs (8) to (14) of the commentary to article 15, the Commission confirmed its decision that it could not distinguish between “law-making” and other treaties for the purposes of articles 15 and 16. Some members expressed dissatisfaction with the effects of this decision in connexion with certain classes of treaties, and others expressed particular concern about treaties of a general or universal character.

77. Particular attention was paid to the Geneva Humanitarian Conventions negotiated under the auspices of the Red Cross. Unfortunately, the Commission was unable to find any satisfactory way of providing for continuity in the case of those conventions in a manner

54 See below, articles 38 (Cases of State responsibility and outbreak of hostilities) and 39 (Cases of military occupation) and the commentary thereto.
that would be compatible with the draft articles, and in particular with the clean slate principle as embodied in articles 15 and 16. The Commission considered in particular whether it could assimilate the Red Cross to an international organization within the meaning of article 4, but it concluded that this would not be feasible.

78. Nevertheless, the attention paid to this matter demonstrated the anxiety that some members of the Commission felt about the effects of the "clean slate" principle as embodied in the draft articles in the case of the humanitarian conventions and other types of multilateral treaties which are of a "worldwide scale". In the time at its disposal, however, the Commission was not able to find a solution to this problem.

Settlement of disputes

79. Several of the comments of Governments drew attention to the need for some procedure for the settlement of disputes, having regard to the nature of the provisions of the draft articles. These articles in many instances lay down tests which are considered by the Commission to be right in principle, but which may lead to difficulties in their application. Some members of the Commission were of the opinion that the articles should not be submitted to the General Assembly or to Governments without the addition of satisfactory provisions for the settlement of disputes. Accordingly, one member of the Commission submitted the proposed draft article on settlement of disputes: this comprises a short article for inclusion in an eventual convention together with an annex providing for a conciliation procedure in any case regarding the interpretation or application of the articles which is not settled through negotiation, any one of the parties to the dispute may set in motion the procedure specified in the annex to the Convention by submitting a request to that effect to the Secretary-General of the United Nations.

80. Some members of the Commission were in favour of including this draft article in the present draft. Several were inclined to agree that in a convention which was supplementary to the Vienna Convention on the Law of Treaties it would be right to adopt procedures for the settlement of disputes based on the provisions of that convention. The general sense of the Commission, however, was that it was too late in the session to consider the matter thoroughly and that, on balance, the Commission should not pursue the matter further without reference to the General Assembly.

81. The Commission is willing, if this should be the wish of the General Assembly, to consider the question of the settlement of disputes for the purposes of the present articles at its twenty-seventh session and to prepare a report for the General Assembly so that it may be available to Governments if and when the articles are being prepared at a conference or in the General Assembly for inclusion in a convention.

The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfill any function for which he shall have been chosen under the following paragraph.

"Annex"

1. A list of conciliators consisting of qualified jurists shall be drawn up and maintained by the Secretary-General of the United Nations. To this end, every State which is a Member of the United Nations or a party to the present Convention shall be invited to nominate two conciliators, and the names of the persons so nominated shall constitute the list. The term of a conciliator, including that of any conciliator nominated to fill a casual vacancy, shall be five years and may be renewed. A conciliator whose term expires shall continue to fulfill any function for which he shall have been chosen under the following paragraph.

2. When a request has been made to the Secretary-General under article [32], the Secretary-General shall bring the dispute before a conciliation commission constituted as follows:

"The State or States constituting one of the parties to the dispute shall appoint:

(a) one conciliator of the nationality of that State or of one of those States, who may or may not be chosen from the list referred to in paragraph 1; and

(b) one conciliator not of the nationality of that State or of any of those States, who shall be chosen from the list.

The State or States constituting the other party to the dispute shall appoint two conciliators in the same way. The four conciliators chosen by the parties shall be appointed within sixty days following the date on which the Secretary-General receives the request.

The four conciliators shall, within sixty days following the date of the last of their own appointments, appoint a fifth conciliator chosen from the list, who shall be chairman.

If the appointment of the chairman or of any of the other conciliators has not been made within the period prescribed above for such appointment, it shall be made by the Secretary-General within sixty days following the expiry of that period. The appointment of the chairman may be made by the Secretary-General either from the list or from the membership of the
82. Taking into account the above points, the Commission has arranged the draft articles as follows:

Part I: General provisions (articles 1 to 13);
Part II: Succession in respect of part of territory (article 14);
Part III: Newly independent States (articles 15 to 29);
Part IV: Uniting and separation of States (articles 30 to 37);
Part V: Miscellaneous provisions (articles 38 and 39).

83. The Commission's work on succession of States in respect of treaties constitutes both codification and progressive development of international law in the sense in which those concepts are defined in article 15 of the Commission's Statute. The articles it has formulated contain elements of both progressive development as well as of codification of the law and, as in the case of several previous drafts, it is not practicable to determine into which category each provision falls.

B. Recommendation of the Commission

84. At the 1301st meeting, on 26 July 1974, the Commission decided, in conformity with article 23 of its Statute, to recommend that the General Assembly should invite Member States to submit their written comments and observations on the Commission's final draft articles on succession of States in respect of treaties and convene an international conference of plenipotentiaries to study the draft articles and to conclude a convention on the subject.

C. Resolution adopted by the Commission

85. The Commission, at its 1301st meeting, on 26 July 1974, adopted by acclamation the following resolution:

International Law Commission. Any of the periods within which appointments must be made may be extended by agreement between the parties to the dispute.

Any vacancy shall be filled in the manner prescribed for the initial appointment.

3. The Conciliation Commission shall decide its own procedure. The Commission, with the consent of the parties to the dispute, may invite any party to the treaty to submit to it its views orally or in writing. Decisions and recommendations of the Commission shall be made by a majority vote of the five members.

4. The Commission may draw the attention of the parties to the dispute to any measures which might facilitate an amicable settlement.

5. The Commission shall receive the parties, examine the claims and objections, and make proposals to the parties with a view to reaching an amicable settlement of the dispute.

6. The Commission shall report within twelve months of its constitution. Its report shall be deposited with the Secretary-General and transmitted to the parties to the dispute. The report of the Commission, including any conclusions stated therein regarding the facts or questions of law, shall not be binding upon the parties and it shall have no other character than that of recommendations submitted for the consideration of the parties in order to facilitate an amicable settlement of the dispute.

7. The Secretary-General shall provide the Commission with such assistance and facilities as it may require. The expenses of the Commission shall be borne by the United Nations.

D. Draft articles on succession of States in respect of treaties

PART I

GENERAL PROVISIONS

Article 1. Scope of the present articles

The present articles apply to the effects of a succession of States in respect of treaties between States.

Commentary

(1) This article corresponds to article 1 of the Vienna Convention 41 and its purpose is to limit the scope of the present articles in two important respects.

(2) First, it gives effect to the Commission's decision that the scope of the present articles, as of the Vienna Convention itself, should be restricted to matters concerning treaties concluded between States.6 It therefore underlines that the provisions which follow are designed for application only to "the effects of succession of treaties between States*. This restriction also finds expression in article 2, paragraph 1 (a), which gives to the term "treaty" the same meaning as in the Vienna Convention, a meaning which specifically limits the term to "an international agreement concluded between States".

(3) It follows that the present articles have not been drafted so as to apply to the effects of a succession of States in respect of treaties to which other subjects of international law, and in particular international organizations, are parties. At the same time, the Commission recognized that the principles which they contain may in some measure also be applicable with reference to treaties to which other subjects of international law are parties. Accordingly, in article 3 it has made a general reservation on this point analogous to that article 3 of the Vienna Convention.

(4) Secondly, article 1 gives effect to the Commission's decision that the present articles should be confined to the effects of a succession of States in respect of

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Footnote 58 continued:


42. In order to avoid unnecessary complication, the commentaries do not, in most cases, mention minor drafting changes made to the 1972 text of the articles.


44. See above, paras. 67-69.
The use of the words "succession of States" in the article is designed to exclude both "succession of governments" and "succession of other subjects of international law", notably international organizations, from the scope of the present articles. This restriction of their scope finds further expression in article 2, paragraph 1 (b), which provides that the term "succession of States" means for the purposes of the present draft "the replacement of one State by another in the responsibility for the international relations of territory".

Article 2 Use of terms

1. For the purposes of the present articles:

(a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(b) "succession of States" means the replacement of one State by another in the responsibility for the international relations of territory;

(c) "predecessor State" means the State which has been replaced by another State on the occurrence of a succession of States;

(d) "successor State" means the State which has replaced another State on the occurrence of a succession of States;

(e) "date of the succession of States" means the date upon which the successor State replaced the predecessor State in the responsibility for the international relations of the territory to which the succession of States relates;

(f) "newly independent State" means a successor State the territory of which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible;

(g) "notification of succession" means in relation to a multilateral treaty any notification, however phrased or named, made by a successor State expressing its consent to be considered as bound by the treaty;

(h) "full powers" means in relation to a notification of succession or a notification referred to in article 37 a document emanating from the competent authority of a State designating a person or persons to represent the State for communicating the notification of succession or, as the case may be, the notification;

(i) "ratification", "acceptance" and "approval" mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty;

(j) "reservation" means a unilateral statement however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty or when making a notification of succession to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(k) "contracting State" means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(l) "party" means a State which has consented to be bound by the treaty and for which the treaty is in force;

(m) "other State party" means in relation to a successor State any party, other than the predecessor State, to a treaty in force at the date of a succession of States in respect of the territory to which that succession of States relates;

(n) "international organization" means an intergovernmental organization.

2. The provisions of paragraph 1 regarding use of terms in the present articles are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State.

Commentary

(1) This article, as its title and the introductory words of paragraph 1 indicate, is intended only to state the meaning with which terms are used in the draft articles.

(2) Paragraph 1 (a) reproduces the definition of the term "treaty" given in article 2, paragraph 1 (a), of the Vienna Convention. It results from the general conclusions reached by the Commission concerning the scope of the present draft articles and its relationship with the Vienna Convention. Consequently, the term "treaty" is used throughout the present draft articles, as in the Vienna Convention, as a general term covering all forms of international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.

(3) Paragraph 1 (b) specifies the sense in which the term "succession of States" is used in the draft articles and is of cardinal importance for the whole structure of the draft. The definition corresponds to the concept of "succession of States" which emerged from the study of the topic by the Commission. Consequently, the term is used as referring exclusively to the fact of the replacement of one State by another in the responsibility for the international relations of territory, leaving aside any connotation of inheritance of rights or obligations on the occurrence of that event. The rights and obligations deriving from a "succession of States" are those specifically provided for in the present draft articles.

(4) The Commission considered that the expression "in the responsibility for the international relations of territory" is preferable to other expressions such as "in the sovereignty in respect of territory" or "in the treaty-making competence in respect of territory", because it is a formula commonly used in State practice and more appropriate to cover in a neutral manner any specific case independently of the particular status of the territory.

See above, para. 48-50.
in question (national territory, trusteeship, mandate, protectorate, dependent territory, etc.). The word "responsibility" should be read in conjunction with the words "for the international relations of territory" and does not intend to convey any notion of "State responsibility", a topic currently under study by the Commission and in respect of which a general reservation has been inserted in article 38 of the present draft.

(5) The meanings attributed in paragraph 1 (c), 1 (d) and 1 (e) to the terms "predecessor State", "successor State" and "date of the succession of States" are merely consequential upon the meaning given to "succession of States" in paragraph 1 (b) and do not appear to require any comment.

(6) The expression "newly independent State", defined in paragraph 1 (f), signifies a State which has arisen from a succession of States in a territory which immediately before the date of the succession of States was a dependent territory for the international relations of which the predecessor State was responsible. In order to make clear that, for the purposes of the draft articles, a newly independent State is a successor State, the Commission inserted at the present session the word "successor" before "State" in the first line of the definition given in paragraph 1 (f).

(7) After studying the various historical types of dependent territories (colonies, trusteeships, mandates, protectorates, etc.), the Commission concluded that their characteristics do not today justify differences in treatment from the standpoint of the general rules governing succession of States in respect of treaties. The Commission recognized that in the traditional law of succession of States, protected States have in some degree been distinguished from other dependencies of a State. Thus, treaties of the protected States concluded prior to its entry into protection have been considered as remaining in force; and treaties concluded by the protecting Power specifically in the name and on behalf of the protected State have been considered as remaining in force for the protected State after termination of the protectorate. But the Commission did not think that a codification of the law of succession of States today need or should provide for the case of "protected States". The Commission also discussed whether any special provision should be included in the draft in regard to possible cases in future of a succession of States relating to an "associated State". It felt, however, that the arrangements for such associations varied considerably and that the rule to be applied would depend on the particular circumstances of each association.

(8) Consequently, the definition given in paragraph 1 (f) includes any case of emergence to independence of any former dependent territories, whatever its particular type may be. Although drafted in the singular for the sake of simplicity, it is also to be read as covering the case—envisaged in article 29—of the formation of a newly independent State from two or more territories. On the other hand, the definition excludes cases concerning the emergence of a new State as a result of a separation of part of an existing State, or of a uniting of two or more existing States. It is to differentiate clearly these cases from the case of the emergence to independence of a former dependent territory that the expression "newly independent State" has been chosen instead of the shorter expression "new State".

(9) Paragraph 1 (g) defines the term "notification of succession". This term connotes the act by which a successor State establishes on the international plane its consent to be bound by a multilateral treaty on the basis of the legal nexus established before the date of the succession of States between the treaty and the territory to which the succession relates. The term "notification of succession" seems to be the most commonly used by States and depositaries for designating any notification of such a successor State's consent to be bound. It is for that reason that the Commission has retained that expression instead of others, such as notification or declaration of continuity, which can also be found in practice. To avoid any misunderstanding from the use of a particular term, the words "however phrased or named" have been inserted after the words "any notification". Unlike ratification, accession, acceptance or approval, notification of succession need not take the form of the deposit of a formal instrument. The procedure for notifying succession is dealt with in article 21. That article provides in particular that the notification of succession shall be transmitted by the newly independent State to the depositary or, if there is no depositary, to the parties or the contracting States. Accordingly, at the present session, the Commission deleted a clause to that effect which appeared in the 1972 text of paragraph 1 (g).

(10) The 1972 text of paragraph 1 (h) defined the term "full powers" in relation only to a notification of succession. The definition corresponded to the phraseology used in article 2, paragraph 1 (c), of the Vienna Convention. Having added to the draft at the present session the provisions of article 37, the Commission expanded the definition of "full powers" to cover the notifications referred to in that article. It also replaced the expression "for communicating the notification" at the end of the 1972 text by "for communicating the notification" since the word "communicating" and not "making" is used both in article 21, paragraph 2, and in article 37, paragraph 2, of the draft articles.

(11) The terms and expressions "ratification", "acceptance" and "approval" (paragraph 1 (i)), "reservation" (paragraph 1 (j)), "contracting State" (paragraph 1 (k)), "party" (paragraph 1 (l)) and "international organization" (paragraph 1 (n)) reproduce the wording of the corresponding terms and expressions of the Vienna Convention and are used with the sense given to them in that Convention.

(12) In drafting rules regarding succession of States in respect of treaties, particularly in respect of bilateral treaties, there is a need for a convenient expression to designate the other parties to treaties concluded by the predecessor State and in respect of which the problem of succession arises. The expression "third State" is not available since it has already been made a technical term in the Vienna Convention denoting "a State not a party to the treaty" (article 2, paragraph 1 (h)). Simply to
International agreement to which not only States but also rules set forth in the draft articles to the relations between the law of treaties. It safeguards the application of the rules set forth in the present articles to which they would be subject under international law independently of these articles.

Article 3. Cases not within the scope of the present articles

The fact that the present articles do not apply to the effects of a succession of States in respect of international agreements concluded between States and other subjects of international law or in respect of international agreements not in written form shall not affect:

(a) the application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles;

(b) the application as between States of the present articles to the effects of a succession of States in respect of international agreements to which other subjects of international law are also parties.

Commentary

(1) This article corresponds to article 3 of the Vienna Convention. Its purpose is simply to prevent any misconception which might result from the express limitation of the scope of the draft articles to succession of States in respect of treaties concluded between States and in written form.

(2) The reservation in sub-paragraph (a) recognizes that certain of the rules stated in the draft may be of general application and relevant also in cases excluded from the scope of the present articles. It therefore preserves the possibility of the "application to such cases of any of the rules set forth in the present articles to which they would be subject under international law independently of these articles".

(3) The reservation in sub-paragraph (b), is based on a provision added by the United Nations Conference on the Law of Treaties to the Commission's draft articles on the law of treaties. It safeguards the application of the rules set forth in the draft articles to the relations between States in cases of a succession of States in respect of an international agreement to which not only States but also other subjects of international law are likewise parties. The reservation underlines the general character of the codification of the law on State succession embodied in the present draft articles so far as the relations between States are concerned, notwithstanding the formal limitation of the scope of the draft articles to succession of States in respect of treaties between States.

(4) In addition, however, to the necessary drafting changes, this article differs in some respects from article 3 of the Vienna Convention. First, the words "or between such other subjects of international law" in the introductory sentence have been omitted, since a case of succession between subjects of international law other than States is not a "succession of States." Secondly, the article contains no provision corresponding to sub-paragraph (a) of article 3 of the Vienna Convention because such a provision is irrelevant for the present draft articles. Lastly, the wording of sub-paragraph (b) of the present article, in particular the use of the words "as between States", is an adaptation of the wording of sub-paragraph (c) of article 3 of the Vienna Convention to the drafting needs of the present context.

Article 4. Treaties constituting international organizations and treaties adopted within an international organization

The present articles apply to the effects of a succession of States in respect of:

(a) any treaty which is the constituent instrument of an international organization without prejudice to the rules concerning acquisition of membership and without prejudice to any other relevant rules of the organization;

(b) any treaty adopted within an international organization without prejudice to any relevant rules of the organization.

Commentary

(1) This article parallels article 5 of the Vienna Convention. As with the general law of treaties, it seems essential to make the application of the present articles to treaties which are constituent instruments of an international organization subject to any relevant rules of the organization. This is all the more necessary in that succession in respect of constituent instruments necessarily encroaches upon the question of admission to membership which in many organizations is subject to particular conditions and therefore involves the law of international organizations. This was indeed one of the reasons why the Commission in 1967 decided to leave aside for the time being the subject of succession in respect of membership of international organizations.

(2) International organizations take various forms and differ considerably in their treatment of membership. In many organizations, membership, other than original membership, is subject to a formal process of admission. Where this is so, practice appears now to have established the principle that a new State is not entitled automatically to become a party to the constituent treaty

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67 1972 draft, article 3.
68 1972 draft, article 4.
** See above, para. 29.
and a member of the organization as a successor State, simply by reason of the fact that at the date of the succession its territory was subject to the treaty and within the ambit of the organization. The leading precedent in the development of this principle was the case of Pakistan's admission to the United Nations in 1947. The Secretariat then advised the Security Council that Pakistan should be considered as a new State formed by separation from India. Acting upon this advice, the Security Council treated India as a continuing member, but recommended Pakistan for admission as a new member: and after some debate, the General Assembly adopted this solution of the case. Subsequently, the general question was referred to the Sixth Committee which, inter alia, reported:

that when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.19

New States have, therefore, been regarded as entitled to become Members of the United Nations only by admission, and not by succession. The same practice has been followed in regard to membership of the specialized agencies and of numerous other organizations.20

(3) The practice excluding succession is clearest in cases where membership of the organization is dependent on a formal process of admission, but it is not confined to them. It appears to extend to cases where accession or acceptance of the constituent treaty suffices for entry, but where membership of the organization is a material element in the operation of the treaty. Thus, any Member of the United Nations may become a member of WHO simply by the acceptance of the WHO Convention but "notifications of succession" are not admitted in the practice of WHO from new States even if they were subject to the régime of the Convention prior to independence and are now Members of the United Nations.21 The position is similar in regard to IMCO and was explained to Nigeria by the Secretary-General of that Organization as follows:

In accordance with the provisions of article 9 of the Convention, the Federation of Nigeria was admitted as an associate member of IMCO on 19 January 1960. Since that date Nigeria has attained independence and has been admitted as a Member of the United Nations. The Secretary-General (of IMCO), in drawing attention to the fact that the Convention contains no provision whereby an associate member automatically becomes a full member, advised Nigeria of the procedure to be followed, as set out in articles 6 and 57 of the Convention, should it wish to become a full member of the Organization. The Secretary-General's action was approved by the Council at its fourth session.22

In other words, membership of the organization being in issue, the new State cannot simply notify the depositary of its succession by a notification made, for instance, in accordance with article 21 of the present draft articles. It must proceed by the route prescribed for membership in the constituent treaty—i.e. deposit of an instrument of acceptance.23

(4) On the other hand, when a multilateral treaty creates a weaker association of its parties, with no formal process of admission, it seems that the general rule prevails and that a new State may become a party and a member of the association by transmitting a notification of succession to the depositary. Thus the Swiss Government, as depositary, has accepted notifications of succession from new States in regard to the Berne Convention (1886) and subsequent Acts of revision which form the International Union for the Protection of Literary and Artistic Works,24 and the same procedure has been followed with respect to the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes provided that (a) States represented at or invited to the Peace Conference might either ratify or accede, and (b) accession by other States was to be treated as a "consequent agreement between the Contracting Powers."25 By decisions of 1955, 1957 and 1959, the Administrative Council of the Court directed the Netherlands Government, as depositary, to ask new States whether they considered themselves a party to either of the Conventions. All the Contracting Parties to the Conventions were consulted before the invitation was issued, so that this may have been a case of a subsequent agreement to create a right of succession. If not, the case seems to belong to those mentioned in paragraph 4 of the present commentary, where the element of membership is not sufficiently significant to oust the general principles of succession of States in respect of multilateral treaties.

(6) In the case of some organizations the question of succession may be complicated by the fact that the
constituent treaty admits the possibility of separate or associate membership for dependent territories. Examples of such organizations are ITU, UNESCO, UPU and WHO. The practice in regard to such separate or associate membership has not been entirely uniform. The two "Unions" [ITU and UPU] seem, in general, to have allowed a succession to membership in cases where the new State already had a separate identity during its existence as a dependent territory having the status of a member, but to have insisted on "admission" or "accession" where it had been merely one part of a collective "dependent" member, e.g. one of a number of dependencies grouped together as a single member. 77 The majority of new States have therefore experienced a formal break in their membership of the two Unions during the period between the date of independence and their admission or accession to membership. On the other hand, they appear to have been dealt with de facto during that period as if they still continued to be within the Unions. As to the two other agencies, neither UNESCO nor WHO recognizes any process of succession converting an associate into a full member on the attainment of independence. 78 Both organizations require new States to comply with the normal admission procedures applicable to Members of the United Nations or, as the case may be, to other States. Both organizations, however, have at the same time adopted the principle that a former associate member which, after independence, indicates its wish to become a member, remains subject to the obligations and entitled to the rights of an associate member during the interval before it obtains full membership.

(7) With regard to treaties adopted within an international organization, membership may again be a factor to be taken into account in regard to a new State's participation in these treaties. This is necessarily so when participation in the treaty is indissolubly linked with membership of the organization. In other cases, where there is no actual incompatibility with the object and purpose of the treaty, admission to membership may be a precondition for notifying succession to multilateral treaties adopted within an organization, but the need for admission does not exclude the possibility of a new State's becoming a party by "succession" rather than by "accession." Thus, although the International Air Services Transit Agreement (1944) is open for acceptance only by Members of the United Nations or, as the case may be, to other States. Both organizations, however, have at the same time adopted the principle that a former associate member which, after independence, indicates its wish to become a member, remains subject to the obligations and entitled to the rights of an associate member during the interval before it obtains full membership.

(8) In the case of international labour conventions, which also presuppose that their contracting parties will be members of the ILO, membership has been used by the organization as a means of bringing about succession to labour conventions. Beginning with Pakistan in 1947, a practice has grown up under which, on being admitted to membership, every newly independent State makes a declaration recognizing that it continues to be bound by the obligations entered into in respect of its territory by its predecessor. This practice, initiated through the secretariat of the ILO in its early stages, had one or two exceptions, 84 but it has now become so invariable that it has been said to be inconceivable that a new State should ever in future become a member without recognizing itself to be bound by labour conventions applicable in respect of its territory on the date of its independence. Furthermore, although these declarations are made in connexion with admission to membership and therefore some time after the date of independence, they are treated as equivalent to notifications of succession, and the labour conventions in question are considered as binding upon the new State from the date of independence.

(9) Some multilateral treaties, moreover, may be adopted within an organ of an international organization, but otherwise be no different from a treaty adopted at a diplomatic conference. Examples are the 1953 Convention on the Political Rights of Women and the 1957 Convention on the Nationality of Married Women, both of which were adopted by resolution of the General Assembly. These Conventions are, it is true, open to any Member of the United Nations; but they are also open to any member of a specialized agency or party to the Statute of the International Court of Justice and to any State invited by the General Assembly; and membership of the Organization has little significance in relation to the Conventions. A fortiori, therefore, the fact that the treaty has been adopted within an organization is no obstacle to a newly independent States.
dent State’s becoming a party by “succession” rather than “accession”.

(10) In the light of the foregoing, the question may even be asked whether the law of succession applies to constituent instruments of international organizations at all. For example, the right of participation of a newly independent State in multilateral treaties in force by a notification of succession cannot normally extend to constituent instruments of an international organization because participation in those instruments is generally governed, as indicated in the preceding paragraphs, by the rules of the organization in question concerning the acquisition of membership. On the other hand, there are certain international organizations, such as some unions, which do not have, properly speaking, specific rules for acquisition of membership. In those organizations the law of succession in respect of treaties has at times been applied, and may be applied, to participation of a newly independent State in their respective constituent instruments. Furthermore, there have been cases in connexion with the separation from a union of States in which the question of the participation in the organization of the separated States has been approached from the standpoint of the law concerning succession in respect of treaties. In addition, succession in respect of a constituent instrument is not necessarily linked to matters relating to membership. For instance, the “moving treaty-frontiers” rule applies in the case of treaties constituting an international organization. In short, while the rules of succession of States frequently do not apply in respect of a constituent instrument of an international organization, it would be incorrect to say that they do not apply at all to this category of treaties. In principle, the relevant rules of the organization are paramount, but they do not exclude altogether the application of the general rules of succession of States in respect of treaties in cases where the treaty is a constituent instrument of an international organization.

(11) As to treaties “adopted within an international organization,” the possibility clearly exists that organizations should develop their own rules for dealing with questions of succession. For example, as already mentioned, the ILO has developed a consistent practice regarding the assumption by “successor” members of the organization of the obligations of ILO conventions previously applicable within the territory concerned. Without taking any position as to whether this particular practice has the status of a custom or of an internal rule of that organization, the Commission considers that a general reservation of relevant rules of organizations is necessary to avoid such practices with regard to treaties adopted within an international organization. During the re-examination of the draft articles at its twenty-sixth session, the Commission considered in the light of comments made by the ILO whether any further provision should be made to help to ensure the continuity of obligations under ILO conventions. The Commission, while not changing its position as to the status of the ILO practice in this connexion, decided that the matter should be left to be governed by the relevant rules of the organization as provided in the 1972 draft.

(12) The basic principle for both categories of treaties dealt with in the article is therefore the same, namely that the rules of succession of States in respect of treaties apply to them “without prejudice to” any relevant rules of the organization in question. Having regard, however, to the fundamental importance of the rules concerning the acquisition of membership in relation to succession of States in respect of constituent instruments, the Commission thought it advisable to make special mention of rules concerning acquisition of membership in cases involving constituent instruments. Accordingly, since this point arises only in connexion with constituent instruments the Commission has divided the article into two sub-paragraphs and in the first sub-paragraph has referred specifically to both “rules concerning acquisition of membership” and “any other relevant rules of the organization.”

(13) As to the meaning of the term “rules” in article 4, it may be useful to recall the statement made by the Chairman of the Drafting Committee of the United Nations Conference on the Law of Treaties, according to which the term “rules” in the parallel article of the Vienna Convention applies both to written rules and to unwritten customary rules of the organization, but not to mere procedures which have not reached the stage of mandatory legal rules.

(14) Having inserted in the present article these general provisions concerning the application of the rules embodied in the draft to constituent instruments of international organizations and to treaties adopted within international organizations, the Commission has not made specific reservations in this regard in later articles.

Article 5. Obligations imposed by international law independently of a treaty

The fact that a treaty is not considered to be in force in respect of a State by virtue of the application of the present articles shall not in any way impair the duty of that State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.

Commentary

(1) Article 5 is modelled on article 43 of the Vienna Convention which reproduces almost verbatim article 40 of the Commission’s draft articles on the Law of Treaties. Article 43 is one of the general provisions of part V of the Vienna Convention, concerning invalidity, termination and suspension of the operation of treaties. The Commission’s commentary on its draft article 40 explained its reason for including the article as follows:

87 Six States have transmitted notifications of succession to the Secretary-General in respect of the Convention on the Political Rights of Women and eight States also in respect of the Convention on the Nationality of Married Women (see United Nations, Multilateral Treaties... 1972 (op. cit.), pp. 349, 350 and 356).


89 1972 draft, article 5.
... The Commission considered that although the point might be regarded as axiomatic, it was desirable to underline that the termination of a treaty would not release the parties from obligations embodied in the treaty to which they were also subject under any other rule of international law. **88**

(2) For the same reason, the Commission deemed it desirable to include a general provision in part I of the present draft making it clear that the non-continuance in force of a treaty upon a succession of States as a result of the application of the draft in no way relieved a State of obligations embodied in the treaty which were also obligations to which it would be subject under international law independently of the treaty.

(3) The Commission replaced the words “a treaty is not in force” in the 1972 draft by “a treaty is not considered* to be in force”. The question whether a treaty is in force belongs to the law of treaties and, in the context of the effects of succession of States in respect of treaties, it seemed to be more appropriate to use the expression “considered to be* in force” which appears in other provisions of the draft, such as, for instance, paragraph I of article 23.

(4) The Commission deleted the word “successor” from the expression “a successor State” and consequently altered “any State” to “that State”. The word “successor” was deleted because under the rules in the draft articles, in particular article 23, a treaty may be considered not to be in force, not only in respect of successor States, but also in respect of other States. The Commission also replaced the words “as a result of* the application of the present articles” by the more flexible wording “by virtue of* the application of the present articles”. This alteration was considered desirable because several articles, such as article 23, lay down conditions under which treaties in a certain category are considered to be in force and only by implication determine the conditions under which such treaties are not to be considered as being in force.

**Article 6.** 89 Cases of succession of States covered by the present articles

The present articles apply only to the effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations.

**Commentary**

(1) The Commission in preparing draft articles for the codification of the rules of international law relating to normal situations naturally assumes that those articles are to apply to facts occurring and situations established in conformity with international law. Accordingly, it does not as a rule state that their application is so limited. Only when matters not in conformity with international law call for specific treatment or mention does it deal with facts or situations not in conformity with international law. Thus, in its draft articles on the law of treaties the Commission included, among others, specific provisions on treaties procured by coercion and treaties which conflict with the norms of *jus cogens* as well as certain reservations in regard to the specific subjects of State responsibility, outbreak of hostilities and cases of aggression. But the Commission—and the United Nations Conference on the Law of Treaties—otherwise assumed that the provisions of the Vienna Convention would apply to facts occurring and situations established in conformity with international law.

(2) In 1972, some members of the Commission considered that it would suffice to rely upon the same general presumption in drafting the present articles and that it was unnecessary to specify that the articles would apply only to the effects of a succession of States occurring in conformity with international law. Other members, however, were of the opinion that, in regard particularly to transfers of territory, it was desirable to underline that only transfers occurring in conformity with international law would fall within the concept of “succession of States” for the purpose of the present articles. Since to specify the element of conformity with international law with reference to one category of succession of States might give rise to misunderstandings as to the position regarding that element in other categories of succession of States, the Commission decided to include among the general articles a provision safeguarding the question of the lawfulness of the succession of States dealt with in the present articles. Accordingly, article 6 provides that the present articles relate only to the effects of a succession of States occurring in conformity with international law and, in particular, the principle of international law embodied in the Charter of the United Nations.

(3) There were few comments by delegations or Governments on article 6 of the 1972 draft. Opinions were divided as to the necessity for its inclusion, but the tendency was in favour of its retention. One Government, however, suggested that the article might be redrafted in such a way as to make it clear that, although the benefits of the draft articles could not be enjoyed in “unlawful” cases, obligations should apply in all cases. At its present session, the weight of opinion in the Commission was in favour of keeping the article in the form in which it was drafted in 1972. It was considered that it was right in principle to restrict the application of the present articles to situations occurring in conformity with international law. Accordingly, the Commission decided to keep article 6 in its 1972 form.

**Article 7.** 90 Non-retroactivity of the present articles

Without prejudice to the application of any of the rules set forth in the present articles to which the effects of a succession of States would be subject under international law independently of these articles, the present articles

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89 1972 draft, article 6.
90 New article.
apply only in respect of a succession of States which has occurred after the entry into force of these articles except as may be otherwise agreed.

Commentary

(1) During the discussion of article 6 at the present session of the Commission, some members expressed doubts as to the possible implications of the article with respect to events that had occurred in the past. It was observed that reference to the Charter of the United Nations might not have the effect of limiting these implications to recent events or even to those which had occurred since the Charter came into force. One member of the Commission attached particular importance to establishing beyond doubt that article 6 had no retroactive effect. Accordingly, he submitted a draft article which, after consideration and some redrafting by the Commission, is now included as article 7.

(2) The decision to include the article, however, was adopted by a narrow majority after criticism had been expressed by several members of the Commission. They considered that, as non-retroactivity was a general principle of the law relating to treaties reflected in article 28 of the Vienna Convention, it was unnecessary and undesirable to include an article in that sense in the present set of articles. Some members thought that the article might give an erroneous impression that the draft articles were largely irrelevant to the current interests of many States and that the text of the article was unduly wide and vague in its effect. The view was also expressed that non-retroactivity was a matter to be considered by Governments in due course in connexion with the final clauses for inclusion in a convention incorporating the draft articles.

(3) Article 7 is modelled on article 4 of the Vienna Convention but is drafted having regard to the provisions on the non-retroactivity of treaties in article 28 of that Convention. The article has two parts. The first, corresponding to the first part of article 4 of the Vienna Convention, is a saving clause which makes clear that the non-retroactivity of the present articles will be without prejudice to the application of any of the rules set forth in the articles to which the effects of a succession of States would be subject under international law independently of the articles. The second part limits the application of the present articles to cases of succession of States which occur after the entry into force of the articles except as may be otherwise agreed. The second part speaks only of "a succession of States," because it is possible that the effects of a succession of States which occurred before the entry into force of the articles might continue after their entry into force and this possibility might cause confusion in the application of the article. The expression "entry into force" refers to the general entry into force of the articles rather than the entry into force for the individual State, because a successor State could not become a party to a convention embodying the articles until after the date of succession of States.

Accordingly, a provision which provided for non-retroactivity with respect to "any act or fact... which took place before the date of the entry into force of the treaty with respect to that party," as in article 28 of the Vienna Convention, would, if read literally, prevent the application of the articles to any successor State on the basis of its participation in the convention. The words "except as may be otherwise agreed" are included to provide a measure of flexibility and reflect the sense of the introductory words to article 28 of the Vienna Convention.

(4) Although the draft of the article was submitted to the Commission in relation to article 6, it is cast in general terms. This is necessary because, if an article were to provide for non-retroactivity in respect of one article alone, this would obviously raise implications and doubts as to the retroactive effect of the other articles. Accordingly, article 7 is drafted as a general provision and is placed in Part I of the draft immediately after article 6.

Article 8. 

Agreements for the devolution of treaty obligations or rights from a predecessor State to a successor State

1. The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor States towards other States parties to those treaties in consequence only of the fact that the predecessor State and the successor State have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

2. Notwithstanding the conclusion of such an agreement, the effects of a succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present articles.

Commentary

(1) Article 8 deals with the legal effects of agreements by which, upon a succession of States, the predecessor and successor States have sought to make provision for the devolution to the successor of the obligations and rights of the predecessor under treaties formerly applicable in respect of the territory concerned. Those agreements, commonly referred to as "devolution agreements," have been quite frequent particularly, although not exclusively, in cases of the emergence of a dependent territory into a sovereign State in the post-war process of decolonization.

(2) Some of the newly independent States which have not concluded devolution agreements have taken no formal step to indicate their general standpoint regarding succession in respect of treaties; such is the case, for example, with States which have emerged from former French African territories. Quite a number of newly independent States, however, have made unilateral declarations of a general character, in varying terms, by

** At the 1296th meeting of the Commission, on 18 July 1974, the article was adopted by 8 votes to 4, with 5 abstentions.

*footnote* 24 1972 draft, article 7.
which they have taken a certain position—negative or otherwise—in regard to the devolution of treaties concluded by the predecessor State with reference to their territory. These declarations, although they have affinities with devolution agreements, are clearly distinct types of legal acts and are therefore considered separately in article 9 of the draft. The present article is concerned only with agreements between the predecessor and successor State purporting to provide for the devolution of treaties.

(3) The conclusion of "devolution agreements" seems to be due primarily to the fact that it was the established practice of the United Kingdom to propose a devolution agreement to its overseas territories on their emergence as independent States and to the fact that many of these territories entered into such an agreement. New Zealand also concluded a devolution agreement with Western Samoa on the same model as that of the United Kingdom agreement with its overseas territories, as did also Malaysia with Singapore on the latter's separation from Malaysia. Analogous agreements were concluded between Italy and Somalia and between the Netherlands and Indonesia. As to France, it concluded devolution agreements in a comprehensive form with, respectively, Laos and Viet-Nam and an agreement in more particular terms with Morocco but devolution agreements do not seem to have been usual between France and her former African territories. The terms of these agreements vary to some extent, more especially when the agreement deals with a particular situation, as in the case of the France-Morocco and Italy-Somalia Agreements. But, with the exception of the Indian Independence (International Arrangements) Order (1974) providing for the special cases of India and Pakistan, the agreements are in the form of treaties; and, with some exceptions, notably the French agreements, they have been registered as such with the Secretariat of the United Nations.

(4) Devolution agreements are of interest from two separate aspects. The first is the extent to which, if any, they are effective in bringing about a succession to or continuance of the predecessor State's treaties; and the second is the evidence which they may contain of the views of States concerning the customary law governing succession of States in respect of treaties. The second aspect is considered in the commentary to article 15. The present article thus deals only with the legal effects of a devolution agreement as an instrument purporting to make provisions concerning the treaty obligations and rights of a newly independent State. The general feature of devolution agreements in that they provide for the transmission from the predecessor to the successor State of the obligations and rights of the predecessor State in respect of the territory under treaties concluded by the predecessor and applying to the territory. A typical example of a devolution agreement is, for instance, the agreement concluded in 1957 between the Federation of Malaya and the United Kingdom by an Exchange of Letters. The operative provisions, contained in the United Kingdom's letter, read as follows:

I have the honour to refer to the Federation of Malaya Independence Act, 1957, under which Malaya has assumed independent status within the British Commonwealth of Nations, and to state that it is the understanding of the Government of the United Kingdom that the Government of the Federation of Malaya agree to the following provisions:

(i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument are, from 31 August, 1957, assumed by the Government of the Federation of Malaya in so far as such instruments may be held to have application to or in respect of the Federation of Malaya.

(ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to or in respect of the Federation of Malaya are from 31 August, 1957, enjoyed by the Government of the Federation of Malaya.

I shall be grateful for your confirmation that the Government of the Federation of Malaya are in agreement with the provisions aforesaid and that this letter and your reply shall constitute an agreement between the two Governments.

(5) The question of the legal effects of such an agreement as between the parties to it, namely as between the predecessor State and the successor State, cannot be separated from that of its effects vis-à-vis third States, for third States have rights and obligations under the treaties with which a devolution agreement purports to deal. Accordingly, it seems important to consider how the general rules of international law concerning treaties and third States, that is articles 34 to 36 of the Vienna Convention, apply to devolution agreements, and this involves determining the intention of parties to those agreements. A glance at a typical devolution agreement, like that reproduced in the preceding paragraph, suffices to show that the intention of the parties to these agreements is to make provision as between themselves...
for their own obligations and rights under the treaties concerned and is not to make provision for obligations or rights of third States, within the meaning of articles 35 and 36 of the Vienna Convention. It may be that, in practice, the real usefulness of a devolution agreement is in facilitating the continuance of treaty links between a territory newly independent and other States. But the language of devolution agreements does not normally admit of their being interpreted as being intended to be the means of establishing obligations or rights for third States. According to their terms they deal simply with the transfer of the treaty obligations and rights of the predecessor to the successor State.

(6) A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory. It is, however, extremely doubtful whether such a purported assignment by itself changes the legal position of any of the interested States. The Vienna Convention contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution of “assignment” found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. In international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent. Accordingly, a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State. It is an instrument which, as a treaty, can be binding only as between the predecessor and successor States and the direct legal effects of which are necessarily confined to them.

(7) Turning now to the direct legal effects which devolution agreements may have as between the predecessor and the successor State, and taking the assignment of obligations first, it seems clear that, from the date of independence, the treaty obligations of the predecessor State cease automatically to be binding upon itself in respect of the territory now independent. This follows from the principle of moving treaty-frontiers which is as much applicable to a predecessor State in the case of independence as in the case of the mere transfer of territory to another existing State dealt with in article 14, because the territory of the newly independent State has ceased to be part of the entire territory of the predecessor State. Conversely, on the date of succession the territory passes into the treaty regime of the newly independent State; and, since the devolution agreement is incapable by itself of effecting an assignment of the predecessor's treaty obligations to the successor State without the assent of the other State parties, the agreement does not of its own force establish any treaty nexus between the successor State and other State parties to the treaties of the predecessor State.

(8) As to the assignment of rights, it is crystal clear that a devolution agreement cannot bind the other States parties to the predecessor's treaties (who are “third States” in relation to the devolution agreement) and cannot, therefore, operate by itself to transfer to the successor State any rights vis-à-vis those other States parties. Consequently, however wide may be the language of the devolution agreement and whatever may have been the intention of the predecessor and successor States, the devolution agreement cannot of its own force pass to the successor State any treaty rights of the predecessor State which would not in any event pass to it independently of that agreement.

(9) It is also evident that in the great majority of cases the treaties of the predecessor State will involve both obligations and rights in respect of the territory. In most cases, therefore, the passing of obligations and the passing of rights to successor State under a treaty are questions which cannot be completely separated from each other.

(10) Consequently, it must be concluded that devolution agreements do not by themselves materially change for any of the interested States (successor State, predecessor State, other State parties) the position which they would otherwise have. The significance of such an agreement is primarily an indication of the intentions of the newly independent State in regard to the predecessor's treaties and a formal and public declaration of the transfer of responsibility for the treaty relations of the territory. This follows from the general principles of the law of treaties and appears to be confirmed by State practice. At the same time devolution agreements may play a role in promoting continuity of treaty relations upon independence.\(^{105}\)

(11) State practice seems to confirm that the primary value of devolution agreements is simply as an expression of the successor State's willingness to continue the treaties of its predecessor. That devolution agreements, if valid, do constitute at any rate a general expression of the successor State's willingness to continue the predecessor State's treaties applicable to the territory would seem to be clear. The critical question is whether a devolution agreement constitutes something more, namely an offer to continue the predecessor State's treaties which a third State, party to one of those treaties, may accept and by that acceptance alone bind the successor State to continue the treaties. In paragraph 5 of the present commentary it has been said that a devolution agreement cannot, according to its terms, be understood as an instrument intended to be the means of establishing rights for third States. Even so, is a devolution agreement to be considered as a declaration of consent by the successor State to the continuance of the treaties which a third State may by its mere assent, express or tacit, convert into an agreement to continue in force the treaties of the predecessor State? Or, in the case of multilateral treaties, does the conclusion and registration of a devolution agreement constitute a notification of succession so that the successor State is forthwith to be regarded by other States parties and the depositary as a party to the treaty?

(12) The Secretary-General's own practice as depositary of multilateral treaties seems to have begun by attributing

\(^{105}\) For an assessment of the value of devolution agreements, see International Law Association, The Effect ... (op. cit.), chap. 9.
largely automatic effects to devolution agreements but to have evolved afterwards in the direction of regarding them rather as a general expression of intention. The present practice of the Secretary-General appears to be based on the view that notwithstanding the conclusion of a devolution agreement, a newly independent State ought not to be included among the parties to a multilateral treaty without first obtaining confirmation that this is in accord with its intention. Thus the Secretariat memorandum on “Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary,” dated 1962, explains that, when a devolution agreement has been registered or has otherwise come to the knowledge of the Secretary-General, a letter is written to the new State which refers to the devolution agreement and continues on the following lines:

It is the understanding of the Secretary-General, based on the provisions of the aforementioned agreement, that your Government recognizes itself bound, as from (the date of independence), by all international instruments which had been made applicable to (the new State) by (its predecessor) and in respect of which the Secretary-General exercises as depositary. The Secretary-General would appreciate it if you would confirm this understanding so that in the exercise of its depositary functions he could notify all interested States accordingly.*

Again, when considering whether to regard a new State as a party for the purpose of counting the number of parties needed to bring a convention into force, it is the new State's specific notification of its will with regard to that convention, not its devolution agreement, which the Secretary-General has treated as relevant.

(13) The Secretary-General does not receive a devolution agreement in his capacity as a depositary of multilateral treaties but under Article 102 of the United Nations Charter in his capacity as registrar and publisher of treaties. The registration of a devolution agreement, even after publication in the United Nations Treaty Series, can therefore not be equated with a notification by the newly independent State to the Secretary-General, as depositary, of its intention to become a separate party to a specific multilateral treaty. Some further manifestation of will on the part of the newly independent State with reference to the particular treaty is needed to establish definitively the newly independent State's position as a party to the treaty in its own name.

(14) The practice of other depositaries of multilateral treaties equally does not seem to support the idea that a devolution agreement, as such, operates to effect or perfect a succession to a multilateral treaty without any notification of the State's will specifically with reference to the treaty in question. Occasionally, some reliance seems to have been placed on a devolution agreement as a factor in establishing a State's participation in a multilateral treaty. Thus, at the instance of the Netherlands Government, the Swiss Government appears to have regarded the Netherlands-Indonesian devolution agreement as sufficient basis for considering Indonesia as a separate party to the Berne Convention for the Protection of Literary and Artistic Works. But in its general practice as depositary of this and of other Conventions, including the Geneva Humanitarian Conventions, the Swiss Government does not seem to have treated a devolution agreement as a sufficient basis for considering a successor State as a party to the convention but has acted only upon a declaration or notification of the State in question. Indonesia also has made it plain in another connexion that it does not interpret its devolution agreement as committing it in respect of individual treaties. Furthermore, it appears from the practice of the United States published in Materials on Succession of States that the United States also acts only upon a declaration or notification of the successor State, not upon its conclusion of a devolution treaty, in determining whether that State should be considered a party to a multilateral treaty for which the United States is the depositary.

(15) The practice of individual States, whether “successor” States or interested “third” States, may be less clear cut but it also appears to confirm the limited significance of devolution agreements. The United Kingdom has sometimes appeared to take the view that a devolution agreement may suffice to constitute the successor State a party to United Kingdom treaties previously applied to the territory in question. Thus, in 1961 the United Kingdom appears to have advised the Federation of Nigeria that its devolution agreement would suffice to establish Nigeria as a separate party to the Warsaw Convention of 1929 and Nigeria appears on that occasion ultimately to have accepted that point of view. On the other hand, Nigeria declined to treat its devolution agreement as committing it to assume the United Kingdom's obligations under certain extradition treaties.

In any event, the United Kingdom seems previously to have advised the Government of Burma rather differently in regard to that same Warsaw Convention. Moreover, when looking at the matter as a “third State”, the United Kingdom has declined to attribute any automatic effects to a devolution agreement. Thus, when informed by Laos that it considered the Anglo-French Civil Procedure Convention of 1922 as continuing to apply between Laos and the United Kingdom in consequence of a devolution agreement, the United Kingdom expressed its willingness that this should be so but added that the United Kingdom wished it to be understood that the Convention continued in force not by virtue of the 1953 Franco-Lao Treaty of Friendship, but because Her Majesty's Government and the Government of Laos were agreed that the 1922 Anglo-French Civil Procedure Convention

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109 Ibid., pp. 16 et seq., paras. 35-85, and pp. 39 et. seq., paras. 158-224.


111 Ibid., p. 181.

112 Ibid., pp. 193-194.

113 Ibid., pp. 180-181.
should continue in force as between the United Kingdom and Laos.  

The Laos Government, it seems, acquiesced in this view. Similarly, in the case concerning the Temple of Preah Vihear, 116 Thailand, in the proceedings on its preliminary objections, formally took the position before the International Court of Justice that in regard to "third States" devolution agreements are *res inter alios acta* and in no way binding upon them.

(16) A devolution agreement is treated by the United States as an "acknowledgement in general terms of the continuance in force of agreements" justifying the making of appropriate entries in its *Treaties in Force* series. 117 But the United States does not seem to regard the devolution agreement as conclusive of the attitude of the newly independent State with respect to individual treaties; nor its own entry of an individual treaty against the name of the new State in the *Treaties in Force* series as doing more than record a presumption or probability as to the continuance in force of the treaty vis-à-vis that State. The practice of the United States seems rather to be to seek to clarify the newly independent State's intentions and to arrive at a common understanding with it in regard to the continuance in force of individual treaties. 118

(17) Many newly independent States which have entered into devolution agreements have recognized themselves as bound by some at least of the multilateral conventions of which the Secretary-General is depositary previously applied with respect to their territories. Some of these States, on the other hand, have not done so. 119 In the case of other general multilateral treaties the position seems to be broadly the same. 120 In the case of bilateral treaties, newly independent States appear not to regard a devolution agreement as committing them vis-à-vis third States to recognize the continuance in force of each and every treaty but reserve the right to make their intentions with respect to each particular treaty. The Government of Indonesia, for instance, took this position very clearly in a Note of 18 October 1963 to the Embassy of the Federal Republic of Germany. 121 Neither this Note nor a previous Note addressed by the Indonesian Government to the United Kingdom in similar terms in January 1961 122 appears to have met with any objection from the other State. While referring to its devolution agreement as evidence of its willingness to continue certain United Kingdom-United States treaties in force after independence, Ghana in its correspondence with the United States reserved a certain liberty to negotiate regarding the continuance of any particular clause or clauses of any existing treaties. 123 Equally, in correspondence with the United Kingdom concerning extradition treaties Nigeria seems to have considered itself as possessing a wide liberty of appreciation in regard to the continued application of this category of treaties, 124 as also in correspondence with the United States. 125 Even where the successor State is in general disposed in pursuance of its devolution agreement to recognize the continuity of its predecessor's treaties, it not infrequently finds it necessary or desirable to enter into an agreement with a third State providing specifically for the continuance of a particular treaty. 126

(18) The practice of States does not admit, therefore, the conclusion that a devolution agreement should be considered as by itself creating a legal nexus between the successor State and third States parties, in relation to treaties applicable to the successor State's territory prior to its independence. Some successor States and some third States parties to one of those treaties have undoubtedly tended to regard a devolution agreement as creating a certain presumption of the continuance in force of certain types of treaties. But neither successor States nor third States nor depositaries have as a general rule attributed automatic effects to devolution agreements. Accordingly, State practice as well as the relevant principles of the law of treaties would seem to indicate that devolution agreements, however important as general manifestations of the attitude of successor States to the treaties of their predecessors, should be considered as *res inter alios acta* for the purposes of their relations with third States. 127

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114 *Ibid.*, p. 188. Even more explicit is the United Kingdom's comment upon this episode (*ibid.*, pp. 188-189). See also the United Kingdom's advice to Pakistan that the Indian Independence (International Arrangements) Order, 1947, could have validity only between India and Pakistan and could not govern the position between Pakistan and Thailand (*ibid.*, pp. 190-191).

115 *See* *I.C.J. Pleadings, Temple of Preah Vihear*, vol. II, p. 33. The Court itself did not pronounce upon the question of succession, as it held its jurisdiction to entertain the case upon other grounds.

116 United States, Department of State, *Treaties in Force—A List of Treaties and other International Agreements of the United States in Force* (Washington, D.C., U.S. Government Printing Office). The United States practice has been described by an Assistant Legal Adviser to the State Department in a letter to the Editor-in-Chief of the *American Journal of International Law* (printed in International Law Association, *The Effect...* (op. cit.), pp. 382-386.

117 *See* United States Exchanges of Notes with Ghana, Trinidad and Tobago and Jamaica, in *United Nations, Materials on Succession of States* (op. cit.), pp. 211-213 and 220-223.

118 For example, Indonesia and Somalia (*See* *Yearbook...* 1962, vol. II, pp. 110 and 111, document A/CN.4/150, paras. 21 and 31-33, and *ibid.*, p. 119, para. 106).

119 *Yearbook...* 1968, vol. II, p. 1, document A/CN.4/200 and Add.1-2. The case of international labour conventions is special owing to the practice of the ILO requiring new States to recognize the continuance of labour conventions on their admission to the organization.


125 For example, agreements between India and Belgium (*See* Belgium, *Moniteur belge* (Brussels), 25 February 1955, Year 1955, No. 57, p. 967); Pakistan and Belgium (United Nations, *Treaty Series*, vol. 133, pp. 200-202); Pakistan and Switzerland (*See* *Recueil officiel des lois et ordonnances de la Confédération suisse* (Bern), 15 December 1955, Year 1955, No. 50, p. 1168); Pakistan and Argentina (United Nations, *Materials on Succession of States* (op. cit.), pp. 6-7; United States and Trinidad and Tobago and United States and Jamaica (*ibid.*, pp. 220-224).

126 Another consideration to be taken into account is the difficulty in some cases of identifying the treaties covered by a devolution agreement.
(19) In the light of the foregoing, paragraph 1 of the present article declares that the obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State towards other States parties in consequence only of the fact that the predecessor State and the successor State have concluded a devolution agreement. In order to remove any possible doubt on the point, it spells out the rule, which emerges both from general principles and State practice, that a devolution agreement does not of its own force create any legal nexus between the successor State and other States parties.

(20) Paragraph 2 of the article then provides that, even if a devolution agreement has been concluded, "the effects of a succession of States" on treaties which at the date of that succession were in force in respect of the territory in question are governed by the present articles. This does not deny the relevance which a devolution agreement may have as a general expression of the successor State's policy in regard to continuing its predecessor's treaties in force nor its significance in the process of bringing about the continuance in force of a treaty. What the paragraph says is that notwithstanding the conclusion of a devolution agreement the effects of a succession of States are governed by the rules of general international law on succession of States in respect of treaties codified in the present articles. It emphasizes that a devolution agreement cannot of itself pass to the successor State vis-à-vis other States parties any treaty obligations or rights which would not in any event pass to it under general international law.

(21) Lastly, on the question of the intrinsic validity as treaties of "devolution agreements", some members considered that this question should be approached from the point of view of "coercion", and in particular of political or economic coercion. They felt that devolution agreements might be the price paid to the former sovereign for freedom and that in such cases the validity of a devolution agreement could not be sustained. Other members observed that, although the earlier devolution agreements might in some degree have been regarded as part of the price of independence, later agreements seem rather to have been entered into for the purpose of obviating the risk of a total gap in the treaty relations of the newly independent State and at the same time recording the predecessor State's disclaimer of any future liability under its treaties in respect of the territory concerned. Having regard to the fact that the question of the validity of a devolution agreement is one which necessarily falls under the general law of treaties codified in the Vienna Convention, the Commission concluded that it was not necessary to include any special provision on the point in the present articles. The validity of a devolution agreement in any given case should, in its view, be left to be determined by the relevant rules of the general law of treaties as set out in the Vienna Convention, in particular in articles 42 to 53.

(22) During the second reading of the draft articles the Commission again considered the relationship between article 8 and the general law of treaties. It had been said in the written comments submitted by one Government that the article as drafted in 1972 left some doubt as to its relationship to articles 35, 36 and 37 of the Vienna Convention, which are concerned with treaties and third States. The Commission, however, confirmed its view that article 8 is in accord with the principle that a treaty does not create an obligation for a third State unless the third State expressly accepts the obligation and that otherwise the possible effects of devolution agreements as treaties should be left to be governed by the relevant rules of international law. Throughout the Commission has proceeded on the basic assumption that the draft articles should be understood and applied in the light of the rules of international law relating to treaties, and in particular of the rules of law stated in the Vienna Convention, and that matters not regulated by the draft articles would be governed by the relevant rules of the law of treaties. This is the fundamental approach which underlies the drafting of the articles. It is of particular importance in relation to article 8 which as drafted does not detract from the possible application, for example, of the rules stated in articles 35, 36 and 37 of the Vienna Convention.

(23) The Commission also considered, in the light of the comments of Governments, whether the drafting of article 8 could be simplified in the form of a single paragraph and whether the text might otherwise be improved. It concluded, however, that the combination of the two propositions contained in the article in a single paragraph might upset the delicate balance of the article and cast undesirable doubts on the value of devolution agreements. Accordingly, subject to minor changes of drafting, the Commission retained the 1972 text of the article.

Article 9. Unilateral declaration by a successor State regarding treaties of the predecessor State

1. The obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor States or of other States parties to those treaties in consequence only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory.

2. In such a case the effects of the succession of States on treaties which at the date of that succession of States were in force in respect of the territory in question are governed by the present articles.

Commentary

(1) As indicated in paragraph 2 of the commentary to article 8, a number of the newly independent States have made unilateral declarations of a general character whereby they have stated a certain position in regard to treaties having application in respect of their respective territories prior to the date of the succession of States. The present article deals with the legal effect of these unilateral declarations in the relations between the
declarant State and other States parties to the treaties in question.

(2) In March 1961, the United Kingdom Government suggested to the Government of Tanganyika that, on independence, it should enter into a devolution agreement by exchange of letters, as had been done by other British territories on their becoming independent States. Tanganyika replied that, according to the advice which it had received, the effect of such an agreement might be that it (a) would enable third States to call upon it—Tanganyika—to perform treaty obligations from which it would otherwise have been released on its emergence into statehood; but (b) would not, by itself, suffice to entitle it to call upon third States to perform towards Tanganyika treaties which they had concluded with the United Kingdom. Accordingly, it did not enter into a devolution agreement, but wrote instead to the Secretary-General of the United Nations in December 1961 making the following declaration:

The Government of Tanganyika is mindful of the desirability of maintaining, to the fullest extent compatible with the emergence into full independence of the State of Tanganyika, legal continuity between Tanganyika and the several States with which, through the action of the United Kingdom, the territory of Tanganyika was prior to independence in treaty relations. Accordingly, the Government of Tanganyika takes the present opportunity of making the following declaration:

As regards bilateral treaties validly concluded by the United Kingdom on behalf of the territory of Tanganyika or validly applied or extended by the former to the territory of the latter, the Government of Tanganyika is willing to continue to apply within its territory, on a basis of reciprocity, the terms of all such treaties for a period of two years from the date of independence (i.e., until 8 December 1963) unless abrogated or modified earlier by mutual consent. At the expiry of that period, the Government of Tanganyika will regard such of these treaties which could not by the application of the rules of customary international law be regarded as otherwise surviving, as having terminated.

It is the earnest hope of the Government of Tanganyika that during the aforementioned period of two years, the normal processes of diplomatic negotiations will enable it to reach satisfactory accord with the States concerned upon the possibility of the continuance or modification of such treaties.

The Government of Tanganyika is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of Tanganyika proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument—whether by way of confirmation or termination, confirmation of succession or accession. During such interim period of review any party to a multilateral treaty which has prior to independence been applied or extended to Tanganyika may, on a basis of reciprocity, rely as against Tanganyika on the terms of such treaty.138

At Tanganyika’s express request, the Secretary-General circulated the text of its declaration to all Members of the United Nations.

The United Kingdom then in turn wrote to the Secretary-General requesting him to circulate to all Members of the United Nations a declaration couched in the following terms:

I have the honour . . . to refer to the Note dated 9 December 1961 addressed to your Excellency by the then Prime Minister of Tanganyika, setting out his Government’s position in relation to international instruments concluded by the United Kingdom, whose provisions applied to Tanganyika prior to independence. Her Majesty’s Government in the United Kingdom hereby declare that, upon Tanganyika becoming an independent Sovereign on 9th of December 1961, they ceased to have the obligations or rights, which they formerly had, as the authority responsible for the administration of Tanganyika, as a result of the application of such international instruments to Tanganyika.139

In other words, the United Kingdom caused to be circulated to all Members of the United Nations a formal disclaimer, so far as concerned the territory of Tanganyika, of any obligations or rights of the United Kingdom under treaties applied by it to that territory prior to independence.

(3) The precedent set by Tanganyika180 has been followed by a number of other newly independent States whose unilateral declarations have, however, taken varying forms.131

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138 United Nations, Materials on Succession of States (op. cit.), pp. 177-178.
139 Ibid., p. 178.
131 For the subsequent declaration made by the United Republic of Tanzania on the Union of Tanganyika with Zanzibar, see paragraph 10 of the present commentary.
131 Tonga made a declaration in 1970 which is different from the other declarations mentioned in the commentary. The text of the declaration reads as follows:

"1. I have the honour to inform you that the Government of the Kingdom of Tonga has given consideration to the question of the effect upon its treaty relations with other countries of the Exchange of Notes between it and the United Kingdom pursuant to which the United Kingdom ceased on 4 June 1970 to have any responsibility for the external relations of the Kingdom of Tonga.

2. Relations between Her Britannic Majesty's Government in the United Kingdom and the Government of the Kingdom of Tonga have been governed by—
The Treaty of Friendship of 29 November 1879;
The Treaty of Friendship of 18 May 1900;
The Agreement of 18 January 1905;
The Agreement of 7 November 1928;
The Agreement of 20 May 1952;
The Treaty of Friendship of 26 August 1958;
The Treaty of Friendship of 30 May 1968.

3. Although those of the above instruments of date earlier than 26 August 1958 did not define the powers of the United Kingdom with respect to the external relations of the Kingdom of Tonga, the latter acknowledged in practice that the relationship between States of protection is one which necessarily implies acceptance by the State enjoying protection of limitations of its sovereignty in the sphere of external relations. At the time of negotiation of the Treaty of 18 May 1900, an undertaking was given in unpublished instruments by the King of Tonga to conduct his relations with foreign Powers under the sole advice and through the channels of the United Kingdom and this undertaking constituted the basis on which the external affairs of Tonga were conducted until 26 August 1858.

4. Article III of the Treaty of 26 August 1958 provided that the external relations of the Kingdom of Tonga should be conducted by and be the responsibility of the Government of the Kingdom of Tonga. By a Despatch on External Relations of the same date the Government of the Kingdom of Tonga was authorized:

(a) to negotiate and conclude agreements of purely local concern (other than agreements relating to matters of defence and security and civil aviation) with the administrations of neighbouring Pacific Islands and the Governments of Australia and New Zealand, including arrangements with them for the exchange of representatives;
(4) Botswana in 1966 and Lesotho in 1967 made declarations in the same terms as Tanganyika. In 1969 Lesotho requested the Secretary-General to circulate to all Members of the United Nations another declaration extending the two-year period of review for bilateral treaties specified in its 1967 declaration for a further period of two years. At the same time, it pointed out that the revision of its position under multilateral treaties was still in progress and that, under the terms of its previous declaration, no formal extension of the period was necessary. The new declaration concluded with the following caveat:

"(b) to negotiate and conclude trade agreements, whether bilateral or multilateral, relating solely to the treatment of goods;

"(c) to become a member of any international technical organization for membership of which the Kingdom of Tonga is eligible under the terms of the instrument constituting the organization; and to conduct any external relations (not being relations excluded from the competence of that Government by international law) arising out of any such agreement concluded by the Government of Tonga or out of membership of any international organization.

5. Paragraph (2) of said Article III placed on the Government of the United Kingdom the general obligation to consult the Government of Tonga regarding the conduct of its external relations, and paragraph (3) laid the responsibility on the sovereign of the Kingdom of Tonga to take such steps as might be necessary to give effect to international agreements entered into on behalf of the Government of Tonga.

6. Article II of the Treaty of 30 May 1968 provided that the Government of the United Kingdom should have full and sole responsibility for, and for the conduct of, the external relations of the Kingdom of Tonga—

"(a) with the United Nations;

"(b) with all international organizations of which neither the United Kingdom nor the Kingdom of Tonga was for the time being a member;

"(c) with respect to the accession or adherence by the Kingdom of Tonga to any alliance or political grouping of States;

"(d) with respect to defence;

"(e) with respect to establishment matters, merchant shipping and civil aviation, except in so far as the Government of the United Kingdom might declare that such responsibility for, or responsibility for the conduct of, such relations should be vested in the Government of the Kingdom of Tonga.

7. Where, in accordance with the said Article, the Government of the United Kingdom had full and sole responsibility for, or for the conduct of, the external relations of the Kingdom of Tonga, paragraph (3) of that Article provided that they should consult with the Government of Tonga regarding the conduct of such external relations, and in particular should consult with the Government of Tonga before entering into any international agreement in respect of the Kingdom of Tonga.

8. Subject to the provisions of the said Treaty, paragraph (4) of the said Article provided that the external relations of the Kingdom of Tonga should be conducted by the Government of Tonga, except in so far as the Government of the United Kingdom might, at the request of the Government of Tonga, undertake responsibility for, or responsibility for the conduct of, such relations.

9. The Government of the Kingdom of Tonga, conscious of the desirability of maintaining existing legal relationships, and conscious of its obligations under international law to honour its treaty commitments, acknowledges that treaties validly made on behalf of the Kingdom of Tonga by the Government of the United Kingdom pursuant to and within the powers of the United Kingdom derived from the above recited instruments and subject to the conditions thereof bound the Kingdom of Tonga as a Protected State, and in principle continue to bind it in virtue of customary international law after 4 June 1970 and until validly terminated.

The Government of the Kingdom of Lesotho wishes it to be understood that this is merely a transitional arrangement. Under no circumstances should it be implied that by this Declaration Lesotho has either acceded to any particular treaty or indicated continuity of any particular treaty by way of succession.

(5) In 1958 Nauru also made a declaration which, with some minor differences of wording, follows the Tanganyika model closely. But the Nauru declaration does differ on one point of substance to which attention is drawn because of its possible interest in the general question of the existence of rules of customary law regarding succession in the matter of treaties with respect to bilateral treaties. The Tanganyika declaration provides that on the expiry of the provisional period of review Tanganyika will regard such of them as "could not by the application of the rules of customary international law be regarded as otherwise surviving," as having terminated. The Nauru declaration, on the other hand, provides that Nauru will regard "each such treaty as having terminated unless it has earlier agreed with the other contracting party to continue that treaty in force to the extent to which their provisions were unaffected in law by the application of the rules of customary international law until validly terminated."
existence without any reference to customary law. In addition, Nauru requested the circulation of its declaration to Members of the Specialized Agencies as well as to States Members of the United Nations.

(6) Uganda, in a Note to the Secretary-General of 12 February 1963, made a declaration applying a single procedure of provisional application to both bilateral and multilateral treaties. The declaration stated that in respect of all treaties validly concluded by the United Kingdom on behalf of the Uganda Protectorate or validly extended to it before 9 October 1962 (the date of independence) Uganda would continue to apply them, on the basis of reciprocity, until the end of 1963, unless they should be abrogated, or modified by agreement with the other parties concerned. The declaration added that at the end of that period, or of any subsequent extension of it notified in a similar manner, Uganda would regard the treaties as terminated except such as “must by the application of the rules of customary international law be regarded as otherwise surviving”. The declaration also expressed Uganda’s hope that before the end of the period prescribed the normal processes of diplomatic negotiations would have enabled it to reach satisfactory accords with the States concerned upon the possibility of the continuance or modification of the treaties; and, in the case of multilateral treaties, it expressed its intention within that same period to notify the depositary of the steps it wished to take in regard to each treaty. Like Tanganyika, Uganda expressly stated that, during the period of review, the other parties to the treaties might, on the basis of reciprocity, rely on their terms as against Uganda.

Kenya and Malawi subsequently requested the Secretary-General to notify Members of the United Nations of declarations made by them in the same forms as Uganda. Kenya’s declaration contained an additional paragraph which is of some interest in connexion with so-called dispositive treaties and which reads:

Nothing in this Declaration shall prejudice or be deemed to prejudice the existing territorial claims of the State of Kenya against third parties and the rights of a dispositive character initially vested in the State of Kenya under certain international treaties or administrative arrangements concerning agreements.

(7) In September 1965 Zambia communicated to the Secretary-General a declaration framed on somewhat different lines:

I have the honour to inform you that the Government of Zambia, conscious of the desirability of maintaining existing legal relationships, and conscious of its obligations under international law to honour its treaty commitments, acknowledges that many treaty rights and obligations of the Government of the United Kingdom in respect of Northern Rhodesia were succeeded to by Zambia upon independence by virtue of customary international law.

Since, however, it is likely that in virtue of customary international law, certain treaties may have lapsed at the end of independence of Zambia, it seems essential that each treaty should be subjected to legal examination. It is proposed, after this examination has been completed, to indicate which, if any, of the treaties which may have lapsed by customary international law the Government of Zambia wishes to treat as having lapsed.

The question of Zambia’s succession to treaties is complicated by legal questions arising from the entrustment of external affairs powers to the former Federation of Rhodesia and Nyasaland. Until these questions have been resolved it will remain unclear to what extent Zambia remains affected by the treaties contracted by the former Federation.

It is desired that it be presumed that each treaty has been legally succeeded to by Zambia and that action be based on this presumption until a decision is reached that it should be regarded as having lapsed. Should the Government of Zambia be of the opinion that it has legally succeeded to a treaty and wishes to terminate the operation of the treaty, it will in due course give notice of termination in the terms thereof.

The Government of Zambia desires that this letter be circulated to all States Members of the United Nations and the United Nations Specialized Agencies, so that they will be effected with notice of the Government’s attitude.

Subsequently, declarations in the same form were made by Guyana, Barbados, Mauritius, the Bahamas and Fiji. The declarations of Barbados, Mauritius, the Bahamas and Fiji did not contain anything equivalent to the third paragraph of the Zambia declaration. The Guyanese declaration, on the other hand, did contain a paragraph similar to that third paragraph, dealing with Guyana’s special circumstances, and reading as follows:

Owing to the manner in which the British Guiana was acquired by the British Crown, and owing to its history previous to that date, consideration will have to be given to the question which, if any, treaties contracted previous to 1804 remain in force by virtue of customary international law.

(8) In all the above instances, the United Kingdom requested the Secretary-General to circulate to States Members of the United Nations a formal disclaimer of any continuing obligations or rights of the United Kingdom in the same terms as in the case of Tanganyika.


See para. 2 above.
(9) Swaziland, in 1968, framed its declaration in terms which are at once simple and comprehensive:

I have the honour . . . to declare on behalf of the Government of the Kingdom of Swaziland that for a period of two years with effect from 6 September 1968, the Government of the Kingdom of Swaziland accepts all treaty rights and obligations entered into prior to independence by the British Government on behalf of the Kingdom of Swaziland, during which period the treaties and international agreements in which such rights and obligations are embodied will receive examination with a view to determining, at the expiration of that period of two years, which of those rights and obligations will be adopted, which will be terminated, and which of these will be adopted with reservations in respect of particular matters.146

The declaration was communicated to the Secretary-General with the request that it should be transmitted to all States Members of the United Nations and members of the specialized agencies.

(10) In 1964 the Republic of Tanganyika and the People's Republic of Zanzibar were united into a single sovereign State which subsequently adopted the name of United Republic of Tanzania. Upon the occurrence of the union the United Republic addressed a Note to the Secretary-General informing him of the event and continuing:

The Secretary-General is asked to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single Member of the United Nations bound by the provisions of the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People's Republic of Zanzibar and other States or international organizations will, to the extent that their implementation is consistent with the constitutional position established by the Articles of Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law.146

The declaration was communicated to the Secretary-General with the request that it should be transmitted to all States Members of the United Nations and members of the specialized agencies.

(11) Two States formerly dependent upon Belgium have also made declarations which have been circulated to States Members of the United Nations. Rwanda's declaration, made in July 1962, was in quite general terms:

The Rwandese Republic undertakes to comply with the international treaties and agreements, concluded by Belgium and applicable to Rwanda, which the Rwandese Republic does not denounce or which have not given rise to any comments on its part.147

The Government of the Republic will decide which of these international treaties and agreements should in its opinion apply to independent Rwanda, and in so doing will base itself on international practice.

These treaties and agreements have been and will continue to be the subject of detailed and continuous investigations.148

(12) Burundi, on the other hand, in a Note of June 1964, framed a much more elaborate declaration which was cast somewhat on the lines of the Tanganyika declaration. It read:

The Ministry of Foreign Affairs and Foreign Trade of the Kingdom of Burundi presents its compliments to U Thant, Secretary-General of the United Nations, and has the honour to bring to his attention the following Declaration stating the position of the Government of Burundi with regard to international agreements entered into by Belgium and made applicable to the Kingdom of Burundi before it attained its independence.

I. The Government of the Kingdom of Burundi is prepared to succeed to bilateral agreements subject to the following reservations:

(1) The agreements in question must remain in force for a period of four years, from 1 July 1962 the date of independence of Burundi, that is to say until 1 July 1966;

(2) The agreements in question must be applied on a basis of reciprocity;

(3) The agreements in question must be renewable by agreement between the parties;

(4) The agreements in question must have been effectively applied;

(5) The agreements in question must be subject to the general conditions of the law of nations governing the modification and termination of international instruments;

(6) The agreements in question must not be contrary to the letter or the spirit of the Constitution of the Kingdom of Burundi.

When this period has expired, any agreement which has not been renewed by the parties or has terminated under the rules of customary international law will be regarded by the Government of Burundi as having lapsed.

Similarly, any agreement which does not comply with the reservations stated above will be regarded as null and void.

With regard to bilateral agreements concluded by independent Burundi the Government intends to submit such agreements to the Secretary-General for registration once internal constitutional procedures have been complied with.

II. The Government of Burundi is prepared to succeed to multilateral agreements subject to the following reservations:

(1) that the matters dealt with in these agreements are still of interest;

(2) that these agreements do not, under article 60 of the Constitution of the Kingdom of Burundi, involve the State in any expense or bind the Burundians individually. By the terms of the Constitution, such agreements cannot take effect unless they have been approved by Parliament.

In the case of multilateral agreements which do not meet the conditions stated above, the Government of Burundi proposes to make known its intention explicitly in each individual case. This also applied to the more recent agreements whose provisions are applied tacitly, as custom, by Burundi. The Government of Burundi may confirm their validity, or formulate reservations, or denounce the agreements. In each case it will inform the depositary whether

* Extended for a further period of two years by a Note of December 1966.

144 See document A/CN.4/263 (Supplement prepared by the Secretariat to Materials on Succession of States (op. cit.)) United Kingdom of Great Britain and Northern Ireland, Treaties, Swaziland.


147 See para. 2 above.

148 See United Nations, Materials on Succession of States (op. cit.), p. 146. This declaration was transmitted to the Secretary-General by the Belgian Government in 1962.
it intends to be bound in its own right by accession of through succession.

With regard to multilateral agreements open to signature, the Government will shortly appoint plenipotentiaries holding the necessary powers to execute formal acts of this kind.

III. In the intervening period, however, the Government will put into force the following transitional provisions:

(1) any party to a regional multilateral treaty or a multilateral treaty of universal character which has been effectively applied on a basis of reciprocity can continue to rely on that treaty as of right in relation to the Government of Burundi until further notice;

(2) the transitional period will terminate on 1 July 1966;

(3) no provision in this Declaration may be interpreted in such a way as to infringe the territorial integrity, independence or neutrality of the Kingdom of Burundi.

The Ministry requests the Secretary-General to be so good as to issue this Declaration as a United Nations document for circulation among Member States and takes this opportunity to renew to the Secretary-General the assurances of its highest consideration.

In this declaration, it will be noted, the express provision that during the period of review the other parties may continue to rely on the treaties as against Burundi appears to relate only to multilateral treaties.

(13) The declarations here in question do not fall neatly into any of the established treaty procedures. They are not sent to the Secretary-General in his capacity as registrar and publisher of treaties under Article 102 of the Charter. The communications under cover of which they have been sent to the Secretary-General have not asked for their registration or for their filing and recording under the relevant General Assembly resolutions. In consequence, the declarations have not been registered or filed and recorded; nor have they been published in any manner in the United Nations Treaty Series. Equally the declarations are not sent to the Secretary-General in his capacity as a depository of multilateral treaties. A sizeable number of the multilateral treaties which these declarations cover may, no doubt, be treaties of which the Secretary-General is the depository. But the declarations also cover numerous bilateral treaties for which there is no depository, as well as multilateral treaties which have depositaries other than the Secretary-General. The declarations seem to be sent to the Secretary-General on a more general basis as the international organ specifically entrusted by the United Nations with functions concerning the publication of acts relating to treaties or even merely as the convenient diplomatic channel for circulating to all States Members of the United Nations and members of the specialized agencies notifications of such acts.

(14) Unlike devolution agreements, the declarations are addressed directly to the interested States, that is, to the States parties to the treaties applied to the newly independent State’s territory prior to its independence. They appear to contain, in one form or another, an engagement by the declarant State, on the basis of reciprocity, to continue the application of those treaties after independence provisionally, pending its determination of its position with respect to each individual treaty. Thus, the first purpose of the declaration would seem to be the creation, in a different context, of a treaty relation analogous to that which is the subject of article 25 of the Vienna Convention concerning provisional application of a treaty pending its entry into force. The question of the definitive participation of the newly independent State in the treaties is left to be determined with respect to each individual treaty during a period of review, the situation being covered meanwhile by the application of the treaty provisionally on the basis of reciprocity.

(15) Notwithstanding certain variations of formulation, the terms of the Tanganyika, Uganda, and Swaziland type declarations confirm what is said in the previous paragraph. Even the Zambia-type declarations, more affirmative in their attitude toward succession to the predecessor State’s treaties, expressly recognize that in virtue of customary law certain treaties may have lapsed at the date of independence; they furnish no indications which might serve to identify either the treaties which are to be considered as succeeded to by the declarant State or those which are to be considered as likely to have lapsed by virtue of customary law; and they expressly state it to be essential that each treaty should be subject to legal examination with a view to determining whether or not it has lapsed.

(16) Although addressed to a large number of States among which are, for the most part, to be found other States parties to the treaties applied to the declarant State’s territory prior to its independence, the declarations are unilateral acts the legal effects of which for the other parties to the treaties cannot depend on the will of the declarant State alone. This could be so only if a newly independent State might be considered as possessing under international law a right to the provisional application of the treaties of its predecessor for a certain period after independence. But such a right does not seem to have any basis in State practice; indeed, many of the declarations themselves clearly assume that the other parties to the treaties are free to accept or reject the declarant State’s proposal to apply its predecessor’s treaties provisionally. Equally, the treaties themselves do not normally contemplate the possibility either of “provisional parties” or of a “provisional application”. Accordingly, the legal effect of the declarations seems to be that they furnish bases for a collateral agreement in simplified form between the newly independent State and the individual parties to its predecessor’s treaties for the provisional application of the treaties after independence. The agreement may be express but may equally arise from the conduct of any individual State party to any treaty covered by the declaration, in particular from acts showing that it regards the treaty as still having application with respect to the territory.

(17) There is, of course, nothing to prevent a newly independent State from making a unilateral declaration in which it announces definitively that it considers itself, or desires to have itself considered, as a party to treaties, or certain treaties, of its predecessor applied to its territory prior to independence. Even then, since the declaration would not, as such, be binding on other
States, its legal effect would be governed simply by the provisions of the present articles relating to notifying succession to multilateral treaties and the continuation in force of treaties by agreement. In other words, in relation to the third States parties to the predecessor State’s treaties the legal effect of such a unilateral declaration would be analogous to that of a devolution agreement.

(18) In the modern practice described above the primary role of unilateral declarations by successor States has been to facilitate the provisional application of treaties previously applied to the territory in question; and these declarations have for the most part been made by newly independent States. Nevertheless unilateral declarations of this kind may be framed in general terms not limited to provisional application and they may be made by successor States other than newly independent States. Accordingly, the Commission decided to formulate in article 9 the rule concerning the legal effect of unilateral declarations as one of general scope and to include it among the general provisions of part I alongside the article dealing with devolution agreements (article 8).

(19) At the same time, since the principal importance of provisional application of treaties upon a succession of States seems in practice to be in cases of newly independent States, the Commission decided to deal with this subject separately, and to place provisions necessary for this purpose in a special section (section 4) in part III of the present draft articles.

(20) As to the present article, the Commission decided to formulate it along the lines of article 8 (devolution agreements), because the negative rule specifying the absence of any direct effects of a successor State’s declaration upon the other States parties to the predecessor’s treaties applies in both cases, even although the legal considerations on which the rule is based may not be precisely the same in the case of declarations as in the case of devolution agreements. Certain differences between devolution agreements and unilateral declarations had been mentioned in the comments of Governments. However, the Commission, when re-examining the draft articles, thought that these were differences of a political rather than of a legal character and that they were sufficiently reflected in the comments to articles 8 and 9. Reference was made in this connexion to paragraph 21 of the commentary to article 8. It was also noted that there was a difference in tone between paragraph 2 of article 8 which began with the words “Notwithstanding the conclusion of such an agreement…” and paragraph 2 of article 9 in which the corresponding words were “In such a case...”.

(21) Accordingly, paragraph 1 of this article states that the obligations or rights of a predecessor State under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties in consequence only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory. And paragraph 2 provides that in such a case “the effects of the succession of States” on treaties which at the date of succession of States were in force in respect of the territory in question are governed by the present articles.

(22) At its twenty-sixth session, the Commission decided to keep article 9 in its original form for the same reasons as given in paragraph 23 of the commentary to article 8 and made only three minor drafting changes.

Article 10. Treaties providing for the participation of a successor State

1. When a treaty provides that, on the occurrence of a succession of States, a successor State shall have the option to consider itself a party thereto, it may notify its succession in respect of the treaty in conformity with the provisions of the treaty or, failing any such provisions, in conformity with the provisions of the present articles.

2. If a treaty provides that, on the occurrence of a succession of States, the successor State shall be considered as a party, such a provision takes effect only if the successor State expressly accepts in writing to be considered.

3. In cases falling under paragraph 1 or 2, a successor State which establishes its consent to be a party to the treaty is considered as a party from the date of the succession unless the treaty otherwise provides or it is otherwise agreed.

Commentary

(1) This article, as its title indicates, concerns the case of participation by a successor State in a treaty by virtue of a clause of the treaty itself, as distinct from the case where the right of participation arises from the general law of succession. Although clauses of that kind have not been numerous, there are treaties, mainly multilateral treaties, which contain provisions purporting to regulate in advance the application of the treaty on the occurrence of a succession of States. The clauses may refer to a certain category of States or to a particular State. Sometimes they have been included in treaties when the process of the emergence of one or more successor States was at an advanced stage at the time of the negotiations of the original treaty or of an amendment or revision of the treaty.

(2) For example, article XXVI, paragraph 5c, of the General Agreement on Tariffs and Trade of 1947 (as amended by the Protocol of 1955) states:

If any of the customs territories, in respect of which a contracting party has accepted this Agreement, possesses or acquires full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, such territory shall, upon sponsorship through a declaration by the responsible contracting party establishing the above-mentioned fact, be deemed to be a contracting party.\textsuperscript{181}

\textsuperscript{180} 1972 draft, article 9.

\textsuperscript{181} United Nations, Treaty Series, vol. 278, p. 204.
This clause, which was included in the original text of the General Agreement, seems to have been designed to enable certain self-governing dependent territories to become separate contracting parties to GATT rather than to furnish a means of providing for the continuation as parties to GATT of newly independent States. In fact, however, the great majority of the newly independent States which have become parties to GATT have done so through the procedure set out in the clause. Moreover, the contracting parties by a series of recommendations have found it desirable to supplement that clause with a further procedure of "provisional application", called "de facto application".

(3) The net result has been that under paragraph 5c of article XXVI of GATT, five newly independent States have become contracting parties to the General Agreement through the simple sponsoring of them by their predecessor State followed by a declaration by the existing Contracting Parties; and that some twenty-five others have become contracting parties by sponsoring and declaration after a period of provisional de facto application. In application, some newly independent States are maintaining a de facto application of the General Agreement in accordance with the recommendations, pending their final decisions as to whether they should become contracting parties. It may be added that States which become contracting parties to the General Agreement under Article XXVI, paragraph 5c, are considered as having by implication agreed to become parties to the subsidiary GATT multilateral treaties made applicable to their territories prior to independence.

(4) Other examples of treaties providing for the participation of a successor State can be found in various commodity agreements: the Second and Third International Tin Agreements of 1960 and 1965; the 1962 International Coffee Agreement; and the 1968 International Sugar Agreement. Article XXII, paragraph 6, of the Second International Tin Agreement, reads:

A country or territory, the separate participation of which has been declared under Article III or paragraph 2 of this Article by any Contracting Government, shall, when it becomes an independent State, be deemed to be a Contracting Government* and the provisions of this Agreement shall apply to the Government of such State as if it were an original Contracting Government* already participating in this Agreement.

This clause, taken literally, would appear to envisage the automatic translation of the newly independent State into a separate contracting party. It has, however, been ascertained from the depositary that the newly independent States which have become parties to the Second Tin Agreement (1960) have not done so under paragraph 6 of article XXII. Similarly, although the Third International Tin Agreement (1965) also contains, in article XXV, paragraph 6, a clause providing for automatic participation, there has not apparently been any case of a newly independent State's having assumed the character of a party under the clause.

(5) Article XXI, paragraph 1 of the Second Tin Agreement (1960) is also of interest in the present connexion. It provided that the Agreement should be open for signature until 31 December 1960 "on behalf of Governments represented at the session", and among these were Zaire and Nigeria, both of whom became independent prior to the expiry period prescribed for signatures. These two new States did proceed to sign the Agreement under article XXI, paragraph 1, and subsequently became parties by depositing instruments of ratification. They thus seem to have preferred to follow this procedure rather than to invoke the automatic participation provision in paragraph 6 of article XXII.

The case of Ruanda-Urundi likewise indicates that the automatic participation provision was not intended to be taken literally. Belgium signed the Agreement on behalf of herself and Ruanda-Urundi, and then expressly limited her instrument of ratification to Belgium in order to leave Ruanda and Urundi free to make their own decision.

(6) The International Coffee Agreement of 1962 again makes provision for the emergence of a territory to independent statehood, but does so rather in terms of "conferring a right upon the new State to become a party to the Agreement after independence if such should be its wish. Thus, article 67, having authorized in paragraph 1 the extension of the Agreement to dependent territories, provides in paragraph 4:

The Government of a territory to which the Agreement has been extended under paragraph (1) of this Article and which has subsequently become independent may, within 90 days after the attainment of independence, declare by notification to the Secretary-General of the United Nations that it has assumed the rights and obligations of a Contracting Party to the Agreement.* It shall, as from the date of such notification, become a party to the Agreement. No territory, after becoming an independent State, exercised its right to notify the Secretary-General—who is the depositary—of its assumption of the character of a separate contracting party. Of the two States which qualified to invoke paragraph 4, one—Barbados—recognized that it possessed the right to become a party under that paragraph to the extent of notifying the Secretary-General, with express reference to article 67, paragraph 4, that it did not wish to assume the rights.


139 Burma, Ceylon and Southern Rhodesia were the territories concerned (ibid., foot-note 549).

140 * Ibid., p. 74, paras. 321-325, for the details of these recommendations.

141 Ibid., pp. 76 et seq., paras. 332-350.


143 Ibid., vol. 616, p. 317.

144 Ibid., vol. 469, p. 169.


and obligations of a contracting party. The other—Kenya—allowed the 90 days' period to expire and did not become a party until three years after the date of its independence, when it did so by depositing an instrument of accession.\(^{163}\)

(7) Like the Second Tin Agreement (1960), the 1962 Coffee Agreement laid down in its final provisions—article 62—that it should be open for signature by the Government of any State represented before independence at the Conference as a dependent territory. Uganda, one of the territories so represented, achieved her independence before the expiry of the period prescribed for signatures and duly became a party by first signing and then ratifying the Agreement.\(^{163}\)

(8) The only other multilateral treaty containing a similar clause appears to be yet another commodity agreement, the International Sugar Agreement (1968),\(^{164}\) article 66, paragraph 2 of which is couched in much the same terms as article 67, paragraph 4, of the 1962 Coffee Agreement. On 20 December 1968, the Government of the United Kingdom notified the extension of the 1968 International Sugar Agreement to certain territories, including Fiji. Subsequently, in a communication dated 10 October 1970, received by the Secretary-General on 17 October 1970, the Government of Fiji notified him as follows:

... Fiji attained independence on 10th October, 1970 and the Government of Fiji declares pursuant to paragraph 2 of article 66 of the International Sugar Agreement that as from the date of this notification it has assumed the rights and obligations of a Contracting Party to the Agreement.\(^{165}\)

(9) An example of a bilateral agreement containing a clause providing for the future participation of a territory after its independence is the Agreement to resolve the controversy over the frontier between Venezuela and British Guiana (Geneva, 1966)\(^{166}\) concluded between the United Kingdom and Venezuela shortly before British Guiana's independence. The Agreement, which stated in its preamble that it was made by the United Kingdom “in consultation with the Government of British Guiana” and that it took into account the latter's forthcoming independence, provided in article VIII:

Upon the attainment of independence by British Guiana, the Government of Guyana shall thereafter be a party to this Agreement,* in addition to the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Venezuela.

Prior to independence, the Agreement was formally approved by the House of Assembly of what was then still "British Guiana." Venezuela, moreover, in notifying the Secretary-General of the Agreement's entry into force between itself and the United Kingdom, drew special attention to the provision in article VIII under which the Government of Guyana would become a party after attaining independence. Guyana in fact attained its independence a few weeks later, and thereupon both Venezuela and Guyana acted on the basis that the latter had now become a third and separate contracting party to the Geneva Agreement.

(10) In the light of the State practice referred to in the preceding paragraphs, the Commission considered it desirable to enunciate separately the two rules set forth in paragraphs 1 and 2 of the present article. Paragraph 1 deals with the more frequent case, namely, where the successor State has an option under the treaty to consider itself as a party thereto. These cases would seem to fall within the rule in article 36 (treaties providing for rights for third States) of the Vienna Convention. But, whether or not a successor State is to be regarded as a third State in relation to the treaty, it clearly may exercise the right to become a party for which the treaty itself specifically provides. At the same time, the exercise of that right would of course, be subject to the provisions of the treaty as to the procedure, or failing any such provisions, to the general rules on succession of States in respect of treaties contained in the present draft articles. The expression “or, failing any such provisions, in conformity with the provisions of the present articles” contemplates therefore the case of treaties providing for the option referred to in the first part of paragraph 1 but containing no provision indicating the means by which the option might be exercised. In these circumstances, the appropriate procedure in the case of newly independent States would be in conformity with the provisions of article 21, and in other cases in conformity with the provisions of article 37.

(11) Paragraph 2 concerns those cases where a treaty purports to lay down that, on a succession of States, the successor State shall be considered as a party. In those cases the treaty provisions not merely confer a right of option on the successor State to become a party but appear to be intended as the means by establishing automatically an obligation for the successor State to consider itself a party. In other words, these cases seem to fall within article 35 (treaties providing for obligations for third States) of the Vienna Convention. Under that article, the obligation envisaged by the treaty arises for the third State only if the third State expressly accepts it in writing. The question then is whether it should make any difference that the treaty was previously binding with respect to the successor State's territory when the territory was under the sovereignty of its predecessor. Certain Governments having raised the question of the advisability of requiring, in the present context, express acceptance in writing for the successor State, the Commission at its present session considered again the possibility of introducing in this respect a measure of flexibility into paragraph 2 of the article. The Commission decided, however, to maintain the requirement of express acceptance in writing as in the 1972 draft. In doing so, the Commission was guided by the need for avoiding any risk that a treaty providing that the successor State shall be considered as a party might be construed as imposing on it an obligation to become a

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\(^{164}\) Ibid., p. 377.

\(^{165}\) See note 159 above. The 1958 Sugar Agreement (United Nations, *Treaty Series*, vol. 385, p. 137), had not contained this clause, and the emergence to independence of dependent territories to which the Agreement had been "extended" had given rise to problems.


party by the will of the original parties. Consequently, paragraph 2 states that the treaty provision that the successor State shall be considered as a party "takes effect only if the successor State expressly accepts in writing to be so considered". Under the paragraph, therefore, the successor State would be considered as being under no obligation at all to become a party by virtue of the treaty clause alone. The treaty clause, whatever its wording, would be considered an option, not an obligation of the successor State to become a party to the treaty. The words "shall be considered as a party" are intended to cover all related expressions found in treaty language, such as "shall be a party" or "shall be deemed to be a party".

(12) The Commission thought it preferable to require evidence of subsequent acceptance by the successor State in all cases, in spite of the fact that in some instances, particularly where the territory was already in an advanced state of self-government at the time of the conclusion of the treaty, representatives of the territory might have been consulted in regard to future participation in the treaty after independence. Nevertheless, the Commission wished to stress that paragraph 2 only deals with the application of the provisions of the treaty itself, and is not intended to exclude the application where appropriate of other provisions in the draft articles. For example, in a case of de jure continuity under Part IV of the draft, the treaty would continue in force in respect of the successor State, and this would not be prevented by a provision in the treaty that "the successor State shall be considered as a party".

(13) The question of the continuity of application of the treaty during the intervening period between the date of the succession of States and the time of the successor State's expression of consent having been raised by certain members, the Commission decided to add the provision contained in paragraph 3. Paragraph 3, therefore, intends to ensure continuity of application by providing that, as a general rule, the successor State, if it consents to be considered as a party, in cases falling under paragraphs 1 or 2 of the article, will be so considered as from the date of the succession of States. This general rule is qualified by the concluding proviso "unless the treaty otherwise provides or it is otherwise agreed" which safeguards the provisions of the treaty itself, as in the case of treaties like the 1962 International Coffee Agreement and the 1968 International Sugar Agreement referred to above, 167 and the freedom of the parties. At its present session, the Commission considered whether paragraph 3 should be amended having regard to the changes made in article 22 which normally have the effect of making a multilateral treaty operative in respect of a newly independent State from the date of making of the notification of succession, rather than from the date of the succession of States.

Commission concluded, however, that where a treaty makes an express provision designed to facilitate continuity in the application of the treaty, as in cases such as those contemplated in paragraphs 1 and 2 of this article, it would be reasonable to maintain the residual rule in the form in which it appears in paragraph 3. Therefore, the Commission did not add a provision for suspension of the operation of the treaty corresponding to paragraph 2 of article 22.

(14) Although the recent precedents recorded in this commentary relate to newly independent States, and mainly to multilateral States, the Commission considered it advisable, given the matters of principle involved, to formulate the provisions of article 10 in general terms, in order to make them applicable to all cases of succession of States and to all types of treaty. This being so, it included the article among the general provisions of the present draft.

Article 11. 168 Boundary régimes

A succession of States does not as such affect:

(a) a boundary established by a treaty; or
(b) obligations and rights established by a treaty and relating to the régime of a boundary.

Article 12. 169 Other territorial régimes

1. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of any territory of a foreign State and considered as attaching to the territories in question;
(b) rights established by a treaty for the benefit of any territory and relating to the use, or to restrictions upon the use, of any territory of a foreign State and considered as attaching to the territories in question.

2. A succession of States does not as such affect:

(a) obligations relating to the use of any territory, or to restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;
(b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

Commentary

(1) Both in the writings of jurists and in State practice frequent reference is made to certain categories of treaties, variously described as of a "territorial", "dispositive", "real" or "localized" character, as binding upon the territory affected notwithstanding any succession of States. The question of what will for convenience be called in this commentary "territorial

167 The case of the participation of Fiji in the 1968 International Sugar Agreement mentioned in paragraph 8 of the commentary to the present article illustrates this point. Fiji became a party not as from the date of the succession of States (10 October 1970) but as from the date of its notification it has assumed the rights and obligations of a contracting Party in accordance with the terms of article 66, paragraph 2, of the 1968 International Sugar Agreement.

168 1972 draft, article 29.

169 1972 draft, article 30.
treaties” is at once important, complex and controversial. In order to underline its importance the Commission need only mention that it touches such major matters as international boundaries, rights of transit on international waterways or over another State, the use of international rivers, demilitarization or neutralization of particular localities, etc.

(2) The weight of opinion amongst modern writers supports the traditional doctrine that treaties of a territorial character constitute a special category and are not affected by a succession of States. At the same time, some jurists tend to take the position, especially in regard to boundaries, that it is not the treaties themselves which constitute the special category so much as the situations resulting from their implementation. In other words, they hold that in the present context it is not so much a question of succession in respect of the treaty itself as of the boundary or other territorial regime established by the treaty. In general, however, the diversity of the opinions of writers makes it difficult to find in them clear guidance as to what extent and upon what precise basis international law recognizes that treaties of a territorial character constitute a special category for the purposes of the law applicable to succession of States.

(3) The proceedings of international tribunals throw some light on the question of territorial treaties. In its second Order in the case concerning the Free Zones of Upper Savoy and the District of Gex the Permanent Court of International Justice made a pronouncement which is perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates. The Treaty of Turin of 1816, in fixing the frontier between Switzerland and Sardinia, imposed restrictions on the levying of customs duties in the Zone of St. Gingolph. Switzerland claimed that from St. Gingolph. Sardinia, although at first contesting this view of the Treaty, eventually agreed and gave effect to its agreement by a “Manifesto” withdrawing the customs line. In this context, the Court said:

...as this assent given by his Majesty the King of Sardinia, without any reservation, terminated an international dispute relating to the interpretation of the Treaty of Turin, as, accordingly, the effect of the Manifesto of the Royal Sardinian Court of Accounts, published in execution of the Sovereign’s orders, laid down, in a manner binding upon the Kingdom of Sardinia, what the law was to be between the Parties; as the agreement thus interpreted by the Manifesto confers on the creation of the zone of Saint-Gingolph the character of a treaty stipulation which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory.*

This pronouncement was reflected in much the same terms in the Court’s final judgment in the second stage of the case. Although the territorial character of the Treaty is not particularly emphasized in the passage cited above, it is clear from other passages that the Court recognized that it was here dealing with an arrangement of a territorial character. Indeed, the Swiss Government in its pleadings had strongly emphasized the “real” character of the agreement speaking of the concept servitudes in connexion with the Free Zones. The case is, therefore, generally accepted as a precedent in favour of the principle that certain treaties of a territorial character are binding ipso jure upon a successor State.

(4) What is not, perhaps, clear is the precise nature of the principle applied by the Court. The Free Zones, including the Sardinian Zone, were created as part of the international arrangements made at the conclusion of the Napoleonic Wars: and elsewhere in its judgments the Court emphasized this aspect of the agreements concerning the Free Zones. The question, therefore, is whether the Court’s pronouncement applies generally to treaties having such a territorial character or whether it is limited to treaties forming part of a territorial settlement and establishing an objective treaty régime. On this question it can only be said that the actual terms of that pronouncement were quite general. The Court does not seem to have addressed itself specifically to the point whether in such a case the succession is in respect of the treaty or in respect of the situation resulting from the execution of the treaty. Its language in the passage from its Order cited above and in the similar passage in its final judgement, whether or not intentionally, refers to “a treaty stipulation* which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory”.

(5) Before the Permanent Court had been established, the question of succession in respect of a territorial treaty came before the Council of the League of Nations with reference to Finland’s obligation to maintain the demilitarization of the Åland Islands. The point arose in connexion with a dispute between Sweden and Finland concerning the allocation of the Islands after Finland’s detachment from Russia at the end of the First World War. The Council referred the legal aspects of the dispute to a committee of three jurists, one of whom was Max Huber, later to be Judge and President of the Permanent Court. The treaty in question was the Åland Islands Convention, concluded between France, Great Britain and Russia as part of the Peace Settlement of 1856, under which the three Powers declared that “the Åland Islands shall not be fortified, and that no military or naval base shall be maintained or created there”. Two major points of treaty law were involved. The first, Sweden’s right to invoke the Convention although not a party to it, was discussed by the Special Rapporteur for the law of treaties in his third report on the topic in connexion with the effect of treaties on third States and objective régimes. The second was the question of Finland’s obligation to maintain the demilitarization of the islands. In its opinion, the Committee of Jurists,

having observed that “the existence of international servitudes, in the true technical sense of the term, is not generally admitted”, 177 nevertheless found reasons for attributing special effects to the demilitarization Convention of 1856:

As concerns the position of the State having sovereign rights over the territory of the Aaland Islands, if it were admitted that the case is one of “real servitude”, it would be legally incumbent upon this State to recognize the provisions of 1856 and to conform to them. A similar conclusion would also be reached if the point of view enunciated above were adopted, according to which the question is one of a more definite settlement of European interests and not a question of mere individual and subjective political obligations. Finland, by declaring itself independent and claiming on this ground recognition as a legal person in international law, cannot escape from the obligations imposed upon it by such a settlement of European interests.

The recognition of any State must always be subject to the reservation that the State recognized will respect the obligations imposed upon it either by general international law or by definite international settlement relating to its territory.* 178

Clearly, in that opinion the Committee of Jurists did not rest the successor State's obligation to maintain the demilitarization régime simply on the territorial character of the treaty. It seems rather to have based itself on the theory of the dispositive effect of an international settlement established in the general interest of the international community (or at least of a region). Thus it seems to have viewed Finland as succeeding to an established régime or situation constituted by the treaty rather than to the contractual obligations of the treaty as such.

(6) The case concerning the Temple of Preah Vihear, 179 cited by some writers in this connexion, is of a certain interest in regard to boundary treaties, although the question of succession was not dealt with by the International Court of Justice in its judgment. The boundary between Thailand and Cambodia had been fixed by 1904 by a Treaty concluded between Thailand [Siam] and France as the then protecting Power of Cambodia. The case concerned the effects of an alleged error in the application of the Treaty by the Mixed Franco-Siamese Commission which demarcated the boundary. Cambodia had in the meanwhile become independent and was therefore in the position of a newly independent State in relation to the boundary Treaty. Neither Thailand nor Cambodia disputed the continuance in force of the 1904 Treaty after Cambodia's attainment of independence, and the Court decided the case on the basis of a map resulting from the demarcation and of Thailand's acquiescence in the boundary depicted on that map. The Court was not therefore called upon to address itself to the question of Cambodia's succession to the boundary Treaty. On the other hand, it is to be observed that the Court never seems to have doubted that the boundary settlement established by the 1904 Treaty and the demarcation, if not vitiated by error, would be binding as between Thailand and Cambodia.

(7) More directly to the purpose is the position taken by the parties on the question of succession in their pleadings on the preliminary objections filed by Thailand. Concerned to deny Cambodia's succession to the rights of France under the pacific settlement provisions of a Franco-Siamese Treaty of 1937, Thailand argued as follows:

Under the customary international law of state succession, if Cambodia is successor to France in regard to the tracing of frontiers, she is equally bound by treaties of a local nature which determine the methods of marking these frontiers on the spot. However, the general rules of customary international law regarding state succession do not prove that, in case of succession by separation of a part of a State's territory, as in the case of Cambodia's separation from France, the new State succeeds to political provisions in treaties of the former State. The question whether Thailand is bound to Cambodia by peaceful settlement provisions in a treaty which Thailand concluded with France is very different from such problems as those of the obligations of a successor State to assume certain burdens which can be identified as connected with the territory which the successor acquires after attaining its independence. It is equally different from the question of the applicability of the provisions of the treaty of 1904 for the identification and demarcation on the spot of the boundary which was fixed along the watershed. 180

Cambodia, although it primarily relied on the thesis of France's "representation" of Cambodia during the period of protection, did not dissent from Thailand's propositions regarding the succession of a new State in respect of territorial treaties. On the contrary, it argued that the peaceful settlement provisions of the 1937 Treaty were directly linked to the boundary settlement and continued:

Thailand recognizes that Cambodia is the successor to France in respect of treaties for the definition and delimitation of frontiers. It cannot arbitrarily exclude from the operation of such treaties any provisions which they contain relating to the compulsory jurisdiction rule in so far as this rule is ancillary to the definition and delimitation of frontiers. 181

Thus both parties seem to have assumed that, in the case of a newly independent State, there would be a succession not only in respect of a boundary settlement but also of treaty provisions ancillary to such settlement. Thailand considered that succession would be limited to provisions forming part of the boundary settlement itself, and Cambodia that it would extend to provisions in a subsequent treaty directly linked to it.

(8) The case concerning right of passage over Indian Territory 182 is also of a certain interest, though it did not involve any pronouncement by the Court on succession in respect of treaty obligations. True, it was under a Treaty of 1779 concluded with the Marathas that Portugal first obtained a foothold in the two enclaves which gave rise to the question of a right of passage in that case. But the majority of the Court specifically held that it was not in virtue of this Treaty that Portugal was enjoying certain rights of passage for civilian personnel on the eve of India's attainment of independence; it was in virtue rather of a local custom that had afterwards become established as between Great Britain and

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177 League of Nations, Official Journal, Special Supplement No. 3 (October 1920), p. 16.
178 Ibid., p. 18.
179 I.C.J. Reports 1962, pp. 6-146.
181 Ibid., p. 165 [translation by the Secretariat].
Portugal. The right of passage derived from the consent of each State, but it was a customary right, not a treaty right, with which the Court considered itself to be confronted. The Court found that India had succeeded to the legal situation created by that bilateral custom "unaffected by the change of régime in respect of the intervening territory which occurred when India became independent". 188

(9) State practice, and more especially modern State practice, has now to be examined; and it is proposed to deal with it first in connexion with boundary treaties and then in connexion with other forms of territorial treaties.

**Boundary treaties**

(10) Mention must first be made of article 62, paragraph 2 (a), of the Vienna Convention which provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty "if the treaty establishes a boundary". This provision was proposed by the Commission as a result of its study of the general law of treaties. After pointing out that this exception to the fundamental change of circumstances rule appeared to be recognized by most jurists, the Commission commented:

Paragraph 2 excepts from the operation of the article two cases. The first concerns treaties establishing a boundary, a case in which both States concerned in the Free Zone case appear to have recognized as being outside the rule, as do most jurists. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article. By accepting treaties establishing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed. The expression "treaty establishing a boundary" was substituted for "treaty fixing a boundary" by the Commission, in response to comments of Governments, as being a broader expression which would embrace treaties of cession as well as delimitation treaties. 184

The exception of treaties establishing a boundary from the fundamental change of circumstances rule, though opposed by a few States, was endorsed by a very large majority of the States at the United Nations Conference on the Law of Treaties. The considerations which led the Commission and the Conference to make this exception to the fundamental change of circumstances rule appear to apply with the same force to a succession of States, even though the question may have presented itself in a different context. Accordingly, the Commission considers that the attitude of States towards boundary treaties at the United Nations Conference on the Law of Treaties is extremely pertinent also in the present connexion.

(11) Attention has already been drawn to the assumption apparently made by both Thailand and Cambodia in the Temple of Preah Vihear Case of the latter country's succession to the boundary established by the Franco-Siamese Treaty of 1904. 186 That this assumption reflects the general understanding concerning the position of a successor State in regard to an established boundary settlement seems clear. Tanzania, although in its unilateral declaration it strongly insisted on its freedom to maintain or terminate its predecessor's treaties, has been no less insistent that boundaries previously established by treaty remain in force. Furthermore, despite their initial feelings of reaction against the maintenance of "colonial" frontiers, the newly independent States of Africa have come to endorse the principle of respect for established boundaries. Article III, paragraph 3, of the OAU Charter, it is true, merely proclaimed the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence". 187 But in 1964, with reservations only from Somalia and Morocco, the Assembly of Heads of State and Government held in Cairo adopted a resolution which, after reaffirming the principle in Article III, paragraph 3, solemnly declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence". 187 A similar resolution was adopted by the Conference of Heads of State or Government of Non-Aligned Countries also held in Cairo later in the same year. This does not, of course, mean that boundary disputes have not arisen or may not arise between African States. But the legal grounds invoked must be other than the mere effect of the occurrence of a succession of States on a boundary treaty.

(12) Somalia has two boundary disputes with Ethiopia, one in respect of the former British Somaliland boundary and the other in respect of the former Italian Somaliland boundary; and a third dispute with Kenya in respect of its boundary with Kenya's North Eastern Province. Somalia's claims in these disputes are based essentially on ethnic and self-determination considerations and on alleged grounds for impeaching the validity of certain of the relevant treaties. Somalia does not seem to have claimed that, as a successor State, it was ipso jure freed from any obligation to respect the boundaries established by treaties concluded by its predecessor State though, according to the written observations of the Government of the Somali Democratic Republic on the draft articles, 188 Somalia has consistently challenged the validity of the 1897 Anglo-Ethiopian Treaty on the ground that it was a treaty "concluded between foreign colonial powers without the consent or knowledge and against the interests of the Somali people". According to

188 See para. 6 above.
188 See below, annex I to the present report.
those observations, apart from the 1897 Anglo-Ethiopian Treaty, the relevant treaties were those of 1897 and 1908 between Ethiopia and Italy and the Anglo-Italian Treaty of 1924, and "when Somalia achieved independence in 1960, it refused to recognize the validity of the treaties made by the colonial powers for the partition of the Somali people and it has never changed this position." On the other hand, Ethiopia and Kenya, which is itself also a successor State, take the position that the treaties in question are valid and that, being boundary settlements, they must be respected by a successor State.

(13) As to the Somali-Ethiopian dispute regarding the 1897 Treaty, the boundary agreed between Ethiopia and Great Britain in 1897 separated some Somali tribes from their traditional grazing grounds; and an exchange of letters annexed to the Treaty provided that these tribes, from either side of the boundary, would be free to cross it to their grazing grounds. The 1897 Treaty was reaffirmed in an agreement concluded between the United Kingdom and Ethiopia in 1954, article I of this agreement reaffirming the boundary and article II the grazing rights. Article III then created a "special arrangement" for administering the use of the grazing rights by the Somali tribes. In 1960, shortly before independence, a question had been put to the British Prime Minister in Parliament concerning the continuance of the Somali grazing rights along the Ethiopian frontier to which he replied:

Following the termination of the responsibilities of H.M. Government for the Government of the Protectorate, and in the absence of any fresh instruments, the provisions of the 1897 Anglo-Ethiopian Treaty should, in our view, be regarded as remaining in force as between Ethiopia and the successor State. On the other hand, Article III of the 1954 Agreement, which comprises most of what was additional to the 1897 Treaty, would, in our opinion, lapse. 190

The United Kingdom thus was of the view that the provisions concerning both the boundary and the Somali grazing rights would remain in force and that only the "special arrangement" which pre-supposed British administration of the adjoining Somali territory, would cease. In this instance, it will be observed, the United Kingdom took the position that ancillary provisions which constituted an integral element in a boundary settlement would continue in force upon a succession of States, while accepting that particular arrangements made by the predecessor State for the carrying out of those provisions would not survive the succession of States. According to the observations of the Government of Ethiopia, its position has been and still is that, following the termination of the United Kingdom's responsibilities for the Somali land Protectorate "the boundary and the grazing provisions of the 1897 Anglo-Ethiopian Agreement remain in force but that only the 'special arrangement' of the 1954 Anglo-Ethiopian Agreement" has lapsed. 191

(14) In a number of other instances the United Kingdom recognized that rights and obligations under a boundary treaty would remain in force after a succession of States. One is the Convention of 1930 concluded between the United States of America and the United Kingdom for the delimitation of the boundary between the Philippine Archipelago and North Borneo. Upon the Philippines becoming independent in 1946, the British Government in a diplomatic Note acknowledged that as a result "the Government of the Republic of the Philippines has succeeded to the rights and obligations of the United States under the Notes of 1930." 192

(15) Another instance is the Treaty of Kabul concluded between the United Kingdom and Afghanistan in 1921 which, inter alia, defined the boundary between the then British Dominion of India and Afghanistan along the so-called Durand line. On the division of the Dominions into the two States of India and Pakistan and their attainment of independence, Afghanistan questioned the boundary settlement on the basis of the doctrine of fundamental change of circumstances. The United Kingdom's attitude in response to this possibility, as summarized by it in Materials on Succession of States, was as follows:

The Foreign Office were advised that the splitting of the former India into two States—India and Pakistan—and the withdrawal of British rule from India had not caused the Afghan Treaty to lapse and it was hence still in force. It was nevertheless suggested that an examination of the Treaty might show that some of its provisions being political in nature or relating to the exchange of diplomatic missions were in the category of those which did not devolve where a State succession took place. However, any executed clauses such as those providing for the establishment of an international boundary or, rather, what had been done already under executed clauses of the Treaty, could not be affected, whatever the position about the Treaty itself might be. 193

Here therefore the United Kingdom again distinguishes between provisions establishing a boundary and ancillary provisions of a political character. But it also appears here to have distinguished between the treaty provisions as such and the boundary resulting from their execution—a distinction made by a number of jurists. Afghanistan, on the other hand, contested Pakistan's right in the circumstances of the case to invoke the boundary provisions of the 1921 Treaty. 194 It did so on various grounds, such as the alleged "unequal" character of the Treaty itself. But it also maintained that Pakistan, as a newly independent State, had a "clean slate" in 1947 and could not claim automatically to be a successor to British rights under the 1921 Treaty.

(16) There are a number of other modern instances in which a successor State has become involved in a boundary dispute. But these appear mostly to be instances where either the boundary treaty in question left the course of the boundary in doubt or its validity was...

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190 United Nations, Materials on Succession of States (op. cit.), p. 185.
191 Ibid., p. 185.
192 Ibid., p. 187.
193 Ibid., pp. 1-5. Mention should also be made of a letter from the British Representative to Sardar-i-Ala, the Afghan Foreign Minister, appended to the 1921 Treaty, which recognized that there were tribes on both sides of the frontier which were of interest to the Government of Afghanistan (ibid., p. 5), and a statement by the Government of the United Kingdom of 3 June 1947 on the occasion of the independence of India and Pakistan, which dealt with the special case of the North-West Frontier Province and the interests of the tribes of the North-West Frontier of India (ibid., pp. 5-6).
challenged on one ground or another; and in those instances the succession of States merely provided the opportunity for reopening or raising grounds for revising the boundary which are independent of the law of succession. Such appears to have been the case, for example, with the Morocco-Algeria, Surinam-Guyana, and Venezuela-Guyana boundary disputes and, it is thought, also with the various Chinese claims in respect of Burma, India and Pakistan. True, China may have shown a disposition to reject the former "British" treaties as such; but it seems rather to challenge the treaties themselves than to invoke any general concept of a newly independent State's clean slate with respect to the treaties, including boundary treaties.

(17) The weight of the evidence of State practice and of legal opinion in favour of the view that in principle a boundary settlement is unaffected by the occurrence of a succession of States is strong and powerfully reinforced by the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which establishes a boundary. Consequently, the Commission considered that the present draft must state that boundary settlements are not affected by the occurrence of a succession of States as such. Such a provision would relate exclusively to the effect of the succession of States on the boundary settlement. It would leave untouched any other ground of claiming the revision or setting aside of the boundary settlement, whether self-determination or the invalidity or termination of the treaty. Equally, of course, it would leave untouched any legal ground of defence to such a claim that might exist. In short, the mere occurrence of a succession of States would neither constrict nor deprive it of its character as legally established boundary, if such it was at the date of the succession of States.

(18) The Commission, at its twenty-fourth session in 1972, then examined how such a provision should be formulated. The analogous provision in the Vienna Convention appears in article 62, paragraph 2(a), as an exception to the fundamental change of circumstances rule, and it is so framed as to relate to the treaty rather than to the boundary resulting from the treaty. For the provision reads: "A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:* (a) if the treaty* established a boundary." However, in the present draft the question is not the continuance in force or otherwise of a treaty between the parties; it is the obligations and rights which devolve upon a successor State. Accordingly, it does not necessarily follow that here also the rule should be framed in terms relating to the boundary treaty rather than to the legal situation established by the treaty; and the opinion of jurists today tends to favour the latter formulation of the rule. If the rule is regarded as relating to the situation resulting from the dispositive effect of a boundary treaty, then it would not seem properly to be an exception to article 15 of the present draft. It would seem rather to be a general rule that a succession of States is not as such to be considered as affecting a boundary or a boundary régime established by treaty prior to that succession of States.

(19) Some members of the Commission considered that to detach succession in respect of the boundary from succession in respect of the boundary treaty might be somewhat artificial. A boundary may not have been fully demarcated so that its precise course in a particular area may be brought into question. In such event recourse might be had to the interpretation of the treaty as the basic criterion for ascertaining the boundary, even if other elements, such as occupation and recognition, may also come into play. Moreover, a boundary treaty may contain ancillary provisions which were intended to form a continuing part of the boundary régime created by the treaty and the termination of which on a succession of States would materially change the boundary settlement established by the treaty. Again, when the validity of the treaty or of a demarcation under the treaty was in dispute prior to the succession of States, it might seem artificial to separate succession in respect of the boundary from succession in respect of the treaty. Other members, however, felt that a boundary treaty had constitutive effects and established a legal and factual situation which thereafter had its own separate existence; and that it was this situation, rather than the treaty, which passed to a successor State. Moreover, not infrequently a boundary treaty contains provisions unconnected with the boundary settlement itself, and yet it is only this settlement which calls for special treatment in case of a succession of States. At the same time the objections raised to this approach to the matter would lose much of their force if it were recognized that the legal situation constituted by the treaty comprised not only the boundary itself but also any boundary régime intended to accompany it and that the treaty provisions combined to constitute the title deeds of the boundary.

(20) In 1972, there was general agreement in the Commission upon the basic principle that a succession of States does not, as such, affect a boundary or a boundary régime established by treaty. Having regard to the various considerations mentioned in the previous paragraphs and to the trend of modern opinion on the matter, the Commission concluded that it should formulate the rule not in terms of the treaty itself but of a boundary established by a treaty and of a boundary régime so established. Accordingly, article 11 was drafted to provide that a succession of States shall not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the régime of a boundary. In accepting this formulation the Commission underlined the purely negative character of the rule, which goes no further than to deny that any succession of States simply by reason of its occurrence affects a boundary established by a treaty or a boundary régime so established. As already pointed out it leaves untouched any legal ground that may exist for challenging the boundary, such as self-determination or the invalidity of the treaty, just as it also leaves untouched any legal ground of defence to

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194 See above, para. 9 of the commentary to article 10.
195 See para. 17 above.
such a challenge. The Commission was also agreed that this negative rule must apply equally to any boundary régime established by a treaty, whether the same treaty as established the boundary or a separate treaty.

Other territorial treaties

(21) The Commission has drawn attention to the assumption which appears to be made by many States, including newly independent States, that certain treaties of a territorial character constitute a special category for purposes of succession of States. In British practice there are numerous statements evidencing the United Kingdom's belief that customary law recognizes the existence of such an exception to the clean slate principle and also to the moving treaty-frontier rule. One such is a statement with reference to Finland. Another is the reply of the Commonwealth Office to the International Law Association. A further statement of a similar kind may be found in Materials on Succession of States, the occasion being discussions with the Cyprus Government regarding article 8 of the Treaty concerning the Establishment of the Republic of Cyprus.

(22) The French Government appears to take a similar view. Thus, in a note addressed to the German Government in 1935, after speaking of what was, in effect, the moving treaty-frontier principle, the French Government continued:

This rule is subject to an important exception in the case of conventions which are not of a political character, that is to say, which were not concluded in relation to the actual personality of the State, but are of territorial and local application and are based on a geographical situation; the successor State, irrespective of the reason for which it succeeds, is bound to assume the burdens arising from treaties of this kind just as it enjoys the advantages specified in them.

Canada, again in the context of the moving treaty-frontier rule, has also shown that it shares the view that territorial treaties constitute an exception to it. After Newfoundland had become a new province of Canada, the Legal Division of the Department of External Affairs explained the attitude of Canada as follows:

...Newfoundland became part of Canada by a form of cession and that consequently, in accordance with the appropriate rules of international law, agreements binding upon Newfoundland prior to union lapsed, except for those obligations arising from agreements locally connected which had established propriety or quasi-proprietary rights. Some further light is thrown on the position taken by Canada on this question by the fact that Canada did not recognize air transit rights through Gander airport in Newfoundland leased to the United States of America before the former became a part of Canada. Furthermore, it does not seem to have questioned the continuance in force of the fishery rights in Newfoundland waters which were accorded by Great Britain to the United States in the Treaty of Ghent in 1818 and were the subject of the North Atlantic Fisheries Arbitration in 1910, or of the fishery rights first accorded to France in the Treaty of Utrecht (1713) and dealt with in a number of further treaties.

(23) An instructive precedent involving the succession of newly independent States is the so-called Belbases Agreements of 1921 and 1951, which concern Tanzania, on the one hand, and Zaire, Rwanda and Burundi, on the other. After the First World War the mandates entrusted to Great Britain and Belgium respectively had the effect of cutting off the central African territories administered by Belgium from their natural sea-port, Dar es Salaam. Great Britain accordingly entered into an Agreement with Belgium in 1921, under which Belgium, at a nominal rent of one franc per annum, was granted a lease in perpetuity of port sites at Dar es Salaam and Kingoma in Tanganyika. This Agreement also provided for certain customs exemptions at the leased sites and for transit facilities from the territories under Belgian mandate to those sites. In 1951, by which time the mandates had been converted into trusteeships, a further Agreement between the two administering Powers provided for a change in the site at Dar es Salaam but otherwise left the 1921 arrangements in force. The Government, it should be added, expended considerable sums in developing the port facilities at the leased sites. On the eve of independence, the Tanzanyika Government informed the United Kingdom that it intended to treat both Agreements as void and to resume possession of the sites. The British Government replied that it did not subscribe to the view that the Agreements were void but that, after independence, the international consequences of Tanganyika's views would not be its concern. It further informed Belgium and the Governments of Zaire (Congo (Léopoldville)), Rwanda and Burundi both of Tanganyika's statement and of its own reply. In the National Assembly Prime Minister Nyerere explained that in Tanganyika's view: "A lease in perpetuity of land in the territory of Tanganyika is not something which is compatible with the sovereignty of Tanganyika when made by an authority whose own rights in Tanganyika were for a limited duration." After underlining the limited character of a mandate or trusteeship, he added: "It is clear, therefore, that in appearing to bind the territory of Tanganyika for all time, the United Kingdom was trying to do something which it did not have the power to do." When in 1962 Tanganyika gave notice of its request for the evacuation of the sites, Zaire (Congo (Léopoldville)), Rwanda and Burundi, which had all now attained independence,


See below, para. 15 of the commentary to article 15.

See para. 3 of the commentary to article 15.

See para. 17 of the commentary to article 15.

United Nations, Materials on Succession of States (op. cit.), p. 183.


countered by claiming to have succeeded to Belgium’s rights under the Agreements. Tanganyika then proposed that new arrangements should be negotiated for the use of the port facilities, to which the other three successor States assented; but it seems that no new arrangement has yet been concluded and that de facto the port facilities are being operated as before.

24) The point made by Tanganyika as to the limited character of the competence of an administering Power is clearly not one to be lightly dismissed. Without, however, expressing any opinion on the correctness or otherwise of the positions taken by the various interested States in this case, it is sufficient here to stress that Tanganyika itself did not rest its claim to be released from the Belbases Agreements on the clean slate principle. On the contrary, by resting its claim specifically on the limited character of an administering Power’s competence to bind a mandated or trust territory, it seems by implication to have recognized that the free port base and transit provisions of the agreements were such as would otherwise have been binding on a successor State.

(25) In the context, at any rate, of military bases, the relevance of the limited character of an administering Power’s competence seems to have been conceded by the United States of America in connexion with the bases in the West Indies granted to it by the United Kingdom in 1941; and this in relation to the limited competence of a colonial administering Power. In the Agreement the bases were expressed to be leased to the United States for 99 years. But on the approach of the West Indies territories to independence the United States took the view that it could not, without exposing itself to criticism, insist that restrictions imposed upon the territory of the West Indies while it was in a colonial status should continue to bind it after independence.\footnote{See A. J. Esagain, “Military servitudes and the new nations”, in W. V. O’Brien, ed., The New Nations in International Law and Diplomacy (The Yearbook of World Polity, vol. III) (New York, Praeger, 1965), p. 78.} \footnote{Ibid., p. 79.} The West Indies Federation for its part maintained that “on its independence it should have the right to form its own alliances generally and to determine for itself what military bases should be allowed on its soil and under whose control such bases should come”.\footnote{Ibid., pp. 72-76.} In short, it was accepted on both sides that the future of the bases must be a matter of agreement between the United States and the newly independent West Indies. In the instant case it will be observed that there were two elements: (a) the grant while in a colonial status and (b) the personal and political character of military agreements. An analogous case is the Franco-American Treaty of 1950 granting a military base to the United States of America in Morocco before the termination of the protectorate. In that case, quite apart from the military character of the agreement, Morocco objected that the agreement had been concluded by the protecting Power without any consultation with the protected State and could not be binding on the latter on its resumption of independence.\footnote{See United Nations, Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation (United Nations publication, Sales No. 63.V.4) p. 101; see also document A/5409 (to be published in Yearbook ... 1974, vol. II (Part Two)), paras. 100-107.}\footnote{26) Treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties. Among early precedents cited is the right of navigation on the Mississippi granted to Great Britain by France in the Treaty of Paris 1763 which, on the transfer of Louisiana to Spain, the latter acknowledged to remain in force.\footnote{507 Another early precedent cited is the grant of navigation rights to Great Britain by Russia in the Treaty of 1825 relating to the Canadian-Alaska boundary, but it is hardly a very clear precedent.} The provisions concerning the Shatt-el-Arab in the Treaty of Erzerum, concluded in 1874 between Turkey and Persia, are also cited. Persia, it is true, disputed the validity of the Treaty. But on the point of Iraq’s succession to Turkey’s right under the Treaty no question seems to have been raised. A modern precedent is Thailand’s rights of navigation on the River Mekong, granted by earlier treaties and confirmed in a Franco-Siamese Treaty of 1926. In connexion with the arrangements for the independence of Cambodia, Laos and Viet-Nam, it was recognized by these countries and by France that Thailand’s navigational rights would remain in force.

(27) As to water rights, a major modern precedent is the Nile Waters Agreement of 1929 concluded between the United Kingdom and Egypt which \textit{inter alia} provided:

\textit{Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile or its branches, or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration,} which would, in such manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.\footnote{508} The effect of this provision was to accord priority to Egypt’s uses of the Nile waters in the measure that they already existed at the date of the Agreement. Moreover, at that date not only the Sudan but Tanganyika, Kenya and Uganda, all riparian territories in respect of the Nile river basin, were under British administration. On attaining independence the Sudan, while not challenging Egypt’s established rights of use, declined to be bound by the 1929 Agreement in regard to future developments in the use of Nile waters. Tanganyika, on becoming independent, declined to consider itself as in any way bound by the Nile Waters Agreement. It took the view that an agreement that purported to bind Tanganyika for all time to secure the prior consent of the Egyptian Government before it undertook irrigation or power works or other similar measures on Lake Victoria or in its catchment area was incompatible with its status as an independent sovereign State. At the same time Tanganyika indicated its willingness to enter into discussions with the other interested Governments for equitable regulation and division of the use of the Nile waters. In reply to Tanganyika the United Arab Republic, for its part, maintained that pending further agreement, the 1929 Nile Waters Agreement, which had so far regulated the
use of the Nile waters, remained valid and applicable. In this instance, again, there is the complication of the treaty's having been concluded by an administering Power, whose competence to bind a dependent territory in respect of territorial obligations is afterwards disputed on the territory's becoming independent.

(28) Analogous complications obscure another modern precedent, Syria's water rights with regard to the River Jordan. On the establishment of the mandates for Palestine and Syria after the First World War, Great Britain and France entered into a series of agreements dealing with the boundary régime between the mandated territories, including the use of the waters of the River Jordan. An Agreement of 1923 provided for equal rights of navigation and fishing, while a further Agreement of 1926 stated that "all rights derived from local laws or customs concerning the use of the waters, streams, canals and lakes for the purposes of irrigation or supply of water to the inhabitants shall remain as at present." These arrangements were confirmed in a subsequent Agreement. After independence, Israel embarked on a hydroelectric project which Syria considered incompatible with the régime established by the above-mentioned treaties. In debates in the Security Council Syria claimed that it had established rights to waters of the Jordan in virtue of the Franco-British treaties, while Israel denied that it was in any way affected by treaties concluded by the United Kingdom. Israel, indeed, denies that it is either in fact or in law a successor State at all.

(29) Some other examples of bilateral treaties of a territorial character are cited in the writings of jurists, but they do not seem to throw much clearer light on the law governing succession in respect of such treaties. Mention has, however, to be made of another category of bilateral treaties which are sometimes classified as "dispositive" or "real" treaties: namely, treaties which confer specific rights of a private law character on nationals of a particular foreign State; e.g. rights to hold land. These treaties have sometimes in the past been regarded as dispositive in character for the purposes of the rules governing the effect of war on treaties. Without entering into the question of whether such a categorization of these treaties is valid in that context, there does not seem to be sufficient evidence that they are to be regarded as treaties of a dispositive or territorial character under the law governing succession of States in respect of treaties.

(30) There remain, however, those treaties of a territorial character which were discussed by the Commission in 1964 at its sixteenth session under the broad designation of "treaties providing for objective régimes" in the course of its work on the general law of treaties. The examination of these treaties by the Commission and by its Special Rapporteur from the point of view of their effects upon third States may be found in the proceedings of the Commission at its sixteenth session. The characteristic of the treaties in question is that they attach obligations to a particular territory, river, canal, etc., for the benefit either of a group of States (e.g. riparian States of a particular river) or of all States generally. They include treaties for the neutralization or demilitarization of a particular territory, treaties according freedom of navigation on international waterways or rivers, treaties for the equitable use of the water resources of an international river basin and the like. The Commission in its work on the law of treaties did not consider that a treaty of this character had the effect of establishing, by its own force alone, an objective régime binding upon the territorial sovereignty and conferring contractual rights on States not parties to it. While recognizing that an objective régime may arise from such a treaty, it took the view that the objective régime resulted rather from the execution of the treaty and the granting upon the treaty of an international custom. The same view of the matter was taken by the United Nations Conference on the Law of Treaties and the Vienna Convention does not expect treaties intended to create objective régimes from the general rules which it lays down concerning the effects of treaties on third States. In the present context, if a succession of States occurs in respect of the territory affected by the treaty intended to create an objective régime, the successor State is not properly speaking a "third State" in relation to the treaty. Owing to the legal nexus which existed between the treaty and the territory prior to the date of the succession of States, it is not open to the successor State simply to invoke article 35 of the Vienna Convention under which a treaty cannot impose obligations upon a third State without its consent. The rules concerning succession in respect of treaties also come into play. But under these rules there are cases where the treaty intended to establish an objective régime would not be binding on a successor State, unless such a treaty were considered to fall under a special rule to that effect. Equally, if the succession of States occurs in relation to a State which is the beneficiary of a treaty establishing an objective régime, under the general law of treaties and the law of succession the successor State would not necessarily be entitled to claim the rights enjoyed by its predecessor State, unless the treaty were considered to fall under such a special rule. That such a special rule exists is, in the opinion of the Commission, established by a number of convincing precedents.

(31) Reference has already been made to two of the principal precedents in discussing the evidence on treaties of a territorial character to be found in the proceedings of international tribunals. These are the Free Zones case and the Åland Islands question, in both of which the tribunal considered the successor State to be

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211 See ibid., p. 288.
212 e.g. certain Finnish frontier arrangements, the demilitarization of Hümminingen, the Congo leases, etc.
213 e.g. the draft convention on the law of treaties in Harvard Law School, Research in International Law: III. Law of Treaties, Supplement to American Journal of International Law (Washington, D.C.), vol. 29, No. 4, October 1935.
215 See paras. 3-5 above.
bound by a treaty régime of a territorial character established as part of a “European settlement”. An earlier case involving the same element of a treaty made in the general interest concerned Belgium’s position, after its separation from the Netherlands, in regard to the obligations of the latter provided for by the Peace Settlements concluded at the Congress of Vienna with respect to fortresses on the Franco-Netherlands boundary. The four Powers (Great Britain, Austria, Prussia, and Russia) apparently took the position that they could not admit that any change with respect to the interests by which these arrangements were regulated had resulted from the separation of Belgium and Holland; and the King of the Belgians was considered by them as standing with respect to these fortresses and in relation to the four Powers, in the same situation, and bound by the same obligations, as the King of the Netherlands before the Revolution. Although Belgium questioned whether it would be considered bound by a treaty to which it was a stranger, it seems in a later treaty to have acknowledged that it was in the same position as the Netherlands with respect to certain of the frontier fortresses. Another such case is article XCII of the Act of the Congress of Vienna, which provided for the neutralization of Chablais and Faucigny, then under the sovereignty of Sardinia. These provisions were connected with the neutralization of Switzerland effected by the Congress and Switzerland had accepted them by a Declaration made in 1815. In 1860, when Sardinia ceded Nice and Savoy to France, both France and Sardinia recognized that the latter could only transfer to France what it itself possessed and that France would take the territory subject to the obligation to respect the neutralization provisions. France, on its side, emphasized that these provisions had formed part of a settlement made in the general interests of Europe. The provisions were maintained in force until abrogated by agreement between Switzerland and France after the First World War with the concurrence of the Allied and Associated Powers recorded in article 435 of the Treaty of Versailles. France, it should be mentioned, had itself been a party to the settlements concluded at the Congress of Vienna, so that it could be argued that it was not in a position of a purely successor State. Even so, its obligation to respect the neutralization provisions seems to have been discussed simply on the basis that, as a successor to Sardinia, it could only receive the territory burdened with those provisions.

(32) The concept of international settlements is also invoked in connexion with the régimes of international rivers and canals. Thus, the Berlin Act of 1885 established régimes of free navigation on both the Rivers Congo and Niger; and in the former case the régime was regarded as binding upon Belgium after the Congo had passed to it by cession. In the Treaty of Saint-Germain-en-Laye (1919) some only of the signatories of the 1885 Act abrogated it as between themselves, substituting for it a preferential régime; and this came into question before the Permanent Court of International Justice in the Oscar Chinn case. Belgium’s succession to the obligations of the 1885 Act appears to have been taken for granted by the Court in that case. The various riparian territories of the two rivers had meanwhile become independent States, giving rise to the problem of their position in relation to the Berlin Act and the Treaty of Saint-Germain. In regard to the Congo the problem has manifested itself in GATT and also in connexion with association agreements with EEC. Although the States concerned may have varied in the policies which they have adopted concerning the continuance of the previous régime, they seem to have taken the general position that their emergence to independence has caused the Treaty of Saint-Germain and the Berlin Act to lapse. In regard to the Niger, the newly independent riparian States in 1963 replaced the Berlin Act and the Treaty of Saint-Germain with a new Convention. The parties to this Convention “abrogated” the previous instruments as between themselves, and in the negotiations preceding its conclusion there seems to have been some difference of opinion as to whether abrogation was necessary. But it was on the basis of a fundamental change of circumstances rather than of non-succession that these doubts were expressed.

(33) The Final Act of the Congress of Vienna set up a Commission for the Rhine, the régime of which was further developed in 1868 by the Convention of Mannheim; and although after the First World War the Treaty of Versailles reorganized the Commission, it maintained the régime of the Convention of Mannheim in force. As to cases of succession, it appears that in connexion with membership of the Commission, when changes of sovereignty occurred, the rules of succession were applied, though not perhaps on any specific theory of succession to international régimes or to territorial treaties.

(34) The question of succession of States has also been raised in connexion with the Suez Canal Convention of 1888. The Convention created a right of free passage through the Canal and, whether by virtue of the treaty or of the customary régime which developed from it, this right was recognized as attaching to non-signatories as well as signatories. Accordingly, although many new States have hived off from the parties to the Convention, their right to be considered successor States was not of importance in regard to the use of the Canal. In 1956, however, it did come briefly into prominence in connexion with the Second Conference on the Suez Canal convened in London. Complaint was there made that a number of States, which were not present, ought to have been invited to the Conference; and, inter alia, it was said that some of those States had the right to be present in the capacity of successor States of one or other party to the Convention. The matter was not pushed to any conclusion, and the incident can at most be said to provide an indication in favour of succession in the case of an international settlement of this kind.

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218 United Nations, Materials on Succession of States (op. cit.), pp. 157-158.
some further precedents of one kind or another might be examined, but it is doubtful whether they would throw any clearer light on the difficult question of territorial treaties. Running through the precedents and the opinions of writers are strong indications of a belief that certain treaties attach a régime to territory which continues to bind it in the hands of any successor State. Not infrequently other elements enter into the picture, such as an allegation of fundamental change of circumstances or the allegedly limited competence of the predecessor State, and the successor State in fact claims to be free of the obligation to respect the régime. Nevertheless, the indications of the general acceptance of such a principle remain. At the same time, neither the precedents nor the opinions of writers give clear guidance as to the criteria for determining when this principle operates. The evidence does not, however, suggest that this category of treaties should embrace a very wide range of so-called territorial treaties. On the contrary, this category seems to be limited to cases where a State by a treaty grants a right to use territory, or to restrict its own use of territory, which is intended to attach to territory of a foreign State or, alternatively, to be for the benefit of a group of States or of all States generally. There must in short be something in the nature of a territorial régime.

In any event, the question arises here, as in the case of boundaries and boundary régimes, whether in these cases there is succession in respect of the treaty as such or rather whether the régime established by the dispositive effects of the treaty is affected by the occurrence of a succession of States. The evidence might perhaps suggest either approach. But the Commission, in 1972, considered that in formulating the rule for the effect of a succession of States upon objective régimes established by treaty, it ought to adopt the same standpoint as in the case of boundary régimes and other régimes of a territorial character established by a treaty. In other words, the rule should relate to the legal situation—the régime—resulting from the dispositive effects of the treaty rather than to succession in respect of the treaty. Moreover, in the case of objective régimes it considered that this course was also strongly indicated by the decisions of the Commission and of the United Nations Conference on the Law of Treaties with regard to treaties providing for such régimes in codifying the general law of treaties.

Accordingly, article 30 of the 1972 draft, like article 29 of the same draft, stated the law regarding other forms of territorial régime simply in terms of the way in which a succession of States affects—or rather does not affect—the régime in question. The difficulty was to find language which adequately defined and limited the conditions under which the article applied. The article was divided into two paragraphs dealing respectively with territorial régimes established for the benefit of particular territory of another State (paragraph 1) and territorial régimes established for the benefit of a group of States or all States (paragraph 2).

Paragraph 1 (a) of article 30 of the 1972 draft provided that a succession of States "shall not . . . affect obligations relating to the use of a particular territory* or to restrictions upon its use, established by a treaty specifically* for the benefit of a particular territory* of a foreign State and considered as attaching to the territories in question.** Correspondingly, paragraph 1 (b) provided that a succession of States "shall not . . . affect rights established by a treaty specifically* for the benefit of a particular territory* and relating to the use, or to restrictions upon the use of a particular territory* of a foreign State and considered as attaching to the territories in question.** The Commission considered that in the case of these territorial régimes there must be attachment both of the obligation and the right to a particular territory rather than to the burdened State as such or to the beneficiary State as such. In adding the words "and considered as attaching to the territories in question", the Commission intended not only to underline this point but also to indicate the relevance of the dispositive element, the establishment of the régime through the execution of the treaty.

Paragraph 2 contained similar provisions for objective régimes, with the exception that here the requirement of attachment to particular territory applied only to the territory in respect of which the obligation was established; there was no requirement of attachment of rights established by the treaty to any particular territory or territories because the special character of the régime with respect to the right established by the treaty lies in its creation in the interest of a group of States or of all States and not with regard to a particular territory or territories.

"Territory" for the purposes of the 1972 article 30 was intended to denote any part of the land, water or air space of a State. But the Commission considered this to be the natural meaning of the word in a context like the present one and that it was unnecessary to specify it in the article.

Re-consideration at the twenty-sixth session

Paragraphs 1 to 40 above reproduce with a few amendments the commentary to articles 29 and 30 of the 1972 draft in the report of the Commission on the work of its twenty-fourth session. A few amendments have been made to take account of comments made by Governments and certain observations made during the consideration of the articles at the present session. This method of presentation has been used so as to show clearly the basis on which the draft articles were originally adopted and the reasons for the decisions taken by the Commission at its present session.

Articles 29 and 30 of the 1972 draft have provoked more comments by delegations and Governments than any other provision in the draft articles with the possible exception of the clean slate principle as expressed in articles 15, 16 and 17. A substantial majority of those who have commented have supported the inclusion of articles 29 and 30 of the 1972 draft and, broadly speaking, have supported the way in which they have been drafted. Nevertheless, certain comments have expressed strong opposition to their inclusion, at least in anything like the form in which they appeared in the 1972 draft.
(43) During the second reading of the draft articles at its present session, the Commission again examined articles 29 and 30 of the 1972 draft carefully and thoroughly in the light of the comments made by delegations and Governments. On the whole, the discussion confirmed the basis for the articles explained in the 1972 commentary and the need for their inclusion, having regard to other provisions in the draft such as those in articles 14 and 15. Most members of the Commission were in favour of their retention in the form in which they appeared in the 1972 draft. Nevertheless, certain members expressed doubts and one member urged the omission of the articles because, in his view they were not well founded and they might have the effect of prejudging a boundary dispute where one of the parties challenged the treaty by which the boundary had been established. Other members, however, felt just as strongly that the articles should be retained.

(44) Among the main arguments against the articles which appeared from the comments of Governments were, first, that the articles were contrary to the principle of self-determination and, secondly, that they would be prejudicial to the position, particularly of newly independent States, which challenged a boundary on the ground that it was established by a treaty that was itself invalid. Most members, however, were of the opinion that the draft articles were in accordance with the principle of self-determination, as well as with the principle of the sovereign equality of States, and that nothing in the articles would prevent the exercise of self-determination in any case in which this might otherwise be appropriate. They were also of the opinion that the articles, as drafted, were limited to the question of the effects of a succession of States as such on the boundary, or the boundary or other territorial regimes established by treaty and did not affect, in any way, the validity of the treaty itself, or indeed any other grounds that there might be for contesting the boundary or the régime. In spite of the expression of these views, the fears of some members as to the prejudicial effects of the articles were not allayed. They did not think that the negative form of the articles or the explanations given in the commentary were sufficient to remove these fears. Accordingly, the Commission considered the possibility of the inclusion of a provision in the draft articles which would make the position clear. It was suggested that this might be done by adding a suitable clause to article 11 or to article 12 but, after considerable discussion, the Commission concluded that it would be more satisfactory to have a separate article.

(45) The Commission considered whether it should include a provision stating that “nothing in article 11 or in article 12 shall be considered as prejudging in any respect a question relating to the validity of a treaty”. However, some members objected to this wording which, in their view, would imply that any article other than article 11 or 12 could prejudice questions relating to the validity of treaties. The Commission accordingly decided to add such an article but that it should not refer to any specific articles in the draft. In these circumstances, the Commission decided to include an article in general terms which now appears as article 13. However, since the new article would be general in character, and articles 11 and 12 are themselves made necessary by articles in different parts of the draft, the Commission decided to put all three articles in part I of the draft, entitled “General Provisions”.

(46) On the basis of this arrangement, articles 11 and 12 were adopted with little change. The only change in article 11 was the replacement of the word “shall” by “does” in the introductory words of the English text. It was thought that the word “does” was more in accord with the statement of an established principle than the mandatory form implicit in the word “shall”. The Commission, however, also considered whether the drafting of sub-paragraph (b) could be improved. In particular, it considered whether the words “and relating to the régime of a boundary” should be replaced by “and forming an integral part of the régime of a boundary”. Ultimately the Commission decided against the use of the words “and forming an integral part of” because it would be very difficult in practice to determine what does or does not form an integral part of the régime of a boundary.

(47) As in the case of article 11, and for the same reasons, the Commission replaced the word “shall” by “does” in the introductory words to paragraph 1 and paragraph 2 of article 12. The Commission also deleted the word “specifically” from each of the sub-paragraphs of paragraphs 1 and 2 because it did not seem to clarify, or to add anything to, the meaning of the text. In paragraph 1 (a) the Commission amended the words “relating to the use of a particular territory” to read “relating to the use of any territory” and “for the benefit of a particular territory of a foreign State” to read “for the benefit of any territory of a foreign State”. The Commission considered that the use of the expression “of a particular territory” might unduly restrict the effect of the article and possibly exclude, for example, transit rights which could not be regarded as adhering for the benefit of a “particular” territory. Similar changes were made in paragraph 1 (b) and in paragraph 2.

(48) Having regard to the comments of one Government, the Commission considered in particular whether article 12 could be drafted so as to provide directly for obligations or rights established for the benefit of the inhabitants of a territory. On the whole, the Commission thought that this was neither feasible nor necessary. Although rights pertaining to territory must in the last resort benefit the inhabitants, the Commission did not consider it advisable to include any express provision relating to the inhabitants because that might have been interpreted as the adoption by the Commission of a view concerning the position of individuals in international law.

(49) In the light of the comments of one Government, the Commission also considered again whether it should...
include a definition of the term “territory” for the purposes of article 12, but it confirmed the decision made in 1972 mentioned above.\textsuperscript{221}

**Article 13.** \textsuperscript{222} **Questions relating to the validity of a treaty**

Nothing in the present articles shall be considered as prejudicing in any respect any question relating to the validity of a treaty.

**Commentary**

(1) The Commission decided to include article 13 in the draft for the reasons mentioned above.\textsuperscript{223} It is intended to avoid any implication that the effects of a succession of States, for which the present articles provide, could in any way prejudice any question relating to the validity of a treaty. Although the article was introduced with specific reference to articles 11 and 12, it was cast in general form, as explained in the commentary to those articles. Accordingly, it has been included in Part I, “General Provisions”, together with articles 11 and 12.

(2) Article 13 provides that nothing in the present articles shall be considered as prejudicing in any respect any question relating to the validity of a treaty.

**PART II**

**SUCCESSION IN RESPECT OF PART OF TERRITORY**

**Article 14.** \textsuperscript{224} **Succession in respect of part of territory**

When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State;

(a) treaties of the predecessor State cease to be in force in respect of the territory to which the succession of States relates from the date of the succession of States; and

(b) treaties of the successor State are in force in respect of the territory to which the succession of States relates from the date of the succession of States, unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

**Commentary**

(1) This article concerns the application of a rule, which is often referred to by writers at the “moving treaty-frontiers” rule, in cases where territory not itself a State undergoes a change of sovereignty and the successor State is an already existing State. The article thus concerns cases which do not involve a union of States or merger of one State with another, and equally do not involve the emergence of a newly independent State. The moving treaty-frontiers principle also operates in varying degrees in certain other contexts. But in these other contexts it functions in conjunction with other rules, while in the cases covered by the present article—the mere addition of a piece of territory to an existing State—the moving treaty-frontiers rule appears in pure form. Although in a sense the rule underlies much of the law regarding succession of States in respect of treaties, the present case constitutes a particular category of succession of States, which the Commission considered should be in a separate part. Having regard to its relevance in other contexts, the Commission decided to place it in part II of the draft, immediately after the general provisions in part I.

(2) Shortly stated, the moving treaty-frontiers rule means that, on a territory’s undergoing a change of sovereignty, it passes automatically out of the treaty regime of the predecessor sovereign into the treaty regime of the successor sovereign. It thus has two aspects, one positive and the other negative. The positive aspect is that the treaties of the successor State begin automatically to apply in respect of the territory in question as from the date of the succession. The negative aspect is that the treaties of the predecessor State, in turn, cease automatically to apply in respect of such territory as from that date.

(3) The rule, since it envisages a simple substitution of one régime for another, may appear \textit{prima facie} not to involve any succession of States in respect of treaties. Nevertheless the cases covered by the rule do involve a “succession of States” in the sense that this concept is used in the present draft articles, namely a replacement of one State by another in the responsibility for the international relations of territory. Moreover, the rule is well established in State practice and is commonly included by writers among the cases of succession of States. As to the rationale of the rule, it is sufficient to refer to the principle embodied in article 29 of the Vienna Convention under which, unless a different intention is established, a treaty is binding upon each party in respect of its entire territory. This means generally that at any given time a State is bound by a treaty in respect of any territory of which it is sovereign, but is equally not bound in respect of territory which it no longer holds.

(4) On the formation of Yugoslavia after the First World War, the former treaties of Serbia were regarded as having become applicable to the whole territory of Yugoslavia. If some have questioned whether it was correct to treat Yugoslavia as an enlarged Serbia rather than as a new State, in State practice the situation was treated as one where the treaties of Serbia should be regarded as applicable \textit{ipso facto} in respect of the whole of Yugoslavia. This seems to have been the implication of article 12 of the Treaty of Saint-Germain-en-Layef so far as concerns all treaties concluded between Serbia and

\textsuperscript{221} See para. 40 above.

\textsuperscript{222} New article.

\textsuperscript{223} See paras. 43-45 of the commentary to articles 11 and 12.

\textsuperscript{224} 1972 draft, article 10.
the several Principal Allied and Associated Powers. The United States of America afterwards took the position that Serbian treaties with the United States both continued to be applicable and extended to the whole of Yugoslavia, while a number of neutral Powers, including Denmark, the Netherlands, Spain, Sweden and Switzerland, also appear to have recognized the continued application of Serbian treaties and their extension to Yugoslavia. The United States position was made particularly clear in a memorandum filed by the State Department as amicus curiae in the case of Ivanovic v. Artukovic.

(5) Among more recent examples of the application of this rule may be mentioned the extension of Canadian treaties to Newfoundland upon the latter's becoming part of Canada, the extension of Ethiopian treaties to Eritrea in 1952, when Eritrea became an autonomous unit federated with Ethiopia, the extension of Indian treaties to the former French and Portuguese possessions on their absorption into India, and the extension of Indonesian treaties to West Iran after the transfer of that territory from the Netherlands to Indonesia.

(6) Article 14 sets out the two aspects of the moving treaty-frontiers rule mentioned above. This article, like the draft articles as a whole, has to be read in conjunction with article 6 which limits the present articles to lawful situations and with the saving clause of articles 38 and 39 concerning cases of military occupation, etc. Article 14 is limited to normal changes in the sovereignty or in the responsibility for the international relations of a territory. Article 39 makes it plain that the present article does not cover the case of a military occupant. As to article 6, although the limitation to lawful situations applies throughout the draft articles, some members of the Commission considered it to be of particular importance in the present connexion.

(7) The scope of the article is defined in its opening phrase which in the 1972 text read as follows: “When territory under the sovereignty or administration of a State becomes part of another State.” It was however observed by Governments and members of the Commission that, in the first place, such a wording did not make it sufficiently clear that the article did not apply to the case of the incorporation of the entire territory of a State into the territory of an existing State and, in the second place, that the words “territory . . . under the administration of a State” should be replaced by an expression based on the definition of “succession of States” given in article 2, paragraph 1 (b), for the purposes both of clarity and consistency. The Commission, at its present session, found that there was substance in those observations and decided to reword the opening phrase of the article to read: “When part of the territory of a State, or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible, becomes part of the territory of another State.” The article would thus not include cases of total incorporation, which would be covered as instances of the “uniting of States”. The words “or when any territory, not being part of the territory of a State, for the international relations of which that State is responsible” have been used in order to cover cases in which the territory in question was not under the sovereignty of the predecessor State, but only under an administering Power responsible for its international relations. Having reached these conclusions, the Commission decided likewise to modify the title of Part II and of the article by replacing the heading “Transfer of territory” by the heading “Succession in respect of part of territory.”

(8) The Commission was aware that the words “becomes part of the territory of another State” might exclude the application of the article as such to a case in which a dependent territory was transferred from one administering Power to another. It recognized that such cases might occur, but observed that they were likely to be very rare. During the course of the second reading, other instances of unusual cases were mentioned which might require the application of special rules. In general, the Commission considered that it would be wiser not to complicate the present draft articles by adding detailed provisions to cover such cases. In the instance of a change in the responsibility for the international relations of a territory from one administering Power to another, the Commission considered that the moving treaty-frontiers rule would not necessarily apply. In such a case, regard should be had to the circumstances in which the change occurred and so far as necessary the rules set out in the present articles should be applied by analogy.

(9) Sub-paragraph (a) of article 14 states the negative aspect, namely that the treaties of the predecessor State cease to be in force from the date of the succession of States in respect of territory which has become part of

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231 Ibid., p. 94, paras. 132-133.
232 In this connexion it may be recalled that the principle of equal rights and self-determination of peoples embodied in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, approved by resolution 2625 (XXV) of the General Assembly, states: “The establishment of a sovereign and independent State, the free association or integration with an independent State * or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.”
another State. From the standpoint of the law of treaties, this aspect of the rule can be explained by reference to certain principles, such as those governing the territorial scope of treaties, supervening impossibility of performance or fundamental change of circumstances (articles 29, 61 and 62 of the Vienna Convention). Accordingly, the rights and obligations under a treaty cease in respect of territory which is no longer within the sovereignty or under the responsibility, for its international relations, of the State party concerned. The only drafting changes made by the Commission in sub-paragraph (a) at the second reading were the substitution of the words “the territory to which the succession of States relates” for the words “that territory”, a consequential change also made in sub-paragraph (b), and the replacement of the words “the succession” by the expression “the succession of States” since it is the latter expression—and not the term “succession”—which is defined in article 2.

(10) Sub-paragraph (a) does not, of course, touch the treaties of the predecessor State otherwise than in respect of their application to the territory which passes out of its sovereignty or responsibility for international relations. Apart from the contraction in their territorial scope, its treaties are not normally affected by the loss of the territory. Only if the piece of territory concerned had been the object, or very largely the object, of a particular treaty might the continuance of the treaty in respect of the predecessor’s own remaining territory be brought into question on the ground of impossibility of performance or fundamental change of circumstances. In such cases, the question should be settled in accordance with the general rules of treaty law codified by the Vienna Convention and did not seem to require any specific rule in the context of the present draft articles. In this connexion, however, certain members recalled that under sub-paragraph (b) of paragraph 2 of article 62 (fundamental change of circumstances) of the Vienna Convention, a fundamental change of circumstances might not be invoked as a ground for terminating or withdrawing from a treaty “if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty”.

(11) In the case of some treaties, more especially general multilateral treaties, the treaty itself may still be applicable to the territory after the succession, for the simple reason that the successor State also is a party to the treaty. In such a case there is not, of course, any succession or of continuance of the treaty rights or obligations of the predecessor State. On the contrary, even in these cases the treaty régime of the territory is changed and the territory becomes subject to the treaty exclusively in virtue of the successor State’s independent participation in the treaty. For example, any reservation made to the treaty by the predecessor State would cease to be relevant while any reservation made by the successor State would become relevant in regard to the territory.

(12) Sub-paragraph (b) of article 14 provides for the positive aspect of the moving treaty-frontiers rule in its application to cases where territory is added to an already existing State, by stating that treaties of the successor State are in force in respect of that territory from the date of the succession of States. Under this sub-paragraph the treaties of the successor State are considered as applicable of their own force in respect of the newly acquired territory. Even if in some cases the application of the treaty régime of the successor State to the newly acquired territory may be said to result from an agreement, tacit or otherwise, between it and the other States parties to the treaties concerned, in most cases the moving of the treaty frontier is an automatic process. The change in the treaty régime applied to the territory is rather the natural consequence of its having become part of the territory of the State now responsible for its international relations.

(13) Exception should be made, however, of certain treaties, for example those having a restricted territorial scope which does not embrace the territory newly acquired by the successor State. Moreover, the Commission considered, at its present session, that the exception should also cover cases in which the application of a treaty of the successor State to the newly acquired territory is radically to change the conditions for the operation of the treaty, as was provided for in other articles of the 1972 draft such as, for instance, in articles 25, 26, 27 and 28. This explains the addition to sub-paragraph (b) of the proviso “unless it appears from the treaty or is otherwise established that the application of the treaty to that territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty”. The word “particular” which in the 1972 treaty appeared before the word “treaty” was considered unnecessary and therefore deleted at the second reading.

(14) As stated in the 1972 draft, by such a formula the Commission intends to lay down an international objective legal test of compatibility which, if applied in good faith, should provide a reasonable, flexible and practical rule. The “incompatibility with the object and purpose of the treaty” and the “radical change in the conditions for the operation of the treaty”, used in other contexts by the Vienna Convention on the Law of Treaties, in the Commission’s view, are the appropriate criteria in the present case to take account of the interests of all the States concerned and to cover all possible situations and all kinds of treaties. Although the words “or would radically change the conditions for the operation of the treaty” are an adaptation of the words in paragraph 1 (b) of article 62 (Fundamental change of circumstances) of the Vienna Convention, the Commission did not consider that in cases of the succession of States it would be appropriate to incorporate all the conditions for which that article provides. On the other hand, it thought that in most, if not all, cases of succession of States the territorial changes might result in “incompatibility with the object and purpose of the treaty” or “radical change in the conditions for the operation of the treaty”. Accordingly, the formula used in article 14 as now drafted has been repeated in a number of other articles where it seemed to be appropriate. The commentaries on those articles do not, however, repeat the explanation of the formula given here.

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(15) Lastly, article 14 should be read in conjunction with the specific rules relating to boundary régimes or other territorial régimes established by a treaty set forth in articles 11 and 12.

PART III
NEWLY INDEPENDENT STATES

SECTION 1. GENERAL RULE

Article 15. Position in respect of the Treaties of the predecessor State

A newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates.

Commentary

(1) This article formulates the general rule concerning the position of a newly independent State in respect of treaties previously applied to its territory by the predecessor State.

(2) The question of a newly independent State’s inheritance of the treaties of its predecessor has two aspects: (a) whether that State is under an obligation to continue to apply those treaties to its territory after the succession of States, and (b) whether it is entitled to consider itself as a party to the treaties in its own name after the succession of States. These two aspects of succession in the matter of treaties cannot in the view of the Commission be treated as if they were the same problem. If a newly independent State were to be considered as automatically bound by the treaty obligations of its predecessor, reciprocity would, it is true, require that it should also be entitled to invoke the rights contained in the treaties. And, similarly, if a newly independent State were to possess and to assert a right to be considered as a party to its predecessor’s treaties, reciprocity would require that it should at the same time be subject to the obligations contained in them. But reciprocity does not demand that, if a State should be entitled to consider itself a party to a treaty it must equally be bound to do so. Thus, a State which signs a treaty subject to ratification has a right to become a party but is under no obligation to do so. In short, the question whether a newly independent State is under an obligation to consider itself a party to its predecessor’s treaties is legally quite distinct from the question whether it may have a right to consider or to make itself a party to those treaties.

Clearly, if a newly independent State is under a legal obligation to assume its predecessor’s treaties, the question whether it has a right to claim the status of a party to them becomes irrelevant. The first point, therefore, is to determine whether such a legal obligation does exist in general international law, and it is this point to which the present article is directed.

(3) The majority of writers take the view, supported by State practice, that a newly independent State begins its life with a clean slate, except in regard to “local” or “real” obligations. The clean slate is generally recognized to be the “traditional” view on the matter. It has been applied to earlier cases of newly independent States emerging either from former colonies (i.e. the United States of America; the Spanish American Republics) or from a process of secession or dismemberment (i.e. Belgium, Panama, Ireland, Poland, Czechoslovakia, Finland). Particularly clear on the point is a statement made by the United Kingdom defining its attitude towards Finland’s position in regard to Russian treaties applicable with respect to Finland prior to its independence:

... I am advised that in the case of a new State being formed out of part of an old State there is no succession by the new State to the treaties of the old one, though the obligations of the old State in relation to such matters as the navigation of rivers, which are in the nature of servitudes, would normally pass to the new State. Consequently there are no treaties in existence between Finland and this country. 238

(4) It is also this view of the law which is expressed in the legal opinion given by the United Nations Secretariat in 1947 concerning Pakistan’s position in relation to the Charter of the United Nations. Assuming that the situation was one in which part of an existing State had broken off and become a new State, 239 the Secretariat advised:

The territory which breaks off, Pakistan, will be a new State; it will not have the treaty rights and obligations of the old State, and will not, of course, have membership in the United Nations.

In international law, the situation is analogous to the separation of the Irish Free State from Great Britain, and of Belgium from the Netherlands. In these cases, the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before. 237

Today the practice of States and organizations concerning the participation of newly independent States in multilateral treaties, as it has developed, may call for some qualification of that statement and for a sharper distinction to be drawn between participation in multilateral treaties in general and participation in constituent instruments of international organizations. Even so, the Secretariat’s opinion, given in 1947, that Pakistan, as a new State, would not have any of the treaty rights of its predecessor was certainly inspired by the clean slate doctrine and confirms that this was the “traditional” and generally accepted view at that date.

(5) Examples of the clean slate doctrine in connexion with bilateral treaties are to be found in the Secretariat studies on “succession of States in respect of bilateral treaties” 238 and in the publication Materials on Succession of States. 239 For instance, Afghanistan invoked


This assumption was disputed by Pakistan.


See above, sect. A, para. 44.

United Nations, Materials on Succession of States (op. cit.).
the clean slate doctrine in connexion with its dispute
with Pakistan regarding the frontier resulting from the
Anglo-Afghan Treaty of 1921.\footnote{\textit{ibid.}, p. 2.} Similarly, Argentina
seems to have started from the basis of the clean slate
principle in appreciating Pakistan's position in relation
to the Anglo-Argentine Extradition Treaty of 1889,\footnote{\textit{ibid.}, pp. 6-7.} although it afterwards agreed to regard the Treaty as in
force between itself and Pakistan. Another, if special,
manifestation of the clean slate doctrine would appear to
be the position taken by Israel in regard to treaties
formerly applicable with respect to Palestine.\footnote{\textit{Ibid.}, pp. 41-42; see also \textit{Yearbook ... 1950}, vol. II, pp. 206-
218, document A/CN.4/19.}

(6) The metaphor of the clean slate is a convenient way
of expressing the basic concept that a newly independent
State begins its international life free from any obligation
to continue in force treaties previously applicable with
respect to its territory simply by reason of that fact. But
even when that basic concept is accepted, the metaphor
appears in the light of existing State practice to be at
once too broad and too categoric.\footnote{\textit{Ibid.}, p. 7.} It is too broad in
that it suggests that, so far as concerns the newly inde-
pendent States, the prior treaties are wholly expunged
and are without any relevance to its territory. The very
fact that prior treaties are often continued or renewed
indicates that the clean slate metaphor does not express
the whole truth. The metaphor is too categoric in that it
does not make clear whether it means only that a newly
independent State is not bound to recognize any of its
predecessor's treaties as applicable in its relations with
other States, or whether it means also that a newly inde-
pendent State is not entitled to claim any right to be or
become a party to any of its predecessor's treaties. As
already pointed out, a newly independent State may have
a clean slate in regard to any obligation to continue to be
bound by its predecessor's treaties without it necessarily
following that the new independent State is without
any right to establish itself as a party to them.

(7) Writers, when they refer to the so-called principle of
clean slate, seem primarily to have in mind the absence
of any general obligation upon a newly independent
State to consider itself bound by its predecessor's
treaties. At any rate, as already indicated, the evidence
of State practice supports the traditional view that a newly
independent State is not under any general obligation to
take over the treaties of its predecessor previously applied
in respect of its territory. It appears to the Commission,
despite some learned opinion to the contrary, that on
this point no difference is to be found in the practice
between bilateral and multilateral treaties, including
multipartite instruments of a legislative character.

(8) The Commission, as stated in article 16 of the
present draft, is of the opinion that a difference does exist
and should be made between bilateral treaties and
certain multilateral treaties in regard to a newly inde-
pendent State's right to be a party to a treaty con-
cluded by its predecessor. But it seems to it very difficult
to sustain the proposition that a newly independent State

\footnote{\textit{Ibid.}, p. 8.} is to be considered as automatically subject to the
obligations of multilateral treaties of a law-making
character concluded by its predecessor applicable in
respect of the territory in question. On the point of
principle, the assimilation of law-making treaties to
custom is not easy to admit even in those cases where the
treaty embodies customary law. Clearly, the law con-
tained in the treaty, in so far as it reflects customary
rules, will affect the newly independent State by its
character as generally accepted customary law. But it is
quite another thing to say that, because a multilateral
treaty embodies custom, a newly independent State must
be considered as \textit{contractually} bound by the treaty as
\textit{a treaty}. Why, the newly independent State may
legitimately ask, should it be bound \textit{contractually} by the
treaty any more than any other existing State which has
not chosen to become a party thereto? A general
multilateral treaty, although of a law-making character,
may contain purely contractual provisions as, for
example, a provision for the compulsory adjudication of
disputes. In short, to be bound by the treaty is by no
means the same thing as to be bound by the general law
which it contains. \textit{A fortiori} may the newly independent
State ask that question when the actual content of the
treaty is of a law-creating rather than of a law-con-
solidating character.

(9) State and depositary practice confirms that the
clean slate principle applies also to general multilateral
treaties and multilateral treaties of a law-making
character. No distinction is made today on this point
—even when a newly independent State has entered into
a "devolution agreement" or made a "unilateral declara-
tion"—by the Secretary-General as depositary of several
general multilateral treaties. The Secretary-General
does not regard himself as able automatically to list
the newly independent State among the parties to
general multilateral treaties of which he is the depositary
and which were applicable in respect of the newly inde-
pendent State's territory prior to its independence. It
is only when he receives some indication of the newly
independent State's will to be considered as a party to
a particular treaty that he enters it in the records as a party
to that treaty. \textit{A fortiori} is this the case when the newly
independent State has not entered into a devolution
agreement or made a unilateral declaration of a general
character.\footnote{\textit{Ibid.}, p. 10.}

(10) The practice of other depositaries appears also to
be based upon the hypothesis that a newly independent
State to whose territory a general multilateral treaty
was applicable before independence is not bound \textit{ipso jure}
by the treaty as a successor State and that some manifesta-
tion of its will with reference to the treaty is first necessary.
Despite the humanitarian objects of the Geneva Red
Cross Conventions and the character of the law
which they contain as general international law, the
Swiss Federal Council has not treated a newly inde-
pendent State as automatically a party in virtue of its
predecessor's ratification on accession. It has waited for
a specific manifestation of the State's will with respect to
each Convention in the form either of a declaration of

\footnote{\textit{See \textit{Yearbook ... 1962}}, vol. II, p. 122, document A/CN.4/150,
para. 134.}
continuity or of an instrument of accession. As to the practice of individual States, quite a number have notified their acceptance of the Geneva Conventions in terms of a declaration of continuity, and some have used language indicating recognition of an obligation to accept the Conventions as successors to their predecessor's ratification. On the other hand, almost as large a number of new States have not acknowledged any obligation derived from their predecessors, and have become parties by depositing instruments of accession. In general, therefore, the evidence of the practice relating to the Geneva Conventions does not seem to indicate the existence of any customary rule of international law enjoining the automatic acceptance by a new State of the obligations of its predecessor under humanitarian Conventions.

(11) The practice of the Swiss Federal Council in regard to the Berne Convention of 1886 for the Protection of Literary and Artistic Works and the subsequent Acts revising it is the same. The Swiss Government, as depositary, has not treated a newly independent State as bound to continue as a party to the Convention formerly applicable to its territory. It does not appear ever to have treated a newly independent State as bound by the Convention without some expression of its will to continue as, or to become, a party. In one case, the Swiss Government does seem to have treated the conclusion of a general devolution agreement as sufficient manifestation of a newly independent State’s will. But that seems to be the only instance in which it has acted on the basis of a devolution alone and, in general, it seems to assume the need for some manifestation of the newly independent State’s will specifically with reference to the Berne Conventions. This assumption also seems to be made by the Swiss Government in the discharge of its functions as depositary of the Paris Convention of 1883 for the Protection of Industrial Property and of the agreements ancillary thereto.

(12) A somewhat similar pattern has been followed in regard to the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, of which the Netherlands Government is the depositary. In 1955 the Netherlands Government suggested to the Administrative Council of the Permanent Court of Arbitration that certain new States, which had formerly been part of one of the High Contracting Parties, could be considered as parties to the Conventions. The Administrative Council then sought the approval of the existing Parties for the recognition of the new States as parties. No objection having been voiced to this recognition, the Administrative Council decided to recognize as Parties those of the new States which had expressed a desire to that effect. In the event twelve new States have expressed the desire to be considered as parties in virtue of their predecessors’ participation, while three have preferred to become parties by accession. One new State expressly declared that it did not consider itself bound by either the 1899 or 1907 Convention and numerous others have not yet signified their intentions in regard to the Conventions. In the case of the Hague Conventions it is true that to become a party means also to participate in the Permanent Court of Arbitration. But again, the practice seems inconsistent with the existence of a customary rule requiring a new State to accept the obligations of its predecessor. Here the notion of succession seems to have manifested itself in the recognition of a new State’s right to become a party without at the same time seeking to impose upon it an obligation to do so.

(13) The practice of the United States of America as depositary of multilateral treaties appears equally to have been based on the assumption that a newly independent State has a right but not an obligation to participate in a multilateral treaty concluded by its predecessor.

(14) The evidence of State practice therefore is in conflict with the thesis that a newly independent State is under an obligation to consider itself bound by a general law-making treaty applicable in respect of its territory prior to independence. If, therefore, general multilateral treaties of a law-making character must be left aside as not binding on the newly independent State ipso jure, are there any other categories of treaties in regard to which international law places an obligation on a newly independent State to consider itself as bound by its predecessor’s treaties?

(15) Considerable support can be found among writers and in State practice for the view that general international law does impose an obligation of continuity on a newly independent State in respect of some categories of its predecessor’s treaties. This view is indeed reflected in the devolution agreements inspired by the United Kingdom; for its very purpose in concluding these agreements was to secure itself against being held responsible in respect of treaty obligations which might be considered to continue to attach to the territory after independence under general international law. It also finds reflection, and more explicitly, in certain of the unilateral declarations made by successor States. Almost all the unilateral declarations made by new States which emerged from territories formerly administered by the United Kingdom contain phrases apparently based on the assumption that some of their predecessor’s treaties would survive after independence in virtue of the rules of customary international law. Both the Tanganyika and the Uganda types of declaration, in speaking of the termination of the predecessor’s treaties (unless continued or modified by agreement) after the expiry of a period of provisional application, expressly except treaties which by the application of the rules of

* Ibid., pp. 7 et seq., paras. 4-58.
* See above, para. 14 of the commentary to article 8.
* Ibid., p. 29, para. 113.
* Ibid., para. 6.
customary international law could be regarded as otherwise surviving. The Zambian type of declaration actually "acknowledges" that many of the predecessor's treaties, without specifying what kinds, were succeeded to upon independence by virtue of customary international law. The various States concerned, as already noted, have not considered themselves as automatically parties to, or as automatically bound to become parties to, their predecessor's multilateral treaties; nor have they in their practice acted on the basis that they are in general bound by its bilateral treaties. It would therefore appear that these States, when entering into devolution agreements or making unilateral declarations, have assumed that there are particular categories in regard to which they may inherit the obligations of their predecessor.

(16) Neither the devolution agreements nor the unilateral declarations in any way identify the categories of treaties to which this assumption relates, while the varied practice of the States concerned also makes it difficult to identify them with any certainty. The probable explanation is that these States had in mind primarily the treaties which are most commonly mentioned in the writings of jurists and in State practice as inherited by a newly independent State and which are variously referred to as treaties of a "territorial character", or as "dispositive", or "real", or "localized" treaties, or as treaties creating servitudes.

(17) This seems to be confirmed by statements of the United Kingdom, by reference to whose legal concepts the framers of the devolution agreements and unilateral declarations in many cases guided themselves. The "Note on the question of treaty succession on the attainment of independence by territories formerly dependent internationally on the United Kingdom" transmitted by the Commonwealth Office to the International Law Association, for example, explains the United Kingdom's appreciation of the legal position as follows:

Under customary international law certain treaty rights and obligations of an existing State are inherited automatically by a new State formerly part of the territories for which the existing State was internationally responsible. Such rights and obligations are generally described as those which relate directly to territory within the new State (for example those relating to frontiers and navigation on rivers); but international law on the subject is not well settled and it is impossible to state with precision which rights and obligations would be inherited automatically and which would not be.

(18) The present article seeks only to establish the general rule in regard to a newly independent State's obligation to inherit treaties. The general rule deducible from State practice is clearly, in the view of the Commission, that a newly independent State is not, ipso jure, bound to inherit its predecessor's treaties, whatever may be the practical advantage of continuity in treaty rela-


tions. This is the rule provided for in the present article with regard to the newly independent State's position in respect of the treaties applied to its territory by the predecessor State prior to the date of the succession of States. The newly independent State "is not bound to maintain in force" those predecessor State's treaties or "to become a party" thereto.

(19) That general rule is without prejudice to the rights and obligations of the States concerned as set forth in the relevant provisions of the present articles. Those provisions safeguard the newly independent State's position with regard to its participation in multilateral treaties by a notification of succession, and to obtaining the continuance in force of bilateral treaties by agreement. They also preserve the position of any interested State with regard to the so-called "localized", "territorial", or "dispositive" treaties dealt with in articles 11 and 12 of the present draft.

(20) To emphasize those limitations, the Commission, at its twenty-fourth session in 1972, inserted at the beginning of this article the proviso "subject to the provisions of the present articles". At the present session, however, the Commission decided to delete the proviso, since it merely reflected a well-known principle of interpretation of treaties. Moreover, if the proviso were retained, it might cast doubt on the applicability of that principle to the articles of the draft which contain no similar reservation.

(21) The general rule in article 15, as indicated, concerns only the case of newly independent States and applies, subject to the above-mentioned limitation, "to any treaty". It covers, therefore, multilateral as well as bilateral treaties. With regard to multilateral instruments of a law-making character or general multilateral treaties embodying principles or customary rules of international law, the Commission recognizes the desirability of not giving the impression that a newly independent State's freedom from an obligation to assume its predecessor's treaties means that it has a clean slate also in respect of principles of general international law embodied in those treaties. But it felt that this point would more appropriately be covered by including in the draft a general provision safeguarding the application to a newly independent State of rules of international law to which it would be subject independently of the treaties in question. Such a general provision is contained in article 5.

SECTION 2. MULTILATERAL TREATIES

Article 16. Participation in treaties in force at the date of the succession of States

1. Subject to paragraphs 2 and 3, a newly independent State may, by a notification of succession, establish its status as a party to any multilateral treaty which at the date of the succession of States was in force in respect of the territory to which the succession of States relates.

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268 ibid., para. 7.

267 1972 draft, article 12.
2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties, the newly independent State may establish its status as a party to the treaty only with such consent.

**Commentary**

(1) The articles of this section deal with the participation of a newly independent State in multilateral treaties to which at the date of the succession of States, the predecessor State was a party, a contracting State or a signatory in respect of the territory to which the succession of States relates. Section 3 deals with the position of a newly independent State in relation to its predecessor's bilateral treaties. The present article deals with the participation of a newly independent State, by a notification of succession, in multilateral treaties which at the date of the succession of States were in force in respect of the territory which has become the newly independent State's territory.

(2) The question whether a newly independent State is entitled to consider itself a party to its predecessor's treaties, as already pointed out in the commentary to article 15, is legally quite distinct from the question whether it is under an obligation to do so. Moreover, although modern depositary and State practice does not support the thesis that a newly independent State is under any general obligation to consider itself a successor to treaties previously applicable in respect of its territory, it does appear to support the conclusion that a newly independent State has a general right of option to be a party to certain categories of multilateral treaties in virtue of its character as a successor State. A distinction must, however, be drawn in this connexion between multilateral treaties in general and multilateral treaties of a restricted character, for it is only in regard to the former that a newly independent State appears to have an actual right of option to establish itself as a party independently of the consent of the other States parties and quite apart from the final clauses of the treaty.²⁶⁸

(3) In the case of multilateral treaties in general, the entitlement of a newly independent State to become a party in its own name seems well settled, and is indeed implicit in the practice already discussed in the commentaries to articles 8, 9 and 15 of this draft. As indicated in those commentaries, whenever a former dependency of a party to multilateral treaties of which the Secretary-General is the depositary emerges as an independent State, the Secretary-General addressed to it a letter inviting it to confirm whether it considers itself to be bound by the treaties in question. This letter is sent in all cases; that is, when the newly independent State has entered into a devolution agreement, when it has made a unilateral declaration of provisional application, and when it has given no indication as to its attitude in regard to its predecessor's treaties.²⁶⁹ The Secretary-General does not consult the other parties to the treaties before he writes to the newly independent State, nor does he seek the views of the other parties or await their reactions when he notifies them of any affirmative replies received from the newly independent State. He appears, therefore, to act upon the assumption that a newly independent State has the right, if it chooses, to notify the depository of its continued participation in any general multilateral treaty which was applicable in respect of its territory prior to the succession. Furthermore, so far as is known, no existing party to a treaty has ever questioned the correctness of that assumption; while the newly independent States themselves have proceeded on the basis that they do indeed possess such a right of participation.

(4) The same appears, in general, to hold good for multilateral treaties which have depositaries other than the Secretary-General. Thus, the practice followed by the Swiss Government as depositary of the Convention for the Protection of Literary and Artistic Works and subsequent Acts of revision, and by the States concerned, seems clearly to acknowledge that successor States, newly independent, possess a right to consider themselves parties to these treaties in virtue of their predecessors' participation;²⁷⁰ and this is true also of the Geneva Humanitarian Conventions in regard to which the Swiss Federal Council is the depositary.²⁷¹ The practice in regard to multilateral conventions of which the United States of America is depositary has equally been based on a recognition of the right of a newly independent States to declare itself a party to the conventions on its own behalf.²⁷²

(5) Current treaty practice in cases of succession therefore seems to provide ample justification for the Commission to formulate a rule recognizing that a newly independent State may establish itself as a separate party to a general multilateral treaty by notifying its continuance of, or succession to, the treaty. With certain exceptions, writers, it is true, do not refer—or do not refer clearly—to a newly independent State's right of option to establish itself as a party to multilateral treaties applicable in respect of its territory prior to independence. The reason seems to be that they direct their attention to the question whether the newly independent State automatically inherits the rights and obligations of the treaty rather than to the question whether, in virtue of its status as a successor State, it may have the right, if it thinks fit, to be a party to the treaty in its own name. The International Law Association, in the resolution of its Buenos Aires Conference already

²⁶⁸ See also para. 12 below.


mentioned, stated the law in terms of a presumption that a multilateral treaty is to continue in force as between a newly independent State and the existing parties unless within a reasonable time after independence the former shall have made a declaration to the contrary. In other words, that body envisaged the case as one in which the new State would have a right to contract out of, rather than to contract into, the treaty. Even so, recognition of a right to contract out of a multilateral treaty would seem clearly to imply, a fortiori, recognition of a right to contract into it; and it is the latter right which seems to the Commission to be more consonant both with modern practice and the general law of treaties.

(6) As for the basis of the right of option of the newly independent State, it was agreed in the Commission that the treaty should be one that was internationally applicable, at the date of the succession of States, in respect of the territory to which the succession relates. Consequently the criterion accepted by the Commission is that by its acts, the predecessor State should have established a legal nexus of a certain degree between the treaty and the territory; in other words it should either have brought the treaty into force or have established its consent to be bound or have at least signed the treaty. The present article concerns the case in which that legal nexus is complete, namely when the treaty is in force in respect of the territory at the date of the succession of States. Two other cases where the legal nexus between the treaty and the territory is less complete are examined in the commentaries to article 17 (participation in treaties not in force at the date of the succession of States) and article 18 (participation in treaties signed by the predecessor State subject to ratification, acceptance or approval).

(7) In applying the criterion referred to above, the essential point is not whether the treaty had come into force in the municipal law of the territory prior to independence, but whether the treaty, as a treaty, was in force internationally in respect of the territory. This is simply a question of the interpretation of the treaty and of the act by which the predecessor State established its consent to be bound, and of the principle expressed in article 29 of the Vienna Convention. The operation of this principle is well explained by the summary of the Secretary-General's depositary practice given in the Secretariat's memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary":

In ascertaining whether a treaty was applicable in the territory, the terms of the treaty, if any, on territorial application are first examined. Some treaties have territorial clauses providing procedures for extension to dependent territories, and it can readily be ascertained whether the treaty was extended to the territory in question. Other treaties are limited in their geographical scope; for example, certain League of Nations treaties on opium are limited to the Far Eastern territories of the parties, and the Secretary-General, in reply to inquiries by some African States, has informed them that it is impossible for them either to succeed or accede to those treaties. Some United Nations treaties are likewise regional in scope; for example, the Convention regarding the Measurement and Registration of Vessels Employed in Inland Navigation, done at Bangkok on 22 June 1956, is open only to States falling within the geographical scope of the Economic Commission for Asia and the Far East, and States outside that area cannot become bound by it.

When the treaty contains no provision on territorial application, the Secretary-General proceeds on the basis that, as provided in article 29 of the Vienna Convention, the treaty was binding on the predecessor State in respect of its entire territory and, therefore, in respect of all its dependent territories. For example, the Vienna Convention on Diplomatic Relations and the four Geneva Conventions on the Law of the Sea contain no provisions regarding their territorial application, and the Secretary-General has assumed that any ratifications of these Conventions by predecessor States embraced all their territories so as to entitle any newly independent States which were their dependencies at the time of ratification to notify their succession to any of the Conventions.

(8) The Secretariat memorandum emphasizes that, in identifying the treaties to which new States may notify their succession, the relevant point is the previous legal nexus between the new State's territory and the treaty, and not the qualifications of the new State to become a party under the provisions of the treaty. In other words, a newly independent State's right to be considered as a party in its own name is wholly independent of the question whether the treaty is open to its participation through a provision for accession of the like under the final clauses. In many cases, even in the majority of the cases, the alternative will be open to a independent State of becoming a party to the treaty by exercising a right to do so specifically provided for in the treaty—usually a right of accession. But a newly independent State's right to notify its succession to a treaty neither requires, nor usually finds, any mention in the final clauses. It arises under general international law from the relationship which existed at the date of the succession between the treaty, the predecessor State and the territory which has now passed to the newly independent State.

(9) Whether this right is properly to be regarded as deriving from a principle of the law of treaties or from a principle of "succession" seems to the Commission to be primarily a doctrinal question. What seems more important is to identify the elements of the principle with as much precision as possible. If the conclusions drawn by the Commission from the modern practice are correct, what the principle confers upon a newly independent State is simply a right of option to establish itself as a separate party to the treaty in virtue of the legal nexus established by its predecessor between the territory to

See foot-note 49 above.

In connexion it is important to distinguish between the incorporation of the treaty in the municipal law of the territory and the extension of the treaty on the international plane to the territory.
which the succession of States relates and the treaty. It is not a right to "succeed" to its predecessor's participation in the treaty in the sense of a right to step exactly, and only to step exactly, into the shoes of its predecessor. The newly independent State's right is rather to notify its own consent to be considered as a separate party to the treaty. In short, a newly independent State whose territory was subject to the régime of a multilateral treaty at the date of the State's succession is entitled, simply in virtue of that fact, to establish itself as a separate party to the treaty.

(10) This general principle is not without some qualifications as to its exercise. The first concerns the constituent instruments of international organizations and treaties adopted with an international organization. In such cases, the application of the general principle is subject to the "relevant rules" of the organization in question and, notably, in the case of constituent instruments to the rules concerning acquisition of membership. This point has been dealt with in the commentary to article 4 and needs no further elaboration here.

(11) Secondly, the newly independent State's participation in a multilateral treaty may be actually incompatible with the object and purpose of the treaty. This incompatibility may result from various factors or a combination of factors: when participation in the treaty is indissolubly linked with membership in an international organization of which the State is not a member; when the treaty is regional in scope; or when participation in a treaty is subject to other preconditions. The European Convention for the Protection of Human Rights and Fundamental Freedoms, for example, presupposes that all its contracting parties will be member States of the Council of Europe, so that succession to the Convention and its several Protocols is impossible without membership of the organization. Accordingly, when in 1968 Malawi asked for information regarding the status of former dependent territories in relation to the Convention, the Secretary-General of the Council of Europe pointed out the association of the Convention with membership of the Council of Europe. Malawi then notified him, as depository, that any legal connexion with the Convention which devolved upon it by reason of the United Kingdom's ratification should now be regarded as terminated. Clearly, in cases such as this the need for a party to be a member of an international organization will operate as a bar to succession to the treaty by States not eligible for membership, the reason being that succession to the treaty by the newly independent State concerned is, in the particular circumstances, really incompatible with the regional object and purpose of the treaty.

(12) Thirdly, as already indicated, an important distinction—analagous to that made in article 20, paragraph 2, of the Vienna Convention—has to be made in the present context between treaties drawn up by a limited number of States and other multilateral treaties. In the context of the admissibility of reservations the Commission and the United Nations Conference on the Law of Treaties took the view that the limited number of the negotiating States may show that the application of the provisions of the treaty in their entirety between all the parties is intended to be an essential condition of the consent of any one of them to be bound by it. They did not think this to be by itself conclusive indication of an intention, but did consider that the limited number of the negotiating States combined with the object and purpose of a particular treaty would suffice to establish such an intention. The limited number of the negotiating States combined with the object and purpose of the treaty may similarly establish an intention to confine the circle of possible parties to the negotiating States. In this case it seems logical also to conclude that the participation of a newly independent State in the treaty should be subject to the concurrence of all the parties. Sometimes these treaties may be constituent instruments of a limited international organization or treaties adopted within such an organization, in which case the matter will be covered by the general reservation in article 4. But there are other cases where these factors are not present and in these cases the Commission considered that an exception must be made to the newly independent State's option to consider itself a party to a multilateral treaty. The appropriate rule must then be that a newly independent State may consider itself a party to a restricted multilateral treaty of this type only with the consent of all the parties.

(13) Having regard to the various considerations set out in the preceding paragraphs, the present article lays down in paragraph 1, as the general rule for multilateral treaties, that a newly independent State is entitled to establish its status as a party, by a notification of succession, to any multilateral treaty which at the date of the succession was in force in respect of the territory to which the succession of States relates, subject to the regime of a multilateral treaty. The appropriate rule must then be that a newly independent State may consider itself a party to a restricted multilateral treaty of this type only with the consent of all the parties.

(14) The application of the article to constituent instruments of international organizations and to treaties concluded within an international organization being subject to the general provision of article 4, it is unnecessary to cover the point again here.

(15) Purely as a matter of drafting, the Commission noted that while paragraph 1 of article 12 of the 1972 draft used the expression "a newly independent State", paragraphs 2 and 3 used the expression "the successor State", when all three paragraphs referred to the same State. In order to avoid any doubts in this respect, the
Commission replaced the expression “the successor State” by “newly independent State” in paragraphs 2 and 3 of the draft article as well as in other subsequent provisions of the draft where it was appropriate to do so. Paragraph 2 has been redrafted to provide for the incompatibility test and for radical change in the conditions for the operation of the treaty in accordance with the decision of the Commission explained above.271

Article 17. Participation in treaties not in force at the date of the succession of States

1. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a contracting State to a multilateral treaty which is not in force if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

2. Subject to paragraphs 3 and 4, a newly independent State may, by a notification of succession, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at the date of the succession of States the predecessor State was a contracting State in respect of the territory to which that succession of States relates.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties or of all the contracting States, the newly independent State may establish its status as a party or as a contracting State to the treaty only with such consent.

5. When a treaty provides that a specified number of contracting States shall be necessary for its entry into force, a newly independent State which establishes its status as a contracting State to the treaty under paragraph 1 shall be reckoned as a contracting State for the purpose of that provision unless a different intention appears from the treaty or is otherwise established.

Commentary

(1) The present article deals with the participation of a newly independent State in a multilateral treaty not in force at the date of the succession of States, but in respect of which at that date the predecessor State had established its consent to be bound in respect of the territory in question. In other words, the article regulates the newly independent State’s participation in a multilateral treaty in cases when, at the date of the succession, the predecessor State although not an actual “party” to the treaty was a “contracting State”.272

(2) A substantial interval of time not infrequently elapses between the expression by a State of its consent to be bound by a treaty and the entry into force of the treaty. This is almost inevitable where the treaty provides that it shall not enter into force until a specified number of States shall have established their consent to be bound. In such cases, at the date of a succession of States, a predecessor State may have expressed its consent to be bound, by an act of consent extending to the territory to which the succession relates, without the treaty’s having yet come into force.

(3) As already indicated,274 the right of option of a newly independent State to participate on its own behalf as a separate party in a multilateral treaty, under the law of succession, is based on the legal nexus formerly established by the predecessor State between the treaty and the territory. The treaty must be internationally applicable, at the date of the succession of States, to the territory which at that date becomes the territory of the newly independent State.

(4) Sometimes this criterion is expressed in terms that might appear to require the actual previous application of the treaty in respect of the territory which becomes the newly independent State’s territory. Indeed, the letter addressed by the Secretary-General to a newly independent State drawing its attention to the treaties of which he is the depositary used the expression “multilateral treaties applied* in (the) territory”.275 In a few cases, newly independent States have also replied that they did not consider themselves to be bound by a particular treaty for the reason that it had not been applied to their territory before independence.276 These States seem, however, to have been concerned more to explain their reasons for not accepting the treaty than to raise a question as to their right to accept it if they had so wished.

(5) It also seems clear that in his letter the Secretary-General intended by his words to indicate treaties internationally applicable, rather than actually applied, in respect of the newly independent State’s territory. Indeed, in the Secretariat memorandum “Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary” the practice on 275

271 See para. 14 of the commentary to article 14.

272 1972 draft, article 13.

273 For the meaning in the present draft of the terms “contracting State” and “party”, see article 2, paras. 1 and 7, of these draft articles.

274 See above, para. 6 of the commentary to article 16.

275 Yearbook . . . 1962, vol. II, p. 122, document A/CN.4/150, para. 134. The International Law Association, it may be added, formulated the criterion as follows: a treaty which was “internationally in force with respect to the entity or territory corresponding with it prior to independence...” (International Law Association, Report on the Fifty-third Conference, Buenos Aires, 1968 (op. cit.), p. 596. (Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors)).

276 For example, Zaire (Congo (Leopoldville)) did not consider itself bound by the Convention on the Privileges and Immunities of the United Nations on this ground Yearbook . . . 1962, vol. II, p. 115, document A/CN.4/150, para. 74); nor did the Ivory Coast with regard to the 1953 Convention on the Political Rights of Women (ibid., p. 115, para. 83).
the matter, as established by 1962, was summarized as follows:

The lists of treaties sent to new States have since 1958 included not only treaties which are in force, but also treaties which are not yet in force, in respect of which the predecessor State has taken final action to become bound and to extend the treaty to the territory which has later become independent. France in 1954 ratified and Belgium in 1958 acceded to the 1953 Opium Protocol, which is not yet in force; both countries also notified the Secretary-General of the extension of the Protocol to their dependent territories. Cameroon, the Central African Republic, the Congo (Brazzaville), the Congo (Leopoldville) and the Ivory Coast have recognized themselves as bound by the instruments deposited by their respective predecessors. In March 1960 the United Kingdom ratified the 1958 Conventions on the Territorial Sea and Contiguous Zone, on the High Seas, and on Fishing, which do not contain any territorial application clauses. Nigeria and Sierra Leone have recognized themselves as bound by these ratifications. It may also be mentioned that Pakistan in 1953 spontaneously informed the Secretary-General that it was bound by the action of the United Kingdom in respect of a League treaty which was not yet in force.\(^{276}\)

So far as is known to the Commission, other States have not questioned the propriety of the Secretary-General’s practice in this matter or the validity of the notifications of succession in the above-mentioned cases. On the contrary, as will appear in the following paragraph, the Commission is of the opinion that they must be considered to have accepted it.

(6) This conclusion raises a further related question. Should the newly independent State’s notification of succession be counted for the purpose of aggregating the necessary number of parties to bring the convention into force when the final clauses of the convention make the entry into force dependent on a specified number of signatures, ratifications, etc.? The Secretariat memorandum of 1962 referring to the point said that in his circular note announcing the deposit of the twenty-second instrument in respect of the 1958 Convention on the High Seas, the Secretary-General had “counted the declarations of Nigeria and Sierra Leone toward the number of twenty-two”.\(^{280}\) Since then, the entry into force of the Convention on the Territorial Sea and Contiguous Zone has been notified by the Secretary-General on the basis of counting notifications of succession by the same two States towards the required total of twenty-two; and also that of the Convention on Fishing and Conservation of the Living Resources of the High Seas on the basis of notifications of succession by three new States. The practice of the Secretary-General as depositary therefore seems settled in favour of treating the notifications of succession of newly independent States as in all respects equivalent to a ratification, accession, etc., for the purpose of treaty provisions prescribing a specified number of parties for the entry into force of the treaty. So far as known, no State has questioned the propriety of the Secretary-General’s practice with respect to these important treaties.

(7) The final clauses here in question normally refer expressly to the deposit of a specified number of instruments of ratification or accession or, as the case may be, of acceptance or approval, by States to which participation is open under the terms of the treaty. Accordingly, to count notifications of succession for the purpose of arriving at the prescribed total number may be represented as modifying in some degree the application of the final clauses of the treaty. But any such modification that may occur results from the impact of the general law of succession of States upon the treaty, and the general law the negotiating States must be assumed to have accepted as supplementing the treaty. Nor is the modification involved in counting a notification of succession as relevant in connexion with these treaty clauses much greater than that involved in admitting that newly independent States may become separate parties to the treaty by notifications for which the final clauses make no provision; and the practice of admitting notifications of succession for this purpose is now well settled. Moreover, to count the notification of a newly independent State as equivalent to a ratification, accession, acceptance, or approval would seem to be in conformity with the general intention of the clauses here in question, for the intention of these clauses is essentially to ensure that a certain number of States shall have definitively accepted the obligations of the treaty before they become binding on any one State.\(^{282}\) To adopt the contrary position would almost be to assume that a newly independent State is not to be considered as sufficiently detached from its predecessor to be counted as a separate unit in giving effect to that intention. But such an assumption hardly appears compatible with the principles of self-determination, independence and equality. The Commission concluded, therefore, that the present article should state the law in terms which accord with these considerations and with the Secretary-General’s depositary practice, as now firmly established.

(8) In the light of the foregoing, the Commission decided to model the provisions of this article along the lines of the corresponding provisions of article 16 with the adjustments required by the present context. In particular, at its present session the Commission considered how to improve the drafting of the provision contained in paragraph 1 of the 1972 draft in order to avoid some problems as to the scope of the provision which might arise from the use of the expression “contracting State” and comparison with the provisions of the preceding article. The Commission considered that paragraph 1, which dealt with treaties which were not in force at the date of the succession of States, should

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\(^{276}\) These two States did so at dates before the Conventions in question had come into force.


\(^{282}\) The Committee on the Succession of New States of the International Law Association in an explanatory note accompanying the draft resolution submitted to the Buenos Aires Conference in 1968 took up a position which led it to a conclusion opposite to that proposed in the present article (International Law Association, Report of the Fifty-third Conference, Buenos Aires, 1968 (op. cit.), pp. 602-603 (Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, Notes)).
cover both the cases where (a) the treaty was still not in force at the date of the notification of succession; and (b) the treaty came into force before the date of such notification. If a contrary interpretation of the original text was given, the cases mentioned under (b) would not have been covered by the draft article, thus creating a serious lacuna since those cases are by no means exceptional. To avoid such a possible misunderstanding, the Commission decided to provide in two separate paragraphs, numbered 1 and 2, for each of the two situations apparently envisaged in paragraph 1 of article 13 of the 1972 draft. In addition, the Commission, in the light of the comments of Governments, amended the last clause of paragraph 1 of the 1972 text in order to make clear that the consent to be bound given by the predecessor (contracting) State referred to the territory to which the succession of States relates.

(9) Consequently, paragraph 1 reproduces with some drafting changes the wording of paragraph 1 of the 1972 text. It enables the newly independent State to become a "contracting State". Paragraph 2, which relates to the cases where the treaty comes into force after the date of the succession of States, but before the notification of succession, enables the newly independence State to become a "party". Paragraphs 3, 4 and 5, of the text reproduce the wording of paragraphs 2, 3 and 4 of the 1972 text of article 13, with some modifications in terminology consequential upon the use of the term "party" in the new paragraph 2. In addition to those modifications, the Commission made a drafting change in the opening phrase of paragraph 4 of the 1972 text, now paragraph 5, replacing the word "parties" by "contracting States". Indeed, before the entry into force of a treaty, there are no parties, but only contracting States.

(10) Lastly, paragraph 5 makes a notification of succession by a newly independent State equivalent to a definitive signature, ratification, etc., for the entry into force of the treaty, in accordance with the conclusion reached above.

Article 18. Participation in treaties signed by the predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 3 and 4, if before the date of the succession of States the predecessor State signed a multilateral treaty subject to ratification, acceptance or approval and by the signature intended that the treaty should extend to the territory to which the succession of States relates, the newly independent State may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. For the purpose of paragraph 1, unless a different intention appears from the treaty or is otherwise established, the signature by the predecessor State of a treaty is considered to express the intention that the treaty should extend to the entire territory for the international relations of which the predecessor State was responsible.

3. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. When, under the terms of the treaty or by reason of the limited number of the negotiating States and the object and purpose of the treaty, the participation of any other State in the treaty must be considered as requiring the consent of all the parties or of all the contacting States, the newly independent State may become a party or a contacting State to the treaty only with such consent.

Commentary

(1) The view has been expressed in the commentaries to articles 16 and 17 that a newly independent State inherits a right, if it wishes, to become a party or contracting State in its own name to a multilateral treaty in virtue of the legal nexus established between the territory and the treaty by the acts of the predecessor State. As indicated in those commentaries, a well established practice already exists which recognizes the option of the successor State to become a party or a contracting State on the basis of its predecessor's having established its consent to be bound, irrespective of whether the treaty was actually in force at the moment of the succession of States. The present article deals with the case of a predecessor State's signature which was still subject to ratification, acceptance or approval when the succession of States occurred.

(2) There is, of course, an important difference between the position of a State which has definitely committed itself to be bound by a treaty and one which has merely signed it subject to ratification, acceptance or approval. The question, therefore, arises whether a predecessor State's signature, still subject to ratification, acceptance or approval, creates a sufficient legal nexus between the treaty and the territory concerned on the basis of which a successor State may be entitled to participate in a multilateral treaty under the law of succession. The Secretariat memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" of 1962 made the following comment on this point:

The lists of treaties sent to new States have not included any treaties which have been only signed, but not ratified, by predecessor States. No case has yet arisen in practice in which a new State, in reliance on a signature by its predecessor, has submitted for deposit an instrument of ratification to a treaty. There is considerable practice to the effect that a new State can inherit the legal consequences of a ratification by its predecessor of a treaty which is not yet in force; but it is not yet clear whether the new State can inherit the legal consequences of a simple signature of a treaty which is subject to ratification. The case presents some practical importance, since numerous League of Nations treaties, some of which were signed, but never ratified, by France, the United Kingdom, etc., are not now open to accession by new States, and new States have sometimes indicated an interest in becoming parties to those treaties.

283 1972 draft, article 14.

In its 1963 report to the General Assembly, the Commission merely noted the existence of the problem without expressing any opinion upon it. Similarly, although it has not been the practice of the Secretary-General to include in the lists of treaties sent to successor States any treaty merely signed and not ratified by the predecessor State, the passage cited from the Secretariat memorandum seems to leave open the question whether a successor State is entitled to ratify such a treaty.

A possible point of view might be that in such a case the conditions do not exist for the transmission of any obligation or right from a predecessor to a successor State. The predecessor did not have any definitive obligations or rights under the treaty at the moment of the succession of States, nor were any such obligations or rights then applicable with respect to the successor State's territory. As the International Court of Justice has stated on several occasions, a signature subject to ratification, acceptance or approval does not bind the State. This is also the law codified by article 14 of the Vienna Convention.

On the other hand, both the opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and article 18 of the Vienna Convention do recognize that a signature subject to ratification creates for the signatory State certain limited obligations of good faith and a certain legal nexus in relation to the treaty. Thus, it seems possible to justify the recognition of the option of a newly independent State to establish its consent to be bound by a treaty in virtue of its predecessor's bare signature of the treaty subject to ratification, acceptance or approval.

This solution, the most favourable both to successor States and to the effectiveness of multilateral treaties, is the one embodied in the present article. In 1972, doubts about the justification of the article were expressed by some members of the Commission, but it was included in the draft to enable Governments to express their views on the matter so that the Commission might reach a clear conclusion on this point during the second reading of the draft. However, little comment on the point was made by delegations and Governments and the few views expressed were divided as to whether the article should be retained. In the absence of clear guidance, the Commission reconsidered the question of inclusion on its merits, but again views were divided. Nevertheless, the Commission, bearing in mind the considerations already mentioned decided to retain the article partly in the interests of the symmetry of the draft as a whole and partly to enable Governments in due course to make their own decision on its retention.

As the Commission observed in 1972, the question had a special interest some years ago in relation to certain League of Nations treaties, but the participation of newly independent States in those treaties ceased to present any problem as a result of the adoption by the General Assembly of its resolution 1903 (XVIII) of 18 November 1963, following the study of the problem made by the International Law Commission in its 1963 report to the Assembly. The question, however, is a general one and some members of the Commission felt that the possibility of a newly independent State's liberty to ratify a treaty on the basis of the predecessor State's signature assuming importance in the future in connexion with multilateral treaties could not be altogether excluded, although it would normally be open to a newly independent State to accede to the treaty.

In its written comments, one Government objected to the article as drafted in 1972 on the ground that it would create inequality between the newly independent State and signatories to the treaty because the newly independent State would not be bound by the good faith obligation incumbent on the predecessor State and other signatories. In this connexion, the Commission confirmed the view expressed in 1972 that, even if the article were adopted, it would not be appropriate to regard the successor State as bound by the obligation of good faith contained in article 18 of the Vienna Convention until it had at least established its consent to be bound and become a contracting State. The Commission, however, did not consider that this was, in itself, sufficient reason for omitting the article from the draft.

Re-examination of the draft article in the light of the comments of Governments exposed certain problems as to its content and drafting. The text of article 14 in the 1972 draft was based on article 14 of the Vienna Convention which relates to signature followed by ratification, acceptance or approval. It is, however, possible for authentication of the text of a treaty to be by methods other than signature and for consent to be bound by a treaty to be given otherwise than by ratification, acceptance or approval. For example, a treaty might be initialled rather than signed and consent to be bound might be expressed by subsequent signature. Reference to article 11 of the Vienna Convention raised the question whether provision should be made in draft article 14 of the 1972 draft (if retained) for cases where consent to be bound by a treaty was to be expressed after authentication of the text by some agreed means other than ratification, acceptance or approval. Nevertheless, the Commission considered that the procedure under article 14 of the Vienna Convention was the normal one and that draft article 14 of the 1972 draft should not be extended to cover possible cases beyond the scope of that article. It was pointed out that signature has particular significance in the context of the Vienna Convention and that this justified the limitation of the

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\[88\] This seems to have been the view on the matter taken by the International Law Association's Committee on the Succession of New States. It should be recalled, however, that the Association took the position that a legal nexus existed between the treaty and the territory when the treaty was in force in respect of the territory at the date of succession of States (see foot-note 275 above). From this standpoint it was consistent for the Association to consider that a legal nexus did not exist on the basis of a bare predecessor State's signature subject to ratification, acceptance or approval.

\[89\] For example in the North Sea Continental Shelf Cases (I.C.J. Reports 1969, p. 3).

\[90\] I.C.J. Reports 1951, p. 28.

\[91\] See paras. 3-5 above.
draft article to signature subject to ratification, acceptance or approval.

(10) The comments of one Government called attention to the ambiguity of the second part of the introductory words to paragraph 1 of the draft article, which read "by the signature intended that the treaty should extend to the territory to which the succession of States relates". It is not in practice always made clear on signature to which territories it is intended that a treaty should extend. The Commission decided that the point should be clarified by a provision relating to signature on the lines of article 29 of the Vienna Convention concerning the territorial scope of treaties.

(11) Attention was also called to the complicated effect of the cross references in paragraph 1 of the draft article and the desirability of simplifying the text as far as possible. Finally, doubts were expressed about the exact meaning of the clause in paragraph 2 "under conditions similar to those which apply to ratification".

(12) Having regard to the above considerations, the Commission decided to re-draft the article in the form which now appears as article 18, which is simplified and avoids the use of cross references to other articles. Paragraph 1 provides that where a multilateral treaty has been signed by the predecessor State before the date of the succession of States subject to ratification, acceptance or approval, with the intention that the treaty should extend to the territory to which the succession of States relates, the newly independent State may itself ratify, accept or approve the treaty. Paragraph 2 provides a presumption that the signature by the predecessor State expresses the intention that the treaty should extend to the entire territory for the international relations of which it was responsible. Paragraph 3 excludes the application of paragraph 1 if the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty. Paragraph 4 contains the usual requirement in the case of "restricted multilateral treaties" of the consent of all the parties or of all the contracting States to participation in the treaty by the newly independent State.

**Article 19. Reservations**

1. When a newly independent State establishes its status as a party or as a contracting State to a multilateral treaty by a notification of succession under article 16 or 17, it shall be considered as maintaining any reservation to that treaty which was applicable at the date of the succession of States in respect of the territory to which the succession of States relates unless, when making the notification of succession, it expresses a contrary intention or formulates a reservation which relates to the same subject matter as that reservation.

2. When making a notification of succession establishing its status as a party or as a contracting State to a multilateral treaty under article 16 or 17, a newly independent State may formulate a reservation unless the reservation is one the formulation of which would be excluded by the provisions of sub-paragraph (a), (b) or (c) of article 19 of the Vienna Convention on the Law of Treaties.

3. When a newly independent State formulates a reservation in conformity with paragraph 2, the rules set out in articles 20, 21, 22 and 23 of the Vienna Convention on the Law of Treaties apply in respect of that reservation.

**Commentary**

(1) The general rules of international law governing reservations to multilateral treaties are now to be found stated in articles 19 to 23 of the Vienna Convention. Under those articles, in the event of a succession, the predecessor State may be a State which has formulated a reservation, with or without objection from other States, or which has itself accepted or objected to the reservation of another State. Those articles at the same time provide for the withdrawal of reservations and also of objections to reservations. The question then arises as to the position of the newly independent State in regard to reservations, acceptances and objections.

(2) Whenever a newly independent State is to be considered as a party to a multilateral treaty, under the law of succession, pure logic would seem to require that it should step into the shoes of its predecessor under the treaty in all respects as at the date of succession. In other words, the newly independent State should inherit the reservations, acceptances and objections of its predecessor exactly as they stood at the date of succession; but it would also remain free to withdraw, in regard to itself, the reservation or objection which it had inherited. Conversely, whenever a newly independent State becomes a party not by the law of succession but by an independent act establishing its consent to be bound, logic would indicate that it should be wholly responsible for its own reservations, acceptances and objections, and that its relation to any reservations, acceptances and objections of its predecessor should be the same as that of any other new party to the treaty. The practice in regard to reservations, while it corresponds in some measure to the logical principles set out in this paragraph, will be found not to be wholly consistent with them.

(3) The Secretariat studies entitled "Succession of States to multilateral treaties" contain some evidence of practice in regard to reservations. Some cases concern the Berne Convention for the Protection of Literary and Artistic Works. Thus, the United Kingdom made a reservation to the Berne Act (1908) regarding retroactivity on behalf of itself and all its dependent territories with the exception of Canada; France, on behalf of itself and all its territories, made a reservation to the same Convention regarding works of applied art; and the Netherlands also made three separate reservations to that Convention on behalf both of itself and the Netherlands East Indies. Each of these three States omitted its reservations when acceding to later texts: the United Kingdom and the Netherlands when becoming parties to the Rome Act of 1928 and France when...
becoming a party to the Brussels Act of 1948. In all the cases of succession occurring in respect of these three States, the Swiss Government as depositary has treated the successor State as inheriting such of its predecessor's reservations as were binding upon the successor's territory in relation to each particular Convention at the date of independence. Moreover, in these cases the Swiss Government appears to have regarded the inheritance of the reservations, when it occurred, as automatic and not dependent upon any "confirmation" of the reservation by the successor State. Among these reservations is one made by the United Kingdom with respect to article 68, paragraph 2, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (1949). Some newly independent States, to which this Convention was formerly applicable as dependent territories of the United Kingdom, have notified the depositary that they consider themselves as continuing to be bound by that Convention in virtue of its ratification by the United Kingdom. The notifications of these States do not refer explicitly to the United Kingdom's reservation. The point of departure for these States was, however, that the Convention had been made applicable to their territories by the United Kingdom prior to independence; and that application was clearly then subject to the United Kingdom's reservation. Moreover, some of the States concerned expressly referred in their notifications to the United Kingdom's ratification of the Convention, and of that "ratification" the reservation was an integral part. As a matter of law, it would seem that the States concerned, in the absence of any indication of their withdrawal of their predecessor's reservation, must be presumed to have intended the treaty to continue to apply to their territory on the same basis as it did before independence, i.e. subject to the reservation. It is also not without relevance that the same depositary Government, when acting as depositary of the Berne Convention for the Protection of Literary and Artistic Works and subsequent Acts of revision, seems to have assumed that reservations are inherited automatically in cases of succession in the absence of any evidence of their withdrawal.

(4) The practice of successor States in regard to treaties for which the Secretary-General is the depositary appears to have been fairly flexible. They have sometimes exercised their right to become a party by depositing an instrument of accession and sometimes by transmitting to the Secretary-General a "notification of succession". When becoming a party by accession, a new State has in some cases repeated a reservation made by its predecessor and applicable to the territory before independence. In such a case the reservation is, of course, to be regarded as an entirely new reservation so far as concerns the newly independent State, and the general law governing reservations to multilateral treaties has to be applied to it accordingly as from the date when the reservation is made. It is only in cases of notification of succession that problems arise.

(5) Equally, when transmitting a notification of succession newly independent States have not infrequently repeated or expressly maintained a reservation made by their predecessor; especially in cases where their predecessor had made the reservation at the time of "extending" the treaty to their territory. Thus, Jamaica, in notifying its "succession" to the Convention relating to the Status of Refugees (1951), repeated textually a reservation which had been made by the United Kingdom specifically with reference to its territory, and Cyprus and Gambia expressly confirmed their maintenance of that same reservation which had likewise been made applicable to each of their territories. Other examples are the repetition by Trinidad and Tobago of a United Kingdom reservation to the International Convention to Facilitate the Importation of Commercial Samples and Advertising Material (1952) made specifically for Trinidad and Tobago, and by Barbados, Cyprus, Fiji, Jamaica and Sierra Leone of United Kingdom reservations made to the 1949 Convention on Road Traffic, with annexes. (6) It is, no doubt, desirable that a State, on giving notice of succession, should at this time specify its intentions in regard to its predecessor's reservations. This, indeed, was the case when Barbados and Fiji submitted their notices of succession to the Convention relating to the Status of Stateless Persons (1954) and indicated which reservations, extended to their respective territories by the United Kingdom, were maintained and which were withdrawn. Fiji likewise indicated which reservations were maintained and which were withdrawn when notifying its succession to the Convention relating to the Status of Refugees (1951) the Convention on the Political Rights of Women (1953), and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962). But it would be going too far to conclude that, if a reservation

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89 Ibid., p. 35, para. 138.
is not repeated at the time of giving notice of succession, it does not pass to the newly independent State. Indeed, in certain other cases newly independent States seem to have assumed the contrary. Thus, both Rwanda and Malta transmitted notifications of succession to the Customs Convention on the Temporary Importation of Private Road Vehicles (1954), without referring to the reservations which had been made by their respective predecessors, Belgium and the United Kingdom, Rwanda, some two months after giving notice of succession, informed the Secretary-General that it did not intend to maintain Belgium’s reservations. Malta, also after an interval of some weeks, similarly informed the Secretary-General. Both these States acted in the same manner in regard to their predecessors’ reservations to the Convention Concerning Customs Facilities for Touring (1954). Both would therefore seem to have thought that a predecessor’s reservations would continue to be applicable unless disclaimed by the successor. The same view of the law was evidently taken by the Office of Legal Affairs of the Secretariat in its Memorandum to the Regional Representative of the United Nations High Commission for Refugees on the succession by Jamaica to rights and obligations under the Convention relating to the Status of Refugees (1951). The Swiss Government also appears to have acted on the assumption that reservations are applicable automatically with respect to a successor State in the absence of any indication of their withdrawal by it when or after giving notice of succession.

(7) Mention must now be made of some recent practice regarding reservations in which the line between “succession” and “accession” seems to have become somewhat blurred. This practice concerns cases where a State has given notice to the Secretary-General of its “succession” to a treaty and at the same time notified him of reservations which are different from or additional to those formulated by its predecessor. Thus, on 29 July 1968 Malta notified the Secretary-General that, as successor to the United Kingdom, it considered itself bound by the Additional Protocol to the Convention concerning Customs Facilities for Touring, relating to the Importation of Tourist Publicity Documents and Material (1954), the application of which had been extended to its territory before independence. Malta’s notification nevertheless contained a reservation on article 3 of the Protocol, while article 14 provided that a reservation was not to be admissible if within a period of 90 days it had been objected to by one third of the interested States. Accordingly, in circulating the notification of succession, the Secretary-General drew attention to the reservation and to the provision in article 14 of the Protocol; and Poland did in fact object to the reservation. In the event, this was the only objection lodged against the reservation within the prescribed period and the Secretary-General then formally notified the interested States of the acceptance of Malta’s reservation in accordance with article 14.

(8) On 25 February 1969 Botswana notified the Secretary-General that it regarded itself as “continuing to be bound” by the Convention of 1954 relating to the Status of Stateless Persons to the same extent as the United Kingdom had been, so that in relation to the Bechuanaland Protectorate “subject, however, to the following additional reservations”; and it then formulated new reservations to articles 31, 12 (1) and 7 (2) of the Convention. In circulating the notification, the Secretary-General reproduced the text of Botswana’s new reservations and at the same time informed the interested States where they would find the text of the earlier reservations made by the United Kingdom which Botswana was maintaining.

(9) On 18 July 1969 Mauritius informed the Secretary-General that it considered itself bound, as from the date of independence by the Convention on the Political Rights of Women (1953) the application of which had been extended to its territory before independence. At the same time, without any allusion to the reservations which had been made to article 3 by the United Kingdom, Mauritius formulated two reservations of its own to that article. One of these (recruitment and conditions of service in the armed forces) corresponded to a general reservation made by the United Kingdom; the other (jury service) had been made by the United Kingdom with respect to certain territories but not with respect to Mauritius itself. The Secretary-General, also making no allusion to the previous reservations of the United Kingdom, simply circulated the text of Mauritius’ two reservations to the interested States.

(10) The most striking example is perhaps that of Zambia’s notification of its succession to the Convention relating to the Status of Refugees (1951). By letter of 24 September 1969 Zambia transmitted to the Secretary-General an instrument of succession to this Convention and an instrument of accession to another treaty, thereby underlining its intention to be considered as a successor State in relation to the 1951 Convention. In depositing its notification of succession, Zambia made no allusion to the reservations previously made by the United Kingdom in respect of the Federation of Rhodesia and Nyasaland. Instead, it referred to article 42 of the Convention, which authorized reservations to certain articles, and proceeded to formulate reservations of its own to articles 17 (2), 22 (1), 26 and 28 as permitted by article 42. The Secretary-General, in a letter to Zambia of 10 October 1969, then drew attention to the fact that its reservations differed from those made by its predecessor State and continued:

Therefore, it is the understanding of the Secretary-General that the Government of Zambia, on declaring formally its succession to the

*** ibid., p. 245, foot-note 9.
** ibid., footnote 10.
* ibid., p. 237, foot-notes 11 and 12.
10 See para. 3 above.
12 Secretary-General’s circular letter of 3 December 1968 (C.N. 18 2, 1968, Treaties-4).
13 Secretary-General’s circular letter of 21 May 1969 (C.N. 80, 1969, Treaties-1).
Convention in the instrument in question, decided to withdraw the old reservations pursuant to paragraph 2 of article 42 of the Convention, and expressed its consent to continue to be bound henceforth by the Convention, subject to the new reservations, the latter reservations to become effective on the day when they would have done so, pursuant to the pertinent provisions of the Convention, had they been formulated on accession.* Accordingly, the said reservations will take effect on the nineteenth day after the deposit of the instrument of succession by the Government of Zambia, that is to say, on 23 December 1969.

The Secretary-General further said that all interested States were being informed of the deposit of the instrument of succession and of the reservations.

(11) The practice examined in the preceding paragraphs appears to show unmistakably that the Secretary-General is now treating a newly independent State as entitled to become a party to a treaty by "succession" to its predecessor’s participation in the treaty, and yet at the same time to modify the conditions of that participation by formulating new reservations.

(12) A newly independent State’s abandonment, express or implied, of its predecessor’s reservations is perfectly consistent with the notion of "succession"; for a State may withdraw a reservation at any time and a successor State may equally do so at the moment of confirming its "succession" to the treaty. The formulation of new or revised reservations would appear, however, not very consistent with the notion of a "succession" to the predecessor State’s right and obligations with respect to the territory. But it does appear compatible with the idea that a successor State, by virtue simply of the previous application of the treaty to its territory, is entitled to or has a right to become a separate party in its own name. So far as is known, no objection has been made by any State to the practice in question or to the Secretary-General’s treatment of it. Nor is this surprising, since in most cases it is equally open to the newly independent State to become a party by "accession" when, subject to any relevant provisions in the treaty, it would be entirely free to formulate its own reservations. The Secretary-General’s treatment of the practice has the merit of flexibility and of facilitating the participation of newly independent States in multilateral treaties, while seeking to protect the rights of other States under the general law of reservations.

(13) There remains the question of objections to reservations in regard to which the published practice is sparse. The series of Secretariat studies entitled "Succession of States to multilateral treaties" apart from a single mention of the existence of this question, contains no reference to succession in respect of objections to reservations; nor is anything to be found in Materials on succession of States. The information published in Multilateral treaties in respect of which the Secretary-General performs depositary functions, however, throws some light on the practice in regard to objections to reservations. In the case of the 1946 Convention on the Privileges and Immunities of the United Nations, the United Kingdom lodged an objection to the reservations of certain States regarding recourse to the International Court of Justice for the settlement of disputes, and subsequently a number of its former dependent territories became parties by transmitting a notification of succession. None of these newly independent States, it appears, made any allusion to the United Kingdom’s objection to those reservations. Nor did Zaire when it notified its succession to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, make any allusion to Belgium’s objection to similar reservations formulated in regard to this Convention. The United Kingdom lodged a series of formal objections to reservations formulated by various States to the three 1958 Conventions on the Territorial Sea and Contiguous Zone, on the High Seas and on the Continental Shelf, and several of its former dependent territories afterwards became parties to one or other of these Conventions by transmitting a notification of succession. Some of those States, however, indicated their position with regard to the objections made by the United Kingdom. Tonga informed the Secretary-General that, in the absence of any other statement expressing a contrary intention, it wished to maintain all objections communicated to him by the United Kingdom to the reservations or declarations made by States with respect to any conventions of which the Secretary-General performs depositary functions. Thus, Tonga is considered as maintaining the United Kingdom objections to certain reservations and declarations made by States with respect to the Convention on the Territorial Sea and the Contiguous Zone. Fiji expressly maintained the objections made by the United Kingdom with regard to that Convention. Both Fiji and Tonga expressly maintained United Kingdom objections to certain reservations or declarations concerning the Convention on the Continental Shelf. With regard to the Convention on the High Seas, both Fiji and Tonga withdrew the "observations" made by the United Kingdom with respect to one State’s reservation to that Convention and each substituted its own "observation." The remaining United Kingdom objections were maintained: expressly by Fiji and impliedly by Tonga, in virtue of its general statement concerning the maintenance of objections, referred to above. In ratifying the Vienna Convention on Diplomatic Relations the United Kingdom declared that it did not regard statements which had been made by three Socialist States with reference to article 11, paragraph 1 (size of a diplomatic mission), as modifying any rights or obligations under this paragraph. Malta, an ex-United Kingdom dependency which became a party by succession, repeated the terms of this declaration in its notification of succession. The United Kingdom held the same position with regard to two other States and in addition did not regard as valid the reservations made by four States concerning article 37, paragraph 2, of the Convention. When Tonga notified its succession to that Convention, it indicated its adoption of the United

See above, para. 44, and foot-notes 40-42.

* United Nations, Materials on Succession of States (op. cit).

† United Nations, Multilateral treaties . . . 1972 (op. cit.).
Kingdom objections respecting the reservations and statements to those nine States. When Barbados notified the Swiss Government of its succession to the 1949 Geneva Conventions relative to the Treatment of Prisoners of War and to the Protection of Civilian Persons in time of War, it repeated a declaration which had been made by the United Kingdom concerning the reservations made by certain States with respect to those Convention.

(14) According to the provisions of the Vienna Convention on the Law of Treaties concerning objections to reservations (article 20, paragraph 4(b) in conjunction with article 21, paragraph 3), unless the objecting State has definitely indicated that by its objection it means to stop the entry into force of the treaty as between the two States, the legal position created as between the two States by an objection to a reservation is much the same as if no objection had been lodged. But, if an objection has been accompanied by an indication that it is to preclude the entry into force of the treaty as between the objecting State and the reserving State, the treaty will not have been in force at all in respect of the successor State’s territory at the date of the succession of States in relation to the reserving State. The evidence of practice, however, does not seem to indicate too great a concern on the part of newly independent States with the objections of their predecessor to reservations formulated by other States.

(15) In the light of these considerations, the Commission made no provision with respect to objections to reservations in its 1972 draft. However, the matter was raised again in the comments of Governments. One Government suggested that there should be a presumption that a predecessor State’s objections were withdrawn unless the newly independent State expressed a contrary intention when making its notification of succession, and another Government mentioned objections in the context of the question of the retroactivity of reservations formulated by the newly independent State. Consequently, the Commission again considered whether it was necessary to make any express provision as regards acceptances of or objections to reservations. In the light of the legal position indicated in the preceding paragraph, the Commission concluded that it would be better, in accordance with its fundamental method of approach to the draft articles, to leave these matters to be regulated by the ordinary rules applicable to acceptances and objections on the assumptions that, unless it was necessary to make some particular provision in the context of the succession of States, the newly independent State would “step into the shoes of the predecessor State”.

(16) In the light of the considerations in the foregoing paragraphs and having regard to the nature of modern multilateral treaties and to the system of law governing reservations in articles 19 to 23 of the Vienna Convention, the Commission decided to adopt a pragmatic and flexible approach to the treatment of reservations in the context of the present draft articles on succession of States in respect of treaties. When a newly independent State transmits a notification of succession, this may clearly be interpreted as an expression of a wish to be considered as a party to the treaty on the same conditions in all respects as its predecessor. But once it is accepted that succession in respect of treaties does not occur automatically but is dependent on an act of will by the newly independent State, the way is open for the law to regulate the conditions under which that act of will is to become effective.

(17) Since the general rule is that a reservation may be withdrawn unilaterally and at any time, the question whether a predecessor State’s reservations attach to a newly independent State would seem to be simply a matter of the latter’s intention at the time of making its notification of succession. If the newly independent State expressly maintains them, the answer is clear. If it is silent on the point the question is whether there should be a presumption in favour of an intention to maintain the reservations except such as by their very nature are applicable exclusively with respect to the predecessor State. The Commission concluded that for various reasons such a presumption should be made. First, the presumption of an intention to maintain the reservations was indicated by the very concept of succession to the predecessor’s treaties. Secondly, a State is in general not to be understood as having undertaken more onerous obligations unless it has unmistakably indicated an intention to do so; and to treat a newly independent State, on the basis of its mere silence, as having dropped its predecessor’s reservations would be to impose upon it a more onerous obligation. Thirdly, if presumption in favour of maintaining reservations were not to be made, the actual intention of the newly independent State might be irrevocably defeated; whereas, if it were made and the presumption did not correspond to the newly independent State’s intention, the latter could always redress the matter by withdrawing the reservations.

(18) Certain comments by delegations and Governments suggested that the article on reservations should reverse the presumption in favour of the maintenance of reservations made by the predecessor State. At its present session, however, the Commission, in view of the above reasons, decided to maintain the presumption stated in paragraph 1 of the 1972 draft article. However, in the light of the comments of Governments, certain changes were made in paragraph 1. First, the Commission decided that the test of incompatibility for which the paragraph provided might be difficult to apply and that, if the newly independent State were to formulate a reservation relating to the same subject-matter as that of the reservation made by the predecessor State, it could reasonably be presumed to intend to withdraw that reservation. The Commission also decided that it was unnecessary to provide expressly, as was done in article 15, paragraph 1(b) of the 1972 draft, for the exclusion of a reservation which was applicable only in relation to the

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285 This rule does not apply in the case of constituent instruments of international organizations or in that of treaties concluded between a “limited number of States” within the meaning of paragraph 2 of article 20.
paragraph would give an opportunity to Governments to codify the whole law of treaties. It was pointed out that the references to the Vienna Convention in that paragraph would give an opportunity to Governments to express their views on the whole question of drafting by reference in the context of codification. While there was some reserve on the general question, such comments as were made by Governments tended to support the use of the method of drafting by reference in this instance. Accordingly, although at the present session of the Commission there was some opposition to the use of the method of drafting by reference, the Commission decided that it was justified in using the method not only for the purposes of paragraph 3 but also for those of paragraph 2.

(22) One Government suggested the inclusion of a provision to make clear that a reservation formulated by a newly independent State when making its notification of succession would not have retroactive effect. The draft articles, however, do not contain any provision that such a reservation would have retroactive effect. Therefore, having regard to the general position that a reservation can only be effective at the earliest from the date when it is made, the Commission decided that it would be better not to include such a provision but once more to leave the matter to be regulated by the ordinary rules of international law relating to treaties.

(23) Paragraph 3 of the present article provides that, when a newly independent State formulates a reservation in conformity with paragraph 2 of the present article, the rules set out in articles 20, 21, 22 and 23 of the Vienna Convention apply in respect of that reservation. This provision is made only with respect to a reservation formulated by a newly independent State under article 19 because it was only for that purpose that it seemed necessary to make any express provision. The paragraph corresponds to article 15, paragraph 3 (a), of the 1972 draft. However, the words "in respect of that reservation" have been added to make clear that the references to the Vienna Convention in paragraph 3 of the present draft article are limited to a reservation formulated in conformity with paragraph 2 of the present article and that the article makes no provision concerning other questions that may arise with respect to reservations, acceptances or objections, which are left to be governed by the general rules. Paragraph 3 has the effect of ensuring that any reservation formulated by a newly independent State in the exercise of the right conferred by paragraph 2 would be subject to the rules of law set out in the Vienna Convention concerning acceptances and objections to reservations, legal effects of reservations and relevant rules of the procedure regarding reservations. In order to avoid any possible misinterpretation of the references to the Vienna Convention, the reference in the 1972 draft to article 23, paragraphs 1 and 4, has been amended so as to include a reference to the whole of that article.

(24) In the light of the limitation of paragraph 3 to purposes connected with the formulation of a new reservation by the newly independent State and the fact that participation in a treaty of the kind contemplated in article 20, paragraph 2 of the Vienna Convention on the Law of Treaties will in any event be subject to the agreement of all the parties or all the contracting States to that treaty, paragraph 3 (b) of the 1972 draft article was considered unnecessary. Accordingly the Commission decided to omit it.
Article 20.  consenting to be bound by part of a treaty and choice between differing provisions

1. When making a notification of succession under article 16 or 17 establishing its status as a party or contracting State to a multilateral treaty, a newly independent State may express its consent to be bound by part of the treaty or make a choice between differing provisions under the conditions laid down in the treaty for expressing such consent or making such choice.

2. A newly independent State may also exercise, under the same conditions as the other parties or contracting States, any right provided for in the treaty to withdraw or modify any consent or choice made by itself or made by the predecessor State in respect of the territory to which the succession of State relates.

3. If the newly independent State does not in conformity with paragraph 1 express its consent or make a choice, or in conformity with paragraph 2 withdraw or modify the consent or choice of the predecessor State, it is considered as maintaining:

(a) the consent of the predecessor State, in conformity with the treaty, to be bound, in respect of the territory to which the succession of States relates, by part of that treaty; or

(b) the choice of the predecessor State, in conformity with the treaty, between differing provisions in the application of the treaty in respect of the territory to which the succession of States relates.

Commentary

(1) This article deals with questions analogous to those covered in article 19. It refers to cases where a treaty permits a State to express its consent to be bound only by part of a treaty or to make a choice between different provisions, that is, to the situations envisaged in paragraphs 1 and 2, respectively, of article 17 of the Vienna Convention. If its predecessor State has consented to be bound only by part of a treaty or, in consenting to be bound, has declared a choice between differing provisions, the question arises as to what will be the position of a State which notifies its succession to the treaty.

(2) An example of a predecessor State's having consented to be bound by part of a treaty is furnished by the 1949 Convention on Road Traffic, article 2, paragraph 1, of which permits the exclusion of annexes 1 and 2 from the application of the Convention. The United Kingdom's instrument of ratification, deposited in 1957, contained a declaration excluding those annexes. When extending the application of the Convention to Barbados, Cyprus, Fiji, Malta and Sierra Leone, the United Kingdom specifically made that extension subject to the same exclusion. In the case of Malta, on the other hand, the declaration excluded only annex 1, while in the case of Jamaica the declaration contained a reservation on a certain point but made no allusion to annexes 1 and 2. On becoming independent, these six countries transmitted to the Secretary-General notifications of succession to the Convention. Five of them, Barbados, Cyprus, Fiji, Malta and Sierra Leone, accompanied their notifications with declarations maintaining the particular exclusions in force in respect of their territories before independence. Jamaica, on the other hand, to which the exclusions had not been applied before independence, did not content itself with simply maintaining the reservation made by the United Kingdom on its behalf; it added a declaration excluding annexes 1 and 2.

(3) The 1949 Convention on Road Traffic furnishes also an example of choice between differing provisions: annex 6, section IV (b) permits a party to declare that it will allow "trailer" vehicles only under certain specified conditions, and declarations to that effect were made by the United Kingdom in respect of Barbados, Cyprus, Fiji and Sierra Leone. These declarations were maintained by these countries in their notifications of succession. Malta, in respect of which no such declaration had been made, said nothing on the matter in its notification. Jamaica, on the other hand, in respect of which also no such declaration had been made, added to its notification a declaration in terms similar to the declaration made by the United Kingdom in respect of Barbados, Cyprus, Fiji and Sierra Leone, and maintained by these countries in their respective notifications of succession.

(4) Another Convention illustrating the question of choice of different provisions is the 1951 Convention relating to the Status of Refugees, article 1, section B, of which permits a choice between "events occurring in Europe before 1 January 1951," or "events occurring in Europe or elsewhere* before 1 January 1951" for determining the scope of the obligations accepted under the Convention. The United Kingdom's ratification specified the wider form of obligation "in Europe or elsewhere" and in this form the Convention was afterwards extended to Cyprus, Fiji, Gambia and Jamaica. When in due course these countries notified the Secretary-General of their succession to the Convention, their notifications maintained the choice of provisions previously in force in respect of their territories.

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828 Ibid., p. 265.
829 Ibid., pp. 260, 261 and 262.
830 Ibid., p. 261. The United Kingdom extended likewise the application of the Convention to Singapore in 1959 subject to the exclusion of annexes 1 and 2. Following its separation from Malaysia Singapore in 1972 transmitted to the Secretary-General a notification of succession to the Convention with the declaration that it did not wish to maintain the exclusions of annexes 1 and 2 made by the United Kingdom at the time of notification of territorial application of the Convention (ibid., p. 262).
831 Ibid., pp. 265, 266 and 267.
832 Ibid., pp. 260 and 262.
833 Ibid., p. 265.
834 Ibid., p. 261.
835 Ibid., p. 94.
836 Ibid., p. 101.
837 Ibid., pp. 94, 95, 96 and 97.
in contrast with the United Kingdom, specified initially the narrower form of obligation “in Europe”; and it was in the narrower form that it extended the Convention to all its dependent territories, twelve of which afterwards transmitted notifications of succession to the Secretary-General. Of these twelve countries four accompanied their notifications with a declaration that they extended their obligations under the Convention by adopting the wider alternative “in Europe or elsewhere.” The other eight countries in the first instance all simply declared themselves “bound by the Convention the application of which had been extended to their territory before the attainment of independence”; and it is clear that they assumed this to mean that France’s choice would continue to govern the application of the Convention to their territory. For not long after notifying their succession to the Secretary-General, three of them informed him of the extension of their obligations under the Convention by the adoption of the wider formula; and four others did the same after intervals varying from eighteen months to nine years. The remaining one country has not changed its notification and is therefore still bound by the more restricted formula.

(5) The Convention on the Stamp Laws in connexion with Bills of Exchange and Promissory Notes (1930) did not itself offer a choice of provisions, but a Protocol to it created and analogous situation by permitting a State to ratify or accede to the Convention in a form limiting the obligation to bills presented or payable elsewhere than in the country concerned. It was subject to this limitation that on various dates between 1934 and 1939 Great Britain extended the Convention to many of its dependent territories. In 1960 Malaysia and in 1966 Malta notified the Secretary-General of their succession to this League of Nations treaty. Their notifications did not make mention of the limitation. In 1968, 1971 and 1972, Cyprus, Fiji and Tonga submitted notifications of succession to the Convention specifying that they maintained the limitation subject to which the Convention was made applicable to their respective territories before the attainment of independence.

(6) Another treaty giving rise to a case of succession in respect of choice of provisions is the 1921 Additional Protocol to the Convention on the Régime de Navigable Waterways of International Concern. Article 1 permitted the obligations of the Protocol to be accepted either “on all navigable waterways” or “on all naturally navigable waterways.” The United Kingdom accepted the first wider, formula in respect of itself and of most of its dependent territories, including Fiji and Malta, each of which subsequently transmitted to the Secretary-General a notification of succession. The notifications indicated that Fiji and Malta continued to consider themselves bound by the Protocol in the form in which it had been extended to their respective territories by their predecessor.

(7) The General Agreement on Tariffs and Trade also furnishes evidence of practice on this question. Article XIV permits a party to elect to be governed by the provisions of Annex J in lieu of certain provisions of the article and in 1948 this election was made by the United Kingdom. In 1957, Ghana and the Federation of Malaya became independent and, on the sponsorship of the United Kingdom, both were declared by the contracting parties to be deemed to be parties to the Agreement. At the same time the contracting parties declared that the United Kingdom’s election of Annex J should be deemed to apply to both the newly independent States. A somewhat different, but still analogous, form of election is offered to a party to GATT under Article XXXV, paragraph 1, which provides:

This Agreement, or alternatively Article II of this Agreement shall not apply as between any contracting party and any other contracting party if:

(a) The two contracting parties have not entered into tariff negotiations with each other, and

(b) Either of the contracting parties, at the time either becomes a contracting party, does not consent to such application.

When Japan became a party to GATT in 1955, Belgium, France and the United Kingdom all invoked this provision and thereby excluded the application of GATT in their relations with Japan. A large number of the former dependencies of those countries which have since been deemed to be parties to the Agreement have considered themselves as inheriting their predecessor’s invocation of Article XXXV, paragraph 1, as against Japan. Although the three predecessor States themselves and some of their successor States have now withdrawn their invocations of that provision, it is still in force for several of their successors.

(8) For reasons similar to those given in the case of reservations, the Commission was of the opinion that a State notifying its succession to a multilateral treaty should have the same rights of choice under the terms of the treaty as are allowed to States establishing their consent to be bound by any other procedures. Once succession is conceived not as an automatic replacement of the predecessor but as an option to continue the territory’s participation in the treaty by an act of will establishing consent to be bound, there can be no objection to allowing a newly independent State the same
rights of choice as it would have under the terms of the treaty if it were becoming a party by accession. Paragraph 1 of article 20 accordingly permits a newly independent State when making a notification of succession to exercise any right of choice provided for in the treaty. The newly independent State may therefore exercise such a right under the same conditions as a State establishing its consent to be bound by a procedure other than a notification of succession. The Commission made some drafting changes in the corresponding provision (former paragraph 2) of the 1972 text and added a cross-reference to articles 16 and 17.

(9) Treaties which accord a right of choice in respect of parts of the treaty or between different provisions not infrequently provide for a power afterwards to modify the choice. Indeed, where the choice has the effect of limiting the scope of the State's obligations under the treaty, a power to cancel the limitation by withdrawing the election is surely to be implied if the treaty contains no provision governing the matter. As to a newly independent State when it has established itself as a party to the treaty in its own right, it must clearly be considered as having the same right as any other party to withdraw or modify a choice in force in respect of its territory; and paragraph 2 of article 20 so provides. The wording of this paragraph (former paragraph 3) has been reviewed in the light of the drafting changes introduced in paragraph 1. Moreover, for the sake of precision, it has been added that the newly independent State may withdraw or modify any consent or choice "made by itself or made by the predecessor State in respect of the territory to which the succession of States relates."

(10) In 1972, the Commission reached the conclusion that if a newly independent State transmits a notification of succession without referring specifically to its predecessor's choice in respect of parts of the treaty or between differing provisions, and without declaring a choice of its own, then it should be presumed to intend to maintain the treaty in force in respect of its territory on the same basis as it was in force at the date of independence; in other words, on the basis of the choice made by its predecessor. This conclusion was based on considerations similar to those indicated with respect to reservations. The Secretary-General normally seeks to obtain clarification of the newly independent State's intention in this regard when it transmits its notification of succession, and it is no doubt desirable that the State should make its position clear. But this does not always occur, and then it is both logical and necessary (otherwise, there might be no means of determining which version of the provisions was binding on the newly independent State) to provide for a presumption in favour of the maintenance of the predecessor's choice. Here, there would be less justification for the reversal of the presumption than in the case of reservations. The newly independent State which makes a notification of succession inherits a treaty as it stands at the date of the succession of States subject to such additional choice that may be conferred on it. Paragraph 3 of article 20, former paragraph 1, accordingly states the rule in terms of a presumption in favour of the maintenance of the predecessor State's consent to be bound by part of a treaty and choice between differing provisions. Drafting changes consequential to those made in paragraphs 1 and 2 of the article were also made in this paragraph.

Article 21. Notification of succession

1. A notification of succession in respect of a multilateral treaty under article 16 or 17 must be made in writing.

2. If the notification of succession is not signed by the Head of State, Head of Government or Minister of Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification of succession shall:

(a) be transmitted by the newly independent State to the depositary or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the newly independent State on the date on which it has been received by the depositary or, if there is no depositary, on the date on which it has been received by all the parties or, as the case may be, by all the contracting States.

4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification of succession or any communication made in connexion therewith by the newly independent State.

5. Subject to the provisions of the treaty, such notification of succession or such communication shall be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

Commentary

(1) Article 21 concerns the procedure through which a newly independent State may exercise its right under article 16 or 17 to establish its status as a party or contracting State to a multilateral treaty by way of succession.

(2) An indication of the practice of the Secretary-General in the matter may be found in the letter which he addresses to newly independent States inquiring as to their intentions concerning treaties of which he is the depositary. This letter contains the following passage:

Under this practice, the new States generally acknowledge themselves to be bound by such treaties through a formal notification addressed to the Secretary-General by the Head of the State or Government or by the Minister for Foreign Affairs.*

* 1972 draft, article 17.

However, although the notifications received by the Secretary-General have for the most part been signed by the Head of State or Government or by the Minister for Foreign Affairs, a few States have sent communications signed by an official of the Foreign Ministry or by the Head of their Permanent Mission to the United Nations, acting under instructions, and these have been accepted as sufficient by the Secretary-General.

(3) Under the depositary practice of the Secretary-General, therefore, the deposit of a formal instrument, such as would be required for ratification or accession, is not considered necessary. All that is needed is a written notification in which the State expresses its will that its territory should continue to be bound by the treaty. Moreover, although the Secretary-General considers it desirable that the notification should emanate from the Head of State or Government or from the Minister for Foreign Affairs, any signature which sufficiently evidences the authority of the State to make the notification is considered adequate.

(4) The depositary practice of the Swiss Government also appears to accept as adequate any communication which expresses authoritatively the will of a newly independent State to continue to be bound by the treaty. Thus, in the case of the Berne Convention for the Protection of Literary and Artistic Works and its subsequent Acts of revision, of which it is the depositary, the Swiss Government has accepted the communication of a "declaration of continuity" as the normal procedure for a newly independent State to adopt today in exercising its right to become a party by succession. Similarly in the case of the Geneva Humanitarian Conventions of 1864, 1906, 1929 and 1949, of which the Swiss Federal Council is the depositary, the communication of a "declaration of continuity" has been the normal procedure through which newly independent States have parties by succession. Any other formula, such as "declaration of application" or "declaration of continuance of application," is accepted by the Swiss Federal Council as sufficient, provided that the newly independent State's intention to consider itself as continuing to be bound by the treaty is clear. The Swiss Federal Council also accepts the communication of a declaration of continuity in almost any form, provided that it emanates from the competent authorities of the State: for example, a note, a letter or even a cable; and the signature not only of a Head of State or Government and Foreign Minister but also of an authorized diplomatic representative is considered by it as sufficient evidence of authority to make the declaration on behalf of the State. Such declarations of continuity, on being received by the Swiss Federal Council, are registered by it with the United Nations Secretariat in the same way as notifications of accession.

(5) The practice of other depositaries is on similar lines. The practice of the United States, for example, has been to recognize the right of newly independent States to declare themselves bound uninterruptedly by multilateral treaties of a non-organizational type concluded in their behalf by the parent State before the new State emerged to full sovereignty.

(6) In some instances the Swiss Government has accepted a notification not from the newly independent State itself but from the predecessor State. It did so before the Second World War when in 1928 the United Kingdom notified to it the desire of Australia, British India, Canada, New Zealand and South Africa to be considered as parties to the Berne Convention for the Protection of Literary and Artistic Works, and in 1937 when the United Kingdom notified to it the participation of Burma in the Geneva Humanitarian Conventions of 1929. It has also done so in one instance since the Second World War: namely, in 1949 when it accepted as sufficient a communication from the Netherlands Government expressing the view of the Government that the new Republic of Indonesia should be considered as a member of the Berne Union.

(7) But the cases of the former British Dominions were very unusual owing both to the circumstances of their emergence to independence and to their special relation to the British Crown at the time in question. Accordingly, no general conclusion should be drawn from these cases that the notification of a predecessor State is as such sufficient evidence of the newly independent State's will to be considered as continuing to be bound by a treaty. Clearly, a newly independent State in the early days of its independence may find it convenient to employ the diplomatic services of the predecessor State for the purpose of making a communication to a depositary. But every consideration of principle—and not the least the principles of independence and self-determination—demands that the act expressing a newly independent State's will to be considered a party to the treaty in the capacity of a successor State should be its own and not that of the predecessor State. In other words, a notification of succession, in order to be effective, should either emanate directly from the competent authorities of the newly independent State or be accompanied by evidence that it is communicated to the depositary expressly by direction of those authorities. If the Swiss Government's acceptance of the Netherland's Government's communication regarding Indonesia's succession to the Berne Convention, mentioned in the

888 United Nations, Materials on Succession of States (op. cit.), p. 224.
890 Burma, although separated from India, was not then an independent State; but it is treated as having become a party to the Conventions in 1937 (ibid., p. 39, para. 160 and p. 50, para. 216).
891 This was so in the case of the former British Dominions.
preceding paragraph, is to be understood as based upon a different view, it is not a precedent which could be endorsed by the Commission. The very fact that the Republic of Indonesia took early action to denounce the Convention confirms the desirability of requiring a notification of succession to emanate from the competent authorities of the newly independent State.\footnote{Yearbook . . . 1968, vol. II, pp. 13-14, document A/CN.4/200 and Add.1-2, paras. 26-31.}

(8) As indicated above, a newly independent State may notify its succession in respect of a treaty not only under article 16, when its predecessor was a party to the treaty at the date of succession, but also under article 17, when its predecessor was a contracting State. For this reason a “notification of succession” is defined in article 2, paragraph 1 (g), as meaning in relation to a multilateral treaty “any notification, however, phrased or named, made by a successor State expressing its consent to be bound by the treaty.” This definition assumes that the deposit of a formal instrument of succession is not required, and that assumption is fully confirmed by the analysis of the practice which has been given in the preceding paragraphs of the present commentary. The question therefore is: what are the minimum formal requirements with which a notification of succession should comply? Although the two cases are not exactly parallel, the Commission considered that guidance may be found in article 67 of the Vienna Convention, which contains provisions regarding the instruments required for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty. That article requires that the notification of any claim to invoke a ground of invalidity, termination, etc., shall be in writing (paragraph 1); that any act declaring invalid, terminating, etc., a treaty shall be carried out through an instrument communicated to the other parties; and that if the instrument is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the production of full powers may be called for (paragraph 2).

(9) Accordingly, the phrasing of paragraphs 1 and 2 of article 21 reflects the language used in article 67 of the Vienna Convention. They provide that a notification of succession under article 16 or 17 must be made in writing and that, if it is not signed by the Head of State, Head of Government or Minister of Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers. Those paragraphs are identical to the 1972 text except that in paragraph 2 the words “of succession” have been added after the word “notification” since, as indicated above, article 2 defines the expression “notification of succession” and not the term “notification.”

(10) Paragraph 3 of the 1972 text was drafted to specify the moment at which the notification of succession should be considered as having been made on the basis of the system provided for in article 78 of the Vienna Convention. Paragraph (a) of article 78 of the Vienna Convention in substance provides that any notification or communication to be made by any State under the Convention is to be transmitted to the depositary, if there is one, and, if not, direct to the States for which it is intended. Paragraph (b) of article 78 then provides that any such notification or communication is to “be considered as having been made by the State in question only upon its receipt by the depositary.” Paragraph (c), however, adds that, if transmitted to a depositary, it is to “be considered as received by the State for which it was intended only when the latter state has been informed by the depositary . . . .” These were \textit{mutatis mutandis} the provisions reproduced in paragraph 3 of the 1972 text of the present article.

(11) At the present session, the Commission reviewed the matter and concluded that the 1972 system was not completely satisfactory, in particular with regard to the determination of the date on which a notification of succession should be considered as having been made by the newly independent State. Precision in the determination of such a date being essential in the context of the present draft articles for all States concerned as well as, in general, for certainty and security in treaty relations, the Commission decided to modify the text adopted in 1972. The changes introduced in article 22 of the draft provided an additional justification for such a modification.

(12) A notification of succession being an act similar in kind to the deposit or notification of an instrument establishing the consent of a State to be bound by a treaty, the Commission thought that the relevant rules laid down in article 16 of the Vienna Convention should be applied here by analogy. Article 16 of the Vienna Convention states that, unless the treaty otherwise provides, instruments of ratification, acceptance, approval or accession establish the consent of the State to be bound by a treaty upon “their deposit with the depositary” or upon “their notification to the contracting States or to the depositary, if so agreed”. The effect of these provisions is that under the procedure of “deposit” the consent to be bound is established at once upon the deposit of the instrument with the depositary; and that the same is true under the procedure of “notification” where the treaty in question provides for the notification to be made to their depositary. On the other hand, where the treaty provides for notification to the other contracting States, article 78 of the Vienna Convention applies and the consent to be bound is established only upon the receipt of the notification by the contracting States\footnote{The expression “contracting States” is defined in article 2, paragraph 1 (f) of the Vienna Convention as meaning “a State which has consented to be bounded by the treaty, whether or not the treaty has entered into force.”} concerned.

(13) In the light of the foregoing considerations, \textbf{paragraph 2 (b) of this article sets forth the rule that, unless the treaty otherwise provides, the notification of succession shall be considered to be made by the newly independent State on the date on which it has been received by the depositary, or, if there is no depositary, on the date on which it has been received by all the parties or, as the case may be, by all the contracting States. Consequently, if there is a depositary, by analogy with sub-paragraphs (b) and (c) of article 16 of the Vienna Convention, the date of receipt of the notification by the depositary shall be the date of succession.}
Vienna Convention, the notification of succession of the newly independent State is considered to have been made on the date on which it was received by the depositary and it is as from that date that the legal nexus is established between the notifying newly independent State and any other party or contracting State. If there is no depositary, by analogy with sub-paragraph (c) of article 16 and sub-paragraph (b) of article 78 of the Vienna Convention, the notification of succession is considered to have been made on the date on which it was received by all the parties or, as the case may be, by all the contracting States and it is from that date that the legal nexus is established between the notifying newly independent State and any other party or contracting State. Sub-paragraph 3 (a) of the article, as sub-paragraph (a) of article 78 of the Vienna Convention, lays down that, unless the treaty otherwise provides, the notification of succession shall be transmitted by the newly independent State to the depositary or, if there is no depositary, to the parties or the contracting States. The Commission replaced the somewhat vague expression “transmitted… to the States for which it is intended” of the 1972 text by the expression “transmitted… to the parties or the contracting States”.

(14) Paragraph 4 of the article then provides that the rule set forth in paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification of succession or any communication made in connexion therewith by the newly independent State. The main purpose of this provision, which was not included in the 1972 text, is to make it clear that although according to paragraph 3, if there is a depositary, the notification of succession is considered as having been made by the newly independent State on the date on which it has been received by the depositary it does not imply any derogation whatsoever from any duty that the depositary may have “to inform” the parties or the contracting States of the notification of succession or any communication made in connexion therewith. Lastly, the interest of the States concerned is likewise protected, if there is a depositary, by the provision set forth in paragraph 5 of this article which corresponds to paragraph 3 (c) of the 1972 text. It provides that, subject to the provisions of the treaty, the notification of succession or any other communication herewith shall be considered as received by the State for which it was intended only when the latter State has been informed by the depositary. Paragraph 5 is concerned with the transmission of information by the depositary and does not affect the operation of paragraph 3, which determines the date of making of a notification of succession.

Article 22. Effects of a notification of succession

1. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 16 or article 17, paragraph 2, shall be considered a party to the treaty from the date of the succession of States or from the date of entry into force of the treaty, whichever is the later date.

2. Nevertheless, the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession except so far as that treaty may be applied provisionally in accordance with article 26 or as may be otherwise agreed.

3. Unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes a notification of succession under article 17, paragraph 1, shall be considered a contracting State to the treaty from the date on which the notification of succession is made.

Commentary

(1) This article deals with the legal effects of a notification of succession made by a newly independent State under article 16 or 17 of the present draft. If determines the date on which that State is to be considered a party or, as the case may be, a contracting State to the treaty in question following the making of its notification of succession, namely once the consent of the newly independent State to be bound by the treaty has been given as provided for in article 21 of the present draft.

(2) The treaty practice appears to confirm that, on making a notification of succession a newly independent State is to be considered as being a party to the treaty from the date of independence. The Secretariat memorandum “Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary” comments on this point as follows:

In general, new States that have recognized that they continue to be bound by treaties have considered themselves bound from the time of their attainment of independence. With regard to international labour conventions, however, it is the custom for new States to consider themselves bound only as of the date on which they are admitted to the International Labour Organisation. Furthermore, the letter sent by the Secretary-General to newly independent States in his capacity as depositary of multilateral treaties makes no reference to the periods of delay contained in some of the treaties mentioned in his letter. It simply observes:

... the new States generally acknowledge themselves to be bound by such treaties through a formal notification addressed to the Secretary-General... The effect of such notification which the


874 Today it is very common for a treaty to provide for a delay of thirty days or of three, or even six, months after the deposit (or notification) of the last of the number of instruments prescribed for the treaty’s entry into force; and for a delay of the same period for the subsequent entry into force of the treaty for individual States. This is, indeed, the case with the great majority of the multilateral treaties of which the Secretary-General is the depositary—a category of treaties which have quite frequently been the subject of notifications of succession. The question arises, therefore, whether a treaty provision prescribing such a period of delay for instruments of ratification, accession, etc., should be considered as extending by analogy to notifications of succession.

875 For instance, under article 77 of the Vienna Convention.

876 1972 draft, article 18.
It follows that periods of delay are not treated as relevant to notifications of succession in the depositary practice of the Secretary-General. It therefore seems as if the notion of continuity, inherent in "succession," has been regarded as excluding the application to notifications of succession of treaty provisions imposing a period of delay for the entry into force for a particular State of a treaty upon deposit of an instrument giving its consent to be bound even if the treaty is already in force generally. This could be justified on the ground that the right to notify succession normally derives not from the treaty itself but from customary law. Moreover, notifications of succession, ex hypothesi, presuppose a relation between the territory in question and the treaty that has already been established by the predecessor State.

(3) The statement in the Secretariat memorandum quoted above regarding labour conventions needs a word of explanation. Notifications of succession to labour conventions take the form of declarations of continuity which are made in connexion with the new State's acceptance of, or admission to, membership of the ILO; and the date of their registration with the United Nations Secretariat is that of its acquisition of membership. Equally, the date of the entry into force of the convention for the new State is the date of its acquisition of membership, since that is the date on which its declaration of continuity takes effect and establishes its consent to be bound by the convention. But the fact remains that in the practice of the ILO a State which makes a declaration of continuity is thereafter considered as a party to the convention concerned as from the date of its independence.

(4) A similar view of the matter seems to be taken in regard to the multilateral treaties of which the Swiss Government is the depositary. Thus, in the case of the Berne Convention for the Protection of Literary and Artistic Works and its subsequent Acts of revision a newly independent State which transmits a notification of succession is regarded as continuously bound by the Convention as from the date of independence. Indeed, it seems that the principle followed is that the Convention is regarded as applying uninterruptedly to the successor State as from the date when it was extended to that State's territory by the predecessor State.74 Sri Lanka (Ceylon) and Cyprus, for example, are listed as having become parties to the Rome Act on 1 October 1931, the date of its extension to these countries by Great Britain. By contrast, when a new State establishes its consent to be bound by means of accession, it is regarded as a party only from the date on which the instrument of accession takes effect.75 In the case of the Geneva Humanitarian Conventions, the rule now followed by the Swiss Federal Council is that a newly independent State which transmits a notification of succession is to be considered as a party from the date on which it attained independence; and it now usually states this when registering the notification with the United Nations Secretariat.76

(5) The Netherlands Government, as depositary of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, appears to adopt a position close to that of the Swiss Government in regard to the Conventions for the Protection of Literary and Artistic Works. In its table of signatures, ratifications, accessions etc., it records successor states as parties not from the date of their own independence but from that of their predecessor State's ratification or accession.77 The depository practice of the United States of America is to recognize the right of new States "to declare themselves bound uninterruptedly by multilateral treaties of a non-organizational type concluded in their behalf by the parent State...."78 Giving examples of this practice, the United States mentioned Sri Lanka (Ceylon) and Malaysia (Malaya) as cases where newly independent States have explicitly taken the position that they consider themselves as parties to the International Air Services Transit Agreement (1944) as from the date of its acceptance by their predecessor, the United Kingdom,79 and it lists Pakistan as a case where the newly independent State was considered to have become a party as from the date of independence—the date of its partition from India.80

(6) The practice is therefore consistent in applying the principle of continuity in cases of notification of succession, but shows variation in sometimes taking the date of independence and sometimes the date when the predecessor State became a party to the treaty as the relevant date. The more general practice, and the settled practice of the Secretary-General as depositary of a large number of multilateral treaties, is to consider a State which transmits a notification of succession as a party to the treaty from the date of independence; that is, from the moment when the "succession" occurred. This practice seems logical since it is at this date that the newly independent State attains its statehood and acquires its international responsibility for the territory to which the succession relates. The concept of succession and continuity are fully satisfied if a newly independent State's notification of succession is held to relate back to the date of independence. To relate back the notification beyond that date would be to make the newly independent State responsible internationally for the defaults of its predecessor in the performance of the treaty prior to succession. This seems excessive, and it is difficult to believe that the newly independent States which have expressed themselves as becoming parties

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75 One month after the deposit of the instrument (ibid., p. 23, para. 81).
76 Ibid., pp. 51-52, paras. 219-224. Only in one early case (Trans-jordan), has the Swiss Federal Council treated the date of notification as the date from which the provisions of the Convention bound the new State (Ibid., p. 52, para. 223).
77 Ibid., p. 31, para. 125.
78 United Nations, Materials on Succession of States (op. cit.), p. 224.
79 Ibid., p. 225.
80 Ibid.
from the date of their predecessor’s notification, accession, acceptance or approval of the treaty intended such a result. True, these newly independent States are, for the most part, States which had entered into a “devolution agreement” with their predecessor State. But it is equally difficult to believe that, by entering into a devolution agreement in however wide terms, they intended to do more than assume thenceforth in respect of the territory the international responsibility for the future performance of the treaty which had previously attached to their predecessor.

(7) The 1972 text of the article provided that, while a newly independent State which makes a notification of succession to a treaty which was in force at the date of the succession of States would be considered a party to the treaty on the receipt of the notification (former paragraph 1), the treaty would be considered as being in force in respect of that newly independent State from the date of the succession of States subject to certain specific exceptions (former paragraph 2). The comments of delegations and Governments on articles 12, 13 and 18 of the 1972 draft called the attention of the Commission to a number of problems that would be created by these provisions.

(8) Article 18 of the 1972 draft would have given retroactive effect to a notification of succession by a newly independent State so that, even if the notification of succession was delayed for a long period after the date of the succession of States, a multilateral treaty would as a general rule be regarded as in force between that State and other parties with effect from the date of the succession of States. In this respect, other parties to the treaty would have had no choice, but the newly independent State would have been able to choose a later date if the retroactive application of the treaty was inconvenient from its point of view. At the present session, several members of the Commission observed that if this were the rule it would create an impossible legal position for the States parties to the treaty which would not know during the interim period whether or not they were obliged to apply the treaty in respect of the newly independent State. Such a State might make a notification of succession years after the date of the succession of States and, in these circumstances, a party to the treaty might be held to be responsible retroactively for breach of the treaty.

(9) In this connexion, some members of the Commission thought that there was an inherent contradiction between paragraphs 1 and 2 of article 18 of the 1972 draft because by definition a party to a treaty means one for which the treaty is in force and, according to paragraph 1, a newly independent State would only become a party from the date of making of the notification of succession while, according to paragraph 2, the treaty would be considered as in force in respect of the newly independent State from the date of the succession of States. Other members expressed the view that paragraph 1 did not entirely accord with the practice of the Secretary-General, who normally regarded a newly independent State as a party to the treaty from the date of the succession of States and not from the date of the making of a notification of succession.

(10) In the light of such considerations, the Commission concluded that article 18 of the 1972 draft should be redrafted so as to provide for the element of continuity consistent with the concept of a succession of States, bearing in mind the legal nexus between a multilateral treaty and the territory of the newly independent State at the date of the succession. It decided that this could be done by providing in principle that the newly independent State making a notification of succession with respect to a multilateral treaty should be regarded as a party from the date of the succession of States.

(11) On the other hand, the Commission considered that some provision should be adopted to avoid the unsatisfactory consequences which would result from giving retroactive effect to the notification of succession so far as concerned the rights and obligations under the treaty as between the newly independent State and the parties to it. During the present session, the Commission considered several means of alleviating the retroactive effects that would follow if the newly independent State were considered as a party to the treaty from the date of the succession of States without qualification. It considered the possibility of inserting in articles 16 and 17 or in article 22 time-limits for the making of a notification of succession. It was, however, not possible to agree on what might be regarded as a reasonable period for this purpose and several members of the Commission objected in principle to the use of time-limits. They would not in any event have solved completely the problems involved in the retroactive effect of article 18, paragraph 2 of the 1972 draft. Finally, the Commission concluded that the most satisfactory solution would be to regard the operation of the treaty as suspended between the date of a succession of States and the date of making of the notification of succession. The Commission considered that if the States concerned wished to apply the treaty during the interim period this could normally be done by means of provisional application in accordance with article 26. It was, however, pointed out that in certain circumstances, for example in cases relating to the application of the 1929 Warsaw Convention for the Unification of Certain Rules relating to International Carriage by Air, to which some of the comments of Governments had called attention, it might be desirable to allow the retroactive application of the treaty if the parties so agreed.

(12) A solution on the lines indicated in the preceding paragraph would make a notification of succession under article 16 or article 17, paragraph 2 of the present draft retroactive in effect as regards the status of the newly independent State as a party to the treaty but would avoid the serious consequences of regarding the
treaty as operative between the newly independent State and the other parties with retroactive effect. It would, of course, involve certain additional duties for the depositary who might have to transmit to the newly independent State information concerning the treaty received between the date from which the newly independent State is considered as a party and the date on which the notification of succession is made. From the point of view of the newly independent State, however, this would have the advantage of putting it into the same position in this respect as other parties with effect from the date of the succession of States or from the date of entry into force of the treaty, as the case might be.

(13) Some members of the Commission observed that to suspend the operation of the treaty so far as the newly independent State was concerned would be virtually the same as saying that it was not in force and that this would be contrary to the definition of “party” which means “a State... for which the treaty is in force.” Strictly speaking, however, this would not be the case because the treaty would be in force although its operation would be suspended. Moreover, suspension of the operation of the treaty would be subject to the exceptions mentioned in paragraph 11 above. On the whole, the Commission thought that this solution, while it might not be in strict compliance with all the provisions of the Vienna Convention, would be in accord with the spirit of article 28 on the non-retroactivity of treaties and with the possibility of suspension of the operation of a treaty by consent of the parties for which article 57 provides. In any event, the Commission took the view that this was a case in which it could properly rely on article 73 of the Vienna Convention which provides expressly that the Convention shall not prejudice any question that may arise in regard to a treaty from a succession of States.

(14) In the light of the above considerations, paragraph 1 of the present article provides that “unless the treaty otherwise provides or it is otherwise agreed,” when a newly independent State makes a notification of succession under article 16 or article 17, paragraph 2, it shall be considered a party to the treaty from the date of the succession of States or from the date of the entry into force of the treaty, whichever is the later.

(15) Notwithstanding that under paragraph 1 the newly independent State may be regarded as a party to the treaty from the date of the succession of States or some later date before the making of the notification of succession, paragraph 2 provides that the operation of the treaty shall be considered as suspended as between the newly independent State and the other parties to the treaty until the date of making of the notification of succession except so far as the treaty may be applied provisionally or as may be otherwise agreed. If the parties so agree, the operation of the treaty may be made retroactive to the date of the succession of States.

(16) Lastly, paragraph 3 deals with the case of a notification of succession made under article 17, paragraph 1, namely the case where the predecessor State was a contracting State in respect of the territory to which the succession of States relates at the date of the succession but the treaty is not in force at the date when the notification of succession is made. The paragraph states that, unless the treaty otherwise provides or it is otherwise agreed, a newly independent State which makes such a notification of succession shall be considered a contracting State to the treaty from the date on which the notification is made. This provision corresponds in effect to article 18, paragraph 1 in the 1972 draft.

SECTION 3. BILATERAL TREATIES

Article 23. Conditions under which a treaty is considered as being in force in the case of a succession of States

1. A bilateral treaty which, at the date of a succession of States was in force in respect of the territory to which the succession of States was in force in respect of the territory to which the succession of States relates, is considered as being in force between a newly independent State and the other State party in conformity with the provisions of the treaty when:

(a) They expressly so agree; or

(b) By reason of their conduct they are to be considered as having so agreed.

2. A treaty considered as being in force under paragraph 1 applies in the relations between the newly independent State and the other State party from the date of the succession of States, unless a different intention appears from their agreement or is otherwise established.

Commentary

(1) This article deals with the conditions under which a bilateral treaty which was in force between the predecessor State and another State at the date of the succession of States is considered as being in force between the newly independent State and the other State party. As already indicated, the question whether a newly independent State may have a right to consider itself a party or a contracting State in its own name to treaties in force at the date of the succession of States is separate and different from the question whether it is under an obligation to do so. Article 15 of the present draft lays down the general rule that a newly independent State is not ipso jure bound by its predecessor State’s treaties nor under any obligation to take steps to become a party or a contracting State to them. This rule applies to bilateral and multilateral treaties alike; but it still leaves the question as to whether this means that the newly independent State is in the position of having a clean slate in regard to bilateral treaties.

(2) The clean slate metaphor, as already noted in the commentary to article 15, is admissible only in so far as it expresses the basic principle that a newly independent State begins its international life free of any general obligation to take over the treaties of its predecessor. The

* See above, para. 2 of the commentary to article 15.

** 1972 draft, article 19.
evidence is plain that a treaty in force with respect to a territory at the date of a succession is frequently applied afterwards as between the newly independent State and the other party or parties to the treaty; and this indicates that the former legal nexus between the territory and the treaties of the predecessor State has at any rate some legal implications for the subsequent relations between the newly independent State and the other parties to the treaties. If in the case of many multilateral treaties that legal nexus appears to generate an actual right for the newly independent State to establish itself as a party or a contracting State, this does not appear to be so in the case of bilateral treaties.

(3) The reasons are twofold. First, the personal equation—the identity of the other contracting party—although an element also in multilateral treaties, necessarily plays a more dominant role in bilateral treaty relations; for the very object of most bilateral treaties is to regulate the mutual rights and obligations of the parties by reference essentially to their own particular relations and interests. In consequence, it is not possible automatically to infer from a State's previous acceptance of a bilateral treaty as applicable in respect of a territory its willingness to do so after a succession in relation to a wholly new sovereign of the territory. Secondly, in the case of a bilateral treaty there is no question of the treaty's being brought into force between the newly independent State and its predecessor, as happens in the case of a multilateral treaty. True, in respect of the predecessor State's remaining territory the treaty will continue in force bilaterally as between it and the other party to the treaty. But should the treaty become applicable as between that other party and the newly independent State, it will do so as a new and purely bilateral relation between them which is independent of the predecessor State. Nor will the treaty come into force at all as between the newly independent and predecessor States. No doubt, the newly independent and predecessor States may decide to regulate the matter in question, e.g. extradition or tariffs, on a similar basis. But if so, it will be through a new treaty which is exclusive to themselves and legally unrelated to any treaty in force prior to independence. In the case of bilateral treaties, therefore, the legal elements for consideration in appreciating the rights of a newly independent State differ in some essential respects from those in the case of multilateral treaties.

(4) From the considerable measure of continuity found in practice, a general presumption has sometimes been derived that bilateral treaties in force with respect to a territory and known to the newly independent State continue in force unless the contrary is declared within a reasonable time after the newly independent State's attainment of independence. Some writers even see in it a general principle of continuity implying legal rights and obligations with respect to the maintenance in force of a predecessor State's bilateral treaties. In some categories of treaties, it is true, continuity in one form or another occurs with impressive regularity. This is, for example, the case with the air transport agreements and trade agreements examined in the second and third Secretariat studies on “Succession in respect of bilateral treaties.”

(5) The prime cause of the frequency with which some measure of continuity is given to such treaties as air transport and trade agreements in the event of a succession seems to be the practical advantage of continuity to the interested States in present conditions. Air transport is as normal a part of international communications today as railway and sea transport; and as a practical matter it is extremely likely that both the newly independent State and the other interested State will wish any existing air services to continue at least provisionally until new arrangements are made. Again, international trade is an integral part of modern international relations; and practice shows that both the newly independent State and the other interested States find it convenient in many instances to allow existing trade arrangements to run on provisionally until new ones are negotiated.

(6) Agreements for technical or economic assistance are another category of treaties where the practice shows a large measure of continuity. An example may be seen in an Exchange of Notes between the United States of America and Zaire [Congo (Leopoldville)] in 1962 concerning the continuance in force of certain United States-Belgian treaties of economic co-operation with respect to the Congo, which is reproduced in Materials on Succession of States. In general, the view of the United States, the interested other party in the case of many such treaties, has been stated to be that an economic co-operation agreement “should be regarded as continuing in force with a newly independent State if that State continues to accept benefits under it”.

(7) A measure of “de facto continuity” has also been found in certain other categories of treaties such as those concerning abolition of visas, migration or powers of consuls and in tax agreements. Continuity is also a feature of the practice in regard to bilateral treaties of a

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889 See United Nations, Materials on Succession of States (op. cit.), pp. 219-220. See also an Exchange of Notes between United States of America and the Somali Republic in 1961 (ibid., pp. 216 and 217).
"territorial" or "localized" character. But these categories of treaties raise special issues which have been examined separately in the commentary to articles 11 and 12 above.

(8) The Commission is therefore aware that State practice shows a tendency towards continuity in the case of certain categories of treaties. It does not believe, however, that the practice justifies the conclusion that the continuity derives from a customary legal rule rather than the will of the States concerned (the newly independent State and the other party to its predecessor's treaty). At any rate, practice does not seem to support the existence of a unilateral right in a newly independent State to consider a bilateral treaty as continuing in force with respect to its territory after independence regardless of the wishes of the other party to the treaty. This is clear from some of the State practice already set out in commentaries to previous articles. Thus, the numerous unilateral declarations by newly independent States examined in the commentary to article 9 have unmistakably been based on the assumption that, as a general rule, the continuance in force of their predecessor's bilateral treaties is a matter on which it would be necessary to reach an accord with the other party to each treaty. The Commission is aware that those declarations envisage that some categories of treaties may continue in force automatically under customary law. But apart from these possible exceptions they clearly contemplate bilateral treaties as continuing in force only by mutual consent. Again, as pointed out in the commentary to article 8 even when a predecessor State purports to transmit rights under its treaties to its successor State, the express or tacit concurrence of the other contracting party has still been regarded as necessary to make a bilateral treaty enforceable as between it and the newly independent State.

(9) Further State practice to the same effect is contained in Materials on Succession of States.\footnote{Ibid., p. 230.} Argentina, for example, which did not accept Pakistan's claim that the Argentine-United Kingdom Extradition Treaty (1889) should be considered as continuing in force automatically with respect to Pakistan, afterwards assented to the extension of that treaty to Pakistan "by virtue of a new agreement" signed in 1953 and formalized by an exchange of notes.\footnote{Ibid., pp. 211-224.} Similarly, correspondence between Ghana and the United States in 1957-1958 shows that the continuance of former United Kingdom treaties in respect of Ghana was regarded as a matter to be dealt with by the conclusion of an agreement.\footnote{Yearbook... 1970, vol. II, pp. 109 et seq., document A/CN.4/229, paras. 23, 33, 35, 62-66, 68, 69, 71, 72, 74 and 77-79.} Agreements of this kind in the form of exchanges of notes are in many cases registered with the Secretariat under Article 102 of the Charter (ibid., p. 128, para. 135).

(10) Continuity of bilateral treaties, as is emphasized in the Secretariat studies,\footnote{Ibid., pp. 127 and 128, paras. 134 and 135. See also Yearbook... 1971, vol. II (Part Two), pp. 146-147, document A/CN.4/243, paras. 177-187, and ibid., pp. 181-183, document A/CN.4/243/Add.1, paras. 169-177.} has been recognized or achieved on the procedural level by several different devices: a fact which in itself suggests that continuity is a matter of the attitudes and intention of the interested States. True, in certain categories of treaties—e.g. air transport agreements—continuity has quite often simply occurred; and this might be interpreted as indicating recognition of a right or obligation to maintain them in force. But even in these cases the continuity seems in most instances to be rather a tacit manifestation of the will of the interested States.\footnote{Some instances can certainly be found where one or other interested States sought to place the continuity on the basis of a legal rule. An example is Japan's claim as of right to the continuance of its traffic rights into Singapore which had been granted to it in the United Kingdom-Japan Agreement for Air Services (1932). This claim was made first against Malaysia and then, after the separation of Singapore from Malaysia, against Singapore itself. But the successor States, first Malaysia and then Singapore, underlined in each case the "voluntary" character of their acceptance of the obligations of the United Kingdom under the 1932 Agreement. (Ibid., pp. 137-138, 140-141, document A/CN.4/243, paras. 122-123 and 138-143.)}

(11) Individual instances of continuity have necessarily to be understood in the light of the general attitude of the States concerned in regard to succession in respect of bilateral treaties. Thus frequent reference is made by writers to the listing of treaties against the name of a successor State in the United States publication Treaties in Force, but this procedure has to be understood against...

\footnote{Ibid., pp. 6 and 7.} \footnote{Ibid., pp. 211-213.} \footnote{Ibid., pp. 229 and 230.}
the background of the United States’ general practice which was authoritatively explained in 1965 as follows:

In practice the United States Government endeavours to negotiate new agreements, as appropriate, with a newly independent State as soon as possible. In the interim it tries, where feasible, to arrive at a mutual understanding with the new State specifying which bilateral agreements between the United States and the former parent State shall be considered as continuing to apply. In most cases the new State is not prepared in the first years of its independence to undertake a commitment in such specific terms. To date the United States-Ghana exchange is the only all-inclusive formal understanding of this type arrived at, although notes have been exchanged with Trinidad and Tobago and Jamaica regarding continued application of the 1946 Air Services Agreement. An exchange of notes with Congo (Brazzaville) on continuation of treaty obligations is couched only in general terms.499

That the United Kingdom regards the continuity of bilateral treaties as a matter of consent on both sides clearly appears from its reply to an inquiry in 1963 from the Norwegian Government concerning the continuance in force of the Anglo-Norwegian Double Taxation Agreement (1951) with respect to certain newly independent States:

The Foreign Office replied to the effect that the Inheritance Agreements concluded between the United Kingdom and those countries now independent were thought to show that the Governments of those countries would accept the position that the rights and obligations under the Double Taxation Agreement should still apply to those countries but that the question whether the Agreement was, in fact, still in force between those countries and Norway was a matter to be resolved by the Norwegian Government and the Governments of those countries.405

A recent statement of Canadian practice indicates that it is similar to that of the United States:

... the Canadian approach has been along essentially empirical lines and has been a two-stage one. Where a newly independent State has announced that it intends to be bound by all or certain categories of treaties which in the past were extended to it by the metropolitan country concerned, Canada has, as a rule, tacitly accepted such a declaration and has regarded that country as being a party to the treaties concerned. However, where a State has not made any such declaration or its declaration has appeared to Canada to be ambiguous, then, as the need arose, we have normally sought information from the Government of that State as to whether it considered itself a party to the particular multilateral or bilateral treaty in connexion with which we require such information.

The writer than added the comment:

Recent practice supports the proposition that, subject to the acquiescence of third States, a former colony continues after independence to enjoy and be subject to rights and obligations under international instruments formerly applicable to it, unless considerations as to the manner in which the State came into being or as to the political nature of the subject matter render the treaty either impossible or invidious of performance by the new State.

Whether this practice should be regarded as a strict succession to a legal relationship, or as a novation, may still be an open question.406

(12) From the evidence adduced in the preceding paragraphs, the Commission concludes that succession in respect of bilateral treaties has an essentially voluntary character: voluntary, that is, on the part not only of the newly independent State but also of the other interested State. On this basis the fundamental rule to be laid down for bilateral treaties appears to be that their continuance in force after independence is a matter of agreement, express or tacit, between the newly independent State and the other State party to the predecessor State's treaty. (13) A further question the Commission had to examine was that of determining when and upon what basis (i.e. definitively or merely provisionally) a newly independent State and the other State party are to be considered as having agreed to the continuance of a treaty which was in force in respect of the newly independent State's territory at the date of the succession. Where there is an express agreement, as in the Exchange of Notes mentioned above,408 no problem arises. Whether the agreement is phrased as a confirmation that the treaty is considered as in force or as a consent to its being so considered, the agreement operates to continue the treaty in force and determines the position of the States concerned in relation to the treaty. There may be a point as to whether they intend the treaty to be in force definitively according to its terms (notably any provision regarding notice of termination) or merely provisionally, pending the conclusion of a fresh treaty. But that is a question of interpretation to be resolved in accordance with the ordinary rules for the interpretation of treaties.

(14) Difficulty may arise in the not infrequent case where there is no express agreement. Where the newly independent State and the other State party have applied the terms of the treaty inter se, the situation is simple, since the application of the treaty by both States necessarily implies an agreement to consider it as being in force. But less clear cases arise in practice: these include situations where one State may have evidenced in some manner an apparent intention to consider a treaty as continuing in force—e.g. by listing the treaty amongst its treaties in force—but the other State has done nothing in the matter; or where the newly independent State has evidenced a general intention in favour of the continuance of its predecessor's treaties but has not manifested any specific intention with reference to the particular treaty; or where neither State has given any clear indication of its intentions in regard to the continuance of bilateral treaties.

(15) As already indicated,407 a general presumption of continuity has sometimes been derived from the considerable measure of continuity found in modern practice and the ever-growing interdependence of States. The Commission observes, however, that the question here in issue is the determination of the appropriate rule in a particular field of law—that of treaty relations where intention and consent play a major role. State practice as shown in the preceding paragraphs, contains much evidence that the continuance in force of bilateral treaties,
 unlike multilateral treaties, is commonly regarded by both the newly independent State and the other State party as a matter of mutual agreement. Accordingly, no general rule or presumption that bilateral treaties continue in force unless a contrary intention is declared may be deduced, in the Commission’s view, from the frequency with which continuity occurs. Moreover, a solution based upon the principle of “contracting out” of continuity but of “contracting in” by some more affirmative indication of the consent of the particular States concerned is more in harmony with the principle of self-determination.

(16) Taking therefore into account both the frequency with which the question of continuity is dealt with in practice as a matter of mutual agreement and the principle of self-determination, the Commission concludes that the conduct of the particular States in relation to the particular treaty should be the basis of the general rule for bilateral treaties. The Commission is aware that a rule which hinges upon the establishment of mutual consent by inference from the conduct of the States concerned may also encounter difficulties in its application in some types of case. But these difficulties arise from the great variety of ways in which a State may manifest its agreement to consider itself bound by a treaty, including tacit consent; and they are difficulties found in other parts of the law of treaties.

(17) The Commission then had to consider the question whether the rule should seek to indicate particular acts or conduct which give rise to the inference that the State concerned has consented to the continuance of a bilateral treaty or whether it should merely be formulated in general terms. It examined whether any particular provisions should be inserted concerning the inferences to be drawn from a newly independent State’s conclusion of a devolution agreement, from a unilateral declaration inviting continuance of treaties (provisionally or otherwise), from a unilateral listing of a predecessor State’s treaty as in force in relation to a new State, or from reliance on the provisions of the treaty by a newly independent State or by the other State party to it in their mutual relations. It came, however, to the conclusion that the insertion of any such provisions prescribing the inferences to be drawn from particular kinds of acts would not be justified. It noted in that respect that in the case of devolution agreements and unilateral declarations, much depends both on their particular terms and on the intentions of those who made them. As appears from the commentaries to articles 8 and 9 even where the States may appear in such instruments to express a general intention to continue their predecessors’ treaties, they frequently make the continuance of a particular treaty a matter of discussion and agreement with the other interested State. Moreover, in all cases it is not simply a question of the intention of one State but of both: of the inferences to be drawn from the act of one and the reaction—or absence of reaction—of the other. Inevitably the circumstances of any one case differ from those of another and it seems hardly possible to lay down detailed presumptions without taking the risk of defeating the real intention of one or other State. Of course, one of the two States concerned may so act as to lead the other reasonably to suppose that it had agreed to the continuance in force of a particular treaty, in which event account has to be taken of the principle of good faith applied in article 45 of the Vienna Convention (often referred to as estoppel or préclusion). But subject to the application of that principle, the problem is always one of establishing the consent of each State to consider the treaty as in force in their mutual relations either by express evidence or by inference from the circumstances.

(18) In general, although the context may be quite different, the questions which arise under the present article appear to have affinities with those which arise under article 45 of the Vienna Convention. The Commission therefore felt that the language used to apply the principle of good faith (estoppel—préclusion) in that article would serve a similar purpose in the present context.

(19) Accordingly, paragraph 1 of the present article provides that a bilateral treaty is considered as being in force between a newly independent State and the other State party to the treaty when (a) they expressly so agree or (b) when “by reason of their conduct they are to be considered as having so agreed”.

(20) Paragraph 2 deals with the question of the date on which a treaty is to be considered as becoming binding between a newly independent State and the other State party to it under the provisions of paragraph 1. The very notions of “succession” and “continuity” suggest that this date should, in principle, be the date of the newly independent State’s “succession” to the territory. This is also suggested by terminology found in practice indicating that the States concerned agree to regard the predecessor’s treaty as continuing in force in relation to the newly independent State. Accordingly, the Commission considers that the primary rule concerning the date of entry into force must be the date of the succession. On the other hand, the continuance of the treaty in force in relation to the newly independent State being a matter of agreement, the Commission sees no reason why the two States should not fix another date if they so wish. Paragraph 2, therefore, admits the possibility of some other dates being agreed between the States concerned.

(21) Mention has already been made of the question whether the newly independent State and the other State party intend to continue the treaty in force definitively in conformity with its terms or only to apply it provisionally. Being essentially a question of intention it will depend on the evidence in each case, including the conduct of the parties. Where the intention is merely to continue the application of the treaty provisionally, the legal position differs in some respects from that in cases where the intention is to maintain the treaty itself in force. Since

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*Cf.*, for example, the Vienna Convention, articles 12-15 (consent to be bound), 20 (acceptance of an objection to reservations), and 45 (loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty).

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*Cf.* See para. 13 above.
this is also true of the provisional application of multilateral treaties, the Commission decided to deal with the question of provisional application, both of bilateral and multilateral treaties, separately in part III, section 4, of the present draft.

Article 24. 410 The position as between the predecessor State and the newly independent State

A treaty which under article 23 is considered as being in force between a newly independent State and the other State party is not by reason only of that fact to be considered as in force also in the relations between the predecessor States and the newly independent State.

Commentary

(1) The rule formulated in this article may be thought to go without saying, since the predecessor State is not a party to the agreement between the newly independent State and the other State party which alone brings the treaty into force between the latter States. Nevertheless, the Commission thought it desirable to formulate the rule in an article, if only to remove any possibility of misconception. It is true that the legal nexus which arises between a treaty and the territory of a newly independent State by reason of the fact that the treaty concluded by its predecessor was in force in respect of its territory at the date of the succession provides a basis for the subsequent application of the treaty in the bilateral relations by agreement between the new sovereign of the territory and the other State party. But it does not invest the newly independent State with a right to become a party to the actual treaty between its predecessor and the other State party, so as to bring the treaty into force also between itself and its predecessor, as would happen in the case of a multilateral treaty.

(2) The position, as has been pointed out, 411 is rather that the agreement between the newly independent State and the other State party gives rise to a collateral bilateral treaty, which exists parallel with the original treaty concluded between the predecessor State and the other State party. The collateral treaty, even though it may be in all respects the twin of the original treaty, operates between the successor State and the other State party as a purely bilateral relation between them which is independent of the predecessor State. Furthermore, should the successor and the predecessor State decide to regulate the same matter—e.g. extradition, tariffs, etc.—on a similar basis, it will be through a new treaty which is exclusive to themselves and legally unconnected with the treaty formerly concluded between the predecessor State and the other State party. Indeed, in many cases—e.g. air transport route agreements—the considerations motivating the provisions of the treaty between the predecessor State and the other State party may be quite different from those relevant in the bilateral relations between the predecessor State and the newly independent State.

(3) The rule is supported by practice inasmuch as neither newly independent States nor predecessor States have ever claimed that in these cases the treaty is to be considered as in force between them as well as between the successor State and the other State party.

(4) Accordingly, the present article simply provides that a bilateral treaty, considered under article 23 as being in force for a newly independent State and the other State party, is not by reason only of that fact to be considered as in force also between the predecessor and the successor State.

(5) At its present session, the Commission again considered, in the light of the comments of Governments, whether it was necessary to retain this article. It concluded that it was advisable to do so for reasons substantially the same as those which had led it to include the article in the 1972 draft.

Article 25. 413 Termination, suspension of operation or amendment of the treaty as between the predecessor State and the other State party

1. When under article 23 a treaty is considered as being in force between a newly independent State and the other State party, the treaty:

(a) does not cease to be in force between them by reason only of the fact that it has subsequently been terminated as between the predecessor State and the other State party;

(b) is not suspended in operation as between them by reason only of the fact that it has subsequently been suspended in operation as between the predecessor State and the other State party;

(c) is not amended as between them by reason only of the fact that it has subsequently been amended as between the predecessor State and the other State party.

2. The fact that a treaty has been terminated or, as the case may be, suspended in operation as between the predecessor State and the other State party after the date of the succession of States does not prevent the treaty from being considered to be in force, or, as the case may be, in operation as between the newly independent State and the other State party if it is established in accordance with article 23 that they so agreed.

3. The fact that a treaty has been amended as between the predecessor State and the other State party after the date of the succession of States does not prevent the unamended treaty from being considered to be in force under article 23 as between the newly independent State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

Commentary

(1) This article deals with the case where, after the succession of States, a bilateral treaty is terminated, suspended in operation or amended as between the predecessor State and the other State party.

410 1972 draft, article 20.
411 See above, para. 3 of the commentary to article 23.
413 1972 draft, article 21.
(2) Once it is recognized that, in general, succession in respect of bilateral treaties occurs through the express or tacit agreement of the newly independent State and the other State party, it follows that the treaty operates between these States independently of the predecessor State. The legal source of the obligations of the newly independent State and the other State party inter se is their own agreement to maintain the original treaty; and the agreement, as it were, cuts the umbilical cord between those obligations and the original treaty. Consequently, there is no legal reason why the termination of the original treaty, by agreement or otherwise, in the relations between the predecessor State and the other State party should at the same time involve the termination of the treaty in the relations between the newly independent State and the other State party. The termination of these treaty relations is a matter which, in principle, concerns the newly independent State and the other State party and them alone.

(3) The expiry of the treaty simply by the force of its own terms may, of course, entail the simultaneous termination of the treaty relations (a) between the predecessor State and the other State party and (b) between the newly independent State and the other State party. Thus, if the treaty provides for its own termination on a specified date, it will cease to be in force on that date for the successor State and the other State party (unless they specifically agree otherwise) because that provision of the treaty forms part of their own agreement. An instance of the expiry of the original treaty by the force of its own terms may be found in the Secretariat study on air transport agreements, which refers to the United States of America having reminded, first, Trinidad and Tobago, and, secondly, Jamaica that an Exchange of Notes of 1961 between the United States and the United Kingdom was due to expire very soon. Another appears in the Secretariat study of trade agreements where mention is made of the expiry of Franco-Italian and Franco-Greek trade agreements, which were applicable to Morocco and Tunisia, some months after the attainment of independence by these countries.

(4) On the other hand, a termination of the treaty as between the predecessor State and the other State party resulting from the initiative of one of them (e.g. a notice of termination under the treaty as a response to a breach of the treaty) does not, ipso jure, affect the separate treaty or relations between the newly independent State and the other State party. The Secretariat study on air transport agreements provides an example in the India-United States of America Agreement of 1946. After Pakistan's separation from India, it agreed with the United States in an Exchange of Notes that the 1946 Agreement should be considered as in force between Pakistan and the United States. In 1954 India gave notice of termination to the United States and in 1955 the 1946 Agreement ceased to be in force with respect to India itself. With respect to Pakistan, however, it continued in force.

(5) Similarly, the principle finds expression in cases where the other State party, desirous of terminating the treaty in respect of the successor as well as the predecessor State, has taken steps to communicate its notice of termination to the successor State as well as the predecessor. Thus, when Sweden decided in 1951 to terminate the Norway and Sweden-United Kingdom Extradition Treaty of 1873, it gave notice of termination separately to India, Pakistan, and Sri Lanka [Ceylon]. Correspondingly, the principle also finds expression in cases where the predecessor and successor States have each separately given notice of termination to the other State party. An example is a series of notices of termination given by Malaysia and by Singapore in May 1966 to put an end to air transport agreements concluded by Malaysia respectively with Denmark, Norway, France, the Netherlands and New Zealand. Malaysia's termination of the 1946 United Kingdom-United States Air Transport Agreement does not appear to be any exception. After Malaysia's attainment of independence, this Agreement was considered by it and the United States as continuing in force between them. Then in 1965, some two months before Singapore's separation from Malaysia, Malaysia gave notice of termination to the United States and this was treated by the latter as terminating the agreement also for Singapore, although the twelve months period of notice presented in the treaty did not expire until after Singapore had become independent. In this case Malaysia was the State responsible for Singapore's external relations at the time when the notice of termination was given, and the United States presumably felt that fact to be decisive. Whether a notice of termination, which has not yet taken effect at the date of independence, ought to be regarded as terminating the legal norms between the treaty and the new State's territory may raise a question. But it is a question which is not limited to bilateral treaties and does not affect the validity of the principle here in issue.

(6) At first sight, Canada might seem to have departed from the principle in correspondence with Ghana in 1960 concerning the United Kingdom-Canada double taxation agreement which had been applied to the Gold Coast

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\[\text{\textsuperscript{415}}\] This point is made the subject of a specific rule by the International Law Association in its resolution No. 3 on succession in respect of treaties (see International Law Association, Report of the Fifty-third Conference, Buenos Aires, 1968 (op. cit.), p. xiv [Resolutions] and p. 601 [Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors, Note 3]).
\[\text{\textsuperscript{418}}\] Ibid., p. 110, para. 32.
\[\text{\textsuperscript{419}}\] Ibid., p. 111, para. 38.
\[\text{\textsuperscript{421}}\] Ibid.
\[\text{\textsuperscript{422}}\] Ibid., para. 135.
\[\text{\textsuperscript{423}}\] Ibid., p. 141, para. 146.
\[\text{\textsuperscript{424}}\] Ibid., para. 147.
\[\text{\textsuperscript{425}}\] Ibid., p. 142, para. 151; see also p. 138, para. 125.
in 1957. Three years later Canada gave notice of termination to the United Kingdom but not to Ghana, which took the position that the agreement was still in force between itself and Canada. The latter is then reported as having objected that it had understood that the United Kingdom would communicate the notice of termination to any States interested by way of succession. If such was the case, Canada would not seem to have claimed that its termination of the original treaty ipso jure put an end also to the operation of the treaty as between itself and Ghana. It seems rather to have maintained that its notice of termination was intended to be communicated also to Ghana and was for that reason effective against the latter. Although Ghana did not pursue the matter, the Commission doubts whether, in the light of article 78 of the Vienna Convention, a notice of termination can be effective against a successor State unless actually received by it. This is on the assumption that when the notice of termination was given by the predecessor State, the treaty was already in force between the new State and the other State party. A notice of termination given by the predecessor State or by the other State party before any arrangement had been reached between the successor State and the other State party would present a situation of a rather different kind.

(7) Paragraph 1(a) of the article accordingly provides that a treaty considered as being in force between a newly independent State and the other State party does not cease to be in force in the relations between them by reason only of the fact that it has subsequently been terminated in the relations between the predecessor State and the other State party. This, of course, leaves it open to the other State party to send a notice of termination under the treaty simultaneously to both the predecessor and successor States. But it establishes the principle of the separate and independent character of the treaty relations between the two pairs of States.

(8) For the sake of completeness, and taking account of the terminology of the Vienna Convention, the Commission has also provided in this article for the case of suspension of operation of the treaty as between the predecessor State and the other State party. The case being similar to that of termination of the treaty, the relevant rules should obviously be the same. Hence the provision contained in paragraph 1(b).

(9) The same basic principle must logically govern the case of an amendment of a treaty which is considered as in force between the predecessor State and the other State party. An amendment agreed between the predecessor State and the other State party would be effective only between themselves and would be res inter alios acta for the newly independent State in its relations with the other State party. It does not, therefore, ipso jure effect a similar alteration in the terms of the treaty as applied in the relations between the newly independent State and the other State party. Any such alteration is a matter to be agreed between these two States, and it is hardly conceivable that the rule should be otherwise.

(10) In the case of air transport treaties, for example, it frequently happens that after the newly independent State and the other State party have agreed, expressly or tacitly, to consider the treaty as continuing in force, the original treaty is amended as between the predecessor State and the other State party to take account of the new air route situation resulting from the emergence of the new State. Such an amendment obviously cannot be reproduced in the treaty as applied between the newly independent State and the other State party. Numerous instances of such amendments to the original treaty made for the purpose of changing route schedules may be seen in the Secretariat study on succession of air transport agreement. In these cases, although the original air transport agreement itself is considered by the new State and the other State party as in force also in the relations between them, the fact that there are really two separate and parallel treaties in force manifests itself in the different route schedules applied, on the one hand, between the original parties and, on the other, between the newly independent State and the other State party.

(11) The principle also manifests itself in cases which recognize the need for a newly independent State's participation in, or consent to, an amendment of the original treaty if the amendment is to operate equality in its relations with the other State party. There are several such cases to be found in the Secretariat study of trade agreements in paragraphs giving an account of the amendment of certain French trade agreements applicable in respect of former French African territories at the date of their attainment of independence. When in 1961 certain Franco-Swedish trade agreements were amended and extended in duration, and again in subsequent years, six new States authorized France to represent them in the negotiations, while a further six newly independent States signed the amending instrument on their own behalf. In other cases of a similar kind France sometimes expressly acted on behalf of the French Community more usually those of the new ex-French African States which desired to continue the application of the French trade agreements signed the amending instruments on their own behalf. The same Secretariat study also mentions a number of Netherlands trade agreements that provided for annual revising instruments in which Indonesia was to have the right to participate. But Indonesia not having exercised this right, its participation in the trade agreements in question ceased. Yet another illustration of the need for a new State's consent, if a revising instrument is to affect it, can be seen in the Secretariat study of extradition treaties, though this is perhaps more properly to be said.


485 See para. 13 below.
considered a case of termination through the conclusion of a new agreement. In 1931 the United Kingdom and United States of America concluded a new extradition treaty, which was expressed to supersed all their prior extradition treaties, save that in the case of each of the Dominions and India the prior treaties were to remain in force unless those States would accede to the 1931 Treaty or negotiate another treaty on their own.\footnote{Yearbook... 1970, vol. II, pp. 107-108, document A/CN.4/229, para. 13.}

(12) Paragraph 1 (c) of the present article, therefore, further provides that a bilateral treaty considered to be in force for a newly independent State and the other State party is not amended in the relations between them by reason only of the fact that it has subsequently been amended in the relations between the predecessor State and the other State party. This again does not exclude the possibility of an amending agreement's having a parallel effect on the treaty relations between the successor State and the other State party if the interested State—in this case the newly independent State—so agrees.

(13) The point remains as to whether any special rule has to be stated for the case where the original treaty is terminated, suspended in operation or amended before the newly independent State and the other State party can be considered as having agreed upon its continuance. If the treaty has been effectively terminated before the date of the succession, there is no problem—other than the effect of a notice of termination given before but expiring after the date of the succession. The treaty is not one which can be said to have been in force in respect of the newly independent State's territory at the date of the succession so that, if that State and the other State party should decide to apply the treaty in their mutual relations, it will be on the basis of an entirely new transaction between them. The problem concerns rather the possibility that the predecessor State or the other State party should terminate the treaty soon after the date of the succession and before the newly independent State and the other State party have taken any position regarding the continuance in force of the treaty in their mutual relations. The Commission is of the view that the necessary legal nexus is established for the purpose of the law of succession if the treaty is in force in respect of the newly independent State's territory at the date of succession. On this basis, there does not seem to be any logical reason why that legal nexus should be affected by any act of the predecessor State after that date.

(14) The Commission realizes that the point may not be of great importance since, as article 23 expressly recognizes, the bringing of the treaty into force in the relations between the newly independent State and the other State party is a matter for their mutual agreement. In consequence, it is open to them to disregard the termination, suspension of operation or amendment of the treaty between the original parties or to treat it as conclusive as between themselves according to their wishes. On the other hand, the point may have importance in determining the position in the case of an alleged agreement to continue the treaty in force to be implied simply from the conduct of the newly independent State and the other State party, e.g. from the continued application of the treaty. The Commission has therefore thought it better to deal with the matter in the article. Paragraph 2 of the article in effect provides that the termination or suspension of operation of the treaty between the original parties after the date of the succession of States does not prevent the treaty from being considered in force or, as the case may be, in operation between the newly independent State and the other State party if it is established in accordance with article 23 that they so agreed. Paragraph 3 provides that the amendment of the treaty between the original parties after the date of the succession of States does not prevent the unamended treaty from being considered as in force under article 23 in the relations between the newly independent State and the other State party, unless it is established that they intended the treaty as amended to apply between them.

(15) In the light of the comments of Governments, the Commission at its present session reconsidered the need for this article and considered whether the drafting of the article, in particular of paragraph 1, could be simplified. The Commission concluded that, although the rules formulated might be regarded as self-evident, it was advisable to include the article in the interests of clarity and certainty. It also concluded, for similar reasons, that it would be better to maintain the article in the form of the 1972 draft, than to try to deal with the different cases in a single provision.

SECTION 4. PROVISIONAL APPLICATION

Article 26. \footnote{\textit{1972 draft, article 22.}} Multilateral treaties

1. If, at the date of the succession of States, a multilateral treaty was in force in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any party which expressly so agrees or by reason of its conduct is to be considered as having so agreed.

2. Nevertheless, in the case of a treaty which falls within the category mentioned in article 16, paragraph 3, the consent of all the parties to such provisional application is required.

3. If, at the date of the succession of States, a multilateral treaty not yet in force was being applied provisionally in respect of the territory to which the succession of States relates and the newly independent State gives notice of its intention that the treaty should continue to be applied provisionally in respect of its territory, that treaty shall apply provisionally between the newly independent State and any contracting State which expressly so agrees or by reason of its conduct is to be considered as having so agreed.
4. Nevertheless, in the case of a treaty which falls within the category mentioned in article 16, paragraph 3, the consent of all the contracting States to such continued provisional application is required.

5. Paragraphs 1 to 4 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

Commentary

(1) The Commission, as mentioned already, decided to deal with the provisional application of treaties on a succession of States separately from their continuance in force definitively. Moreover, since the principal importance of provisional application in the context of succession of States seems to be in the case of newly independent States, it also decided to assign this matter to the present section of part III. Section 4 is divided into three articles: the present article and article 27 cover respectively multilateral and bilateral treaties, and article 28 the termination of provisional application.

(2) The provisional application of a multilateral treaty as such hardly seems possible, except in the case of a "restricted" multilateral treaty and then only with the agreement of all the parties. The reason is that participation in a multilateral treaty is governed by its final clauses which do not, unless perhaps in rare cases, contemplate the possibility of participation on a provisional basis, i.e. on a basis different from that of the parties to the treaty inter se. Theoretically, it might be possible by a notification circulated to all the parties to obtain the consent of each one to such a provisional participation in the treaty by a newly independent State. But this would raise complex questions as to the effect of obligations of individual States. Moreover, this form of provisional application does not appear to occur in practice. The Commission did not, therefore, think that it would be appropriate to recognize it in the present draft.

(3) What does occur in practice, and is indeed specifically implied by some of the unilateral declarations mentioned in the commentary to article 9, is the provisional application of a multilateral treaty on a reciprocal basis between a newly independent State and individual States parties to the treaty. But in those cases what happens is that the multilateral treaty is by a collateral agreement applied provisionally between the newly independent State and a particular party to the treaty on a bilateral basis. The case is thus totally different from the definitive participation of a newly independent State in virtue of the option accorded to it in articles 16 and 17 to establish its status as a party or contracting State by its own act alone.

(4) Where the multilateral treaty is one of a restricted character which falls under article 16, paragraph 3, or article 17, paragraph 4, the position is different. There is then no real obstacle to prevent the parties, limited in number as they are, from agreeing with the newly in-

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464 See above, para. 19 of the commentary to article 9.
is to be considered as having so agreed. **Paragraph 4** states that nevertheless, in the case of a restricted multilateral treaty, the consent of all the contracting States to such continued provisional application is required.

(9) Finally, **paragraph 5** states that paragraphs 1 to 4 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the newly independent State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

**Article 27.** Bilateral treaties

A bilateral treaty which at the date of a succession of States was in force or was being provisionally applied in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and the other State concerned when:

(a) they expressly so agree; or

(b) by reason of their conduct they are to be considered as having agreed to continue to apply the treaty provisionally.

**Commentary**

(1) Under **article 23** the continuance in force of a bilateral treaty as between a newly independent State and the other State party is always a question of agreement express or implied. The question being one of agreement, it is equally open to the States concerned to agree merely to continue to apply the treaty provisionally between them rather than to continue it in force definitively in accordance with its terms. This is a procedure specifically invited by many of the unilateral declarations mentioned in the commentary to article 9. Those declarations fix a period during which the newly independent State offers to apply any bilateral treaty provisionally with a view to its replacement by a fresh treaty, or failing such replacement, its termination at the end of the period. In the case of declarations of this type, if the other State accepts either expressly or implicitly the offer of the newly independent State, it is necessarily an agreement for the *provisional application* of the treaty which arises.486

(2) The provisional application of bilateral treaties also arises quite frequently in practice from express agreement to that effect between the newly independent State and the other State party. These express agreements are normally in the form of an exchange of notes and provide for the provisional application of the treaty pending the negotiation of a new treaty or for a specified period, etc. When there is such an express agreement, no difficulty arises because the intention of the States concerned to apply the treaty provisionally is clearly indicated in the agreement. The main problem is where there is no such express agreement and the intention to continue the application of the treaty provisionally rather than definitely has to be inferred from the circumstances of the case. Not infrequently one or other party may have given a specific indication of its intention to apply the treaty provisionally, as in the case of the unilateral declarations referred to above; and in that case the inference from the conduct of the parties in favour of provisional application will be strong. In the absence of any such specific indication of the attitude of one or other State, the situation may be more problematical; but as in other contexts in the law of treaties it can only be left to be determined by an appreciation of the circumstances of the particular case.

(3) The Commission, at the present session, decided to cover in the articles of the draft devoted to provisional application not only the case of the provisional application between the newly independent State and the other States or State party to treaties in force at the date of the succession of States in respect of the territory to which the succession of States relates, but also the case of the provisional application between the newly independent State and the other contracting States or State to treaties not yet in force which were applied provisionally in respect of that territory at the date of the succession of States. The reasons to cover the latter case have been explained in the commentary to article 26 relating to the provisional application of multilateral treaties, paragraphs 3 and 4 of which deal with multilateral treaties not yet in force but provisionally applied in respect of the territory to which the succession of States relates at the date of such a succession. So far as bilateral treaties are concerned the point is covered in the present article by the words "or was being provisionally applied" added by the Commission to the 1972 text. As a consequential change, the words "and the other State party" have been replaced by the words "and the other State concerned".

(4) Article 27 accordingly provides that a bilateral treaty which at the date of a succession of States was in force or was being provisionally applied in respect of the territory to which the succession of States relates is considered as applying provisionally between the newly independent State and the other State concerned if they expressly so agree or by reason of their conduct they are to be considered as having agreed to continue to apply the treaty provisionally.

**Article 28.** Termination of provisional application

1. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 26 may be terminated:

(a) by reasonable notice of termination given by the newly independent State or the party or contracting State provisionally applying the treaty and the expiration of the notice; or

(b) in the case of a treaty which falls within the category mentioned in article 16, paragraph 3, by reasonable notice of termination given by the newly independent State

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486 1972 draft, article 23.
487 1972 draft, article 24.
State or the parties or, as the case may be, the contracting States, and the expiration of the notice.

2. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a bilateral treaty under article 27 may be terminated by reasonable notice of termination given by the newly independent State or the other State concerned and the expiration of the notice.

3. Unless the treaty provides for a shorter period for its termination or it is otherwise agreed, reasonable notice of termination shall be twelve months' notice from the date on which it is received by the other State or States provisionally applying the treaty.

4. Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 26 shall be terminated if the newly independent State gives notice of its intention not to become a party to the treaty.

Commentary

(1) Article 28 sets out the grounds for the termination of the provisional application of treaties under article 26 or 27. For the reasons stated in the introduction to this chapter of the report, it deals only with the grounds which fall within the law of succession of States and does not refer to those which come under the general law of treaties such as the mutual agreement of the States applying the treaty provisionally or the conclusion by those States of a new treaty relating to the same subject-matter and incompatible with the application of the earlier treaty. With this limitation of the scope of the article in mind, the Commission, at the present session, deleted, in paragraphs 1 and 2 of the corresponding article of the 1972 draft, the references to the termination of provisional application by mutual agreement and reworded the introductory part of each of those paragraphs in order to emphasize that they do not attempt to give an exhaustive list of grounds for the termination of provisional application.

(2) Paragraph 1 deals with the termination of the provisional application of multilateral treaties. Subject to the reservation in the opening clause “Unless the treaty otherwise provides or it is otherwise agreed”, the paragraph states that the provisional application of a multilateral treaty may be terminated by the giving of reasonable notice and the expiration of the notice. When it is a question of termination by the giving of notice, one of the main points is to identify the State or States which may give notice.

(3) As regards the termination of the provisional application of multilateral treaties in general, sub-paragraph (a) of paragraph 1 provides that reasonable notice of such termination may be given by the newly independent State “or the party or contracting State provisionally applying the treaty”. The reference in that clause to the giving of notice by a party corresponds to the case—envisioned in paragraph 1 of article 26—where the treaty was in force at the date of the succession of States in respect of the territory to which the succession relates. The reference to the giving of notice by a contracting State corresponds to the case—envisioned in paragraph 3 of that article—where the treaty was not yet in force at the date of the succession of States but was being applied provisionally in respect of the territory in question. As regards the termination of the provisional application of restricted multilateral treaties, that is treaties falling within the category mentioned in paragraph 3 of article 16, sub-paragraph (b) of paragraph 1 of article 28 provides that reasonable notice of such termination may be given by the newly independent State “or the parties or, as the case may be, the contracting States”.

(4) Paragraph 2 of article 28 deals with the termination of the provisional application of bilateral treaties. Subject to the same reservation as in paragraph 1, it provides that the provisional application of a bilateral treaty may be terminated by reasonable notice given by the newly independent State “or the other State concerned and the expiration of the notice”. The expression “other State concerned” covers both cases envisaged in article 27, that is the case where the bilateral treaty was in force at the date of the succession of States in respect of the territory to which the succession of States relates and the case where it was being provisionally applied in respect of that territory.

(5) The requirement of reasonable notice in paragraphs 1 and 2 is for the protection of both the newly independent State and other States concerned since the abrupt termination of provisional application might create administrative and other difficulties. The Commission noted that article 56 of the Vienna Convention, which concerns denunciation or withdrawal from a treaty, in dealing with a problem having similar aspects, prescribed a twelve months' period of notice. Having regard to the kind of treaties normally involved—e.g. trade, air transport, tax and extradition treaties—the Commission considered that a similar period of notice would be appropriate in the present context. On the other hand, if the treaty should provide for a shorter period of notice for its termination, it would be logical that this shorter period should apply also to the termination of the provisional application of the treaty under the present article. Accordingly, Paragraph 3 of article 28 states that, unless the treaty provides for a shorter period for its termination or it is otherwise agreed, reasonable notice of termination of provisional application shall be twelve months' notice from the date on which it is received by the other State or States provisionally applying the treaty.

(6) At the present session, the Commission added a further provision to article 28 which appears in paragraph 4. That paragraph states that, unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a multilateral treaty under article 26 shall be terminated if the newly independent
State gives notice of its intention not to become a party to the treaty. The Commission considered that it would be incongruous in such a case to continue the provisional application of the treaty. On the other hand, since the article is not intended to cover exhaustively all the ways in which provisional application might be terminated, the Commission did not consider it necessary to provide for the case where a newly independent State establishes its status as a party to a treaty by making a notification of succession. In this case, provisional application would obviously cease.

SECTION 5. NEWLY INDEPENDENT STATES FORMED FROM TWO OR MORE TERRITORIES

Article 29. Newly independent States formed from two or more territories

1. Articles 15 to 28 apply in the case of a newly independent State formed from two or more territories.

2. When a newly independent State formed from two or more territories is considered as or becomes a party to a treaty by virtue of articles 16, 17 or 23 and at the date of the succession of States the treaty was in force, or consent to be bound had been given, in respect of one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of that State unless:

(a) it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty;

(b) in the case of a multilateral treaty not falling under article 18, paragraph 4, the ratification, acceptance or approval of the treaty is restricted to the territory or territories to which it was intended that the treaty should extend; or

(c) in the case of a multilateral treaty falling under article 18, paragraph 4, the newly independent State and the other States parties or, as the case may be, the other contracting States otherwise agree.

Commentary

(1) Article 29 concerns the special case of the emergence of a newly independent State formed from two or more territories, *not already States when the succession occurred*. This case is to be differentiated from the uniting of two or more States in one State dealt with in article 30 of the present articles.

(2) The underlying legal situations at the moment of the succession are not the same in the uniting of two or more States as in the creation of a State formed from two or more territories. The States which unite in one State have prior treaty regimes of their own—an existing complex of treaties to which each of them is a party or a contracting State in its own name. A mere territory may have an existing complex of treaties formerly made applicable to it by its administering Power; but these treaties are not treaties to which it is itself a party at the moment when it joins other territory or territories to compose a State. On the contrary, they are treaties to which a newly independent State would be considered a party only after notification of succession in the case of a multilateral treaty or by agreement in the case of a bilateral treaty.

(3) One example of such a plural-territory State, of a federal type, is Nigeria, which was created out of four former territories, namely, the colony of Lagos, the two protectorates of Northern and Southern Nigeria and the northern region of the British Trust Territory of the Cameroons. The treaty situation on the eve of independence has been broadly estimated as follows: of the 78 multilateral treaties affecting parts of Nigeria before independence, 37 applied to all territories, 31 to

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439 1972 draft, article 25.
Lagos only, 3 to the two Protectorates only, 6 to both Lagos and the two Protectorates and 1 to the Trust Territory only. Of the 222 bilateral treaties 151 applied equally to all four parts, 53 to Lagos only, 1 to the two Protectorates only, 13 to both Lagos and the two Protectorates, and 2 to the Trust Territory only. Nigeria is a State which entered into a devolution agreement with the United Kingdom prior to independence and has since notified or acknowledged its succession to a certain number of the above-mentioned multilateral and bilateral treaties. Neither in its devolution agreement nor in its notifications or acknowledgements does Nigeria seem to have distinguished between treaties previously applicable in respect on all four territories or only of some of them. Moreover, in notifying or acknowledging the continuance in force of any treaties for Nigeria, it seems to have assumed that they would apply to Nigeria as a whole and not merely within the respective regions in regard to which they had been applicable before independence. Both depositaries and other contracting parties appear to have acquiesced in this point of view, for they also refer simply to Nigeria.  

(4) The Federation of Malaysia is a more complex case, involving two stages. The first was the formation of the Federation of Malaya as an independent State in 1957 out of two colonies, Malacca and Penang, and nine Protectorates. The bringing together of these territories into a federal association had begun in 1948 so that post-1948 British treaties were applicable in respect of the whole federation at the moment of independence; but the pre-1948 British treaties were applicable in respect only of the particular territories in regard to which they had been concluded. The devolution agreement entered into by Malaya referred simply to instruments which might be held to “have application to or in respect of the Federation of Malaya”. On the other hand, Article 169 of the Constitution which related to the Federal Government’s power to legislate for the implementation of treaties, did provide that any treaty entered into by the United Kingdom “on behalf of the Federation or any part thereof” should be deemed to be a treaty between the Federation and the other country concerned. Exactly what was intended by this provision is not clear. But in practice neither the Federation nor depositaries appear in the case of multilateral treaties to have related Malaya’s participation to the particular regions of Malaya in regard to which the treaty was previously applicable.  

In the case of bilateral treaties the practice available to the Commission does not indicate clearly how far continuance in force of pre-independence treaties was related to the particular regions in regard to which they were applicable. 

(5) The second stage of the Federation occurred in 1963 when, by a new agreement, Singapore, Sabah and Sarawak joined the Federation, the necessary amendments being made to the Constitution for this purpose. Article 169 continued as part of the amended Constitution and was therefore in principle applicable in internal law with respect to the new territories; but no devolution agreement was entered into between the United Kingdom and the Federation in relation to these territories. In two opinions given in 1963 the United Nations Office of Legal Affairs regarded the entry of the three territories into the Federation as an enlargement of the Federation. The first concerned Malaysia’s membership of the United Nations and, after reciting the basic facts and certain precedents, the Office of Legal Affairs stated:  

An examination of the Agreement relating to Malaysia of 9 July 1963 and of the constitutional amendments, therefore, confirms the conclusion that the international personality and identity of the Federation of Malaya was not affected by the changes which have taken place. Consequently, Malaysia continues the membership of the Federation of Malaya in the United Nations.  

Even if an examination of the constitutional changes had led to an opposite conclusion that what has taken place was not an enlargement of the existing Federation but a merger in a union or a new federation, the result would not necessarily be different as illustrated by the cases of the United Arab Republic and the Federal Republic of Cameroon.  

If that opinion concerned succession in relation to membership, the second concerned succession in relation to a treaty—a Special Fund Agreement. The substance of the advice given by the United Nations Office of Legal Affairs is as follows:  

As you know, the Agreement between the United Kingdom and the Special Fund was intended to apply to Special Fund projects in territories for the international relations of which the United Kingdom is responsible (see, e.g., the first paragraph of the preamble to the Agreement). In view of the recent changes in the international representation of Sabah (North Borneo) and Singapore, the United Kingdom Agreement may be deemed to have ceased to apply with respect to those territories in accordance with general principles of international law, and this would be true notwithstanding that the Plans of Operation for the projects technically constitute part of the Agreement with the United Kingdom under article I, paragraph 2, of that Agreement. Although the Special Fund could take the position that the United Kingdom Agreement has devolved upon Malaysia and that it continues to apply to Singapore and Sabah (North Borneo), this could well result in two separate agreements becoming applicable within those territories (i.e., the United Kingdom Agreement for projects already in existence and, as explained below, the Agreement with Malaya with respect to future projects), a situation which could give rise to confusion and should be avoided if possible.  

As regards the Agreement between the Special Fund and Malaya, it continues in force with respect to the State now known as Malaysia since the previous international personality of the Federation of Malaya continues and has no effect on its membership in the United Nations. Similarly, the Agreement between the Special Fund and the Federation of Malaya should be deemed unaffected by the change

445 E.g. the Secretary-General’s letter of enquiry of 28 February 1961 (ibid., p. 117, para. 96).  
446 See, for example, United States, Department of State, Treaties in Force . . . 1972 (op. cit.), pp. 179-180.  
447 See United Nations, Materials on Succession of States (op. cit.), p. 76.  
448 Ibid., pp. 87-88.  
in the name of the State in question. Moreover, we are of the opinion that the Malayan Agreement applies of its own force and without need for any exchange of letters to the territory newly acquired by that State, and to Plans of Operation for future projects therein, in the absence of any indication to the contrary from Malaysia.460

The office of Legal Affairs thus advised that "Malaysia" constituted an enlarged "Malaya" and that "Malaya's" Special Fund Agreement, by operation of the moving treaty-frontier principle, had become applicable in respect of Singapore and Sabah. This advice was certainly in accordance with the principle generally applied in cases of enlargement of territory, as is illustrated by the cases of the accession of Newfoundland to the Canadian Federation, and the "federation" of Eritrea with Ethiopia.461 Moreover, the same principle, that Malaya's treaties would apply automatically to the additional territories of Singapore, Sabah and Sarawak, appears to have been acted on by the Secretary-General in his capacity as depositary of multilateral treaties. Thus, in none of the many entries for "Malaysia" in Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions 462 is there any indication that any of the treaties apply only in certain regions of Malaysia.

(6) Similarly, in the case of other multilateral treaties Malaysia appears to have been treated simply as an enlargement of Malaya and the treaties as automatically applicable in respect of Malaysia as a whole.463 An exception is the case of GATT where Malaysia notified the Director-General that certain pre-federation agreements of Singapore, Sarawak and Sabah would continue to be considered as binding in respect of those States, but would not be extended to the States of the former Federation of Malaya; and that certain other agreements in respect of the latter States would for the time being not be extended to the three new States.464

(7) The circumstances of the Federation of Rhodesia and Nyasaland in 1953, which was formed from the colony of Southern Rhodesia and the protectorates of Northern Rhodesia and Nyasaland, were somewhat special so that it is not thought to be a useful precedent from which to draw any general conclusions in regard to the formation of plural-territory States. The reason is that the British Crown retained certain vestigial powers with respect to the external relations of the Federation and this prevents the case from being considered as a "succession of States" in the normal sense.

(8) States formed from two or more territories may equally be created in the form of unitary States, modern instances of which are Ghana and the Republic of Somalia. Ghana consists of the former colony of the Gold Coast, Ashanti, the Northern Territories Protectorate and the Trust Territory of Togoland. It appears there were no treaties, multilateral or bilateral, which were applied before independence to Ashanti, the Northern Territories or Togoland which were not also applied to the Gold Coast; on the other hand, there were some treaties which applied to the Gold Coast but not to the other parts of what is now Ghana. The latter point is confirmed by the evidence in Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions.465 In regard to bilateral treaties it seems that of the nine United Kingdom treaties listed under Ghana in the United States publication Treaties in Force, three had previously applied to the Gold Coast alone, one to the Gold Coast and Ashanti alone and only five to all four parts of Ghana.

(9) After independence Ghana notified its succession in respect of a number of multilateral treaties of which the Secretary-General is the depositary, some being treaties previously applicable only in respect of parts of what is now its territory. There is no indication in the Secretary-General's practice that Ghana's notifications of successions are limited to particular regions of the State; and, similarly, there is no indication in the United States Treaties in Force that any of the nine United Kingdom bilateral treaties specified as in force vis-à-vis Ghana are limited in their application to the particular regions in respect of which they were in force prior to independence. Nor has the Commission found any practice to the contrary in the Secretariat studies of succession in respect of multilateral or of bilateral treaties or in Materials on Succession of States.466 In other words, the presumption seems to have been made that Ghana's acceptance of succession was intended to apply to the whole of its territory, even although the treaty might previously have been applicable only in respect of some part of the new composite State.

(10) The Republic of Somalia is a unitary State composed of Somalia and Somaliland. Both these territories had become independent States before their uniting as the Republic of Somalia so that, technically, the case may be said to be one of a uniting of States. But their separate existences as independent States were very short-lived and designed merely as steps towards the creation of a unitary Republic. In consequence, from the point of view of succession in respect of treaties the case has some similarities with that of Ghana, provided that allowance is made for the double succession which the creation of the Republic of Somalia involved. The general attitude of the Somalia Government seems to have been that treaties, when continued at all, apply only to the areas to which they territorially applied before independence. This is certainly borne out by the position taken by Somalia in regard to ILO conventions previously applicable to either or both of the territories of which it was composed.467 There were two such conventions previously applicable both to the Trust Territory and to British Somaliland and these Somalia recognized as continuing in force in respect of the whole
Republic. Seven more conventions had previously been applicable to the Trust Territory but not to British Somaliland and a further six applicable to British Somaliland but not to the Trust Territory. These conventions also it recognized as continuing in force but only in respect of the part of its territory to which they had been applicable. It appears that Somalia adopts the same attitude in regard to extradition treaties; and that it accordingly would refuse extradition of a person in the Trust Territory if extradition were sought under a former British extradition treaty applicable in respect of British Somaliland.

(11) In general, Somalia has been very sparing in its recognition of succession in respect of treaties, as may be seen from the extreme paucity of references to Somalia in the Secretariat studies. It is also reflected in the fact that it has not recognized its succession to any of the multilateral treaties of which the Secretary-General is the depositary. As to these treaties, the position taken by the Secretary-General in 1961 in his letter of enquiry to Somalia is of interest. He listed nine multilateral treaties previously applicable in respect of both the Trust Territory and British Somaliland and said that, upon being notified that Somalia recognized itself as bound by them, it would be considered as having become a party to them in its own name as from the date of independence. He then added:

The same procedure could be applied in respect of those instruments which either were made applicable only to the former Trust Territory of Somaliland by the Government of Italy or only to the former British Somaliland by the Government of the United Kingdom, provided that your Government would recognize that their application now extends to the entire territory of the Republic of Somalia.

This passage seems to deny to Somalia the possibility of notifying its succession to the treaties in question only in respect of the territory to which they were previously applicable. If so, it may be doubted whether in the light of later practice it any longer expresses the position of the Secretary-General in regard to the possibility of a succession restricted to the particular territory to which the treaty was previously applicable.

(12) The practice summarized in the preceding paragraphs indicates that cases of the formation of a State from two or more territories fall within the rules of part III (Newly independent States) of the present draft articles and that the only particular question which they raise is the territorial scope to be attributed to a treaty which at the date of succession was signed or in force, or consent to be bound had been given, in respect of one or more, but not all, of the territories which formed the newly independent State when that State takes the appropriate steps for the purpose of participation in the treaty.

(13) As is apparent from the recorded practice, the question of territorial scope has been dealt with in one way in some cases and in a different way in others. However, once it is accepted that in a newly independent State it is a matter of consent, the differences in the practice are reconcilable on the basis that they merely reflect differences in the intentions—in the consents—of the States concerned. The question then is whether a treaty should be presumed to apply to the entire territory of the newly independent State formed from two or more territories unless a contrary intention appears, or whether a treaty should be presumed to apply only in respect of the constituent territory or territories to which it was previously made applicable or extended unless an intention to apply it to the entire territory of the newly independent State appears.

(14) The Commission considered the former of these two possibilities to be the more appropriate rule. Consequently, the present article, like the corresponding article of the 1972 text, is formulated on the basis of such a rule. At the second reading, however, the Commission considered it necessary, for reasons both of precision and consistency with other provisions of part III of the present draft articles, to supplement and redraft the text of the article adopted in 1972.

(15) As adopted at the present session, paragraph 1 of the article provides that articles 15 to 28 apply in the case of a newly independent State formed from two or more territories. The purpose of this provision is to remove any possible doubt there might otherwise be that a newly independent State formed from two or more territories is subject to the same basis rules as any other newly independent State with regard to the participation in multilateral or bilateral treaties, or their provisional application, on the basis of the present draft articles.

(16) Paragraph 2 states, in its introductory sentence, that when a newly independent State formed from two or more territories is considered as or becomes a party to a treaty by virtue of article 16, 17 or 23 and at the date of the succession of States the treaty was in force, or consent to be bound had been given, in respect of one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of that State. At the same time, sub-paragraphs (a) to (d) except from the "entire territory" presumption four cases. The first exception relates to a case in which it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty (sub-paragraph (a)). The second exception concerns multilateral treaties other than restricted ones. In such a case, the newly independent State may indicate in its notification of succession that the application of the treaty is restricted to the territory in respect of which the treaty was in force, or in respect of which consent to be bound had been given, prior to the date of the succession of States (sub-paragraph (b)). Finally, for restricted multilateral treaties and bilateral treaties the "entire territory" presumption may be negatived by agreement between the newly independent State and the other States or State concerned (sub-paragraphs (c) and (d)). Some drafting changes notwithstanding, these four exceptions to the "entire territory" presumption are similar to the ones included in the 1972 text. More substantive in character are the changes made in the introductory sentence of the paragraph, particularly the
use of the words “is considered as or becomes a party to a treaty by virtue of article 16, 17 or 23” and the reference not only to treaties in force at the date of the succession of States, as in the 1972 text, but also to treaties in respect of which “consent to be bound had been given” at that date by the predecessor State.

(17) Paragraph 3 has been added in order to extend the “entire territory” presumption to the case of ratification, acceptance or approval by the newly independent State of a treaty signed by the predecessor State, as provided for in article 18 of the present draft. Accordingly, the introductory sentence of this paragraph states that when a newly independent State formed from two or more territories becomes a party to a multilateral treaty under article 18 and by the signature or signatures of the predecessor State or States it had been intended that the treaty should extend to one or more, but not all, of those territories, the treaty shall apply in respect of the entire territory of the newly independent State. The three exceptions to the presumption set forth in sub-paragraphs (a), (b) and (c) parallel the exceptions of the corresponding sub-paragraphs of paragraph 2 referred to above. The exception contained in sub-paragraph (d) of paragraph 2 is not relevant in the present context, article 18 of the present draft dealing exclusively with multilateral treaties.

PART IV
UNITING AND SEPARATION OF STATES

Article 30. Effects of a uniting of States in respect of treaties in force at the date of the succession of States

1. When two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State unless:
   (a) the successor State and the other State party or States parties otherwise agree; or
   (b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

2. Any treaty continuing in force in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States unless:
   (a) in the case of a multilateral treaty other than one falling within the category mentioned in article 16, paragraph 3, the successor State makes a notification that the treaty shall apply in respect of its entire territory; or
   (b) in the case of a multilateral treaty falling within the category mentioned in article 16, paragraph 3, the successor State and all the parties otherwise agree; or
   (c) in the case of a bilateral treaty, the successor State and the other State party otherwise agree.

3. Paragraph 2 (a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

   Article 31. Effects of a uniting of States in respect of treaties not in force at the date of the succession of States

1. Subject to paragraphs 3 and 4, a successor State falling within article 30 may, by making a notification, establish its status as a contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, any of the predecessor States was a contracting State to the treaty.

2. Subject to paragraphs 3 and 4, a successor State falling within article 30 may, by making a notification, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date any of the predecessor States was a contracting State to the treaty.

3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. If the treaty is one falling within the category mentioned in article 16, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

5. Any treaty to which the successor State becomes a contracting State or a party in conformity with paragraph 1 or 2 shall apply only in respect of the part of the territory of the successor State in respect of which consent to be bound by the treaty had been given prior to the date of the succession of States unless:
   (a) in the case of a multilateral treaty not falling within the category mentioned in article 16, paragraph 3, the successor State indicates in its notification made under paragraph 1 or 2 that the treaty shall apply in respect of its entire territory; or
   (b) in the case of a multilateral treaty falling within the category mentioned in article 16, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

6. Paragraph 5 (a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

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460 1972 draft, article 26.

461 New article.
Article 32. Effects of a uniting of States in respect of treaties signed by a predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 2 and 3, if before the date of the succession of States one of the predecessor States had signed a multilateral treaty subject to ratification, acceptance or approval, a successor State falling within article 30 may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. If the treaty is one falling within the category mentioned in article 16, paragraph 3, the successor State may become a party or a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

4. Any treaty to which the successor State becomes a party or a contracting State in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was signed by one of the predecessor States unless:

   (a) in the case of a multilateral treaty not falling within the category mentioned in article 16, paragraph 3, the successor State when ratifying, accepting or approving the treaty gives notice that the treaty shall apply in respect of its entire territory; or

   (b) in the case of a multilateral treaty falling within the category mentioned in article 16, paragraph 3, the successor State and all the parties or, as the case may be, all the contracting States otherwise agree.

5. Paragraph 4 (a) does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the entire territory of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

Commentary

(1) These articles deal with a succession of States arising from the uniting of one State to two or more States, which had separate international personalities at the date of the succession. They cover the case where one State merges with another State even if the international personality of the latter continues after they have united. The case of the emergence of a newly independent State from the combining of two or more territories, not already States at the date of the succession, has been dealt with separately in Part III, article 29. The transfer of a mere territory to an existing State also falls under an earlier provision of the draft articles, namely the moving treaty-frontier rule set out in article 14.

(2) The succession of States envisaged in the present articles does not take into account the particular form of the internal constitutional organization adopted by the successor State. The uniting may lead to a wholly unitary State, to a federation or to any other form of constitutional arrangement. In other words, the degree of separate identity retained by the original States after their uniting, within the constitution of the successor State, is irrelevant for the operation of the provisions set forth in these articles.

(3) Being concerned only with the uniting of two or more States in one State, associations of States having the character of intergovernmental organizations such as, for example, the United Nations, the specialized agencies, OAS, the Council of Europe, CMEA, etc., fall completely outside the scope of the articles; as do some hybrid unions which may appear to have some analogy with a uniting of States but which do not result in a new State and do not therefore constitute a succession of States.

(4) One example of such a hybrid is EEC, as to the precise legal character of which opinions differ. For the present purpose, it suffices to say that, from the point of view of succession in respect of treaties, EEC appears to keep on the plane of intergovernmental organizations. Thus, article 234 of the Treaty of Rome unmistakably approaches the question of the pre-Community treaties of member States with third countries from the angle of the rules governing the application of successive treaties relating to the same subject matter (article 30 of the Vienna Convention). In other words, pre-Community treaties are dealt with in the Rome Treaty in the context of the compatibility of treaty obligations and not of the succession of States. The same is true of the instruments which established the other two European Communities. Furthermore, the Treaty of Accession of 22 January 1972 which sets out the conditions under which four additional States may join EEC and EURATOM, deals with the pre-accession treaties of the candidate States on the basis of compatibility of treaty obligations—of requiring them to bring their existing treaty obligations into line with the obligations arising from their accession to the Communities. Similarly, the Treaty of Accession expressly provides for the new member States to become bound by various categories of pre-accession treaties concluded by the Communities or by their original members and does not rely on the operation of any principle of succession.

(5) Numerous other economic unions have been created in various forms and with varying degrees of

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483 New article.
“community” machinery; e.g. EFTA, LAFTA and other free-trade areas and the Benelux. In general, the constitutions of these economic unions leave in no doubt their essential character as intergovernmental organizations. In these case of the Belgium-Luxembourg Economic Union, if Belgium may be expressly empowered to conclude treaties on behalf of the Union, the relationship between the two countries within the Union appears to remain definitively on the international plane. In practice all these economic unions, including the closely integrated Liechtenstein-Swiss Customs Union, have been treated as international unions and not as involving the creation of a new State.

(6) In analysing the effect on treaties of a uniting of States, writers tend to make a distinction between cases in which the successor State is organized in a federal form and cases in which the successor State adopts another constitutional form of government, but they tend also to conclude that the distinction has no great significance. Among the historical examples more commonly mentioned are the formation of the United States of America, Switzerland, the German Federation of 1871, the foundation of the Greater Republic of Central America in 1895 and the former unions of Norway and Sweden and of Denmark and Iceland. The chief modern precedents are the uniting of Egypt and Syria in 1958 and of Tanganyika and Zanzibar in 1964.

(7) Various interpretations of the effect of the formation of the German Federation of 1871 upon pre-existing treaties have been advanced but the prevailing view seems to be that the treaties of the individual German States continued either to bind the federal State, as a successor to the constituent State concerned, within their respective regional limits or to bind the individual States through the federal State until terminated by an inconsistent exercise of federal legislative power. It is true that certain treaties of individual States were regarded as applicable in respect of the federation as a whole. But these cases appear to have concerned only particular categories of treaties and in general any continuity of the treaties of the States was confined to their respective regional limits. Under the federal constitution the individual States retained both their legislative and their treaty-making competence except in so far as the federal Government might exercise its overriding powers in the same field.

(8) The Swiss Federal Constitution of 1848 vested the treaty-making and treaty-implementing powers in the federal Government. At the same time, it left in the hands of the Cantons a concurrent, if subordinate, power to make treaties with foreign States concerning "L'économie publique, les rapports de voisinage et de police". The pre-federation treaties of individual Cantons, it seems clear, were considered as continuing in force within their respective regional limits after the formation of the federation. At the same time, the principle of continuity does not appear to have been limited to treaties falling within the treaty-making competence still possessed by the Cantons after the federation. It further appears that treaties formerly concluded by the Cantons are not considered under Swiss law as abrogated by reason only of incompatibility with a subsequent federal law but are terminated only through a subsequent exercise of the federal treaty-making power.

(9) Another precedent, though the federation was very short-lived, is the foundation of the Greater Republic of Central America in 1895. In that instance El Salvador, Nicaragua and Honduras signed a Treaty of Federation constituting the Greater Republic; and in 1897 the Greater Republic itself concluded a further treaty of federation with Costa Rica and Guatemala, extending the federation to these two Republics. The second treaty, like the first, invested the Federation with the treaty-making power, but it also expressly provided "former treaties entered into by the States shall still remain in force in so far as they are not opposed to the present treaty".

(10) The notification made by the Soviet Union on 23 July 1923 concerning the existing treaties of the Russian, White Russian, Ukrainian and Transcaucasian Republics may perhaps be regarded as a precedent of a similar kind. The notification stated that the People's Commissariat for Foreign Affairs of the USSR is charged with the execution in the name of the Union of all its international relations, including the execution of all treaties and conventions entered into by the above-mentioned Republics with foreign States which shall remain in force in the territories of the respective Republics.

(11) The admission of Texas, then an independent State, into the United States of America in 1845 also calls for consideration in the present context. Under the United States constitution the whole treaty-making power is vested in the federal Government, and it is expressly forbidden to the individual States to conclude treaties. They may enter into agreements with foreign Powers only with the consent of Congress which has always been taken to mean that they may not make treaties on their own behalf. The United States took the position that Texas's pre-federation treaties lapsed and that Texas fell within the treaty régime of the United States; in effect it was treated as a case for the application of the moving treaty-frontier principle. At first, both France and Great Britain objected, the latter arguing that Texas could not, by voluntarily joining the United States federation, exonerate itself from its own existing treaties. Later, in 1857, Great Britain came round to the United States view that Texas's pre-federation treaties had lapsed. The reasoning of the British Law Officers seems, however, to have differed slightly from that of the United States Government.

(12) As to non-federal successor States, the "personal unions" may be left out of account, because they do not raise any question of succession. They entail no more than the possession, sometimes almost accidental, by two States of the same person as Head of State (e.g. Great

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Britain and Hanover between 1714 and 1837), and they in no way affect the treaty relations of the States concerned with other States. In any event, they appear to be obsolete. So-called "real unions", on the other hand, entail the creation of a composite successor State. Such a State exists when two or more States, each having a separate international personality, are united under a common constitution with a common Head of State and a common organ competent to represent them in their relations with other States. A union may have some other common organs without losing its character as a "real" rather than a federal union; but the essence of the matter for present purposes is the separate identities of the individual States and the common organs competent to represent them internationally in at least some fields of activity. Amongst the older cases of real unions that are usually mentioned are the Norwegian-Swedish union under the Swedish Crown from 1814 to 1905 and the Danish-Icelandic union under the Danish Crown from 1918 to 1944. In each of these cases, however, one of the two union States (Norway and Iceland respectively) had not been independent States prior to the union, and it is only in connexion with the separation of parts of unions that these precedents are cited. More to the point are the modern precedents of the unities of Egypt and Syria in 1958 and of Tanganyika and Zanzibar in 1964.

(13) Egypt and Syria, each an independent State and Member of the United Nations, proclaimed themselves in 1958 one State to be named the "United Arab Republic", the executive authority being vested in a Head of State and the legislative authority in one legislative house. Article 58 of the Provisional Constitution also provided that the Republic should consist of two regions, Egypt and Syria, in each of which there should be an executive council competent to examine and study matters pertaining to the execution of the general policy of the region. But under the Constitution of the Republic the legislative power and the treaty-making power (article 56) were both entrusted to the central organs of the unified State, without any mention of the region's retaining any separate legislative or treaty-making powers of their own. Prima facie, therefore, the Proclamation and Provisional Constitution designed the United Arab Republic to be a new unitary State rather than a "union", either real or federal. In practice, however, Egypt and Syria were generally recognized as in some measure retaining their separate identity as distinct units of the United Arab Republic.

(14) This view of the matter was, no doubt, encouraged by the terms of article 69 of the Provisional Constitution, which provided for the continuance in force of all the pre-union treaties of both Egypt and Syria within the limits of the particular region in regard to which each treaty had been concluded. Vis-à-vis third States, however, that provision had the character of a unilateral declaration which was not, as such, binding upon them.

(15) In regard to multilateral treaties, the Foreign Minister of the United Arab Republic made a communication to the Secretary-General of the United Nations in the following terms:

It is to be noted that the Government of the United Arab Republic declares that the Union is a single Member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law.

The response of the Secretary-General to this communication was, during the existence of the Union, to list the United Arab Republic as a party to all the treaties to which Egypt or Syria had been parties before the Union was formed; and under the name of the United Arab Republic he indicated whether Egypt or Syria or both had taken action in respect of the treaty in question. As to the treatment accorded to the United Arab Republic in regard to membership of the United Nations, the notification addressed by the United Arab Republic to the Secretary-General had requested him to communicate the information concerning the formation of the United Republic to all Member States and principal organs of the United Nations and to all subsidiary organs, particularly those on which Egypt or Syria, or both, had been represented. The Secretary-General, in his capacity as such, accepted credentials issued by the Foreign Minister of the United Arab Republic, for its Permanent Representative, informing Member States and all principal and subsidiary organs of his action in the following terms:

In accepting this letter of credentials the Secretary-General has noted that this is an action within the limits of his authority, undertaken without prejudice to and pending such action as other organs of the United Nations may take on the basis of notification of the constitution of the United Arab Republic and the Note [the Foreign Minister's Note informing the Secretary-General of the formation of the United Republic] of 1 March 1958.

The upshot was that the "representatives of the Republic without objection took their seats in all the organs of the United Nations of which Egypt or Syria, or both, had been members"; and this occurred without the United Arab Republic's undergoing "admission" as a Member State. It seems therefore that the Secretary-General and the other organs of the United Nations, acted on the basis that the United Arab Republic united and continued in itself the international personalities of Egypt and Syria. The specialized agencies, mutatis mutandis, dealt with the case of the United Arab Republic in a similar way. In the case of ITU it seems that the United Arab Republic was considered as a party to the constituent treaty, subject to different reservations in respect of Egypt and Syria which corresponded to

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448 The union of Austria and Hungary in the Dual Monarchy is another case sometimes cited, but only in regard to the effect of a separation of parts of a union on treaties.


471 Ibid.


473 Ibid., para. 19.

474 Ibid., para. 20.

(16) The practice regarding bilateral treaties proceeded on similar lines, in accord with the principles stated in article 69 of the Provisional Constitution; i.e. the pre-union bilateral treaties of Egypt and Syria were considered as continuing in force within the regional limits in respect of which they had originally been concluded. The practice examined shows that it was the case with regard to extradition treaties, commercial treaties and air transport agreements of Egypt and Syria.\footnote{Ibid., pp. 129-130 and 127, document A/CN.4/229, paras. 147 and 130-131. See also Yearbook . . . 1971, vol. II (Part Two), pp. 142-146 and 148, document A/CN.4/243, paras. 152-175 and 190, and pp. 179-181 and 183-184, document A/CN.4/243/Add.1, paras. 149-166 and 181.} The same view in regard to the pre-union treaties of Egypt and Syria was reflected in the lists of treaties in force published by other States. The United States, for example, listed against the United Arab Republic twenty-one pre-union bilateral treaties with Egypt and six with Syria.

(17) The uniting of Tanganyika and Zanzibar in the United Republic of Tanzania in 1964 was also a union of independent States under constituent instruments which provided for a common Head of State and a common organ responsible for the external, and therefore, treaty, relations of the United Republic.\footnote{See “Treaties and succession of States and governments in Tanzania”, in Nigerian Institute for International Affairs, African Conference on International Law and African Problems: Proceedings (op. cit.), paras. 26-28.} The constituent instruments indeed provided for a Union Parliament and Executive to which various major matters were reserved. Unlike the Provisional Constitution of the United Arab Republic, they also provided for a separate Zanzibar legislature and executive having competence in all internal matters not reserved to the central organs of the United Republic. The particular circumstances in which the United Republic was created, however, complicated this case as a precedent from which to deduce principles governing the effect of the uniting of two or more States in one State upon treaties.

(18) Although both Tanganyika and Zanzibar were independent States in 1964 when they united in the United Republic of Tanzania, their independence was of very recent date. Tanganyika, previously a Trust Territory, had become independent in 1961; Zanzibar, previously a colonial protectorate, had attained independence and become a Member of the United Nations only towards the end of 1963. In consequence the formation of Tanzania occurred in two stages, the second of which followed very rapidly after the first: (a) the emergence of each of the two individual territories to independence, and (b) the unifying of the two, the independence, States in the United Republic of Tanzania. Tanganyika, on beginning life as a new State, had made the Nyerere declaration by which, in effect, it gave notice that pre-independence treaties would be considered by it as continuing in force only on a provisional basis during an interim period, pending a decision as to their continuance, termination or renegotiation.\footnote{See above, para. 2 of the commentary to article 9.} It recognized the possibility that some treaties might survive “by the application of rules of customary law”, apparently meaning thereby boundary and other localized treaties. Otherwise, it clearly considered itself free to accept or reject pre-independence treaties. The consequence was that, when not long afterwards Tanganyika united with Zanzibar, many pre-union treaties applicable in respect of its territory had terminated or were in force only provisionally. Except for possible “localized treaties”, it was bound only by such treaties as it had taken steps to continue in force. As to Zanzibar, there seems to be little doubt that, leaving aside the question of localized treaties, it was not bound to consider any pre-independence treaties as in force at the moment when it joined with Tanganyika in forming the United Republic of Tanzania.

(19) In a Note of 6 May 1964, addressed to the Secretary-General, the new United Republic informed him of the unifying of the two countries as one sovereign State under the name of the United Republic of Tanganyika and Zanzibar (the subsequent change of name to Tanzania was notified on 2 November 1964).\footnote{United Nations, Multilateral Treaties . . . 1972 (op. cit.), p. 7, foot-note 8.} It further asked the Secretary-General: to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single member of the United Nations bound by the provisions of the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People’s Republic of Zanzibar and other States or international organizations will, to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union, remain in force with the regional limits prescribed on their conclusion and in accordance with the principles of international law.\footnote{Ibid.}

This declaration, except for the proviso “to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union”, follows the same lines as that of the United Arab Republic. Furthermore, the position taken by the Secretary-General in communicating the declaration to other United Nations organs and to the specialized agencies was almost identical with that adopted by him in the case of the United Arab Republic, and the specialized agencies seem to have followed the precedent of the United Arab Republic in dealing with the merger of Tanganyika and Zanzibar in the United Republic of Tanzania. At any rate, the resulting united State was treated as simply continuing the membership of Tanganyika (and also of Zanzibar in those cases where the latter had become a member prior to the union) without any need to undergo the relevant admission procedure.

(20) As to multilateral treaties, Tanzania confirmed to the Secretary-General that the United Republic would continue to be bound by those in respect of which the Secretary-General acts as depositary and which had been signed, ratified or acceded to on behalf of Tanganyika.
No doubt, the United Republic's communication was expressed in those terms for the simple reason that there were no such treaties which had been signed, ratified or acceded to on behalf of Zanzibar during the latter's very brief period of existence as a separate independent State prior to the union. In the light of that communication, the Secretary-General listed the United Republic as a party to a number of multilateral treaties on the basis of an act of acceptance, ratification or accession by Tanganyika prior to the union. Moreover, he listed the date of Tanganyika's act of acceptance, ratification or accession as the commencing date of the United Republic's participation in the treaties in question. Only in the cases of the Charter of the United Nations and the Constitution of WHO, to which Zanzibar had become a party by admission prior to the union, was any mention made of Zanzibar; and in these cases under the entry for Tanzania he also gave the names of Tanganyika and Zanzibar together with the separate dates of their respective admissions to the United Nations. In the other cases, the entry for Tanzania did not contain any indication that Tanzania's participation in the treaty was to be considered as restricted to the regional limits of Tanganyika.

(21) Tanganyika, after attaining independence, notified its succession to the four Geneva Humanitarian Conventions of 1949 and was therefore a party to them at the time of the formation of the United Republic of Tanzania. Zanzibar, on the other hand, had taken no action with respect to these treaties prior to the union. Tanzania is now listed as a party, but it seems that the question whether Tanzania's participation embraces Zanzibar as well as Tanganyika is regarded as still undetermined. Similarly, the Republic of Tanganyika but not Zanzibar had become a party to the Paris Convention for the Protection of Industrial Property (Lisbon text) prior to the formation of the United Republic. After the formation of the Union, BIRPI listed Tanzania as having acceded to the Paris Convention on the basis of the Lisbon text; but in this case also it was stated that the question of the application of the Convention to Zanzibar was still undetermined. The situation at the moment of union differed in the case of GATT, in that Zanzibar, although it had not taken steps to become a party prior to the formation of the United States, had been an associate member of GATT before attaining independence. Otherwise, it was similar as Tanganyika had notified the Secretary-General of its accession not only to GATT but to forty-two international instruments relating to GATT. After the unifying the United Republic of Tanzania informed GATT of its assumption of responsibility for the external, trade, relations of both Tanganyika and Zanzibar, and the United Republic was then regarded as a single contracting party to GATT. In the case of FAO also Tanganyika, before the Union, had taken steps to become a member while Zanzibar, a former associate member, had not. On being notified of the uniting of the two countries in a single State, the FAO Conference formally recognized that the United Republic of Tanzania "replaced the former member Nation, Tanganyika, and the former associate member, Zanzibar". At the same time, the membership of the United Republic is treated by FAO as dating from the commencement of Tanganyika's membership; and it appears that Zanzibar is considered to have had the status of a non-member State during the brief interval between its attainment of independence and the formation of the United Republic of Tanzania. In ITU, the effect of the creation of the United State seems to have been determined on similar lines.

(22) Bilateral treaties—leaving aside the question of localized treaties—in the case of Tanganyika were due under the terms of the Nyerere declaration to terminate two years after independence, that is on 8 December 1963 and some months before the formation of Tanzania. The position at the date of the uniting therefore was that the great majority of the bilateral treaties applicable to Tanganyika prior to its independence had terminated. In some instances, however, a preindependence treaty had been continued in force by mutual agreement before the unifying took place. This was so, for example, in the case of a number of commercial treaties, legal procedure agreements and consular treaties, the maintenance in force of which had been agreed in exchanges of notes with the interested States. In other instances, negotiations for the maintenance in force of a pre-independence treaty which had been begun by Tanganyika prior to the date of the uniting were completed by Tanzania after that date. In addition, a certain number of new treaties had been concluded by Tanganyika between the date of its independence and that of the formation of the United Republic. In the case of visa abolition agreements, commercial treaties, extradition and legal procedure agreements, it seems that prior to the uniting Zanzibar had either indicated a wish to terminate the pre-independence treaties or given no indication of a wish to maintain any of them in force. In the case of consular treaties, seven of which had been applicable in respect of Zanzibar prior to its independence, it seems that the consuls continued at their posts up to the date of the uniting, so that the treaties appear to that extent to have remained in force, at any rate provisionally.


(23) After the formation of the United Republic, Tanganyika's new Visa Abolition Agreements with Israel and the Federal Republic of Germany were, it appears, accepted as *ipso jure* continuing in force. In addition, agreements concluded by Tanganyika for continuing in force post-independence agreements with five countries were regarded as still in force after the unifying. In all these cases the treaties, having been concluded only in respect of Tanganyika, were accepted as continuing to apply only in respect of the region of Tanganyika and not extending to Zanzibar. As to commercial treaties, the only ones in force on the eve of the unifying were the three new treaties concluded by Tanganyika after its independence with Czechoslovakia, the Soviet Union and Yugoslavia. These treaties again appear to have been regarded as *ipso jure* remaining in force after the formation of the United Republic, but in respect only of the region of Tanganyika. In the case of extradition agreements, understandings were reached between Tanganyika and some countries for the maintenance in force provisionally of these agreements. It seems that after the unifying these understandings were continued in force and, in some cases, made the subject of express agreements by exchanges of notes. It further seems that it was accepted that, where the treaty had been applicable in respect of Zanzibar prior to its independence, the agreement for its continuance in force should be considered as relating to Zanzibar as well as Tanganyika. And since these were cases of mutual agreement, it was clearly open to the States in question so to agree. It may be added that after the uniting consular treaties applicable previously in relation to Tanganyika or to Zanzibar also appear to have continued in force as between the United Republic and the other States parties in relation to the region to which they had applied prior to the creation of the United State.

(24) The distinguishing elements of the uniting of Egypt and Syria and of Tanganyika and Zanzibar appear to be (a) the fact that prior to each uniting both component regions were internationally recognized as fully independent sovereign States; (b) the fact that in each case the process of uniting was regarded not as the creation of a wholly new sovereign State or as the incorporation of one State into the other but as the uniting of two existing sovereign States into one; and (c) the explicit recognition into each case of the continuance in force of the pre-union treaties of both component States in relation to, and in relation *only* to, their respective regions, unless otherwise agreed.

(25) Attention is drawn to two further points. The first is that in neither of the two cases did the constitutional arrangements leave any treaty-making power in the component States after the formation of the united State. It follows that the continuance of the pre-union treaties within the respective regions was wholly unrelated to the possession of treaty-making powers by the individual regions after the formation of the union. The second is that in its declaration of 6 May 1964 Tanzania qualified its statement of the continuance of the pre-existing treaties of Tanganyika and Zanzibar by the proviso "to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union". Such a proviso, however, is consistent with a rule of continuity of pre-existing treaties *ipso jure* only if it does no more than express a limitation on continuity arising from the objective incompatibility of the treaty with the unifying of the two States in one State; and this appears to be the sense in which the proviso was intended in Tanzania's declaration.

(26) The precedents concerning the unifying of Egypt and Syria and of Tanganyika and Zanzibar appear therefore to indicate a rule prescribing the continuance in force *ipso jure* of the treaties of the individual constituent States, within their respective regional limits and subject to their compatibility with the situation resulting from the creation of the unified State. In the case of these precedents the continuity of the treaties was recognized although the constitution of the united State did not envisage the possession of any treaty-making powers by the individual constituent States. In other words, the continuance in force of the treaties was not regarded as incompatible with the united State merely by reason of the non-possession by the constituent States, after the date of the succession, of any treaty-making power under the constitution. The precedents concerning federal States are older and less uniform. Taken as a whole, however, and disregarding minor discrepancies, they also appear to indicate a rule prescribing the continuance in force *ipso jure* of the pre-federation treaties of the individual States within their respective regional limits. Precisely how far in those cases the principle of continuity was linked to the continued possession by the individual States of some measure of treaty-making power or international personality is not clear. That element was present in the cases of the German and Swiss federations and its absence in the case of the United States of America seems to have been at any rate one ground on which continuity was denied. Even in those cases, however, to the extent that they considered the principle of continuity to apply, writers seem to have regarded the treaties as remaining in force *ipso jure* rather than through any process of agreement.

(27) In the light of the above practice and the opinion of the majority of writers, the Commission concluded that a uniting of States should be regarded as in principle involving the continuance in force of the treaties of the States in question *ipso jure*. This solution is also indicated by the need of preserving the stability of treaty relations. As sovereign States, the predecessor States had a complex of treaty relations with other States and ought not to be able at will to terminate those treaties by uniting in a single State. The point has particular weight today in view of the tendency of States to group themselves in new forms of association.

(28) Consequently, the Commission formulated the rule embodied in article 30 as the corresponding article of the 1972 draft, on the basis of the *ipso jure* continuity principle duly qualified by other elements which need also to be taken into account: i.e. the agreement of the States concerned, the compatibility of the treaties in force prior to the uniting of the States with the situation resulting from it, the effects of the change on the operation of the treaty and the territorial scope which those treaties had under their provisions. The Commission introduced,
for the sake of clarity and precision, a certain number of drafting changes in the corresponding 1972 text, but the rules embodied in the article, as adopted at the present session, are in substance the same as in 1972. However, there is one clarification which involves an important point of substance. Article 14 and the present article have been drafted so as to make it clear that, where one State is incorporated into another State and thereupon ceases to exist, the case falls not within article 14 but within the present article. The Commission considered that this was more in accord with the principles of modern international law and that, where a State voluntarily united with an existing State which continued to possess its international personality, it was better to provide for the de jure continuity of treaties than to apply the moving treaty-frontier rule.

(29) On reconsideration, the Commission decided to delete former paragraph 3 which provided that the rules set forth in paragraph 1 and 2 of the article “apply also when a successor State * itself unites with another State*. The Commission observed that such a case actually referred to two distinct and not simultaneous successions of States, each of which should be treated separately in accordance with the rules of the present draft articles relating to the uniting of States.

(30) Paragraph 1 or article 30 states, therefore, that when two or more States unite and so form one successor State, any treaty in force at the date of the succession of States in respect of any of them continues in force in respect of the successor State except as provided for in sub-paragraphs (a) and (b). Paragraph 1 (a) merely sets aside the ipso jure continuity rule when the successor State and the other State party or States parties so agree. Paragraph 1 (b) then, excepts from the ipso jure continuity rule cases where it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

(31) Paragraph 2 of article 30 takes care of the territorial scope element by providing that any treaty continuing in force in conformity with paragraph 1 shall apply only in respect of the part of the territory of the successor State in respect of which the treaty was in force at the date of the succession of States. This general rule limiting the territorial scope of the treaties to the parts of the territory in respect of which they were applicable at the date of the succession of States admits, however, the three exceptions enumerated in sub-paragraphs (a), (b) and (c) of paragraph 2. The exception in sub-paragraph (a) entitles the successor State unilaterally to make a notification that the treaty shall apply in respect of its entire territory. This appeared to the Commission to be justifiable on the basis of actual practice and as favouring the effectiveness of multilateral treaties. Sub-paragraphs (b) and (c) relating to restricted multilateral treaties and bilateral treaties provide that such treaties may also be extended to the entire territory of the successor State when the other States parties or State party so agree. Paragraph 3 excepts from the right of the successor State to make a notification under paragraph 2 (a) extending the application of the treaty to its entire territory cases where such application would be incompatible with the object and purpose of the treaty or would radically change the conditions for its operation.

(32) Since article 30, like the corresponding 1972 article, relates only to treaties in force at the date of the succession of States, the Commission decided to amend the title to read: “Effects of a uniting of States in respect of treaties in force at the date of the succession of States”. At the same time, the Commission observed that because of this limitation of the scope of article 30, there was no provision in the draft articles which would enable a successor State formed by a unifying of States to become a party, or a contracting State, to a treaty which was not in force at the date of the succession through procedures similar to those established by articles 17 and 18 for newly independent States. Having reached the conclusion that there was no valid reason for such a difference in treatment between those two categories of successor States—the newly independent and those formed by a unifying of States—the Commission decided to add to the draft two new articles, articles 31 and 32, entitled “Effects of a uniting of States in respect of treaties not in force at the date of the succession of States” and “Effects of a uniting of States in respect of treaties signed by a predecessor State subject to ratification, acceptance or approval” respectively.

(33) Article 31, paragraphs 1 to 4, is based on paragraphs 1 to 4 of article 17. Under conditions similar to those applying to newly independent States, it enables a successor State formed by a unifying of States to establish, by making a notification, its status as a party or a contracting State to a multilateral treaty which was not in force at the date of the succession of States. The introductory part and sub-paragraphs (a) and (b) of paragraph 5 of article 31 relating to the territorial scope element reflect the provisions of the introductory part and sub-paragraphs (a) and (b) of paragraph 2 of article 30. Paragraph 6 of article 31 also reflects the provisions of article 30 concerning incompatibility with the object and purpose of the treaty and radical change in the conditions for the operation of the treaty.

(34) Article 32, paragraphs 1 to 3, is based on paragraphs 1, 3 and 4 of article 18. Paragraph 1 of article 32 does not, however, contain the proviso in paragraph 1 of article 18 that by its signature the predecessor State intended that the treaty should extend to the territory to which the succession of States relates, because such a proviso has clearly no relevance to a uniting of States. Paragraph 2 of article 18, which relates exclusively to that proviso, has consequently been omitted from article 32. Provisions in paragraphs 4 and 5 of article 32 are similar to those in paragraphs 5 and 6 of article 31.

(35) Lastly, the Commission considered that the rules governing a unifying of States should be the same whether the unifying was established by treaty or by other instruments. To make such a formal distinction the basis for applying different rules of succession in respect of treaties could hardly be justified. A constituent instrument not in treaty form may often embody agreements negotiated between the States concerned. The uniform rules provided for in the present articles are intended
therefore to apply equally to cases of a uniting of States established by treaty. They take precedence over the rules of the general law of treaties embodied in article 30 of the Vienna Convention (application of successive treaties relating to the same subject-matter) to the extent that those rules might otherwise be applicable.

**Article 33.** Succession of States in cases of separation of parts of a State

1. When a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist:

   (a) any treaty in force at the date of the succession of States in respect of the entire territory of the predecessor State continues in force in respect of each successor State so formed;

   (b) any treaty in force at the date of the succession of States in respect only of that part of the territory of the predecessor State which has become a successor State continues in force in respect of that successor State alone.

2. Paragraph 1 does not apply if:

   (a) the States concerned otherwise agree; or

   (b) it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. Notwithstanding paragraph 1, if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly independent State, the successor State shall be regarded for the purposes of the present articles in all respects as a newly independent State.

**Article 34.** Position if a State continues after separation of part of its territory

When, after separation of any part of the territory of a State, the predecessor State continues to exist, any treaty which at the date of the succession of States was in force in respect of the predecessor State continues in force in respect of its remaining territory unless:

   (a) it is otherwise agreed;

   (b) it is established that the treaty related only to the territory which has separated from the predecessor State; or

   (c) it appears from the treaty or is otherwise established that the application of the treaty in respect of the predecessor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

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Commentary

(1) These articles deal with questions of succession in respect of treaties in cases where a part of parts of the territory of a State separate to form one or more independent States. The situations covered by the articles presuppose a predecessor State and one or more successor States, namely, the new State or States established in part or parts of the former territory of the predecessor State. The articles regulate the effect of such a succession of States on treaties in force at the date of the succession of States in respect of the whole or part of the territory of the predecessor State from the standpoint of:

   (a) the successor or successor States, whether or not the predecessor State continues to exist (article 33) and

   (b) of the predecessor State, when it continues to exist (article 34).

Separation of parts of a State when the predecessor State ceases to exist

(2) Almost all the precedents of separation of parts of a State when the predecessor State has ceased to exist have concerned the so-called "union of States". One of the older precedents usually referred to in this connexion is the separation of parts of Great Colombia in 1829-1831, after being formed some ten years earlier by New Granada, Venezuela and Quito (Ecuador). During its existence Great Colombia had concluded certain treaties with foreign powers. Among these were treaties of amity, navigation and commerce concluded with the United States of America in 1824 and with Great Britain in 1825. After the separation, it appears that the United States of America and New Granada considered the treaty of 1824 to continue in force as between those two countries. It further appears that Great Britain and Venezuela and Great Britain and Ecuador, although with some hesitation on the part of Great Britain, acted on the basis that the treaty of 1825 continued in force in their mutual relations. In advising on the position in regard to Venezuela the British Law Officers, it is true, seem at one moment to have thought the continuance of the treaty required the confirmation of both Great Britain and Venezuela; but they also seem to have felt that Venezuela was entitled to claim the continuance of the rights under the treaty.

(3) Another of the older precedents usually referred to is the separation of Norway and Sweden in 1905. During the union these States had been recognized as having separate international personalities, as is illustrated by the fact that the United States had concluded separate extradition treaties with the Governments of Norway and Sweden. The King of Norway and Sweden had, moreover, concluded some treaties on behalf of both States. The King, however, did not address identical notifications to foreign Powers in which they stated their view of the effect of such separation. These notifications, analogous to some more recent notifications, informed other Powers of the position which the two States took in regard to the continuance of the union's treaties: those made specific-
ally with reference to one State would continue in force only as between that State and the other States parties; those made for the union as a whole would continue in force for each State but only relating to itself.

(4) Great Britain accepted the continued existence of the union treaties vis-à-vis Sweden only pending a further study of the subject, declaring that its separation from the union undoubtedly afforded His Majesty's Government the right to examine, de novo, the treaty engagements by which Great Britain was bound to the union. Both France and the United States of America, on the other hand, appear to have shared the view taken by Norway and Sweden that the treaties of the former union continued in force on the basis set out in their notifications.

(5) The termination of the Austro-Hungarian Empire in 1918 appears to have been a case of separation of parts of a union in so far as it concerns Austria and Hungary and the other territories of the Empire. The extinction of the Dual Monarchy is complicated as a precedent by the fact that it took place after the 1914-1918 war and that the question of the fate of the Dual Monarchy's treaties were regulated by the peace treaties. Austria in its relations with States outside the peace treaties appears to have adopted a more reserved attitude towards the question of its obligation to accept the continuance in force of Dual Monarchy treaties in its relations with certain countries, Austria persisted in the view that it was a new State not ipso jure bound by those treaties. Hungary, on the other hand, appears generally to have accepted that it should be considered as remaining bound by the Dual Monarchy treaties ipso jure.

(6) The same difference in the attitudes of Austria and Hungary is reflected in the Secretariat's studies of succession in respect of bilateral treaties. Thus, in the case of an extradition treaty, Hungary informed the Swedish Government in 1922 as follows:

Hungary, from the point of view of Hungarian constitutional law, is identical with the former Kingdom of Hungary, which during the period of dualism formed, with Austria, the other constituent part of the former Austro-Hungarian monarchy. Consequently, the dissolution of the monarchy, that is, the termination of the constitutional link as such between Austria and Hungary, has not altered the force of the treaties and conventions which were in force in the Kingdom of Hungary during the period of dualism.**

Austria, on the other hand, appears to have regarded the continuity of a Dual Monarchy extradition treaty with Switzerland as dependent on the conclusion of an agreement with that country.** Similarly, in the case of trade agreements the Secretariat study observes: "In so far as the question was not regulated by specific provisions in the Peace Settlement, Austria took a generally negative view of treaty continuity, and Hungary a positive one".*** And this observation is supported by references to the practice of the two countries in relation to the Scandinavian States, the Netherlands and Switzerland, which were not parties to the Peace Settlement. Furthermore, those different attitudes of the two countries appear also in their practice in regard to multilateral treaties, as is shown by the Secretariat study of succession in respect of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes.****

(7) Between 1918 and 1944 Iceland was associated with Denmark in a union of States under which treaties made by Denmark for the union were not to be binding upon Iceland without the latter's consent. During the union Iceland's separate identity was recognized internationally; indeed, in some cases treaties were made separately with both Denmark and Iceland. At the date of separation from the union there existed some pre-union treaties which had continued in force for the union with respect to Iceland as well as further treaties concluded during the union and in force with respect to Iceland. Subsequently, as a separate independent State, Iceland considered both categories of union treaties as continuing in force with respect to itself and the same view of its case appears to have been taken by the other States parties to those treaties. Thus, according to the Secretariat study of extradition treaties:

... a list published by the Icelandic Foreign Ministry of its treaties in force as of 31 December 1964 includes extradition treaties which were concluded by Denmark before 1914 with Belgium, France, Germany (listed under "Federal Republic of Germany"), Italy, Luxembourg, Netherlands, Norway, Spain, the United Kingdom (also listed under Australia, Canada, Ceylon, India and New Zealand) and the United States of America. In each case it is also indicated that the other listed countries consider that the treaty is in force.****

Again, according to the Secretariat study of trade agreements, the same Icelandic list:

... includes treaties and agreements concerning trade concluded before 1914 by Denmark with Belgium, Chile, France, Hungary, Italy, Liberia, Netherlands, Norway, Sweden, Switzerland and the United Kingdom (also listed under Australia, Ceylon, India and South Africa), and trade treaties and agreements concluded between 1918 and 1944 with Austria, Bolivia, Brazil, Czechoslovakia, Finland, Greece, Haiti, Poland, Romania, Spain, the USSR and the United States of America. Seventeen of the twenty-seven listed States have also confirmed that the treaties in question remain in effect. The remainder appear to have taken no position.****

As to multilateral treaties, it is understood that, after its separation from the union Iceland considered itself a party to any multilateral treaty which had been applicable to it during the union. But the provision in the constitution of the union that treaties made for the union were not to be binding upon Iceland without its consent was strictly applied; and a good many multilateral treaties made by Denmark during the union, including treaties concluded under the auspices of the League of Nations, were not in fact subscribed to by Iceland. This seems to be the explanation of why in Multilateral Treaties in respect of which the Secretary-General performs

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depository functions. Denmark is in a number of cases listed today as a party to a League of Nations treaty, but not Iceland.\footnote{497} In some cases, moreover, Denmark and Iceland are both bound by the treaty or Denmark is bound and the treaty is open to accession by Iceland.\footnote{498} The practice in regard to multilateral treaties thus only serves to confirm the separate international personality of Iceland during the union.

(8) The effect of the formation of the United Arab Republic on the pre-union treaties of Syria and Egypt has been considered in the commentary to article 30. Some two and a half years after its formation the union ceased to exist through the withdrawal of Syria. The Syrian Government then passed a decree providing that, in regard to both bilateral and multilateral treaties, any treaty concluded during the period of union with Egypt was to be considered in force with respect to the Syrian Arab Republic. It communicated the text of this decree to the Secretary-General, stating that in consequence “obligations contracted by the Syrian Arab Republic under multilateral agreements and conventions during the period of the Union with Egypt remain in force in Syria”.\footnote{499} In face of this notification the Secretary-General adopted the following practice:

Accordingly, in so far as concerns any action taken by Egypt or subsequently by the United Arab Republic in respect of any instrument concluded under the auspices of the United Nations, the date of such action is shown in the list of States opposite the name of Egypt. The dates of actions taken by Syria, prior to the formation of the United Arab Republic, are shown opposite the name of the Syrian Arab Republic, as also are the dates of receipt of instruments of accession or notification of application to the Syrian Province deposited on behalf of the United Arab Republic during the time when Syria formed part of the United Arab Republic.\footnote{500}

In other words, each State was recorded as remaining bound in relation to its own territory by treaties of the United Arab Republic concluded during the period of the union as well as by treaties to which it had itself become a party prior to the union and which had continued in force in relation to its own territory during the union.

(9) Syria made a unilateral declaration as to the effect of separation from the union on treaties concluded by the union during its existence. At the same time, Syria clearly assumed that the pre-union treaties to which the former State of Syria had been a party would automatically continue to be binding upon it and this seems also to have been the understanding of the Secretary-General. Egypt, the other half of the union, made no declaration. Retaining the name of the United Arab Republic (the subsequent change of name to Arab Republic of Egypt (Egypt) was notified to the Secretary-General on 2 September 1971), it apparently regarded Syria as having in effect seceded, and the continuation of its own status as a party to multilateral treaties concluded by the union as being self-evident. Egypt also clearly assumed that the pre-union treaties to which it had been a party would automatically continue to be binding upon the United Arab Republic. This treaty practice in regard to Syria and the United Arab Republic has to be appreciated against the background of the development of their membership of international organizations.\footnote{501} Syria, in a telegram to the President of the General Assembly, simply requested the United Nations to “take note of the resumed membership in the United Nations of the Syrian Arab Republic”.\footnote{502} The President, after consulting many delegations and after ascertaining that no objection had been made, authorized Syria to take its seat again in the Assembly. Syria, perhaps because of its earlier existence as a separate Member State, was therefore accorded treatment different from that accorded in 1947 to Pakistan, which was required to undergo admission as a new State. No question was ever raised as to the United Arab Republic’s right to continue its membership after the extinction of the union. Broadly speaking, the same solution was adopted in other international organizations.\footnote{503}

(10) Other practice in regard to multilateral treaties is in line with that followed by the Secretary-General, as can be seen from the Secretariat studies of the Berne Convention for the Protection of Literary and Artistic Works,\footnote{504} the Convention for the Protection of Industrial Property \footnote{505} and the Geneva Humanitarian Conventions.\footnote{506} This is true also of the position taken by the United States of America, as depository of the Statute of IAEA, in correspondence with Syria concerning the latter’s status as a member of that Agency. As to bilateral treaties, the Secretariat studies of air transport and trade agreements confirm that the practice was similar.\footnote{507}

(11) The case of the Mali Federation is sometimes cited in the present connexion. But the facts concerning that extremely ephemeral federation are thought to be too special for it to constitute a precedent from which to derive any general rule. In 1959 representation of four autonomous territories of the French Community adopted the text of a constitution for the “Federation of Mali”, but only two of them—Sudan and Senegal—ratified the constitution. In June 1960 France, Sudan and Senegal reached agreements on the conditions of the transfer of competence from the Community to the Federation and the attainment of independence. Subsequently, seven agreements of co-operation with France were concluded in the name of the Federation of Mali. But in August Senegal annulled its ratification of the constitution and was afterwards recognized as

\footnote{497}E.g., Protocol on Arbitration Clauses (1923), Convention for the Execution of Foreign Arbitral Awards (1927), etc. See United Nations, Multilateral Treaties...1972 (op. cit.), pp. 438 et seq.


\footnote{499}United Nations, Multilateral Treaties... 1972 (op. cit.), p. 3, foot-note 3.

\footnote{500}Ibid.

\footnote{501}See above, commentary to article 30.

\footnote{502}United Nations, Multilateral Treaties...1972 (op. cit.), p. 3, foot-note 3.


\footnote{504}Ibid., pp. 67-68, paras. 296-297.

\footnote{505}Ibid., pp. 49-50, para 211.

an independent State by France; and in consequence the newborn Federation was, almost with its first breath, reduced to Sudan alone. Senegal, the State which had in effect seceded from the Federation, entered into an exchange of notes with France in which it stated its view that:

... by virtue of the principles of international law relating to the succession of States, the Republic of Senegal is subrogated, in so far as it is concerned, to the rights and obligations deriving from the co-operation agreements of 22 June 1960 between the French Republic and the Federation of Mali, without prejudice to any adjustments that may be deemed necessary by mutual agreement.

The French Government replied that it shared this view. Mali, on the other hand, which had contested the legality of Senegal's separation from the Federation and retained the name of Mali, declined to accept any succession to obligations under the co-operation agreements. Thus, succession was accepted by the State which might have been expected to deny it and denied by the State which might have been expected to assume it. But in all the circumstances, as already observed, it does not seem that any useful conclusions can be drawn from practice in regard to the case of this Federation.

**Separation of parts of a State when the predecessor State continues to exist**

(12) When part or parts of the territory of a State separate from it and become themselves independent States, and the State from which they had sprung, the predecessor State continues its existence unchanged except for its diminished territory, the effect of the separation is the emergence of a new State by secession. Before the era of the United Nations, colonies were considered as being in the fullest sense territories of the colonial power. Consequently some of the earlier precedents usually cited for the application of the clean slate rule rule in cases of secession concerned the secession of colonies; e.g. the secessions from Great Britain and Spain of their American colonies. In these cases the new States are commonly regarded as having started their existence freed from any obligation in respect of the treaties of their parent State. Another early precedent is the secession of Belgium from the Netherlands in 1830. It is believed to be the accepted opinion that in the matter of treaties Belgium was regarded as starting with a clean slate, except for treaties of a local or dispositive character. Thus, in general the pre-1830 treaties continued in force for the Netherlands, while Belgium concluded new ones or formalized the continuance of the old ones with a number of States.

(13) When Cuba seceded from Spain in 1898, Spanish treaties were not considered as binding upon it after independence. Similarly, when Panama seceded from Colombia in 1903, both Great Britain and the United States regarded Panama as having a clean slate with respect to Colombia's treaties. Panama itself took the same stand, though it was not apparently able to convince France that it was not bound by Franco-Colombian treaties. Colombia, for its part, continued its existence as a State after the separation of Panama, and the view that it remained bound by treaties concluded before the separation was never questioned. Again, when Finland seceded from Russia after the First World War, both Great Britain and the United States of America concluded that Russian treaties previously in force with respect to Finland would not be binding on the latter after independence. In this connexion reference may be made to a statement by the United Kingdom in which the position was firmly taken by that State that the clean slate principle applied to Finland except with respect to treaty obligations which were "in the nature of servitudes".

(14) The termination of the Austro-Hungarian Empire has already been discussed in so far as it concerned the Dual Monarchy itself. In so far as it concerned other territories of the Empire, those other territories, which seem to fall into the category of secession, were Czechoslovakia and Poland. Both these States were required in the Peace Settlements to undertake to adhere to certain multilateral treaties as a condition of their recognition. But outside these special undertakings they were both considered as newly independent States which started with a clean slate in respect of the treaties of the former Austro-Hungarian Empire.

(15) Another precedent from the pre-United Nations era is the secession of the Irish Free State from the United Kingdom in 1922. Interpretation of the practice in this case is slightly obscured by the fact that for a period after its secession from the United Kingdom the Irish Free State remained within the British Commonwealth as a "Dominion". This being so, the United Kingdom took the position that the Irish Free State had not seceded and that, as in the case of Australia, New Zealand and Canada, British treaties previously applicable in respect of the Irish Free State remained binding upon the new Dominion. The Irish Free State, on the other hand, considered itself to have seceded from the United Kingdom and to be a newly independent State for the purposes of succession in respect of treaties. In 1933 the Prime Minister (Mr. De Valera) made the following statement in the Irish Parliament on the Irish Free State's attitude towards United Kingdom treaties:

... acceptance or otherwise of the treaty relationships of the older State is a matter for the new State to determine by express declaration or by conduct (in the case of each individual treaty), as considerations of policy may require. The practice here has been to accept the position created by the commercial and administrative treaties and conventions of the late United Kingdom until such time as the individual treaties or conventions themselves are terminated or amended. Occasion has then been taken, where desirable, to conclude separate engagements with the States concerned.

The Irish Government, as its practice shows, did not claim that a new State had a right unilaterally to determine its acceptance or otherwise of its predecessor's treaties.

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507 See above, para. 3 of the commentary to article 15.
508 See para. 5 above.
510 See para. 5 above.
511 Russia and Germany.
treaties. This being so, the Irish Prime Minister in 1933 was attributing to a seceded State a position not very unlike that found in the practice of the post-war period concerning newly independent States.

(16) In the case of multilateral treaties, the Irish Free State seems in general to have established itself as a party by means of accession, not succession, although it is true that the Irish Free State appears to have acknowledged its status as a party to the 1906 Red Cross Convention on the basis of the United Kingdom's ratification of the Convention on 16 April 1907.\(^{513}\) In the case of the Berne Union for the Protection of Literary and Artistic Works, however, it acceded to the Convention, although using the United Kingdom's diplomatic services to make the notification.\(^{513}\) The Swiss Government, as depositary, then informed the parties to the Union of this accession and, in doing so, added the observation that the Union's International Office considered the Irish Free State's accession to the Convention as "proof that, on becoming an independent territory, it had left the Union". In other words, the Office recognized that the Free State had acted on the basis of the clean slate principle and had not "succeeded" to the Berne Convention. Moreover, in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions* the Republic of Ireland is listed as a party to two conventions ratified by Great Britain before the former's independence and in both these cases the Republic became a party by accession.\(^{514}\)

(17) During the United Nations period, cases of separation resulting in the creation of a newly independent State, as distinct from a dependent territory emerging as a sovereign State, have been comparatively few. The first such case was the somewhat special one of Pakistan which, for purposes of membership of international organizations and participation in multilateral treaties, was in general treated as being neither bound nor entitled *ipso jure* to the continuance of pre-independence treaties.\(^{515}\) This is also to a large extent true in regard to bilateral treaties,\(^{516}\) though in some instances it seems, on the basis of the devolution arrangements embodied in the Indian Independence (International Arrangements) Order, 1947, to have been assumed that Pakistan was to be considered as a party to the treaty in question. Thus, the case of Pakistan has analogies with that of the Irish Free State and, as already indicated in the commentary to article 15 appears to be an application of the principle that on separation such a State has a clean slate in the sense that it is not under any *obligation* to accept the continuance in force of its predecessor's treaties. In all the circumstances, the emergence of Pakistan to independence may be regarded as being in essence a case of the formation of a newly independent State.

(18) The adherence of Singapore to the Federation of Malaysia in 1963 has already been referred to.\(^{517}\) In 1965, by agreement, Singapore separated from Malaysia, becoming an independent State. The Agreement between Malaysia and Singapore, in effect, provided that any treaties in force between Malaysia and other States at the date of Singapore's independence should, in so far as they had application to Singapore, be deemed to be a treaty between the latter and the other State or States concerned. Despite this "devolution agreement" Singapore subsequently adopted a posture similar to that of other newly independent States. While ready to continue Federation treaties in force, Singapore regarded that continuance as a matter of mutual consent. Even if in one or two instances other States contended that it was under an obligation to accept the continuance of a treaty, this contention was rejected by Singapore.\(^{518}\) Similarly, as the entries in *Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions*\(^{519}\) show, Singapore has notified or not notified its succession to multilateral treaties, as it has thought fit, in the same way as other newly independent States.

**Reconsideration at the twenty-sixth session**

(19) The main provisions of the 1972 text of articles 33 and 34 may be summarized as follows: Article 27 of the 1972 draft was entitled "Dissolution of a State". It was based on the assumption that parts of a State became individual States and that the original State ceased to exist. Paragraph 1 of the article was divided into three sub-paragraphs laying down the following rules which, by hypothesis, concerned only the successor States, that is, the parts which had become individual States. Under sub-paragraph (a), any treaty concluded by the predecessor States in respect of its entire territory continued in force in respect of each successor State emerging from the dissolution. Under sub-paragraph (b), any treaty concluded by the predecessor State in respect only of a particular part of its territory which had become an individual State continued in force in respect of this State alone. Sub-paragraph (c) contemplated the case of the dissolution of a State previously constituted by the unification of two or more States. Paragraph 2 of article 27 of the 1972 draft listed two exceptions to the rules laid down in paragraph 1. These exceptions were set out in sub-paragraphs (a) and (b).

(20) Article 28 of the 1972 draft was entitled "Separation of part of a State". It was based on the assumption

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\(^{514}\) Ibid., p. 13, para. 25.


that the part which separated became an individual State but, unlike the case contemplated in article 27 of the 1972 draft, the predecessor State continued to exist. Article 28 of the 1972 draft laid down two rules concerning the treaty position of the original State and of the new State arising from the separation. The first, set out in the introductory part of paragraph 1, concerned the predecessor State. It provided that any treaty which was in force in respect of that State continued to bind it in relation to its remaining territory. Exceptions to that rule were listed in sub-paragraphs (a) and (b) of paragraph 1. The second rule, set out in paragraph 2, concerned the successor State. It provided that the State was to be considered as being in the same position as a newly independent State in relation to any treaty which at the date of separation was in force in respect of the territory now under its sovereignty.

(21) At the present session, the Commission re-examined the articles in the light of the comments of Governments. Two basic questions arose out of those comments particularly in connexion with article 27 of the 1972 draft. First, was there sufficient distinction between the "dissolution of a State" (former article 27) and "the separation of part of a State" (former article 28) to justify treating the former as a category on its own? If there was no material distinction between the two categories, was it right to have two articles to deal with them? Secondly, if the "dissolution of a State" was to be treated as a distinct category, should the article be based on the principle of ipso jure continuity, the principle of consent or the clean slate principle? Even if there was a material distinction between the two categories, should it follow automatically that there must be a different solution for each of them?

(22) As it appears from the commentary to article 27 in the 1972 draft, almost all of the practice relating to the disintegration of a State resulting in its extinction concerned the "dissolution" of what traditionally has been regarded as a union of States, which implied that the component parts of the union retained a measure of individual identity during the existence of the union. This concept was in the background of the distinction between dissolution and separation of part of a State. The Commission, however, did not retain in 1972 the concept of a "union of States" for either article 26 or 27. On the contrary, for article 27, as well as for article 26 of the 1972 draft, the concept of "the State" was taken as the starting point. The implication was that for the purposes of article 27, as well as those of article 26 of the 1972 draft, the internal structure of the State was regarded as immaterial: this point was made very clear in the 1972 draft. With this starting-point, the question arises whether, in modern international law, there is any material difference between a State that dissolves into parts and one from which a part separates. It may be that in both cases the State divides into parts.

(23) From a purely theoretical point of view, there may be a distinction between dissolution and separation of part of a State. In the former case, the predecessor State disappears; in the latter case, the predecessor State continues to exist after the separation. This theoretical distinction might have implications in the field of succession in respect of treaties, but it does not necessarily follow that the effects of the succession of States in the two categories of cases must be different for the parts which become new States. In other words, it is possible to treat the new States resulting from the dissolution of an old State as parts separating from that State.

(24) Irrespective of whether or not there is a theoretical distinction between the two categories of cases, the question remains whether the principles of continuity or the clean slate principle should be applied to them.

(25) As regards "dissolution", already in 1972 the Commission recognized that traditionally jurists have tended to emphasize the possession of a certain degree of separate international personality by constituent territories of the State during the union as an element for determining whether treaties of a dissolved State continue to be binding on the States emerging from the dissolution. After studying the modern practice, however, the Commission concluded that the almost infinite variety of constituted relationships and of kinds of "union" render it inappropriate to make this element the basic test for determining whether treaties continue in force upon a dissolution of a State. It considered that today every dissolution of a State which results in the emergence of new individual States should be treated on the same basis for the purpose of the continuance in force of treaties. The Commission concluded that although some discrepancies might be found in State practice, still that practice was sufficiently consistent to support the formulation of a rule which, with the necessary qualifications, would provide that treaties in force at the date of the dissolution should remain in force ipso jure with respect to each State emerging from the dissolution. The fact that the situation may be regarded as one of "separation of part or parts of a State" rather than one of "dissolution" does not alter this basic conclusion.

(26) In cases of secession the practice prior to the United Nations era, while there may be one or two inconsistencies, provides support for the clean slate rule in the form in which it is expressed in article 15 of the present draft: i.e. that a seceding State, as a newly independent State, is not bound to maintain in force, or to become a party to, its predecessor's treaties. Prior to the United Nations era depositary practice in regard to cases of succession of States was much less developed than it has become in the past twenty-five years owing to the very large number of cases of succession of States with which depositaries have been confronted. Consequently, it is not surprising that the earlier practice in regard to seceding States does not show any clear concept of notifying succession to multilateral treaties, such as is now familiar. With this exception, however, the position of a seceding State with respect to its predecessor's treaties seems in the League of Nations era to have been much the same as that in modern practice of a State which has emerged to independence from a previous colonial, trusteeship or protected status.
The available evidence of practice during the United Nations period appears to indicate that, at least in some circumstances, the separated territory which becomes a sovereign State may be regarded as a newly independent State to which in principle the rules of the present draft articles concerning newly independent States should apply. Thus, the separation of East and West Pakistan from India was regarded as analogous to a secession resulting in the emergence of Pakistan. Similarly, if the election of WHO to admit Bangladesh as a new member together with its acceptance of West Pakistan as continuing the personality and membership of Pakistan are any guide, the virtual splitting of a State in two does not suffice to constitute the disappearance of the original State.

The basic position of the State which continues in existence is clear enough since it necessarily remains in principle a party to the treaties which it has concluded. The main problem therefore is to formulate the criteria by which to determine the effect upon its participation in these treaties of the separation of part of its territory. The territorial scope of a particular treaty, its object and purpose and the change in the situation resulting from the separation are the elements which have to be taken into account.

In the light of the foregoing the Commission, with regard to the second rule of article 28 of the 1972 draft, decided that the scope of the rule should be limited to cases where the separation occurred in circumstances which were essentially of the same character as those existing in the case of the formation of a newly independent State. In addition, with reference to the provisions of paragraph 1 (c) of article 27 of the 1972 draft the Commission observed that it contemplated the case of the dissolution of a State previously constituted by the uniting of two or more States and referred, therefore, to two distinct and not simultaneous succesions of State, each of which should be considered separately. Accordingly, as in conformity with a decision which it had taken in a similar situation arising in connexion with article 30, the Commission decided that the provisions of paragraph 1 (c) of article 27 of the 1972 draft should be deleted from the final text.

Having taken the two decisions referred to in the preceding paragraph, the Commission sought to present the provisions of articles 27 and 28 of the 1972 draft in a clearer and more systematic manner. It came to the conclusion that they should be re-arranged so that one article would contain the provisions concerning the successor State and the other, the provisions concerning the predecessor State.

Article 33 is entitled “Succession of States in cases of separation of parts of a State.” As is expressly stated in the opening clause, the article deals with the case where a part or parts of the territory of a State separate to form one or more States, whether or not the predecessor State continues to exist, that is to say, whether or not it is dissolved, to use the terminology of the 1972 draft. The article, therefore, covers both the situation dealt with in the former article 27, and the situation dealt with in the former article 28, but it covers those situations exclusively from the standpoint of the successor State. Sub-paragraphs (a) and (b) of paragraph 1 reproduce, with some drafting changes, the rules set out in the corresponding sub-paragraphs of the former article 27. Paragraph 2 reproduces, again with drafting changes, the exceptions to those rules set out in paragraph 2 of the former article 27.

Paragraph 3 provides for a further exception to paragraph 1. That exception concerns the successor States which separate from the predecessor States in circumstances essentially of the same character as those existing in the case of the formation of a newly independent State. It reflects paragraph 2 of the former article 28 with the limitations in scope already mentioned. By contrast with cases under paragraph 1 where the predecessor State may or may not survive the succession of States, in cases to which paragraph 3 applies, the predecessor State would always continue to exist. This is implicit in the idea of “dependency” which provides the key to the meaning of “newly independent State” as defined in article 2, paragraph 1 (f).

The new text of article 34 is entitled “Position if a State continues after separation of part of its territory.” As is expressly stated in the opening clause, the new text concerns—as did the former article 28—the case where, after the separation of any part of the territory of a State, the predecessor State continues to exist, but it deals with that case exclusively from the standpoint of the predecessor State. The introductory part of the new text of article 34 reproduces, with several drafting changes, the rule appearing in the introductory part of paragraph 1 of the 1972 text of the article. The paragraphs of the article designated by the letters (a), (b) and (c), list three exceptions to that rule. Paragraph (a) corresponds to sub-paragraph (a) of paragraph 1 of the 1972 text. Paragraph (b) corresponds to the first clause of sub-paragraph (b) of paragraph 1 of the 1972 text and paragraph (c) to the second clause of that sub-paragraph.

Article 35. Participation in treaties not in force at the date of the succession of States in cases of separation of parts of a State

1. Subject to paragraphs 3 and 4, a successor State falling within article 33, paragraph 1, may by making a notification, establish its status as a contracting State to a multilateral treaty which is not in force if, at the date of the succession of States, the predecessor State was a contracting State to the treaty in respect of the territory to which the succession of States relates.

2. Subject to paragraphs 3 and 4, a successor State falling within article 33, paragraph 1, may by making a notification, establish its status as a party to a multilateral treaty which enters into force after the date of the succession of States if at that date the predecessor State was a contracting State to the treaty in respect of the territory to which the succession of States relates.

\(^{581}\) See para. 29 above.

\(^{582}\) New article.
3. Paragraphs 1 and 2 do not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

4. If the treaty is one falling within the category mentioned in article 16, paragraph 3, the successor State may establish its status as a party or as a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

Article 36. Participation in cases of separation of parts of a State in treaties signed by the predecessor State subject to ratification, acceptance or approval

1. Subject to paragraphs 2 and 3, if before the date of the succession of States the predecessor State had signed a multilateral treaty subject to ratification, acceptance or approval and the treaty, if it had been in force at that date, would have applied in respect of the territory to which the succession of States relates, a successor State falling within article 33, paragraph 1, may ratify, accept or approve the treaty as if it had signed that treaty and may thereby become a party or a contracting State to it.

2. Paragraph 1 does not apply if it appears from the treaty or is otherwise established that the application of the treaty in respect of the successor State would be incompatible with its object and purpose or would radically change the conditions for the operation of the treaty.

3. If the treaty is one falling within the category mentioned in article 16, paragraph 3, the successor State may become a party or a contracting State to the treaty only with the consent of all the parties or of all the contracting States.

Commentary
(1) Both article 33 in the final text and the corresponding article in the 1972 text relate exclusively to treaties which were in force at the date of the succession of States. Accordingly, the successor State in the case of separation of parts of a State would be unable to succeed to a treaty which was not in force at that date by procedures similar to those provided for by articles 17 and 18 for newly independent States, procedures which the Commission extended in articles 31 and 32 to successor States formed by a uniting of States.

(2) At the present session, the Commission came to the conclusion that there was no valid reason for such a difference of treatment between two categories of successor States, namely, newly independent States and States formed by a uniting of States, on the one hand, and, on the other, successor States in cases of separation of parts of a State. Accordingly, it prepared two new articles, numbered 35 and 36. Article 35 adapts the provisions of article 17 to the case of a successor State falling within article 33, paragraph 1, that is, a successor State emerging from a separation of part of a State. Similarly, article 36 adapts the provisions of article 18 to the case of such a successor State.

Article 37. Notification

1. Any notification under article 30, 31 or 35 must be made in writing.

2. If the notification is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

3. Unless the treaty otherwise provides, the notification shall:

(a) be transmitted by the successor State to the depositary or, if there is no depositary, to the parties or the contracting States;

(b) be considered to be made by the successor State on which it has been received by the depositary or, if there is no depositary, on the date on which it has been received by all the parties or, as the case may be, by all the contracting States.

4. Paragraph 3 does not affect any duty that the depositary may have, in accordance with the treaty or otherwise, to inform the parties or the contracting States of the notification or any communication made in connexion therewith by the successor State.

5. Subject to the provisions of the treaty, such notification or communication shall be considered as received by the State for which it was intended only when the latter State has been informed by the depositary.

Commentary
(1) For purposes that are in a sense comparable to those for which a newly independent State may make a notification of succession under the articles in part III of the draft, certain articles in part IV provide for the making of a notification by a successor State. These are articles 30, 31 and 35. However, the term “notification” has been used in these articles in order to maintain a clear distinction between the case of newly independent States covered by part III, and the cases of other successor States falling within part IV. Nevertheless, the Commission considered that it would be right to adapt the provisions of article 21 for the purpose of notifications made under the articles in part IV.

(2) Accordingly, paragraphs 1 and 2 provide that a notification under article 30, 31 or 35 must be made in writing and that, if it is not signed by the Head of State, Head of Government or Minister for Foreign Affairs, the representative of the State communicating it may be called upon to produce full powers.

(3) Paragraph 3 (a) of the article, as sub-paragraph (a) of article 78 of the Vienna Convention lays down that, unless the treaty otherwise provides, the notification shall be transmitted by the successor State to the depositary or, if there is no depositary, to the parties or the contracting States.

(4) Paragraph 3 (b) of this article sets forth the rule that, unless the treaty otherwise provides, the notification shall be considered to be made by the successor State on the date on which it has been received by the
the Vienna Convention, the notification is considered to
mines the date of making of a notification of succession.

Paragraph 5 is concerned with the trans-
communication made in connexion herewith shall be
connexion therewith by the successor State.

If there is no depositary, by analogy with sub-paragraph
(b) of article 16 and sub-paragraph (b) of article 78 of
the Vienna Convention, the notification is considered to
have been made on the date on which it was received by
all the parties or, as the case may be, by all the con-
tracting States and it is from that date that the legal
nexus is established between the notifying successor State
and any other party or contracting State.

(5) Paragraph 4 of the article then provides that the
rule set forth in paragraph 3 does not affect any duty that
the depositary may have, in accordance with the treaty
or otherwise,\textsuperscript{828} to inform the parties or the contracting
States of the notification or any communication made in
connexion therewith by the successor State.

(6) Paragraph 5 of this article provides that, subject to
the provisions of the treaty, the notification or any other
communication made in connexion herewith shall be
considered as received by the State for which it was
intended only when the latter State has been informed by
the depositary. Paragraph 5 is concerned with the trans-
mission of information by the depositary and does not
affect the operation of paragraph 3, which deter-
mines the date of making of a notification of succession.

\section*{PART V}

\textbf{MISCELLANEOUS PROVISIONS}

\textbf{Article 38.} \textsuperscript{829} \textit{Cases of State responsibility
and outbreak of hostilities}

The provisions of the present articles shall not prejudice
any question that may arise in regard to the effects of a
succession of States in respect of a treaty from the inter-
national responsibility of a State or from the outbreak
of hostilities between States.

\textbf{Article 39.} \textsuperscript{830} \textit{Cases of military occupation}

The provisions of the present articles do not prejudice
any question that may arise in regard to a treaty from the
military occupation of a territory.

\textit{Commentary}

(1) The provisions of articles 38 and 39 constituted in
the 1972 draft a single article—numbered 51—which

\textsuperscript{828} For instance, under article 77 of the Vienna Convention.
\textsuperscript{829} 1972 draft, article 31.
\textsuperscript{830} Idem.

excluded from the scope of the draft articles three
specific matters, namely, "any question that may arise in
regard to a treaty from the military occupation of a
territory or from the international responsibility of
a State or from the outbreak of hostilities between
States". The reasons, however, for the exclusion of the
first matter—questions arising from the military occu-
pation of a territory—were different from those for the
exclusion of the other two.

(2) The military occupation of a territory does not
constitute a succession of States. While it may have an
impact on the operation of the law of treaties, it has no
impact on the operation of the law of succession of
States. It can, however, give rise to problems analogous
to those of a succession of States and this could lead to
a misunderstanding of its true nature in relation to a
succession of States. It is to avoid such a misunderstanding
that the Commission found it desirable to
exclude specifically from the scope of the draft questions
arising from the military occupation of a territory. On
the other hand, it excluded the two other matters referred
to in the article 31 of the 1972 draft—questions arising
from the international responsibility of a State or from
the outbreak of hostilities, but for different reasons.

(3) Questions arising from the international respon-
sibility of a State were also excluded from the Vienna
Convention by article 73. The Commission, when pro-
posing this exclusion in its final report on the law of
treaties, explained in its commentary to the relevant
article \textsuperscript{828} its reasons for doing so. It considered that an
express reservation in regard to the possible impact of
the international responsibility of a State on the appli-
cation of its draft articles was desirable in order to
prevent any misconceptions as to the interrelation
between the rules governing that matter and the law of
treaties. Principles of State responsibility might have an
impact on the operation of certain parts of the law of
treaties in conditions of entirely normal international
relations. The Commission, therefore, decided that
considerations of logic and of the completeness of the
draft articles indicated the desirability of inserting a
general reservation covering cases of State responsibility.
The Commission further underlined the need to for-
mulate the reservation in entirely general terms in order
that it should not appear to prejudice any of the ques-
tions of principle arising in connexion with this topic
of State responsibility, the codification of which the
Commission already had in hand. The same consider-
ations and the possibility of an impact of the rules of
State responsibility on the operation of the law of suc-
cession of States made it desirable, in the Commission’s
view, to insert in the text of the article a general reser-
vation covering questions arising from the international
responsibility of a State.

(4) Questions arising from the outbreak of hostilities
were likewise excluded from the Vienna Convention by
article 73. This exclusion was inserted in article 73 not by
the International Law Commission but by the United

\textsuperscript{828} Article 69. See \textit{Official Records of the United Nations Con-
ference on the Law of Treaties, Documents of the Conference (op.
ctn.), p. 87.}
Nations Conference on the Law of Treaties itself. The Commission had taken the view that the outbreak of hostilities should be considered as an entirely abnormal condition and that the rules governing its legal consequences should not be regarded as forming part of the general rules of international law applicable in the normal relations between States. Without dissenting from that general point of view, the Conference decided that a general reservation concerning the outbreak of hostilities was nevertheless desirable. True, there was a special reason for inserting that reservation in the Vienna Convention; for article 42, paragraph 2, of the Convention expressly provides that the termination or the suspension of its operation “may take place only as a result of the application of the provisions of the treaty or of the present Conventions”. Even so, the Commission considered that in the interests of uniformity as well as because of the possible impact of the outbreak of hostilities in cases of succession it was desirable to reproduce the reservation in the present articles.

(5) At the present session, the Commission came to the Conclusion that the difference in the reasons for the exclusion from the scope of the draft of the three matters referred to in the text of article 31 of the 1972 draft should be reflected both in the arrangement and in the wording of the provisions relating to that exclusion. As regards arrangement, the Commission divided that text into two articles. The first—article 38—is devoted to the exclusion of questions arising from the international responsibility of a State or from the outbreak of hostilities between States. The second—article 39—is devoted to the exclusion of questions arising from the military occupation of a territory. As regards wording, article 38, following the normal style for the drafting of legal rules, states that “the provisions of the present articles shall* not prejudge” any of the questions referred to therein while article 39, which is an assertion for the avoidance of doubt, states that those provisions “do* not prejudge” such questions. Furthermore, the expression in article 38 “any question that may arise in regard to the effects of a succession of States in respect of a treaty**” was replaced in article 39 by “any question that may arise in regard to a treaty***” because the military occupation of territory is not to be confused with a succession of States. Accordingly, there can be no question in the case of military occupation of the effects of a succession of States.

Chapter III
STATE RESPONSIBILITY

A. Introduction

1. Historical review of the work of the Commission

86. At its first session, in 1949, the International Law Commission included the question of State responsibility in the list of fourteen topics of international law selected for codification. In 1955, following the adoption by the General Assembly of resolution 799 (VIII) of 7 December 1953, the Commission appointed Mr. F. V. Garcia Amador Special Rapporteur for the topic. Between 1956 and 1961 Mr. Garcia Amador submitted to the Commission six successive reports on State responsibility. Being occupied throughout those years with the codification of other branches of international law, such as arbitral procedure and diplomatic and consular intercourse and immunities, the Commission was not able to undertake the codification of the topic of State responsibility, although from time to time, particularly in 1956, 1957, 1959 and 1960, it held some general exchanges of views on the question.***

87. In 1960 the question of the codification of State responsibility was raised in the Sixth Committee of the General Assembly for the first time since 1953. It was considered in 1961 and 1962 by the Sixth Committee and by the International Law Commission in the context of the programme of future work in the field of the codification and progressive development of international law. The discussion brought out differences of opinion regarding the approach to the subject, in particular as to whether the Commission should begin by codifying the rules governing State responsibility as a general and separate topic, or whether it should take up certain particular topics of the law of nations, such as the status of aliens, and at the same time, within this context, should set out to codify the rules whose violation entailed international responsibility, as well as the rules of responsibility in the proper sense of the term. Finally it was agreed, both in the General Assembly and in the International Law Commission, that it was a question not merely of continuing work already begun but of taking up the subject again ex novo, that State responsibility should be included among the priority topics, and that measures should be taken to speed up work on its codification. As Mr. Garcia Amador was no longer a member, the Commission agreed in 1962 that it would be necessary to carry out some preparatory work before a special rapporteur was appointed, and it entrusted this task to a Sub-Committee on State Responsibility of ten members.****

88. The work of the Sub-Committee on State Responsibility was reviewed by the Commission at its 686th

*** For a detailed history of the question up to 1969, see Yearbook ... 1969, vol. II, p. 229, document A/7610/Rev.1, chap. IV.

**** Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Arribas, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tunkin, Mr. Tsuruoka and Mr. Yasseen.
meeting, during its fifteenth session (1963), on the basis of the report submitted by the Chairman of the Sub-Committee, Mr. Ago. \(^{531}\) All the members of the Commission who took part in the discussions agreed with the general conclusions formulated by the Sub-Committee, namely: (a) that, with a view to the codification of the topic, priority should be given to the definition of the general rules governing international responsibility of the State; (b) that there would be no question of neglecting the experience and material gathered on certain particular aspects of the topic, especially that of responsibility for injuries to the person or property of aliens; and (c) that careful attention should be paid to the possible repercussions which new developments in international law might have had on State responsibility. The members of the Commission also approved the programme of work proposed by the Sub-Committee. After having unanimously approved the report of the Sub-Committee, the Commission at the same session appointed Mr. Robert Ago as Special Rapporteur for the topic of State responsibility. It was also agreed that the Secretariat should prepare a number of working papers on the topic. \(^{532}\)

89. The Commission decided not to begin its consideration of the substance of the question of State responsibility until it had completed its study of the law of treaties and special missions; it was unable to do so until 1969. Before this, in 1967, having before it a note on State responsibility submitted by the Special Rapporteur, \(^{533}\) the Commission, as newly constituted, confirmed the instructions given him in 1963. \(^{534}\)

90. In 1969, at the twenty-first session of the Commission, the Special Rapporteur submitted his first report on the international responsibility of States. \(^{535}\) The report contained a review of previous work on the codification of the topic and reproduced, as annexes, the most important texts prepared in the course of earlier codification work, both individual and collective, official and unofficial. \(^{536}\)

91. As the Special Rapporteur explained when introducing it before the Commission, \(^{537}\) his report was intended to provide the Commission with a conspectus of what had been done so far, by studying which it could derive the maximum benefit for its future work and at the same time avoid committing the errors which in the past had stood in the way of codification of this important branch of international law.

92. In concluding his analysis, the Special Rapporteur reviewed the ideas which had guided the International Law Commission since the time when, having been forced to recognize that its previous efforts had led nowhere, it decided to take up the study of the topic of responsibility again, but from a fresh viewpoint; in particular, he summarized the plan adopted by the Sub-Committee on State Responsibility set up in 1962, and confirmed by the Commission itself at its fifteenth (1963) and nineteenth (1967) sessions, on the strength of which the Commission had decided to try to give a fresh impetus to the work of codification and reach some positive results, in pursuance of the recommendations of the General Assembly in resolutions 1765 (XVII), 1902 (XVIII), 2045 (XX), 2167 (XXI), 2272 (XXII) and 2400 (XXIII).

93. The Commission discussed the Special Rapporteur's first report in detail at its 1011th to 1013th and 1036th meeting. \(^{538}\) The debate revealed a considerable identity of views in the Commission as to the most appropriate way of continuing the work on State responsibility and as to the criteria that should govern the preparation of the different parts of the draft articles which the Commission proposed to undertake. The Commission's conclusions in that regard were subsequently set out in its report on the work of its twenty-first session. \(^{539}\)

94. The conclusions reached by the Commission at its twenty-first session were favourably received at the twenty-fourth session of the General Assembly. \(^{540}\) The over-all plan for the study of the topic, the successive stages for the execution of the plan for the study of the topic, the successive stages for the execution of the plan and the criteria for the different parts of the draft was laid down by the Commission, met with the general approval of the Sixth Committee. In the light of the Committee's report, the General Assembly, in resolution 2501 (XXIV) of 12 November 1969, in which it referred to its resolution 2400 (XXIII), recommended that the Commission should continue its work on State responsibility.

95. On the basis of the directives laid down by the International Law Commission and the recommendations of the General Assembly, the Special Rapporteur was entrusted with the task of preparing a new report for the twenty-fifth session of the Commission. \(^{541}\) The note was considered at the Commission's 934th and 395th meetings (see Yearbook \ldots 1967, vol. II, p. 114, document A/CN.4/209 and ibid., p. 101, document A/CN.4/208).

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\(^{545}\) ibid., pp. 104-117 and 239-242.


\(^{547}\) Official Record of the General Assembly, Twenty-fourth Session, Sixth Committee, 1103rd-1111th and 1119th meetings; and ibid., Annexes, agenda items 86 and 94 (b), document A/7746, paras. 86-89.
porteur began to consider, in succession, the many and diverse questions raised by the topic as a whole. He submitted to the Commission at its twenty-second session, in 1970, a second report on State responsibility, entitled "The origin of international responsibility". The introduction to the report contained a detailed plan of work for the first phase of the study of the topic, in which attention is to be focused on the subjective and objective conditions for the existence of an internationally wrongful act. The introduction was followed by a first chapter dealing with a number of general fundamental principles governing the topic as a whole. The Special Rapporteur presented his second report at the 1074th and 1075th meetings of the Commission. At the same time he submitted a questionnaire listing a number of points on which he wished to know the views of members of the Commission for the purposes of the continuation of his work.438

96. At its 1075th, 1076th, 1079th, and 1080th meetings, the Commission discussed the Special Rapporteur's second report in a general manner by way of a first broad review, and postponed more detailed consideration of specific points till a later session. At the 1081st meeting, the Special Rapporteur summarized the main conclusions as to method, substance and terminology to be drawn from the Commission's broad review. It was agreed that the Special Rapporteur's third report and those to follow would contain a detailed analysis of the various conditions which must be met for a State to be regarded as having committed an internationally wrongful act and as having thereby incurred international responsibility.448

97. At the twenty-fifth session of the General Assembly, the Sixth Committee found that the conclusions reached by the Commission at its 1970 session were generally acceptable. In resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission should continue its work on State responsibility.

98. At the twenty-third session of the Commission, in 1971, the Special Rapporteur submitted his third report, entitled "The internationally wrongful act of the State, source of international responsibility". This report began with an introduction setting out the various conclusions reached by the Commission following its consideration of the second report. The introduction as followed by a first chapter ("General principles"), divided into four sections (articles 1-4). In this chapter the Special Rapporteur reproduced the material included in chapter I of his second report, revised and supplemented in the light of the discussion in the Commission at its twenty-second session, namely: the principle that any internationally wrongful act of the State entails the State's international responsibility; the conditions for the existence of an internationally wrongful act; the subjects which may commit internationally wrongful acts; and the irrelevance of municipal law to the characterization of an act as internationally wrongful. The report ended with sections 1 to 6 (articles 5 to 9) of chapter II of the draft ("The 'act of the State' according to international law"); in all, this chapter is to comprise ten sections dealing with the conditions for the attribution to the State, as a subject of international law, of an act which might constitute a source of international responsibility. Sections 1 to 6, included in the third report, present some preliminary considerations on the subject matter of the chapter and also examine the following points: the attribution to the State of the acts of its organs; the irrelevance of the position of an organ in the distribution of powers and in the internal hierarchy of the State; the attribution to the State of acts of organs of public institutions separate from the State; the attribution to the State of acts of private persons in fact performing public functions or in fact acting on behalf of the State; and the attribution to the State of the acts of organs placed at its disposal by another State or by an international organization.

99. Consideration of the conditions for attributing to the State, as a subject of international law, an act which might constitute a source of international responsibility was continued and completed in the fourth report by the Special Rapporteur, which was submitted in 1972 at the Commission's twenty-fourth session. This report contains sections 7 to 10 (articles 10 to 13) of chapter II of the draft ("The 'act of the State' according to international law"), which deal with problems relating to the attribution to the State of acts or omissions on the part of organs acting outside their competence or contrary to the rules concerning their activity, and with problems which arise in the same context with regard to the conduct of private individuals acting in that capacity, the conduct of organs of another subject of international law, and the conduct of organs of an insurrectional movement whose structures have subsequently become, in whole or in part, the structures of a State.

100. Being occupied with the preparation of draft articles on the representation of States in their relations with international organizations, on the succession of States in respect of treaties and on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission was unable, for lack of time, to consider the topic of State responsibility either at its twenty-third session (1971) or at its twenty-fourth session (1972). The Commission included in its reports on those sessions, however, a brief statement of the position with regard to the study...
2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

(a) Form of the draft

107. The final form to be given to the codification of State responsibility is obviously a question which will

101. At the General Assembly's twenty-sixth session (1971) the view was taken in the Sixth Committee that the Special Rapporteur's work made a valuable contribution likely to speed up the preparation by the Commission of draft articles on the subject. In its resolution 2780 (XXVI) of 3 December 1971 the General Assembly recommended that the Commission should continue its work on State responsibility with a view to making substantial progress in the preparation of draft articles on the topic. At the General Assembly's twenty-seventh session (1972), a number of representatives in the Sixth Committee considered that the International Law Commission should give the highest priority to the study of State responsibility, and the Assembly, in resolution 2926 (XXVII) of 28 November 1972, recommended that the Commission should prepare a first set of draft articles on the topic.

102. In 1973, at its twenty-fifth session, the Commission began the preparation of a set of draft articles on State responsibility in accordance with the General Assembly's recommendations. Having considered at its 1202nd to 1213th and 1215th meetings chapter I and chapter II, sections 1 to 3, of the third report by the Special Rapporteur, the Commission adopted on first reading, at its 1225th and 1226th meetings, the text proposed by the Drafting Committee for draft articles 1 to 6: i.e. the articles of chapter I ("General principles") of the draft (articles 1 to 4) and the first two articles (articles 5 and 6) of chapter II ("The 'act of the State' according to international law"). The text of these articles and the commentaries thereto were reproduced in the Commission's report on the work of its twenty-fifth session.

103. The limitation of the scope of the present draft articles to responsibility for internationally wrongful acts, the distinction made between "primary" and "secondary" rules and the inductive method followed by the Special Rapporteur and the Commission in the preparation of the draft articles were approved by most of the representatives who took part in the discussion in the Sixth Committee at the General Assembly's twenty-eighth session. On the whole, the provisions of the draft adopted by the Commission in 1973 also elicited favourable comments. The General Assembly, by its resolution 3071 (XXVIII) of 30 November 1973, paragraph 3 (b) and (c), recommended that the Commission should continue on a priority basis at its twenty-sixth session its work on State responsibility, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII), 1902 (XVIII), 2400 (XXIII) and 2926 (XXVII), with a view to the preparation of a first set of draft articles on responsibility of States for internationally wrongful acts, and that the Commission should undertake at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of other activities.

104. At its current session the Commission continued its consideration of draft chapter II ("The 'act of the State' according to international law"), i.e., of the provisions relating to the conditions for the attribution to the State, as a subject of international law, of an act which may be a source of international responsibility. At its 1251st to 1253rd and 1255th to 1263rd meetings, the Commission examined chapter II, sections 4-6, of the Special Rapporteur's third report and referred the articles proposed in those sections to the Drafting Committee. At its 1278th meeting, the Commission examined the text of articles 7-9 as proposed by the Drafting Committee and adopted the text of those articles on first reading.

105. The consideration of the Special Rapporteur's third report has thus been completed. At its twenty-seventh session the Commission will resume its study of this topic at the point where it left off at the current session. It will thus begin by examining, on the basis of the relevant sections contained in the Special Rapporteur's fourth report, questions which fall within chapter II of the draft and have not yet been discussed. The Commission will then take up for consideration the objective element of the internationally wrongful act, i.e. draft chapter III ("Breach of an international obligation"), which the Special Rapporteur is now preparing.

106. The text of all the draft articles on State responsibility adopted by the Commission so far, and also the text of articles 7-9 and commentaries thereto as adopted at the current session, are reproduced below for the information of the General Assembly.
have to be settled later, when the Commission has
completed the draft. The Commission, in accordance
with its statute, will then formulate the recommendation
it considers appropriate. Without prejudging this re-
commendation, the Commission has decided to give its
study on State responsibility the form of a set of draft
articles, as expressly recommended by the General
Assembly in resolutions 2780 (XXVI), 2926 (XXVII)
and 3071 (XXVIII). The Commission too, feels that the
preparation of a set of draft articles is the most effective
method of discerning and developing rules of inter-
national law concerning State responsibility. The articles
now being prepared are drafted in a form which will
permit their being used as a basis for concluding a
convention, if that is eventually decided.

(b) Scope of the draft

108. As with other topics it has undertaken to codify in
the past, the Commission intends to limit its study of
international responsibility, for the time being, to State
responsibility. It does not underrate the importance
of studying questions relating to the responsibility of
subjects of international law other than States. The
overriding need for clarity in the examination of the topic
and the organic nature of the draft, however, clearly
makes it necessary to defer consideration of these other
questions.

109. The draft articles under consideration relate solely
to the responsibility of States for internationally wrongful acts. The Commission fully recognizes the
importance, not only of questions relating to responsi-
bility for internationally wrongful acts, but also of those
concerning liability for possible injurious consequences
arising out of the performance of certain lawful activi-
ties, especially those which because of their nature give
to rise to certain risks. The Commission takes the view,
however, that questions in this latter category should not
be dealt with jointly with those in the former category.
Owing to the entirely different basis of the so-called
responsibility for risk and the different nature of the
rules governing it, as well as its content and the forms
it may assume, a joint examination of the two subjects
could only make both of them more difficult to grasp.
Being obliged to accept the possible risks arising from
the exercise of an activity which is itself lawful, and being
obliged to face the consequences—which are not
necessarily limited to compensation—of the breach of
a legal obligation, are two different matters. It is only
because of the relative poverty of legal language that the
same term is habitually used to designate both. In the
light of these considerations and in order to avoid any
misunderstanding, the Commission, while reserving for
later consideration the question of a final title for the
present draft, wishes to emphasize that, as it has already
pointed out, the expression "State responsibility" which
appears in the title of the draft articles is to be under-
stood as meaning solely "responsibility of States for
internationally wrongful acts". 888

110. The limitation of the present draft articles to the
responsibility of States for internationally wrongful acts
will not, of course, prevent the Commission from un-
dertaking in due time a separate study of the topic of
international liability for injurious consequences arising
out of the performance of certain activities that are not
prohibited by international law, as recommended by the
General Assembly in its resolution 3071 (XXVIII),
paragraph 3 (e). What the Commission should not do is
to deal in one and the same draft with two matters which,
though possessing certain common features and character-
istics, are quite distinct. For reasons of this kind the
Commission considered that it was particularly necessary
to adopt, for the definition of the principle stated in
article 1 of the present draft, a formulation which,
while indicating that the internationally wrongful act is
a source of international responsibility, does not lend
itself to an interpretation that might automatically
exclude the existence of another possible source of
"responsibility".

111. International responsibility bears some very dif-
ferent aspects from other topics of which the Com-
mission has hitherto undertaken the codification. In its
previous drafts, the Commission has generally con-
centrated on defining the rules of international law
which, in one or another sector of inter-State relations,
impose specific obligations on States and may, in a
certain sense, be termed "primary". In dealing with the
topic of responsibility, on the other hand, the Com-
mision is undertaking to define other rules which, in
contradistinction to those mentioned above, may be
described as "secondary" inasmuch as they are con-
cerned with determining the legal consequences of
failure to fulfil obligations established by the "primary"
rules. In preparing the present draft, therefore, the
Commission intends to concentrate on determining the
rules which govern responsibility, maintaining a strict
distinction between this task and that of defining the
rules which impose on States obligations the violation
of which may be a source of responsibility. This strict
distinction seemed to the Commission to be essential if
the topic of international responsibility was to be placed
in its proper perspective and viewed as a whole.

112. The need to take into consideration the content,
nature and scope of the obligations laid on the State by
the "primary" rules of international law and to distinguish
on that basis between different categories of international
obligations will undoubtedly become plainly apparent
when the objective element of the internationally wrong-
ful acts comes up for study. In order to be able to assess
the gravity of the internationally wrongful act and to
determine the consequences attributable to that act,
it will undoubtedly be necessary to take into considera-
tion the fact that the importance attached by the interna-
tional community to respect for some obligations—for example,
those concerned with peace-keeping—will be of a com-
pletely different order from that attached to respect for
other obligations, specifically because of the content
of the former. It will also be necessary to distinguish
some obligations from others according to the aims they
pursue and the results sought from them if we are to be
able to determine in each case whether or not there has
been a breach of an international obligation and, if so, to fix the time of commission of the internationally wrongful act. These various aspects will be gone into at the appropriate time. But they must not be allowed to obscure the essential fact that it is one thing to define a rule and the obligation it imposes, and another to determine whether there has been a breach of that obligation and what should be the consequences of the breach. Only the second aspect comes within the sphere of responsibility proper; to encourage any confusion on this point would be to raise an obstacle which might once again frustrate any hope of successful codification. That is clear from past experience.

113. In the present draft articles, the Commission is proposing to codify the rules governing the responsibility of States for internationally wrongful acts in general, and not only in regard to certain particular sectors such as responsibility for acts causing injury to the person or property of aliens. The international responsibility of the State is a situation which results not just from the breach of certain specific international obligations, but from the breach of any international obligation, whether established by the rules governing one particular matter or by those governing another matter. The draft articles accordingly deal with the general rules of the international responsibility of the State for internationally wrongful acts; that is to say, the rules which govern all the new legal relationships that may follow from an internationally wrongful act of a State, regardless of the particular sector to which the rule violated by the act may belong.

(c) Structure of the draft

114. In broad outline, and subject to any decisions which the Commission may take later, the structure of the proposed draft articles corresponds to the plan for studying the international responsibility of States adopted by the Commission at earlier sessions on the basis of the proposals of the Special Rapporteur. The preparation of the draft will therefore comprise two distinct main phases. Speaking generally, the first will deal with the origin of international responsibility, and the second with the content of the responsibility. More precisely, the first will determine on the basis of what facts and in what circumstances there exists on the part of a State an internationally wrongful act which, as such, is a source of international responsibility. The second will determine the consequences attached by international law to an internationally wrongful act in the various cases, in order to derive therefrom a definition of the content, forms and degrees of international responsibility. Once these two essential tasks have been accomplished, the Commission may possibly decide whether a third should be added: namely, to consider certain problems concerning what has been termed the “implementation” ("mise en œuvre") of the international responsibility of the State, and questions concerning the settlement of disputes arising out of the application of the rules relating to responsibility.

115. Within this general framework, the first task in preparing a set of draft articles to cover the question of the responsibility of the State for internationally wrongful acts is to formulate the basic general principles. Once these principles have been established, the next step will be to deal with all the questions relating to the subject element of the internationally wrongful act: that is to say, questions concerning the possibility of attributing particular conduct (a particular act or omission) to the State as a subject of international law, and hence of considering this conduct as an act of the State in international law. It will then be necessary to solve the problems which arise with regard to the objective element of the internationally wrongful act: in other words, to establish in what circumstances the conduct attributed to the State must be considered as constituting a breach of an international legal obligation. In this way it will be possible to bring together the conditions for an act of the State to be characterized as an internationally wrongful act giving rise, as such, to State responsibility at the inter-State level. The next step will be to examine the questions which arise in connexion with the possible participation of more than one State in the same unlawful situation, or with the responsibility which a State may sometimes incur through the internationally wrongful act of another State. It will also be necessary to analyse the various circumstances whose existence may possibly exclude any wrongfulness of the conduct attributed to the State. It will then be possible to pass on to the second phase of the work, that relating to the content, forms and degrees of international responsibility.

116. In the light of the foregoing considerations, chapter I of the draft articles is devoted to “general principles”. It contains, first, a definition of the fundamental principle attaching responsibility to every internationally wrongful act of the State (article 1). Next it states the principle, closely linked to the first, that every State is subject to the possibility of being held, under international law, to have committed an internationally wrongful act entailing its international responsibility (article 3). This is followed logically by the principle which states the two elements, subjective and objective, for the existence of a wrongful act of the State under international law (article 3). The chapter ends with the definition of a fourth general principle —namely, the principle of the irrelevance of the internal law of a State to the characterization of an act of that State as internationally wrongful (article 4). The text of these provisions was adopted provisionally by the Commission in 1973, at its twenty-fifth session.\footnote{See above para. 102 and foot-note 553.}

117. Chapter II of the draft (“The act of the State under international law") is devoted to the subjective element of the internationally wrongful act and, therefore, to the determination of the conditions in which particular conduct must be considered as an “act of the State” under international law. After an introductory commentary containing preliminary considerations designed to take into account certain theoretical difficulties and to assert in any case the autonomy of international law in this matter, the chapter contains a series of rules in the form of articles. These rules deal first with the question of establishing what persons may be the authors of conduct which may be considered as an act of the State according to international law. First comes the principal category, State organs—those so

\footnote{See above para. 102 and foot-note 553.}
characterized according to the internal law of the State. Next comes conduct whose authors do not, strictly speaking, form part of the organization of the State but which is also considered as an act of the State according to international law. Secondly, it is necessary to decide within this general context whether conduct falling under all these different categories should or should not, in certain particular conditions, be attributed to the State according to international law. Thirdly, the analysis concludes on a negative note by stating the rules which indicate the categories of conduct for which attribution to the State is excluded, while examining what may be the international situation of the State in relation to such conduct.

118. At its twenty-fifth and twenty-sixth sessions the Commission examined the introduction to chapter II and the first five articles. These articles form only a part of the provisions which are to appear in this chapter of the draft. The first article of the chapter (article 5) defines the rule which, in this sphere, constitutes the starting point—the rule that an act or omission may be taken into consideration for the purposes of attribution to the State as an internationally wrongful act if it has been committed by an organ of the State: that is to say, by an organ possessing that status according to the internal legal order of the State and acting in that capacity in the case in question. As a corollary to this rule, the second article (article 6) states that, for purposes of attribution of its conduct to the State, it is immaterial whether the organ in question belongs to any of the main branches of the State structure, whether its functions concern international relations or are of a purely internal character, or whether it holds a superior or subordinate position in the organization of the State. The third article (article 7) concerns the attribution to the State, as a subject of international law, of the conduct of organs, not of the State itself, but of other entities empowered by the international law of the State to exercise elements of the governmental authority (territorial governmental entities, entities not forming part of the formal structure of the State or of a territorial governmental entity). The fourth article (article 8) deals with the attribution to the State—again with a view to establishing its international responsibility—of the conduct of persons or groups of persons who do not formally possess the status of organs of the State or of one of the entities referred to in article 7 but who acted in fact on behalf of the State or were in fact exercising, in certain circumstances, elements of the governmental authority. The fifth article (article 9) lays down the conditions for attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization.660

119. The second and third group of questions raised in chapter II of the draft are dealt with by the Special Rapporteur in his fourth report, which has not yet been examined by the Commission. Section 7 of the report (article 10) deals essentially with the highly controversial question of that attribution to the State of the conduct of an organ which has exceeded its authority or acted contrary either to specific instructions or to the general requirements of the exercise of its activity. An effort is also made to clarify the situation which may arise where a person has continued to act as an organ when in fact, even if not formally, he has lost that status. Section 8 (article 11) excludes in principle, for the purposes of State responsibility, the possibility of attributing to the State under international law the conduct of private individuals who have acted as such, and it then examines the sense and the circumstances in which the existence of an internationally wrongful act on the part of the State can nevertheless be contemplated in connexion with certain conduct of private individuals. Section 9 (article 12) considers whether it is possible to attribute to the State acts or omissions of organs of another subject of international law (a State, an international organization, or an insurrectional movement possessing international personality) acting in its territory, or whether such acts or omissions should be attributed only to the other subject of international law in question. In the same context the Special Rapporteur deals in section 10 (article 13) with the specific question of retroactive attribution to a State of the acts of organs of a successful insurrectional movement.

120. Once the above-mentioned sections of the Special Rapporteur's fourth report have been examined, the Commission will have completed the study of the requirements for the characterization of specific conduct as an "act of the State" with a view to establishing its international responsibility. It will then have to take up chapter III of the draft, dealing with the various aspects of what has been called the objective element of the internationally wrongful act: the breach of an international obligation. In his fifth report the Special Rapporteur will first examine, in a section devoted to preliminary considerations on the lines of chapter II, section 1, the general questions which arise in connexion with the second constituent element of an internationally wrongful act. Following these considerations, the Special Rapporteur will examine in particular the fundamental question whether the source of the international legal obligation breached—customary, conventional or other—has any bearing on the question whether the breach is or is not an internationally wrongful act. Next to be examined will be the various problems relating to the determination of different categories of breaches of international obligations. An essential question which will arise in this context is whether in these days it is necessary to recognize the existence of a distinction based, as was indicated above, on the importance to the international community of the obligation breached, and accordingly whether contemporary international law should acknowledge a separate and more serious category of internationally wrongful acts, which might perhaps be described as international crimes. Another question which will arise in the same context is: what distinction should be made between the breach of an obligation requiring specific conduct on the part of the State and
the breach of an obligation requiring it only to ensure that a particular event does not occur (wrongful acts of conduct and wrongful acts of event)? An effort will be made later to deal with the different characteristics of the breach of obligation according to whether the obligation breached is one of those which specifically require a certain act or omission or is one of those which require in general terms that a certain result shall be ensured, without specifying the means by which the result is to be obtained. Another matter which will be examined in this context is the validity of the rule that local remedies must be exhausted before, for example, the breach of certain obligations relating to the treatment of aliens can be established. Next to be examined will be the various questions relating to the determination of the tempus commissi delicti, both in relation to the requirement that the obligation whose breach is complained of shall have been in force at the time when the conduct resulting in the breach took place, and in relation to cases where the act of the State takes the form of a continuing situation or the sum of a series of separate and successive actions. Once these points have been settled—and the above list is not intended to be either exhaustive or indicative of a final order of priority—some special problems, as already noted will still remain to be considered: for example, the possibility of attributing an internationally wrongful act simultaneously to more than one State in respect of one and the same situation, and the possibility of making a State responsible, in certain circumstances, for an internationally wrongful act committed by another State. Such problems could form the subject matter of a later chapter. The first phase of the study of State responsibility for internationally wrongful acts could then be completed with another chapter, devoted to detailed consideration of various circumstances which exclude wrongfulness—force majeure or act of God, consent of the injured State, legitimate application of a sanction, self-defence, state of emergency and so on—and of possible mitigating circumstances. The Commission will then be ready to move on to the second phase, concerning the content, forms and degrees of international responsibility.

121. The Commission felt that it would be better to postpone any decision concerning the desirability of prefacing the draft articles on State responsibility with an article giving definitions or an article indicating what matters would be excluded from the scope of the articles. When solutions to the various problems have reached a more advanced stage, it will be easier to see whether or not such preliminary clauses are needed in the general structure of the draft. Care should be taken to avoid definitions or initial formulations that might prejudice solutions to be adopted later. The first part of the draft will be based on a general notion of responsibility, that term denoting the set of new legal relationships to which an internationally wrongful act on the part of a State may give rise in various cases. Later it will be for the Commission to say whether, for example, such relationships may arise only between the State concerned and the State whose rights have suffered injury, or also between the State concerned and other subjects of international law, or possibly even with the international community as a whole. For the time being the Commission will confine itself to explaining in the commentaries to the articles, whenever necessary, the meaning of expressions used.

122. Lastly, the Commission agreed that the topic of international responsibility was one of those where the progressive development of international law could be particularly important especially—as the Special Rapporteur has shown—with regard to the distinction between different categories of breaches of international obligations and to the content and degrees of responsibility. The Commission wishes expressly to state, however, that in its view the relative importance of progressive development and of the codification of accepted principles cannot be settled according to any pre-established plan. It must emerge in practical form from the pragmatic solutions adopted to the various problems.

B. Draft articles on State responsibility

123. The text of articles 1 to 9 as adopted by the Commission at the twenty-fifth session and at the present session, and the text of articles 7 to 9 with the commentaries thereto, as adopted by the Commission at the present session, are reproduced below for the information of the General Assembly.

1. Text of draft articles 1-9 as adopted by the Commission at its twenty-fifth and twenty-sixth sessions

Chapter I

GENERAL PRINCIPLES

Article 1. Responsibility of a State for its internationally wrongful acts

Every internationally wrongful act of a State entails the international responsibility of that State.

Article 2. Possibility that every State may be held to have committed an internationally wrongful act

Every State is subject to the possibility of being held to have committed an internationally wrongful act entailing its international responsibility.

Article 3. Elements of an internationally wrongful act of a State

There is an internationally wrongful act of a State when:
(a) conduct consisting of an action or omission is attributable to the State under international law; and
(b) that conduct constitutes a breach of an international obligation of the State.

1 As was stated in paragraph 109 above, the draft articles relate only to the responsibility of States for internationally wrongful acts. The question of the final title of the draft will be examined by the Commission at a later date.
Article 4. Characterization of an act of a State as internationally wrongful

An act of a State may only be characterized as internationally wrongful by international law. Such characterization cannot be affected by the characterization of the same act as lawful by internal law.

Chapter II

The act of the State under international law

Article 5. Attribution to the State of the conduct of its organs

For the purposes of the present articles, conduct of any State organ having that status under the internal law of that State shall be considered as an act of the State concerned under international law, provided that organ was acting in that capacity in the case in question.

Article 6. Irrelevance of the position of the organ in the organization of the State

The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character and whether it holds a superior or a subordinate position in the organization of the State.

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if

(a) it is established that such person or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

2. Text of draft articles 7-9 commentaries thereto as adopted by the Commission at its twenty-sixth session

Article 7. Attribution to the State of the conduct of other entities empowered to exercise elements of the governmental authority

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.

2. The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

Commentary

(1) In article 5 of the present draft articles, the Commission laid down the basic principle for determining what are "acts of the State" under international law: the first kind of conduct to be attributed to the State as a possible source of international responsibility is the conduct of those who, under the internal law of the State in question, are its own "organs". In stating this principle, however, the Commission in no way wished to affirm that the conduct of such "organs" would be the only conduct that could be attributed to the State with a view to establishing the international responsibility, if any, of the State. The purpose of article 5 is merely to indicate the most important category of conduct which can be attributed to the State. Article 7 supplements article 5 by indicating that under international law the actions and omissions attributed to the State also include those of organs of entities which, while having under internal law a legal personality separate from that of the State itself, are nevertheless entities empowered by this same law to exercise some elements of the governmental authority. By analogy with what was pointed out in relation to the conduct of State organs, only the private conduct of the individuals composing the organs of the entities in question is excluded in principle from attribution to the State.

(2) The principle of attribution to the State of the conduct referred to is the corollary of the unity of the State from the international point of view. The action of the State as a subject of international law is, indeed, performed first and foremost through the action of organs belonging to the machinery of the State proper; but to this action must be added that of organs of the machinery of all the other entities which have been empowered by internal law to exercise elements of the governmental authority. This is true both when the basis of their separate existence is the local or territorial setting which they act (as in the case of municipalities, provinces, regions, cantons, component States of a federal State and so on) and when this basis is, instead, the special nature of the functions performed (as may be the case of a bank of issue, a transport company entitled to exercise police powers, and so forth). In other words,
the principle stated in article 6 of the draft—namely, the irrelevance of the position of a State organ in the organization of the State for the purpose of attributing to the State, as a possible source of international responsibility, the actions or omissions of that organ—is not the only corollary of the fundamental idea of the unity of the State from the international point of view. The same principle should also lead us to disregard, for that purpose, the distinction between the various entities which, under internal law, perform specific services for the community and, in so doing, exercise functions which constitute elements of the governmental authority.

(3) Some members of the Commission, although fully in agreement on the fundamental idea mentioned above and on the consequences which quite naturally flow from it in the matter of determining what are "acts of the State" under international law, expressed doubts about the need to include in the draft articles a rule expressly stating the principle that conduct regarded as an act of the State includes that of organs of entities which, although legally separate from the State under internal law, are nevertheless empowered by that law to exercise elements of the governmental authority. The real point of those doubts was whether the entities in question and in particular territorial governmental entities, should in fact be regarded as entities separate from the State under its internal law. It is obvious that where such entities formed an integral part of the machinery of the State itself, the conduct of their organs would automatically be subject to the rule laid down in article 5, concerning the attribution to the State of the acts of its own organs. In reply to these doubts, however, it was pointed out that while there may be State legal systems under which territorial governmental entities are integrated into the structure of the State, so that the organs of these entities are regarded as organs of the State itself under its internal law, that is not the case under the majority of State legal systems. As a general rule such entities are endowed under internal law with a legal personality separate from that of the State, and consequently their organs are not regarded as organs of the State itself. The Commission therefore considered that the deletion of article 7, or even the deletion of paragraph 1 of the article, would leave a dangerous loophole in the codification of the topic—a loophole through which a State might evade international responsibility for the actions or omissions of organs of the entities in question.

(4) The principle that the State is responsible for acts and omissions of organs of territorial governmental entities, such as municipalities, provinces and regions, has long been unequivocally recognized in international judicial decisions and the practice of States. With regard to judicial decisions, a recent reaffirmation of the principle will be found in the award made on 15 September 1951 by the Franco-Italian Conciliation Commission established under article 83 of the Treaty of Peace of 10 February 1947, in the case concerning the Heirs of the Duc de Guise. The Commission expressed the following opinion:

For the purposes of reaching a decision in the present case it matters little that the decree of 29 August 1947 was not enacted by the Italian State but by the region of Sicily. For the Italian State is responsible for implementing the Peace Treaty, even for Sicily, notwithstanding the autonomy granted to Sicily in internal relations under the public law of the Italian Republic. With regard to the practice of States, the most conclusive expression of the conviction held by States in this matter is found in the opinions given during the preparatory work for the Conference for the Codification of International Law held at The Hague in 1930. Point VI of the request for information addressed to Governments by the Preparatory Committee of the Conference expressly asked the question whether the State became responsible as a result of "acts or omissions of bodies exercising public functions of a legislative or executive character (communes, provinces, etc.)." All Governments answered in the affirmative. This principle was also acknowledged in the codification drafts on State responsibility from official and private sources, and is accepted without discussion by all modern writers who have dealt with the question.

653 Ibid., vol. XIII (United Nations publication, Sales No. 64.V.3), p. 161 [translation by the United Nations Secretariat].
655 The principle referred to is expressly stated in Basis of Discussion No. 16 prepared by the Preparatory Committee for the Hague Codification Conference (Yearbook ... 1956, vol. II, p. 223, document A/CN.4/96, annex 2); in article II of the resolution adopted by the Institute of International Law in 1927 (ibid., p. 228, annex 8); in article III of the draft convention prepared by the Harvard Law School in 1929 (ibid., p. 229, annex 9) and in article 17, para. 1 (d) of the draft prepared by the same School in 1961 (Yearbook ... 1969, vol. II, p. 146, document A/CN.4/217 and Add. 1, annex VII); in article 14, para. 1 of the revised preliminary draft prepared by Mr. F. V. García Amador in 1961 (Yearbook ... 1969, p. 48, document A/CN.4/134, addendum); in article VII of the "Principles of international law that govern the responsibility of the State in the opinion of the United States of America", prepared by the Inter-American Juridical Committee in 1965 (Yearbook ... 1969, vol. II, p. 154, document A/CN.4/217 and Add.1, annex XV); and in section 170 of the Restatement of the law of the American Law Institute of 1965 (Yearbook ... 1971, vol. II (Part One), p. 194, document A/CN.4/217/Add.2).
(5) As to the question whether the component states of a federal State are to be included among the territorial governmental entities dealt with in the present article, it should be noted first of all that a consistent series of legal decisions has affirmed the principle of the international responsibility of the federal State for the conduct of organs of component states amounting to a breach of an international obligation of the federal State, even in situations in which internal law does not provide the federal State with means of compelling the organs of component states to abide by the deferral State’s international obligations. The award in the Case of the “Montijo”, made on 26 July 1875 by the United States-Colombian arbitral tribunal established under the agreement of 17 August 1874, is the starting point for this consistent series of decisions. This principle has been reaffirmed in many decisions since that time. In this connexion, reference may be made to the awards rendered by the United States of America/Venezuela Claims Commission established by the Convention of 5 December 1885, the French-Venezuela Mixed Commission established under the protocol of 19 February 1902, the British-Venezuelan Mixed Commission established under the protocols of 13 February and 7 May 1903, the Mexico/United States of America General Claims Commission established by the Convention of 8 September 1923 and the France/Mexico Claims Commission established by the Convention of 12 March 1927. Thus, for example, in the award made on 7 June 1929 in the Pellat Case, the last-mentioned Commission reaffirmed the “principle of the international responsibility ... of a federal State for all the acts of its separate States which give rise to claims by foreign States” and noted specially that such responsibility “... cannot be denied, not even in cases where the federal Constitution denies the central Government the right of control over the separate States or the right to require them to comply, in their conduct, with the rules of international law”.

(6) With regard to the practice of States it may be noted in particular that, according to the Governments which replied to the request for information addressed to them by the Preparatory Committee for the 1930 Codification Conference, the fact that the component states of a federal State have broad autonomy under internal law in no way rules out the possible international responsibility of the federal State for the conduct of organs of the component States. Attempts made in the past by some States with a federal structure to resist claims for compensation in respect of the conduct of organs of a component State have become increasingly rare in this century and have finally ceased.

(7) The substantial unanimity found in the international judicial decisions and in the practice of States in affirming the principle that a federal State is internationally responsible for the conduct of organs of its component states is not matched by a similar unanimity with regard to the grounds for that principle. The international responsibility of a federal State for the conduct of organs of its component states is sometimes presented as international responsibility for its own act, the conduct of an organ of the component state being regarded as attributable internationally to the federal State on the same grounds as its conduct of its own organs. In some judgements and statements of opinion, on the other hand, the international responsibility of a federal State in the cases considered here is conceived in terms of responsibility for the act of another—that is, of indirect responsibility of a subject of international law for the act of another subject—and the conduct of the organ of the component state is then attributed to that state alone.

(8) The two different ways of presenting and justifying the responsibility of a federal State for the conduct of organs of its component states are also to be found in some learned works. Most international jurists tend nowadays to see the structure of a federal State merely as an advanced form of decentralization of a State which, in outward appearance, remains basically unitary. Hence the holders of this view logically regard the principle of responsibility of a federal State, in the cases considered here, merely as the consequence of the attribution to that State, from the point of view of international law, of actions and omissions of organs of the component states. In the view of these authors, therefore, such attribution is made on the same basis as the attribution of the conduct of organs of a municipality, a region or the like.

575 League of Nations, Bases of Discussion ... (op. cit.), vol. III, pp. 121 et seq.; and Supplement to Volume III (op. cit.), p. 4.
574 A typical example of this is to be found in the practice of the United States of America. After resisting, in the nineteenth century, the idea that the federation was responsible for the acts or omissions of organs of the component states, the United States Government adopted a much more flexible position and finally accepted such responsibility without reservation, as shown by the instructions sent to the United States agent before the Mexico/United States of America General Claims Commission in 1926 (G. H. Hackworth, Digest of International Law, vol. V (Washington, D.C., U.S. Government Printing Office, 1943), pp. 594-595) and by the reply given in 1929 to point X of the request for information addressed to the United States Government by the Preparatory Committee for the Hague Codification Conference (League of Nations, Supplement to Volume III (op. cit.), p. 21).

(Continued on next page)
influence of this view is to be seen in several codification
drafts.\(^\text{976}\) Other jurists, however—admittedly, mainly
the older ones—regard the federal State much less as a
composite State, that is, a State made up of states, than
as a union of states in which the international personality
of the federal State and the personality, however limited
it may be, of the component states co-exist. Consequently,
if an organ of a component State commits an
act or omission relating to a sphere in which that State
does not appear to have any international obligations
directly incumbent upon it, the act or omission in question
should be regarded under international law as an act
or omission of the federal State, on the same footing
as the conduct of organs of a municipality, and, as
such, entails the federal State’s responsibility. On the
other hand, where an organ of a component state engages
in conduct which amounts to a specific breach of an
obligation incumbent upon the component state as a
separate subject of international law, such conduct
cannot be attributed to the federal State. The inter-
national responsibility of the federal State can all the
same be invoked but as an indirect responsibility.\(^\text{977}\)
Some codification drafts also reflect this approach.\(^\text{978}\)

(9) The differences of opinion thus revealed in judicial
decisions, in the practice of States and in learned works
with regard to the grounds on which a federal State bears
international responsibility for the conduct of organs of
its component states possess, perhaps, more theoretical
interest than practical significance. At all events they
seem to be due essentially to the fact that one and the
same term—“federal State”—is used to denote entities
having very different structures. It is an undeniable fact
that no distinction is drawn in public international law
between, on the one hand most of the federal States in
existence today, and on the other a State with a unitary
structure, and that the component states of such a
federal State in no way figures as internationally separate
entities. There are, however, federations whose com-
ponent states retain to varying degrees an international
personality of their own, and it is quite possible that
fresh example of structures of this kind may emerge in
the future. Indeed, many different situations exist in
practice, for cases are also known in which some of the
component states of one and the same federal State enjoy
personality under internal law only, whereas other
components of the same State are regarded as separate
subjects of international law. This plurality of situations
cannot but have repercussions on the theoretical basis
of international responsibility.

(10) In the Commission’s opinion, all that need be said
on this point is that, if the component states of a partic-
ular federal State do not possess a separate inter-
national personality, even within narrow limits, and if,
therefore, they do not at any time have international
rights and obligations, there can be no doubt that they
are no different, so far as the problem considered here is
concerned, from the other territorial governmental
entities dealt with in this article. The actions or omissions
of organs of component states are then simply to be
regarded under international law as acts of the federal
State. In the cases—comparatively rare nowadays—in
which component states retain an international per-
sonality of their own with a relatively restricted legal
capacity, it seems evident that the conduct of their
organs is likewise attributable to the federal State where
such conduct amounts to a breach of the federal State’s
international obligations. On the other hand, the con-
duct of organs of a component state amounts to a breach
of an international obligation incumbent upon the
component state, such conduct is to be attributed to
the component state and not to the federal State.
The international responsibility of the federal State can then
be invoked only as the responsibility of one subject of
international law for the act of another subject of inter-
national law.

(11) In connexion with the foregoing considerations the
Commission discussed whether, after the statement of
the principle of attribution to the State, as a possible
source of international responsibility, of the conduct of
organs of territorial governmental entities, an exception
should be made to the principle in order to deal, in partic-
ular, with the case of component states of a federation
which might have retained, in certain specific matters,
an international legal personality and capacity of their
own, separate from those of the federation. The Com-
mision did not, however, find it necessary to make
such a reservation. The purpose of the present article is
simply to determine whether, under international law,
the conduct of organs of territorial governmental entities
of a State—be it federal or unitary—should be regarded
as acts of the State: assuming, of course, that those
organs have acted in a sphere in which their action may

\(^{\text{976}}\) See for example article 17 of the draft prepared by the Harvard
Law School in 1961; article 14 of the revised preliminary draft
prepared by F. V. Garcia Amador in 1961; article VII of the “Prin-
ciples of international law that govern the responsibility of the State
in the opinion of the United States of America”, section 170 of the
Restatement of the law” by the American Law Institute (for refer-
ences, see above, foot-note 565); and article 2 of the draft agreement
on responsibility in international law prepared by B. Graefrath and
P. A. Steiniger in 1973. Wissenschaftliche Zeitschrift der Humboldt-
Universität zu Berlin (op. cit.), p. 467.

\(^{\text{977}}\) The thesis summarized here has been particularly developed by
H. Triepel, Völkerrecht und Landesrecht (Leipzig, Mohr (Siebeck),
1899), pp. 359 et seq. and 366 et seq.; with minor variations from one
writer to another, this view is also supported by K. Strupp, “Das
völkerrechtliche Delikt”, Handbuch des Völkerrechts pp. 109 et seq.;
(Stuttgart, Kohlhammer, 1920), vol. III, part. 4, pp. 106 et seq.;
Ch. de Visscher, “La responsabilité des États”, Bibliotheca Visseriana
(Leyden, Brill, 1924), vol. II, pp. 105-106; A. Verdross, “Theorie der
mittelbaren Staatshaftung,” Österreichische Zeitschrift für Öf-
fentlichen Recht (Vienna), vol. I, No. 4 (new series) (1948), pp. 395 et
seq.; D. B. Levin, Ovstetvennost gosudarstv v sovremen mez-
dunarodnom prave (Moscow, Mezhdunarodnye otnoshenia, 1966),
pp. 41 et seq. Some of these authors also advance the possibility of a
direct responsibility of the component State in certain cases in which
its acts take place within its own sphere of international com-

\(^{\text{978}}\) See for example, Basis of Discussion No. 23 of the Preparatory
Committee for the Hague Conference (Yearbook . . . 1965), vol. II,
p. 223, document A/CN.4/96, annex 2; article IX of the resolution
adopted by the Institute of International Law in 1927 (ibid., p. 228,
annex 8); and article 4 of the draft prepared by the Deutsche
Gesellschaft für Völkerrecht in 1930 (Yearbook 1969, vol. II,
come up against the existence of international obligations of the State in question. Where an organ of a component state of a federal State acts in a sphere in which the component state has international obligations that are incumbent on it and not on the federal State, that component state clearly emerges at the international level, as a subject of international law separate from the federal State, and not merely as a territorial government entity subordinate to the federal State. It stands to reason that in this case the conduct of the organ in question is, in virtue of article 5 of the present draft, the act of the component state; the problem of attributing the conduct in question to the federal State does not even arise in this hypothetical case, which thus automatically falls outside the scope of those covered by this article. It will, of course, be another matter to determine in such a case, not to what subject of international law the act is to be attributed, but what subject is to be held internationally responsible for that act. This entirely different aspect of the matter will logically come up for consideration in another chapter and will form the subject of another article of the present draft.

(12) The question also arose whether the rule of attribution to the State of the acts or omissions of organs of territorial governmental entities was not open to an exception in the case where such acts or omissions amounted to a breach of a contractual obligation assumed by such an entity under internal law. In this context it has often been affirmed as a principle that the State cannot be held internationally responsible for the breach of contracts entered into by the organs of a territorial governmental entity in connexion, for instance, with loans. In the Commission’s view, however, the question whether the conduct under consideration can or cannot entail the international responsibility of the State is not a matter of whether or not such conduct should be regarded as attributable to the State. To find the right answer to such a question it is necessary to determine whether or not, in the specific case in point, the State is under an international obligation, for example in virtue of a treaty, requiring that State in its international relations to honour certain contractual obligations under internal law, whether those obligations have been incurred by organs of the State itself or by organs of a territorial governmental entity. Hence, even where the question whether the State has an international responsibility or not was answered in the negative, that answer would be dictated, not by the fact that such conduct of an organ of a territorial governmental entity, amounting to non-fulfilment of a contractual obligation of that entity, was not attributable under international law to the State, but by the fact that the second condition for the existence of an internationally wrongful act of the State—i.e. the breach of an international obligation of the State—would not be met in the case in question. Consequently no exception whatsoever need be made in this connexion to the principle laid down in paragraph 1 of the present article.

(13) The general rule laid down in article 7, paragraph 1, providing for the attribution to the State of the conduct of organs of territorial governmental entities obviously does not exclude the possibility that States may, by treaty, adopt a different, special rule designed to prevail over the general rule in specified matters. For instance, some treaties to which federal States are parties include a so-called “federal clause” exempting the federal State from responsibility in the event that non-performance of the treaty is due to the failure of the federal State’s constitution to provide it with means of compelling its component states to abide by the treaty. This is clearly an exception to the general rule, applicable solely in relations between the States parties to the treaty in question and in the matters which the treaty covers.

(14) The rule laid down in article 7, paragraph 2, stems from, and is designed to cover, the need to take into account a typical phenomenon of our times: the proliferation of entities which, within a given community, are empowered to exercise some governmental authority. The manifold causes of this phenomenon need not be dwelt upon here. Suffice it to note that there is a tendency, within State communities, to set up more and more establishments, institutions—in a word, “entities”—which are required under internal law to perform certain tasks in the interest of the community but which possess, in the eyes of the law, an organization and a personality of their own, separate from those of the State. Among these various “entities”—whatever the régime by which they are governed—there are some whose particular characteristic is that the internal legal system confers upon them, to a greater or lesser extent, the exercise of certain elements of the governmental authority, usually of a regulatory or executive nature.

(15) Since this phenomenon is a relatively recent development, it is only to be expected that the practice of States has few precedents to offer. The request for information sent to Governments by the Preparatory Committee for the 1930 Codification Conference did not include any point dealing expressly with the case of entities other than territorial governmental entities exercising “public functions of a legislative or executive character” (point VI). However, in their replies to the questions raised in point VI, some Governments observed that the State was responsible also for acts or omissions of collective entities other than those of a local character, in so far as such entities were also required to exercise public functions of the same nature. The most interesting reply from this standpoint was that from the German Government, according to which:

... when, by delegation of powers, bodies act in a public capacity, e.g. police an area or exercise sovereign rights as in the case when they levy taxes for their own needs ... the principles governing the responsibility of the State for its organs apply with equal force. From the point of view of international law, it does not matter whether a State polices a given area with its own police or entrusts this duty, to a greater or less extent, to autonomous bodies.

When, however, these bodies, acting outside their allotted sphere, are guilty of behaviour towards foreigners which is contrary to international law, the principles set out in No. VII (concerning the conditions under which the State becomes responsible for foreigners injured by private individuals in their rights recognized under international law) will also apply.

879 League of Nations, Bases of Discussion ... (op. cit.), pp. 90 et seq.
The remarks in this connexion apply in practice principally to legal entities, and particularly administrative bodies possessing the right of self-government; but they are also applicable when the State, as an exceptional measure, invests private organizations with public powers and duties or authorizes them to exercise sovereign rights, as in the case of private railway companies permitted to maintain a police force."**

The Preparatory Committee accordingly came to the conclusion that it should refer both to territorial government entities such as communes and provinces and more generally to "autonomous institutions" which exercise public functions of a legislative or administrative character. It therefore prepared the following basis of discussion:

A State is responsible for damage suffered by a foreigner as the result of acts or omissions of such corporate entities (communes, provinces, etc.) or autonomous institutions as exercise public functions of a legislative or administrative character, if such acts or omissions contravene the international obligations of the State.**

Unfortunately the Third Committee of the Conference did not have time to examine and adopt that basis of discussion.

(16) The few modern authors who have studied the problem have put forward the logical reasons which require that the conduct of organs of the entities here considered should be attributed, at the international level, to the State.** Moreover the principle of such attribution is restated, in varied forms and at greater or lesser length, in certain codification drafts.**

(17) In the Commission's view, the question whether the conduct of organs of its territorial governmental entities should be attributed to the State under international law, calls for the same affirmative answer when the organs involved are organs of entities whose separate existence meets a need for decentralization not ratione loci but ratione materiae, and for the same reasons. In both cases it is important that the State should not be able to evade its international responsibility in certain circumstances solely because it has entrusted the exercise of some elements of the governmental authority to entities separate from the State machinery proper. The Commission, for its part, feels able to conclude that there is already an established rule on the subject; but it is also convinced that, even if that were not the case, the requirements of clarity in international relations and the very logic of the principles governing them would make it necessary to affirm such a rule in the course of the progressive development of international law.

(18) The choice of criteria for designating the entities to be covered by paragraph 2 of the present article is not easy, for the entities in question vary widely in characteristics, in the matters falling within their field of activity and, sometimes, in the régimes which govern them. The fact that an entity can be classified as public or private according to the criteria of a given legal system, the existence of a greater or lesser State participation in its capital or, more generally, in the ownership of its assets, and the fact that it is not subject to State control, or that it is subject to such control to a greater or lesser extent, and so on, do not emerge as decisive criteria for the purposes of attribution or non-attribution to the State of the conduct of its organs. Hence the Commission has come to the conclusion that the most appropriate solution is to refer to the real common feature which these entities have: namely that they are empowered, if only exceptionally and to a limited extent, to exercise specified functions which are akin to those normally exercised by organs of the State. The justification for attributing to the State, under international law, the conduct of an organ of one or other of the entities here considered still lies, in the final analysis, in the fact that the internal law of the State has conferred on the entity in question the exercise of certain elements of the governmental authority. It stands to reason that, if it is to be regarded as an act of the State for purposes of international responsibility, the conduct of the organ of an entity of this kind must relate to a sector of activity in which the entity in question is entrusted with the exercise of the elements of governmental authority concerned. Thus, for example, the conduct of an organ of a railway company to which certain police powers have been granted will be regarded as an act of the State under international law if it falls within the exercise of those powers.

(19) With regard to the formulation of the rule, the Commission felt it preferable to cover in a single article all the cases of conduct of organs of entities which under the internal law of the State have a personality separate from the State but which are empowered by the same law to exercise certain elements of the governmental authority, whether through the application of a normal criterion of decentralization ratione loci of the exercise of the governmental authority, or in order to meet a more exceptional and more limited need for decentralization ratione materiae of certain elements of the governmental authority. For this purpose, the term "entity" has been used in the title of the article as being the most neutral term and the easiest to translate into the various languages, and also as a term wide enough in meaning to cover bodies as different as territorial governmental entities, public corporations, semi-public entities, public
Article 8. Attribution to the State of the conduct of persons acting in fact on behalf of the State

The conduct of a person or group of persons shall also be considered as an act of the State under international law if

(a) it is established that such person or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.

Commentary

(1) Article 5 and 7 of this draft dealt with the attribution to the State qua subject of international law, as a possible source of its responsibility, of the conduct of organs which are part of the formal structure of the State and the conduct of organs of territorial governmental entities of the State and the conduct of organs of territorial governmental entities of the State or of one of the other entities mentioned in article 7 or who have been instructed by such organs to perform certain functions or certain activities, though not by way of formal appointment as an organ. Sub-paragraph (b), on the other hand, covers the case of persons or groups of persons who, although unconnected by any formal or de facto link with the machinery of the State or the machinery of any of the other entities mentioned in article 7, have acted in exceptional circumstances by assuming on their own initiative the exercise of certain elements of the governmental authority.

(2) The hypothesis contemplated in sub-paragraph (a) was intended by the Commission mainly to cover cases in which the organs of the State supplement their own action and that of their subordinates by the action of private persons or groups who act as “auxiliaries” while remaining outside the official structure of the State. In the same context the Commission wished to deal with the familiar cases in which the organs of the State or of one of the other entities empowered by internal law to exercise elements of the governmental authority prefer, for varied and in any case self-evident reasons, not to undertake certain duties directly or not to carry out certain tasks themselves. They then make use of persons who are not formally part of the State machinery or of the machinery of any of the other entities mentioned; they call upon private individuals or groups of private individuals to take on the duties and tasks in question, although here again these individuals or groups are not thereby formally attached to the structures in question and do not, in other words, thereby become de jure organs of the State or of the other entities mentioned. The Commission, also bearing in mind the important role played by the principle of effectiveness in the international legal order, considered that that order must of necessity take into account, in the cases contemplated, the existence of a real link between the person performing the act and the State machinery rather than the lack of a formal legal nexus between them. The conduct in which the persons or groups in question thus engage in fact on behalf of the State should therefore be regarded under international law as acts of the State: that is to say, as acts which may, in the event, become the source of an international responsibility incumbent on the State.

(3) The validity of this conclusion is confirmed by international judicial decisions and international practice, even though the former have only occasionally had to deal with the acts of the persons referred to in sub-paragraph (a). The cases which have actually arisen in international life relate mainly to situations in which the activities of the persons concerned were especially liable to bring them into contact with foreign countries. The main forms of conduct which have been taken into consideration for attribution to the State as acts generating international responsibility are, first, the conduct of private individuals or groups of private individuals who, while remaining such, are employed as auxiliaries in the police or armed forces or sent as “volunteers” to neighbouring countries, and secondly, the acts of persons employed to carry out certain missions in foreign territory.
(4) As an example of the first set of situations, mention may be made of the award given on 30 November 1925 by a Great Britain/United States arbitral tribunal in the D. Earnshaw and Others (Zafiro) Case. The tribunal found that the conduct of the crew of a United States merchant vessel was attributable to the United States of America and engaged the international responsibility of that State, because it had been established that the vessel, although private, was in fact acting as a supply ship for United States naval operations. Its captain and crew were for this purpose under the command of a United States naval officer. A further example is to be found in the decision in the Stephens Case, given by the Mexico/United States General Claims Commission on 15 July 1927. Referring to a group of guards who were not part of the Mexican army but whom it had employed as auxiliaries, the Claims Commission observed:

It is difficult to determine with precision the status of these guards as an irregular auxiliary of the army, the more so as they lacked both uniforms and insignia; but at any rate they were "acting for" Mexico.

On this basis the Claims Commission concluded that the act of a person who was part of these groups of guards employed as auxiliaries engaged Mexico’s responsibility on the same basis as the act of members of the regular armed forces.

(5) With regard to the second set of situations, reference may be made to the Black Tom and Kingsland cases, concerning acts of sabotage committed in the United States of America during the First World War by persons acting on behalf of Germany. In its decision of 16 October 1930 the United States and Germany Mixed Claims Commission established under the agreement of 10 August 1922 declared that, if it were proved that the damage complained of was due to the acts of the persons in question, Germany must be held responsible. In the same context, reference may also be made to the positions taken by States on the occasion of incidents concerning notorious cases in which persons have been abducted from the territory of another State: the Rossi, Jacob, Eichmann and Argoud cases.

(6) In addition to the two sets of situations just mentioned, reference may be made to certain positions taken on the occasion of incidents caused by the conduct of the press, radio, television, etc. It has happened that the country considering itself injured has claimed the existence of international responsibility for such conduct on the grounds that, in the country where the conduct occurred, the press and other mass information media were really controlled by the Government.

(7) It does not seem necessary to dwell on further specific examples of the application of the principle stated in sub-paragraph (a) of the present article, since this principle is practically undisputed. The attribution to the State, as a subject of international law, of the conduct of persons who are in fact acting on its behalf, though without thereby acquiring the status of organs either of the State itself or of some other entity empowered to exercise elements of the governmental authority, is unanimously upheld by the writers on international law who have dealt with this question.

(8) The Commission wishes nevertheless to make it quite clear that, in each specific case in which inter-

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886 Lehigh Valley Railroad Company and Other Cases (Black Tom and Kingsland cases), United Nations, Reports of International Arbital Awards, vol. VIII (United Nations publication, Sales No. 58.V.2), pp. 84 et seq. In this decision the Commission held that the burden of proof had not been sustained and it consequently decided the case in Germany’s favour. It was later proved, on the basis of new information, that the damage had in fact been caused by German saboteurs; the Commission therefore set aside its previous decision and held Germany responsible for the damage caused (decision of 15 June 1939, ibid., pp. 458-459). On this case, see L. H. Woolsey, "The arbitration of the sabotage claims against Germany", American Journal of International Law (Washington, D.C.), vol. 33, No. 4, October 1939, pp. 737 et seq.
887 This was an abduction carried out in Switzerland in 1928 by persons probably acting by agreement with the Italian police. On this case, see Scherer, "Der Notenwechsel zwischen der Schweiz und Italien in der Angelegenheit Cesare Rossi", Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Berlin), vol. I, part II (1929), pp. 280 et seq.
888 Berthold Jacob was abducted from Swiss territory in 1935 by persons manifestly employed for this work by the Gestapo, and taken to Germany. On this incident, see Queneudec, op. cit., p. 49; and "Die deutsch-schweizerische Schiedsordnung im Falle Jacob", die Friedens-Warte (Geneva), vol. 35, No. 4 (1935), pp. 157-158.
890 Colonel Argoud was abducted from German territory and taken to France in 1963 by persons suspected of acting on behalf of the French police. See on this subject the information given in Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Stuttgart), vol. 25, No. 2 (May 1965), pp. 295 et seq.; vol. 27, No. 1-2 (1967), pp. 188-189; and A. Coeuret-Zilgien, L’Affaire Argoud—Considérations sur les arrestations internationalement irrégulières (Paris, Pédone, 1965).
891 For examples drawn from practice see also E. Zellweger, Die völkerrechtliche Berantwortlichkeit des Staats für die Presse (Zurich, Polygraphischer Verlag, 1949), pp. 40 et seq.
national responsibility of the State has to be established, it must be genuinely proved that the person or group of persons were actually appointed by organs of the State to discharge a particular function or to carry out a particular duty, that they performed a given task at the instigation of those organs. Where such proof is lacking, the conduct of the persons concerned can only fall under the provisions of a subsequent draft article which is to deal with the conduct engaged in by individuals or groups of individuals as private persons. For these reasons the text adopted by the Commission for article 8, sub-paragraph (a), begins with the words “it is established”.

(9) With regard to the hypothesis contemplated in sub-paragraph (b), the Commission focused its attention mainly on circumstances in which, for one reason or another, the regular administrative authorities have disappeared. During the Second World War, for example, in belligerent countries and any other country invaded, local administrations fled before the invader, or, later, before the armies of liberation. It then sometimes happened that persons acting on their own initiative provisionally took over, in the interests of the community, the management of certain public concerns or that committees of private persons provisionally took charge of the administration, issued ordinances, performed legal acts, administered property, pronounced judgements, etc., in other words, exercised elements of the governmental authority. In such circumstance it may also happen that private persons acting on their own initiative assume functions of a military nature; for example, when the civilian population of a threatened city takes up arms and organizes its defence.\textsuperscript{595} There are other situations in which the organs of administration are lacking as a result of natural events such as an earthquake, a flood or some other major disaster. Here again, private persons do not hold any public office under internal law may come to assume public functions in order to carry on services which cannot be interrupted, or which must be provided precisely because of the exceptional situation.\textsuperscript{596}

(10) What sets the cases now envisaged apart from those dealt with in sub-paragraph (a) is that the persons or group of persons referred to here have assumed the exercise of the functions in question on their own initiative instead of being appointed to or entrusted with them by organs of the State or of one of the entities referred to in article 7. Moreover, in many cases, they act without the knowledge of the official organs. There is thus no formal or real link with the machinery of the State or of one of the entities entrusted by the internal law of the State with the exercise of elements of the governmental authority.

(11) The question then arises whether such conduct should also be regarded under international law as acts of the State that are capable of entailing its international responsibility if they constitute a breach of an international obligation of the State. International practice in this matter is very limited, and this is hardly surprising in view of the rather exceptional nature of the situations envisaged and, in particular, of the hypothesis that the conduct in question may constitute internationally wrongful acts. The Commission has found, however, that national laws often regard such conduct as conduct of the State under internal law and even hold the State responsible for such acts. In the Commission’s view the State, as a subject of international law, should a fortiori bear the responsibility for such conduct when it has led to a breach of an international obligation of that State.\textsuperscript{597} The criterion which, it would seem, should guide international law in this matter is that the nature of the activity performed should be given more weight than the existence of a formal link between the agent and the organization of the State or of one of the entities referred to in article 7. This view is shared by the few writers that have dealt with the case of private individuals who, in exceptional circumstances, assume on their own initiative the exercise of certain elements of the governmental authority.\textsuperscript{598} However, the Commission wishes to stress that, since the persons under consideration have no prior link to the machinery of the State or to any of the other entities entrusted under internal law with the exercise of elements of the governmental authority, the attribution of their conduct to the State is admissible only in genuinely exceptional cases. The Commission is unanimous in indicating that, for this purpose, the following conditions must be met: in the first place, the conduct of the person or group of persons must effectively relate to the exercise of elements of the governmental authority. In the second place, the conduct must have been engaged in because of the absence of official authorities (that is, organs of the State or one of the entities dealt with in article 7) and, furthermore, in circumstances which justifies the exercise of these elements of authority by private persons: that is to say, in the last resort, in one of the circumstances mentioned in the commentary to the present article.\textsuperscript{599}

(12) The Commission wishes to point out that the case of persons acting in fact on behalf of the State in the circumstances covered by the present article should not be confused with the case of what are called “de facto
governments". The case of the persons considered in the present article presupposes the existence of a government in office and of State machinery whose place they take or whose action they supplement in certain circumstances, themselves remaining outside that machinery but behaving in fact as though they formed part of it. A de facto government, on the other hand, is itself a State apparatus which has replaced the State machinery that existed previously. The term "de facto government", or "general de facto government".888 is sometimes used to denote a government which, though not invested with power in accordance with the previously established constitutional forms, has fully and finally taken power, the previous government having disappeared. The adjective in question then merely reflects the existence of a problem of legitimacy concerning the origin of the new government—a problem which, moreover, subsists only from the point of view of a constitutional rule that will probably cease to exist itself, being replaced by a new written or unwritten rule. All this is without relevance to the problems of international responsibility, in which no distinction may be made between a State ruled by a de facto government and one ruled by a de jure government. A State whose Government has been established in full compliance with the prescribed constitutional forms and a State whose Government was born of a revolutionary change incur international responsibility under exactly the same conditions and for the same reasons. The State organization exists in the one case as in the other; and the persons who are part of it are no less "organs"—true organs—of the State because the Government has a de facto rather than a de jure origin.888 It is therefore article 5 of the present draft which makes their actions or omissions attributable to the State.

(13) With regard to the formulation of the rule, the Commission found it preferable to deal in one and the same article with the various hypotheses regarding the conduct of persons acting on behalf of the State, as a subject of international law, without having received any formal appointment as organs under the internal law of that State. It was thought desirable, however, to draw a distinction within this single article between the case of persons acting at the instigation of an organ of the State (or of any of the entities mentioned in article 7) and the case of private persons who, in exceptional circumstances, assume on their own initiative functions involving the exercise of elements of the governmental authority. As to the order in which the two cases are stated, the priority is given to what is, so to speak, the more "usual" case. With regard to terminology, the word "person" is preferred to "individual" so as to include both a private individual and, for instance, an association or private company. The term "official authorities" was chosen so as to cover both the organs of the State and the organs of the entities mentioned in article 7.

Article 9. Attribution to the State of the conduct of organs placed at its disposal by another State or by an international organization

The conduct of an organ which has been placed at the disposal of a State by another State or by an international organization shall be considered as an act of the former State under international law, if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed.

Commentary

(1) Where a State places one of its organs at the disposal of another State in order that that organ may temporarily act for the benefit and under the authority of that other State, there is a possibility that, notwithstanding the provisions of the previous articles, the conduct of that organ may be regarded under international law as an act of the State at whose disposal it has been placed, and not of the State whose organ it is. An analogous situation may arise where an organ is "lent" to a particular State, not by another State, but by an international organization. These exceptional situations form the subject-matter of the provisions of the present article, which is intended chiefly to specify the conditions that have to be met for the exceptional change of attribution to take place. There are three essential conditions for this: (a) the organ placed at the disposal of a State by another State or by an international organization must possess the legal status of an "organ" of that other State or of that organization at the time when it acts under the authority of the State to which it has been "lent"; (b) the beneficiary State must actually have the "lent" organ at its disposal at the time when the organ engages in the conduct likely to give rise to international responsibility; and (c) the conduct in question must have been engaged in by the "lent" organ in the exercise of elements of the governmental authority of the beneficiary State.

(2) The first of these conditions is easily defined: the present article refers solely to the case where a State or an international organization has placed one of its organs at the disposal of another State and that organ has not lost its original status merely by temporarily performing functions under the authority of a State other than its own. Consequently article 9 does not apply to the
conduct of persons or groups of persons who, according to the legal order of the sending State or international organization, are mere private individuals at the time of such conduct, either because they have never had the legal status of an organ of that State or organization or because they have lost that status on being placed at the disposal of another State. For example, "experts" placed at the disposal of a State under technical assistance programmes are more often than not to be regarded under the legal system of the sending State or organization as private individuals, not as "organs"; and in many cases, even if they had the status of an "organ" previously, they have lost it on being seconded to another State. The State at whose disposal an expert is placed may if it wishes confer on him, under its own internal legal order, the status of an organ of the State or of one of the other entities contemplated in article 7 of the present draft. It is even conceivable that the State in question may in fact entrust him with the performance of certain functions or duties on its behalf in accordance with article 8. The conduct of the expert can then be attributed under international law to the beneficiary State as a possible source of international responsibility for that State, but by virtue of articles 5 to 8, not article 9, of the present draft. If, on the other hand, the beneficiary State confines itself to using the services of the expert "lent" to it by another State, or by an international organization, in the same way as the services of any other national or foreign expert—i.e. if the "lent" expert remains a private individual—his conduct is not subject to the possibility of being considered as an act of the beneficiary State. In such circumstances, international responsibility cannot conceivably attach to that State except upon the usual conditions on which a State may generally incur responsibility in connexion with the activities of mere private individuals.

(3) It is not, however, essential that the organ placed at the disposal of a State by another State should be an organ forming part of the State machinery proper under the internal legal order of the latter State. It may equally well be an organ of a territorial governmental entity or, more generally, of any entity empowered by the internal law of the sending State to exercise elements of the governmental authority. For example, a town may suffer a disaster and the municipality of a foreign town may place its fire brigade temporarily at the disposal of another State. Again, a city may come to the assistance of a foreign city suffering for example, from over-rapid growth and make its town-planning services temporarily available to the foreign city. In both cases it is possible that the organs thus "lent" may, in the exercise of their functions, encroach upon foreign rights or interests. The provision in article 9 should therefore be understood to cover also the case in which a State places at the disposal of another State an organ belonging, not to its own machinery, but to that of another entity empowered by the internal legal order to exercise elements of the governmental authority.

(4) The second of the conditions stated above which must be met in order for a specific situation to be among those covered by article 9 is that the conduct in question should be engaged in by an organ of a State or of an international organization which has genuinely been placed at the disposal of another State. This logically excludes from the scope of article 9 the most common cases of activities carried on by organs of a State or of an international organization in the territory of another State: namely, those in which these organs merely perform in foreign territory functions which are and remain functions of the State or international organization to which they belong. In such cases no functional link is established between the organ acting and the machinery of the State in whose territory it is called upon to act. This applies both to actions performed by the organ in question without the consent, or even against the will, of the territorial State (such as military operations against that State) and to functions performed with the consent of that State (diplomatic or consular functions, for instance, or representational functions for an international organization). In both these cases it is obviously out of the question to attribute to the territorial State the conduct of the organs concerned. By virtue of article 5 of the draft, such actions on the part of the State organs can only be regarded as acts of the State to whose machinery the organs belong. In any case, this point will be considered in detail in a later article of this draft, in which particular attention will be paid to the conduct, in the territory of a State, of organs of another subject of international law.

(5) The condition that the organ in question shall have been "placed at the disposal" of a State does not mean only that the organ must be appointed to perform functions appertaining to the State at whose disposal it is placed. It also requires that, in performing the functions entrusted to it by the beneficiary State, the organ shall act in conjunction with the machinery of that State and under its exclusive direction and control, not on instructions from the sending State.

(6) The second condition therefore excludes from the scope of the rule stated in article 9 situations in which certain functions of the allegedly "beneficiary" State are performed without its freely given consent, as happens when a State placed in a position of dependence, protectorate, unequal union, territorial occupation or the like is compelled to allow the acts of its own machinery to be set aside and replaced to a greater or lesser extent by those of the machinery of another State. In situations of this kind, whatever language may sometimes be used to save appearances, the dominant, protecting, etc. State is in no sense placing its own organs "at the disposal" of the dependent, protected or similar State; it is merely replacing, in specific sectors, the activities of the latter State's organs by those of its own organs, which obviously go on acting under its own direction and control. In such situations, therefore, no genuine "placing at the disposal" of one State of organs belonging to another State has taken place. It is a case of "transfer" of functions rather than transfer of "organs"; and this is in reverse, inasmuch as the exercise of certain functions normally discharged by the organs of the territorial State is transferred to the organs of another State, which discharge them under the latter State's authority and control. From the standpoint of international law, therefore, there is no doubt that the actions and omissions
of the organs concerned are actions and omissions of the State to which the organs belong, and that such cases fall solely within the scope of article 5 of the present draft.

(7) Furthermore, the second of the conditions under consideration excludes from the scope of the rule stated in article 9 those situations in which the organs of a State or of an international organization perform functions appertaining to another State in the territory of that other State and with its consent, but nevertheless act under the authority, direction and control of the sending State or organization. Such a situation can arise, for example, where a State sends a contingent of its own personnel to the territory of another State that is faced with a specific emergency, but without placing them at the latter State's disposal, i.e. where the former State continues to direct and control the operations of the personnel sent to the foreign territory. It is true that the organ then acts in the interests of a State other than the State to which it belongs and that it performs duties which normally fall to the organs of the beneficiary State; but what is important is that in doing so the organ in question continues to act as part of the machinery of the sending State and under its aegis, and that no real functional link is established with the machinery of the beneficiary State. There is consequently no need for a proviso excepting such cases from the general rule laid down in article 5 of the draft; from the standpoint of international law, the conduct of the organs in question still constitutes an act of the State to which those organs belong.

(8) To conclude, it cannot be held that an organ of a State or of an international organization has been "placed at the disposal" of another State, and hence that the present article is applicable, unless the organ in question acts in the exercise of functions appertaining to the State at whose disposal it has been placed, and under that State's authority, direction and control, and is required to obey any instructions it may receive from that State and not instructions from the State to which it belongs.

(9) The third condition that has to be met for a given situation to be one of those contemplated in article 9 is that the organ placed at the disposal of a State by another State or by an international organization should be acting in the exercise of elements of the governmental authority of the beneficiary State. In other words, the rule in article 9 cannot be held to apply where an organ of a State or of an international organization, placed as such at the disposal of a given State, is acting within the internal legal order of the beneficiary State, but as a mere private individual. It frequently happens that a State places one of its organs at the disposal of another State and that the beneficiary State confines itself to using that organ as a mere expert or adviser, or in some such capacity, and does not entrust it with the exercise of official duties normally performed by its own organs. Unless this last essential condition is met, the conduct of the organ placed at the disposal of the beneficiary State obviously cannot be considered to be an act of that State in international law. There will be an act of the State only where the organ lent by a foreign State is actually instructed to act as though it were an organ of the beneficiary State: i.e. where the conduct in question takes place in a sphere in which the organ has been entrusted with the exercise of functions embodying genuine elements of the governmental authority and not simply with tasks which, however important they may be, are to be performed in an exclusively personal capacity.

(10) As examples of situations in which application of the rule stated in article 9 might be entertained, reference was made in the Commission to the case in which certain conduct is engaged in by a detachment of police placed at the disposal of another State to deal with internal disturbances; by a section of the health service or some other unit placed under the orders of another country to assist in overcoming an epidemic or the consequences of a natural disaster; by officials of a State or of an international organization appointed by another State to administer in its territory a public service which its own officials are unable, in certain circumstances, to administer; by judicial organs appointed in particular cases to act as judicial organs of another State; and so on. Specific instances were cited: for example, that of the United Kingdom Privy Council acting as the highest court of appeals for New Zealand and that of judicial organs of Nigeria appointed to serve also as Chief Justices of Botswana and Uganda and as President of the Court of Appeal of the Gambia. It was pointed out that Nigeria has also placed some of its civil servants at the disposal of other African States to take temporary charge of organizing the civil service of the beneficiary State.

(11) As to the cases in which the rule in article 9 might apply, the Commission also considered whether those cases might include the dispatch of armed contingents by a State to the territory of another State to be stationed there or employed in military operations. It was made clear, however, that situations of that kind generally lie outside the operation of the rule stated in the present article. Armed forces sent by a State to foreign territory for defensive or offensive military purposes are not forces "placed at the disposal" of the State to whose territory they are sent, at least not in the sense in which the expression "placed at the disposal" is to be understood in article 9. We should not be misled by the use of that or similar expressions in a different sense. Sending troops to the territory of another State to engage in concerted operations, based on that territory, against a third State, or to assist in withstanding an attack from such a State; stationing contingents of a State's own forces in the territory of another State in peace-time in order to defend the country, in the common interest, against external threats; using a State's own military forces to help the territorial State in a civil war in progress there: all those are situations which can be called "aid" to another State—lawful or unlawful according to the circumstances—but not a "placing at the disposal" of that State of forces sent to its territory. The forces in question usually remain at the disposal of the State to which they belong; they act under its orders, control and instructions; and, what is more important, they exercise through their actions a characteristic element of the governmental authority of that State, not of the territorial State. By any token, the activities of such forces or of their members are acts of the State to which they
belong. It could happen that the territorial State incurs joint responsibility, but for quite different reasons: for example, by tolerating certain actions on the part of the foreign troops or even, in some cases, by merely permitting their presence in its territory; however, that responsibility would flow from the application of the provisions of other rules and not of the rule stated in the present article.

(12) This does not, of course, mean that it is necessary to rule out altogether the possibility of exceptional cases in which a State genuinely places at the disposal of another State a contingent of its own armed forces, so that the other State may employ that contingent under its authority and control and assign it to tasks which may involve the exercise of elements of the beneficiary State’s governmental authority. But in such cases, the contingent in question will probably be assigned to special tasks different from those on which armed forces are usually employed. In this connexion it was recalled that, at the time of the earthquake which devastated Peru in 1970, contingents of the Soviet army and the United States navy and a Swedish engineer regiment were placed, through the United Nations, at the Peruvian Government’s disposal for relief operations, which were carried out under that Government’s control and instructions and which certainly involved the exercise of elements of the governmental authority. Other similar examples were also mentioned. Hence the Commission unanimously recognized that in cases of this kind it is perfectly possible for situations to arise in which the provisions of article 9 should be applied.

(13) The problem of determining to what State conduct should be attributed as a possible source of international responsibility where the conduct is that of an organ of a State placed at the disposal of another State, and therefore acting under the latter State’s authority and in the exercise of elements of its governmental authority, was considered in the arbitral award made on 9 June 1931 in the Chevreau Case by Judge Beichmann, who was appointed arbitrator under the compromis of 4 March 1930 between France and the United Kingdom. The arbitrator had before him a French claim concerning damage suffered by Julien Chevreau, a French national resident in Persia who had been arrested by British forces operating near the Caspian Sea, and who had subsequently been detained on suspicion of intelligence with the enemy and deported. The question at issue was whether the United Kingdom was required to compensate Chevreau for the loss of certain property, books and documents which, according to Chevreau, had been in his rooms at the time of his arrest and had subsequently been stolen or lost owing to the negligence of the British consular authorities. In fact, at the request of the French Consul at Resht, who was away from Persia at the time, Chevreau’s books and documents had been sent to the British Consul who, in the absence of the French consular authority, was running the French Consulate. In his award the arbitrator rejected the French claim, stating that “the British Government cannot be held responsible for negligence by its Consul in his capacity as the person in charge of the Consulate of another Power.” The situation in question thus corresponded precisely to one of the cases envisaged above: that in which the organ of one State is required to run a public service of another State, under the authority of the latter State and in place of one of the latter State’s organs that is unable to perform its functions itself. The conclusion reached by the arbitrator, ruling out the possibility of attributing to the United Kingdom negligence committed by an organ of the British State at a time when it was performing a typical public function of the French State, was obviously based on recognition of the principle which, in the Commission’s opinion, should govern the matter: namely, that an act or omission on the part of an organ of one State acting in exceptional circumstances under the authority of another State and in the exercise of elements of that other State’s governmental authority should be considered under international law to be an act of that other State and not of the State to which the organ belongs.

(14) Those authors of learned works on international law who have studied the problem of the international responsibility of a State for the conduct of organs placed at its disposal by another State or by an international organization also express themselves in favour of attributing such conduct to the State receiving the “loan” in question, providing that the organs concerned have genuinely been placed at the disposal of the beneficiary State: that is to say, that they are subject in their actions to the authority and control of that State, not to those of the sending State or international organization.

(15) In the Commission’s view there can be no doubt about the validity of the rule stated in article 9. The principle of the attribution to a particular State of the conduct of an organ of another State or of an international organization that has been effectively placed at the disposal of the former State is a logical inference from the criteria governing the rules stated in the previous articles. An organ which is “lent” by one State to another State, and which consequently performs its activities under the authority and control of the latter State, is not acting as an organ of the State to which it belongs. Its acts are no more attributable to the last-mentioned State than acts committed by that organ as a private individual would be. On the other hand, the conduct in which that organ engages in the exercise of elements of the governmental authority of the State at

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whose disposal it has been placed is of necessity an act of that State, even if that State has not granted the status of an organ in its own legal system. Even in this case, the conduct of the “lent” organ is an act of the State receiving the loan”, just as the conduct of an individual in fact exercising elements of the governmental authority of that State would be. That State would have to bear the responsibility if the act should be characterized as internationally wrongful.

(16) In formulating the rule stated in article 9, the Commission discussed whether or not express provision should be made in its text for the case in which the very act of placing some of a State’s organs at the disposal of another State would in itself constitute a breach of an international obligation incumbent on one or the other of the two States concerned or on both of them. A State may be internationally bound not to furnish aid of any kind—and therefore not to “lend” any of its organs—to another State against which, for example, the Security Council may have ordered the adoption of sanctions. Again, the act of placing specific organs at the disposal of another State with a view to their use in the commission of an internationally wrongful act may certainly amount to a breach of an international obligation. Conversely, it is possible that the action of a State in admitting to its territory organs placed at its disposal by another State may, in specific cases, constitute a breach of an international obligation incumbent on it. The Commission did not, however, consider that such possibilities made it necessary to formulate an exception to the rule in article 9. A loan of one of its organs by a State to another State is one act: the subsequent conduct of the lent organ acting under the authority and control of the beneficiary State is another. Even in the case where the first act was in itself an internationally wrongful act of the lending State entailing, as such, its international responsibility, the conduct of the wrongfully lent organ acting henceforth under the authority of the beneficiary State and in the exercise of that State’s governmental authority would nevertheless have to be regarded as an act of the latter State.

(17) The Commission likewise saw no need to make a special reservation for the case where criteria for attribution different from those prescribed in article 9 might be specified in the agreement by which a subject of international law undertakes to place some of its organs at the disposal of another subject of international law. The Commission held that such a reservation would be unnecessary in the relations between the State to which organs were lent and the lending State because such relations would in any case be governed by the international agreement concluded between them. In relations with third States—the most important aspect of the question—a reservation of this kind might lead to misunderstandings and provide the State bearing responsibility under the rule laid down in the present article with an inadmissible pretext for evading that responsibility. The agreement concluded between the two parties to the “loan” of organs must in no case be allowed to prejudice the situation of third States or to affect claims by which such third States might invoke, under general international law, the international responsibility of one or other of the two parties in question.

(18) With regard to the formulation of the rule, it has already been noted that, in using in article 9 the words “organ ... placed at the disposal of a State by another State”, the intention was to include in the scope of this expression also an organ of one of the entities separate from the State proper which are taken into consideration in article 7. The words “placed at the disposal” were preferred to others, such as “lent” or “transferred” because they seemed to convey more clearly the essential condition for the attribution of an act to the State to which the foreign organ has been sent: namely, that that organ should be subject in its actions to the authority, direction and control of that State. Lastly, the phrase “if that organ was acting in the exercise of elements of the governmental authority of the State at whose disposal it has been placed” was selected as that best calculated to make it clear (a) that the conduct of the organ placed at the disposal of a State by another State or by an international organization cannot be attributed as a possible source of international responsibility to the State receiving the “loan” in the case where such conduct has been engaged in as part of activities carried on by the “lent” organ in an exclusively personal capacity, and (b) that such attribution is likewise excluded in cases where the conduct complained of has been engaged in as part of activities which are carried on officially but which involve the exercise of elements of the governmental authority of the State to which the organ belongs and not of the State at whose disposal the organ has been placed.

Chapter IV

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

A. Introduction

1. Historical review of the work of the Commission

124. During the preparation of the draft articles on the law of treaties from 1950 to 1966, the International Law Commission considered on several occasions the question whether the draft articles should apply not only to treaties between States but also to treaties concluded by other entities, and in particular by international organizations. The course finally adopted was to confine the study undertaken by the Commission to...
treaties between States. The Commission accordingly included in the final draft articles an article 1 which read: “The present articles relate to treaties concluded between States”. The draft articles were subsequently transmitted as the basic proposal to the United Nations Conference on the Law of Treaties, which, having met at Vienna in 1968 and 1969, adopted on 22 May 1969, the Vienna Convention on the Law of Treaties. Article 1 of the Commission’s draft became article 1 of the Convention, reading as follows: “The present Convention applies to treaties between States.” However, in addition to the provision of article 1, the Conference adopted the following resolution:

Resolution relating to article 1 of the Vienna Convention on the Law of Treaties

The United Nations Conference on the Law of Treaties,
Recalling that the General Assembly of the United Nations, by its resolution 2166 (XXI) of 5 December 1966, referred to the Conference the draft articles contained in chapter II of the report of the International Law Commission on the work of its eighteenth session,
Taking note that the Commission’s draft articles deal only with treaties concluded between States,
Recognizing the importance of the question treaties concluded between States and international organizations or between two or more international organizations,
Cognizant of the varied practices of international organizations in this respect, and
Desirous of ensuring that the extensive experience of international organizations in this field be utilized to the best advantage,
Resolves that the International Law Commission should study, in consultation with the principal international organizations, the question of treaties concluded between States and international organizations or between two or more international organizations.

125. The General Assembly, having discussed that resolution, dealt with it in paragraph 5 of its resolution 2501 (XXIV) of 12 November 1969, in which the Assembly

Recommends that the International Law Commission study, in consultation with the principal international organizations, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question.

126. In 1970, at its twenty-second session, the Commission decided to include the question referred to in resolution 2501 (XXIV), paragraph 5, in its general programme of work, and it set up a Sub-Committee composed of thirteen members to make a preliminary study. The Sub-Committee submitted two reports, the first in the course of the Commission’s twenty-second session and the second during its twenty-third session. In 1971, on the basis of the second report, the Commission appointed Mr. Paul Reuter Special Rapporteur for the question of treaties concluded between States and international organizations or between two or more international organizations. In addition, it confirmed a decision taken in 1970 requesting the Secretary-General to prepare a number of documents, including an account of the relevant practice of the United Nations and the principal international organizations, “it being understood that the Secretary-General will, in consultation with the Special Rapporteur, phase and select the studies required for the preparation of that documentation.”

127. To facilitate the task of carrying out that decision, the Special Rapporteur addressed a questionnaire to the principal international organizations, through the Secretary-General, with a view to obtaining information on their practice in the matter. The Secretariat, in its turn, prepared the following studies and documents between 1970 and 1974:

(a) A document containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations Treaty Series;

(b) A selected bibliography on the question (A/CN.4/277);

(c) A study of the possibilities of participation by the United Nations in international agreements on behalf of a territory (A/CN.4/281).

128. Meanwhile the General Assembly, by its resolution 2634 (XXV), paragraph 4 (e), and paragraph 4 (d), of Section I, its resolution 2780 (XXVI), recommended that the Commission should continue its consideration of the question of treaties concluded between States and international organizations or between two or more international organizations.

129. In 1972 the Special Rapporteur, submitted his first report on the topic referred to him. This report reviewed the discussions which the Commission and after it the Conference, while examining the law of treaties, had held on the question of the treaties of international organizations. In the light of that review, the report made a preliminary examination of several essential problems such as the form in which international organizations express their consent to be bound by a treaty, their capacity to conclude treaties, the question of representation, the effect of treaties concluded by international organizations and the precise meaning of the
reservation concerning "any relevant rules of the organization" which appears in article 5 of the Vienna Convention.

130. The same year the General Assembly, by section I, paragraph 3 (e) of its resolution 2926 (XXVII), renewed its previous recommendations to the Commission concerning consideration of the question of treaties concluded between States and international organizations.

131. In 1973 the Special Rapporteur submitted to the Convention for its twenty-fifth session, a second report supplementing the first in the light of, inter alia, the substantial information since communicated by international organizations in reply to the questionnaire which had been addressed to them. 818 The same year the General Assembly, after examining the Commission's report, recommended in its resolution 3071 (XXVIII), paragraph 3 (f) that the Commission should continue its study of the question of treaties concluded between States and international organizations or between two or more international organizations.

132. Mr. Reuter's first two reports were discussed by the Commission at its 1238th and 1241st to 1243rd meetings, held at its twenty-fifth session (1973). The opinions expressed by the members concerning those reports are reflected in the Commission's report on the work of that session. 819 The following year the General Assembly, after examining the Commission's report, recommended in its resolution 3071 (XXVIII), paragraph 3 (f) that the Commission should continue its study of the question of treaties concluded between States and international organizations or between two or more international organizations.

133. In 1974, for the Commission's present session, the Special Rapporteur submitted a third report (A/CN.4/279). This contained the text, accompanied by commentaries, of five articles intended to form part I, entitled "Introduction", of a set of draft articles on the question of treaties concluded between States and international organizations or between two or more international organizations. These five articles bore the following titles: article 1, "Scope of the present articles"; article 2, "Use of terms"; article 3, "International agreements not within the scope of the present articles"; article 4, "Non-retroactivity of the present articles"; and article 6, "Capacity of international organizations to conclude treaties". Article 2 contained only some of the provisions which it eventually have to include, and no text was submitted for an article 5.

134. The draft articles set forth in the Special Rapporteur's third report were examined by the Commission at its 1274th, 1275th, 1277th and 1279th meetings. The Commission referred all these provisions to the Drafting Committee and at its 1291st meeting adopted, on first reading, on the basis of the Committee's report, the texts of article 1; article 2, paragraph 1 sub-paragraphs (a), (d), (e), (f) and (i), and paragraph 2; and articles 3, 4 and 6, as reproduced in the present chapter.

135. The Commission wishes to make it clear that the texts adopted at the present session form only the initial provisions of the set of draft articles which it proposes to prepare later on, and which is described in general outline below. 824 It also wishes to emphasize that, as will be explained, 825 the text of these articles is provisional.

2. GENERAL REMARKS CONCERNING THE DRAFT ARTICLES

(a) Form of the draft

136. As in the other work undertaken by the Commission over the past ten years and more, the form adopted for the present codification is that of a set of draft articles capable of constituting the substance of a convention at the appropriate time. This approach to the topic does not prejudice the decision which will be taken later when the draft articles have been completed; the Commission will then, in accordance with its Statute, recommend whatever procedure it considers most appropriate. Even at this stage, however, a set of draft articles, because of the strict requirements it imposes upon the preparation and drafting of the text, appears the most suitable form in which to deal with questions concerning treaties concluded between States and international organizations or between international organizations.

(b) Relationship to the Vienna Convention

137. By comparison with others, the present codification possesses some distinctive characteristics owing to the extremely close relationship between the draft articles and the Vienna Convention.

138. Historically speaking, the provisions which will constitute the draft articles now under consideration would have found a place in the Vienna Convention had the Conference not decided that, in order to complete its task within the prescribed period, it would confine its attention to treaties between States. Consequently the further stage in the codification of the law of treaties represented by the preparation of draft articles on treaties concluded between States and international organizations or between international organizations cannot be divorced from the basic text on the subject, namely the Vienna Convention.

139. That Convention has provided the general framework for the present draft articles. This means, firstly, that the draft articles will deal with the same questions as formed the substance of the Vienna Convention; they will therefore disregard the problems corresponding to those which the Convention set aside so far as treaties between States were concerned: agreements not in written form (article 3 of the Vienna Convention); State succession, international responsibility and outbreak of hostilities (article 73); and recognition. The subject-matter of the draft articles will therefore be those major questions which are dealt with in the Vienna Convention. The Commission can have no better guide than to take the text of each of the articles of that Convention in turn and consider what changes of drafting

818 See foot-note 613.
819 See foot-note 618.
820 See below, para. 143 and foot-note 638.
821 See below, section B.
822 See below, supra, section B.
823 See below, supra, section B.
824 See paras. 139-140.
825 See below, para. 144.
or of substance are needed in formulating a similar article dealing with the same problem in the case of treaties concluded between States and international organizations or between international organizations.

140. This task, as the Commission envisages it, calls for a very flexible approach. On considering what changes should be made in an article of the Vienna Convention in order to give it the form of an article applicable to treaties concluded between States and international organizations, the Commission may be presented with an opportunity to draft a provision containing additions to or refinements on the Vienna Convention that might also be applicable to treaties between States, for example in connexion with a definition of treaties concluded in written form or the consequences of the relationship between a treaty and other treaties or agreements. Where such an opportunity occurs, the Commission will in principle refrain from pursuing it and from proceeding with any formulation which would give the draft articles, on certain points, a structure more detailed or more refined than the Vienna Convention. The position will be different where, because of the subject-matter under consideration, namely treaties between States and international organizations or between international organizations, new and original provisions are required to deal with problems or situations unknown to treaties between States.

141. Unfortunately these considerations do not dispose of all the difficulties raised by the relationship between the draft articles and the Vienna Convention. The preparation of a set of draft articles that may become a convention presents, as regards the future relationship between the articles and the Vienna Convention, awkward problems of law and drafting which will not become fully apparent until the draft is completed. Nevertheless, certain general features are readily perceptible even now. The draft articles must be so worded and assembled as to form an entity independent of the Vienna Convention; if the text later becomes a convention in its turn, it may enter into force for parties which are not parties to the Vienna Convention possibly including, it must be remembered, all international organizations. Even so, the terminology and wording of the draft articles could conceivably have been brought into line with the Vienna Convention in advance, so as to form a homogeneous whole with that Convention. The Commission has not rejected that approach outright and has not ruled out the possibility of the draft articles as a whole being revised later with a view to providing for States which are parties both to the Vienna Convention and to such convention as may emerge from the draft articles, a body of law as homogeneous as possible, particularly in terminology. In the present version of the text submitted to the General Assembly, however, the Commission has not allowed this consideration to weigh and has given preference to clarity and simplicity of expression.

(c) Consultation with international organizations

142. Both the United Nations Conference on the Law of Treaties and the General Assembly recommended that the Commission should pursue its work “in consultation with the principal international organizations”. The most effective form of consultation has been the gathering of a wealth of information from the principal organizations concerned, in the form of studies and of replies to the questionnaire drawn up by the Special Rapporteur; this will be supplemented by such observations on the present draft articles as the international organizations see fit to submit concurrently with States. The Commission is open to any suggestions which may be made to enable it to benefit from the assistance of such organizations in as broad and generous a measure as it has from the help of the United Nations Secretariat. It is not yet possible to say in what manner the organizations concerned will participate in the final stage of the present codification, because the eventual form of the codification is still undecided.

(d) Method followed in the preparation of the draft

143. In conformity with the general conception of the relationship which the draft articles should naturally bear to the Vienna Convention, it was decided to keep the order of that Convention so far as possible, so as to permit continuous comparison between the draft articles and the corresponding articles of the Conventions. Accordingly, for the time being at least, the draft articles bear the same numbers as those of the Vienna Convention and the text of the corresponding article of the Vienna Convention is reproduced as a foot-note to each draft article. The gaps which, purely temporarily, thus appear here and there in the numbering are due to the fact that some provisions of the Vienna Convention are closely linked with others and must consequently be examined in conjunction with them; moreover there are some articles in the Vienna Convention which do not give rise to corresponding provisions in the present draft articles. Any articles of the present draft which do not correspond to an article of the Vienna Convention will be numbered bis, ter and so forth in order to preserve the parallel between the Vienna Convention and the draft articles.

144. It is scarcely necessary to add that the results of this work, submitted to the General Assembly on first reading, are strictly provisional. This, of course, is because the present draft, like all drafts of the same kind, has not yet had the benefit of observations from Governments (and, in this particular case, from international organizations). However, the text is all the more tentative inasmuch as it is already apparent that the difficulties will be very unequally apportioned between the major divisions of the topic, and because the final formulation of the relationship between the draft and the Vienna Convention, and hence the wording of the articles themselves, will depend very much on the ultimate use to be made of them.

145. In these circumstances it may be thought that it would have been better to begin the examination of the draft articles with provisions concerning the conclusion

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See above, paras. 124 and 125.
and entry into force of treaties (articles 6 to 25 of the Vienna Convention) rather than with general provisions such as those of article 1 and the succeeding articles. The course which, despite that consideration, has been adopted seemed essential in order to settle from the outset a few basic questions of principle on which the whole design of the draft depends. Hence the articles reproduced below will be found to contain a significant sample of the problems which the International Law Commission will encounter as its work proceeds. This topic not only presents drafting difficulties and calls, in places, for subtle adjustments in relation to the Vienna Convention, but sometimes raises new and fundamental problems.

B. Draft articles on treaties concluded between States and international organizations or between international organizations

PART I. INTRODUCTION

Article 1. Scope of the present articles

The present articles apply to:

(a) treaties concluded between one or more States and one or more international organizations, and

(b) treaties concluded between international organizations.

Commentary

(1) The title of the draft articles is a slightly simplified version of the title of the topic as it appears in several General Assembly resolutions and in the resolution relating to article 1 of the Convention adopted by the United Nations Conference on the Law of Treaties. The titles of part I and article 1 are in the same form as those in the Vienna Convention. The scope of the draft articles is described in the body of article 1 in more precise terms than in the title in order to avoid any ambiguity. Furthermore the two categories of treaties concerned have been presented in two separate sub-paragraphs because this distinction will often have to be made in the treaty regime to which the draft articles apply. This is the case in article 2, paragraph 1 (a), and more generally in the draft articles dealing with the expression of consent to be bound by a treaty. For the purposes of the expression of such consent, the case of a State party to a treaty with one or more international organizations will be dealt with in a manner closely modelled on the Vienna Convention; on the other hand, the case of such organizations themselves will be governed by specific and perhaps different provisions. The separation into two sub-paragraphs, (a) and (b), is therefore justified but does not affect the fact that many of the draft articles will apply indiscriminately to both the categories distinguished here.

(2) The term "treaty", which is used in the draft articles in a sense different from the meaning assigned to it in the Vienna Convention, has been preferred to the far more general term "agreement"; the latter should be kept to denote conventional acts, whatever the parties to them and whatever their form.

Article 2. Use of terms

1. For the purpose of the present articles:

(a) "treaty" means an international agreement governed by international law and concluded in written form:

(i) between one or more States and one or more international organizations, or

(ii) between international organizations,

whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(d) "reservation" means a unilateral statement, however phrased or named, made by a State or by an international organization when signing or consenting [by any agreed means] to be bound by a treaty whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that international organization;

(e) "negotiating State" and "negotiating organization" mean respectively:

(i) a State,

(ii) an international organization which took part in the drawing up and adoption of the text of the treaty;

The corresponding provisions of the Vienna Convention reads as follows:

"Article 2. Use of terms"

1. For the purposes of the present Convention:

(a) ‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation;

(d) ‘reservation’ means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;

(e) ‘negotiating State’ means a State which took part in the drawing up and adoption of the text of the treaty;

(f) ‘contracting State’ means a State which has consented to be bound by the treaty, whether or not the treaty has entered into force;

(i) ‘international organization’ means an intergovernmental organization.

2. The provisions of paragraph 1 regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in the internal law of any State."

Square brackets [ ] around an expression indicate that the Commission intends to revert to it at a later stage in its work when it has examined other draft articles to which the expression relates.
(f) "contracting State" and "contracting organization" mean respectively:

(i) a State,

(ii) an international organization

which has consented to be bound by the treaty, whether or not the treaty has entered into force;

. . .

(i) "international organization" means an intergovernmental organization;

2. The provisions of paragraph 1 regarding the use of terms in the present articles are without prejudice to the use of those terms or to the meaning which may be given to them in the internal law of any State or by the rules of any international organization.

Commentary

(1) Paragraph 1 (a) defining the term "treaty," follows the corresponding provision of the Vienna Convention but takes into account article 1 of the present draft. No further details have been added to the Vienna Convention text. It became evident during the discussions in the Commission that it would not always be easy to establish whether a conventional act was governed by international law or by some system of national law. It was also pointed out that certain acts might be governed in some respects by international law but in others by national law and that in order to determine the nature of the conventional act it would be necessary to establish which of the two aspects predominated; but this view was disputed, and in any case the Commission thought it preferable to leave those particular problems to be solved by practice.

(2) Another debatable point was whether in some organizations—still few and far between at present—there might not be some conventional acts concluded between the organization and some of its members which were wholly governed by the rules of the organization and which should be removed from the scope of the draft articles. This, however, is a somewhat isolated case peculiar to certain integrated organizations such as the European Communities; furthermore the provisions of the present draft articles are to be understood as subject to the rules of the organization, and it seemed unnecessary to place any other special limitation on the scope of the draft. 638 639

(3) Apart from the addition of international organizations, paragraph 1 (d), dealing with the term "reservation" follows the corresponding provision of the Vienna Convention and does not call for any special comment except on one point. In article 11 of the Vienna Convention, listing the means of expressing the consent of a State to be bound by a treaty, the expression "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession" is followed by the words "or by any other means if so agreed". This addition did not appear in the text submitted by the Commission; it is due to an amendment by Poland and the United States of America, 631 and its effect is to remove all formalism from the expression of consent to be bound by a treaty. It would have been logical to amplify article 19, on the formulation of reservations, and article 2, paragraph 1 (d), in the same way; however, the States participating in the Conference omitted to do so. In addition they might perhaps have simplified the wording of those provisions by discarding the enumeration of ratification, acceptance, approval and accession and by covering these and all other possible cases by the expression "by any agreed means".

(4) In the case of the present draft articles it might seem more appropriate to defer consideration of the definition of the term "reservation" until the Commission has examined the articles corresponding to articles 11 and 19 of the Vienna Convention. However, it emerged that, instead of waiting, the Commission could provisionally adopt a wording for article 2, paragraph 1 (d), that had the twofold advantage of being simpler than the corresponding provision of the Vienna Convention and of leaving in abeyance the question whether the terms "ratification", "acceptance", "approval", and "accession" could also be used in connexion with acts whereby an organization expressed its consent to be bound by a treaty. The provision here proposed has the further advantage of stressing the non-formalistic nature of the rules for concluding international treaties, which holds good for international organizations at least as much as for States. The wording proposed remains provisional: the Commission will consider later whether the expression "agreed means" is adequate or should be replaced by a somewhat broader form of words such as "recognized or agreed means".

(5) Paragraph 1 (e) defines the terms "negotiating State" and "negotiating organization". It follows the corresponding provision of the Vienna Convention but takes into account article 1 of the present draft. Since the term "treaty" refers here to a category of conventional acts different from that covered by the same term in the Vienna Convention, the wording need not allow for the fact that international organizations sometimes play a special role in the negotiation of treaties between States by participating through their organs in the preparation, and in some cases even the establishment, of the text of certain treaties.

(6) Paragraph 1 (f), also follows the corresponding provision of the Vienna Convention, taking into account article 1 of the present draft. 633

(7) Paragraph 1 (i) gives the term "international organization" a definition identical with that in the Vienna Convention. This definition should be understood in the sense given to it in practice: that is to say,

638 The question whether the draft should include provisions corresponding to those of article 2, paragraph 1, sub-paragraphs (b) and (c), of the Vienna Convention will be examined after the Commission has studied the articles relating to ratification, acceptance, approval and accession and the article relating to full powers.


633 The question whether the draft articles should include provisions corresponding to those of article 2, paragraph 1, sub-paragraphs (g) and (h), of the Vienna Convention will be examined after the articles relating to "parties" and "third States" have been considered.
as meaning an organization composed mainly of States, and in some cases having associate members which are not yet States or which may even be other international organizations; some special situations have been mentioned in this connexion, such as that of the United Nations within ITU, EEC within GATT or other international bodies, or even the United Nations acting on behalf of Namibia, through the Council for Namibia, within WHO after Namibia became an associate member of WHO. 488

(8) It should, however, be emphasized that the adoption of the same definition of the term “international organization” as that used in the Vienna Convention has far more significant consequences in the present draft than in that Convention.  

(9) In the present draft, this very elastic definition is not meant to prejudice the régime that may govern, within each organization, entities (subsidiary or connected organs) which enjoy some degree of autonomy within the organization under the rules in force in it. Likewise no attempt has been made to prejudge the amount of legal capacity which an entity requires in order to be regarded as an international organization within the meaning of the present draft. The fact is—and we shall revert to this point in the commentary to article 6—that the main purpose of the present draft is to regulate, not the status of international organizations, but the régime of treaties to which one or more international organizations are parties. The present draft articles are intended to apply to such treaties irrespective of the status of the organizations concerned.

(10) Attention should be drawn to a further very important consequence of the definition proposed. The present draft articles are intended to apply to treaties to which international organizations are parties, whether the purpose of those organizations is relatively general or relatively specific, whether they are universal or regional in character, and whether admission to them is relatively open or restricted; the draft articles are intended to apply to the treaties of all international organizations.

(11) Here the present draft differs profoundly from another text prepared by the Commission, namely the draft articles on the representation of States in their relations with international organizations, 484 which cover basically international organizations of universal character.

(12) The difference stems from the very purpose of the two drafts. The draft articles on the representation of States in their relations with international organizations are concerned with the law of international organizations and their purpose is to unify, within a limited area, the specific rules of certain organizations. Consequently, if the draft is limited to certain organizations possessing similar characteristics, namely universal character, there is no good reason why each organization should be endowed, in that particular area, with a régime of its own. The present draft articles, however, deal not with the law of international organizations but with the law of treaties; the legal force and the régime of the treaties considered therein derive their substance, not from the rules of each organization—that is to say, rules which would have to be unified—but from general international law. Hence the rules that govern a treaty between the United Nations and the ILO should be the same as those that govern a treaty between the ILO and the Council of Europe, for both sets of rules derive from the same principles.

(13) The inference from this basic legal analysis is that the scope of the present draft should include treaties to which all international organizations are parties. Historical and practical considerations point to the same conclusion. This was certainly what the United Nations Conference on the Law of Treaties and the General Assembly had in mind when they requested the Commission to undertake this study. Since the Conference did not have time to adopt the provisions required in order to settle in a single convention the position with regard both to treaties between States and to treaties between States and international organizations or between international organizations, the whole topic should at least be confined to no more than two instruments. The very aim of codification, which is a matter of unity, clarity and simplicity, would be jeopardized if, beyond the scope of two texts, a large area of treaty relations between States and organizations, or between organizations, had still to be left in doubt.

(14) Article 2, paragraph 2 extends to international organizations the provisions of article 2, paragraph 2, of the Vienna Convention. This extension has raised a question of terminology which is especially important inasmuch as it affects other provisions of the present draft.

(15) It is scarcely disputed that article 2, paragraph 2 of the Vienna Convention calls “the internal law of any State” matched, in the case of international organizations, by a corresponding notion covering rules whose special characteristic is that they are proper to each organization. In the first place there are the rules embodied in the organization’s constituent instrument. In the second place there are the rules which have developed from that instrument, or pursuant to it, either in written form or in practice. The legal potential, the scope and the form of such rules deriving from a constituent instrument obviously vary from one organization to another.

(16) What term, therefore, should be used to denote this body of rules which are specific to each international organization? The Commission encountered this problem in preparing and discussing several of its draft articles on treaties between States, in particular the text which became article 5 of the Vienna Convention. 485 The Commission chose the expression “the rules of any international organization”, a general formula corresponding to the expression used in a specific context

482 In connexion with situations in which an organization is called upon to act specifically on behalf of a territory, see the Secretariat study on “Possibilities of participation by the United Nations in international agreements on behalf of a territory” (A/CN.4/281) (to be printed in Yearbook ... 1974, vol. II (Part Two)).


in article 5 of the Vienna Convention, namely “any relevant rules of the organization”. Other expressions such as “internal law of an organization”, “law proper to an organization” and the like were discarded for substantive reasons or for the sake of simplicity.

Article 3. International agreements not within the scope of the present articles

The fact that the present articles do not apply

(i) to international agreements to which one or more international organizations and one or more entities other than States or international organizations are [parties];

(ii) or to international agreements to which one or more States, one or more international organizations and one or more entities other than States or international organizations are [parties];

(iii) or to international agreements not in written form concluded between one or more States and one or more international organizations, or between international organizations

shall not affect:

(a) the legal force of such agreements;

(b) the application to such agreements of any of the rules set forth in the present articles to which they would be subject under international law independently of the articles;

(c) the application of the present articles to the relations of States and international organizations or to the relations of international organizations as between themselves, when those relations are governed by international agreements to which other entities are also [parties].

Commentary

(1) It is pretty well beyond dispute that the situation under international law of certain international agreements not within the scope of the present articles needs to be safeguarded by a provision on the lines of article 3 of the Vienna Convention. Suffice it to point out that it is not unusual for an international agreement to be concluded between an international organization and an entity other than a State or an international organization. Reference might be made here (if the Vatican City were not recognized as possessing the characteristics of a State) to agreements concluded between the Holy See and international organizations. Similarly there can be little doubt that agreements concluded between the International Committee of the Red Cross and an international organization (such as those concluded with EEC under the World Food Programme) are indeed governed by international law. The development of world humanitarian law and its extension for the benefit of entities which have not yet been constituted as States will provide further examples of this kind, and there will even be agreements concluded between one or more international organizations, one or more States and one or more entities which are neither States nor international organizations.

(2) On the other hand there is no need to labour the frequency and importance of agreements not in written form concluded between one or more States and one or more international organizations. There may indeed be some doubt as to whether agreements resulting from an offer made by a State and accepted by an international organization at a meeting of which only a summary record is to be kept are written agreements; it must also be borne in mind that many agreements between organizations are set down, for example, in the verbatim records of conferences or co-ordination committees. Lastly, the development of telecommunications necessarily leads to a proliferation of unwritten international agreements on a variety of matters ranging from peacekeeping to intervention on economic markets—so much so that voices have been raised against what has sometimes been considered the abuse of such agreements. However, even if such comment may in some cases be deemed justified, they do not affect the principle of such agreements. It is for each organization, under the rule to be laid down further on in article 6 of the draft, so to organize the régime of agreements not concluded in written form that no organ goes beyond the limits of the competence conferred on it by the relevant rules of the organization.

(3) It therefore seemed to the Commission that some agreements should have the benefit of provisions similar to those of article 3, sub-paragraphs (a), (b) and (c), of the Vienna Convention. The text of those sub-paragraphs of the Convention has been adopted for draft article 3, subject, in the case of sub-paragraph (c) to the changes obviously necessitated by the difference in scope between the Vienna Convention and the draft articles.

(4) On the other hand a problem might arise in defining the agreements to which the rules laid down in sub-paragraphs (a), (b) and (c) apply. The Commission considered that for the sake of clarity it should enumerate those agreements, and it discarded global formulae which, though simpler in form, were less precise; it has accordingly enumerated the agreements in question in separate categories in sub-paragraphs (i), (ii) and (iii) of draft article 3; categories (i) and (ii), as is implicit in the general meaning of the term “agreement”, include both agreements in written form and agreements not in written form.

(5) On considering the three categories referred to in sub-paragraphs (i), (ii) and (iii) it will be seen that the
Commission has excluded agreements between States, whether or not concluded in written form, and agreements between entities other than States or than international organizations, whether or not concluded in written form. It took the view that after the Vienna Convention there was no need to reiterate that agreements between States, whatever their form, were subject to international law. Agreements concluded between entities other than States or than international organizations seem too heterogeneous a group to constitute a general category, and the relevant body of international practice is as yet too exiguous for the characteristics of such a general category to be inferred from it.

(6) Lastly, mention should be made of an important point on which draft article 3 differs from article 3 of the Vienna Convention. To designate the agreements to which the rules of its article 3 relate, the Vienna Convention makes use, without defining it, of the notion of "subject of international law". The use of this expression despite the disputes it may provoke has no great disadvantages in a convention which, like the Vienna Convention, touches only very remotely upon agreements concluded by "subjects of international law other than States". That does not apply, however, to the present draft articles; they are wholly concerned with agreements to which one or more international organizations are parties. More particularly, in view of the very broad and very flexible definition given to "international organization" in article 2, the possibility is by no means excluded that an "international organization" may possess the capacity to conclude an international treaty even though there is no likelihood of its being recognized as possessing other rights which it would need in order to have the status of a "subject of international law". The purpose of this remark is not to question the fact that many organizations, especially the large organizations of universal character, are "subjects of international law" but merely to point out that, in view of the great variety of international organizations, the notions of "international organization" and "subject of international law" would both have to be defined much more precisely if they were to be defined in terms of each other. All reference to the notion of "subject of international law" has therefore been eliminated from draft article 3 and the entirely neutral term "entity" has been used. The results is that, on this point at least, the draft articles are more flexible, broader and, it may perhaps be said, more dynamic than the Vienna Convention; for, in recognizing that entities which are not yet "subject to international law" can be parties to international agreements that are subject to international law, they show that, through treaty-making, new entities can gain progressively wider access to international relations.

Article 4. Non-retroactivity of the present articles 687

Without prejudice to the application of any rules set forth in the present articles to which treaties between one or more States and one or more international organizations or between international organizations would be subject under international law independently of the articles, the articles apply only to such treaties after the [entry into force] of the said articles as regards those States and those international organizations.

Commentary

This provision repeats the text of article 4 of the Vienna Convention, subject only to the adjustments necessitated by draft article 1.688 The expression "entry into force" is to be regarded as provisional and has accordingly been placed in square brackets. Taken literally, that expression might be construed as implying that, in order to be enforceable against international organizations, the present draft articles would have to be embodied in a convention to which those international organizations were parties. However, the question of the final use to be made of the draft articles has been left in abeyance, and the question whether international organizations should be parties to a convention incorporating the proposed articles has not yet been examined by the Commission. This is an important and difficult question on which the Commission hopes to receive the comments of Governments and interested organizations.

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

SECTION 1. CONCLUSION OF TREATIES

Article 6. Capacity of international organizations to conclude treaties 689

The capacity of an international organization to conclude treaties is governed by the relevant rules of that organization.

Commentary

(1) Up to the end of its work at the present session, the Commission remained divided on the question of

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687 The corresponding provision of the Vienna Convention reads as follows:

"Article 4. Non-retroactivity of the present Convention"

"Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States."

688 The present draft articles cannot include any provision corresponding to article 5 of the Vienna Convention, which reads as follows:

"Treaties constituting international organizations and treaties adopted within an international organization"

"The present Convention applies to any treaty which is the constituent instrument of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization."

689 The Vienna Convention has the same titles for part II and section 1, and an article 6 which reads as follows:

"Capacity of States to conclude treaties"

"Every State possesses capacity to conclude treaties."
an article dealing with the capacity of international organizations to conclude treaties. Varied and finely differentiated views were expressed on this subject by the members. With some slight simplification, these may be reduced to two general points of view. According to the first, such an article would be of doubtful utility or should at least be limited to stating that an organization’s capacity to conclude treaties depends only on the organization’s rules; the proposal for a draft article 6 submitted as a first choice by the Special Rapporteur in his third report (A/CN.4/279) 640 conformed, up to a point, to that view. According to the second point of view, the article should at least mention that international law lays down the principle of such capacity; from this it follows, at least in the opinion of some members of the Commission, that in the matter of treaties the capacity of international organizations is the ordinary law rule, which can be modified only by express restrictive provisions of the constituent instruments. The alternative proposal submitted by the Special Rapporteur in his third report 641 went some way to meet that second view.

(2) The wording eventually adopted by the Commission for article 6 is the result of a compromise based essentially on the finding that this article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations at international law; that question remains open, and the proposed wording is compatible both with the conception of general international law as the basis of international organizations’ capacity and with the opposite conception. The purpose of article 6 is merely to lay down a rule relating to the law of treaties; the article indicates, for the sole purposes of the régime of treaties to which international organizations are parties, by what rules their capacity to conclude treaties should be assessed. Some members of the Commission, however, took the view that draft article 6, as at present worded, would not suffice to solve all the problems which the Commission would encounter in its further work on the draft articles, for example when it had to draw up, for application to international organizations, rules to match those laid down for States in articles 27 and 46 of the Vienna Convention.

(3) Thus set in context, article 6 is nevertheless of great importance. It reflects the fact that every organization has its own distinctive legal image which is recognizable, in particular, in the individualized capacity of that organization to conclude international treaties. Article 6 thus applies the fundamental notion of “rules of any international organization” already laid down in article 2, paragraph 2, of the present draft and developed in the commentary 642 to that provision. The addition, in article 6, of the adjective “relevant” to the expression “rules of that organization” is due simply to the fact that, while article 2, paragraph 2, relates to the “rules of any organization” as a whole, article 6 concerns only some of those rules, namely those which are relevant in settling the question of the organization’s capacity.

(4) A question naturally arises as to the nature and characteristics of the “relevant rules” in the matter of an organization’s capacity, and it might be tempting to answer this question in general terms, particularly with regard to the part played by practice. That would obviously be a mistake which the text of draft article 6 seeks to avert by specifying that “the capacity of an international organization to conclude treaties is governed by the relevant rules of that * organization”.

(5) It should be clearly understood that the question how far practice can play a creative part, particularly in the matter of international organizations’ capacity to conclude treaties, cannot be answered uniformly for all international organizations. This question, too, depends on the “rules of the organization”; indeed, it depends on the highest category of those rules—those which form, in some degree, the constitutional law of the organization and which govern in particular the sources of the organization’s rules. It is theoretically conceivable that, by adopting a rigid legal framework, an organization might exclude practice as a source of its rules. Even without going as far as that, it must be admitted that international organizations differ greatly from one another as regards the part played by practice and the form which it takes, inter alia in the matter of their capacity to conclude international agreements. There is nothing surprising in this; the part which practice has played in this matter in an organization like the United Nations, faced in every field with problems fundamental to the future of all mankind, cannot be likened to the part played by practice in a technical organization engaged in humble operational activities in a circumscribed sector. For these reasons, practice was not mentioned in article 6; practice finds its place in the development of each organization in and through the “rules of the organization”, and that place varies from one organization to another.

(6) These considerations should make it possible to clear up another point which has been of keen concern to international organizations in other contexts 643 but which is open to no misunderstanding so far as the present draft articles are concerned. In matters, such as the capacity to conclude treaties, which are governed by the rules of each organization, there can be no question of fixing those rules as they stand at the time when the codification undertaken becomes enforceable against each organization. In reserving the practice of each organization in so far as it is recognized by the organization itself, what is reserved is not the practice established at the time of entry into force of the codification but the very faculty of modifying or supplementing the organization’s rules by practice to the extent permitted by those rules. Thus, without imposing on the organizations the constraint of a uniform rule which is ill suited to them, article 6 recognizes the right of each of them to have its own legal image.

640 See p. 135 above.
641 See p. 150 above, document A/CN.4/279, paragraph 20 of the commentary to article 6.
642 Paras. 15 and 16.
Chapter V

THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

146. In paragraph 1 of resolution 2669 (XXV) of 8 December 1970, the General Assembly recommended that the International Law Commission should, as a first step, take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification and, in the light of its scheduled programme of work, should consider the practicability of taking the necessary action as soon as the Commission deemed it appropriate.

147. Pursuant to that recommendation the Commission, at its twenty-third session, held in 1971, decided to include a question entitled “Non-navigational uses of international watercourses” in its general programme of work without prejudging the priority to be given to its study. It would be for the Commission in its new composition to decide what priority the topic should be given and what other action should be taken, bearing in mind the current programme of work of the Commission as well as its revised long-term programme. 644

148. The Commission agreed that for undertaking the substantive study of the rules of international law relating to the non-navigational uses of international watercourses with a view to its progressive development and codification on a world-wide basis, all relevant materials on State practice should be compiled and analysed. The Commission noted that a considerable amount of such material had already been published in the Secretary-General’s report on “Legal problems relating to the utilization and use of international rivers” (A/5409) 645 prepared pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, as well as in the United Nations Legislative Series. 646 On the other hand, in paragraph 2 of resolution 2669 (XXV), the General Assembly requested the Secretary-General to continue the study initiated in accordance with General Assembly resolution 1401 (XIV) in order to prepare a “supplementary report” on the legal problems relating to the question, “taking into account the recent application in State practice and international adjudication of the law of international watercourses and also intergovernmental and non-governmental studies of this matter”. 647

149. In paragraph 5, section I of resolution 2780 (XXVI) of 3 December 1971, the General Assembly recommended that “the International Law Commission, in the light of its scheduled programme of work, decide upon the priority to be given to the topic of the law of the non-navigational uses of international watercourses”.

150. At its twenty-fourth session, held in 1972, the Commission indicated its intention to take up the foregoing recommendation of the General Assembly when it came to discuss its long-term programme of work. At that session, the Commission reached the conclusion that the problem of pollution of international waterways was one of both substantial urgency and complexity and accordingly requested the Secretariat to continue compiling the material relating to the topic with special reference to the problems of the pollution of international watercourses. 648

151. In paragraph 5, section I of resolution 2926 (XXVII) of 28 November 1972, the General Assembly noted the Commission’s intention, in the discussion of its long-term programme of work, to decide upon the priority to be given to the topic. By the same resolution (paragraph 6, section I) the General Assembly requested the Secretary-General to submit, as soon as possible, the study on the legal problems relating to the non-navigational uses of international watercourses requested by the Assembly in resolution 2669 (XXV), and to present an advance report on the study to the International Law Commission at its twenty-fifth session.

152. Pursuant to the foregoing decision of the General Assembly, the Secretary-General submitted to the Commission at its twenty-fifth session, an advance report 649 on the progress of work in the preparation of the supplementary report requested by the Assembly.

153. At its twenty-fifth session, the Commission gave special attention to the question of the priority to be given to the topic. Taking into account the fact that the supplementary report on international watercourses 650 would be submitted to members by the Secretariat in the near future, the Commission considered that a formal decision on the commencement of work on the topic should be taken after members had had an opportunity to review the report. 651

154. By paragraph 4 of resolution 3071 (XXVIII) of 30 November 1973 the General Assembly recommended that the Commission should at its twenty-sixth session commence its work on the law of the non-navigational uses of international watercourses by, inter alia, adopting preliminary measures provided for under article 16 of its statute. Also, by paragraph 6 of the same resolution, the General Assembly requested the Secretary-General to complete the supplementary report requested in resolution 2669 (XXV), in time to submit it to the Commission before the beginning of its twenty-sixth session.

155. At its twenty-sixth session the Commission had before it the supplementary report on the legal problems

644 Yearbook ... 1971, vol. II (Part One), p. 350, document A/8410/Rev.1, para. 120.
645 To be printed in Yearbook ... 1974, vol. II (Part Two).
650 See para. 148 above.
relating to the non-navigational uses of international watercourses submitted by the Secretary-General pursuant to General Assembly resolution 2669 (XXV) (A/CN.4/274). 5

156. Pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII) the Commission, at the present session, set up a Sub-Committee composed of Mr. Kearney (Chairman), Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi which was requested to consider the question and to report to the Commission.

157. During the twenty-sixth session, the Sub-Committee held three meetings. Members of the Sub-Committee submitted memoranda which were reproduced in a working paper (ILC (XXVI) SC.1/WP.1). On the basis of those memoranda and the discussions thereon, the Sub-Committee adopted and submitted to the Commission a report (A/CN.4/283) which is annexed to this chapter.

158. The Commission considered the report of the Sub-Committee at its 1297th meeting held on 22 July 1974 and adopted it without change.

159. The Commission also unanimously appointed Mr. Richard D. Kearney Special Rapporteur for the question of the law of the non-navigational uses of international watercourses.

ANNEX

Report of the Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses

I. INTRODUCTION

1. The Sub-Committee on the Law of the Non-Navigational Uses of International Watercourses was set up by the International Law Commission at its 1256th meeting of 14 May 1974, pursuant to the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII) of 30 November 1973. The members of the Sub-Committee are: Mr. Kearney (Chairman), Mr. Elias, Mr. Šahović, Mr. Sette Câmara and Mr. Tabibi.

2. The Sub-Committee was requested to consider the question of the law of the non-navigational uses of international watercourses which had been included by the Commission in its general programme of work at its twenty-third session in 1971, and to report to the Commission.

3. During the Commission’s twenty-sixth session, the Sub-Committee held three meetings on 23 May and 1 and 15 July 1974.

4. The Sub-Committee had before it background documentation submitted by the Secretariat, including the records of the consideration of the matter in the General Assembly and, in particular, the report of the Secretary-General on the “Legal Problems relating to the utilization and uses of international rivers” (A/5409) and the supplement thereto (A/CN.4/274, vols. I and II) the latter prepared pursuant to the request made by the General Assembly in resolution 2669 (XXV) of 8 December, as well as a volume of the United Nations Legislative Series entitled Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation. 5

5. Members of the Sub-Committee submitted memoranda setting forth suggestions on the content of a working plan as well as on organizational and substantive matters having a bearing on such a plan. Those memoranda are reproduced in a working paper (ILC (XXVI)/SC.1/WP.1).

6. On the basis of these memoranda and the discussions thereon, the Sub-Committee reached the following conclusions, which it submits to the Commission for its consideration.

II. THE NATURE OF INTERNATIONAL WATERCOURSES

7. The threshold question that arises in a study of the legal aspects of non-navigational uses of international watercourses is determination of the meaning and scope that should be given to the term “international watercourses”. Some of the more recent multilateral treaties relating to international uses of water have used “river basin” as the measure of scope of application. The 1963 Convention between Guinea, Mali, Mauritania and Senegal deals with the general delusive notion of “the Senegal River Basin” (see A/CN.4/274, paras. 36-39). Article 13 states that the Senegal River, including its tributaries, is “an international river”. The 1964 Convention between the same States (ibid., paras. 45-50) provides that the Inter-State Committee, established by the 1963 Convention, shall be responsible, inter alia, for assembling basic data relating to the River basin as a whole and informing the riparian States of all projects or problems concerning the development of the River basin (article 11). Also in 1963, Cameroon, Chad, Dahomey, Guinea, the Ivory Coast, Mali, Niger, Nigeria and Upper Volta concluded the Act regarding navigation and economic co-operation between the States of the Niger basin (ibid., paras. 40-44), which provides that the utilization of the River Niger, its tributaries and subtributaries, is open to each riparian State in respect of the portion of the Niger River basin lying in its territory and without prejudice to its sovereign rights in accordance with the principles defined in the Act and in the manner that may be set forth in subsequent special agreements (article 2).

8. The 1964 Convention and Statutes between Cameroon, Chad, Niger and Nigeria relating to the development of the Chad Basin (ibid., paras. 51-56), provides that the exploitation of the Basin and especially the utilization of surface and underground waters has the widest meaning and refers in particular to the needs of domestic and industrial and agricultural development and the collecting of its flora and fauna products (Statutes, article 4). In this case, the term “basin” may, because of the inclusion of underground waters, have a somewhat broader meaning and be the equivalent of “drainage basin”.

9. In this context, it should be noted that the International Rivers Sub-Committee of the Afro-Asian Legal Consultative Committee has been basing its work on the concept of “international drainage basin” (ibid., paras. 364-367).

10. The Inter-American Juridical Committee, in its draft conventions on the industrial and agricultural use of international rivers and lakes of 1965 (ibid., para. 379), restricted its coverage to contiguous and adjacent rivers and lakes and international rivers are defined. On the other hand, in 1966, the Inter-American Economic and Social Council adopted a resolution on control and economic utilization of hydrographic basins and streams in Latin America (ibid., para. 380). In this resolution, the Council recommended to the member countries of the Alliance for Progress joint studies on “control and economic utilization of the hydrographic basins and streams of the region of which they are a part, for the purpose of promoting, through multinational projects, their utilization for the common good . . .”.

11. The major multilateral convention on the subject in South America is the Treaty on the River Plate Basin, signed by Argentina, Bolivia, Brazil, Paraguay and Uruguay on 23 April 1969 (ibid., paras. 60-64). This is an agreement in which the Parties agree to combine their efforts for promoting the harmonious development and physical integration of the River Plate Basin, and of its areas of influence.
which are immediate and identifiable. The agreement contemplates the
drafting of operating agreements and legal instruments with the
end of ensuring reasonable utilization of water resources, particularly
through regulation of watercourses and their multiple and equitable
uses. Article II of the Treaty provides for annual meetings of the
Foreign Ministers of the River Plate Basin States to draft policy
directions to achieve the objectives of the Treaty.

12. At the Fourth Meeting in 1971 the Foreign Ministers adopted the
"Act of Asunción" (ibid., para. 327), to which were annexed 25
resolutions. These resolutions carried further the work of "pro-
moting the harmonious development and physical integration of the
River Plate Basin" (ibid., para. 61). The treaty does not contain any
specific definition of "basin". In resolution No. 25 which deals with
the use of international rivers, the concepts of successive international
rivers and contiguous international rivers are taken as a basis for
the solution of legal problems in the following way:

"1. In contiguous international rivers, which are under dual
sovereignty, there must be a prior bilateral agreement between the
riparian States before any use is made of waters.

"2. In successive international rivers, where there is no dual
sovereignty, each State may use the water in accordance with its
needs provided that it causes no appreciable damage to any other
State of the Basin."

Certain recent South American bilateral agreements adopt a
somewhat different approach by using differing terminology for
pollution problems and for utilization. For example, the Argentine-
Chile "Act of Santiago concerning hydrologic basins" (ibid., para. 327) of 1971 states: "The Parties shall avoid polluting their river and
lake systems in any manner" (paragraph 2 of the Act). With respect
to use, however, the terms "contiguous reaches of international
rivers", "common lakes" and "successive international rivers" are employed (paragraphs 3-5 of the Act). The indication is that broader
coverage is intended for dealing with "pollution" than for dealing
with "uses".

13. The Great Lakes Water Quality Agreement of 1972 between
Canada and the United States of America is concerned with "the
However, in order to raise the quality of the boundary waters, it was
found necessary to provide for programmes to reduce pollution from
sewage, industrial sources, agricultural, forestry and other land use
activities (Art. V) in the entire Great Lakes system which is defined as
"all of the streams, rivers, lakes and other bodies of water that are
within the drainage basin of the St. Lawrence River . . ." (Art. 1 (d)).

14. For the purpose of ascertaining the meaning and the scope
of the concept of international watercourses due consideration should
be given to the 1911 resolution of the Institute of International Law
entitled "International Regulations regarding the use of International
Watercourses". However, there is no use of the term "water-
courses" but instead reference to "stream" and "lake" in the text of the
Resolution itself. Fifty years later, the resolution of the Institute
of International Law on "Utilization of non-maritime international
Waters (except for navigation)" (1961) adopted the concept of
hydrographic basin as a synonym for "watercourses". Article 1 of the
Resolution provides:

"The present rules and recommendations are applicable to the
utilization of waters which form part of a watercourse or hydro-
graphic basin which extends over the territory of two or more
States." And Article 2 reads:

"Every State has the right to utilize waters which traverse or
border its territory, subject to the limits imposed by international
law and, in particular, those resulting from the provisions which
follow.

"This right is limited by the right of utilization of other States
interested in the same watercourses or hydrographic basin."

15. The International Law Association, at its Helsinki Conference
of 1966, prepared a set of articles on the Uses of the Waters of
International Rivers (Helsinki Rules), which is based on the concept
of "international drainage basin". The term is defined in article II as:

"An international drainage basin is a geographical area ex-
tending over two or more States determined by the watershed
limits of the system of waters, including surface and underground
waters, flowing into a common terminus." These studies, though not having the weight of State practice, provide
additional examples of the various terms that have been used to
denote "international watercourses".

16. Further examples are available from treaties, State practice,
studies of regional organizations, and the researches of legal organ-
izations to show that the term "international watercourses" does
not possess a sufficiently well-defined meaning to delimit, with any
degree of precision, the scope of the work which the Commission
should undertake on the uses of fresh water. It is also clear that the
natures of the problems studied may have an effect upon the scope
of the work.

17. In view of these uncertainties, the Sub-Committee proposes that
States be requested to comment on the following questions:
(a) What would be the appropriate scope of the definition of an
international watercourse, in a study of the legal aspects of fresh
water uses on the one hand and of fresh water pollution on the
other hand?
(b) Is the geographical concept of an international drainage basin the
appropriate basis for a study of the legal aspects of non-naviga-
tional uses of international watercourses?
(c) Is the geographical concept of an international drainage basin the
appropriate basis for a study of the legal aspects of the pollution
of international watercourses?

III. NON-NAVIGATIONAL USES OF
INTERNATIONAL WATERCOURSES

18. Another question that must be considered at the outset is what
activities are included within the term "non-navigational uses". Fresh
water is put to a manifold number of uses and an exhaustive listing is
not only impossible but unnecessary. However, at least the outlines of
the Commission's field of activity should be fixed by determining the
major uses to be considered.

19. The most general characterization would be to consider uses as
(a) agricultural; (b) commercial and industrial; (c) social and
domestic.

20. Agricultural uses account for the major proportion of fresh
water use, at least in the sum of the amount of water removed from
watercourses for irrigation and other farming purposes which is not
returned directly to the watercourse. Nevertheless, there is a con-
siderable amount of direct water return as well as return by seepage.
In many cases, however, the quality of this return water has been
debased to a greater or lesser extent by fertilizers, insecticides and
various farm wastes.

21. In areas where, at least on a seasonal basis, water is in excess
rather than in short supply, another agricultural use is the reduction
in the moisture content of the soils through drainage. This use can

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655 Annuaire de l'Institut de droit international, 1911 (Paris),
vol. 24 (1911), pp. 365-367. For an English translation of the text,
see F. Berber, Rivers in International Law (London, Stevens, 1959),
p. 27.

656 Annuaire de l'Institut de droit international 1961, (Basle),
vol. 49 (1962), t. II, p. 381. The text of the resolution is reproduced in
A/5409, para. 1076 (to be printed in Yearbook . . . 1974, vol. II
(Part Two)).

657 International Law Association, Report of the Fifty-second
give rise to erosion problems. It is connected, however, with a much larger problem that does not concern a "use" as such but is an essential element in river-planning. This is the problem of flood control. In view of the very substantial dangers and losses that result from flooding, a study of the legal aspects of international watercourses would appear to be incomplete without the inclusion of a consideration of this problem.

22. There is a question whether commercial fishing and other food production activities fall within the area of agricultural uses or of commercial and economic uses. All events the flora and fauna of international watercourses are an essential part of a study of legal aspects of fresh water uses, particularly because the increase in the demands for water and the increase in pollution of international watercourses by all kinds of waste have had markedly adverse effects upon aquatic life in many areas throughout the world.

23. The limitation of the Commission's study to "non-navigational uses" causes certain difficulties. It would not seem feasible to consider non-navigational uses without taking account of the effect those uses have upon navigation; and, contrariwise, it would be short-sighted not to take account of the effect of navigation upon non-navigational uses. Thus, timber floating and navigation are, in the absence of strict control, not compatible uses, because of the dangers of collision. Hydro-electric production and navigation are also incompatible uses because the dam cuts off the passage of vessels unless locks are built to carry them round it. Consideration should be given to this interaction and the views of States sought on the point. In addition, the attention of the Sixth Committee, which proposed the scope of the study, should be drawn to the problem.

24. Manufacturing of all kinds give rise to constantly increasing requirements for fresh water. These demands are particularly high in connexion with the processing of raw materials. Much production is geared to the use of watercourses as a means for the disposal of industrial wastes. The growth of industry in many cases has exceeded the capacity of rivers to deal with these wastes. The problem has been complicated by the production of a great range of synthetic materials which are impervious to the natural processes of decomposition.

25. The social and domestic uses of fresh water are probably the most important to mankind as a whole. Urban civilization, which is becoming the dominant pattern of life in the second half of this century, requires the availability of large supplies of fresh water of substantially good quality. Most of the water used for domestic consumption is returned to the drainage system—even if not to the same watercourse from which it is taken. There is, therefore, not a great loss in quantity of available water, but usually a very substantial drop in quality as a result of using the watercourse for water disposal.

26. As industry is usually a part of an urban complex, the combination of industrial wastes and domestic wastes has had disastrous effects upon lakes and rivers. Also, as in industrial wastes, a wide variety of synthetic materials are found in domestic wastes that are non-biodegradable.

27. The combination of these factors generally has an adverse effect of some magnitude upon the social uses of watercourses. These uses, while not having the economic importance of those previously discussed, are still high on this list of human values. Recreation of all kinds has always been one of the most appealing aspects of lakes and rivers. Sport, fishing, swimming, boating and like activities are uses that should be preserved. They are, like other uses, dependent upon the two basic factors of water quantity and water quality. It is worth noting that they may be particularly affected by a variety of recent developments such as the discharge of large quantities of heated water into the watercourse as a result of certain industrial processes or energy production.

28. From what has been said, it is clear that the major effects of various uses upon watercourses is to change the quantity of water available, the rate of flow of water and the quality of water. All of these effects are interrelated. Thus, from the point of view or irrigation, a reduction in water quality, among other consequences, may reduce the quantity of usable water available because the lower quality of the water may require the use of a larger quantity of water to produce the same effect. Because there is only a limited quantity of water available, it is also clear that increasing demand, which is the chronic condition because of increasing population, results in competition among the various uses for the available water.

29. When the water concerned is that of an international drainage basin or an international watercourse, the competition among the various users can become an international competition, and the problem which faces the Commission is largely, though not entirely, to determine and to formulate the legal principles which should be applied to regulate this competition. This will require, as the first step, an examination of existing international practice, and particularly practice as reflected in conventions or administrative arrangements, for dealing with trans-boundary water problems.

30. Because uses can be conflicting, both on the national and on the international level, this examination should be directed to the consequences of a reasonably broad range of water uses in the international context. The Sub-Committee believes that the views of States should be sought as to the range of uses that the Commission should take account of in its work. In addition, certain special problems, such as those previously referred to above, need to be considered. The Sub-Committee recommends that the following questions should be put to States:

A. Should the Commission adopt the following outline of fresh water uses as the basis for its study?

1. Agricultural uses
   (a) Irrigation
   (b) Drainage
   (c) Waste disposal
   (d) Aquatic food production

2. Economic and commercial uses
   (a) Energy production (hydroelectric, nuclear and mechanical)
   (b) Manufacturing
   (c) Construction
   (d) Transportation other than navigation
   (e) Timber floating
   (f) Waste disposal
   (g) Extractive (mining, oil production, etc.)

3. Domestic and social
   (a) Consumptive (drinking, cooling, washing, laundry, etc.)
   (b) Waste disposal
   (c) Recreational (swimming, sport, fishing, boating, etc.)

B. Are there any other uses that should be included?

C. Should the Commission include flood control and erosion problems in its study?

D. Should the Commission take into account in its study of the interaction between use for navigation and other uses?

IV. Organization of work

31. The uses to which international watercourses are put vary widely according to factors such as climate, the physical characteristics of the watercourse, the availability of raw materials for industrial production, and the stages of economic and social development in the basin States. This variety of existing uses could give rise to the viewpoint that it may be desirable to give priority to the study of particular uses, such as industrial uses, in view of the continually mounting demand for water by industry or agriculture because of the obvious requirement for much greater food production in the light of the rapidly multiplying world population.

32. The Sub-Committee does not consider that it would be wise to accord priority to any specific use. The discussion of the various uses indicates a series of complex relationships among them which require simultaneous exploration. However, the discussion of uses
also has indicated that there are two principal limitations upon the use of fresh water—the quantity and the quality of water available. Although, as previously mentioned, there is a definite interrelationship between these two limitations, each nevertheless raises legal considerations of a different character. The problem of quantity raises an issue of distributive justice, namely: to what extent is a State as a territorial sovereign entitled to divert water for its own uses when that diversion makes the water unavailable for use by another State which, without the diversion, would be able to make use of the water?

33. The problem of quality in relation to quantity involves issues that lie more in the field of the limits of liability for fault. The question really is: at what point does the legitimate use of an international watercourse for waste disposal become illegitimate because of the nature or amount of the waste which is passing into the territory of another State?

34. It would be possible to concentrate first on the question of quality, that is, pollution problems, or on the question of quantity. Taking up one first, however, would not mean that all consideration of the other should be postponed. For example, establishment of principles to bring waste disposal within acceptable limits would have a direct impact upon the other uses of water.

35. Whether to take up the study of uses in general or the problem of pollution first, is a close issue. There is a somewhat greater amount of State practice available regarding general uses, for example in respect of hydro-electric production and irrigation, than there is regarding waste disposal. On the other hand, there is the fact that waste disposal is a use that affects all the other uses of fresh water, whether as an essential element of the use, e.g. irrigation, industrial production, etc., or as destruction of the use, e.g. recreation or domestic uses, if the pollution is by dangerous chemicals or radioactive wastes. This would appear to afford a somewhat better opportunity to work out general principles and thus make it advantageous to deal with as the first stage. For these reasons the Sub-Committee considers that it would be desirable to ask States if they support taking up the pollution problem first. The Sub-Committee recommends that States be requested to reply to the following question:

Are you in favour of the Commission taking up the problem of pollution of international watercourses at the initial stage in its study?

V. CO-OPERATION WITH OTHER AGENCIES

36. As the excellent report of the Secretary-General on the “Legal Problems Relating to the Utilization and Uses of International Rivers” of 1963, together with the supplementary report of 1974, make clear, the specialized agencies of the United Nations and other international organizations have produced a great volume of technical and scientific work in the area of uses of fresh water. Such studies are currently being carried out. Exhaustive work is being done in many of the fields that relate to pollution as a result of the United Nations Conference on the Human Environment, held at Stockholm in 1972, and the establishment of the United Nations Environment Programme. The Commission should make full use of these studies in its work. The Sub-Committee recommends that the Secretary-General be requested to advise all international organizations that are engaged in studies of international watercourses of the legal work being carried on by the Commission and to request their co-operation in this work, particularly be designating an officer or officers of these organizations to serve as the channel of information and co-operation.

37. A further question is whether the technical, scientific and economic aspects of this area of study are both sufficiently complex and of such importance to the formulation of effective legal principles that special steps should be taken to ensure receipt by the Commission of the most competent and useful advice. In this connexion, the precedent of the Committee of Experts established to assist the Commission in dealing with certain aspects of the law of the sea and related conventions, might be taken into account. This again is a matter upon which the views of States should be solicited and, to this end, the Sub-Committee recommends the following question:

Should special arrangements be made for ensuring that the Commission is provided with the technical, scientific and economic advice which will be required through such means as the establishment of a Committee of Experts?

Chapter VI
OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

A. Succession of States in respect of matters other than treaties

160. At the present session of the Commission, Mr. Mohammed Bedjaoui, Special Rapporteur, submitted his seventh report (A/CN.4/282)*** on the succession of States in respect of matters other than treaties. The Commission, however, was unable to resume the consideration of the topic, as in pursuance of paragraph 3 (a) and (b) of General Assembly resolution 3071 (XXVIII) of 30 November 1973, it had to devote most of the time of the session to the second reading of the draft articles on succession of States in respect of treaties and to the preparation of a first set of draft articles on State responsibility.

*** See p. 91 above.

B. The most-favoured-nation clause

161. At the present session of the Commission, Mr. Endre Ustor, Special Rapporteur, submitted his fifth report (A/CN.4/280)*** on the most-favoured-nation clause. For the reasons indicated in the preceding paragraph, the Commission was unable to resume the consideration of the topic at its present session.

C. Long-term programme of work

162. The consideration by the Commission of the recommendation contained in paragraph 4 of General Assembly resolution 3071 (XXVIII), concerning commencement of work on the law of non-navigational uses

*** See p. 117 above.
of international watercourses (agenda item 8 (a)) is dealt with in chapter V of the present report.

163. As regards the recommendation contained in paragraph 3 (e) of resolution 3071 (XXVIII) concerning undertaking at an appropriate time a separate study of the topic of international liability for injurious consequences arising out of the performance of activities other than internationally wrongful acts (agenda item 8 (b)), the Commission decided to place that topic on its general programme of work.

D. Organization of future work

164. Having concluded at its present session second reading of the draft articles on succession of States in respect of treaties as recommended by the General Assembly, the Commission intends to continue at its twenty-seventh session, as a matter of priority, its study of the topic of State responsibility and the preparation of the draft articles relating thereto. It also proposes to consider other topics in its current programme of work on which a first set of draft articles has already been prepared, namely: the most-favoured-nation clause, succession of States in respect of matters other than treaties and the question of treaties concluded between States and international organizations. This is without prejudice to the possibility, time permitting, of giving some time to the consideration of the topic of the law of the non-navigational uses of international watercourses.

165. The Commission has become increasingly aware, during recent years, that an annual session of ten weeks duration is insufficient to meet the demands of its programme of work. The twelve-week session of 1974 has permitted the preparation of the final draft articles on succession of States in respect of treaties, further progress on State responsibility and the preparation of the initial articles on treaties concluded between States and international organizations. This was accomplished only by intensive effort. If the session had been limited to ten weeks, it would not have been possible to complete the draft on succession of States in respect of treaties. In the light of this experience, as well as the experience in previous years, the Commission is convinced that the twelve-week session should be adopted as the minimum duration on a permanent basis. Accordingly it recommends that the General Assembly approve a twelve-week session as the minimum standard period of work for the Commission, as from the next session.

E. Co-operation with other bodies

1. ASIAN-AFRICAN LEGAL CONSULTATIVE COMMITTEE

166. The Chairman of the twenty-fifth session, Mr. Jorge Castañeda, attended the fifteenth session of the Asian-African Legal Consultative Committee held at Tokyo in January 1974, as an observer for the Commission. He reported orally on his attendance, at the opening meeting of the present session (1250th meeting) of the Commission.

167. The Asian-African Legal Consultative Committee was represented at the twenty-sixth session of the Commission by its President, Mr. K. Nishimura, who addressed the Commission at its 1278th meeting.

168. Mr. Nishimura expressed the profound admiration of the Asian-African Legal Consultative Committee for the work which the Commission had accomplished during the past twenty-five years. It was a matter of gratification that in spite of the meticulous care and thought which the Commission devoted to the drafting of each article, it had been able to complete its recommendations on as many as eighteen different topics, some of which had had a tremendous impact on the development of international law and had received general acceptance by the world community through their incorporation in multilateral conventions. In that connexion, he made special mention of the topics of the law of the sea, diplomatic intercourse and immunities, consular relations and the law of treaties. The codification of those topics would not have been possible without the efforts and work of the Commission.

169. He stressed the importance which his organization attached to the close links between the Commission and the Asian-African Legal Consultative Committee and expressed satisfaction that, in its work, the Commission had shown its willingness not only to cooperate with, but also to take into account the work done by, various regional bodies. The co-operation and exchanges between the Commission and the Committee had always been extremely fruitful. He expressed his sincere hope that they would not only be maintained but further strengthened in the years to come.

170. Turning to the work of the Committee, Mr. Nishimura noted that it had been confronted with much heavier responsibilities during the past four years, due to the increase in its membership, which had now risen to 26, requests of its members for assistance in various legal fields, particularly in connexion with the work of UNCTAD and UNCITRAL, as well as the general desire to use the Committee as a forum for Asian-African co-operation in legal matters.

171. He emphasized that four of the last five sessions of the Committee as well as several sub-committee meetings had been devoted to exchanges of views on the law of the sea. The Committee's secretariat had been engaged in collecting and analysing various data with a view to assisting its member Governments to prepare for the Third United Nations Conference on the Law of the Sea. He said that at the Committee's last session, a statement of principle had been submitted to it on behalf of the land-locked countries in preparation for the Conference. Nevertheless, the Committee had not neglected other subjects studied by the Commission, such as State succession and State responsibility, which were of great importance to many new States.

172. He added that the Committee closely followed the studies prepared by other United Nations organs and bodies such as UNCTAD and UNCITRAL on legal matters of common interest. It had similarly devoted considerable time to an exchange of views on the rule of foreign office legal advisers. Finally, he informed the
Commission that the Committee was also interested in the non-navigational uses of international watercourses, a subject which presented great problems for the countries of Asia and Africa in general.

173. The Committee was informed that the sixteenth session of the Committee, to which it had a standing invitation to send an observer, would be held at Teheran in 1975. The Commission requested its Chairman, Mr. Endre Ustor, to attend the session or, if he was unable to do so, to appoint another member of the Commission for this purpose.

2. EUROPEAN COMMITTEE ON LEGAL CO-OPERATION

174. Mr. Ali Suat Bilge attended the twentieth session of the European Committee on Legal Co-operation held at Strasbourg in December 1973, as an observer for the Commission. Mr. Abdul Hakim Tabibi attended the twenty-first session of the Committee, held at Strasbourg in June 1974, as an observer for the Commission, and made a statement before the Committee (A/CN.4/L.214, annex 1).

175. The European Committee on Legal Co-operation was represented at the twenty-sixth session of the Commission by Mr. H. Golsong, Director of Legal Affairs of the Council of Europe, who addressed the Commission at its 1292nd meeting.

176. Mr. Golsong recalled that he had conveyed in a message addressed to the General Assembly on the occasion of its celebration of the twenty-fifth anniversary of the Commission the sentiments of admiration of the European Committee on Legal Co-operation for the Commission’s accomplishments during its twenty-five years of existence. The Committee had wished to associate itself with that anniversary celebration by stressing, at its own tenth anniversary, the objectives which linked it with the Commission, namely, the codification and progressive development of international law.

177. Turning to one of the main activities of the Committee, the international protection of human rights, Mr. Golsong referred to recent developments concerning the Convention for the Protection of Human Rights and Fundamental Freedoms, noted that twenty-five years after its signature, the Convention naturally gave rise to procedural problems with regard to its application. For that reason, studies had recently been undertaken with a view to simplifying and speeding up that procedure.

178. With regard to the Committee’s work on the protection against pollution of water resources and particularly of international watercourses, a topic in which the Commission would no doubt be interested because of its commencement of work on the law of the non-navigational uses of international watercourses, Mr. Golsong informed the Committee that the draft convention which had been prepared on the subject (see A/CN.4/274, para. 377) was now before the Committee of Ministers of the Council of Europe. In some respects, that draft contained legal innovations which were of some importance. It took the form of a basic instrument which laid down the obligations for future contracting parties to enter into negotiations with each other with a view to concluding co-operation agreements between the riparian States of the same international watercourse. In its present form, that pactum contra-hendo was without precedent. The draft also imposed specific material obligations on contracting States to maintain the quality of the waters in accordance with minimum quality standards, and to enact regulations to prohibit or restrict the discharge into the waters of certain dangerous or harmful substances. The obligations laid down in the draft convention raised the question of the international responsibility that would arise from their breach. A long discussion on that question had led to the formulation of a provision (article 21) which read:

The provisions of this Convention shall not affect the rules applicable under general international law to any liability of States for damage caused by water pollution. (Ibid.)

That provision therefore left it to general international law to determine the consequences of the breach of an international obligation of the kind specified in the draft convention. On that point, the draft thus relied on the results of the work in progress in the Commission on the subject of State responsibility. On the other hand, the system embodied in the draft for the settlement of disputes was more specific. It was based on the obligation to submit any dispute to an ad hoc arbitral tribunal set up for each individual case. Provision had had to be made for cases that were perhaps peculiar to problems of the pollution of an international watercourse crossing the territory of several States, namely, cases in which the dispute involved several States not having the same interests. It was difficult, when providing for ad hoc arbitration, to devise a system that would satisfy a diversity of interests. A tentative formula was embodied in an appendix to the draft, which made provision for the establishment of links between two or more arbitral tribunals seized of applications with identical or analogous subject-matter.

179. With regard to the practice of the Committee relating to the law of treaties, he drew attention to the increasing difficulties arising from the simultaneous existence of several treaties covering more or less the same subject-matter or related subject-matters. That had led to an overlapping of international treaty obligations, because in the Council of Europe treaties were not binding on member States unless they individually expressed their consent to be bound. Studies were now in progress with a view to finding solutions to the problems of overlapping raised by the application of such treaties. He also drew attention to problems arising from the possibility that the European Communities might wish, in order to co-ordinate various conventions relating to the same subject-matter, to accede to certain conventions. It was not clear what would happen, for example, if the European Communities acceded to the Paris Convention for the Prevention of Marine Pollution from Land-Based Sources adopted on 21 February 1974, at the same time as one or more of their member States. Such problems were related to the item on the Com-

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666 See p. 153 above.
667 To be printed in Yearbook . . . 1974, vol. II (Part Two).
mission's agenda concerning treaties concluded between States and international organizations or between two or more international organizations.

180. Finally, Mr. Golsong mentioned the problems of the final stage of the codification of international law and expressed doubts about the wisdom of adopting resolutions in the United Nations General Assembly instead of concluding international codification treaties negotiated in diplomatic conferences. The Committee was faced with a similar problem and was attempting to find ways of solving it. A major factor in that respect was the political will of States. Both the Committee and the Commission were in duty bound to seek in their respective spheres legal solutions which were conducive to the progressive development of law and which were acceptable to as many States as possible.

181. The Commission was informed that the next session of the Committee, to which it had a standing invitation to send an observer, would be held at a time and place to be notified later. The Commission requested its Chairman, Mr. Endre Ustor, to attend the session or, if he was unable to do so, to appoint another member of the Commission for the purpose.

3. INTER-AMERICAN JURIDICAL COMMITTEE

182. The Commission was regrettably unable to be represented by an observer, either its Chairman or another member of the Commission appointed by him for the purpose, at the session held by the Inter-American Juridical Committee at Rio de Janeiro in January and February 1974.

183. The Inter-American Juridical Committee was represented at the twenty-sixth session of the Commission by Mr. A. Gómez Robledo, who addressed the Commission at its 1259th meeting.

184. He paid tribute to the Commission for its important contribution to the codification and progressive development of international law and emphasized the great interest with which its work was received on the American continent. He also expressed the hope that the increasingly close and fruitful co-operation between the International Law Commission and the Inter-American Juridical Committee would contribute to the establishment of an international order based on peace and justice.

185. Turning to the question of the codification of private international law, one of the matters dealt with by the Committee, he emphasized that in America, and particularly in Latin America, the codification of private international law—and the unification of the law on certain subjects relevant to international trade—had been pursued as vigorously as that of public international law. The Inter-American Specialized Conference on Private International Law, which was to be held at Panama in January 1975, was expected to explore the possibility of bridging the gap between the two systems of private international law now existing in Latin America as it dealt with the specific items on the agenda of the Conference. Those topics included commercial companies—multinational companies, in particular—international sale of goods, international bills of exchange, international commercial arbitration and ship-

ping. The Committee had prepared draft conventions on most of those topics for submission to the Conference.

186. Another matter dealt with by the Committee in 1973 was the topic of territorial colonialism in America, both extra-continental and intra-continental, which had been on its agenda for the last few sessions. He stressed that the Committee was anxious to implement in the region the relevant General Assembly resolutions on the elimination of colonialism. In February 1973, the Committee had adopted, by the unanimous vote of all the Latin American members present, a resolution which expressly referred in its preamble to certain situations and which in its operative part offered the Committee's full co-operation in the study and settlement of the Panama Canal Zone situation and specifically suggested that the General Assembly of OAS should appoint a special commission to recommend measures which would lead to the abolition, within a short time, of all forms of colonialism, neo-colonialism and usurpation of territory by alien States in the American continent.

187. He said that the Committee had closely followed developments in regard to the law of the sea. Although naturally mindful of regional interests, the Committee had always tried to suggest approaches and solutions that were generally acceptable to the international community as a whole. The Committee had undertaken the study of the régime of the International sea-bed area. The resolution it had adopted on that subject contained certain novel elements which deserved comment. In the first place, the Committee had reaffirmed its position that the limits of the international sea-bed area should coincide with those of the areas of national jurisdiction, which extended to a maximum distance of 200 nautical miles measured from the baseline used for the territorial sea, or with the outer limit of the continental rise, where that limit extended beyond 200 miles. The Committee had adopted a geomorphological criterion for purposes of defining the outer limit of the continental shelf. Another novel feature of the resolution was the inclusion of minerals in suspension in the waters of the high seas as part of the international sea-bed area, and hence of the common heritage of mankind. The Committee believed that minerals in suspension were, by their nature, outside the scope of fisheries and that their inclusion in the seabed régime conformed with the spirit, if not the letter, of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil thereof, beyond the Limits of National Jurisdiction (General Assembly resolution 2749 (XXV) of 17 December 1970). The Committee had also dealt with the difficult problem of the authority or institution which would be called upon to administer or manage the international sea-bed area and had adopted an eclectic approach. It had, however, stressed that, regardless of the régime to be adopted, the exploration and exploitation of the area must constitute an international public service under the supervision of organs genuinely representing the international community.

188. Finally, Mr. Gómez Robledo informed the Commission that the Inter-American system was undergoing a process of revision during which the question of the co-ordination of the United Nations system with
that of OAS or of conflicts of jurisdiction between the
two organizations—had once again come to the fore. The
time had perhaps come for an objective and dis-
passionate reappraisal of the scope of the jurisdiction
of regional organizations in conformity with the Charter
of the United Nations, the supremacy of which was
expressly recognized by the Charter of OAS. Because of
the manifestly legal character of that question, the
Committee had placed it on its agenda and had ap-
tioned two rapporteurs, both of whom had submitted
reports, which would be considered at the Committee’s
next session.

189. The Commission was informed that the next
session of the Committee, to which it had a standing
invitation to send an observer, would be held at Rio de
Janeiro, in September 1974. The Commission requested
its Chairman, Mr. Endre Ustor, to attend the session or,
if he was unable to do so, to appoint another member of
the Commission for the purpose.

F. Date and place of the twenty-seventh session
190. The Commission decided to hold its next session
at the United Nations Office at Geneva starting on
5 May 1975.

G. Representation at the twenty-ninth session
of the General Assembly
191. The Commission decided that it should be rep-
resented at the twenty-ninth session of the General
Assembly by its Chairman, Mr. Endre Ustor.

H. Remarks on the report of the Joint Inspection Unit
192. The Commission learned, towards the end of
the session, of the existence of a report by the Joint Inspection
Unit on the pattern of conferences of the United Nations
and the possibilities for more rational and economic use
of its conference resources. 662

193. The Commission noted with surprise that the
report contained certain passages relating to the Com-
mision, which had been drafted without any kind of
consultation with the Commission or its secretariat.
This failure on the part of the inspectors concerned to
carry out what would appear to be an elementary re-
quirement for the preparation of an accurate report is
reflected in the considerations and the suggestions
contained in the report. Nevertheless, these develop-
ments give the Commission occasion to place before the
General Assembly its own estimate of the nature and
requirements of the task of codification and progressive
development of international law entrusted to it by the
General Assembly.

194. The composition of the Commission and its
procedures, as set forth in the Commission’s Statute
approved by the General Assembly and evolved in
practice, as well as the organization of the sessions of the
Commission, were conceived and determined bearing
essentially in mind the very special nature of the task
performed by the Commission and its needs. As has been
frequently recognized by the General Assembly, the
accomplishments of the Commission during the 25 years
of its existence prove beyond all doubt the soundness of
the established system. The misconception reflected in
the conclusions and suggestions advanced by the authors
of the report in question lies probably in the failure to
grasp the essential unity of the system and the inter-
connexion existing between its elements.

195. The Commission does not intend to comment in
detail on all the conclusions and suggestions contained
in the report, but nevertheless considers it desirable to call
attention to the interconnexion mentioned above and to
the disruptive impact that the suggested changes in the
present pattern would necessarily have on the effectiveness
of the Commission and the quality of its work, to the
detriment of the codification of international law and its
progressive development.

196. Evidence that the authors of the report in question
did not possess enough information on the nature and
task of the Commission is reflected, on the one hand, in
the conclusions and suggestions they made in connexion
with the methods of work followed by the Commission,
and, on the other hand, by the tendency to assimilate the
position and role of the International Law Commission
to those of other United Nations bodies.

197. With regard to the first point, it should be pointed
out that the Commission’s work can only be done on the
basis of learned studies, prepared in advance, relating to
the recondite and complex areas of international law.
This explains the system of special rapporteurs provided
for in the Statute of the Commission. The special rap-
porteurs, an essential feature of the Commission’s
method of work, study and analyse, on a continuing
basis over a lengthy period, the law relating to the
subject assigned to them.

198. Members of the Commission require substantial
time to study the reports submitted by the special rap-
porteurs and to prepare themselves for discussion in
the Commission. It is through such discussion that, on
the basis of the reports submitted by the special rap-
porteurs, the Commission arrives at the meeting-point
between the conceptions and tendencies of the different
legal systems as well as the most appropriate balance
between tradition and progressive development in the
formulation of the rules concerning a given subject. All
this requires preparatory work by the members of the
Commission, whether or not they are special rap-
porteurs, not only when they are attending meetings
during the sessions, but also when the Commission is not
meeting.

199. While the session of the Commission is in pro-
gress, the special rapporteurs have to study the remarks
and criticisms made by the members during the discussion
and prepare new texts with commentaries explaining
the reasons for the new formulations. This is also true
to a great extent for other members of the Commission,
particularly when they consider it necessary to submit
alternative proposals of their own. Members work not
only in the public and private meetings of the Commission, but also during the hours which they devote to studying the Commission's documents and other legal publications, during the consultations held outside the conference room with a view to finding solutions to the problems under discussion, and so on. Several members also give lectures to the annual seminar which is held under the auspices and during the sessions of the Commission.

200. Those who suggest that the Commission could save time by increasing the number of plenary meetings held during the session or by establishing working groups seem to be unaware of the special nature of the work performed by the Commission, its subsidiary bodies and its members. That work consists essentially in elaborating drafts of international legal norms. Apart from the great care and thoroughness that this work demands because of its importance, the task of elaborating norms is by definition a process of abstraction, of synthesis, that is to say, the kind of work that calls for the highest degree of concentration. It must be added that apart from this need for reflection, the search for doctrinal and judicial antecedents and for State practice represents a very specific aspect of particular importance which also distinguishes the work of the Commission from the work done within other United Nations bodies.

201. An increase in the number of meetings would involve a risk of lowering the quality of the Commission's work, when it is precisely because of that quality that the reports and drafts prepared by the Commission have met with almost complete acceptance both in the General Assembly and in the diplomatic conferences where they have been considered. It is by keeping the quality of the Commission's drafts at the present level that the process of codification may advance at a reasonable pace with safeguards for all. The lowering of present standards would inevitably lead to failures at the final codification stage, either at diplomatic conferences or at the General Assembly. It should also be noted that the method of discussion, which avoids unnecessary repetition, results in a considerable economy in the use of time at meetings.

202. As regards the establishment of working groups, those who suggest that the Commission should have recourse also to that means of work would seem to be unaware that the drafting committee, constituted at each annual session by the Commission and comprising approximately half its membership, is actually a standing working group which holds several private meetings a week throughout the session. The Drafting Committee prepares texts of draft articles for consideration by the Commission embodying solutions not only to drafting problems but also to problems of substance referred to it by the Commission. Moreover, whenever necessary, ad hoc working groups are also set up by the Commission to deal with specific subjects, as, for instance, has been the case at the present session in connexion with the preliminary questions involved in the study of the topic concerning the law of the non-navigational uses of international watercourses. If to this it is added that the meetings of the expanded Bureau of the Commission, which includes the Bureau of the session, the former Chairmen of the Commission and the special rapporteurs, it will be seen that on the average the members of the Commission are required to attend far more meetings than the daily public meeting of the plenary of the Commission. This is a higher, not a lower, average than that of other United Nations bodies. In this connexion, it should be borne in mind that, elected in a personal capacity, the members of the Commission must give their personal attention to the work done in the Commission and cannot be replaced by alternates or advisers.

203. Another suggestion made is that the Commission could split into two or more sub-committees. Here again the Commission faces unfair criticism because a suggestion of that kind seems to ignore the fact that one of the basic principles of the Commission's Statute is, as already stated, the representation at the different stages of the Commission's work of the main forms of civilization and of the principal legal systems of the world. It is obvious that a balanced representation cannot be assured if the Commission, which has 25 members, is divided into several sub-committees. The Commission cannot endorse a suggestion contrary to this basic principle of its Statute. This principle has proved to be in practice one of the reasons for the success of the Commission's drafts and reports in diplomatic conferences and in the General Assembly. Suffice it to compare the very positive achievements of the diplomatic conferences which have considered drafts prepared by the Commission after a long and learned preparation in a body which represents fully the principal legal systems of the world with the failures of former attempts at codifying international law on the basis of work which did not have the same scientific and diplomatic guarantees. Moreover, the division of the Commission's work among sub-committees could be disruptive of the unity and coherence of the process of codification and progressive development of international law as a whole.

204. The success of the Commission's present procedures and methods of work is undoubtedly due to the continuous interaction of scientific expertise and governmental responsibility throughout the preparation of a codification draft. Although such interaction requires much time, the fate of previous attempts at codification clearly shows that it is the only way to achieve practical results. The question today is not whether codification should be rapid or slow but how to achieve a lasting codification generally accepted and corresponding to the present needs of the international society.

205. Moreover, taking into consideration the procedure established by the Statute of the Commission, which requires the comments of Governments, particularly between the first and the second reading, to submit to the General Assembly every two or three years a final set of draft articles of high technical value and degree of acceptability to the whole international community on essential areas of international law, is not, in the Commission's view, a slow pace at all. It is probably the maximum pace that States themselves are in a position to follow. For instance, in 1971, the Commission submitted to the General Assembly its final draft articles on the representation of States in their relations with international organizations, but the diplomatic conference
entrusted with the task of examining the draft will not meet until 1975. To impose a still quicker pace at any price, even in the highly hypothetical case that it could be done without impairing the technical value or acceptability of the drafts, would lay on States a burden which could in the last resort jeopardize the entire process of the codification and progressive development of international law undertaken under the auspices of the United Nations.

206. With regard to the second point referred to above, the tendency to assimilate the Commission to United Nations bodies composed of representatives of States, the inspectors seem to overlook altogether the great progress that the establishment of a body such as the Commission represents for the codification and progressive development of international law. Codification work, in order to be successful, requires two distinct stages, the second of which is the only one that should be entrusted to a diplomatic conference or to the General Assembly, as bodies composed by representatives of States. The first one, on the contrary, must by its very nature be entrusted to a body of jurists such as the Commission. Working independently of States, although in close contact with them through the Sixth Committee of the General Assembly and the procedure of written comments, the Commission is enabled to formulate texts embodying an objective determination of the legal rules governing the particular area of international relations concerned, as well as taking into account the different trends existing today in the principal legal systems of the world in order to facilitate the progressive development of international law in a coherent manner and in accordance with the current interests, structures and needs of the international community as a whole.

207. The members of the Commission, as stated in the Commission's Statute, are persons who are elected by the General Assembly, who individually possess recognized competence and qualifications in both doctrinal and practical aspects of international law and who collectively represent the principal legal systems of the world. Therefore, to assimilate the Commission to an expert working group is not only inaccurate but is prejudicial to the work of the Commission in view of the tendency to apply to its unique position general patterns which may be justified in the case of an expert working group but which are completely inadequate and unjustified for a body such as the Commission.

208. If a comparison must be made between the Commission and another United Nations body, it is with the International Court of Justice that such a comparison should be made. The Court is entrusted with the task of applying international law to controversies between States, while the Commission performs the task of formulating draft rules of international law. The work done by the Court, at the judicial level, and that done by the Commission, at the legislative level, are complementary and make those bodies, respectively, the principal judicial and legal organs of the United Nations system.

209. As to the seat of the Commission, the General Assembly in 1955 expressly amended article 12 of the Commission's Statute to provide that the Commission was to sit at the United Nations Office at Geneva. This decision of the General Assembly was not taken lightly but after a thorough examination of all aspects of the matter and on the basis of the requirements of the Commission's work. The basic assumption on which this decision of the Assembly was taken remains as valid today as it was in 1955. The United Nations Office at Geneva affords the best possible conditions for the Commission's work. The Palais des Nations has an exceptionally specialized library, originally constituted in the days of the League of Nations and including collections of works and periodicals going back for several decades. This is an absolutely indispensable working instrument both for the special rapporteurs—some of whom come to Geneva at their own expense between sessions expressly to prepare their work—and for the members of the Commission in general. The translators, revisers, interpreters and others of the staff of the Palais des Nations have, over the years, become familiar with the Commission's work. They are acquainted with the 25 years of accumulated precedent resulting from the work of the Commission. Besides, Geneva is the most suitable place for the work of a body such as the Commission which is called upon to solve legal problems in a quiet and studious atmosphere. Geneva is also the meeting-place of the International Law Seminar, organized annually by the United Nations Office at Geneva, which is closely linked with the Commission's sessions: members of the Commission give lectures to the Seminar, and the participants have the opportunity of attending the Commission's meetings—an arrangement which constitutes one of the salient features of the Seminar.

210. Another important factor to be borne in mind is that the members of the Commission, a body which is not in permanent session, are persons working in the academic and diplomatic fields with professional responsibilities outside the Commission, as required by their respective Governments or professions, a fact which enables the Commission to proceed with its work not in an ivory tower but in close touch with the realities of international life. Many of the members have made permanent arrangements to be present in Geneva and during the Commission's sessions. For instance, several members have been appointed permanent representatives in Geneva or have made Geneva one of the main centres of their activities. In this connexion, it should be recalled that, as already indicated, the members of the Commission being elected by the General Assembly in their personal capacity, cannot be replaced by alternates or advisers. If the seat of the Commission were transferred outside Geneva it would be extremely difficult for many members to attend meetings of the Commission, and this would negate one of the basic principles of the Statute of the Commission, namely to ensure the presence in the Commission of the most qualified representatives of the main forms of civilization and principal legal systems of the world. All these considerations apply equally to the suggestion that the sessions of the Commission should be held in two or more places in rotation: a suggestion which from the standpoint of continuity, would also have a negative effect on the conditions of the Commission's work.
211. Another point to which the Commission would like to draw attention is the timing of its sessions. With the exception of the second part of its seventeenth session (an exceptional winter session), the Commission has been convened annually in the spring or early summer. In the light of experience, this time of the year has been found to be the most appropriate for facilitating the full attendance of its members. It is the best possible compromise between the requirements of members mainly engaged in academic and legal adviser activities and those of members having diplomatic and representative functions. To convene the Commission at a time of the year closer to the opening or the closing of the annual session of the General Assembly or of the academic year in most countries, would deprive the Commission of the attendance of many of its members. The opening date of a session of the Commission is sometimes adjusted to events such as the convening of a codification conference by the General Assembly, and the closing date depends also on certain factors such as the length of the session which, owing to the requirements of the work, has been more and more frequently of over ten weeks' duration. These adjustments of dates do not, however, derogate from the Commission's established practice of holding its sessions in the spring and early summer, a practice which the Commission considers it also essential to maintain if the accomplishment of its task is not to be adversely affected.

212. In conclusion, the Commission is unanimously of the opinion that the present composition, procedures, methods of work, and organizational pattern of the Commission are correct and appropriate and that they also represent the most effective means of carrying out the task entrusted to it by the General Assembly under Article 13, paragraph 1 (a) of the Charter. Hence, the Commission sees no reason why its Statute should be amended or the present basic method of work and organizational pattern modified.

I. International Law Seminar

213. Pursuant to General Assembly resolution 3071 (XXVIII) of 30 November 1973 the United Nations Office at Geneva organized during the Commission's twenty-sixth session a tenth session of the International Law Seminar intended for advanced students of that discipline and junior officials of government departments whose functions habitually include consideration of questions of international law. In order to associate the Seminar with the Commission's tribute to the memory of Mr. Milan Bartoš, this tenth session was named the "Milan Bartoš session".

214. Between 27 May and 14 June 1974 the Seminar held ten meetings, devoted to lectures followed by discussion.

215. Twenty-four students, each from a different country, participated in the Seminar; they also attended meetings of the Commission during that period, including the meeting commemorating the twenty-fifth anniversary and the meeting devoted to tributes to the memory of Milan Bartoš. The participants had access to the facilities of the Palais des Nations Library and an opportunity to attend a film show given by the United Nations Information Service.

216. Seven members of the Commission generously gave their services as lecturers. The lectures dealt with various subjects including some connected with the past, present or future work of the Commission, namely the determination of jus cogens (Mr. Yasseen), the Commission's long-term programme of work (Mr. El-Erian), national treatment and most-favoured-nation treatment (Mr. Ustor) and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (Mr. Šahovič). One lecturer (Mr. Elias) dealt with the question of the hijacking of aircraft and international law; one lecture was devoted to the future of Antarctic co-operation (Mr. Hambro) and another to State sovereignty and international law (Mr. Ushakov).

217. In addition, under General Assembly resolution 3032 (XXVII) of 18 December 1972, Mr. Pilloud, Director of the Department of Principles and Law of the International Committee of the Red Cross, spoke on the international humanitarian law applicable in armed conflicts. Mr. Rybakov, Director of the Codification Division of the United Nations Office of Legal Affairs, dealt with the work of the Sixth Committee of the General Assembly on some contemporary problems of international law. Mr. Ratón, Director of the Seminar, gave an introductory talk on the International Law Commission and its work.

218. The Seminar was held without cost to the United Nations, which did not contribute to the travel or living expenses of the participants. As at previous sessions, the Governments of Denmark, Finland, the Federal Republic of Germany, Israel, the Netherlands, Norway and Sweden made fellowships available to participants from developing countries. Such fellowships, ranging in value from US$1,200 to US$3,000, were awarded to 13 candidates. The award of fellowships is making it possible to achieve a much better geographical distribution of participants and to bring from distant countries deserving candidates who would otherwise be prevented from attending the session solely by lack of funds. In 1965, when the Seminar held its first session, only one candidate from a developing country was able, in the absence of fellowships, to participate, whereas between 1966 and 1974, out of 228 participants of 85 different nationalities, 107 have had the benefit of fellowships, 88 of which were provided by the States mentioned above and 19 by UNITAR. This result, although gratifying, needs to be improved upon still further. It is therefore to be hoped that the above-mentioned Governments will continue to be generous or will become even more so and that, if possible, additional fellowships will be granted so as to make it unnecessary to refuse fellowships to accepted candidates for lack of funds, as happened this year. It should be noted that the names of those to be awarded fellowships are made
known to the donor Governments and that the recipients are likewise informed of the source of their fellowships.

J. Supplement to the Guide to the documents of the Commission

219. The Commission was informed that the United Nations Library at Geneva was prepared to bring up to date the guide to the documents of the International Law Commission issued from 1949 to 1969, which it had made available in 1970, by compiling a supplement covering the years 1969-1974. The Commission expresses its appreciation of the initiative taken by the Library at Geneva; it is convinced that, like the guide, the supplement will be of value to the Commission and to jurists throughout the world.

ANNEXES

ANNEX I

Observations of Member States on the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-fourth session *

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NOTE


**Austria**

TRANSMITTED BY A LETTER DATED 11 OCTOBER 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS  

[Original: English]

The Austrian Federal Government concurs with the opinion expressed by the International Law Commission that the preparation of draft articles has been the most appropriate and effective method of studying and identifying the rules of international law relating to succession of States in respect of treaties. As divergent views on this matter have in the past been expounded by eminent scholars of international law it is an important task to arrive at a solution of the problems arising in connexion with the succession of States in respect of treaties which will gain as widespread an acceptance as possible by the international community.

The present provisional draft articles adopted by the International Law Commission represent basically a system which has, inter alia, already been propounded by American jurists. Austria therefore entirely agrees with the general outline as well as the basic content of these draft articles. A specific comment on article 15, paragraph 2, stipulating that a newly independent State may, under certain conditions, formulate a new reservation when establishing its status as a party or a contracting State to a multilateral treaty under article 12 or 13 has, however, to be made. The idea embodied in this provision seems to arise from a misunderstanding of the concept of succession. A new State inherits conventions in precisely the same state in which they apply to its territorial predecessor and therefore inherits the latter’s reservations. It may waive these reservations because that is also the right of its predecessor, but it may not make new ones since its predecessor cannot do so. If a newly independent State wishes to make reservations it ought to, in the view of Austria, use the process of ratification or accession to become a party to the multilateral treaty.

**Czechoslovakia**

TRANSMITTED BY A note verbale of 11 October 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS  

[Original: English]

1. It can be stated that the submitted draft of the articles on succession of States in respect of treaties, prepared by the International Law Commission, reflects in its subject the current international practice, proceeds from the requirements of newly established States and is in harmony with the fundamental principles of current international law, particularly the principles of sovereign equality of States and self-determination of nations. Therefore the draft can, in substance, be regarded as a good foundation for a future codification of the questions involved. In this connexion the Czechoslovak authorities would wish to note that, quite naturally, there is a close connexion with the problems involved in the succession of States in respect of treaties and the other questions of succession of States, and that, therefore, in elaborating on individual problems of the succession of States, it is necessary to proceed consistently from the same principles and to respect the necessity for a balanced relationship between individual cases of succession.

2. In giving consideration to the articles on succession of States in respect of treaties, the Czechoslovak authorities have a favourable view of particularly the clean-slate principle on which the substance of the draft is based, applied to the relation of States which emerged from former dependent territories to the international treaties concluded by their former metropolitan powers, under which such a newly independent State is not committed to the treaties concluded by former metropolitan powers. In this connexion, however, the Czechoslovak authorities wish to point to the fact that new States come into existence not only in the process of decolonization, but also by other ways. In this context, the Czechoslovak authorities would like to draw attention to the States which came into being as a result of a social revolution. Proceeding from this fact, the Czechoslovak authorities note that the definition of "newly independent State" contained in article 2, paragraph 1(f), does not cover all the possibilities and hold that the formulation in question...
should be supplemented in the above sense or possibly, after appropriate modification of paragraph 1 (d) of the same article dealing with the term "successor State," be deleted from the draft.

3. The proposed draft does not touch upon the question of the relation between recognition and succession of States. As is evident from experience, however, inasmuch as a refusal of recognition may be used for the purpose of preventing the successor State from making use of the rights ensuing in respect of that State from succession, it would be useful to specify in the draft that succession in respect of multilateral international treaties under conditions contained in the draft articles exists irrespective of whether the new State is or is not recognized by all other States parties to the treaty in question.

4. As concerns other comments and notes on individual draft articles, the Czechoslovak authorities wish to point out the following:

(a) Article 2, paragraph 1 (e) clarifies the term of time when succession of States starts. In the opinion of the Czechoslovak authorities it would be appropriate in this connection to take into consideration the fact that a succession of States is part of a certain process which the successor State undergoes and to give thought to a formulation that would allow an indisputable determination of the moment when succession starts.

(b) Article 27 deals with the succession in respect of treaties of those States that were newly established following a disintegration of a former State. The Czechoslovak authorities the clean-slate principle should be set in such cases as a rule. The present formulation, which refers to this principle in paragraph 2 as an exception only, is insufficient. (Czechoslovakia, which came into existence in 1918 as an independent State upon the disintegration of Austria-Hungary proceeded from the "clean-slate" principle in its practice.)

(c) Article 30 regulates the question of other territorial regimes in relation to succession. In the opinion of the Czechoslovak authorities it would be suitable to amend the formulation of the article so as to make it evident that the provision concerns such territorial regimes that serve the interests of international co-operation and are in accordance with international law and the United Nations Charter and to exclude any misuse of the application of the article in favour of regimes established by treaties based on inequality of rights.

(d) Article 31 is evidently based on article 73 of the Vienna Convention and the Czechoslovak authorities have no objections of principle to its inclusion. They cannot agree, however, with the article mentioning "occupation of territory." As a rule, occupation of a territory results from the use or threat of force prohibited by current international law. Accordingly, a formulation of the article including an occupation of territory would not be in harmony with the above principle of international law which is among the most important, not mentioning the fact that a military occupation has always been regarded as a temporary situation which does not change anything in the international status of the occupied territory. A question arises, therefore, what does occupation have in common with a succession of States? Proceeding from the above arguments, it is recommended that the reference to occupation of territory be deleted from the draft. The Czechoslovak authorities also point out in this context that there is no such reference in article 73 of the Vienna Convention.


Denmark

TRANSMITTED BY A NOTE VERBALE OF 19 NOVEMBER 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

It is the opinion of the Danish Government that the present attempt at codification of the topic on State succession in respect of treaties is generally acceptable with respect not only to the structuring and delimitation of the draft, which underscore the relationship with the Vienna Convention on the Law of Treaties, but also to the individual articles. Particularly the implications of the "clean-slate" principle in relation to bilateral treaties should today—in the light of the practice of States and the basic principle of equal rights and self-determination of peoples—be considered accepted customary rules of international law. This view is also in keeping with the practice observed so far in Denmark when dealing with specific cases of treaty succession.

The proposed draft articles may be used in the preparation either of a convention on the topic or of a code which is not legally binding.

In the opinion of the Danish Government it seems preferable to aim at the adoption of a legally binding convention. The fact that a convention, as a result of the general rule on non-retroactivity of treaties, will normally not be binding upon a successor State in respect of its own terms of succession is hardly a sufficient argument against using the convention as an instrument, as has also been pointed out by the International Law Commission. A convention rather than a non-binding code may serve more adequately to determine what shall be considered generally accepted international law regarding succession in respect of treaties and consequently be a guide to all States. A convention will moreover, in any event, be binding in the relationship which, with respect to State succession, emerges between a predecessor State and third States when these States have become parties to the convention. It might finally be considered whether to insert in a prospective convention an optional clause on retroactivity relative to new States.

If the convention is chosen as the instrument of the present codification the Danish Government will be of the opinion that the draft, as has also been suggested by members of the International Law Commission, ought to be supplemented with provisions on the settlement of disputes stemming from the application or interpretation of the draft rules. Such provisions may ensure uniform understanding of the adopted rules.

The Danish Government reserves the right to submit its commentary to the individual articles at a later date.


Ethiopia

TRANSMITTED BY A LETTER DATED 15 MAY 1974 FROM THE PERMANENT MISSION OF ETHIOPIA TO THE UNITED NATIONS

[Original: English]

I have the honour to refer to the report of the International Law Commission on the work of its twenty-fourth session and, in particular, to its commentary on the text of its draft articles on the succession of States in respect of treaties relating to boundary regimes.

Referring to the grazing provisions of the 1897 Anglo-Ethiopian Agreement relating to the boundary between Ethiopia and the former British Somaliland Protectorate, the Commission, in its commentary to draft articles 29 and 30, states that Ethiopia "declined to recognize that the ancillary provisions, which constituted one of the
conditions of that settlement, would remain binding upon it."a
In that same commentary, the Commission also mentions that
Somalia has denounced the Agreement "in response to Ethiopia's
unilateral withdrawal of the grazing provisions ..."b The Govern-
ment of Ethiopia takes exception to these passages in the Com-
mmission's commentary.

In clarifying the position of my Government, I would like to
inform you that at no time has the Government of Ethiopia stated
that it is not bound by the grazing arrangements of the 1897 Anglo-
Ethiopian Agreement. Neither has it taken any action to withdraw
those arrangements. The Government of Ethiopia has at all times
been consistent in its position that the boundary clauses as well as
the grazing provisions of the 1897 Anglo-Ethiopian Agreement
remain valid and that they are binding upon both Ethiopia and
Somalia.

Furthermore, the Commission refers to the view of the United
Kingdom expressed following the termination of its responsibilities
for the Protectorate that the boundary and the grazing provisions
of the 1897 Anglo-Ethiopian Agreement remain in force but that
only the "special arrangement" of the 1954 Anglo-Ethiopian
Agreement would lapse. Such also has been and still is the position
of the Government of Ethiopia.

The Government of Ethiopia, prior to the termination of the
Somaliland Protectorate, had notified the Government of the
United Kingdom that the "special arrangement" of the 1954 Agree-
ment would automatically come to an end. That notification has
been considered as an official expression of the position of the Gov-
ernment of Ethiopia that all the provisions of the 1897 Agreement
together with the grazing arrangements remain valid and unim-
paired. No subsequent events have taken place to warrant any
suggestion to the effect that the Government of Ethiopia has ter-
minated the grazing arrangements.

I would be grateful if you would kindly transmit the foregoing
observations of my Government to the International Law Com-
mmission and I wish to express the hope that the Government will
take into account those observations in preparing its commentary
to articles 29 and 30 in its final report on the succession of States
in respect of treaties.

a Para. 12 of the commentary to draft articles 29 and 30.
b The text of the sentence as it appears in the Committee's report
reads as follows: "Somalia does not seem to have claimed that, as a
successor State, it was ipso jure freed from any obligation to respect
the boundaries established by treaties concluded by its predecessor
State though it did denounce the 1897 Anglo-Ethiopian Treaty in
response to Ethiopia's unilateral withdrawal of the grazing rights
mentioned below."

German Democratic Republic

TRANSMITTED BY A LETTER DATED 5 DECEMBER 1973 FROM
THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

1. The Ministry of Foreign Affairs of the German Democratic
Republic welcomes the provisional draft articles on succession of
States in respect of treaties presented by the International Law
Commission and, in general, considers them to be a suitable basis
for a future codification of the questions of succession of States.
In this connexion, however, it is deemed necessary to underline the
close interrelation which no doubt exists between succession in
respect of treaties and succession in respect of matters other than
treaties. Proceeding from the fact that succession of States is a
homogeneous institution of international law, the Ministry of
Foreign Affairs of the German Democratic Republic expresses
itself in favour of a single convention comprising both aspects of
State succession; in case separate regulations were to be adopted,
at least uniform principles should be established in their texts.

2. The Ministry of Foreign Affairs of the German Democratic
Republic considers with regard to State succession in general that
it is a matter important for the development of international rela-
tions, both as a result of national liberation and social revolution
and of the unifying, separation or dissolution of States. Future rules
on succession of States should facilitate the entry into international
relations of the successor State and should therefore be such as to
enable the latter to enjoy its rights as a sovereign, equal State
without hindrance or delay. At the same time it is in the interest
of all States that cases of State succession should not disturb inter-
national treaty and other relations which were established in accord-
ance with the principles of international law in force and that the
previous state of such relations should be maintained.

3. The provisional draft articles on succession of States in respect
of treaties proceed from the principle of clean slate in cases of
succession resulting from decolonization. In the view of the Ministry
of Foreign Affairs of the German Democratic Republic this is a
basically correct point of departure in this context. In its hard core
the draft covers decolonization comprehensively, but it does not
sufficiently take account of the fact that the process of decolonization
has come to its end, save for a few exceptions. Therefore, it appears
appropriate to call attention to the fact that new States may also
emerge by way of social revolution and that the same principles
should be applicable to them as are applied to States emerging by
way of decolonization. Bearing this in mind, it is obvious that the
term "newly independent State" contained in article 2, paragraph 1(f)
is inadequate in these respects. The Ministry of Foreign Affairs of
the German Democratic Republic holds the view that the term in
question should be replaced with a notion of successor State which
would cover all successor States in so far as they are new States.
That means that those successor States which have emerged from
social revolution should also be covered, along with those which
have emerged from the uniting of States, the dissolution of States
and from the separation of States.

4. Concerning the date of succession (article 2, paragraph 1(ce))
the draft leaves the question open at which date the succession occurs
and who determines such date. Since, in international practice,
succession normally takes place as a process, it would be advisable,
to avoid any legal uncertainty, to include in the draft a formula
which would stipulate unambiguously that the successor State,
exercising the right of self-determination of its people, determines
the date of succession and notifies that date to other States.

5. A clearer wording would seem to be necessary for the provi-
sions of article 12, paragraph 2, and article 13, paragraph 2, ac-
cording to which a successor State cannot notify its participation in a multi-
lateral treaty in force or not yet in force, if the object and purpose
of the treaty are incompatible with the participation of the successor
State in that treaty. The Ministry of Foreign Affairs of the German
Democratic Republic does not hold the present version adequate
to exclude arbitrary hindrance of successor States from becoming
parties to treaties.

6. The Ministry of Foreign Affairs of the German Democratic
Republic is for several reasons not in a position to accept the estab-
lishment of the principle of ipso jure continuity in the case of the
dissolution of a State as envisaged in draft article 27. Unlike uniting
(article 26), the dissolution of a State, as a rule, takes place without
a treaty, that means against the will of the existing State. In terms
of social conditions any such States are new States whose position
after succession must, as a matter of principle, not be inferior to
that of "newly independent States." It is therefore hard to understand
why article 27 contains the same provisions as article 26. Though
article 27, paragraph 2, provides for exceptions from ipso jure
continuity, thus allowing a limited option for the successor State,
this is certainly not satisfactory. As dissolutions of States can, in
essence, be compared with decolonization rather than with the
uniting of States, it is the opinion of the Ministry of Foreign Affairs
of the German Democratic Republic that the principle of clean
slate should be established here as a rule and not as an exception.
Besides, the Ministry of Foreign Affairs of the German Democratic Republic wishes to underline its position that the interest in having largely preserved the existing state of international treaty relations in so far as these have come about in conformity with the established principles of international law, should receive more attention in the draft.

7. The Ministry of Foreign Affairs of the German Democratic Republic fully supports the automatic succession into boundary treaties as provided for in article 29. The same holds true for the same principle in respect of other territorial régimes as contained in article 30. As far as article 30 is concerned, it has to be added, however, that the present version is not satisfactory because practically it may be used to justify the existence of those territorial régimes which came into being and continue to exist on the basis of unequal treaties. In the view of the Ministry of Foreign Affairs of the German Democratic Republic that article should, therefore, be supplemented to the effect that its provisions would regulate State succession only in the case of territorial régimes which serve the interests of peaceful international co-operation in accordance with the purposes and principles of the Charter of the United Nations.

8. The present draft of the International Law Commission does not refer to the relationship between recognition and State succession. The position of the Ministry of Foreign Affairs of the German Democratic Republic on this point is that the absence of recognition of a successor State must not result in that State being prevented from or hindered in exercising the rights and obligations ensuing from succession. Apart from succession in respect of bilateral treaties, which can hardly be realized without mutual recognition, the Ministry of Foreign Affairs of the German Democratic Republic would deem it necessary to include in the draft articles a provision making it clear that succession in respect of multilateral treaties occurs independently of the recognition of a State. This would also take account of the generally recognized principle of international law that the international personality of a State exists independently of its recognition. In the opinion of the Ministry of Foreign Affairs of the German Democratic Republic a formula patterned on article 74 of the Vienna Convention could be adequate for this purpose.

Kenya

TRANSMITTED BY A note verbale OF 26 APRIL 1974 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original: English]

The comments of the Kenya Government were made by the Kenyan representative to the Sixth Committee on 6 October 1972, during the debate on the item. Nevertheless, the Kenya Government wishes to put on record its views with respect to article 29 of the International Law Commission draft on boundary régimes, which states as follows:

"A succession of States shall not as such affect:

(a) a boundary established by a treaty; or

(b) obligations and rights established by a treaty and relating to the régime of a boundary."

It has become necessary to comment on the above article, to which the Kenya Government fully subscribes, in view of the observations made by the Somali Democratic Republic, on its specific application, inter alia, to the Somali-Kenya boundary.

It is the opinion of the Kenya Government that the International Law Commission took the correct legal position on boundary régimes as reflected in the draft article 29 and the commentary thereon, because the purpose of a boundary treaty is to mark out with precision the limits of a particular State sovereignty. Once this is done, the relevance of the treaty, except for evidentiary purposes, disappears. When succession of a State, i.e. . . . "when the replacement of one State by another in the responsibility for the international relations of territory . . . " takes place, the successor State steps into the shoes of the predecessor State in so far as the State's boundaries are concerned, not because of the boundary treaty, but because of the very existence of the boundaries as a fact, delimiting the predecessor State's sovereignty. It is irrelevant and confusing to bring in the issue of self-determination in such a situation in this context, as the Somali Democratic Republic seeks to do.

When the report of the International Law Commission was discussed by the General Assembly during the adoption of the resolution of the Sixth Committee on the item, the Somali representative, in the explanation of his country's vote, made a statement containing arguments similar to those contained in their note verbale. This prompted a reply from the Permanent Representative of Kenya who stated as follows:

"In explaining the vote of my delegation, we should like to reiterate our position in connexion with article 29 on boundary régimes. We fully subscribe to the conclusions of the International Law Commission in that article. A State can only succeed to the territory previously held by its predecessor. In our opinion, this has nothing to do with the exercise of self-determination: it is purely a matter of one State succeeding to the sovereignty formerly exercised by another State over a given territory.

"The inviolability of existing treaties has been fully recognized and enshrined in the Charter of the Organization of African Unity; it is a principle which the International Law Commission has also endorsed; and it is the guiding principle of the Government of Kenya.

"As far as the Kenya-Somali boundary is concerned, there is absolutely no room for dispute: the boundary was clearly demarcated by the Anglo-Italian Treaty of 1924, and we stand by that boundary—not because it was concluded by the colonialists, but because it clearly spells out the areas of sovereignty of the two States. Our full position on this subject was reitered in the statement we made before the Sixth Committee, which we should like to incorporate by reference into the record of this meeting."

The principle of the respect for the sovereignty and territorial integrity of each State and the inviolability of existing boundaries has been enshrined, not only in the Charter of the United Nations, but also in the charter of the Organization of African Unity, and the charters of various other regional bodies. In the Organization of African Unity resolution A.H.G./Res. 16 (1), the assembly of Heads of State and Government meeting in the First Ordinary Session in Cairo, restated the pledge of all the member States:

"1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;

"2. Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence."

This is a pledge by which the Kenya Government will always abide with respect to its neighbours and which it expects all the other States to respect.

a Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee, 1324th meeting, paras. 5-11.


c Official Records of the General Assembly, Twenty-seventh Session, Plenary Meetings, 2091st meeting.
General remarks

1. The Netherlands Government welcomes the present set of 31 draft articles in an important field of international law, in which up to the present time few generally accepted rules could be discerned; State practice has shown a considerable variety of conduct in this field. Therefore the present project undertaken by the International Law Commission, that is to codify and develop the law of State succession to treaties, is an important and difficult one.

2. The Commission has rightly considered the question of the effects of a State's succession to treaties as falling within the framework of the law of treaties. It states that the present draft articles "presuppose the existence of the provisions, wording and terminology of the Convention on the Law of Treaties." In article 15, paragraph 3, an express reference is made to certain articles of the Vienna Convention. However it should be noted that article 73 of the Vienna Convention may be interpreted as excluding the applicability of all provisions of that Convention to cases of State succession. Accordingly the present articles should define completely the impact of State succession on treaties.

3. It is apparent that the Commission has primarily paid attention to the position of newly independent States vis-à-vis treaties concluded by their predecessor States for their territories prior to independence. In part III of the draft the rights of a successor State to complete the signature of its predecessor (by ratification, reservations, choice of different provisions) are carefully worked out. Such provisions are equally useful in the cases of State succession mentioned in articles 26 and 27.

4. The Commission has opted for a moderate version of the clean slate principle in respect of newly emerging States as one of the basic rules of the present draft. The Netherlands Government has carefully considered the question of the advisability of this approach. Continuity has carefully considered the question of the advisability of this approach. Continuity of treaty relations is a goal well worth pursuing, in the interest of both the newly emerging States and the treaty-partners of predecessor States. The Commission explains in its commentary that it has attempted to strike a balance between the well-recognized principle of self-determination of peoples and the fact of the "legal nexus" between the treaty regime and the territory of the new State prior to its independence. The Netherlands Government agrees with this approach. It would stress that the fact of the legal nexus points to the desirability of continuance of such treaties as are appropriate to be continued, for the benefit of both the new State and the treaty partners of its predecessor. In this respect, the Netherlands Government would suggest consideration of the possibility that certain general multilateral conventions of world-wide applicability, embodying important rules of international law, would escape the application of the clean slate rule. In cases where such conventions already were applicable in territory of a newly independent State prior to its independence, a presumption of continuity, together with the possibility to opt out, might be considered. The decision whether a certain convention would be subject to such a régime could be made by the General Assembly of the United Nations or by the diplomatic conference adopting the text of the convention in question.

5. It is clear that a "Convention on state succession in respect of treaties" would have great value as a confirmation of the rules of law in this field. This confirmative element will have to be stressed in the preamble to the Convention. In so far as the Convention would codify already accepted rules of general international law, a newly emerging State would be bound to those rules whether it was a party or not.

6. One important, basic rule of the law of State succession to treaties is not clearly mentioned as such in the present draft. It is the general rule of treaty law that a treaty is binding upon a State party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established. This rule is mentioned in the present draft only in the articles 10, paragraph (a) and 28, paragraph 1. As it is a basic rule for the position of the States concerned in all cases of State succession where the predecessor State continues to exist (see, for instance, part III), or the successor State is an already existing State, it should be formulated as an "umbrella-article" before parts II, III and IV of the draft.

7. The continued validity of the treaties of the predecessor State for the remainder of its territory, as well as the continued applicability of its treaties in respect of successor States laid down in articles 25 to 28, are subject to an exception resulting from another important rule of treaty law, codified in article 62 of the Vienna Convention: the possibility of invoking a fundamental change of circumstances as a ground for termination of or withdrawal from a treaty. The Netherlands Government would assume that the fact of a State succession may well be in itself a fundamental (radical) change of circumstances, which may be invoked by all States concerned (predecessor State, successor State, other States parties), as an exception to continued applicability of a treaty. In this respect the draft might be more clear. The possibility of invoking a fundamental change of circumstances is mentioned only in articles 25 to 28, but should be clearly set out before the parts II, III and IV as a second "umbrella-article," covering, for instance, the case of article 10.

8. The principle of equality of all parties to a treaty is acknowledged by the Commission in article 4: article 12, paragraph 3; article 13, paragraph 3; article 19, and articles 22 to 24. Here it is not only the newly independent State which has the right to apply for admittance as a party, but the "other States parties" (of article 2, paragraph 1 (m)) rightly have a "say" in the matter of the continued applicability of their treaties in respect of a successor State. The Netherlands Government would suggest that this important principle be also acknowledged in other cases of State succession to multilateral treaties: in such a way that each "other State party" would have a right to refuse establishing relations under the treaty in respect of a certain successor State, unless this refusal would be incompatible with the object and purpose of the treaty, as would, for instance, be the case if the treaty allowed for participation by "all States". The Netherlands Government would strongly advise the drafting of articles on settlement of such disputes, analogous to articles 65 and 66 of the Vienna Convention.

Comments on separate articles

10. Article 7. The Netherlands Government would welcome a more positive attitude of the Commission towards devolution agreements between a predecessor State and its former dependent territories at the time they achieve independence. Such achievement of independence is in most cases the result of a gradual process of emancipation, in close co-operation between the still-administering State and the still-being-administered territory. The negative rule formulated in article 7 is from a legal point of view of course quite correct, and even self-evident. Article 34 of the Vienna Convention embodies the same rule, but this article is followed by articles 35 and 36, in which the positive aspect is mentioned of treaties providing for rights or duties of third States. The Netherlands Government fails to see

b Ibid., para. 34.

c Cf. article 5; also article 43 of the Vienna Convention.

d See article 29 of the Vienna Convention.
why this positive aspect should be denied to devolution agreements if all the States parties concerned should agree to this. Devolution agreements can have a distinct value as an indication of the new State’s awareness of which treaties were in force in respect of its territory at the time it became independent, and its willingness to continue them. Of course it is up to the “third State” to accept or decline this offer. (See the comments in paragraph 8 above in respect of the “third State’s” right to object in cases of multilateral treaties.)

11. Article 8. The same applies to a great extent to unilateral declarations of new States, a practice much used by newly independent African States. Here too the positive aspect of such declarations, expressing the new State’s awareness of the treaties which were in force in respect of its territory, and its willingness to continue them, should be more strongly emphasized.

12. Article 12. See the comments in paragraph 8 above on the right to object of the other States parties and in paragraph 4 above on the question of “inheritance ipso jure” of certain general law-making conventions, with a possibility to opt out.

13. Article 13. After comparing the proposal by the International Law Association* and the opposite proposal of the Commission on the question whether or not to count declarations or successions for the purpose of fixing the number of ratifications or accessions required for the entry into force of a treaty, the Netherlands Government accepts the choice of the Commission, as laid down in article 13, paragraph 4, as the most logical system. The ratio of the requirement is, after all, that a sufficient number of States declare their willingness to abide by the provisions of the treaty in question.

14. Articles 17 and 18. In reply to the Commission’s question “whether any time-limit ought to be placed on the exercise of the option to notify succession to a multilateral treaty,” the Netherlands Government would state that in itself a time-limit for declarations of succession would appear to be unnecessary (cf. the right of accession). However, if a declaration of succession is considered as having retroactive effect, as the Commission proposes in article 18, paragraph 2, this amounts to an important difference with declarations of accession. In order to avoid uncertainty as to the legal régime applying to the territory of the new State in the period between the date of succession and the date of the declaration of succession, the Netherlands Government could accept the retroactive effect of declarations of succession, provided they are subject to a time-limit. For this purpose the time-limit of one year (proposed by the Commission in article 24, paragraph 3 (b) as a “reasonable notice of termination” of provisional application) might be suitable. If the new State is not ready to state its position within that time, it still has the right to accede, with legal effect ex nunc.

15. Article 19, paragraph 1 (b) recognizes the possibility of tacit continuation of bilateral treaties. The Netherlands Government, though in favour of any system that may promote continuity of legal relations between States, would point out that the desirability of a possible tacit continuation may differ according to the character of the treaty in question. From the point of view of legal security it is preferable that both the new State and the treaty-party of the predecessor State expressly state their willingness to apply the treaty in the relations between them.

16. Articles 22 to 24. The same point is even more pressing in cases of provisional application of treaties. This possibility has the advantage of promoting continuity of treaty relations, but the disadvantage of promoting legal insecurity. Provisional application is seldom allowed for under the text of the treaty itself. Therefore it is desirable that this exceptional way of applying a treaty is expressly agreed upon by the other State party and the successor State.

17. Article 25. In cases of union of two or more dependent territories into one newly independent State articles 12 to 21 are applicable. Treaties which are continued as a result of this application are, under article 25, considered as being in force for the entire territory of the new State. This means that the other States parties to treaties that were applicable in only one part of the new State prior to independence will be confronted with a much larger area of application than the area in respect of which they originally agreed to apply those treaties. They may well see objection to this in respect of certain treaties. This illustrates the point made by the Netherlands Government in paragraphs 7 and 8 above: the principle of equality of all parties to a treaty demands that in all cases of State succession mentioned in parts II, III and IV of the draft the other States parties have the right to object to continuation of their treaties vis-à-vis a successor State. The Netherlands Government would call attention to the possibility of conflicting treaties that were in force in the separate parts of the component State before the merger into one State. Such treaties cannot be applied at the same time in the entire territory of the new State. In such cases the component State will have to choose between issuing a declaration of succession to only one of the treaties, or letting both of them lapse.

18. Articles 27 and 28. These articles are of special interest to the Kingdom of the Netherlands. The Kingdom consists of three component countries: the Netherlands, the Netherlands Antilles and Surinam. If the Netherlands Antilles and Surinam in the near future become independent States, from a purely legal point of view article 27 of the present draft would be applicable, in view of the constitutional rules embodied in the Statuut voor het Koninkrijk. From a historical point of view, however, it might be more appropriate to apply article 18, paragraph 1, to the Antilles and Surinam and article 28, paragraph 1, to the Netherlands. Generally speaking, in most cases of dismemberment the personality of the original State is, from a historical point of view, continued by one of the component parts. Several treaties of the Kingdom have been concluded or denounced in respect of only one or two of the component parts; this is mentioned in the instrument of ratification or denunciation. If article 28 should be applied, it is not clear whether this case is covered by the words in paragraph 1 (b) “[unless] It appears from the treaty or from its object and purpose ...” In that respect, the phrasing of article 29 of the Vienna Convention: “Unless a different intention appears from the treaty or is otherwise established ...” would seem better to serve the purpose.

19. Articles 29 and 30. The Netherlands Government agrees that certain treaties, fixing territorial régimes, should be inherited by the successor State. It would point out, however, that the reasons why this is desirable apply not only to territorial arrangements but also to certain treaties containing rules in respect of the fundamental legal position of the population of the territory in question, like treaties with respect to minorities, the right to opt for a particular nationality, and other treaties guaranteeing fundamental rights and freedoms to the population of the territory which is involved in a change of sovereignty.

* Italics supplied.

**TRANSMITTED BY A note verbale DATED 12 SEPTEMBER 1974 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS**

Comments: The definition, it seems, covers only the situation where
the predecessor State has been replaced by the successor State
peacefully on a definite date. In the case of succession of States after
a protracted civil war, the time when the successor State becomes
responsible for the international relations of territory is always open
to varying interpretations. As the date of succession of States is an
important factor so far as the rights, obligations, and responsibilities
of the successor State are concerned, it is advisable that some for-

Article 2, paragraph 1 (h): Full powers
Proposal: The words "a State" should be substituted by the words
"the successor State", occurring after the words "competent
authority of"—"Full powers means in relation to a notification of
succession a document emanating from the competent authority
of the successor State designating a person or persons to represent
the State for making the notification."

Comments: The definition in identity, as mentioned in the
commentary, with the definition given in article 2, paragraph 1 (c),
of the Vienna Convention. However, that provision is meant for the
States in general, while the present provision speaks only of the
successor State. Thus, it is preferable that the words "a State" after
the words "competent authority of" be substituted by the words
"the successor State" to avoid any ambiguity.

Article 6: Cases of succession of States covered by the present articles
Proposals: Delete the words "international law and, in particular" and
add the word "as" between the words "law" and "embodied".

Comments: In draft article 6 it is stipulated that the transfer of
territory brought about "in conformity with international law" and
also in accordance with the "principles of international law embodied
in the Charter of the United Nations," shall be covered by the present
articles.

In these articles the succession of States can be brought about in
two different ways:

(a) in accordance with generally accepted principles of inter-
national customary law; and
(b) in accordance with the principles laid down in the Charter
of the United Nations.

However, it is a well-known fact that the principles of international
law are not only uncertain but may also come into conflict with some
of the provisions of the Charter. For instance, customary inter-
national law recognizes the principles of debellatio. This principle
lays down that if, as a result of legal, as distinct from illegal, war,
the international personality of one of the belligerents is totally
destroyed, victorious powers may do one of three things:

(a) they may annex the territories of the defeated State or hand
over portions of it to another State or States;
(b) they may leave it unmoved as territorium nullius to be oc-
cupied by any other subject of international law;
(c) they may recognize one or several new subjects of international
law in the area by creating such entities. In such cases they may
recognize that entity or entities and then leave it to other subjects
of international law who may be prepared to recognize this situation
and treat one or all of them as successors of the defunct entity.

It may be noted that the Charter does not recognize any type of
war as legal. The very purpose of the Charter was to abolish war and
this is evident from the Preamble which reads, inter alia:
"...to save succeeding generations from the scourge of war, which
twice in our life-time has brought untold sorrow to mankind,
..."

"And for these ends
"to practice tolerance and live together in peace with one another
as good neighbours, and
"to unite our strength to maintain international peace and security,
and
"to ensure, by the acceptance of principles and the institution of
methods, that armed force shall not be used, save in the common
interest,
...

According to article 31, paragraph 2, of the Vienna Convention a
preamble is always taken as an integral part of the text of the con-
vention.

Apart from the Preamble to the Charter of the United Nations,
Article 1 of the Charter further states that:

"The Purposes of the United Nations are:

1. To maintain international peace and security, and to that end:
to take effective collective measures for the prevention and removal
of threats to the peace, and for the suppression of acts of aggression
or other breaches of the peace, and to bring about by peaceful
means, and in conformity with the principles of justice and
international law, adjustment or settlement of international disputes
or situations which might lead to a breach of the peace;
...

Further, according to Article 2, paragraphs 2, 3 and 4, of the Charter:

2. All Members, in order to ensure to all of them the rights and
benefits resulting from membership, shall fulfill in good faith the
obligations assumed by them in accordance with the present
Charter.

3. All Members shall settle their international disputes by peace-
ful means in such a manner that international peace and security,
and justice, are not endangered.

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."

From the above-mentioned Article it becomes clear that the Charter
recognizes the principles of sovereign equality of all States and
prevents the use of force by one State against the territorial integrity
of another sovereign State. The only case where the use of force
is permitted under Charter is referred to in Article 51 which states, inter alia, that:

"Nothing in the present Charter shall impair the inherent right
of individual or collective self-defence if an armed attack occurs
against a Member of the United Nations . . ."

As is clear from the language of Article 51, this right of use of force
can only be exercised if there has actually been an aggression against
the Member State.

It may further become apparent from Article 51 that this right of
"individual or collective self-defence" is not an unlimited one. There
are certain qualifications to it. For instance when "measures [are]
taken by Members in exercise of this right of self-defence" the
Member State is under an obligation to "immediately" report "to the
Security Council" that such a situation has arisen and it is then left
to the Security Council to take "such action as it deems necessary in
order to maintain or restore international peace and security".

The Charter enumerates certain cases where States come into
existence through peaceful means. These are embodied in Article 76,
sub-paragraph b which states:

"to promote the political, economic, social, and educational
advancement of the inhabitants of the trust territories, and their
progressive development towards self-government or independence
as may be appropriate to the particular circumstances of each
territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement."

This Article envisages many situations, namely:

(a) where there is a duty on the trust State to prepare the Trust Territory for independence and grant independence when it feels that the time has come to do so;

(b) where the people of a certain Trust Territory express their desire for independence;

(c) where by special agreement it is provided that the Territory shall be granted independence under certain circumstances.

The twentieth century has witnessed another phenomenon—that of intervention. The powerful neighbouring States in their desire to extend their sphere of influence, instead of resorting to aggression usually take advantage of internal unrest in another neighbouring State and resort to inciting and aiding and abetting the insurgents with the aim of separating a part of that State and establishing a separate international personality. Sometimes such intervention even leads to a war thereby endangering peace and security in the world. This is also against the spirit of the Charter which guarantees sovereign equality of all States irrespective of their size or population.

To prevent this sort of intervention it is proposed that while drafting further articles it must be made incumbent on the community of nations not to recognize a State that has come into existence as a result of intervention and which therefore should not take benefits that accrue under the draft articles on succession of States.

Article 7: Devolution agreements
Proposal: The following paragraph 3 should be added:

"3. This rule is without prejudice to the provisions of articles 29 and 30."

Comments: It is true that the devolution agreement does not create any legal nexus between the successor State and the other State parties to the treaties. However, this rule has conspicuous exceptions which have been embodied in articles 29 and 30.

Paragraph 2 of article 7 by using the words "... governed by the present articles," may give an impression that the above-mentioned exceptions as laid down in articles 29 and 30 are covered. However, the Commission's commentary is silent on the point. Thus, it becomes advisable, to avert any difference of opinion, to add paragraph 3 as proposed.

Article 15: Reservations
Proposal: Renumber sub-paragraphs (a) and (b) of paragraph 3 as follows:

Sub-paragraph (a) should be paragraph 3, and
Sub-paragraph (b) should be paragraph 4.

Comments: The form of paragraph 3 is improper. Sub-paragraph (a) deals with the formulation of a new reservation by a newly independent State, while sub-paragraph (b) talks of the objection by the newly independent State to a reservation made by another State party. As both sub-paragraphs deal with different aspects of reservations, it will be more proper to divide the provisions into two paragraphs.

Article 19: Conditions under which a treaty is considered as being in force

Comments: The applicability of paragraph 2 of this article: The clean slate principle in the case of a newly independent State is quite understandable. However, it is questionable to allow the other State party to absolve itself of its treaty obligations by the mere fact that a succession of States has taken place. The other State party will remain obliged to fulfill its treaty obligations if the successor State desires to continue such treaty in force.

Part V: Boundary régimes or other territorial régimes established by a treaty—articles 29 and 30.

The Pakistan Government, being aware of the catastrophic results of making the boundaries established under a treaty challengeable by the mere fact that a succession of States has taken place, fully supports the existence of article 29. It has proposed certain amendments to the previous articles and also the addition of paragraphs to give added strength to the provisions of article 29, and also to avoid any contrary interpretations.

To challenge territorial régimes established under treaties, as mentioned in article 30, would mean creating a chaos in international relations which can never be the object of a convention like the present one. Thus the Pakistan Government also supports the inclusion of such an article in the draft articles.

Poland

TRANSMITTED BY A NOTE VERBALE OF 12 FEBRUARY 1974 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[Original: English]

With reference to the United Nations Secretary-General's note No. LE 113 (2-2), the Government of the Polish People's Republic has the honour to inform him that it welcomes with great satisfaction the transmitted text of the draft articles on succession of States in respect of treaties, produced by the International Law Commission. The draft constitutes a further step towards codification of the international law.

In the opinion of the Government of the Polish People's Republic the draft correctly takes into account the specific characteristics of the various types of succession of States; in particular, the International Law Commission rightly applied the clean slate principle in the case of the newly independent States—as required by the principle of self-determination of nations and sovereignty of States, while for the question of inheritance of treaties, the only just approach has been adopted by the Commission—namely the principle of "continuity" in the cases of the different types of succession such as "uniting" or "dissolution" of States.

Simultaneously, the Government of the Polish People's Republic considers that treaties relating to certain territorial problems and, in particular, those establishing State boundaries are a category apart, not affected by cases of succession. These treaties constitute a specific category in international law—also in respect of succession of States. The principle of absolute continuity in respect of the boundary treaties—in the field of succession—is a consequence of the existence in the international law of the jus cogens rule which makes it mandatory to respect the territorial integrity of States. It is the view of the Government of the Polish People's Republic that this principle, expressed in article 29 of the draft, also corresponds with the best interests of the newly independent States. At the same time this principle, duly safeguarding the most vital interests of third States, thereby serves the international community as a whole. The Government of the Polish People's Republic firmly supports the inclusion of this principle in the future convention on the succession of States in respect of treaties.

The Government of the Polish People's Republic considers that the provisions of the draft articles can be applied solely to such cases of State succession as arises while the principles of the international law, and in particular the principles enshrined in the Charter of the United Nations, are being respected. The provisions of articles 6 and 31 expressing this proposition dispel any doubts concerning both the scope of the term of succession of States and the scope of certain other provisions of the draft. It is useful, therefore, to retain these provisions in their present form.
The Government of the Polish People’s Republic deems that the question of succession of States in respect of treaties should be considered with due regard to the provisions of the Vienna Convention and that the codification of norms regulating succession of States in respect of treaties should also have the form of a convention, as the provisions of the codification being drafted should enjoy a legal standing equal to the Vienna Convention.

While presenting the foregoing general remarks on the draft elaborated by the International Law Commission, the Government of the Polish People’s Republic wishes to offer the following comments of a more specific nature meant to improve and supplement the provisions of the draft itself:

(1) It is highly desirable to establish a time-limit, be it even remote (seven or even ten years) during which a newly independent State could use its right to notify its succession in respect of a multilateral treaty. Then it would be clear, at least from a certain point in time, what is the legal position—e.g., other States parties would know the date wherefrom they should take into account an eventuality of the retroactive application of a treaty in relation to newly independent States. On the other hand in the event of expiry of the term, a newly independent State would always have the right to accede to the treaty.

(2) There are no provisions in the draft seeking to regulate the legal status of the other States parties to the multilateral treaty vis-à-vis newly independent States during the period between succession of States and notification of succession in respect to the treaty (inter alia, in the light of the fact that notification of succession has retroactive effects). This question raises some doubts, e.g., whether the fact that the legal nexus existing between the other States parties and territory which became the territory of a newly independent State has been broken on the day of assumption of independence by that State results in the termination of all treaty obligations of other States parties in respect of this territory, or whether they have at least the same obligations as States in the period of suspension of the treaty (i.e., the obligation to restrain themselves from acts tending to obstruct the resumption of the operation of the treaty). It is also unclear whether because of retroactive effects of the notification of succession, other States parties can be held responsible for acts inconsistent with the treaty and committed after the assumption of independence by a newly independent State and before the date of succession of such States in respect of the treaty. Poland, as well as certain other parties to various multilateral treaties, is interested in the proper regulation of these questions.

(3) In the occasionally very long lapse between the date of a State’s succession and notification of succession, different situations may occur, e.g., termination or suspension of the treaty in relation to the predecessor State, complete termination of the treaty or its amendment either in relation to all parties or to some of them only (including, for instance, the predecessor State.) The draft, in article 21, paragraphs 2 and 3, covers similar problems in respect of bilateral treaties. Explicit regulation of these problems also in relation to multilateral treaties would seem desirable.

(4) Another question breeding a number of reflections is that of the relation between the succession of States in respect of treaties and the institution of reservations to multilateral treaties. In the draft, this question has been solved in respect of one type of succession only, namely in respect to the newly independent States (article 15), whereas the problem of reservations and objections to multilateral treaties relates to all types of succession. It would be desirable, therefore, to fill this gap by adding both an appropriate supplementary paragraph to article 10 and a comprehensive article to part IV of the draft covering these types of succession in respect of which the principle of continuity is applied.

(5) As far as the question of reservations and objections in the context of succession of the newly independent State is concerned, the Government of the Polish People’s Republic feels that the clean slate principle should be applicable also to the succession in respect to reservations of the predecessor States. Since the act of succession in respect of a treaty itself is of a constitutive—and not declaratory—nature, it seems logical that it should be so treated in every respect—also in respect of the scope of the treaty covered by that act. Besides, in the case of the newly independent States formed of two or more territories (article 25), the present presumption in favor of automatic inheritance of the reservations could cause some difficulties; for instance, if the reservations applied to the different territories are not mutually reconcilable. Therefore, the presumption formulated in article 15, paragraph 1 of the draft should be reversed.

(6) The question of inheritance of objections has been completely omitted in the draft. In practice, however, a newly independent State on three occasions took clear positions with regard to objections of the predecessor States. Thus Barbados added a declaration to its notification of succession in respect of the 1949 Geneva Conventions on the Protection of War Victims, in which it submitted objections identical to those previously formulated by the United Kingdom. Two other cases concern the Geneva Conventions on the Law of the Sea of 1958. Fiji and Tonga, while withdrawing an objection of the United Kingdom in respect of reservations of Indonesia, declared that they maintained all other objections. Taking into account the acts presented above, it seems necessary to include in article 15 a provision providing that predecessor States’ objections do not devolve upon the newly independent State unless expressly maintained in the notification of succession. In the opinion of the Government of the Polish People’s Republic, supported by the practice quoted above, this is a correct presumption. The International Law Commission in its commentary rightly points to a universal lack of interest on the part of the newly independent States in the maintaining of objections made by metropolitan States. The practice shows that metropolitan States made their objections, primarily, in pursuit of their own interests. It seems desirable to regulate the question of reservations and objections in two separate articles. One of them could deal with the predecessor States’ reservations and objections and the other with new reservations and objections.

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Somalia

TRANSMITTED BY A NOTE VERBALE OF 6 JUNE 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS [Original: English]

In accordance with General Assembly resolution 2926 (XXVII) of 28 November 1972, on the report of the International Law Commission which recommends, in paragraph 3(b) of section I, that the Commission should proceed with further consideration on succession of States in respect of treaties in the light of comments received from Member States, the Government of the Somali Democratic Republic submits the following observations on certain questions contained in Part V of the draft articles in chapter II, C of the report, which are of direct concern to the Somali Democratic Republic. In this part, which deals with boundary regimes and other territorial regimes established by treaty, direct reference is made to
Somalia’s boundary disputes with Ethiopia and Kenya.\(^a\) It is of course essential, since inferences of great international import are to be drawn from the examples quoted in the report, that both the historical background and the legal questions inferred should be established with the greatest care and after the fullest examination of the questions under study. However, both the accuracy of the historical record and the legal interpretations of the Somali-Ethiopian and Somali-Kenyan territorial disputes which appear in the report can be strongly challenged.

It should be stated at the outset that the main position of the Somali Democratic Republic with regard to the draft articles on treaties and boundary régimes is that it does not recognize the legal validity of treaties concluded between foreign colonial powers without the consent or knowledge and against the interests of the Somali people.

A brief account of the background leading to the division of the Somali people by imperial powers during the colonial period will serve to clarify this position. Long before the era of colonization, the Somali people constituted a single national entity. Being a homogeneous people with a common culture, language and faith, and inhabiting a recognized area of land, they were able to maintain their national identity and their traditional heritage in the Somali Peninsula.

With the opening of the Suez Canal in 1869, the horn of Africa assumed considerable strategic importance to the European powers. Between 1865 and 1892 France established a foothold around the port of Djibouti, French Somaliland; in 1887 Britain established a protectorate to the east of Djibouti and in 1908 Italy established its claim to other parts of the Somali Coast. An additional factor in this situation was that Ethiopia was also at that time seeking to expand its frontier. To avoid increasing friction over their respective spheres of influence, it became expedient for the European powers to attempt to fix the inland borders of the protectorates they had established.

The report of the International Law Commission refers to treaties that were drawn up with regard to Somali territory in the colonial period. The relevant treaties were those of 1897 and 1908\(^b\) between Ethiopia and Italy and that of 1897 between Ethiopia and Britain\(^c\) and the Anglo-Italian Treaty of 1924.\(^d\)

The first two of these treaties, which dealt with the boundaries between Italian Somaliland and Ethiopia, called for a marking of the frontier on the ground, but, since this was never carried out, disagreement continued over the exact interpretation of the provisions. The continued dispute over the exact demarcation of the frontier between Ethiopia and Italian Somaliland, and in particular over the Somali territory of Ogaden, led eventually to the invasion of Ethiopia by Italy in 1935.

The Treaty of 1897 between Ethiopia and Britain was concluded through secret negotiations and its implementation involved the ceding to Ethiopia of a large area of Somali territory—the Haud—where Somali nomadic pastoralists had grazed their herds from time immemorial.

\(^a\) See para. 12 of the commentary to articles 29 and 30.


The Anglo-Italian treaty of 1924 became the basis of the de facto frontier between Italian Somaliland and Kenya. In 1926, the border of Kenya with Ethiopia was demarcated by the colonial Powers, and the Northern Frontier District (the NFD), an area exclusively inhabited by Somalis, was included in the territory of Kenya, although it was administered as an entirely separate province.

After the Italians had been ousted from East Africa in 1942 and sovereignty restored to Ethiopia, Britain placed Italian Somaliland under a British Military Administration and for some years retained control over the Haud and Ogaden areas. In 1946 the proposal of Mr. Ernest Bevin, then British Foreign Secretary, that all the Somali territories should be united under the United Nations Trusteeship system was rejected by certain members of the United Nations. While the former Italian Somaliland became a United Nations Trust Territory under Italian Administration, the British Government placed the Ogaden illegally under Ethiopian administration. The boundary problem remained unsettled and persistent efforts by the United Nations Trusteeship Council and the United Nations General Assembly during the 1950s to arrive at a solution, before Somalia became independent, ended in failure.

The boundary dispute between the Protectorate of British Somaliland and Ethiopia also developed to serious proportions and led to the establishment by Britain of a provisional boundary line in 1950, for, with the transfer of the administration of the Haud to Ethiopia, the people of British Somaliland became fully aware of their dismemberment through artificial and arbitrary boundaries.

It is important to emphasize, at this point, that when Somalia achieved independence in 1960, it refused to recognize the validity of the treaties made by the colonial Powers for the partition of the Somali people and it has never changed this position.

In all international conferences in which Somalia has participated, the Somali Government has consistently maintained a firm and unequivocal position vis-à-vis the Somali territories under foreign domination. Thus, for example, Somalia rejected the Organization of African Unity resolution on the question of frontiers, passed in Cairo on 21 July 1964.\(^e\) The Somali Government also reserved its position with regard to similar resolutions passed by other international conferences, for example, the Non-Aligned Conference held in Cairo in 1964.\(^f\)

The Somali territorial disputes with Ethiopia and Kenya raise some fundamental issues of principles in the field of international law. The arguments put forward by some jurists which hinge primarily on the principle of territorial integrity and the corollary concept of the inviolability of frontiers are not applicable to the Somali case. For one thing, the principle of respect for another's territorial integrity presupposes that the State is in legal possession of that territory. It has always been the stand of the Government of the Somali Democratic Republic that Ethiopia and Kenya are unlawfully exercising sovereignty over Somali territories to which they are not entitled. This is because the de facto Somali-Ethiopian and Somali-Kenyan boundaries are based on the provisions of illegal treaties which are in conflict with prior treaties of protection signed between protecting colonial Powers and the Somali people. Furthermore, the principle of territorial integrity has no application to the Somali case because it is inconsistent with the right of self-determination—an internationally accepted principle which is enshrined in the Charters of the United Nations and the Organization of African Unity and in the Declaration of Non-Aligned Conferences.

It should be noted in this context that self-determination is not only a general concept in international relations but is also established as a legal doctrine by Article 1 of the United Nations Charter which makes it one of the purposes of the organization "to develop friendly relations among nations based on respect for the principle
of equal rights and self-determination of peoples." Indeed the principle has been given practical application by the United Nations in cases like those of Togo and the Cameroons.

The doctrine of inviolability or sanctity of frontiers is only invoked in cases where the boundaries are demarcated on just and equitable grounds and where such demarcation is based on mutual agreements with the parties concerned. In this connexion, it should be clearly understood that Somalia's borders with Ethiopia are provisional administrative boundaries pending final demarcation and solution of the dispute. In a letter dated 15 March 1950, addressed to the President of the Trusteeship Council, the late Count Sforza, then Minister of Foreign Affairs of Italy, referring to the unilateral fixing of the provisional administrative line, wrote:

"2. It is clear from the letter of 1 March 1950, which is reproduced in the above-mentioned document and from a similar letter transmitted direct to the Italian Government by the United Kingdom Government that as the retiring Administrative Authority, the latter has felt bound, in view of the possible difficulties entailed in trirpartite negotiations, to fix the provisional administrative line itself unilaterally.

3. The Italian Government, while stating that it has no intention of questioning the procedure adopted and noting that the decision in question is of a provisional nature and in no way prejudices the final settlement of the problem, nevertheless deems it appropriate to point out that the provisional line was fixed without its being consulted and, as protector of the rights of Somaliland, to reserve its position with regard not only to the legal aspects of the question, but also to certain practical difficulties which may arise from the line so fixed . . ."\n
The International Law Commission appears to have based its comments on the demarcation of frontiers primarily on precedent and on customary international law as reflected by the traditional norms and principles applied by European Powers during the era of colonization. But under present-day international law, the obligations of Members of the United Nations under the Charter of the United Nations prevail over any pre-existing treaty obligations (see Article 103 of the Charter). The Charter recognition of the rights to self-determination therefore prevails over rights which Somalia's neighbours claim under earlier treaties.

The legal problems posed by the arbitrary demarcation of boundaries and territorial regimes by the former colonial Powers provide the International Law Commission with a golden opportunity to develop an important area of international law on the basis of principles which stem not from an outmoded colonialism but from the Charter itself. It must formulate institutional procedures to deal with the colonial legacy of serious territorial problems, such as Somalia's, which are a threat to the peace and stability of many independent countries.

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The relevant articles are based on a so-called clean slate doctrine. Its fundamental principle is, as expressed in article 11 of the draft, Commission on the work of its twenty-fourth session, held at Geneva from 2 May to 7 July 1972, containing a provisional draft of 31 articles on succession of States in respect of treaties. Pursuant to a decision taken by the Commission in accordance with articles 16 and 21 of its Statute to transmit the provisional draft articles to Governments of Member States for their observations, the Secretary-General invited the Swedish Government to present its views on the draft not later than 1 October 1973, in order to enable the Special Rapporteur on the topic to take them into account in preparing the report which he will submit to the Commission in 1974.

The Swedish Government wishes to submit the following observations concerning the Commission's draft.

The Government is aware of the high quality of the draft and appreciates the excellent work performed, in particular, by the Special Rapporteur, Sir Humphrey Waldock. The extensive research carried out by the Secretariat in relevant international practice also deserves praise. The draft and the commentaries pertaining thereto constitute a most valuable contribution to the study of a difficult and vital problem in international law and organization.

The present observations of the Swedish Government are of preliminary character and are as they refer to provisional draft articles, their purpose is to offer comments and suggestions at a stage when the Commission is still working on its final draft. Accordingly, the remarks submitted below are without prejudice to the position the Government may feel justified in taking at later stages of the work.

Some of the observations concern the draft as a whole, others refer to individual articles.

**General comments**

A salient feature of the draft is that more than one half concerns State succession in the case of so-called newly independent States, while only three or four articles out of 31 deal with other categories of successor States. As will be argued later on under article 2, the definition offered in that article of "newly independent State" is less than complete. There is, however, no doubt that the term alludes above all to States which have achieved independence since the Second World War. The Commission in its commentaries recalls that the General Assembly, by its resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963 recommended that the Commission should proceed with its work on succession of States with appropriate reference to the views of those States. So it is understandable that the Commission has—in its words—"given special attention throughout the study of the topic of the succession of the former colonial States referred to in the above-mentioned resolutions of the General Assembly without, however, neglecting the relevant practice of older States".\n
On the other hand, the Commission observes that the era of decolonization is nearing its completion and that it is in connexion with other cases—such as secession, dismemberment of an existing State, the formation of unions of States and the dissolution of a union of States—that in the future problems of succession are likely to arise. In view of this forecast which is shared by the Swedish Government, it seems somewhat impractical to let rules related to a temporary and perhaps exceptional situation dominate a draft of articles intended for future application over a longer period of time. Moreover, the draft articles on newly independent States hardly solve the problem to what extent treaties concluded by predecessor States are still valid for States which have achieved independence since the Second World War. They rather tend to confirm the prevailing uncertainty in that respect. The General Assembly's wishes might better be met by seeking a separate solution to treaty problems related to succession connected with decolonization, i.e., by an ad hoc settlement of an ad hoc situation.

The relevant articles are based on a so-called clean slate doctrine. Its fundamental principle is, as expressed in article 11 of the draft,
that a newly independent State is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that, at the date of the succession of States, the treaty was in force in respect of the territory to which the succession of States relates.

This negative aspect does not, however, exhaust the clean slate doctrine as formulated by the Commission. The newly independent State also has the right by a notification to effect its adherence to general multilateral treaties concluded by its predecessor. As regards restricted multilateral treaties the newly independent State may establish its status as a party with the consent of all the parties, and in the case of bilateral treaties, through express or tacit agreement between the newly independent State and the other State party. It is obvious that this combination of non-obligation and right to establish status as a party (in some cases without, in others with the consent of other parties) may prolong the uncertainty regarding the new State’s treaty relations instead of offering workable solutions.

For the Commission the clean slate doctrine is a codification of existing international law. The Commission considers that the doctrine derives from State practice and is confirmed by the principle of self-determination. The description of practice given in the Commission’s commentaries rather shows, however, that conflicting views have been expressed and followed in practice, and that consequently practice is far from being consistent.

With respect to general multilateral treaties the Commission relies to a large extent on the practice of the Secretary-General and other depositaries. It should, however, not be overlooked that, unless the parties otherwise agree, the functions of a depositary are limited and, on the whole, merely of an administrative character (article 77 of the Vienna Convention). The practice of depositaries cannot in itself blind the parties. Furthermore, silence of a party in regard to action taken by the depositary or to information received from him, does not necessarily mean consent. If a new State notifies the depositary that it will not consider itself obligated by a treaty concluded by the predecessor, and a party to the treaty, when informed by the depositary, omits any protest, this attitude does not necessarily imply that the party agrees or concedes that the new State is not bound. The party may well be of the opinion that the treaty is binding on the new State, but, in view of the fact that in international law the matter is controversial, consider that it should not intervene. The party may even wish to await the results of the work carried on by the Commission on the question before committing itself one way or the other. It is, in other words, doubtful whether it is possible to deduce an adequate opinio juris from the practice of depositaries and parties in this matter. As concerns the attitude of the newly independent States, it appears from the Commission’s commentaries that some have declared themselves free of predecessor treaties of this kind while others, in particular with respect to the Geneva Red Cross Conventions, have used language indicating recognition of an obligation to accept the Conventions as successors to their predecessors’ ratifications. Also the practice of newly independent States seems not to be wholly consistent.

Similarly, with respect to bilateral treaties, the Commission states that there is a “considerable measure of continuity found in practice” in regard to certain categories of treaties, such as air transport and trade agreements, agreements for technical or economic assistance, etc. This tendency towards continuity is obviously based on strong practical needs of both old and new States and will therefore certainly not prove to be of transient nature. In these circumstances it is difficult to see how a clean slate principle can be derived from current State practice with respect to bilateral treaties.

Nor does it seem possible to base the clean slate doctrine on the principle of self-determination. This principle is admittedly vague and might be stretched in various directions, but its substance is that nations or peoples have a right to political independence. It would appear to be an overstatement of the principle to assert that it implies that a newly independent State enters the international community free of the predecessor’s treaties (with the exception of so-called territorial treaties) and, in addition, has the right, at its convenience, to step into the predecessor’s shoes in respect of general multilateral treaties. Furthermore, it is not apparent why the principle of self-determination should require clean slate for newly independent States and for States emerging by separation (article 25) but not for States created by unifying of States or dissolution of a State (article 26 and 27).

These considerations lead to the conclusion that there is a case for the view that in this field State practice is large ambiguous and undecided, and that general principles such as self-determination of peoples do not give sure guidance. Accordingly, the task to be accomplished seems to be not so much codification of existing customary law as progressive development of the law. When customary international law in the field is non-existent or controversial, practice considerations could and should be allowed to influence the preparations of written rules of international law.

From the practical point of view the clean slate doctrine is apt to cause serious inconvenience. According to the doctrine the newly independent State is presumed to make its appearance free from the predecessor’s treaties but it can by notification or by agreement with the other parties adhere to these treaties as from the date of succession or, in some cases, from a later date. Even if there are nuances to the doctrine, which are omitted in this description, it is obvious that its application will, as pointed out above, result in great uncertainty and confusion as to the treaty relations of the new State. It is doubtful whether for the new State the disadvantage of unsettled treaty relations is sufficiently counterbalanced by the advantage of a certain freedom of action. In any case, confusion in international treaty relations is a distinct inconvenience to the international community as a whole. As the clean slate doctrine is apt to create or maintain such confusion, it is arguable that the doctrine is not in conformity with the general interest of States. Such general interest would, it would seem, be accorded priority as against the particular interest of an individual State or group of States. This does not necessarily mean that particular interests must be neglected. On the contrary, solutions should be sought whereby also these could be satisfied to a reasonable degree.

In view of these considerations, it might be worth while attempting to create a system or model based not on the clean slate doctrine but on the opposite principle that the new State continues to be bound by the treaties concluded by the predecessor State. The application of that principle would seem to maintain stability and clarity in treaty relations. The understandable wish of a successor State not to be bound by treaties in the conclusion of which it has not taken part and which are contrary to its interests, could be satisfied by attributing to that State an extensive right to denounce undesirable treaties. It might also be possible to provide that certain categories of treaties would not be binding on the successor State, e.g., treaties of alliance and military treaties. If so, those categories should, however, be clearly defined so as to avoid differences of interpretation. There are obviously many other features and details of such a system which would have to be studied and worked out. In particular, various problems regarding the right of denunciation would have to be solved, such as whether there should be a time-limit to the exercise of that right, whether the denunciation should be immediately effective, and whether other parties should, for the sake of equality, have a corresponding right of denunciation.

The establishment of an alternative model on these lines would in any case be a great help to Governments in deciding what attitude to take with respect to the very difficult problems related to State succession in regard to treaties. As has already been stressed, the present observations of the Swedish Government are of a preliminary character. The Government is not in a position at the present stage to express a definitive opinion on the clean slate model or on an opposite system. There are, in its opinion, disadvantages connected with clean slate. The Government would therefore welcome an
alternative draft of articles based on the opposite assumption that the new State inherits the treaties of the predecessor (possibly with the exception of certain categories) but has the right in a manner to be regulated in the draft to denounce such treaties (with the exception of “territorial” treaties). It would then be possible closely to examine the two systems and compare their respective advantages and disadvantages.

It might be objected that the alternative system would not be satisfactory to the States which have achieved independence since the Second World War. As has been repeatedly emphasized, it is doubtful whether the present draft solves the problems of their treaty relations, despite the extensive part devoted to them.

It may be asked if the problems of these States are not better served by separate solutions of concrete and practical measures. The drafting of rules for the future would thereby also be much simplified. Many of the provisions contained in the part dealing with “newly independent States” (such as, e.g., those on “provisional application”) would be unnecessary, and this part and the part dealing with “separation of part of a State” could be combined, which would eliminate a distinction which seems rather artificial or in any case difficult to define.

Observations on particular articles

Article 2

The definition of the term “succession of States” in paragraph 1 (b) as “the replacement of one State by another in the responsibility for the international relations of territory” raises doubts. “Responsibility” in this context obviously means something else than “State responsibility” in the technical sense, and it is not evident what it does mean. In any case the term is not clear enough to form part of a definition. Equally vague and obscure is the expression “international relations of territory”. Does it imply that “territory” already is a subject of international law having relations to States governed by that law, such as treaty relations? If so, what becomes of the clean slate theory? If not, what kind of international relations is meant?

It seems preferable to return to the expression earlier used by the Special Rapporteur, namely “the replacement of one State by another in the sovereignty of territory”. If that expression is considered too limited, because of the word “sovereignty”, the term “administration” might be added, so that paragraph 1 (b) might read:

“Succession of States means that the sovereignty over or administration of a territory passes from one State to another.”

“Notification of succession” as defined in paragraph 1 (g) does not mean notification of a “succession of States” as defined in sub-paragraph 1 (b), but notification of the consent of a successor State to be bound by a multilateral treaty, i.e., succession to a treaty. The use of the same term “succession” for these two different events is hardly consistent with the statement in the commentary that the Commission’s approach “is based upon drawing a clear distinction between, on the one hand, the fact of the replacement of one State by another in the responsibility for the international relations of a territory and, on the other, the transmission of treaty rights and obligations from the predecessor to the successor State”.

The definition in paragraph 1 (f) of “newly independent State” is not complete. The crucial term used in the definition is “dependent territory” and that term is not defined. It is obvious that in the view of the Commission “dependent territory” is something different from “part of a State” (used in the title of article 28) but the difference is not clarified by definitions, as would be desirable.

Article 3

The principles contained in this article are not controversial, and it might be sufficient to refer to them in the commentary. If the article is maintained, its title should perhaps be changed. After all, the article is dealing with cases in which the provisions of the draft are applicable, under sub-paragraph (a) in substance and under sub-paragraph (b) also formally.

Article 5

As in the case of article 3, the content of this article might be transferred to the commentary.

Article 12

In its report, the Commission intimated that it would like to receive the views of Governments on the questions whether a time-limit ought to be placed on the exercise of the option to notify continued adherence to a general multilateral treaty. As the option is apt to cause uncertainty as to the validity of these treaties for new States, it seems to be a minimum requirement that such a time-limit should be set. For similar reasons, it might be desirable to provide a time-limit also for the agreements by which restricted multilateral treaties, under article 12, paragraph 3, and bilateral treaties, under article 19, are continued.

Article 13

The intended sense of the phrase “multilateral treaty, which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates . . .” is better expressed in the commentary by the wording “multilateral treaty not yet in force at the date of the succession of States, but in respect of which at that date the predecessor State had established its consent to be bound with reference to the territory in question”.

The text of the article would accordingly be improved by replacing the first-mentioned phrase by the latter one.

Article 14

The Commission included this article in order to enable Governments to express their views on it, and thereby assist the Commission in reaching a clear conclusion as to whether it should be maintained in the draft. The article seems to be in line with the clean slate doctrine and at the same time demonstrates its tendency to lead to inequality between States. It is stated in the commentary that “even on the assumption of the adoption of this article, it would not be appropriate to regard the successor State as bound by the obligation of good faith contained in article 18 of the Vienna Convention until it had at least established its consent to be bound and become a contracting State”.

The successor State would in other words be able to take advantage of a right established by the predecessor’s signature of a treaty without assuming the obligation of good faith pertaining to that right. In these circumstances the inclusion of the article can hardly be recommended.

Article 15

Paragraph 2 of the article provides that a newly independent State, when establishing its status as a party or a contracting State to a multilateral treaty, may, subject to certain exceptions, formulate new reservations. In support of this provision the Commission states that

“the Secretary-General is now treating a newly independent State entitled to become a party to a treaty by succession to its predecessor’s participation in the treaty, and yet at the same time to modify the conditions of that participation by formulating new reservations”.


Par. 1 of the commentary to article 13.

Para. 8 of the commentary to article 14.

Para. 11 of the commentary to article 15.
It hardly needs to be pointed out that it is not within the authority of a depositary to agree to reservations and that consequently his practice cannot be the basis of a rule of customary international law. Nor does the fact that parties to a treaty in individual cases have not protested against new reservations submitted by newly independent States necessarily mean that these parties recognize that there is a general right in favour of these new States to formulate their own reservations.

Paragraph 2 must therefore be considered as a proposal de lege ferenda. As such it is not appropriate, because in general reservations are not desirable and practical reasons why additional ones should be allowed in this case are not apparent.

In article 15, there is included by reference the content of a number of articles, dealing with reservations of the Vienna Convention on the Law of Treaties. The Commission states in the commentary that thereby Governments will be given an opportunity "to express their views on the whole question of drafting by reference in the context of codification". As far as the present article is concerned the reference method seems justified as otherwise the article would no doubt have been very long and heavy, and as the present draft, in any event, has a close connexion to the Vienna Convention. Regarding the general question of drafting by reference, it is not possible to give a positive or negative answer valid for all occasions. Reasons for and against vary both in kind and weight with circumstances and the decision will have to be based on the situation in the particular case.

Article 16

As with the right to form new reservations, it seems exaggerated to accord to a newly independent State the right to declare its own choice in respect of parts of a treaty or between alternative provisions.

Article 18

A provision that the newly independent State in its notification of succession may specify a date for its adherence later than the date of the succession of States seems hardly justified, as it would introduce another element of uncertainty in treaty relations.

Article 19

Regarding a time-limit, see comments above under article 12.

Articles 22 to 24

The provisions regarding "provisional application" seem to be needed in order to correct practical inconveniences of the clean slate doctrine. As formulated, they lead to additional inequality between States concerned. A newly independent State will be committed to provisional application of a multilateral treaty only after it has made a formal notification to that effect, while a State party to the treaty will be so committed also "by reason of its conduct". The justification of this difference is not apparent.

It may be added that the interpretation of the phrase "by reason of its conduct" in particular cases in regard to both multilateral and bilateral treaties is apt to cause difficulties and disputes.

As already pointed out, the complications of a provisional application would be avoided in the alternative model referred to above.

Articles 29 and 30

The phrase "a succession of State shall not as such affect" might be reconsidered. It is obvious that boundary regimes and other territorial regimes may be affected by a succession of States. By such a succession a new boundary State may emerge or the territory under a special territorial régime may become part of another (new) State. What is meant is presumably that the successor State is bound by the boundary régime or the territorial régime. If so, the negative formula used should be replaced by some wording affirming that such régimes continue in force in regard to successor States. A similar positive formula is used in article 26 on unifying States and in article 27 on dissolution of a State, which are based on the same principle of continuity of treaties in relation to the succession of States.

Syrian Arab Republic

TRANSMITTED BY A LETTER DATED 26 JUNE 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

With reference to your letter No. LE 113 (2-2) dated 18 January 1973 concerning the provisional draft articles on succession of States in respect of treaties adopted by the International Law Commission at its twenty-fourth session held in Geneva from 2 May to 7 July 1972, I have the honour to inform you that the Government of the Syrian Arab Republic is in general agreement with these provisional draft articles.

United Kingdom of Great Britain and Northern Ireland

TRANSMITTED BY A NOTE VERBALE OF 29 OCTOBER 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

General observations

1. The provisional draft articles on succession of States in respect of treaties, adopted by the International Law Commission in 1972, are a useful basis for further work on this topic. The United Kingdom Government support the decision of the Commission to take the provisions of the Vienna Convention (which the United Kingdom has ratified) as an essential framework of the law relating to succession of States in respect of treaties.

2. In paragraphs 35 and 36 of the introduction to the draft articles the Commission refers to the principles of the United Nations Charter. It is noted that these principles, and in particular that of self-determination, are considered by the Commission to have "implications" in the modern law concerning succession in respect of treaties, the main implication in their opinion being "to confirm" the clean slate principle. The United Kingdom Government continue to have doubts as to whether full weight has been given to the many instances in which, without controversy, States concerned have continued to apply treaties after a succession of States. Where there have been controversies, these have usually been satisfactorily resolved without too much difficulty. Whilst a succession of States marks a time of change, it is usually in the interests of all States concerned to maintain as much of the essential fabric of international society (in which treaties play an important part) as is consistent with the change. This is especially the case with multilateral treaties of a law-abiding character or which establish international standards.

3. With regard to the form of the draft, the United Kingdom favour the drawing up by the Commission of a final set of draft articles for a convention. Whilst noting the temporal element in any codification and development of law of succession of States, a convention is considered to be the best type of instrument in the present state of international society. In this connexion, it is noted that the International Court of Justice in some of its recent judgments has cited the Vienna Convention even though it is not in force and when in force will not be retrospective.

4. Provisions for the settlement of disputes arising out of the application of interpretation of any convention on this topic will

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Para. 18 of the commentary to article 15.

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be desirable. The United Kingdom Government favour procedures which will be compulsory rather than merely optional. The topic is one where conciliation, mediation, arbitration or adjudication would be appropriate. As regards the latter, the United Kingdom Government support the principle of recourse to the International Court of Justice.

**Observations on specific draft articles**

**Article 2, paragraph 1 (b):** Whilst the phrase “in the responsibility for the international relations of territory” has been used in State practice, the present definition is not altogether satisfactory. Quite apart from the possibility of confusion with the notion of “State responsibility”, the meaning of the phrase is not entirely free from doubt in all cases and it can give rise to difficulties, e.g., as regards protected States. A possible improvement to get over the latter difficulty would be to add the words “previously forming the territory or part of the territory of the first State”. However, the first alternative in the commentary (“in the sovereignty in respect of territory”)*b* might be preferable. A consequential amendment would then be necessary to article 2, paragraph 1 (e).

**Article 2, paragraph 1 (f):** In the light of article 28 and the observation thereon, the following is suggested:

“‘newly independent State’ means a successor State the territory of which immediately before the date of the succession of States was part of the territory of the predecessor State”. (Additions in italics.)

The first change (the insertion of the word “successor”) would emphasize the fact that a newly independent State is a category of successor State.

The scope and meaning in particular cases of the term “successor territory for the international relations of which the predecessor State was responsible” is not completely clear.

**Article 2, paragraph 1 (g):** The words “considered as” might usefully be omitted here and elsewhere in the draft.

**Article 2, paragraph 1 (i):** A reference to accession could be added, in line with paragraph 1 (j) of the article.

**Article 6:** The United Kingdom Government consider that this article is superfluous for the reason given in paragraph 1 of the commentary; and that, if included, the article might be open to different interpretations in particular cases.

**Article 9, paragraph 2:** The Commission’s proposals that express acceptance in writing is required appears to be unduly restrictive. In the sort of situation under consideration tacit consent should be permitted.

**Article 10:** The reference to “administration” goes too far and may lead to uncertainty. The point in the commentary*c* should be included in the terms of the draft article, e.g., by beginning “subject to the provisions of the present articles”, as in draft article 11. In the final phrase of sub-paragraph (b) the compatibility test which exists in relation to reservations is proposed: this requires careful study. It would be preferable to make a more direct reference to the example of a treaty intended or expressed to have a restricted territorial scope which is given in the commentary. The questions of impossibility of performance and fundamental change of circumstances also need to be considered in this connexion.

**Article 11:** Reference is made to paragraph 2 (“General observations”) above.

**Article 12:** Although the rule proposed in paragraph 1 is subject to the exceptions in paragraphs 2 and 3, it is considered that insufficient weight is given to the intention of the parties to a particular treaty. As regards paragraph 2, whilst not opposing the proposal that a notification of succession may be made even though the accession provisions of a particular treaty do not cover a certain newly-independent State*e* the intention of the parties could appear from the wording of the treaty as well as from its object and purpose.

**Article 13:** The observations of article 12 apply equally to article 13.

**Article 14:** The United Kingdom Government favour the effectiveness of multilateral treaties. However, the proposal in this article is not free from difficulty. It is the practice of the United Kingdom Government to consult the Government of each British dependent territory about its attitude to a particular treaty after signature and before ratification. Moreover, it has not been the practice of the United Kingdom Government to include treaties signed but not ratified in the list of treaties compiled for each dependent territory before its independence. On balance, it is considered that the need for the proposed new rule is not great enough to outweigh its difficulties.

As regards paragraph 1 (b), a reservation which “must be considered as applicable only in relation to the predecessor State” could hardly be “applicable in respect of the territory in question at the date of the succession of States”. Accordingly, paragraph 1 (b) is unnecessary.

In paragraph 2, a cross-reference might usefully be made to “the rules set out in article 19 of the Vienna Convention on the Law of Treaties”, instead of repeating them in extenso.

**Article 16:** As regards paragraph 3, once a newly independent State has established its status as a party, it has all the rights and obligations of a party. Thus, the need for this paragraph is doubtful.

**Article 18:** Where a newly independent State makes a notification of succession some considerable time after independence, other States may, in good faith, have acted in the meantime on the assumption that the treaty was not applicable between them and the newly independent State. Should the newly independent State insist upon the date of independence as the effective date, the other States would presumably not be open to allegations of breach for having failed to apply the treaty in the meantime. This aspect of the question is not dealt with in the Commission’s proposals. In paragraph 2 (b), it should be possible for all the parties to agree on a later date in all cases and not merely in those falling under article 12, paragraph 3.

**Article 19:** In the commentary reference is made to United Kingdom practice. Too much has been read into the italicized words in the quotation. The qualification of the Foreign Office reply was dictated by the need not to interfere in the external affairs of the newly independent countries. The purpose of the words “in conformity with the provisions of the treaty” in paragraph 1 is not clear. Paragraph 1 (b) appears to be concerned with tacit agreement by conduct.

**Article 21:** Paragraphs 2 and 3 of this article appear to restate the rules in its paragraph 1. The drafting of the article could probably be much simplified.

**Article 22:** The term “successor State” appears in this article (and articles 23 and 24) although the articles appear in part III on “newly independent States”. As well as to “another State party”, reference should be made to the “predecessor State”: in contrast to the position under article 19, a multilateral treaty can of course be applied provisionally between the successor State and the predecessor State. More generally, the proposals, as drafted, would appear to permit a newly independent State to pick and choose between the existing

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*a* Para. 8 of the commentary.

*b* Para. 4 of the commentary.

*c* Para. 12 of the commentary.

*d* Para. 11 of the commentary.
parties to a treaty. The desirability of such discrimination is open to question, especially when it is not permitted under the general law on multilateral treaties. It could lead to different "schools" of rules within a single treaty system.

The commentary indicates that a right of choice is not intended. The notifications referred to have been made, in the case of declarations, to the Secretary-General of the United Nations, rather than to individual States parties to or depositaries of particular treaties.

**Article 25:** The rule in sub-paragraph (a) has two alternative tests — compatibility and "radical change of conditions". Only the former is proposed in article 10, sub-paragraph (b). The compatibility test is not always easy to apply, in practice, regarding reservations. The test of a radical change of conditions, which sounds similar to that of fundamental change of circumstances, is new and may also give rise to different interpretations in practice. The right proposed in sub-paragraph (b) would seem possibly to go beyond what is provided in article 29 of the Vienna Convention.

**Article 26:** The two tests in sub-paragraph 1 (b) are similar to those proposed in sub-paragraph (a) of article 25. But they are applied to different questions—in article 26 to that of the continuance in force of a treaty and in article 25 to that of the extent of a treaty's application. In article 26, the latter question is dealt with by an entirely different approach in paragraph 2. The justification for these differences is not clear.

**Article 27:** The drafting of paragraph 1 could be simplified by referring to treaties "in force" at the material time, rather than to treaties "concluded" beforehand.

**Article 28:** It is considered that paragraph 1 of this article should be included in part III which could be broadened to cover successor States which are not newly independent. As regards paragraph 2, this would become unnecessary where the definition proposed in these observations for the term "newly independent State" (article 2, paragraph 1 (f)) to be adopted.

**Articles 29 and 30:** The point in the commentary might with advantage be included in the text of the draft articles. "Territory" should be defined so as to include "all or any part" of a State's territory.

The question of the obligations of the predecessor State is dealt with in part II of the draft articles (in article 10, sub-paragraph (a)) and in part IV (in article 28, paragraph 1). However, it is not dealt with in part III; the Commission may wish to consider this possible lacuna in their proposals.

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**United States of America**

TRANSMITTED BY A NOTE VERBALE OF 7 FEBRUARY 1974 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

The Government of the United States considers that the articles on succession of States in respect of treaties proposed in first reading by the International Law Commission at its twenty-fourth session in 1972 constitute a sound basis for consideration of this difficult topic. The difficulties inherent in preserving a proper balance between the objectives of preserving continuity in international relationships on the one hand while on the other taking account of the necessities of an emergent State have, to a large extent, been met in the proposed articles. In commenting thereon, the United States will concentrate upon what it considers to be the major points of principle raised by the draft articles.

The decision of the Commission to maintain, particularly in part I ("General provisions") a substantial parallelism with the Vienna Convention is a sensible one. The unification of international law is prompted by the adoption of substantially indentical texts to the greatest extent that varying subject-matter permits. This procedure is all the more desirable when, as in the present case, the project under consideration lies within the general field of the law of treaties. Accordingly, the United States supports articles 1 through 5 as proposed by the Commission.

The purpose of article 6, to make clear that succession with regard to territory which does not take place in accordance with the requirements of international law should not be considered as the type of succession that is envisaged in the draft articles, is laudable. There is a question however, whether the formulation of the article achieves the end sought. To the extent that the articles impose obligations upon successor States that are designed to promote the principles of the Charter of the United Nations there is no reason for excluding the imposition of such obligations upon any State that claims to be a successor State in respect of territory. Thus, the provision in article 29 that a succession shall not as such affect a boundary established by a treaty should apply in the case of any territorial change. Its applicability, in fact, may be more necessary in the case of a territorial change having elements of illegitimacy than in cases where there is no question as to the legality of the succession.

It would be desirable to clarify article 6 to make it clear that the obligations in the draft articles apply in all cases. The article could scarcely be recast so as to provide that the rights conferred upon successors in the articles may be exercised only by States whose succession has taken place in conformity with international law. It would also seem advisable to revise the commentary. The position that the Commission drafts on the assumption that the rules it lays down would normally apply to facts occurring and situations established in conformity with international law appears too broad. The entire subject of State responsibility, for example, is concerned with rules applying to situations when there has been a breach of international law. In preparing the Vienna Convention on Diplomatic Relations the Commission was concerned with formulating the normal rules for diplomatic intercourse among States. But in preparing the draft on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, the Commission was dealing with conduct in violation of the Vienna Diplomatic Conventions and other treaties and of basic principles of international law.

**Articles 7 and 8** might be clarified in each case by combining paragraphs 1 and 2 into a single paragraph which would say, in effect, that notwithstanding the conclusion of a devolution agreement, or a unilateral declaration by the successor State regarding continuance in force of treaties, the present articles govern the effects of the succession with respect to treaties in force in the territory on the date of succession. As presently drafted article 7 leaves some doubts as to its relationship to articles 35, 36 and 37 of the Vienna Convention and article 8 raises some questions as to the law of unilateral acts. Examination of the commentaries to these articles, such as the commentary to article 7, and of the commentary to article 8, establishes the desirability of eliminating doubt on these points.

With regard to article 10, the United States considers that for purposes both of clarity and consistency it would be desirable to replace the phrase "under the sovereignty or administration of a State" with a phrase based on article 2, paragraph 1 (b), such as, "when territory as to which one State has responsibility for international relations..."

The United States supports the general approach taken in part III of the draft articles, regarding newly independent States. There are,

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b See paras. 3 and 5 of the commentary.

c Para. 39 of the commentary.

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b See paras. 3 and 5 of the commentary.

c Para. 39 of the commentary.

d Para. 39 of the commentary.
however, a number of improvements which could be made. Article 12 permits any newly independent State to become party to a multilateral treaty that applied to its territory prior to independence subject, inter alia, to the requirement that the participation of the State is not incompatible with the object and purpose of the treaty. A requirement of this type is reasonable, but the question arises whether the test to be applied could be made more precise. A further question is how is a determination to be made whether succession to the treaty is or is not consistent with its object and purpose.

Regarding the first issue, it would appear that whenever a successor State may accede to a treaty there should not be any reasonable doubt as to its right to succeed to the treaty. While this would appear to be a reasonable although strong conclusion, it might be modified in the article. Where the question of compatibility is unclear, however, and the treaty concerned has no provisions for dealing with the situation, a number of difficult questions arise. If a party to the treaty objects on the ground of incompatibility, is this sufficient to prevent succession? If not, does the objection result in barring treaty relationships between that party and the successor State? Questions of the same character arise also with respect to a number of other articles in which the requirement of compatibility with object and purpose is laid down—article 13, paragraph 2, article 14, paragraph 1 and article 15, paragraph 2 (c). The United States considers that the Commission should, in its second reading, attempt to reduce this area of uncertainty to the extent possible although it recognizes that a number of questions regarding interpretation and application of the articles must be left to solution on a case by case basis.

Article 18 provides that a newly independent State which submits a notification of succession is considered as a party to the treaty as of the date of receipt thereof, but that the treaty is considered as being in force between the parties from the date of succession. The commentary states that his application of the principle of continuity is supported by practice although States have deviated from the rule in relation to certain successions and treaties. The United States accepts the principle as a logical corollary to the theory of succession but considers that it may raise some difficult problems. For example, a new State is established. A dispute between private individuals develops which includes as a major issue whether a multilateral agreement applicable to the territory prior to independence remains in force within the new State. No notification of succession having been given by the new State the court decides the case on the basis that the treaty is inapplicable. Thereafter, the new State deposits a notice of succession and the successor State is asked if any, does bringing the treaty into effect retrospectively have upon the justification? Is the judgement open to collateral attack? Is the situation affected by whether the time for appeal has expired and no appeal has been taken; by whether an appeal is pending? Is it equitable to make provision in the articles for reopening a final decision in such a case? If so, what of settlements agreed between the parties, whether or not approved by a court, based on the assumption that the treaty was inapplicable?

This set of problems is further complicated by the factor that in authorizing the new State to make a declaration of succession, article 12 does not contain any limitation as to time. A State could make such a notification five, ten, or twenty-five years after becoming independent, and the declaration would have retroactive effect for the entire period. The possible effects upon long-settled legal relationships are sufficiently extreme to require some protective measures. It would be desirable to provide a time-limit within which the right to notify succession must be expressed. The period should be long enough so that the new State has time enough to conduct a review of possibly applicable multilateral treaties while not being so long that private litigants or a court, for example, could not postpone a judgement pending clarification of the applicability of a treaty. In this connexion, an additional protective step would be to provide that periods of prescription or limitation would not run with respect to claims involving the applicability of a treaty during the three-year period.

An even more complicated timing problem arises in connexion with articles 15 and 16. Article 15 permits a new State at the time it notifies succession to withdraw reservations previously applicable to the territory concerned or, subject to certain limitations, to make new reservations. Any old reservation inconsistent with a new reservation is replaced by the new reservation. It is not clear whether the retroactive effect of article 18 applies to the varying situations dealt with in article 16. Certainly it would seem reasonable to consider that a reservation maintained in effect under the notification of succession should be considered as having remained in effect during the period between independence and notification if the treaty is considered in effect for that period. But to give a new reservation should retroactive effect would be quite another matter since it could lead to arbitrary and inequitable consequences that the other parties would be totally unable to guard against. Paragraph 3 of article 15 provides some protection in that the reference to article 20 of the Vienna Convention would presumably permit other States party to object to the reservation within 12 months from the date of notification. However, it is possible that the third State might have no objection to the reservation as such but would have objection to its being retroactive. Similar problems arise when the new reservation is inconsistent with an old reservation. The Commission should eliminate these complications by making it clear that new reservations take effect when made, that is, at the date of notification of succession.

The right of the new State under paragraph 2 of article 16 to change the predecessor State's choice in respect of parts of the treaty or between differing provisions raises the same problems of uncertainty and possible prejudice, if the choice is given retroactive effect, as are raised by new reservations. Accordingly, such choice should have effect only from the notification of succession.

The difficulties encountered with regard to articles 15 and 16 emphasize the need for establishing a time-limit within which the new State should notify succession.

Article 25 provides that, when a newly independent State is formed from two or more territories which had differing treaty regimes prior to independence, any multilateral treaty continued in force pursuant to the prior articles relating to newly independent States is applicable either to the entire territory of the new State or only to the former territories of the predecessor State. Is this rule a reasonable one? For example, this rule could result in the application of the Vienna Convention on Consular Relations to a consular district in one section of a State while a consular district in another section could be subjected to a different set of requirements. Or the immunities of a diplomatic agent might vary according to whether he was in the part of the State covered by the Vienna Convention or not. It is suggested that sub-paragraph (b) of the article should be deleted. The new State is not required to maintain the treaty in effect and sub-paragraph (a) affords sufficient protection to take care of the usual case. The only difficult point not covered by sub-paragraph (a) is the situation when multilateral treaty obligations applicable in one section would conflict with treaty obligations applicable in another section. In such cases, the new State, if it wished to maintain both treaties in effect, should be entitled to limit application to the original territory.

The distinction between the dissolution of a State (article 27) and the separation of part of a State (article 28) is quite nebulous. The principal criterion appears to be that in dissolution the predecessor States would not run with respect to claims of the new State, the remaining part continues to be the predecessor State. This differentiation seems largely nominal. If State A splits in half and the half calls itself State B and the other State C, should this produce different results than if State A splits in half and the half calls itself State B...
and the other half State A, or vice versa? The practice cited in the commentaries to the two articles does not provide substantial assistance in sharpening the distinction between the two situations. It is suggested that article 28 adds an unnecessary element of complexity to the draft articles and that the concept of "newly independent State" is sufficiently broad to encompass the separation of part of a State in all those cases in which application of the rules in part III is indicated.

The question whether the application of a treaty is incompatible with its object and purpose arises in a substantial number of the draft articles. In articles 25, 26 and 27 (as well as 28 if retained) the additional question of whether certain actions radically change the conditions for the operation of a treaty is raised. These are concepts of a general nature whose application to individual cases of succession may well result in strong differences of opinion. Other problems of interpretation and application have been pointed out in the comments of the United States, such as, for example, the difficulties in applying the rules relating to the time of succession.

It is clear, therefore, that differences between Governments will develop with regard to varying aspects of succession to treaties. Consequently, the Government of the United States urges the Commission to include provision for the settlement of disputes that may arise among the parties regarding the interpretation and execution of the articles.

*Articles 29 and 30* are valuable from the point of view that they seek to avoid permitting the fact of a succession to be used as an argument for exarcerbating territorial disputes. The underlying logic is simple and incontrovertible. A successor State can only acquire as its territorial domain the territory and territorial rights of the predecessor. If the territory as held by the State had boundaries firmly fixed and settled by treaty with an established and well-working régime for keeping those boundaries delineated then the successor State inherits all this. If the territory as held by the predecessor State included obligations by an upstream riparian State established by treaty to release water from its river dams so as to aid the irrigation projects in the territory, the new State receives its territory with those benefits. On the other hand, if the territory as held by the predecessor State had a poorly-defined boundary as a consequence of a poorly-drafted treaty or was subject to an obligation to control its releases of water to assist irrigation in a downstream riparian State then the successor State acquires what the predecessor had, territory with badly defined boundaries or subject to an obligation to help the downstream State.

Failure to state the rules set forth in articles 29 and 30 would give rise to an assumption that the fact of succession could be used to support claims for territorial change or abolition of territorial rights. The result would be that an effort to codify international law would have resulted in undermining friendly relations among States. The United States, therefore, favours retention of articles 29 and 30.

Article 30, however, would benefit from simplification. The structure and drafting are complicated by a requirement in paragraph 1 that rights and obligations have to attach to a particular territory in the State obligated and a particular territory in the State benefited. This latter requirement seems both unnecessary and unduly confusing. If a land-locked State has transit rights to send certain commodities through a neighbouring State to a port, should it make any difference whether the commodities are grown or manufactured throughout the land-locked State or only in certain areas? Even if grown in a certain area the sale of the commodities benefits the State as a whole as well as the area directly concerned. Consequently, the United States would propose that this requirement be eliminated from the article.
ANNEX II

Comparative tables of the numbering of the articles of the provisional and final drafts on succession of States in respect of treaties adopted by the Commission *

In connexion with the topic "Succession of States in respect of treaties", the International Law Commission prepared a provisional and a final draft of articles. The provisional draft was adopted by the Commission at its twenty-fourth session, in 1972 and is included in the Commission's report on the work of that session. That draft is the subject of the observations of Member States. The final draft, adopted at the twenty-sixth session, is included in the present report.

The two tables below indicate the correspondence between the articles, sections and parts of the two drafts. It should be noted that where an article in the final draft has no corresponding article in the provisional draft, the fact is indicated in the relevant column by a dash (—).

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* Originally circulated as document A/9610/Add.3.

b See annex I above.
c See above, chap. II.

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### Table 1

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