

YEARBOOK
OF THE
INTERNATIONAL
LAW COMMISSION
1971

Volume II
Part Two

*Documents of the twenty-third session:
Survey of International Law
and other documents*

UNITED NATIONS



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New York, 1973



NOTE

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PREFATORY NOTE

Volume II of the 1971 *Yearbook* consists of two separately published parts containing the following documents:

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| A/CN.4/217/Add.2 | First report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—Review of previous work on codification of the topic of the international responsibility of States: Addendum—annex XXIV (Restatement of the law, by the American Law Institute) |
| A/CN.4/241 and Add.1-6 | Sixth report on relations between States and international organizations, by Mr. Abdullah El-Erian, Special Rapporteur |
| A/CN.4/246 and Add.1-3 | Third report on State responsibility, by Mr. Roberto Ago, Special Rapporteur—The internationally wrongful act of the State, source of international responsibility |
| A/CN.4/247 and Add.1 | Fourth report on succession in respect of matters other than treaties, by Mr. Mohammed Bedjaoui, Special Rapporteur—Draft articles with commentaries on succession to public property |
| A/CN.4/249 | Fourth report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur |
| A/8410/Rev.1 | Report of the International Law Commission on the work of its twenty-third session (26 April-30 July 1971) |

PART TWO (*present volume*)

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| A/CN.4/243 and Add.1 | Succession of States in respect of bilateral treaties: second and third studies prepared by the Secretariat [air transport agreements and trade agreements] |
| A/CN.4/244/Rev.1 | General Assembly resolution 2669 (XXV) on Progressive development and codification of the rules of international law relating to international watercourses: note by the Secretariat |
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| A/CN.4/L.173 | <i>Idem</i> —Draft articles on observer delegations of States to organs and to conferences: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur |
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REVIEW OF THE COMMISSION'S LONG-TERM PROGRAMME OF WORK

[Agenda item 7]

DOCUMENT A/CN.4/245 *

Survey of international law
Working paper prepared by the Secretary-General

[Original text: English]
[23 April 1971]

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ABBREVIATIONS

EEC	European Economic Community
FAO	Food and Agriculture Organization of the United Nations
IAEA	International Atomic Energy Agency
IBRD	International Bank for Reconstruction and Development
ICAO	International Civil Aviation Organization
GATT	General Agreement on Tariffs and Trade (also the Contracting Parties and the secretariat)
ILO	International Labour Organisation
IMCO	Inter-Governmental Maritime Consultative Organization
IMF	International Monetary Fund
OAS	Organization of American States
OAU	Organization of African Unity
OECD	Organisation for Economic Co-operation and Development
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNIDO	United Nations Industrial Development Organization
UNITAR	United Nations Institute for Training and Research
WMO	World Meteorological Organization

Preface

1. The present working paper has been prepared by the Secretary-General in response to a request made by the International Law Commission at its twenty-second session in connexion with the revision of its long-term programme of work. The relevant passage in the Commission's report is as follows:

Confirming its intention of bringing up to date in 1971 its long-term programme of work, taking into account the General Assembly recommendations and the international community's current needs, and discarding those topics on the 1949 list which were no longer suitable for treatment, the Commission asked the Secretary-General to submit at its twenty-third session a new working paper as a basis for the Commission to select a list of topics which may be included in its long-term programme of work.¹

2. In paragraph 3 of resolution 2634 (XXV) of 12 November 1970, the General Assembly approved the programme and organization of work the session planned by the Commission for 1971, as well as its intention to bring up to date its long-term programme of work. It may be recalled in this connexion that the General Assembly had previously expressed its opinion that the field of international law should be widely examined in determining the future course of the Commission's work. Thus in the preamble to resolution 1505 (XV) of 12 December 1960, entitled "Future work in the field of the codification and progressive development of international law", the General Assembly considered:

[...] that it is desirable to survey the present state of international law, with a view to ascertaining whether new topics susceptible of codification or conducive to progressive development have arisen, whether priority should be given to any of the topics already included in the Commission's list or whether a broader approach may be called for in the consideration of any of these topics.

3. In order to assist the Commission in its task, a review has accordingly been made in the present document of the principal topics of international law. Before describing, in the Introduction, the main features of this study and the factors which have been taken into consideration in its preparation, it may be helpful to recall briefly the way in which the Commission's existing programme was drawn up and subsequent developments in the Commission's work, which together form the immediate context in which the present document is submitted.

4. At its first session in 1949 the Commission reviewed, on the basis of a memorandum submitted by the Secretary-General entitled *Survey of International Law in relation to the work of Codification of the International Law Commission*² (hereinafter referred to as the "1948 Survey"), twenty-five topics for possible inclusion in a list of topics for study.³ Following its consideration of the matter, the Commission drew up a provisional list of fourteen topics selected for codifi-

¹ *Yearbook of the International Law Commission, 1970*, vol. II, p. 309, document A/8010/Rev.1, para. 87.

² United Nations publication, Sales No. 1948.V.1(1).

³ The topics are listed in the Commission's first report to the General Assembly (A/925), in *Yearbook of the International Law Commission, 1949*, p. 280, para. 15.

cation;⁴ it was understood that the list was only provisional and that changes might be made after further study by the Commission or in compliance with the wishes of the General Assembly.⁵ This list (hereinafter referred to as the "1949 list") has continued to constitute the Commission's basic long-term programme of work. Since 1949 the Commission has submitted final drafts or reports with respect to seven of these topics (régime of the high seas; régime of territorial waters; nationality, including statelessness; law of treaties; diplomatic intercourse and immunities; consular intercourse and immunities; arbitral procedure) and two are currently under study (succession of States and Governments; State responsibility). The remaining five topics in the 1949 list which have not been the subject of a final draft or reports and which are not currently under study, are: recognition of States and Governments; jurisdictional immunities of States and their property; jurisdiction with regard to crimes committed outside national territory; treatment of aliens; right of asylum.

5. In addition to considering topics included in the 1949 list, the Commission has studied, or is studying, items referred to it by the General Assembly.⁶ These items, together with those on the 1949 list, have constituted the Commission's total programme at any one time,⁷ with a distinction being drawn, for reasons of

convenience, between those topics which were currently under study ("the current programme of work") and the remainder. Despite the inclusion in its programme of topics suggested by the General Assembly, and the submission by the Commission of final drafts or reports on a number of topics included in the 1949 list, the Commission has not formally made any changes in the 1949 list since it was drawn up.⁸

6. The task which is before the Commission of revising its long-term programme of work may thus be summarized as requiring, in the words of the Commission's 1970 report, the "discarding of those topics on the 1949 list which [are] no longer suitable for treatment", and the devising of a new list "taking into account the General Assembly recommendations and the international community's current needs".⁹

Introduction

7. The following study is intended to provide a review of the state of international law, as it exists at the present time, which will be of assistance to the Commission in the task of drawing up its future long-term programme of work. This document may thus be regarded as a successor to the 1948 Survey,¹⁰ following discussion of which the Commission's existing long-term programme was established. Having regard to the similar scope of the two studies, it has been possible in this survey to refer to the earlier one and to use it as a guide or yardstick by which to measure the progress made since 1948 with respect to the codification and progressive development of international law. There are, however, significant points of difference between the two surveys which should be noted, reflecting the considerable changes that have occurred during the intervening period. Whereas the 1948 Survey was written before the Commission had begun its activities, the survey now submitted contains an account of the Commission's work over the past twenty-two years and of the general experience gained, within the framework of the United Nations, of the codification and progressive development of the law in general. There have, in addition, been developments on a wider scale which have broadly affected the evolution of international law over the last twenty to twenty-five years.

the evidence of customary international law more readily available". See *Yearbook of the International Law Commission*, 1970, vol. II, p. 251, document A/CN.4/230, para. 15.

⁸ From time to time the Commission has reviewed the planning of its future work and reached some decisions or conclusions relating thereto, particularly at its tenth session in 1958 (see *Yearbook of the International Law Commission*, 1958, vol. II, pp. 107-110, document A/3859, paras. 57-69), at its fourteenth session in 1962 (*ibid.*, 1962, vol. II, pp. 187-191, document A/5209, paras. 24-64) and at its twentieth session in 1968 (*ibid.*, 1968, vol. II, pp. 223-224, document A/7209/Rev.1, paras. 95-102). However, those decisions or conclusions were not intended to revise or consolidate the Commission's long-term programme of work. They were aimed rather at establishing a certain order of priority among the topics to be studied by the Commission in the immediate future.

⁹ *Yearbook of the International Law Commission*, 1970, vol. II, p. 309 document A/8010/Rev.1, para. 87.

¹⁰ See para. 4 above.

⁴ The eleven topics not selected by the Commission were the following: subjects of international law; sources of international law; obligations of international law in relation to the law of States; fundamental rights and duties of States; domestic jurisdiction; recognition of acts of foreign States; obligations of territorial jurisdiction; territorial domain of States; pacific settlement of international disputes; extradition; laws of war. The pacific settlement of international disputes and the laws of war were not included in the 1948 Survey. With regard to the topic entitled "Fundamental rights and duties of States" it should be noted that, in accordance with General Assembly resolution 178 (II) of 21 November 1947, the Commission drew up a "draft declaration on the rights and duties of States" at its first session in 1949.

⁵ *Yearbook of the International Law Commission*, 1949, p. 281, paras. 16-17.

⁶ In addition to the "draft declaration on the rights and duties of States" (mentioned in foot-note 4 above) the items so referred to the Commission are the following: formulation of the Nürnberg principles; question of international criminal jurisdiction; reservations to multilateral conventions; question of defining aggression; draft code of offences against the peace and security of mankind; extended participation in general multilateral treaties concluded under the auspices of the League of Nations; special missions; relations between States and international organizations; most-favoured-nation clause; juridical régime of historic waters, including historic bays; treaties concluded between States and international organizations or between two or more international organizations; and non-navigational uses of international watercourses. Some of these items arose from the work of the Commission on broader or related topics. An account of the action taken with respect to these topics is given in the previous Secretariat working paper, "Review of the Commission's programme of work and of the topics recommended or suggested for inclusion in the programme" *Yearbook of the International Law Commission*, 1970, vol. II, p. 247, document A/CN.4/230) and in the working papers prepared by the Secretariat in 1967 (*ibid.*, 1967, vol. II, p. 337, document A/209/Rev.1, annex). (*ibid.*, 1968, vol. II, p. 226, document A/7209/Rev.1, annex).

⁷ The only topic the Commission has considered which was not either included in the 1949 list or recommended by the General Assembly was the topic "Ways and means for making

8. The need to encourage "the progressive development of international law and its codification"¹¹ has been one which, on the whole, States have come increasingly to recognize and to which they have given steadily growing attention during this period. The annual sessions of the General Assembly and of the Commission have provided a regular means, previously lacking, for the systematic examination of international law. The reasons why States have sought, on an increasing scale, to use the opportunity so provided to endeavour to strengthen international law and to extend the range of its functions may be attributed to a variety of causes, but the most fundamental no doubt remains the connexion between the maintenance of international peace and security (which, it may be recalled, is foremost in the list of purposes of the United Nations included in Article 1 of the Charter) and the development of international law. There is an immediate and basic link between the effective operation of a system of legal rules relating to the conduct of States, including the prohibition of the threat or use of force, and the codification and progressive development of international law, regarded as a process aiming at facilitating the interpretation and ensuring the application of these rules in international relations by formulating, restating or recasting them in a form which clarifies its content or restores its certainty.

9. Besides this underlying preoccupation with the need to maintain international peace and security, there have been other major factors which have led States to attach growing importance to the process of the continuing adaptation of international law. The years since 1945 have witnessed a growing degree of interdependence between States, brought about by the ease of modern communications and the necessities of economic progress, which in turn has created demands for the development of international law in fields hitherto untouched. Scientific and technological inventions have also played their part by producing a need for legal regulation of activities—such as those in outer space or on the sea-bed—which, even twenty years ago, were beyond man's capacities. Moreover, the membership of the international community has more than doubled since 1945. Whereas some fifty States signed the United Nations Charter at San Francisco, one hundred and twenty seven States are now Members of the United Nations. The States which have become independent since 1945 have contributed new interests and aspirations to international law. The fact that the codification process—in the widest sense as meaning the means whereby existing law is adapted to changing needs—has been open to a much broader range of countries, has served to accentuate the role which codification can play as an important element in peaceful devel-

opment, permitting the revision of the law in the light of fresh requirements, and as a means of securing general endorsement for the law so as to contribute to the maintenance of stability in international relations.

10. Recognition of the need that, to the greatest extent possible, States should seek to regulate their relations by legal means, has been expressed on various occasions by the General Assembly, both in its resolutions concerning the work of the Commission and more generally. In the preamble to resolution 2501 (XXIV) of 12 November 1969, for example, dealing with the report of the Commission, the General Assembly emphasized

the need for the further codification and progressive development of international law in order to make it a more effective means of implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations and to give increased importance to its role in relations among nations.

11. More recently, in the Declaration on the Occasion of the Twenty-fifth Anniversary of the United Nations (resolution 2627 (XXV) adopted on 24 October 1970), the General Assembly stated, in paragraph 3, that

the progressive development and codification of international law, in which important progress was made during the first twenty-five years of the United Nations, should be advanced in order to promote the rule of law among nations.

12. The General Assembly welcomed in this connexion the adoption, on the same day, of the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (resolution 2625 (XXV), annex) (hereinafter referred to as the Declaration on Principles of Friendly Relations). Under the terms of the general part of the instrument the General Assembly declared

The principles of the Charter which are embodied in this Declaration constitute basic principles of international law, and consequently appeals to all States to be guided by these principles in their international conduct and to develop their mutual relations on the basis of the strict observance of these principles.

13. Taking account of these general trends as well as of the practice developed by the Commission, the present survey covers the various topics into which international law as a whole may be divided, so as to permit an approximate side-by-side comparison to be made of the degree of codification achieved in different branches and at the same time to indicate, if only in the broadest terms or by implication, the scope of the work which remains to be done with respect to the codification and progressive development of individual topics. It was considered that a survey of this nature would best meet the Commission's needs by enabling it to examine, within the relatively short time available to it, the wide range of topics involved, and to determine the contents of its future long-term programme.

14. The matters dealt with have accordingly been arranged under seventeen headings, with sub-divisions where appropriate. In each chapter a brief indication is

¹¹ Article 13, paragraph 1 (a) of the United Nations Charter provides, *inter alia*:

"The General Assembly shall initiate studies and make recommendations for the purpose of [...] promoting international co-operation in the political field and encouraging the progressive development of international law and its codification;"

given of the scope and, if possible, importance of the subject, of the separate issues which arise, and the approximate extent of relevant State practice. Reference is made to activities relating to the codification and development of the topic undertaken by the Commission itself, by other United Nations organs, by plenipotentiary conferences, or by various regional organizations or learned bodies. These references are selective and do not purport to be exhaustive of all the activities which may possibly be cited in this connexion. A survey of this character, with a short commentary on each item, is almost bound to have certain limitations. Since the survey is not intended to provide a description of the actual content of the law—which would require a document very much greater in length—but only a description of the nature and extent of the law in each area, it has been necessary to ensure that, while not entering into an unduly detailed account of the substance in each chapter, nevertheless sufficient information was given to the reader to enable him to evaluate the scope and form of the matter under discussion.

15. Besides this methodological consideration, the question also arises of the selection of topics for inclusion in the present survey and the manner of their presentation. In accordance with the practice followed by the Commission,¹² the survey is primarily concerned with matters falling within the sphere of public international law. While there are a number of topics which, by general consent, form part of this field of law, there is no complete uniformity in the doctrine. Writers, even those sharing a similar basic viewpoint, frequently differ in the organization of their works covering the whole of international law. Although different opinions may be advanced, therefore, on whether a particular topic should come under one or another heading, and on the degree of relative importance to be attached to it, nevertheless it is believed that the topics covered in the present review include those to be found in most treatises and which represent (with whatever degree of difference in emphasis) what would generally be considered to be the main branches of the subject at the present time.

16. A related issue concerns the degree of systematization and comprehensiveness aimed at. In the 1948 Survey attention was drawn to the fact that the Commission's Statute contemplated the eventual codification of the whole of international law; accordingly the selection of topics by the Commission at any one time needed to be viewed against this broad objective. Therefore that survey attempted, like the present one, to cover the major branches of international law. However, the 1948 Survey did not endeavour to place all topics and aspects of international law within a definitive and formal framework.¹³ This policy—of seeking, on the

one hand, to show the need for a wide and comprehensive approach whilst, on the other, avoiding over-systematization—has also been followed in the preparation of the present survey. It may be justified on several grounds, including the fact that the endorsement of a definition or delimitation, by the Commission, of the contents of international law at a given moment, could not be more than a mere tentative working tool, subject necessarily to permanent revision. As the legal order in force in international society at a given stage of its historical development, international law has an essentially fluid content which varies from age to age and cannot be circumscribed once and for ever. New questions are endlessly added to those already covered—for instance, at present, international law is enriched as a result of the creation of international organizations entrusted with functions related to new fields of international co-operation, of the elaboration of new rules to cover technological advances, etc.; on the other hand, questions traditionally included among the contents of international law have simply disappeared, lost their original significance or are now approached from a somewhat different perspective.

17. As regards other features of the study, it should be pointed out that this document, like the 1948 Survey, does not deal expressly with a number of major issues which, although influential on the actual course of international law, do not fall (or have not hitherto fallen) within the immediate ambit of the codification process. These issues include the functioning of the system of international security created by the United Nations Charter, the interpretation of its provisions in specific instances, and the consideration by United Nations organs of problems, such as actual disputes between States, which may have an impact on international law. Nor does the survey attempt to describe the interaction which may take place between the adoption of a resolution by a plenary organ of a major inter-governmental body and a subsequent change in State practice, although such interaction may occur as part of the intricate process whereby international law is adapted to changing circumstances. As regards the question of the sources of international law more generally, it should be noted that this matter—which was dealt with in the 1948 Survey under a single heading—has, in the present study, been referred to in connexion with specific topics and not on an over-all basis.

18. Unlike the 1948 Survey, moreover, this survey does not contain sections dealing with "The function of the Commission and the selection of topics for codification" and "The method of selection", "The

¹² Article 1, paragraph 2 of the Commission's Statute provides:

"The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law."

¹³ This approach was apparently endorsed by the Commission which, at its first session, after discussing whether or not

a general plan of codification embracing the entirety of international law should be drawn up, expressed its conclusions as follows:

"The sense of the Commission was that, while the codification of the whole of international law was the ultimate objective, it was desirable for the present to begin work on the codification of a few of the topics, rather than to discuss a general systematic plan which might be left to later elaboration."

(*Yearbook of the International Law Commission*, 1949, p. 280, para. 14).

character of the work of the Commission" and "Procedure of codification". The 1948 Survey was written as a preparatory document, before the Commission had begun its work and when these issues had not yet received practical application. The Commission has now over twenty years accumulated experience to draw on, and although the questions raised under these headings in the 1948 Survey remain of major importance, they were not considered matters on which explicit commentary was necessary in the present study. The 1948 Survey reflected also the distinction embodied in the Commission's Statute between "codification" and "progressive development", even though part of the text was devoted to indicating the practical indivisibility of these two notions. The experience of the Commission has borne out the validity of this argument, and the distinction between "codification" and "progressive development", as the methodological basis for the approach to be taken by the Commission, has not been maintained in the practice of the Commission. The present survey therefore does not attempt to categorize the topics dealt with into those suitable for codification and those suitable for progressive development, but simply provides a conspectus of the whole field of substantive international law, on the basis of which the Commission may select the topics to be included in its future long-term programme. Attention may be drawn to the fact that the Commission's recommendations, even with respect to the codification of a topic, must in any case be submitted to the General Assembly.¹⁴ At such time therefore as the Commission may report to the General Assembly regarding the topics selected for its future programme, the Commission may point out (if such indeed is the case) that it will be difficult for it to distinguish whether its efforts with regard to these topics will pertain to their codification or to their progressive development.

19. Besides issues of this character, there are certain other general considerations which may need to be borne in mind in connexion with the Commission's present task. One matter, which has already been touched on, concerns a certain shift in method and emphasis that may be said to have occurred with regard to international law since the Commission last undertook the preparation of its long-term programme. States seek more and more to change, adjust or recast existing rules of international law and to bring within the scope of international law areas of activities previously regarded as being entirely within the discretion of the State. Furthermore, the present needs of the world are such that a vastly more active attitude is now taken to the development of international law. The awareness of the nature, novelty and magnitude of such needs has led States to tackle collectively the legal problems involved from their inception and on a more regular and systematic basis than in the past. The 1948 Survey

was mainly based on the law which had developed between States by means of the conclusion of particular treaties and through the growth of customary law over previous centuries, and the accent was put for the most part on the codification of that body of law. This was reflected in the list of topics selected for codification adopted by the Commission at its first session.¹⁵ The work subsequently done by the Commission has contributed significantly to the development of international law; during the period of the Commission's existence, and very much as a result of its activities, a substantial body of law has been successfully codified and endorsed by the international community. Although not exclusively so, the achievements of the Commission have been in areas traditionally lying within the scope of international law, where topics, long familiar in State practice, have been examined and recast so as to meet changing circumstances. Having regard to the requirement that, in bringing up to date its long-term programme of work, the Commission should do so "taking into account [. . .] the international community's current needs",¹⁶ the Commission may wish to take into consideration the shift referred to above in determining the contents of its future programme, without of course overlooking its responsibility for the codification and progressive development of the rules relating to areas lying traditionally within the scope of international law and the fact that the rules governing several of those areas have not yet been codified.

20. A more specific series of observations concerns the conclusions which may be drawn from the accumulated practice of the Commission and the fact that a body of codified law now exists, much of it based on drafts prepared by the Commission. One important and well-evidenced point to which attention may be drawn is that the practice of the Commission has consistently shown that the headings of main chapters of international law should not be identified, so far as the actual process of codification is concerned, with particular topics falling within them to which separate attention may need to be given. Even within a general chapter, the study of a particular topic necessarily implies the delimitation of its scope and the leaving aside of a certain number of issues which may themselves eventually require treatment, either as distinct topics or as aspects of another more widely defined subject, possibly encompassing elements to be found in various branches of the law. Apart from factors of this kind, brought about by the need to deal with topics on a reasonably manageable scale and at a pace convenient to governments, the question also arises of the effect of the passage of time on codification activities. The codification of a given topic creates a new legal situation, with consequences for future as well as for existing law. The new legal situation may

¹⁴ Article 18, para. 2, of the Statute of the Commission.

¹⁵ See para. 4 above.

¹⁶ See para. 1 above.

itself require that further acts of codification or revision be undertaken, in order to meet fresh problems that arise. Even without that, on the basis of the newly codified law States may develop practices that may become customary rules, which in turn may be made the object of codification. Although the last mentioned development cannot yet be said to occur to any marked degree, the existence of a considerable amount of codified international law may on occasions raise difficulties of co-ordination when new areas of law are being examined. The question of the relationship between different codified chapters or sections of international law is thus one to which the Commission may need to give increased attention as its work proceeds. The progress made through codification by means of treaty instruments raises further issues, to some of which the Commission has already had occasion to give attention—such as the relationship between conventional codified law and general customary law, the desirability of shortening the final stage of the codification of international law by expediting the process of ratification of or accession to codification conventions, and the question of the significance of codification conventions, irrespective of their contractual force. All these points serve to underline the fact that the process of the codification of international law, and thus the revising of the Commission's long-term programme of work, has become a much more complex and delicate task than it was in 1949.

21. While this may be so, there are nevertheless various features of the codification process, as it has evolved over the past twenty years, which may assist in dealing with the various problems posed. As the contents of this study indicate, there is in fact a considerable variety of methods by which the General Assembly may seek to achieve the objectives set out in Article 13, paragraph 1 (a) of the Charter with regard to the codification and progressive development of international law. While the Commission has been established as the permanent body available for this purpose, the development of specific topics of international law has on various occasions been entrusted to special bodies, or recourse had to other procedures. Even as regards the work of the Commission itself, moreover, it may be useful to draw attention to the degree of differentiation which has been achieved with regard to codification in different areas. Examination of the codification conventions which have been concluded on the basis of the Commission's efforts brings out the fact that, quite apart from the particular modifications introduced in the branch of law concerned, the nature and extent of the act of codification has varied considerably from case to case. The Conventions on the Law of the Sea, on Diplomatic Relations, on Consular Relations, on Special Missions and on the Law of Treaties, differ from one another not merely in their content but also in the different kind, or different degree, of legal obligation they entail and in the varying extent to which, within the basic principles laid down, States may adapt their provisions to meet parti-

cular requirements. Whilst reflecting the different character of the branch of law being treated in each case, it is the need to achieve this differentiation which renders the task of codification a significantly distinct one, with separate problems and issues, in each instance undertaken. One of the most valuable features of the Commission's work, it is submitted, has been its ability to deal with this element and to develop, as its study of a given topic has proceeded, the most suitable vehicle for the specific act of codification and progressive development under consideration. The fact that the results of the Commission's activities in different areas have mostly been embodied in the same instrument, namely a codification convention, has sometimes caused this particular aspect of the Commission's work to be overlooked. The achievements of the Commission have thus been due, not only to the development of the process of co-ordinating the Commission's study of a given topic with the opinions expressed by governments, either in their written comments or during discussions in the Sixth Committee, but to the flexibility of approach which has been shown. The Commission's practice in this regard, as indicated in the following survey, has thus served to demonstrate that there is a range of possibilities available whereby the object of the Commission—"the promotion of the progressive development of international law and its codification"¹⁷—may be pursued, and that what may fit the needs of the particular topic and of the international community in one context may not be equally suitable in another. As the Commission's work continues in future years it will no doubt further extend the repertoire of the techniques which are available, within the framework of the Statute, for the successful codification and progressive development of the law in different spheres.

22. In conclusion, attention may be called to the fact that the question of the period of time envisaged for the duration of the Commission's future long-term programme and the number of topics which the Commission may choose to include in its programme, are of course related. The adoption of a programme of work on the basis of a twenty to twenty-five year period (which would be roughly the duration of the previous programme) would itself provide some general indication of the number of topics which would have to be added to those now under study and which, it may be presumed, the Commission will wish to retain on its programme. This consideration, while perhaps an obvious one, was thought worthy of mention since, as a practical matter, the Commission may find its task facilitated if there is broad agreement at the outset on the approximate time span that should be chosen.

¹⁷ Article 1, para. 1, of the Statute of the Commission.

Chapter I

The position of States in international law

1. SOVEREIGNTY, INDEPENDENCE AND EQUALITY OF STATES

23. The doctrines of the sovereignty and equality of States have provided the bases of international law since the emergence of a society of independently governed States. These elements have formed the starting point for the development of various fundamental principles of international law relating to the conduct of States and, in particular, of the rule forbidding interference in the affairs of other States. The basic rights and duties of States derived from these principles may thus be said to consist, in essence, of the exercise of sovereignty by individual States and the respect these States owe in turn to the exercise of sovereignty by others, within an international community governed by international law.

24. References to these elements are to be found in each of the instruments establishing international organizations possessing a wide range of responsibilities, whether of a universal or regional character. The Charter of the United Nations contains, notably in Chapter I, a series of provisions concerning the basic rights and duties of States, whilst Article 2, setting out the principles on which the Organization and its Members shall act, provides in paragraph 1 that

The Organization is based on the principle of the sovereign equality of all its Members.

25. As regards regional organizations, the reciprocal operation of the fundamental rights and duties of States is well illustrated by the Charter of the Organization of American States (Bogotá, 1948)¹⁸

International order consists essentially of respect for the personality, sovereignty and independence of States... (Article 5, para b.)

26. The OAS Charter also provides that: States are juridically equal, enjoy equal rights and equal capacity to exercise these rights, and have equal duties. The rights of each State depend not upon its power to ensure the exercise thereof, but upon the mere fact of its existence as a person under international law. (Article 6.)

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements. (Article 15.)¹⁹

27. The Organization of African Unity expressly stated in its Charter (Addis Ababa, 1963)²⁰ that it had amongst its purposes "to defend [the] sovereignty, [...] territorial integrity and independence" (article II, para. 1 (c)) of African States, and the principles affirmed in article III include:

1. The sovereign equality of all Member States;
2. Non-interference in the internal affairs of States;
3. Respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.

28. There are, in addition, other general treaties, such as the Vienna Conventions on Diplomatic Relations,²¹ on Consular Relations,²² on the Law of Treaties²³ and the Convention on Special Missions,²⁴ and many multilateral and bilateral treaties, especially those of alliance or friendship, which refer expressly, usually in their preamble or in the general provisions, to the sovereignty, independence and equality of the States parties thereto.

29. So far as the Commission has been concerned, it may be said that its work has throughout necessarily been based on the assumptions of the sovereignty, independence and equality of States, and reflections of these assumptions are to be found in all of the texts it has prepared. The Commission has not, however, attempted to codify, in the sense of formulating in more precise terms, the meaning to be attached to the principles relating to the sovereignty, independence and equality of States as such, except on one occasion. At its first session in 1949 the Commission, acting in response to a request by the General Assembly, prepared a draft Declaration on Rights and Duties of States,²⁵ a task which necessarily involved consideration of the basic principles under discussion. According to the draft, which was drawn up in the form of a declaration for adoption by the General Assembly, the General Assembly would have proclaimed, *inter alia*, the following provisions:

Every State has the right to independence and hence to exercise freely, without dictation by any other State, all its legal powers, including the choice of its own form of government. (Article.)

Every State has the duty to refrain from intervention in the internal or external affairs of any other State. (Article 3.)

Every State has the right to equality in law with every other State. (Article 5.)

30. In paragraph 2 of resolution 375 (IV) of 6 December 1949, the General Assembly deemed the draft Declaration "a notable and substantial contribution towards the progressive development of international law and its codification" and commended it as such "to the continuing attention of Member States and of jurists of all nations". Member States were requested to comment on the draft and on the future action, if any, to be taken by the Assembly. In resolution 596 (VI) of 7 December 1951 the General Assembly, considering that the number of States which had made comments

²¹ *Ibid.*, vol. 500, p. 95.

²² *Ibid.*, vol. 596, p. 261.

²³ *Official Records of the United Nations Conferences on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289

²⁴ General Assembly resolution 2530 (XXIV), annex.

²⁵ *Yearbook of the International Law Commission, 1949*, pp. 287 *et seq.*

¹⁸ United Nations, *Treaty Series*, vol. 119, p. 3.

¹⁹ See also articles 7, 8 and 13.

²⁰ United Nations *Treaty Series*, vol. 479, p. 39.

and suggestions was too small to form a basis for any definite decision, postponed further examination of the draft Declaration until a sufficient number of States had submitted comments. No action has since been taken by the Assembly.

31. As regards efforts towards the codification and progressive development of the concepts under discussion which have been undertaken since the Commission's work in 1949, particular mention may be made of the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. The Special Committee, composed of the representatives of Member States²⁶ and established in 1963, held a series of sessions between 1964 and 1970 in order to reach agreement on the formulation of the principle, among others,²⁷ of the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter [of the United Nations],²⁸ and the principle of sovereign equality of States. The formulation of these principles, embodied in the Declaration on Principles of Friendly Relations are reproduced below:

The principle concerning the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter

[...]

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

²⁶ Originally twenty-seven, increased to thirty-one in accordance with General Assembly resolution 2103 A (XX) of 20 December 1965. The item entitled "Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations", was placed on the provisional agenda of the seventeenth session of the General Assembly, in accordance with resolution 1686 (XVI) of 18 December 1961, under the item entitled "Future work in the field of the codification and progressive development of international law". For detailed references to the history of the work of the Special Committee, see chapter I, section B, of its final report: *Official Records of the General Assembly, Twenty-fifth Session, Supplement No. 18* (A/8018).

²⁷ The others being: the principle that States 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 (see paras. 44 and 109 below); the principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered (see para. 124 below); the duty of States to co-operate with one another in accordance with the Charter (see para. 151 below); the principle of equal rights and self-determination of peoples (see paras. 46 and 198 below); and the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter (see para. 35 below).

²⁸ See also the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, adopted by the General Assembly in resolution 2131 (XX) of 21 December 1965, and the provisions contained in the draft Declaration on Rights and Duties of States quoted in paragraph 29 above.

No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantage of any kind. Also, no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the régime of another State, or interfere in civil strife in another State.

The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention.

Every State has an inalienable right to choose its political, economic social and cultural systems, without interference in any form by another State.

Nothing in the foregoing paragraphs shall be construed as affecting the relevant provisions of the Charter relating to the maintenance of international peace and security.

The principle of sovereign equality of States

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.

In particular, sovereign equality includes the following elements:

- (a) States are juridically equal;
- (b) Each State enjoys the rights inherent in full sovereignty;
- (c) Each State has the duty to respect the personality of other States;
- (d) The territorial integrity and political independence of the State are inviolable;
- (e) Each State has the right freely to choose and develop its political, social, economic and cultural systems;
- (f) Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States.

32. The principle of the sovereignty of States, which has as one of its consequences the duty of one State not to interfere in the affairs of another, also entails a similar obligation on the part of international organizations. Thus Article 2, paragraph 7, of the United Nations Charter provides

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

2. FULFILMENT IN GOOD FAITH OF THE OBLIGATIONS OF INTERNATIONAL LAW ASSUMED BY STATES

33. The principle that States shall fulfil their obligations in good faith is one which is of general application with respect to all obligations internationally binding on a State. Apart from such issues as may arise in individual cases, the principle may be of particular relevance, however, in instances where the international obligation includes the requirement that States give effect, through national laws, to their duties arising out of international law, or, more widely, in so far as provisions of domestic or constitutional law may be invoked by States in connexion with the implementation of international obligations.

34. Article 13 of the draft Declaration on Rights and Duties of States, prepared by the Commission in 1949,²⁹ contains the following statement of the principle:

Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty.

Article 14 declared further that States have the duty to conduct their relations with other States in accordance with international law and with the principle that the sovereignty of each State is subject to the supremacy of international law.

35. The matter was examined more recently in connexion with the preparation of the Declaration on Principles of Friendly Relations which contains an elaboration of the principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter. The Special Committee which drafted the Declaration took no action on a proposal which would have denied States the right to avoid their obligations on the grounds of their incompatibility with national law or national policy.³⁰ The formulation contained in the Declaration is as follows:

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.

Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

36. The general principle set out in the above texts has been reflected in provisions contained in conventions adopted under the auspices of the United Nations. Article 27 of the Vienna Convention on the Law of Treaties,³¹ for example, provides

A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.

(Article 46, which is referred to in paragraph 37 below, regulates the effect of non-compliance with provisions of internal law regarding competence to conclude treaties.) Treaties frequently contain provisions requiring the States parties to take the necessary steps under their constitutional processes to adopt such legislative or other methods as may be necessary to give effect to the rights recognized in the convention.³² In other cases the substantive obligations are stated in terms of an obligation to enact legislation or to take other domestic action to achieve specifically stated purposes.³³ A particular instance of the basic principle is also found in the text of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal, adopted by the Commission in 1950.³⁴ Principle II states that

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.³⁵

37. The 1948 Survey included a section entitled "The obligations of international law in relation to the law of the State" (part II, section I, 3), dealing with the issues raised in relation to the obligation of States to give effect, through their national law, to the responsibilities they have assumed internationally. The Commission decided, however, to postpone until later its consideration of the topic, which was not therefore included in the 1949 list of topics for codification. As was noted in the 1948 Survey, there are considerable variations in domestic constitutional provisions and practices with respect to the ratification and implementation of treaties. One aspect of these variations, and of the problems which may be posed on the international plane, was considered by the Commission and by the United Nations Conference on the Law of Treaties during the preparation of article 46 of the

²⁹ See foot-note 25 above.

³⁰ See the 1966 report of the Special Committee (*Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6230, paras. 525, 548 and 566) and the 1967 report (*ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6799, paras. 239-240, 291 and 296-297).

³¹ This provision was based on an amendment submitted to the United Nations Conference on the Law of Treaties by the delegation of Pakistan (document A/CONF.39/C.1/L.181 reproduced in *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 145, document A/CONF.39/14, para. 233). The Commission considered that this matter rather fell within the scope of the law of State responsibility; see the statement at the Conference by its Special Rapporteur on the Law of Treaties, Sir Humphrey Waldock (*Ibid.*, *First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), 29th meeting, para. 73.

³² See, for example, article 2, paragraph 2 of the International Covenant on Civil and Political Rights (General Assembly resolution 2200 A (XXI), annex); article V of the Convention on the Prevention and Punishment of the Crime of Genocide (United Nations, *Treaty Series*, vol. 78, p. 277); and articles III and IV of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (General Assembly resolution 2391 (XXIII), annex).

³³ For example, article 2 of the International Covenant on Economic, Social and Cultural Rights (General Assembly resolution 2200 A (XXI), annex) and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (General Assembly resolution 2106 A (XX), annex). See also the 1949 Geneva Convention (United Nations, *Treaty Series*, vol. 75, pp. 2 *et seq.*).

³⁴ *Yearbook of the International Law Commission, 1950*, vol. II, p. 374, document A/1316, part III.

³⁵ See also Principle IV (*ibid.*, p. 375), and article 4 of the Draft Code of Offences against the Peace and Security of Mankind, regarding governmental and superior orders as a defence (*ibid.*, 1954, vol. II, p. 151-152, document A/2693, chap. III).

Vienna Convention.³⁶ The majority of the Commission were of the view that the complexity and uncertain application of provisions of internal law relating to the conclusion of treaties was such that that law should not be accepted as relevant to the validity, on the international level, of actions taken in violation of it unless the violation was manifest.³⁷

3. THE TERRITORIAL DOMAIN OF THE STATE³⁸

38. In the course of examining matters coming under this heading the 1948 Survey pointed out that, although there had been a number of relevant international awards and decisions³⁹ and a considerable amount of State practice existed, chiefly as regards territorial disputes, the subject had remained almost entirely outside the codification efforts. The reasons given in explanation of this state of affairs were:

The salient aspect of this part of international law lies in the rules relating to the original acquisition of territorial sovereignty by discovery, occupation, conquest and prescription. Rights and claims to territory have been traditionally regarded as synonymous with the most vital interests of States, and it is perhaps not surprising that there has been a reluctance to cast the applicable rules of law in the form of codified principles which might be invoked immediately, with some eagerness, by parties to pending disputes.⁴⁰

39. The 1948 Survey concluded its discussion on this topic by examining certain questions relating to the acquisition of, and change in, sovereignty that "would seem to require clarification", mention being made of specific aspects of the modes of acquisition of territory

(acquisitive prescription; role of conquest) and the question of the effect of changes in sovereignty (through conquest or cession) upon the nationality of the residents of the territories concerned, and the right of option in that regard. In connexion with the formulation of a rule of international law concerning prescription, the 1948 Survey underlined the technical character of some aspects of the matter, enumerating among them questions of determination of boundaries, the rule of the thalweg, accession and alluvion, and the like. So far as the acquisition of title through conquest was concerned, the Survey indicated that, with the prohibition of the right of war, "the time would appear ripe for a revaluation of the role of conquest as conferring a legal title" and that there was room for the view that "the principle of non-recognition of acquisition of territory by force may find a place as a legal rule denying the title of conquest to States resorting to war in violation of their fundamental obligations".⁴¹ Finally, the Survey drew attention to the fact that "the regulation by treaty of the right of option frequently raises problems for the solution of which a general formulation of the applicable law would be both feasible and useful."⁴²

40. When the topic was considered during the Commission's first session, the view was expressed that the subject was not suitable for immediate codification, and the Commission decided not to include it in its future programme.⁴³

41. Since that time, although there have been further examples of State practice and several pertinent decisions have been given by the International Court of Justice⁴⁴ and by international tribunals,⁴⁵ the situation, at least from the standpoint of codification of the legal rules involved, has remained much as was described in the 1948 Survey. Attempts to codify the principles and rules have continued to be limited, so as to relate either to particular areas of the globe (for example, the conclusion of the Antarctic Treaty in 1959)⁴⁶ or to

³⁶ See article 43 of the 1966 draft articles on the law of treaties and the Commission's commentary thereon (*Yearbook of the International Law Commission* 1966, vol. II, p. 240, document A/6309/Rev.1, part II, chap. II), and the discussion at the United Nations Conference on the Law of Treaties (*Official Records of the United Nations Conference on the Law of Treaties, First Session, Summary records of the plenary meetings and of the meetings of the Committee of the Whole* (United Nations publication, Sales No. E.68.V.7), pp. 238 *et seq.*, 43rd meeting, and *ibid.*, *Second Session, Summary records* ... Sales No. E.70.V.6, pp. 84 *et seq.*, 18th plenary meeting). See also the discussion of a proposal by the delegation of Luxembourg, which would have required the parties to take any measures of international law required to ensure that treaties are fully applied (*ibid.*, pp. 44 *et seq.*, 12th and 13th plenary meetings).

It may be noted that article 2, paragraph 1, of the Vienna Convention on the Law of Treaties deals with the use of terms such as "treaty", "ratification", "acceptance", "approval", and "accession", for the purposes of the Convention; paragraph 2 of the same article provides that this is "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".

³⁷ Paragraph 10 of the commentary to draft article 43, in *Yearbook of the International Law Commission*, 1966, vol. II, p. 242, document A/6309/Rev.1, part II, chap. II.

³⁸ For questions relating to territorial waters, the continental shelf, the sea-bed beyond the limits of national jurisdiction, and internal waters, see chapters IX and X below. For matters relating to air space see chapter XI.

³⁹ The 1948 Survey referred specifically to the decision of the Permanent Court of International Justice in the Legal Status of Eastern Greenland case, *P.C.I.J.*, Series A/B, No. 53, p. 22.

⁴⁰ 1948 Survey, para. 64.

⁴¹ *Ibid.*, para. 66.

⁴² *Ibid.*, para. 67.

⁴³ *Yearbook of the International Law Commission*, 1949, pp. 42-43, 5th meeting, paras. 55-61.

⁴⁴ Mention may be made, in particular, of *The Minquiers and Ecrehos Case* (*I.C.J. Reports* 1953, p. 47); *Case concerning Sovereignty over certain Frontier Land* (*ibid.*, 1959, p. 209); *Case concerning Right of Passage over Indian Territory* [Merits], (*ibid.*, 1960, p. 6); and *Case concerning the Temple of Preah Vihear*, (*ibid.*, 1962, p. 6). See also the Advisory Opinion of 21 June 1971 on the "Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970)" [*ibid.*, 1971, p. 16].

⁴⁵ For example, *Argentine—Chile Frontier Case* (see *United Nations Reports of International Arbitral Awards*, vol. XVI (United Nations publication, Sales No. E/F.69.V.I) p. 109) and *Rann of Kutch Arbitration* (*American Society of International Law. International Legal Materials*, 1968 (Washington, 1968), vol. VIII, No. 3, p. 633).

⁴⁶ *United Nations, Treaty Series*, vol. 402, p. 71. The Treaty provides for a suspension, without renunciation, of rights, and claims to, territorial sovereignty and establishes in effect a special régime for the area reflecting its particular characteristics.

particular matters connected with the topic. A brief account is given below of the more recent developments which are of significance with regard to different aspects of the subject. The account has been divided as follows:

(a) Questions relating to modes of acquisition of territory;

(b) Questions concerning specific limitations on the exercise of territorial sovereignty.

(a) *Questions relating to modes of acquisition of territory*

42. The State system within which international law has traditionally operated has as one of its bases the occupation and division of territory: each State is established within a definite area of the globe delimited normally by agreed boundaries. International law gives recognition to the territorial sovereignty exercised by the State in question within that area, and to the exercise in principle of sole jurisdiction by that State to the exclusion of the jurisdiction of any other State.⁴⁷ International law nevertheless lays down certain general regulations concerning the exercise of territorial sovereignty by States, for instance in the interest of maintaining international peace and security.⁴⁸ In general, however, it is necessary that specific limitations on the exercise of territorial sovereignty (which are considered in the following sub-section) be established by treaty or be otherwise explicitly acknowledged by the State in question. As regards the rules which have been elaborated by international law with respect to the acquisition of territorial sovereignty, historically these were based on institutions of private law, developed and amplified to fit the circumstances of a society of independent States. Any attempt to codify those rules which might be undertaken at the present time would need, however, to reflect the progress made in the development and application of a number of fundamental principles of international law—in particular the principle of the prohibition of the threat or use of force and the principle of equal rights and self-determination of peoples—and to assess their effect upon the rules relating to the acquisition of territory by a State.

43. In particular the role of conquest as a possible mode of acquiring sovereignty has—as the 1948 Survey indicated—been further discussed in the light of the principle of the prohibition of the threat or use of

force. On this question the draft Declaration on Rights and Duties of States would have imposed on States “the duty to refrain from recognizing any territorial acquisitions by another State” (article 11) which had acted in violation of its “duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order.” (Article 9.)⁴⁹

44. More recently, the Declaration on Principles of Friendly Relations contains in its elaboration of the principle that States 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, various provisions declaring illegal the acquisition of territory, if effected by the threat or use of force, subject to the limits and exceptions prescribed. The Declaration includes in particular the following provisions:

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(a) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or

(b) The powers of the Security Council under the Charter.⁵⁰

45. Besides the question of the impact on the rules concerning modes of acquisition of territory of the principle of the prohibition of the threat or use of force, the relationship between those rules and the principle of equal rights and self-determination of peoples also raises a series of major issues. The period since 1945—the period in fact since the establishment of the

⁴⁷ Thus, in the language of article 2 of the draft Declaration on Rights and Duties of States,

“Every State has the right to exercise jurisdiction over its territory and over all persons and things therein, subject to the immunities recognized by international law.”

⁴⁸ See, for example, the eighth and ninth paragraphs of the text relating to the principle that States 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, contained in the Declaration on Principles of Friendly Relations (quoted in para. 109 below), and the provisions from that formulation cited in para. 44 below; see also articles 4 and 7 of the Draft Declaration on Rights and Duties of States.

⁴⁹ See also *Preparatory study concerning a draft Declaration on the Rights and Duties of States* (United Nations publication, Sales No. 1949.V.4), pp. 111-113.

⁵⁰ General Assembly resolution 2625 (XXV), annex.

United Nations—has witnessed an unparalleled increase in the number of States enjoying or regaining national sovereignty. This movement has been closely identified with the process of decolonization in which the United Nations has played a large part. The Declaration on the granting of independence to colonial countries and peoples (resolution 1514 (XV) of 14 December 1960) includes amongst its provisions

...

2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

...

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.

46. Besides the establishment of special bodies to examine the steps taken, or to be taken, to ensure the implementation of this Declaration, it may be noted that the principle of equal rights and self-determination of peoples was also amongst those included in the Declaration on Principles of Friendly Relations. The formulation adopted with regard to that principle included, in particular, the following passages:

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

47. The following general conclusions suggest themselves on the basis of the above. First, the decolonization movement and the establishment of self-determination as a legal principle, culminating in the establishment of sovereign equal States throughout most of the world, will result, if they have not indeed already done so, in the drying up of some of the modes of acquisition of territory (most notably discovery and occupation of overseas territories) and affect the traditional operation of those modes. However, they do not destroy *per se* legal titles of the past, although new legal principles and rules may be instituted with respect to situations which continue to exist. Attention may be called in this connexion to the distinction drawn, in the provisions of the Declaration quoted above,⁵¹ between "the territory of a colony or other Non-Self-Governing

Territory" and that of "the territory of the State administering it". Present international law recognizes that the former enjoys a particular international status even before the exercise of the right of self-determination, a development very much bound up with the United Nations. The action taken by the United Nations with respect to Namibia and the Advisory Opinion of the International Court of Justice of 21 June 1971 concerning the legal consequences for States of the continued presence of South Africa in Namibia⁵² may be noted in this connexion. Lastly, by way of generalization it may be mentioned that, subject to certain exceptions relating to territorial claims arising out of particular boundary disputes and instances of partition, the principles of *uti possidetis*, followed by the States of Latin America during the early nineteenth century, has been the main guideline for determining the boundaries of the new States emerging from the recent process of decolonization. The principle, which entails delimitation of boundaries according to lines of demarcation of former colonial possessions, has been generally applied both as regards administrative lines of demarcation between two former dependent territorial entities administered by the same State, and as regards boundaries between territories administered by different States.

48. As indicated earlier, the application to particular disputes of the legal rules concerning the acquisition of territorial sovereignty has often been considered by international courts and tribunals. Although the court or tribunal has necessarily taken account of legal rules and principles applicable to other aspects also, much of the judgement has frequently been concerned with the elaboration of customary rules dealing with the acquisition, and retention, of territorial sovereignty. Such judicial discussions, taken together with the State practice arising out of particular territorial disputes, provide a rich and extensive source of material on which many jurists have already based statements of principle. As the 1948 Survey indicated, there would appear to be no obstacle, if regard is had solely to legal grounds, to spelling out that practice and the judicial statements concerned in one of the forms envisaged in article 23 of the Statute of the Commission. The difficulties—as the 1948 Survey recognized—are, it would seem, primarily political. It has nevertheless been recognized since 1949 that possible claims to sovereignty in specific areas can be dealt with by treaty. Proceeding from this, it could be argued that it would be advantageous—and desirable—to seek to clarify the rules involved, particularly in the light of the development of certain fundamental principles of international law, even if the rules concerned were to be formulated in rather flexible terms. Those rules would, in any case, have to be stated in general terms and their application to particular instances would, as practice shows, involve account being taken of the special facts relating to given situations. As against this is the consideration, to which the Commission will no doubt wish to give weight, of the form any such

⁵¹ See para. 46 above.

⁵² See foot-note 44 above.

clarification might take, and the difficulty which would in all probability be experienced in producing a text that would enjoy the support of the widest possible number of States.

(b) *Questions concerning specific limitations on the exercise of territorial sovereignty*

49. The question of specific—as opposed to general—limitations on the exercise by the State concerned of territorial sovereignty arises in three main, if overlapping, contexts: the existence of special limitations on territorial sovereignty which may occur in certain circumstances, sometimes referred to under the heading of “State servitudes”; the concept of “objective régimes”; and rights of transit.

50. While the whole concept of “State servitudes” is the subject of controversy, it is accepted that, in accordance with the fundamental importance which international law attaches to the principle of territorial sovereignty, such limitations as may exist in given instances—for example, prohibitions on militarization or the establishment of neutrality—are particular restraints, applicable to the instant case, and to that case only. From this it is argued that the rights are personal only, that there is no need to use the language of property law, and that the “régime” or situation has no inherent right of permanence. Although the controversy—to a considerable degree doctrinal and terminological—has been primarily about the character of the alleged “servitude”, discussion has inevitably involved consideration of the preliminary issue also, of the process whereby the rights and duties in question came to be established. Principles of general law have therefore been invoked, despite the agreed particularity of any servitude which may have been established, since they have provided the basis on which each specified network of rights and obligations has been founded. This basis, in broad terms, can consist either in treaty law, in so far as a treaty may be the foundation of a given servitude, or in the law relating to unilateral acts,⁵³ where the act of a single State began the process which led to the claimed servitude. There are, of course, also intermediate situations: a local custom or tacit agreement resulting from the acts of two or more States immediately involved is a prime instance. Situations of this character have inevitably given rise to a number of disputes and international tribunals have, on occasions, considered arguments as to whether or not a servitude was established, or that some “objective régime” with a considerable degree of permanence had been created. It cannot be said, however, that any very large body of distinctive case law has emerged on the topic. Moreover, the question would not appear to have been the object of any codification process. As regards the work of the Commission, it may be noted that the Commission is concerned with matters relating to “dispositive”, “localized” or “territorial” treaties in the context of the topic of State

succession, in particular as regards succession in respect of treaties.⁵⁴

51. So far as the treaty aspect is concerned, this was dealt with to some extent by the Commission when, during the preparation of its draft articles on the law of treaties, it considered the question of so-called “objective régimes”. The Commission decided not to include a provision on this issue, stating its reasons as follows:

The Commission considered whether treaties creating so-called “objectives régimes”, that is obligations and rights valid *erga omnes*, should be dealt with separately as a special case. Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective régimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid *erga omnes*, did not regard these cases as resulting from any special concept or institution of the law of treaties. They considered that these cases resulted either from the application of the principle in article 32 or from the grafting of an international custom upon a treaty under the process which is the subject of the reservation in the present article. Since to lay down a rule recognizing the possibility of creation of objective régimes directly by treaty might be unlikely to meet with general acceptance, the Commission decided to leave this question aside in drafting the present articles on the law of treaties. It considered that the provision in article 32, regarding treaties intended to create rights in favour of States generally, together with the process mentioned in the present article, furnish a legal basis for the establishment of treaty obligations and rights valid *erga omnes*, which goes as far as is at present possible. Accordingly, it decided not to propose any special provision on treaties creating so-called objective régimes.⁵⁵

52. Consistent with the above, the matter now falls, at least in part, within the framework of part III, section 4 (“Treaties and third States”), of the Vienna Convention on the Law of Treaties. The operation of the provisions of the Convention concerned has been examined by the Secretary-General in a study relating to the possible establishment of international machinery for the promotion of the exploration and exploitation of the resources of the international area of the seabed,⁵⁶ although given in a specific context, it is believed

⁵⁴ See paras. 201-204, below.

⁵⁵ *Yearbook of the International Law Commission, 1966*, vol. II, p. 231, document A/6309/Rev.1, part II, para. 4 of commentary to article 34.

⁵⁶ “Study on the question of establishing in due time appropriate international machinery for the promotion of the exploration and exploitation of the resources of the sea-bed and the ocean floor beyond the limits of national jurisdiction, and the use of these resources in the interests of mankind”, chap. IV, section 2. The study was annexed to the report of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction: *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 22 (A/7622)*, p. 81, annex II.

⁵³ See generally chap. VIII below.

that the opinion there expressed may be of general application.

53. The question of rights of transit has become closely identified with the question of the rights to be accorded to land-locked States (including their right of access to the sea). Strictly speaking, however, the legal position of such States is merely a special element of the topic as a whole. There are a number of multilateral conventions which deal with the matter, including the Convention on Transit Trade of Land-Locked States (New York, 1965).⁵⁷ These treaties are either of a general character, such as the 1965 Convention, or contain provisions relating to transit in connexion with other issues, such as customs arrangements or regional measures of economic co-operation. There are in addition many bilateral treaties regulating transit rights (chiefly as regards the transit of goods and persons) as between the particular States involved. In some cases special practices have led to the establishment of institutional arrangements on a regular basis in order to administer an agreement. In addition to this body of law, which is mainly treaty law, the question of transit has also been before the International Court of Justice.⁵⁸

54. The existence of the Convention on Transit Trade of Land-Locked States, and the fact that most transit rights now enjoyed by particular States are based on treaty arrangements, together with the individual nature of the respective needs and interests of the States most directly concerned, would suggest that this is a sphere where efforts towards the codification and progressive development of the law would not appear to be called for on the part of the Commission at the present time.

4. RECOGNITION OF STATES AND GOVERNMENTS

55. The 1948 Survey⁵⁹ emphasized the importance of the question of recognition of States, as well as that of governments and belligerency.⁶⁰ After quoting some of the statements made by members of the League of Nations Committee of Experts with regard to the suitability, or otherwise, of the subject for codification, and referring to the work of other bodies, the Survey declared that

The main reason for the inability—or reluctance—to extend the attempts at codification to what is one of the central and most frequently recurring aspects of international law and relations has been the widely held view that questions of recognition pertain to the province of politics rather than of law.⁶¹

56. It was stated that there were many, however, who believed that that view was contrary to the evidence of international practice, and, if acted upon,

probably inconsistent with the authority of international law. An imposing body of practice and doctrine existed, making it feasible to attempt to formulate and answer, as a matter of international law,

... such questions as the requirements of statehood entitling a community to recognition; the legal effects of recognition (or of non-recognition) with regard to such matters as jurisdictional immunity, State succession, diplomatic intercourse; the admissibility and effect, if any, of conditional recognition; the question of the retroactive effect of recognition; the modes of implied recognition; the differing legal effects or recognition *de facto* and *de jure*; the legal consequences of the doctrine and practice of non-recognition; and last—but not least—the province of collective recognition.⁶²

Most of these problem were also germane, it was said, to the question of recognition of governments and belligerency.

57. As regards attempts to regulate the question of recognition, attention may be called to the relevant provisions of two major inter-American instruments. The Convention on Rights and Duties of States, signed at Montevideo in 1933,⁶³ provides in article 3, *inter alia*, that

The political existence of the State is independent of recognition by other States.

Articles 6 and 7 of the Convention are as follows:

The recognition of a State merely signifies that the State which recognizes it accepts the personality of the other with all the rights and duties determined by international law. Recognition is unconditional and irrevocable.

The recognition of a State may be express or tacit. The latter results from any act which implies the intention of recognizing the new State.

58. The Charter of the Organization of American States,⁶⁴ concluded in 1948, repeats, in article 9, the sentence from article 3 of the Montevideo Convention quoted above. Article 10 of the Charter declares

Recognition implies that the State granting it accepts the personality of the new State, with all the rights and duties that international law prescribes for the two States.

These two treaties appear to be the only instances in which an explicit attempt has been made to regulate the question by way of a multilateral instrument.

59. As regards the attitude of the Commission with respect to the topic, in 1949 it was agreed to place the item "Recognition of States and Governments" on the list of subjects for study. Although reference was made to the political aspects of the question the general opinion was that, in view of its undoubted importance, an attempt should be made to codify it.

60. Since 1949 the Commission has referred to the subject of the recognition of States and governments in several of its drafts, but has not entered into an extensive examination of the question. A paragraph of the observations concerning the draft Declaration on Rights

⁵⁷ United Nations, *Treaty Series*, vol. 597, p. 3. As of 1 April 1971, 23 States were parties to the Convention.

⁵⁸ Case concerning Right of Passage over Indian Territory (Merits), *I.C.J. Reports* 1960, p. 6.

⁵⁹ Paras. 40-43.

⁶⁰ Regarding the recognition of belligerency, see generally chapter XVI below.

⁶¹ 1948 Survey, para. 42.

⁶² *Ibid.*

⁶³ League of Nations, *Treaty Series*, vol. CLXV, p. 19.

⁶⁴ United Nations, *Treaty Series*, vol. 119, p. 3.

and Duties of States, adopted by the Commission at its first session in 1949, stated:

Another proposed article would have provided that "Each State has the right to have its existence recognized by other States". The supporters of this proposal took the view that, even before its recognition by other States, a State has certain rights in international law; and they urged that, when another State on an appraisal made in good faith considers that a political entity has fulfilled the requirements of statehood, it has a duty to recognize that political entity as a State; they appreciated, however, that, in the absence of an international authority with competence to effect collective recognition, each State would retain some freedom of appraisal until recognition had been effected by the great majority of States. On the other hand, a majority of the members of the Commission thought that the proposed articles would go beyond generally international law in so far as it applied to new-born States; and that in so far it related to already established States the article would serve no useful purpose. The Commission concluded that the whole matter of recognition was too delicate and too fraught with political implications to be dealt with in a brief paragraph in this draft Declaration, and it noted that the topic was one of the fourteen topics the codification of which has been deemed by the Commission to be necessary or desirable.⁶⁵

61. Secondly, paragraph 1 of the commentary to article 60 (Severance of diplomatic relations) of the draft articles on the law of treaties adopted by the Commission in 1966 states:

[...] any problems that may arise in the sphere of treaties from the absence of recognition of a Government do not appear to be such as should be covered in a statement of the general law of treaties. It is thought more appropriate to deal with them in the context of other topics with which they are closely related, either succession of States and Governments, which is excluded from the present discussion for the reasons indicated in paragraph 30 of the Introduction to this chapter, or recognition of States and Governments, which the Commission in 1949 decided to include in its provisional list of topics selected for codification.⁶⁶

The United Nations Conference on the Law of Treaties amended article 60 of the Commission's draft with a view to cover not only the "severance" but also the "absence" of diplomatic relations, as well as of consular relations.⁶⁷

62. Paragraph 2 of article 7 of the draft articles on special missions, adopted by the Commission in 1967, stated:

A State may send a special mission to a State, or receive one from a State, which it does not recognize.⁶⁸

As indicated in paragraph 2 of the commentary to this draft article, the Commission did not, however, decide the question whether the sending or reception of a

special mission prejudices the solution of the problem of recognition, as that problem lay outside the scope of the topic of special missions. The Sixth Committee, which considered the draft articles at the twenty-third session of the General Assembly in 1968, decided to delete the paragraph quoted⁶⁹ and the Convention on Special Missions adopted by the General Assembly on 8 December 1969 does not refer to the existence or absence of recognition on the part of the States concerned.

63. Finally, it may be noted that during its 1969 session the Commission briefly considered, in connexion with the topic entitled "Relations between States and international organizations", the desirability of dealing, in separate articles, with the possible effects of various exceptional situations, such as absence of recognition, on the representation of States in international organizations. The Commission decided, in view of the delicate and complex nature of the questions concerned, to resume examination of the matter at a future session and to postpone any decision.⁷⁰

64. When, pursuant to paragraph 2 of General Assembly resolution 1505 (XV) of 12 December 1960, Member States submitted written comments regarding possible subjects for study by the Commission, three expressed support for a study of the question of the recognition of States and governments, whilst another considered that discussion might be postponed for the time being because of the political considerations which are interwoven with the basic questions. A broadly similar division of views was expressed in the Sixth Committee.⁷¹

65. In general summary of the position, it may be said that the subject has continued to be of importance, and indeed, in a society composed largely of independent States, it appears unlikely that the act of recognition could cease at any time to be of significance in international relations. Although steps have been taken (for example, the inclusion of the topic on the Commission's long-term programme in 1949) towards codifying the topic so as to make its legal parameters more distinct, there has been a persistent current of opinion which has considered that since what was involved was a matter of discretion, lying in the hands of individual governments, there was, in effect, nothing to codify except this basic freedom of choice. While the question of the recognition of particular bodies (whether as States, governments or as other entities, such as those engaged in belligerency or national liberation movements) has been raised on numerous occasions since the inception of the United Nations, a process of collective recognition has not

⁶⁵ *Yearbook of the International Law Commission, 1949*, p. 289, para. 50. Provisions of the draft Declaration on Rights and Duties of States and of the Declaration on Principles of Friendly Relations, concerning the non-recognition of territorial acquisitions made by illegal means are cited in paras. 43-44 above.

⁶⁶ *Ibid.*, 1966, vol. II, p. 260, document A/6309/Rev.1, part II, chap. II.

⁶⁷ Vienna Convention on the Law of Treaties, article 74.

⁶⁸ *Yearbook of the International Law Commission, 1967*, vol. II, p. 350, document A/6709/Rev.1, chap. II, D.

⁶⁹ *Official Records of the General Assembly, Twenty-third Session, Sixth Committee, 1048th meeting*, para. 43.

⁷⁰ *Yearbook of the International Law Commission, 1969*, vol. II, p. 206, document A/7610/Rev.1, para. 18.

⁷¹ *Ibid.*, 1970, vol. II, p. 258, *et seq.*, document A/CN.4/230, paras. 52-58.

emerged;⁷² membership of and representation in international organizations such as the United Nations has remained in terms distinct from the act of recognition.⁷³ Whether or not for that reason, there has been no general move to institutionalize the process of recognition on a world-wide scale. An effort to codify the topic would thus have, at the outset, to consider the major issue of whether or not the exercise of recognition is to remain essentially a matter lying wholly or largely in the hands of individual States and governments.

66. A distinction may perhaps be usefully drawn, however, between the basic act of recognition itself and elements of its application or implementation. While the act of recognition is exercised by individual States, the freedom of choice which is granted is supposed to be exercised by them in good faith and in accordance with the rules of international law governing the conditions, requirements, forms and effects of recognition. In this perspective, attention may be called to various specific aspects of the matter which may themselves be suitable for codification: for instance, modes of recognition, including implied recognition; recognition *de facto* and *de jure*; the retroactive effect of recognition; and the legal effects of recognition (or of its absence) with regard to such matters as jurisdictional immunity, State succession, diplomatic and consular relations and treaty relations. When aspects of the question of the effects of non-recognition have arisen in connexion with the Commission's work in various spheres (for example, with respect to the preparation of the draft articles on the law of treaties and in connexion with the topic of "Relations between States and international organizations"), the Commission has had difficulty in dealing with the question in isolation and has tended to set it aside until such time as it might decide to study

the topic on a wider basis. It is possible, therefore, that by distinguishing the role of recognition in terms of the political relations between States on the one hand, and its legal requirements and consequences in various spheres on the other, consideration might be given to examining aspects listed above, not just in a single context, but more widely, with a view to its possible codification as a distinct legal institution or procedure, albeit one which is part of a larger whole. It may be pointed out in this connexion that over the past thirty to fifty years there have been numerous cases of one State refusing to recognize another (or, more commonly, of one government declining to recognize another) and nevertheless engaging in a series of legal transactions with that other State—negotiating with that State or government, entering into agreements with it, trading with it, and being members of the same international organization. The question thus arises of the exact significance, outside of formal diplomatic relations and under domestic law, to be attached to non-recognition, and the legal basis of such relations as the two States or governments may be said to maintain. Subject to the more general political factors indicated, to which the Commission will no doubt wish to give due weight, the Commission may therefore like to take this possibility into consideration, as a way in which the topic might conceivably be approached, in the event that it should decide to take up the study of the question of recognition.

5. JURISDICTIONAL IMMUNITIES OF FOREIGN STATES AND THEIR ORGANS, AGENCIES AND PROPERTY⁷⁴

67. The 1948 Survey included a section on "Jurisdiction over foreign States"⁷⁵ and the Commission decided to include in its 1949 list of topics "Jurisdictional immunities of States and their property". Under the heading "Jurisdiction over foreign States", the 1948 Survey mentioned the jurisdictional immunities of States and their property, sovereigns, armed forces, public vessels, and of bodies engaged in commercial transactions and activities as an agency of the State. It appears that the scope of the corresponding section of the 1948 Survey was thus somewhat wider than the topic included by the Commission in its 1949 list which, as mentioned, referred to jurisdictional immunities of the States and their property only. However, for the present purposes of the revision of the list by the Commission, it was considered more appropriate to deal in this section with all the aspects referred to in the 1948 Survey.

68. The basic principle that States and their property are immune from the jurisdiction of foreign courts, although generally recognized, has not been directly stated in a multilateral convention having a universal character.⁷⁶ The obligation to grant jurisdictional

⁷² "Collective recognition" means that States act collectively during the process of receiving information of the situation, evaluating that information and reaching a decision, and communicating that decision; "individual recognition", on other hand, means that States act individually throughout this process. Between these two modes, of individual or collective recognition, intermediate procedures have, to some degree, been evolved on a regional basis, most notably within the framework of the inter-American system. Doctrine has distinguished in this connexion, as particular intermediate types, "consulted" and "concerted" recognition. In so-called "consulted recognition" States act collectively as regards the collection of information, the other two steps (the taking of a decision and its communication) being in principle performed individually. "Concerted recognition" implies concerted action at the decision-making stage, as well as during the stage of gathering information. Lastly, the acts of individual recognition (whether or not forming part of the process of "consulted recognition" may be communicated at the same time ("simultaneous recognition") or by the same act ("joint recognition"). Without a detailed examination of State practice, it would be difficult to evaluate the extent to which these procedures and distinctions have actually been observed.

⁷³ It may be noted that in resolution 396 (V) of 14 December 1950, entitled "Recognition by the United Nations of the representation of a Member State", the General Assembly expressly declared that the attitude adopted by the General Assembly concerning the question of which of several authorities shall be regarded as the Government entitled to represent a Member State, "shall not of itself affect the direct relations of individual Member States with the State concerned".

⁷⁴ For matters relating to diplomatic and consular privileges and immunities of representatives of States, diplomatic agents and consular officers, see chapter VI below.

⁷⁵ 1948 Survey, paras. 50-56.

⁷⁶ At the regional level the Convention on Private International Law (the Bustamante Code of 1928 (League of

immunity is grounded in the overriding legal duty to respect the independence and equal status of States. However, if the basic principle is generally recognized as flowing from "customary law" or "international comity", its contents and, particularly, its application to certain organs, vessels or agencies of the State, are far from being clear. Frequently, however, these uncertainties have been settled by specific agreements. The need to codify the topic was underlined by the 1948 Survey as follows:

There would appear to be little doubt that the question—in all its aspects—of jurisdictional immunities of foreign States is capable and in need of codification. It is a question which figures, more than any other aspect of international law, in the administration of justice before municipal courts. The increased economic activities of States in the foreign sphere and the assumption by the State in many countries of the responsibility for the management of the principal industries and of transport have added to the urgency of a comprehensive regulation of the subject. While there exists a large measure of agreement on the general principle of immunity, the divergencies and uncertainties in its application are conspicuous not only as between various States but also in the internal jurisprudence of States.⁷⁷

The Survey added:

[...] it may be found convenient to include in the effort to codify this branch of the law the immunities of the Head of the State as well as those of men-of-war and of the armed forces of the State.⁷⁸

69. The existence of the basic principle referred to above has been reflected in several conventions, *inter alia*, in conventions adopted on the basis of the Commission's drafts, such as the Conventions relating to diplomatic law and the law of the sea. The principle has also been reflected in other conventions and more restricted agreements, primarily, it would seem, with the object of defining its limits and any exceptions agreed upon. The latter treaties have been concerned with State trading activities, with the activities of separate State entities (which generally again raise the State trading question), with State ships and with the armed forces of the State.⁷⁹ So far as State trading is concerned, several States, including some whose foreign trade is carried out only by State agencies and others whose trade is only partly public, have concluded a number of bilateral treaties of commerce and navigation and trade agreements containing provisions waiving jurisdictional immunities in the case of commercial

activities.⁸⁰ At the regional level the Convention on Private International Law (the Bustamante Code)⁸¹ provides that the courts of the contracting States will normally be incompetent to take cognizance of civil or commercial cases to which other contracting States are parties.

70. On the other hand, the final report on the Immunity of States in respect of Commercial Transactions, drawn up in 1960 by the Asian-African Legal Consultative Committee,⁸² favoured a restrictive approach to the immunities of States in respect of commercial transactions. More specifically, all the delegations (other than that of Indonesia) were of the view that a distinction should be made between different types of State activity and that immunity should not be granted in respect of those activities which may be called commercial or of a private nature. All delegations were agreed that where the State trading organization was a separate entity under the law of the State, immunity should not be available. The position adopted in this report was based, at least in part, on the trends in the very extensive judicial and executive practice which exists and appears to be similar, generally speaking, to the practice followed at present in most west European countries and in the United States of America. It is perhaps also relevant to note here that, in several States which had previously been largely immune in their own courts, legislation has been enacted limiting or abolishing that immunity.

71. So far as one particular form of State trading activity is concerned—air transport—immunity has also been recognized as limited. The Convention for the Unification of Certain Rules Relating to International Carriage by Air (Warsaw, 1929)⁸³ makes subject to the rules of the Convention (presumably including those concerning jurisdiction) transportation performed by the State or by legal entities constituted under public law. (An additional Protocol to the Convention, concluded in 1955,⁸⁴ provides that parties can declare that this provision is not to apply to transportation performed directly by the State or by territories under its administration. Few States have made this declaration.) Further, some bilateral air transport agreements provide for waiver of any immunities by carriers designated under them, and it is understood that such waiver is in some instances a condition of the grant of operating permission.

72. So far as State ships are concerned, the Brussels International Convention for the Unification of Certain Rules relating to the Immunity of State Owned Vessels

Nations, *Treaty Series*, vol. LXXXVI, p. 111) provides generally for immunity, subject to certain specified exceptions, some of which are mentioned below.

It may be noted that a Committee of Experts established by the Council of Europe completed in 1970 a draft European Convention on State Immunity and Additional Protocol which has been submitted to other organs, including the Committee of Ministers of the Council, for approval.

⁷⁷ 1948 Survey, para. 52.

⁷⁸ *Ibid.*, para. 54.

⁷⁹ There are other matters which have been subject of practice, litigation and of doctrinal discussion but on which, it would appear, there are no relevant treaties: jurisdiction in respect of immovable property, in respect of the distribution of estates and other funds, and in respect of ownership of shares in a corporation organized in another State.

⁸⁰ In certain of these agreements, immunity was retained with respect to members of the State trading organ, whilst waived in respect of the actual commercial activities undertaken.

⁸¹ See foot-note 76 above.

⁸² *Asian-African Legal Consultative Committee, Third Session, Colombo, 20 January to 4 February 1960* (New Delhi, 1960), pp. 55-81.

⁸³ League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

⁸⁴ United Nations, *Treaty Series*, vol. 478, p. 371.

(1926)⁸⁵ provides in general for the submission of such vessels, their cargo and the State to the jurisdiction of foreign courts with the exception of vessels owned or operated by the State and used, at the time the cause of action arose, exclusively on governmental and non-commercial service.⁸⁶ The substance of this Convention is included in the relevant title of the Treaty on International Commercial Navigation Law signed at Montevideo in 1940.⁸⁷

73. The Convention on the Territorial Sea and the Contiguous Zone (Geneva, 1958)⁸⁸ contains provisions concerning the immunity of State vessels. Article 21, based on the Brussels Convention, provides that the set of rules applicable to merchant ships in passage through the territorial sea applies also to government ships operated for commercial purposes, but not to other government ships. One consequence of this article, which was controversial,⁸⁹ is that government ships operated for commercial purposes might be stopped or diverted by the coastal State for purposes of certain legal proceedings. Somewhat similarly, article 9 of the Convention on the High Seas (Geneva, 1958)⁹⁰ provides that ships owned or operated by a State and used only on government non-commercial service shall, on the high seas, have complete immunity from the jurisdiction of any State other than the flag State.⁹¹ On the other hand, article 22 of the Convention on the Territorial Sea and the Contiguous Zone provides that, with certain exceptions, nothing in the articles on innocent passage which apply to government ships (other than warships operated for non-commercial purposes) affects the immunities which such ships enjoy under these articles "or other rules of international law", and article 8 of the Convention on the High Seas states that warships on the high seas have complete immunity from the jurisdiction of any State other than the flag State.

⁸⁵ League of Nations, *Treaty Series*, vol. CLXXVI, p. 199.

⁸⁶ Note, however, that under the Convention, in certain cases, such vessels can be sued in the courts of the State which owns or operates them.

⁸⁷ M. O. Hudson, ed., *International Legislation* (Washington, Carnegie Endowment for International Peace, 1949), vol. VIII (1938-1941), p. 460.

⁸⁸ United Nations, *Treaty Series*, vol. 516, p. 205. On the law of the sea, see chap. X below.

⁸⁹ The Commission in paragraph 2 of its commentary on its article 22 (article 21 of the Convention) noted that certain members were unable to accept the rules of the Brussels Convention and opposed the article (*Yearbook of the International Law Commission*, 1956, vol. II, p. 276, document A/3159). A number of State made declarations and reservations with respect to this and related provisions, to which objections were made (see United Nations, *Multilateral Treaties in respect of which the Secretary-General performs depositary functions: List of signatures, Ratifications, Accessions, etc. as at 31 December 1970* (United Nations publication, Sales No. E.71.V.5), pp. 362 *et seq.*

⁹⁰ United Nations, *Treaty Series*, vol. 450, p. 11.

⁹¹ Again it can be noted that this provision is concerned with execution of jurisdiction outside territorial limits rather than the exercise of jurisdiction by the courts. As regards declarations and reservations made, and objections thereto, see United Nations, *Multilateral treaties ... 1970* (*op. cit.*), pp. 368 *et seq.*

74. It may be noted that there is a series of procedural issues which may arise in virtually any case, irrespective of subject-matter, involving jurisdiction over, and the immunities of, a foreign State or its agencies. These questions, which have been referred to (but not always fully clarified) in some of the treaties, are listed below. First, in what circumstances can a State waive its immunity and when can it be said to have done so? While it is usually clear that express submission before a court is sufficient, what interpretation is to be given to a provision in a contract, or in a national law or executive order? Second, in what circumstances, if any, can precautionary action (for instance, arrest of a ship) be taken before trial against a State? Third, what weight should be given to certificates or other statements by the executive of the States involved as to matters in issue in the suit? Fourth, what rights, if any, exist with regard to the discovery of documents and the obtaining of evidence? And, finally, to what extent is execution available in respect of the property of the State or its agencies?

75. Differences of view exist on these questions, as indeed they do on the substantive matters referred to above. But it may be suggested that the differences are not in all cases large, although they can nevertheless cause friction and uncertainty; that, as was said in the 1948 Survey, it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law on this topic, commanding general acceptance; and that its day-to-day importance makes it suitable for codification and progressive development.

76. So far as the immunities of the Head of State are concerned, perhaps the major development since the 1948 Survey has been the inclusion in the Convention on Special Missions of article 21, paragraph 1, which reflects the existence of customary immunities as follows:

The Head of the sending State, when he leads a special mission, shall enjoy in the receiving State or in a third State national law to Heads of State on an official visit.

Paragraph 2 of the same article recognizes that the Head of Government, Minister for Foreign Affairs and other persons of high rank likewise enjoy certain privileges and immunities under international law when outside their country.

77. There remains one major instance of the application of jurisdictional immunities with respect to organs of a foreign State, namely, with respect to armed forces stationed in the territory of another State.⁹² While the issues which arise are, from a legal standpoint, often similar to those which may occur in the other contexts mentioned earlier, the special considerations attendant on the deployment and control of armed forces require

⁹² Discussion here is limited to armed forces present with the consent of the host State outside the immediate battlefield situation. Occupying forces are also excluded. Regarding the law of armed conflicts, see generally chapter XVI below.

that this topic or aspect be distinguished from those referred to above.

78. The principal questions which arise are the powers of the sending State to exercise jurisdiction over its forces in the host State, the immunity from local jurisdiction of the sending State in respect of those proceedings, and the immunities, if any, of the force and its members from local jurisdiction in respect of matters governed by the local law. These questions have been regulated by local legislation, by administrative action, by bilateral agreement and, more recently, by multipartite treaties. National courts have also had frequent occasion to determine the questions involved.

79. The practice would now appear to have developed that where members of the armed forces of a State are stationed in another State for any period of time an agreement relating to that presence and to their status in general will be concluded. When this is done, largely consistent precedents are available to those preparing the agreements. The existence during the past twenty-five years of a number of pertinent multipartite and other treaties has largely ensured that the customary law has not had to be invoked. One central feature of the whole of this practice, however, which should be noted is that it has mostly, if not solely, concerned particular groups of countries only. The questions involved have arisen on a general basis only in respect of United Nations peace-keeping forces.⁹³

6. EXTRA-TERRITORIAL QUESTIONS INVOLVED IN THE EXERCISE OF JURISDICTION BY STATES

80. Extra-territorial elements may need to be considered in connexion with the exercise of jurisdiction by States in two main sets of circumstances: in determining the extent to which a State may claim jurisdiction with respect to matters having an extra-territorial aspect, and, secondly, with regard to the question of the recognition by foreign States of the exercise of jurisdiction by another. The present section is divided under two headings in accordance with this distinction. The following account does not purport to be exhaustive of the matters which might be referred to under this heading, attention being concentrated on aspects which may be of particular interest to the Commission.

(a) *Exercise of jurisdiction by a State in matters having an extra-territorial element*

81. This section is not concerned with the full range of purposes to which the exercise of State jurisdiction may be put, which would hardly be a subject for codification in terms of international law, but with the narrower question of the exercise of such jurisdiction to regulate matters having a distinct extra-territorial element. Such matters broadly comprise, on the one hand,

those where the act in question may be said to be a matter of general international concern—for example, the commission of acts of piracy, or war crimes, trading in narcotic drugs or aerial hijacking—and those in which the particular State has a specific interest, even though the activity was conducted outside its territory or has some other external element. The two categories frequently overlap or coalesce, however, in particular instances. Specific topics which are usually considered to fall, to a greater or lesser extent, within the purview of international law (matters such as human rights, nationality, extradition, asylum and the rights of aliens) are considered elsewhere in the survey.

82. So far as the Commission is concerned, it may be recalled that the 1948 Survey included, under the heading "Jurisdiction of States", *inter alia* the topic "Jurisdiction with regard to crimes committed outside national territory". The 1948 Survey pointed out that the right of a State to try its nationals for offences committed abroad was not in issue. The question which required clarification and authoritative solution was the existence and extent of the right in respect of aliens.⁹⁴ The Commission decided to include the question in its list of topics for codification, but without any mention of priority. The Commission has not subsequently taken up the study of the topic.

83. A number of the conventions which have been concluded in order to regulate issues of international concern have included provisions for extra-territorial litigation (i.e. litigation having an extra-territorial element), usually in terms of criminal jurisdiction, although it cannot be said that a clear and consolidated pattern of practice has emerged. Thus the Geneva Conventions of 1949⁹⁵ require the prosecution by the parties of all those who commit breaches of the obligations specified, regardless of the place where the offence was committed. The 1923 International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications⁹⁶ provides in certain cases for the prosecution of nationals for offences committed abroad. The International Convention for the Suppression of Counterfeiting Currency⁹⁷ of 1929 goes further and allows the prosecution of aliens for certain offences committed abroad. The Single Convention on Narcotic Drugs⁹⁸ of 1953 similarly provides—in the absence of the possibility of extradition—for proceedings against aliens for extra-territorial violations of the rules.

84. So far as offences committed in aircraft are concerned, the Convention on Offences and Certain Other

⁹⁴ 1948 Survey, paras. 61-63.

⁹⁵ United Nations, *Treaty Series*, vol. 75, p. 2. The Convention on the Prevention and Punishment of the Crime of Genocide (*ibid.*, vol. 78, p. 277), by contrast, provides for prosecution by the courts of the State in whose territory the crime was committed, or by an international tribunal. The Nürnberg Principles, prepared by the Commission in 1960, do not deal with the question of jurisdiction. (See paras. 442-443 and 434-436 below.)

⁹⁶ League of Nations, *Treaty Series*, vol. XXVII, p. 213.

⁹⁷ *Ibid.*, vol. CXII, p. 371.

⁹⁸ United Nations, *Treaty Series*, vol. 520, p. 151.

⁹³ The question of the privileges and immunities of United Nations peace-keeping forces is referred to in paragraph 351 below.

Acts Committed on Board Aircraft (Tokyo, 1963)⁹⁹ provides, *inter alia*, for the exercise of jurisdiction by the State of registration and also by other States, where the offence in question has certain specified characteristics. A Convention for the Suppression of Unlawful Seizure of Aircraft, which was signed at The Hague in December 1970 under the auspices of ICAO, contains provisions requiring the State of registry and the State where the aircraft lands to take various measures regarding the exercise of jurisdiction with respect to such offences.¹⁰⁰ Any State which is able to arrest the alleged offender is obliged to submit the case to its competent authorities if it does not extradite him.

85. Under the Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, concluded by OAS (February, 1971),¹⁰¹ it is provided in article 1 that

acts of terrorism, especially kidnapping, murder and other assaults against the life or physical integrity of those persons to whom the State has the duty, according to international law, to give special protection, as well as extortion in connexion with those crimes,

are to be considered common crimes of international significance, regardless of motive (article 2). Where the alleged offender is not extradited, the State in whose territory he is is required to try him, as if the deed imputed to him had been committed in that State (article 5).

86. Most of the treaties mentioned in the preceding paragraphs are primarily if not solely concerned with criminal jurisdiction. The law relating to maritime activities contains, however, elements of both civil and criminal jurisdiction. The absence of any particular national jurisdiction over the high seas (as opposed to land areas) has necessarily entailed a wide exercise of jurisdiction by States with respect to their ships operating there. The 1958 Law of the Sea Conventions contain a number of articles, based largely on customary law, defining the scope of national jurisdiction over activities outside the State's territory and territorial sea. Other general instruments drawn up outside the United Nations also regulate jurisdiction over acts on the high seas. The 1954 International Convention (with annexes) for the Prevention of the Pollution of the Sea by Oil, as amended in 1962 and 1969,¹⁰² for example, requires

that legal proceedings be brought by the flag State in certain circumstances in respect of oil discharges. The European Agreement for the prevention of broadcasts transmitted from stations outside national territories (Council of Europe, 1965)¹⁰³ requires the parties to take jurisdiction over the defined offences which are committed by their nationals, *inter alia*, outside any national territory, or by aliens whether within their territory, on their ships or aircraft, or on board any floating or airborne object under their jurisdiction. The parties also have power to apply its provisions to broadcasting stations conducted from objects affixed to or supported by the sea-bed.

87. As regards the issue of civil jurisdiction more generally, this has also given rise to questions which have—especially regionally—been answered by treaties. At least one group of treaties concerning civil jurisdiction—those regulating maritime claims—are potentially of universal scope. The International Convention relating to arrest of seagoing ships (Brussels, 1952)¹⁰⁴ and the International Convention on certain rules concerning civil jurisdiction in matters of collision (Brussels, 1952)¹⁰⁵ after defining the claims to which they apply, prescribe the States which have jurisdiction. With the exception of this group of treaties, however, those regulating civil jurisdiction are either bilateral or regional. The principal multipartite convention concluded to date appears to be that signed by the member States of EEC in 1968. This European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters¹⁰⁶ bases jurisdiction primarily on the domicile of the defendant, but provides for various additional grounds of jurisdiction as well.

88. In commenting on the material set out above it may be useful to point to a distinction between civil and criminal jurisdiction. Whereas there has been relatively little action, especially at the universal as opposed to regional level, with reference to civil jurisdiction, for criminal jurisdiction the contrary is true. This activity, much of it in the form of treaties,¹⁰⁷ has however arisen out of particular substantive concerns—with war crimes, with trafficking in narcotic drugs, with aerial hijacking and so on—and has not been directed towards the question of exercise of the jurisdiction of a State in extra-territorial matters as such. Putting it another way, that question has not been regarded as a subject or problem in itself, but rather as one of the issues which sometimes—but not always

⁹⁹ *Ibid.*, vol. 704 (not yet published), No. 10106.

¹⁰⁰ ICAO, *Convention for the Suppression of Unlawful Seizure of Aircraft*, document 8920 (1970). For a more detailed account, see para. 328 below.

¹⁰¹ *Official Documents of the Organization of American States*, OEA/Ser.A/17 (Washington D.C., OAS General Secretariat, 1971), p. 6. It is provided in article 9 that the Convention is open for signature by member States of OAS as well as by any other State that is a Member of the United Nations or any of its specialized agencies, or is a party to the Statute of the International Court of Justice, or is invited by the General Assembly of OAS to sign it. See also paras. 247-248 below.

¹⁰² United Nations *Treaty Series*, vol. 327, p. 3 and *ibid.*, vol. 600, p. 332. The 1969 amendments are annexed to IMCO Assembly resolution A 175(VI) of 21 October 1969.

¹⁰³ United Nations, *Treaty Series*, vol. 634, p. 239.

¹⁰⁴ *Ibid.*, vol. 439, p. 193.

¹⁰⁵ *Ibid.*, p. 217.

¹⁰⁶ American Society of International Law, *International Legal Materials*, 1969 (Washington, 1969), vol. VIII, No. 2, p. 229.

¹⁰⁷ Note however the adoption by the General Assembly of resolutions 2583 (XXIV) of 15 December 1969 and 2712 (XXV) of 15 December 1970 (see para. 448 below) on the question of prosecution and extradition of war criminals, and also the numerous national laws adopted in implementation of the treaties referred to above.

—¹⁰⁸ arise when certain substantive activities which are of widespread international concern are being prohibited or regulated by treaty. Moreover the extent of the grant of jurisdiction differs from one convention to another.

89. Attention might be drawn to the case of national legislation, which by contrast usually deals with jurisdiction in general terms.¹⁰⁹ Proceeding from this, however, it might be said that State practice as represented by legislative provisions on jurisdiction is so diverse and conflicting that no common rule could be drawn from it.¹¹⁰ It could nevertheless be suggested that the differences in practice between national laws are not so great as they may appear at first sight; accordingly, it might perhaps be possible to reconcile the apparent disparities.¹¹¹

90. A further and perhaps more basic issue is whether the available material, taken within its over-all setting, is such as to suggest that any attempted codification could, in practice, proceed beyond the inclusion of certain very generally worded rules. Would it be possible to say more, in essence, than that States may exercise jurisdiction in respect of acts having extra-territorial elements if the act has some reasonable connexion with them or their territory, subject to the rules established in conventions dealing with specific matters of international concern? Investigation may, of course, show that a more narrowly drafted rule or rules could be prepared, at least in defined areas, in accordance with the prevailing pattern of dealing with major instances separately. The central question which arises for consideration, therefore, can perhaps be summarized as follows: to what extent would a general codification instrument, probably in broad terms, assist in the implementation or improvement of the means available for dealing with matters such as jurisdiction over war criminals, over persons committing crimes on aircraft, or trafficking in narcotics, where a degree of exercise of jurisdiction by a State in matters having an extra-territorial element has been generally accepted by the international community?

91. The matters treated above have been chiefly

those in which a treaty has been concluded involving the possibility of the use of national legislative and judicial jurisdiction to deal with widespread problems of a general or social nature. A more particular body of practice has to some degree developed with respect to various forms of national economic regulation, most notably taxation where a foreign element is involved, or other controls applied, such as restrictive trade practices legislation. In these instances the interest which a State may have in seeking to exercise jurisdiction derives from its own position and circumstances, and the matter becomes of international concern only, as it were, by process of a chain reaction, when the steps taken are such as to involve the interests of another country or countries.

92. The competence of a State to tax an alien or foreign income is generally considered to be subject to some limitations—albeit very limited; it would appear that the State must be able to claim at least some interest in the income in question. In practice these very vague limits are generally replaced by bilateral treaties between the States involved.¹¹² These treaties, which allocate the taxing competence between the two States and provide for mutual assistance, follow in many cases almost standard forms. Accordingly, there have been attempts to draw up model conventions either as a basis for a multilateral treaty or as a guide for those preparing bilateral treaties. Certain of these efforts have looked particularly to the concerns of the developing States. Thus, within the United Nations, an *Ad Hoc* Group of Experts on Tax Treaties between Developed and Developing Countries has met pursuant to resolution 1273 (XLIII) of the Economic and Social Council.¹¹³ Second, the Asian-African Legal Consultative Committee in 1967 adopted a Final Report on Relief against Double Taxation and Fiscal Evasion (or Multiple Taxation).¹¹⁴ The report contained "General Principles recommended for adoption in international agreements for avoidance of double or multiple taxation of income".¹¹⁵ Finally, the Fiscal Committee of OECD in 1963 drew up a draft model convention.¹¹⁶

93. Other taxes—for instance on capital gains and estates and on such activities as air and shipping transport—have also been the subject of special bilateral treaties. Such taxes have sometimes also been regulated in the course of more comprehensive bilateral treaties (e.g. those on air transport, consular treaties, and treaties of commerce and navigation). And, of course, multilateral agreements, especially the General Agreement on Tariffs and Trade, often control the imposition

¹⁰⁸ Thus it may be noted that although the practices of slavery and racial discrimination have been overwhelmingly condemned by the international community, the pertinent treaty instruments have not included any extensive grant of extra-territorial jurisdiction. And see foot-note 95 above as to the position under the Genocide Convention.

¹⁰⁹ There would appear to have been no comprehensive investigation of national law on the question of extra-territorial jurisdiction since that of the Harvard Research of 1935. It is not clear whether any significant changes have occurred since then.

¹¹⁰ Indeed, the draftsmen of several of the treaties were not successful in preparing exhaustive provisions on jurisdiction, and reserved the possibility of the application of national laws defining the extent of the jurisdiction which might be exercised.

¹¹¹ On this issue, see for example the introduction to the draft Convention prepared by the Harvard Research, quoted in the 1948 Survey, para. 63. In addition it might be noted that apparently wide claims of jurisdiction may often in practice be limited by the exercise of prosecutorial and judicial discretion.

¹¹² See generally United Nations, *International Tax Agreements: World Guide to International Tax Agreements*.

¹¹³ See United Nations, *Tax treaties between developed and developing countries* (United Nations Publication, Sales No. E.69.XVI.2).

¹¹⁴ *Asian-African Legal Consultative Committee, Report of the Ninth Session, New Delhi, 18-29 December 1967*, p. 97.

¹¹⁵ *Ibid.*, p. 100.

¹¹⁶ OECD, *Draft Double Taxation Convention on Income and Capital: Report of the OECD Fiscal Committee* (Paris, 1963).

of certain taxes by reference to most-favoured-nation or national treatment.

94. Questions concerning the exercise of competence in cases having an extra-territorial element have also arisen in respect of the attempts of a number of States to apply their legislation prohibiting or controlling monopolies to activities occurring outside their territories. Once again it is accepted that there are limits on this competence (the State claiming jurisdiction must have some real interest in the matter it is attempting to regulate), and again the limits are vague. The situation is different from the case of taxation, however, in that treaties have not in general been negotiated to resolve the questions.¹¹⁷

95. It is probable that the above two questions are not suitable for general codification as carried out by the Commission. The problems involved may occur (especially in the second case) only in limited areas of the world and may be better resolved on a bilateral or regional basis; the questions, although arising against a broader background of the restrictions on the exercise of the jurisdiction of a State in cases having an extra-territorial element, are in many respects technical ones to be resolved by the appropriate expert bodies; the issues often appear to differ from one case to the next and to need discreet treatment often by way of a bilateral treaty; and, as noted, steps have already been taken by other bodies to resolve the issues. On the other hand the issues which have presented themselves and the possible answers are illustrative for the purposes of a more general consideration of the exercise of jurisdiction in cases having an extra-territorial element, and, as such, of interest to the Commission.

(b) *Extra-territorial recognition of the jurisdiction exercised by States*

96. The basic rule is that a State has no power to take action outside its territory in order to apply and enforce its laws, as by carrying out acts of sovereignty in the territory of another State. It is, for instance, contrary to international law for a State to send members of its police force into another State to effect an arrest, or to execute a judgement. The rigours of this rule have been reduced in many cases by bilateral, regional and universal treaties providing for various kinds of judicial assistance (independent of the operation of private international law, whereby the courts of the system may give recognition to legal transactions in another). Thus, so far as arrest of alleged criminals is concerned, extradition treaties have been concluded, and other treaties regulate the service of documents, the obtaining of evidence and the recognition and enforcement of foreign judgements. The question of extradition is discussed later.¹¹⁸ So far as the other matters—service of process, obtaining of evidence and the recognition and execution of judgements—are concerned, while it is not possible

to list the large number of bilateral instruments,¹¹⁹ it is possible to mention one or two recent regional and general codification instruments. Thus the Asian-African Legal Consultative Committee in 1965 adopted sets of model rules: first on the recognition and enforcement of foreign judgement in civil cases, and second on the service of judicial process and the recording of evidence in civil and criminal cases, and recommended them for consideration of governments.¹²⁰ The Convention signed in 1968 by the States members of EEC regarding civil and commercial judgements deals *inter alia* with the enforcement of judgements.¹²¹

97. Within the United Nations, two conventions have been adopted concerned with specific aspects of execution. In 1958 the Convention on the Recognition and Enforcement of Foreign Arbitral Awards was concluded¹²² and in 1956 the Convention on the Recovery Abroad of Maintenance.¹²³

98. The basic question here is whether the Commission should concern itself with the preparation of texts concerning judicial assistance. Although it might be said that this question falls within the field of private international law rather than of public international law, and that the Commission has generally not been concerned with the former, elements of both would be involved in any regulation which was attempted. There has already been a considerable amount of practice on a bilateral or regional basis and, at the universal level, with regard to specific aspects (such as foreign arbitral awards). Arguably this suggests that this pattern of practice should be continued, but the evidence is not such as to impose a categorical answer on this point.

99. More broadly, as was stated in the 1948 Survey when dealing with the question of recognition of the acts of foreign States,¹²⁴ it might be said that it would be inconsistent with the independence or equality of States if the organs of one State were to refuse to recognize private rights grounded on the legislative, judicial or administrative acts of other States. Moreover weighty reasons of international economic stability and orderly intercourse might counsel an international regulation of the subject. On the other hand, it was acknowledged that such questions were questions of private international law. Further, limits resulting from *l'ordre public* and other sources clearly restrained the scope of any

¹¹⁹ Or the provisions in the law of many States providing, even in the absence of a treaty, for service of foreign process, and other forms of judicial co-operation.

¹²⁰ Asian-African Legal Consultative Committee, *Report of the Seventh Session, Baghdad, 1965*, pp. 107-115.

¹²¹ Referred to in para. 87 above.

¹²² United Nations, *Treaty Series*, vol. 330, p. 3. The work of UNCITRAL in the field of international commercial arbitration may be noted. More generally it may be noted also that some of the general conventions concerned with such matters as counterfeiting of currency and traffic in women and children provide for the issuance of letters rogatory and for the recognition of foreign conviction for the purpose of laws on recidivism.

¹²³ *Ibid.*, vol. 268, p. 3.

¹²⁴ 1948 Survey, paras. 48-49.

¹¹⁷ Except in so far as the restrictive practice law of a number of countries has been harmonized. The extra-territorial problem then does not generally arise.

¹¹⁸ See paras. 368-371 below.

obligation of recognition. The Commission decided not to include the topic of "Recognition of Acts of Foreign States" in its list, mainly, it would seem, because the area was considered too vast and ill-defined.¹²⁵ In the light of this consideration, the Commission may therefore possibly like to examine whether it might include in its future long-term programme the undertaking at some stage of a study dealing with the more limited question of judicial assistance (or of specific aspects of that question, such as service of civil proceedings and the taking of evidence), due account being taken of the regional and bilateral activity which has already been pursued in this field.

Chapter II

The law relating to international peace and security

1. CHARTER PROVISIONS AND ADOPTION OF THE DECLARATION ON THE STRENGTHENING OF INTERNATIONAL SECURITY AND OF THE DECLARATION ON PRINCIPLES OF FRIENDLY RELATIONS

100. Article 2 of the Charter, which sets out the principles on which the United Nations and its Members shall act, includes in paragraphs 3 and 4 a statement of the basic obligations of States with respect to the maintenance of international peace and security. These paragraphs provide as follows:

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

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.

101. These two fundamental provisions of the Charter were amplified and re-endorsed by the General Assembly in two Declarations adopted during the twenty-fifth session (1970). In paragraph 1 of the Declaration on the Strengthening of International Security (resolution 2734 (XXV) of 16 December 1970) the General Assembly "*Solemnly reaffirms* the universal and unconditional validity of the purposes and principles of the Charter" and, in paragraph 2, "*Calls upon* all States to adhere strictly" to those purposes and principles. Paragraphs 5 and 6, which relate expressly to the two principles contained in Article 2, paragraphs 3 and 4 of the Charter, are as follows:

The General Assembly,

...

5. *Solemnly reaffirms* that every State has the duty to refrain from the threat or use of force against the territorial integrity and political independence of any other State, and that the territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter, that the territory of a State shall not be the object of acquisition by another State resulting from the

threat or use of force, that no territorial acquisition resulting from the threat or use of force shall be recognized as legal and that every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State;

6. *Urges* Member States to make full use and seek improved implementation of the means and methods provided for in the Charter for the exclusively peaceful settlement of any dispute or any situation, the continuance of which is likely to endanger the maintenance of international peace and security, including negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, good offices including those of the Secretary-General, or other peaceful means of their own choice, it being understood that the Security Council in dealing with such disputes or situations should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.

The other provisions of the Declaration on the Strengthening of International Security refer to additional aspects of the matter.

102. The Declaration on Principles of Friendly Relations, adopted by the General Assembly under resolution 2625 (XXV) of 24 October 1970 on the occasion of the twenty-fifth anniversary of the United Nations, includes specific texts relating to these two major principles, based on the work of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, which met between 1964 and 1970. In the preamble to resolution 2625 (XXV) the General Assembly stated that it was "deeply convinced" that the adoption of the Declaration would contribute to the strengthening of world peace and constitute a landmark in the development in international law and of relations among States, in promoting the rule of law among nations and particularly the universal application of the principles embodied in the Charter.

103. Particular reference is accordingly made below to the formulation contained in the Declaration with respect to the two major principles coming under the heading "The law relating to international peace and security", namely the prohibition of the threat or use of force and the requirement that disputes be settled by peaceful means.

2. PROHIBITION OF THE THREAT OR USE OF FORCE

104. The basic principle contained in Article 2, paragraph 4, of the Charter¹²⁶ is the outcome of an historical development undergone by international law over the past half century. The Covenant of the League of Nations provided in article 11 that

1. Any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations.

Article 16 declared that

¹²⁵ *Yearbook of the International Law Commission, 1949*, p. 4, 5th meeting, paras. 30-36.

¹²⁶ Quoted in para. 100 above.

1. Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15,¹²⁷ it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League,

which thereby agreed to suspend all relations with it, whilst the Council was empowered to recommend what military contribution Members should make to the armed forces to be used to protect the covenants of the League.

105. Under the General Treaty for Renunciation of War as an Instrument of National Policy¹²⁸ (the "Kellogg-Briand Pact") of 1928 the parties condemned recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another [article I]

and agreed

that the settlement or solution of all disputes of conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means [article II].

106. These instruments, which were invoked by the International Tribunals of Nürnberg and Tokyo, contributed to the process whereby the principle of the prohibition of the threat or use of force received express recognition in the United Nations Charter and in present international law. Chapter VII of the Charter deals with the action which may be taken "with respect to threats to the peace, breaches of the peace, and acts of aggression" and Chapter VIII with "regional arrangements". Besides the steps which may be taken by the Security Council (in particular under Articles 39 to 42 of the Charter), particular reference may be made in this connexion to Article 51, relating to "the inherent right of individual or collective self-defence" and to Articles 52 and 53, concerning regional arrangements with respect to the maintenance of international peace and security.

107. The Commission has, at the request of the General Assembly, on several occasions considered the general question of the prohibition of the threat or use of force. The draft Declaration on Rights and Duties of States prepared by the Commission in 1949¹²⁹ contains the following provisions:

¹²⁷ Article 12 provided that Members should submit "any dispute likely to lead to a rupture" to arbitration, judicial settlement or inquiry by the Council, and agree in no case to resort to war until three months after the award, decision or report. Under Article 13, Members agreed to submit suitable disputes to arbitration or adjudication, to comply with the award or decision, and not to go to war with a Member which so complied. Disputes not submitted to arbitration or adjudication were, under Article 15, to be dealt with by the Assembly or Council of the League; if the report of the Council was agreed to by all Members, except the parties to the dispute (or, in the case of a report of the Assembly, by all Members of the Council and a majority of other Members of the League, other than the parties), the Members agreed not to go to war with any party which complied with the recommendations of the report.

¹²⁸ League of Nations, *Treaty Series*, vol. XCIV, p. 57.

¹²⁹ *Yearbook of the International Law Commission*, 1949, p. 287.

Article 9. Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity or political independence of another State, or in any other manner inconsistent with international law and order.

Article 12. Every State has the right of individual or collective self-defence against armed attack.¹³⁰

108. The Commission was also concerned with the law relating to the prohibition of the use of force in the course of its preparation of the Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgement of the Tribunal,¹³¹ and of the draft Code of Offences against the Peace and Security of Mankind.¹³²

109. The principle of the prohibition of the threat or use of force was amongst those considered by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States.¹³³ The formulation contained in the Declaration adopted under resolution 2625 (XXV) of 24 October 1970 is set out below:

The principle that States 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

Every State has the duty to refrain in its 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. Such a threat or use of force constitutes a violation of international issues.

A war of aggression constitutes a crime against the peace, for which there is responsibility under international law.

In accordance with the purposes and principles of the United Nations, States have the duty to refrain from propaganda for wars of aggression.

Every State has the duty to refrain from the threat or use of force to violate the existing international boundaries of another State or as a means of solving international disputes, including territorial disputes and problems concerning frontiers of States.

¹³⁰ See also articles 3 (duty of non-intervention in the internal or external affairs of another State), 4 (duty to refrain from fomenting civil strife in the territory of another State), 7 (duty of State to ensure that conditions prevailing in its territory do not menace international peace and security), 8 (duty to settle disputes with States by peaceful means in such a manner that international peace and security, and justice, are not endangered), 10 (duty to refrain from giving assistance to a State acting in violation of article 9) and 11 (non-recognition of territorial acquisition by a State acting in violation of article 9). See generally, *Preparatory study concerning a Draft Declaration on the Rights and Duties of States* (United Nations publication, Sales No. 1949.V.4).

¹³¹ See paras. 434-436 below.

¹³² See paras. 437-441 below.

¹³³ The elaborations of other principles—especially that on equal rights and self-determination (quoted in part in para. 46 above)—also contain relevant provisions. Other General Assembly resolutions, such as resolutions 380 (V) and 381 (V) of 17 November 1950 and 2160 (XXI) of 30 November 1966, also bear on the principle, as do a number of resolutions of the General Assembly and Security Council concerned with particular disputes and questions.

Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect. Nothing in the foregoing shall be construed as prejudicing the positions of the parties concerned with regard to the status and effects of such lines under their special régimes or as affecting their temporary character.

States have a duty to refrain from acts of reprisal involving the use of force.

Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence.

Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State.

Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.

The territory of a State shall not be the object of military occupation resulting from the use of force in contravention of the provisions of the Charter. The territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal. Nothing in the foregoing shall be construed as affecting:

(a) Provisions of the Charter or any international agreement prior to the Charter régime and valid under international law; or

(b) The powers of the Security Council under the Charter.

All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control and strive to adopt appropriate measures to reduce international tensions and strengthen confidence among States.

All States shall comply in good faith with their obligation under the generally recognized principles and rules of international law with respect to the maintenance of international peace and security, and shall endeavour to make the United Nations security system based on the Charter more effective.

Nothing in the foregoing paragraphs shall be construed as enlarging or diminishing in any way the scope of the provisions of the Charter concerning cases in which the use of force is lawful.

110. The principle has also been affirmed in many regional, multipartite and bilateral treaties. Multipartite treaties of alliance also often contain provisions embodying the principle, as do a large number of bilateral treaties of alliance, friendship, and non-aggression.

111. As regards the specific aspect of the principle involved in attempts to define the concept of aggression, attention may be drawn to a series of efforts which have been made in this respect within the framework of the United Nations. Thus, in 1951, a proposal that the General Assembly define the concept of aggression as precisely as possible was referred, along with the relevant documents, to the Commission.

The sense of the Commission was that it was undesirable to define aggression by a detailed enumeration of aggressive acts,

since no enumeration could be exhaustive. Furthermore, it was thought inadvisable unduly to limit the freedom of judgment of the competent organs of the United Nations by a rigid and necessarily incomplete list of acts constituting aggression. It was therefore decided that the only practical course was to aim at a general and abstract definition.¹⁸⁴

112. The Commission was unable, however, to agree to the broadest general definition submitted, and rejected a proposal that it make further attempts to define aggression on the basis of the other texts before it,¹⁸⁵ although it did subsequently include in its draft Code of Offences against the Peace and Security of Mankind paragraphs relating to aggression. Among the offences listed in article 2 of the draft code are:

(1) Any act of aggression, including the employment by the authorities of a State of force against another State for any purpose other than national or collective self-defence or in pursuance of a decision or recommendation by a competent organ of the United Nations.

(2) Any threat by the authorities of a State to resort to an act of aggression against another State.¹⁸⁶

113. The definition of the concept of aggression has also been the subject of extensive consideration by the General Assembly itself and by a number of special Committees.¹⁸⁷ Following debates in 1951 and 1952, the General Assembly by resolution 688 (VII) of 20 December 1952, established a Special Committee which was requested to submit to the Assembly's ninth session "draft definitions of aggression or draft statements of the notion of aggression". This Committee, to which several texts were presented, decided unanimously not to put the texts to a vote but to transmit them to the General Assembly and Member States for comments.¹⁸⁸ A second Special Committee, which was established by General Assembly resolution 895 (IX) of 4 December 1954 and met in 1956, also did not adopt a definition.¹⁸⁹

114. By resolution 1181 (XII) of 29 November 1957, the General Assembly decided *inter alia* to invite the views of those States which had been admitted to membership since 14 December 1955 and to refer their and other replies to a new Committee composed of the Member States of the General Committee of the General Assembly. This Committee was to deter-

¹⁸⁴ *Yearbook of the International Law Commission, 1951*, vol. II, p. 132, document A/1858, para. 45.

¹⁸⁵ *Ibid.*, pp. 132-133, paras. 46-52.

¹⁸⁶ *Ibid.*, p. 135.

¹⁸⁷ For a history of the consideration of the question before 1952 see *Official Records of the General Assembly, Seventh Session, Annexes*, vol. II, agenda item 54, document A/2211. This was prepared in answer to General Assembly resolution 599 (VI) of 31 January 1952, in which the General Assembly stated its view that, although the existence of the crime of aggression may be inferred from the circumstances peculiar to each particular case, it is nevertheless possible and desirable, with a view to ensuring international peace and security and to developing international criminal law, to define aggression by reference to the elements which constitute it.

¹⁸⁸ *Official Records of the General Assembly, Ninth Session, Supplement No. 11 (A/2638)*, p. 3, para. 26.

¹⁸⁹ *Ibid.*, Twelfth Session, Supplement No. 16 (A/3574), p. 5, para. 24.

mine when it was appropriate for the General Assembly to consider again the question of defining aggression. The Committee met in 1959, 1962 and 1965 but did not determine that any particular time was appropriate for the General Assembly to renew its consideration of the question.

115. The matter came before the General Assembly again in 1967. In resolution 2330 (XXII) of 18 December 1967 the Assembly recognized that there was a widespread need to expedite the definition of aggression and established a Special Committee on the Question of Defining Aggression which was "to consider all aspects of the question so that an adequate definition of aggression may be prepared". This Committee met in 1968, 1969 and 1970. At these sessions it made some progress towards its objective and by General Assembly resolution 2644 (XXV) of 25 November 1970 it was requested to continue its work during 1971. A session of the Special Committee was held between 1 February and 5 March 1971.

116. It may be noted that the Commission also considered the question of coercive acts during the preparation of its articles on the law of treaties. Article 49 of its final draft provided that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of the Charter of the United Nations. Paragraph 3 of the commentary noted that:

Some members of the Commission expressed the view that any other form of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter", and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.¹⁴⁰

117. Article 49, with one change ("the principles of the Charter" became "the principles of international law embodied in the Charter"), became article 52 of the Vienna Convention on the Law of Treaties.¹⁴¹ In addition the Conference adopted a Declaration on the Prohibition of Military, Political or Economic Coercion in the Conclusion of Treaties.¹⁴² This Declaration, *inter alia*, solemnly condemned the threat or use of pressure in any form, whether military, political, or economic, by any State in order to coerce another State to perform any act relating to the conclusion of a treaty in violation of the principles of the sovereign equality of States and freedom of consent.

118. The formulation of the principle contained in the Declaration on Principles of Friendly Relations¹⁴³ included a provision that

All States shall pursue in good faith negotiations for the early conclusion of a universal treaty on general and complete disarmament under effective international control...

Without attempting to give a complete account of the disarmament negotiations which have been pursued since the adoption of the United Nations Charter,¹⁴⁴ reference may be made to a series of treaties which have been adopted in this sphere. The main instances are the following: the Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (Moscow, 1963),¹⁴⁵ the Treaty on principles governing the activities of States in the exploration and use of outer space, including the moon and other celestial bodies (1967),¹⁴⁶ the Treaty on Non-Proliferation of Nuclear Weapons (1968),¹⁴⁷ and the Treaty on the Prohibition of the emplacement of nuclear weapons and other weapons of mass destruction on the sea-bed and the ocean floor and in the subsoil thereof (1970).¹⁴⁸ Efforts have also been made or are being pursued on a regional basis with respect to the introduction of arms control measures, or of steps to reduce or prohibit particular military activities, in given areas: the conclusion in 1967 of the Treaty for the Prohibition of Nuclear Weapons in Latin America (Mexico City, 1967)¹⁴⁹ may be noted in this connexion. Issues raised with regard to the weapons referred to in these agreements, and other forms of mass destruction, remain under discussion.

119. Whilst it is difficult, given the breadth and importance of the issues involved, to pronounce on the matter with any degree of finality, the following general comments suggest themselves with regard to the question of the prohibition of the threat or use of force. First, major steps have already been taken, or are being taken, by the international community to emphasize and elaborate the basic principle prohibiting the use of force; these efforts, chiefly in the context of the Declaration on Principles of Friendly Relations, have resulted in the adoption of texts commanding general support. Second, the history of these attempts over the past twenty-five years suggests that they are more likely to be successful, at least in the sense of receiving the eventual broad approval of governments, if they are made in bodies which are composed of representatives of States. Lastly, the history of the matter indicates the importance of co-ordinating activities in this area, so as to avoid the problems which may arise if parallel and possibly conflicting or overlapping codification efforts are undertaken at the same time.

¹⁴⁴ For a detailed description, see United Nations, *The United Nations and Disarmament, 1945-1970* (United Nations publication, Sales No. E.70.IX.1).

¹⁴⁵ United Nations, *Treaty Series*, vol. 480, p. 43.

¹⁴⁶ *Ibid.*, vol. 610, p. 205.

¹⁴⁷ Annexed to General Assembly resolution 2373 (XXII) of 12 June 1968.

¹⁴⁸ Annexed to General Assembly resolution 2660 (XXV) of 7 December 1970.

¹⁴⁹ United Nations, *Treaty Series*, vol. 634, p. 281.

¹⁴⁰ *Yearbook of the International Law Commission, 1966*, vol. II, p. 246, document A/6309/Rev.1, part II, chap. II.

¹⁴¹ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

¹⁴² *Ibid.*, p. 285, document A/CONF. 39/26, annex.

¹⁴³ Quoted in para. 109 above.

3. LAW RELATING TO THE PEACEFUL SETTLEMENT OF DISPUTES

120. Although States are obliged under present general international law to settle their disputes¹⁵⁰ by peaceful means, they are not obliged to submit to any particular method of settlement. This is also the position under the Charter of the United Nations, Article 2, paragraph 3 of which sets out the general obligation in the following terms:

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

121. Article 33, paragraph 1, lists in a non-exhaustive manner¹⁵¹—the parties may use “other peaceful means of their own choice”—the main “peaceful means” of settlement of disputes identified by general international law at the present time, namely: negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement and resort to regional agencies or arrangements. The possibility under the Charter system of resort to one of the political organs of the United Nations should also be noted. Consistent with the principle stated earlier, the various procedures which have been developed and which are listed above operate on a basis which is, in the last resort, optional. A general distinction may, however, be drawn between instances (such as acceptance of the jurisdiction of the International Court of Justice, under Article 36, paragraph 2 of its Statute) where States have agreed before a dispute arises to accept a given mode of settlement, and those procedures where agreement is reached on the method of settlement only after the dispute has arisen (thus probably the commonest method, at least in the initial stages of a dispute, is for the parties to seek a settlement by negotiation).

122. The present survey does not attempt to review the total amount of practice, and accompanying commentaries, relating to each of the means listed above and various additional means which could be distinguished, although it may be recalled here that each means entails a procedure having its own characteristics and particularities and that a codification of the topic as a whole, or of some of the specific means of peaceful settlement, would imply the need to deal, in precise terms, with such characteristics and particularities. The following section has been divided as follows:

(a) Treaties relating to the peaceful settlement of disputes, and consideration of the matter, and of specific means, by United Nations bodies.

(b) Consideration by the Commission of the subject of the peaceful settlement of disputes.

(c) Dispute settlement provisions included in various specific treaties, in particular those concluded on the basis of drafts prepared by the Commission.

123. Strictly speaking, the last heading relates to particular methods of settling disputes arising out of treaties on specific topics, rather than to over-all legal provisions on the subject *per se*, but it serves to indicate the attitude of the international community and of the Commission on the question of peaceful settlement as a whole. Moreover the matters dealt with under that heading bear on the issue, which has often been raised, of whether the better or more feasible method of providing for the peaceful settlement of disputes is through the conclusion of a general instrument or through the use of more particularized means, such as the inclusion in a treaty on a given topic of an article (or other provision) providing for the settlement of disputes arising out of the application or interpretation of the treaty in question.

(a) *Treaties relating to the peaceful settlement of disputes, and consideration of the matter, and of United Nations bodies*

124. The major instance of a treaty bearing on peaceful settlement as such is the Charter of the United Nations. This imposes an obligation on States Members to settle their disputes by the peaceful means mentioned: but, as noted, adoption of one or other means is not made obligatory. In addition, United Nations organs have certain powers to consider disputes which threaten international peace or security, with a view to their peaceful settlement. These powers have frequently been used; indeed, the majority of disputes between States which have occurred during the last twenty-five years have been discussed at some stage by one of the major political organs of the United Nations.¹⁵² The relevant Charter provisions, and subsequent practice, have been the subject of extensive consideration by the General Assembly and by the Security Council and other United Nations bodies at different times,¹⁵³ most recently in the context of the consideration of the Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. The Declaration on Principles of Friendly Relations¹⁵⁴ contains the following elaboration of the principle of peaceful settlement of disputes.¹⁵⁵

¹⁵² It has not been thought possible to attempt, within the scope of the present survey, to summarize this practice. See, however, generally the *Repertory of Practice of United Nations Organs* and the *Repertoire of the Practice of the Security Council*.

¹⁵³ For a summary of pertinent studies and decisions by United Nations organs, see S. D. Bailey, *Peaceful Settlement of International Disputes: Some Proposals for Research*, 3rd rev. ed. (UNITAR, 1971), chap. II, and annexes I and II.

¹⁵⁴ General Assembly resolution 2625 (XXV), annex.

¹⁵⁵ As regards the various proposals made in the course of the adoption of this text, see *Official Records of the General Assembly, Twenty-first Session, Annexes*, agenda item 87, document A/6230, paras. 158-161; *ibid.*, *Twenty-second Session, Annexes*, agenda item 87, document A/6799, paras. 371-374; and, generally, *ibid.*, *Twenty-fifth Session, Supplement No. 18* (A/8018), p. 12, paras. 16-18 and p. 35, paras. 56-57.

¹⁵⁰ As regards the definition of a dispute that given by the Permanent Court of International Justice in the *Mavromatis Palestine Concession* (Preliminary Objections (P.C.I.J., 1924 Series A, No. 2., p. 11) may be noted—“a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons”—with the qualification that the present section is concerned only with disputes between States.

¹⁵¹ Thus it may be noted the use of “good offices” is not specifically mentioned.

The principles that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered

Every State shall settle its international disputes with other States by peaceful means in such a manner that international peace and security and justice are not endangered.

States shall accordingly seek early and just settlement of their international disputes by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their choice. In seeking such a settlement the parties shall agree upon such peaceful means as may be appropriate to the circumstances and nature of the dispute.

The parties to a dispute have the duty, in the event of failure to reach a solution by any one of the above peaceful means, to continue to seek a settlement of the dispute by other peaceful means agreed upon by them.

States parties to an international dispute, as well as other States shall refrain from any action which may aggravate the situation so as to endanger the maintenance of international peace and security, and shall act in accordance with the purposes and principles of the United Nations.

International disputes shall be settled on the basis of the sovereign equality of States and in accordance with the principle of free choice of means. Recourse to, or acceptance of, a settlement procedure freely agreed to by States with regard to existing or future disputes to which they are parties shall not be regarded as incompatible with sovereign equality.

Nothing in the foregoing paragraphs prejudices or derogates from the applicable provisions of the Charter, in particular those relating to the pacific settlement of international disputes.

125. It may be noted that the principle was also considered by the General Assembly in 1965 and 1966, at the request of the United Kingdom, which suggested that a study be made "of the entire field of peaceful settlement of disputes in all its aspects".¹⁵⁶ The Assembly did not take any substantive action in either year and the item mentioned has not been further considered.

126. The General Assembly has also considered particular methods of disputes settlement,¹⁵⁷ of which the most recent was a study, arising out of a proposal made by the Netherlands, concerning the feasibility and desirability of establishing a special international body for fact-finding or of entrusting to an existing organization fact-finding responsibilities. In resolution 2329 (XXII) of 18 December 1967 the General Assembly, *inter alia*, urged Member States to make more effective use of the existing methods of fact-finding, drew special attention to the possibility of recourse to procedures for the ascertainment of facts, and requested the Secretary-General to prepare a register of experts in legal and other fields, whose services the parties to a dispute might use for fact-finding, and asked Member

States to nominate up to five of their nationals for inclusion in such a register.¹⁵⁸

127. Finally, it may be noted that, in the course of its twenty-fifth session in 1970, the General Assembly considered an item entitled "Review of the role of the International Court of Justice" and adopted resolution 2723 (XXV) of 15 December 1970, whereby the Secretary-General was requested to seek the views of Member States on the matter and to submit a report, analysing the replies received, to the twenty-sixth session of the General Assembly. Reference was also made by a number of speakers to the topic of the peaceful settlement of disputes during the discussion at the General Assembly's twenty-fifth session of the item "Need to consider suggestions regarding the review of the Charter of the United Nations".

128. General instruments concerning the pacific settlement of disputes have also been concluded at the regional level. Thus in 1948 the American Treaty on Pacific Settlement (the Pact of Bogotá)¹⁵⁹ was signed. After a first chapter setting out and reaffirming the parties' general obligations to settle disputes by peaceful means, the Treaty includes chapters on good offices and mediation, investigation and conciliation, jurisdiction of the International Court of Justice and arbitration. It replaces, for the parties to it, eight earlier multilateral conventions drawn up within the Inter-American system. The members of the Council of Europe prepared and opened for signature in 1957 a European Convention for the peaceful settlement of disputes, containing chapters on judicial settlement, conciliation and arbitration.¹⁶⁰

129. The Charter of the Organization of African Unity (Addis Ababa, 1963)¹⁶¹ includes as one of its principles the peaceful settlement of disputes by negotiation, mediation, conciliation or arbitration, and provides for the establishment of a Commission of Mediation, Conciliation and Arbitration. A Protocol to the Charter dealing with the Commission was concluded in 1964.¹⁶² The Protocol provides for the composition and organization of the Commission and the general principles applicable to its operation, and contains chapters on mediation, conciliation and arbitration.

¹⁵⁸ A first version of the register was issued in 1968 (A/7240) and a second version, containing summaries of biographical data supplied by Member States in respect of their nationals, was issued in 1969 (A/7751), together with a further supplement in 1970 (A/8108). See also *Yearbook of the International Law Commission*, 1970, vol. II, p. 268, document A/CN.4/230, para. 139, for a suggestion made in 1967 that the Commission should consider drawing up the statute of a new United Nations body for fact-finding.

¹⁵⁹ United Nations, *Treaty Series*, vol. 30, p. 55.

¹⁶⁰ *Ibid.*, vol. 320, p. 243.

¹⁶¹ *Ibid.*, vol. 479, p. 39.

¹⁶² American Society of International Law, *International Legal Materials* (Washington, D.C., 1964) vol. III, No. 6, p. 1116. Under article XIX of the Charter, the Protocol required approval only by the Assembly of Heads of State and Government to make it effective, and, as thus approved, forms an integral part of the Charter.

¹⁵⁶ *Ibid.*, *Twentieth Session, Annexes*, agenda item 99, document A/5964, para. 3; *ibid.*, *Twenty-first Session, Annexes*, agenda item 36, document A/6617.

¹⁵⁷ Including revision of the General Act for the Pacific Settlement of International Disputes of 26 September 1928. The Revised General Act, to which, as of 1 January 1971, six States had acceded, is contained in United Nations, *Treaty Series*, vol. 71, p. 101.

(b) *Consideration by the Commission of the subject of the peaceful settlement of disputes*

130. The question of peaceful settlement as such has been before the Commission in at least three different contexts: first, as a proposal that the "Pacific settlement of international disputes" be included in its 1949 list of topics for codification; second, in the preparation of the draft Declaration on Rights and Duties of States; and, third, in its works on arbitral procedure. These are now considered in turn.

131. When the Commission was drawing up its list of topics in 1949, one of its members suggested that it consider the inclusion of the pacific settlement of international disputes.¹⁶³ Some members of the Commission doubted whether codification—rather than progressive development—was really involved and also pointed to the fact that the Interim Committee of the General Assembly was working on the question. Doubts were also expressed whether anything that the Commission produced would be other than a dead letter. The Chairman accordingly concluded that the general opinion did not favour inclusion of the topics.¹⁶⁴

132. The draft Declaration on Rights and Duties of States, prepared by the Commission in 1949, contains the following provision:

Article 8. Every State has the duty to settle its disputes with other States by peaceful means in such a manner that international peace and security, and justice, are not endangered.

The Commentary notes that the text was derived from article 15 of the Panamanian draft and that its language follows closely Article 2, paragraph 3, of the United Nations Charter.

133. The 1948 Survey contained a section on the law of arbitral procedure, with reference to the arbitration of disputes between States, and the Commission decided to include this subject on its 1949 list.¹⁶⁵ In 1952 it adopted a provisional draft on arbitral procedure¹⁶⁶ which it submitted to Governments for their comments. Following the receipt of those comments the Commission prepared in 1953 a revised draft which it recommended the General Assembly should recommend to Members with a view to the conclusion of a convention.¹⁶⁷ The General Assembly however made no such recommendation; in resolution 989 (X) of 14 December 1955, the Assembly noted that a number of suggestions for improvement of the draft had been made and invited the Commission to consider the comments of Governments and the observations made in the Sixth Committee, and to report to the General Assembly at its thirteenth session. The resolution

expressed also the General Assembly's belief that a set of rules on arbitral procedures would inspire States to draw up provisions for inclusion in treaties and special arbitration agreements and declared that the General Assembly would consider at its thirteenth session the problem of the desirability of convening a conference to conclude a convention on the topic.

134. The Commission was accordingly faced with the question whether it should aim at a convention or rather prepare a set of model rules which States and others might adopt in drawing up arbitration agreements.¹⁶⁸ The Commission chose the latter alternative: the 1953 draft went beyond what a majority of Governments were prepared to accept in a general multilateral convention, and recasting it with a view to attracting their support would mean complete revision involving in all probability an alteration of the whole concept on which the draft was based. The Model Rules on Arbitral Procedure¹⁶⁹ which were prepared as a result were then submitted to the General Assembly which, in resolution 1262 (XIII) of 14 November 1958, decided to bring

the draft articles... to the attention of Member States for their consideration and use, in such cases and to such extent as they consider appropriate, in drawing up treaties of arbitration or *compromis*

and invited Governments to send their comments to the Secretary-General with a view to facilitating a review by the United Nations at an appropriate time. No action has subsequently been taken by the Assembly or the Commission on this item.

(c) *Dispute settlement provisions included in various specific treaties, in particular those concluded on the basis of drafts prepared by the Commission*

135. Before some of the instances of such provisions are considered it may be useful to draw a distinction between procedural provisions which can be said to be an integral part of the main body of the treaty or entwined with substantive rules, and those having the nature of final clauses. A clear instance of the former

¹⁶³ The criticisms in the General Assembly of the Commission's first draft and of its proposal for the preparation of a convention were summarized as follows by the Special Rapporteur:

"The Commission's draft would distort traditional arbitration practice, making it into a quasi-compulsory jurisdictional procedure, instead of preserving its classical diplomatic character, in which it admittedly produces a legally binding, but final, solution, while leaving Governments considerable freedom as regards the conduct and even the outcome of the procedure, both wholly dependent on the form of the *compromis*. The General Assembly took the view that the International Law Commission had exceeded its terms of reference by giving *preponderance* to its desire to promote the development of international law instead of concentrating on its *primary* task, the codification of custom."

See *Yearbook of the International Law Commission*, 1957, vol. II, p. 2, document A/CN.4/109, para. 7. The passage was reproduced by the Commission in its report on its tenth session (*ibid.*, 1958, vol. II, p. 80, document A/3859, para. 12).

¹⁶⁹ *Ibid.*, 1958, vol. II, p. 83, document A/3859, chap. II, section II.

¹⁶³ The 1948 Survey (see para. 4 above) had included only the law of arbitral procedure (1948 Survey, para. 99).

¹⁶⁴ *Yearbook of the International Law Commission*, 1949, pp. 43 *et seq.*, 5th meeting, paras. 69-82.

¹⁶⁵ *Ibid.*, pp. 50-51, 6th meeting, paras. 33-44.

¹⁶⁶ *Ibid.*, 1952, vol. II, p. 60, document A/2163, chap. II.

¹⁶⁷ *Ibid.*, 1953, vol. II, p. 201, document A/2456, chap. II. For the draft convention, see *ibid.*, p. 208.

kind is provided by the provisions in the Convention on Fishing and Conservation of the Living Resources of the High Seas (Geneva, 1958)¹⁷⁰ concerning the establishment and competence of commissions (articles 9-11). The same may be said of articles 65 and 66, and the related annex, of the Vienna Convention on the Law of Treaties.

136. The two sets of draft articles prepared by the Commission in 1953 as draft conventions on the elimination of future statelessness and on the reduction of future statelessness both contained an identical provision (article 10) regarding the establishment of a tribunal which would be competent to decide complaints presented by an agency acting on behalf of stateless persons and, secondly, for disputes between contracting parties regarding the interpretation or application of the conventions to be submitted either to the International Court of Justice or to the tribunal to be established.¹⁷¹ The commentary noted with reference to the provision concerning the settlement of disputes between the parties that

That provision is common to most international conventions of a legislative character, in particular, those concluded under the auspices of the United Nations.¹⁷²

137. The Convention on the Reduction of Statelessness,¹⁷³ which was prepared on the basis of the Commission's draft and which was opened for signature in 1961, provides in article 14 for the compulsory jurisdiction of the International Court of Justice in the following terms:¹⁷⁴

Any dispute between Contracting States concerning the interpretation or application of this Convention which cannot be settled by other means shall be submitted to the International Court of Justice at the request of any one of the parties to the dispute.

138. The first set of draft articles prepared by the Commission and considered by a codification conference—those on the Law of the Sea—contained no general provisions on peaceful settlement. It did, however, include the provisions already mentioned relevant to the conservation of maritime resources.¹⁷⁵ In addition, the

Commission included provisions for the settlement of disputes arising from the articles on the continental shelf (article 73). Having explained that certain members were opposed to the inclusion of a draft clause on compulsory arbitration or jurisdiction, on the ground that there was no reason to impose on States one only of the various means provided by international law for the settlement of disputes, the reasons why the majority of the Commission nevertheless considered such a clause to be necessary were set out as follows:

The articles on the continental shelf are the result of an attempt to reconcile the recognized principles of international law applicable to the régime of the high seas with recognition of the rights of the coastal State over the continental shelf. Relying, as it must, on the continual necessity to assess the importance of the interests at stake on either side, this compromise solution must allow for some power of discretion. Thus, it will often be necessary to rely on a subjective assessment—with the resultant possibilities of disagreement—to determine whether, in the terms of article 71 paragraph 1, the measures taken by the coastal State to explore and exploit the continental shelf result in "unjustifiable" interference with navigation or fishing; whether, as is laid down in paragraph 2 of that article, the safety zones established by the coastal State do not exceed a "reasonable" distance around the installation, whether, in the terms of paragraph 5 of the article, a sea lane is "recognized" and whether it is "essential to international navigation"; finally, whether the coastal State, when preventing the laying of submarine cables or pipelines, is really acting in the spirit of article 70, which only authorizes such action when it comes within the scope of "reasonable" measures for the exploration and exploitation of the continental shelf. If it is not kept within the limits of respect for law and is not impartially complied with, the new régime of the continental shelf may endanger the higher principle of the freedom of the seas. Consequently, it seems essential that States which disagree concerning the exploration and exploitation of the continental shelf should be required to submit any dispute arising on this subject to an impartial authority. For this reason the majority of the Commission thought it necessary to include the clause in question. It is incumbent on the parties to decide the manner in which they wish to settle their differences; if the parties are unable to reach agreement on the manner of settlement, however, either party may refer the matter to the International Court of Justice.¹⁷⁶

139. It would appear therefore that the particular provisions for settlement of disputes included by the Commission in its draft articles on the law of the sea arose directly out of the various specific provisions. By contrast, so far as the inclusion of a comprehensive article for the settlement of disputes with respect to the law of the sea in general was concerned, the view was expressed that the continental shelf provision was a special case and that it did not follow that similar machinery should be set up for the whole draft. Furthermore, such a task did not lie within the Commission's purview, but was properly the concern of the General Assembly.¹⁷⁷ The first United Nations Conference on

¹⁷⁰ United Nations, *Treaty Series*, vol. 559, p. 285.

¹⁷¹ *Yearbook of the International Law Commission, 1953*, vol. II, p. 228, document A/2456, chap. IV, section IX. Regarding the Commission's work on statelessness, see paras. 360-367 below.

¹⁷² *Yearbook of the International Law Commission, 1953*, vol. II, p. 227, document A/2456, para. 157. The final draft conventions submitted by the Commission in 1954 contained a revised version of the articles in question (*ibid.*, 1954, vol. II, p. 142, document A/2693, para. 25).

¹⁷³ See United Nations, *Human Rights: A Compilation of International Instruments of the United Nations* (United Nations publication, Sales No. E.68.XIV.6), p. 53.

¹⁷⁴ Note also Article II:

"The Contracting States shall promote the establishment within the framework of the United Nations, as soon as may be after the deposit of the sixth instrument of ratification or accession, of a body to which a person claiming the benefit of this Convention may apply for the examination of his claim and for assistance in presenting it to appropriate authority."

¹⁷⁵ See para. 135. above.

¹⁷⁶ *Yearbook of the International Law Commission, 1956*, vol. II, pp. 300-301, document A/3159, para. 4 of commentary to article 73. The contrary view that there was no organic connexion between the disputes settlement provision and the substantive articles was expressed at the 1958 Conference on the Law of the Sea.

¹⁷⁷ *Ibid.*, vol. I, 334th meeting, paras. 30-37.

the Law of the Sea held in 1958 finally decided to delete the provision concerning the settlement of disputes arising out of the articles relating to the continental shelf, did not insert in the Conventions a comprehensive dispute settlement provision, and instead adopted an Optional Protocol¹⁷⁸ providing for the compulsory settlement of disputes arising out of the interpretation or application of any of the four Law of the Sea Conventions. The machinery for the settlement of disputes arising out of the Convention on Fishing and Conservation of the Living Resources of the High Seas was retained in that Convention.¹⁷⁹

140. The draft articles concerning diplomatic intercourse and immunities prepared by the Commission in 1958¹⁸⁰ and submitted to the General Assembly with a recommendation that they be recommended to Member States with the view to the conclusion of a convention, did contain, unlike the articles on the law of the sea, a comprehensive article on dispute settlement (article 45). The article provided that disputes that could not be settled through diplomatic channels were to be referred to conciliation or arbitration or, failing that, at the request of one of the parties, to the International Court of Justice. The commentary to draft article 45 read in part:

Some members considered that where, as in the present case, the Commission's task had consisted of codifying substantive rules of international law, it was unnecessary to deal with the question of their implementation. Others suggested that the clause should be included in a special protocol. A majority, however, thought that, if the present draft were submitted in the form of a convention, a provision governing the settlement of disputes would be necessary and that, for this purpose, it should stipulate that, in cases where other peaceful means of settlement proved ineffective, the dispute would be referred to the International Court of Justice.¹⁸¹

Once again a provision for comprehensive settlement was not adopted by the codification Conference, which instead adopted an Optional Protocol¹⁸² establishing a compulsory procedure of settlement as between the parties to the latter instrument.

141. Neither the draft articles on consular relations nor those on special missions prepared by the Commission in 1961 and 1967 respectively contained provisions for the settlement of disputes. In both instances the body responsible for preparing a convention on the basis of the Commission's draft adopted an optional protocol establishing a compulsory procedure, rather than a settlement procedure in the conventions.

¹⁷⁸ Optional Protocol of Signature concerning the Compulsory Settlement of Disputes. United Nations, *Treaty Series*, vol. 450, p. 169.

¹⁷⁹ The Optional Protocol exempts (article II) from its operation the provisions of the Convention on Fishing and Conservation of the Living Resources of the High Seas establishing such machinery.

¹⁸⁰ *Yearbook of the International Law Commission, 1958*, vol. II, p. 89, document A/3859, chap. III, section II.

¹⁸¹ *Ibid.*, p. 105.

¹⁸² Optional Protocol concerning the Compulsory Settlement of Disputes. United Nations, *Treaty Series*, vol. 500, p. 241.

142. Finally, the question has been considered by the Commission in relation to the law of treaties. The final set of draft articles on the law of treaties which were submitted by the Commission in 1966¹⁸³ contained no general provisions for the settlement of disputes arising from the interpretation and application of the draft. Part V, concerned with the invalidity, termination and suspension of the operation of treaties, contained, however, a section on the procedure to be followed in cases of invalidity, termination, withdrawal from or suspension of a treaty. In its commentary on draft article 62, the Commission noted that many of its members regarded this provision as a key article for the application of Part V. If the grounds set out in Part V were arbitrarily asserted, the security of treaties might be endangered; moreover the facts were often controversial.

Accordingly, the Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity, termination or suspension of the operation of a treaty may be arbitrarily asserted as a mere pretext for getting rid of an inconvenient obligation.

[The Commission] considered that the establishment of the procedural provisions of the present article as an integral part of the law relating to the invalidity, termination and suspension of the operation of treaties would be a valuable step forward. The express subordination of the substantive rights... to the procedure prescribed... and the checks on unilateral action which the procedure contains would, it was thought, give a substantial measure of protection against purely arbitrary assertions of the nullity, termination or suspension of that operation of a treaty.¹⁸⁴

143. The United Nations Conference on the Law of Treaties, in preparing the Vienna Convention on the Law of Treaties on the basis of the Commission's draft, did not change the scope of the article on the procedure to be followed which was proposed by the Commission (article 65 of the Convention), but it added a new article (article 66) providing, unlike the Commission's draft, for compulsory judicial settlement or arbitration in disputes concerning the application or interpretation of articles 53 or 64 (*jus cogens*) and a compulsory conciliation for disputes concerning the application or interpretation of other articles of Part V of the Convention. The conciliation procedure so established is embodied in an annex to the Convention.¹⁸⁵

144. The conclusion may be advanced from the above chronology that the Commission has not in general been concerned, when elaborating texts setting out substantive rules and principles, with determining the method of implementation of those rules and principles, or with the procedure to be followed for resolving differences arising from the interpretation and application of the substantive provisions—with one exception. That

¹⁸³ For the draft articles and commentaries, see *Yearbook of the International Law Commission, 1966*, vol. II, p. 187, document A/6309/Rev.1, part II, chap. II.

¹⁸⁴ *Ibid.*, pp. 262 and 263, paras. 1 and 6 of the commentary to article 62.

¹⁸⁵ Note also article 77, paragraph 2, of the Convention. It provides a procedure to be followed in the event of a difference between a depositary (whose functions are set in the first paragraph of the article) and a State.

exception arises when the procedure is seen as inextricably entwined with, or as logically arising from, the substantive rules and principles, or, in the Commission's words "as an integral part" of the codified law. Otherwise the question of the settlement of disputes and, indeed, of implementation as a whole, have been regarded as issues to be decided by the General Assembly or by the codification conference of plenipotentiaries which acts on the draft.

145. A number of other conventions drawn up within the United Nations, not based on the Commission's drafts, contain provisions concerning settlement of disputes between the parties. Some of them provide for compulsory adjudication or arbitration. As regards those containing provisions relating to compulsory settlement, reference may be made to the Convention on the Privileges and Immunities of the United Nations,¹⁸⁶ article VIII, section 30 of which provides as follows:

All differences arising out of the interpretation and application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other hand, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court be accepted as decisive by the parties.

146. The Single Convention on Narcotic Drugs (1961)¹⁸⁷ provides in article 48:

1. If there should arise between two or more Parties a dispute relating to the interpretation or application of this Convention, the said Parties shall consult together with a view to the settlement of the dispute by negotiation, investigation, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice.

2. Any such dispute which cannot be settled in the manner prescribed shall be referred to the International Court of Justice for decision.

147. It may be noted that in some instances States have, on becoming parties, made reservations—in a few cases under express provisions of the convention in question—with respect to clauses providing for compulsory adjudication or arbitration.

148. In the case of certain other treaties—particularly in the fields of human rights and economic activities—specific procedures which have been considered particularly appropriate have been adopted. Thus the International Convention on the Elimination of All Forms of Racial Discrimination¹⁸⁸ and the International Covenant on Civil and Political Rights¹⁸⁹ provide for the establishment of committees which may be entrusted with the task of reviewing the reports of the parties on their implementation of the conventions and of considering communications from States and individuals.

190 The procedures adopted within the framework of the Council of Europe in the field of human rights include the functioning, under the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁹¹ of a Commission and of a Court, which have dealt with a considerable number of complaints or cases involving the interpretation and application of the Convention. The various commodity agreements which have been concluded also provide for specific methods of dispute settlement, such as consideration of the matter by the Council established by the agreement, or through some similar procedure by a designated body.

149. Other peaceful settlement provisions, often more tested and elaborate, have been included in other treaties in the economic field: for example, the General Agreement on Tariffs and Trade and the various treaties relating to the establishment, in different parts of the world, of "common market" or "free trade" areas, or similar economic groupings. Particular reference may be made in this connexion to the treaties establishing the various European Communities and the operation in this regard of the European Court in Luxembourg. So far as bilateral treaties are concerned, it may be noted that many agreements, especially those relating to trade, economic aid, technical assistance and air transport, provide for the application of specified means for the peaceful settlement of disputes including, in many cases, compulsory adjudication or arbitration.

Chapter III

The law relating to economic development

150. This topic, which was not included as such in the 1948 Survey,¹⁹² is one which cuts across traditional categories of international law. It is included here, however, for two reasons. First, there has been a growing emphasis, both within the United Nations¹⁹³ and outside, on this emerging body of law as a part of, and a complement to, the objective stated in the Preamble to the United Nations Charter of promoting "social progress and better standards of life in larger freedom" and the purpose of the Organization mentioned in paragraph 3 of Article 1 of the Charter,

¹⁹⁰ See paras. 384-390 below. The Economic and Social Council is empowered to consider reports submitted under the International Covenant on Economic, Social and Cultural Rights. Note also the variety of procedures developed by the ILO over the past fifty years, and the Protocol instituting a Conciliation and Good Offices Commission to be responsible for seeking a Settlement of any disputes which may arise between States Parties to the Convention against Discrimination in Education, adopted by the General Conference of UNESCO in 1962. See *Human Rights: A Compilation of International Instruments of the United Nations* (United Nations publication, Sales No. E.68.XIV.6), p. 33.

¹⁹¹ United Nations, *Yearbook of Human Rights for 1950* (United Nations publication Sales No. 1952.XIV.1), pp. 418 *et seq.*

¹⁹² See para. 4 above.

¹⁹³ See, for example, *Yearbook of the International Law Commission, 1970*, vol. II, pp. 267 and 268, document A/CN.4/230, paras. 130-134 and 141-142.

¹⁸⁶ United Nations, *Treaty Series*, vol. 1, p. 15.

¹⁸⁷ *Ibid.*, vol. 520, p. 151.

¹⁸⁸ General Assembly resolution 2106 A (XX), annex.

¹⁸⁹ General Assembly resolution 2200 A (XXI), annex.

namely "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character".¹⁹⁴ Secondly, the bringing together of the various matters which come under this heading enables one to take an over-all look at, and to make a more comprehensive review of, the different activities in question. This treatment also helps emphasize the growing scope of international law, from a body of law imposing negative restraints on independent sovereign States, to a body of law which, in recognition of conditions of increasing interdependence, imposes on States various positive obligations of a procedural and substantive kind. The law, in other words, is coming to be seen as concerned not only with the protection of the independence of States but also with the duty to co-operate in the promotion of national and human welfare. Article 55 of the Charter indeed provides that

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples,

the United Nations shall promote various measures of international economic and social co-operation.

151. The Declaration on Principles of Friendly Relations, adopted on 24 October 1970,¹⁹⁵ includes amongst its principles "the duty of States to co-operate with one another in accordance with the Charter". The formulation of the principle refers not only to the duty of States of co-operating in maintaining international peace and security but also to the duty to co-operate in promoting "economic stability and progress, the general welfare of nations and international co-operation free from discrimination based on such differences" (i.e. in their political, economic and social systems).

152. The present chapter deals only with the public international law aspects of economic development, specially with the economic relations and co-operation conducted by States as subjects of public international law. It is not proposed to enter into discussion of questions concerning the private international law aspects of economic development.¹⁹⁶ For reasons of convenience, this chapter is divided as follows:

¹⁹⁴ See also Chapter IX of the Charter, entitled "International economic and social co-operation".

¹⁹⁵ General Assembly resolution 2625 (XXV), annex.

¹⁹⁶ As regards the private international law aspects, it is perhaps sufficient to recall that the Commission in 1966 was of the view that it should not undertake responsibility for studying the question of furthering co-operation in the development of the law of international trade and in promoting its progressive unification and harmonization (see *Yearbook of the International Law Commission*, 1966, vol. I, part II, 880th meeting, paras. 38-66), and that later that year the General Assembly by resolution 2205 (XXI) decided to establish the United Nations Commission on International Trade Law (UNCITRAL). At the first session (1968) of UNCITRAL a great number of delegations considered that the following, non-exhaustive list of topics should form the future work programme of UNCITRAL: (1) international sale of goods; (2) commercial arbitration; (3) transportation; (4) insurance; (5) international payments; (6) intellectual property; (7) elimination of discrimination in laws affecting international trade; (8) agency;

1. International legal rules and measures concerning the regulation and co-ordination of the economic activities of States.

2. International trade.

3. Economic and technical assistance.

153. None of these categories is completely self-contained, but the divisions drawn are useful in suggesting some of the principal features of the law falling under the present heading which are of interest in the matter.

1. INTERNATIONAL LEGAL RULES AND MEASURES CONCERNING THE REGULATION AND CO-ORDINATION OF THE ECONOMIC ACTIVITIES OF STATES

154. Multilateral efforts have been made recently, within the framework of various international organizations, universal and regional, designed to specify the principles, rules and policies which should govern the relation between the sovereign right of States to determine their economic affairs (in particular their right freely to dispose of their natural resources), and the inter-dependence which, for a variety of reasons, exists between the States of the world and their respective economies. Issues relating to this general topic have been frequently discussed, and may indeed be said to be of predominant interest for many international bodies.¹⁹⁷ It is not intended to deal here, on a comprehensive scale, with the debates held and proposals made, but to single out those which may be of particular interest to the Commission in revising the 1949 list of topics selected for codification.

155. So far as the General Assembly is concerned, reference may be made to the establishment in 1958 of the United Nations Commission on Permanent Sovereignty over Natural Resources.¹⁹⁸ On the basis of the work of that Commission the General Assembly adopted, under the terms of resolution 1803 (XVII) of 14 December 1962, a Declaration of permanent sovereignty over natural resources, whereby the General Assembly gave recognition to the inalienable rights of all States freely to dispose of their natural wealth and resources. The Declaration also contained various provisions regarding the rights and duties of the State and the foreign investor under agreements, the authorizations and laws of the State, and international law, with regard to the exploration, development and disposition of the natural resources. Paragraphs of the resolu-

and (9) legalization of documents (see *Yearbook of the United Nations Commission on International Trade Law*, vol. I: 1968-1970 (United Nations publication, Sales No. E.71.V.1), p. 77, para. 40). UNCITRAL has subsequently begun consideration of the international sale of goods, international payments, international commercial arbitration and international shipping legislation.

¹⁹⁷ Within the United Nations, the organs engaged in this field include, besides the General Assembly and the Economic and Social Council, UNCTAD and UNIDO.

¹⁹⁸ See *Yearbook of the International Law Commission*, 1964, vol. II, p. 131, document A/CN.4/165, paras. 44-54, and *ibid.*, 1969, vol. II, p. 120, document A/CN.4/209, paras. 27-31 and the sources referred to there.

tion deal with such matters as the import of foreign capital, earnings on such capital, acts of nationalization and foreign investment agreements.

156. The issues raised have been further considered at subsequent sessions of the Assembly.¹⁹⁹ This continuing consideration has been concerned not only with the elaboration of the principle in abstract legal terms; the General Assembly has consistently placed the principle in its economic and social context and has looked to practical means of exploiting and marketing resources.²⁰⁰ At its twenty-fifth session the General Assembly adopted resolution 2692 (XXV) of 11 December 1970, which, *inter alia*, called upon Governments to continue their efforts aimed at the complete implementation of the principles and recommendations contained in previous resolutions and invited the Economic and Social Council

to instruct the Committee on Natural Resources to include in its work programme a periodic report on the advantages derived from the exercise by developing countries of permanent sovereignty over their natural resources, with particular reference to the impact of such exercise on the increased mobilization of resources, especially of domestic resources, for their economic and social development, on the outflow of capital therefrom as well as on the transfer of technology.

157. Member States were further invited to inform the Committee on Natural Resources

on the progress achieved to safeguard the exercise of permanent sovereignty over their natural resources, including the measures taken to control the outflow of capital in a manner compatible with the exercise of their sovereignty and international co-operation.

158. The General Assembly also considered the question of sovereignty over natural resources in preparing the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.²⁰¹ Both Covenants contain articles which state that

All peoples may... freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law ...

and that

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully their natural wealth and resources.²⁰²

159. The question of sovereignty over natural resources also arose in the elaboration of the Declaration on Principles of Friendly Relations.²⁰³ In addition to

the formulation of the principle of the duty to co-operate cited above,²⁰⁴ one element of the text on the principle of sovereign equality of States embodied in the Declaration reads as follows:

Each State has the right freely to choose and develop its political, social, economic and cultural system.

The statement of the principle of equal rights and self-determination of peoples similarly provides that

all peoples have the right... to pursue their economic, social and cultural development.

160. Resolution 2626 (XXV) of 24 October 1970 proclaimed the Second United Nations Development Decade to begin 1 January 1971, and adopted an International Development Strategy for the Decade. The resolution, a document comprising several pages, is divided as follows: (A) preamble; (B) goals and objectives; (C) policy measures (international trade; trade expansion, economic co-operation and regional integration among developing countries; financial resources for development; invisibles including shipping; special measures in favour of the least developed among the developing countries; special measures in favour of the land-locked developing countries; science and technology; human development; expansion and diversification of production; plan formulation and implementation); (D) review and appraisal of both objectives and policies; (E) mobilization of public opinion. Paragraph 10 of the preamble stated, *inter alia*, that "Every country has the right and duty to develop its human and natural resources...". Each economically advanced country was requested to provide by 1972 annually to developing countries financial resource transfers of a minimum net amount of one per cent of its gross national product.

161. As regards more particular aspects concerning economic relations between States, attention may be called to the conclusion of a substantial number of treaties in recent years, on a multilateral, regional or bilateral basis, concerning the establishment and operation of foreign companies, or of companies in which both foreign and local interests participate, and the investment of funds for development.²⁰⁵ Many States have enacted investment or company laws which have amongst their purposes the implementation of such treaties. There is, furthermore, a good deal of State practice, including in some instances agreements resolving the issues, arising from various acts of expropriation and nationalization. National and international courts have also given a number of decisions relating

¹⁹⁹ See the working paper and supplement cited in the previous note.

²⁰⁰ See, most recently, the Report of the Secretary-General entitled "The exercise of permanent sovereignty over natural resources and the use of foreign capital and technology for their exploitation" (mimeographed document A/8058).

²⁰¹ For the text of the two Covenants, see General Assembly resolution 2200 A (XXI), annex.

²⁰² Article 1, para. 2, of each Covenant and articles 25 and 47 respectively. See also *Yearbook of the International Law Commission*, 1969, vol. II, p. 120, document A/CN.4/209, para. 30.

²⁰³ For more precise formulations which were not included in the Declaration, see *ibid.*, p. 121, para. 31.

²⁰⁴ See para. 151.

²⁰⁵ The work of the Inter-American Juridical Committee with respect to the harmonization of the legislation of the Latin American countries on companies, including the problem of international companies, may be noted in this connexion; see the report made to the Commission in 1969 (*Yearbook of the International Law Commission*, 1969, vol. II, pp. 196-197, document A/CN.4/215, paras. 4-11) and the statement made before the Commission in 1970 (*ibid.*, 1970, vol. II, p. 312, document A/8010/Rev.1, para. 101). See also United Nations, *Foreign Investment in Developing Countries* (United Nations publication, Sales No. E.68.II.D.2), p. 59, annex III.

to the expropriation or nationalization of property owned, in whole or in part, by foreign nationals or companies. IBRD has given attention to the question of agreed methods for the settlement of disputes involving foreign investment. Following a series of regional meetings the Executive Directors of IBRD, on the instructions of the Bank's Board of Governors, in 1965 adopted and opened for signature the Convention on the Settlement of Investment Disputes between States and Nationals of other States,²⁰⁶ providing for the settlement, with the consent of the parties, by arbitration or conciliation of any investment dispute. An International Centre for Settlement of Investment Disputes has been established in connexion with the Convention.

162. It may be recalled in this connexion that the Commission has considered the rights of aliens (including rights with respect to property) in the course of its examination of the topic of State responsibility,²⁰⁷ and also during its consideration of the succession of States and governments.²⁰⁸

163. The extensive powers of States in respect of monetary and fiscal policy have, in several instances, been limited by a widespread network of treaties and of regulations of international organizations or institutions. Some of them are of potentially universal scope, such as the Articles of Agreement of IMF and GATT. Others are more limited or regional (for example, various régimes established, usually by agreement, with respect to the use of certain major currencies) and still other bilateral (especially in the tax field).²⁰⁹

2. INTERNATIONAL TRADE

164. In the body of treaty law regulating economic relations between States, trade agreements are a sector with special features. In general, trade agreements establish the right to trade between the States concerned and the conditions under which that trade is to be carried out. Beyond that, however, it is not really possible to generalize, although one can note that a large percentage of international commerce is subject to the rules established within GATT and that this Agreement, at least *de facto*, replaces many of the previous bilateral agreements. Further, regional arrangements (economic communities and free-trade areas) established in many parts of the world are also increasingly generalizing particular conditions of trade.²¹⁰ There is the further fact—so far as the bilateral treaties are concerned—that a number of clauses and devices have led

historically to the establishment of certain standard conditions. The principal examples are the most-favoured-nation and national clauses, which have the effect of spreading benefits given to other countries, or to a signatory State's own nationals, to the beneficiaries of the provisions.

165. The work programme of UNCITRAL,²¹¹ which includes the study of the international sale of goods, international payments, international commercial arbitration and international shipping legislation, involves to a considerable degree examination of these and other standard conditions and practices relating to international trade. The Commission is, of course, currently considering the most-favoured-nation clause, although not simply in the economic context.²¹² The question of whether a similar study could be made of certain other standard formulas which appear frequently in trade agreements would need to be carefully considered, having regard not only to the work being undertaken by UNCITRAL but also to the fact that any such study would in all probability be more narrowly technical and less legal than that on the most-favoured-nation clause, if only for the reason that the latter raises such purely legal issues as those relating to the effect of treaties on third States.²¹³

3. ECONOMIC AND TECHNICAL ASSISTANCE

166. The law relating to the granting and operation of economic and technical assistance and the related international structures and procedures, are to be found in widely accepted texts, including resolutions of the General Assembly and Economic and Social Council, in many multilateral and bilateral treaties or agreements,

under the auspices of UNCTAD) which have had the effect of unifying conditions of trade with respect to particular commodities. The matter has become bound up, however, with the general system of preferences, referred to in foot-note 212 below.

²¹¹ See foot-note 196 above.

²¹² For a summary of the Commission's work in this field, see paras. 275-278 below. Reference may be made to the agreed conclusions adopted within UNCTAD in October 1970 concerning the grant of a general system of preferences for the exports of the developing countries. As is noted in the relevant documents, this marks a departure from the most-favoured-nation clause (in that the preferences will not be extended to developed countries) and members of GATT (and possibly parties to other treaties embodying the most-favoured-nation claim as well) will have to obtain waivers of their obligations. The International Development Strategy for the Second United Nations Development Decade, adopted by the General Assembly on 24 October 1970, also briefly notes these arrangements (General Assembly resolution 2626 (XXV), para. 32).

²¹³ The present consideration of the most-favoured-nation clause item had indeed its origins in the draft articles prepared by the Commission, in the course of its work on the law of treaties, on the position of third States in relation to treaties. In addition to the extensive body of treaty law dealing with the terms and conditions of trade, there are many agreements—several concluded within the United Nations—for the facilitation of trade by easing and standardizing customs requirements.

²⁰⁶ United Nations, *Treaty Series*, vol. 575, p. 159. It may be also noted that the International Bureau of the Permanent Court of Arbitration, which had until then been open only to States, in 1962 adopted rules of arbitration and conciliation for the settlement of international disputes to which only one of the parties is a State.

²⁰⁷ See chap. IV below.

²⁰⁸ See chap. V below.

²⁰⁹ On tax treaties, see paras. 92-93 above.

²¹⁰ Distinct from this, it may be noted that a number of commodity agreements have been concluded (in recent years,

in instruments not governed by international law, and in a wide range of national laws and executive actions. It is not possible even to begin to itemize this material here. At the universal level are such bodies as the United Nations, UNDP, UNCTAD and the specialized agencies, including IBRD and its associated agencies. There are also regional or more limited bodies, such as the various regional banks established under the auspices of the United Nations. Many developed countries have established bilateral programmes directly with the recipients. In all this practice many common trends appear²¹⁴ and the question has been asked and is asked whether a body of customary, general law is beginning to emerge. Thus it has been suggested in the Commission, with reference to the legal principles of reciprocal assistance between States, that certain developments were expressions of the duty of States to render assistance to one another in economic matters.²¹⁵ Portions of the formulation of the principle of co-operation contained in the Declaration on Principles of Friendly Relations may be noted in this connexion. The adoption, under resolution 2626 (XXV), of the International Development Strategy for the Second United Nations Development Decade, is also relevant. Thus paragraph 12 of the Strategy reads:

Governments... pledge themselves, individually and collectively, to pursue policies designed to create a more just and rational world economic and social order in which equality of opportunities should be as much a prerogative of nations as of individuals within a nation. They subscribe to the goals and objectives of the Decade and resolve to take the measures to translate them into reality.

And further, Governments, individually and jointly, solemnly resolved to adopt and implement the policy measures set out in the document.

167. The comment can of course be made that no such obligation as that suggested has been accepted in positive law; that at the most there is an imperfect obligation to take certain actions towards certain objectives within particular institutional and procedural arrangements. Moreover, it might be thought that these arrangements—and any resulting substantive obligation—are still at an early stage of their development, and that the time is not yet ripe for any attempt to spell out an obligation in concrete legal terms. There are moreover, as the foregoing suggests, many bodies immediately and continually concerned both with the broad policies and with their detailed implementation.

Chapter IV

State responsibility

168. The topic of the law of State responsibility was included in the 1949 list, and remains currently under

study by the Commission. As is perhaps inevitable with a subject of such far-reaching scope, there has been some shift of emphasis over the years as regards the various aspects to be studied and their respective order of priority within the over-all framework. Indeed, no other subject examined by the Commission has required such extensive consideration of questions of methodology, and of the range of issues to be tackled and of the level at which their codification was to be attempted.

169. The issue of greatest difficulty which has faced the Commission has been that of deciding whether to proceed on a basis of codifying specific aspects of the question in a way which would embrace the actual content of the obligation involved, or whether to proceed, at least initially, on a more abstract plane and to seek to codify, not the substantive body of rules the violation of which may entail the responsibility of a State, but the law of State responsibility *per se*, regarded as in itself a distinct institution or complex of legal rules. The Commission has followed both approaches at different times. Initially, an attempt was made to concentrate attention on the law of State responsibility as it relates to the treatment given to the person and property of aliens. The Commission eventually decided that it would be unable to make progress by pursuing that approach, to the exclusion of other aspects of the law of State responsibility. It was therefore agreed, pursuant to the adoption by the General Assembly of resolution 1765 (XVII) of 20 November 1962,²¹⁶ to resort to the other approach, so as to comprise, within a set of fundamental rules, State responsibility for any internationally wrongful act. It is this course which the Commission is now pursuing. A comparison may perhaps be made in this connexion, if only to provide an illustration of the nature (and of the difficulty) of the problem involved, with the Commission's work on the law of treaties: the Commission may be said to be following the same approach in the case of the law of State responsibility as it adopted with regard to the law of treaties, with the difference that whereas for the law of treaties the treaty instrument itself existed, as a focus of attention, in the case of State responsibility it is a conceptual notion or set of principles which is supposed to play that central role.

170. Having regard not only to the importance of the subject itself but also to the significance of the development of the Commission's own views concerning the way in which the codification of the law of State responsibility should be undertaken, the following paragraphs give an account of the steps taken or proposed in regard to the Commission's work in this sphere since 1949. This account is brief, and at times it has been necessary to summarize complex statements or arguments in a few lines or words. A more complete description of the discussions and issues involved is

²¹⁴ Many standard agreements are, of course, concluded for example by UNDP and IBRD.

²¹⁵ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 268, document A/CN.4/230, para. 142. Note also the suggestion made in the Sixth Committee that there was now a generally recognized legal rule that no political or other conditions should be attached to the aid extended to developing countries (*ibid.*, p. 267, para. 132).

²¹⁶ The relevant portion of the resolution is quoted in paragraph 174 below.

contained in the works mentioned in the foot-notes, and in the further documents to which those works refer.

171. Beginning first with the 1948 Survey,²¹⁷ this drew attention to the efforts at codification in the sphere of State responsibility which had been made under the auspices of the League of Nations. The comment was made that it was only natural that the preparatory work for the Codification Conference of 1930 should, when dealing with the responsibility of States for damage to the person and property of aliens, have covered "what is perhaps the major part of the law of State responsibility".²¹⁸ Two reasons were given for this. In the first instance, the treatment of aliens and injuries to aliens was said to constitute the most conspicuous example of the application of the law of State responsibility and the bulk of cases decided by international tribunals related to this aspect. Secondly, the central problems of State responsibility had been raised in dealing with these cases, as indeed they were whatever the occasion on which a State was charged with responsibility under international law. Proceeding, the 1948 Survey suggested that there were a number of questions which are common to all aspects of State responsibility. Those listed included the question of the responsibility of the State for the acts of officials acting outside the scope of their competence; the responsibility of the State for acts of private persons; the degree, if any, to which national law may be invoked as a reason for the non-fulfilment of international obligations; and the requirement of fault as a condition of liability. However, the law of State responsibility transcended the question of responsibility for the treatment of aliens. Besides mentioning problems concerning responsibility which related to the codification of the principles of the Nürnberg Charter and judgement,²¹⁹ the 1968 Survey set out a range of other questions: the prohibition of abuse of rights; the forms of reparation; the question of penal damages; and the various forms and occasions of responsibility resulting from the increasing activities of the State in commercial and economic fields.²²⁰

172. The subject of State responsibility was included in the 1949 list by the Commission, following a relatively short discussion. The principal motives for its inclusion appear to have been, on the one hand, its importance, and, on the other, the feeling that an evolution might have occurred since the 1930 Codification Conference such as to suggest that a better chance existed to codify the topic.

²¹⁷ See para. 4 above.

²¹⁸ 1948 Survey, para. 97. The 1948 Survey also dealt, under a separate heading, with the question of the treatment of aliens (*ibid.*, paras. 79-84), chiefly as regards their status under the law of the country of residence. Particular mention was made of the equal protection of such rights as aliens possess under that law and of the recognition of human rights.

²¹⁹ Regarding the Commission's treatment of this topic, see *Yearbook of the International Law Commission*, 1970, vol. II, pp. 251-252, document A/CN.4/230, para. 16. See also, paras. 434-436 below.

²²⁰ 1948 Survey, para. 98.

173. The General Assembly, by resolution 799 (VIII) of 7 December 1953, requested the Commission to undertake the codification of "the principles of international law governing State responsibility" as soon as it considered it advisable. Following the General Assembly recommendation, the Commission, at its seventh session in 1955, decided to begin the study of the topic State responsibility and appointed Mr. F. V. García Amador as Special Rapporteur. At the next six sessions of the Commission, from 1956 to 1961, the Special Rapporteur presented a series of reports devoted mainly to the study of questions relating to the responsibility of the State for injuries caused in its territory to the person and property of aliens,²²¹ Owing to its work in other branches of international law, the Commission was not able between 1956 and 1961 to proceed to the stage of giving full consideration to the task of codifying the law relating to State responsibility, although it held some general exchanges of views on the matter.²²² At the Commission's session in 1961, when the planning of the future work of the Commission was discussed, all members who spoke were agreed that the subject of State responsibility should be included among the Commission's priority topics. There were differences of opinion, however, regarding the approach to the subject and in particular as to whether the Commission should begin by codifying the general rules governing the State responsibility, or whether it should codify at the same time the rules whose violation entailed international responsibility.

174. At the Commission's fourteenth session, in 1962, it was agreed, in accordance with sub-paragraph 3 (a) of General Assembly resolution 1686 (XVI) of 18 December 1961 that "State responsibility" should receive priority in the Commission's work. A Sub-Committee on

²²¹ The first report, a preliminary one, was entitled "International responsibility" and contained some "bases of discussions" (See *Yearbook of the International Law Commission*, 1956, vol. II, p. 173, document A/CN.4/96). The second report (*ibid.*, 1957, vol. II, p. 104, document A/CN.4/106) added to the title the sub-heading "Responsibility of the State for injuries caused in its territory to the person or property of aliens. "Part I: Acts and omissions", and contained in annex a set of preliminary draft articles. The third report (*ibid.*, 1958, vol. II, p. 47, document A/CN.4/111) was sub-titled "Part II: The international claim". The fourth report (*ibid.*, 1959, vol. II, p. 1, document A/CN.4/119) was sub-titled "Measures affecting acquired rights" and undertook a more detailed study of matters dealt with in the second report (international protection of acquired rights; expropriation in general and contractual rights). The fifth report (*ibid.*, 1960, vol. II, p. 41, document A/CN.4/125), adding to the previous sub-title the phrase "constituent elements of international responsibility", dealt, *inter alia*, with measures affecting acquired rights and the constituent elements of a wrongful act, including "abuse of rights" and "fault". The sixth and last report (*ibid.*, 1961, vol. II, p. 1, document A/CN.4/134 and Add.1) was devoted to the subject of "reparation of the injury" and also included in its addendum revised texts of the draft articles previously submitted. Mr. García Amador ceased to be a member of the Commission in 1961.

For further references to the reports of Mr. García Amador and to the Commission's consideration of the topic up to 1969, see *ibid.*, 1969, vol. II, p. 229, document A/7610/Rev.1, chap. IV.

²²² For a summary, see *ibid.*, p. 229, para. 67.

State Responsibility was established and asked to make suggestions regarding the scope of the future study and the approach to be followed.²²³ By resolution 1765 (XVII) of 20 November 1962, the General Assembly recommended that the Commission should continue its work on State responsibility.

taking into account the views expressed at the seventeenth session of the General Assembly and the report of the Sub-Committee on State Responsibility and giving due consideration to the purposes and principles enshrined in the Charter of the United Nations.

175. The report of the Sub-Committee was considered by the Commission at its fifteenth session in 1963. All members of the Commission who took part in the discussion agreed with the general conclusions of the report, namely: (1) that priority should be given to the definition of the general rules governing the international responsibility of the State; (2) that, in defining these general rules, the experience and material gathered in certain special sectors, especially that of responsibility for injuries to the person or property of aliens, should not be overlooked; and (3), that careful attention should be paid to the possible repercussions which developments in international law might have on State responsibility. After having unanimously approved the report of the Sub-Committee, the Commission appointed Mr. R. Ago as Special Rapporteur for the topic. By resolutions 1902 (XVIII) of 18 November 1963, 2045 (XX) of 8 December 1965, and 2167 (XXI) of 5 December 1966, the General Assembly reiterated the recommendation contained in resolution 1765 (XVII) mentioned above. In its resolution 2272 (XXII) of 1 December 1967, the General Assembly recommended that the Commission should expedite the study of the topic of State responsibility and, by resolution 2400 (XXIII) of 11 December 1968, requested the Commission to "make every effort to begin substantive work" on the topic.

176. In 1969, at the Commission's twenty-first session, Mr. R. Ago submitted his first report on the international responsibility of States.²²⁴ This report contained a review of previous work undertaken by various bodies with regard to the codification of the topic and also summarized the methodological conclusions reached by the Sub-Committee set up in 1962, and later by the Commission itself in 1963 and 1967, on the basis of which the Commission decided to resume the study of the topic from a fresh viewpoint, in an effort to achieve positive results in accordance with various recommendations which had been made by the General Assembly. After examining this study, the Commission requested the Special Rapporteur to prepare a report containing

a first set of draft articles on the topic, the aim being, in the Commission's words,

to establish, in an initial part of the proposed draft articles, the conditions under which an act which is internationally illicit and which, as such, generates an international responsibility, can be imputed to a State.²²⁵

The criteria laid down by the Commission as a guide for its future work on the topic were summarized as follows:²²⁶

(a) The Commission intended to confine its study of international responsibility, for the time being, to the responsibility of States;

(b) The Commission would first examine the question of the responsibility of States for internationally wrongful acts. The question of responsibility arising from certain lawful acts, such as space and nuclear activities, would be examined as soon as the Commission's programme of work permitted;

(c) The Commission agreed to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and that of defining the rules that place obligations on States, the violation of which may generate responsibility;

(d) The study of the international responsibility of States would comprise two broad separate phases, the first covering the origin of international responsibility and the second the content of that responsibility. The first task was to determine what facts and circumstances must be established in order to be able to impute to a State the existence of an internationally wrongful act which, as such, is a source of international responsibility. The second task was to determine the consequences attached by international law to an internationally wrongful act in different cases, in order to arrive, on this basis, at a definition of the content, forms and degrees of responsibility. Once these tasks had been accomplished, the Commission would be able to decide whether a third phase should be added in the same context, covering the examination of certain problems relating to what has been termed the "implementation" of the international responsibility of States and questions concerning the settlement of disputes with regard to the application of the rules on responsibility.²²⁷

177. At the Commission's twenty-second session in 1970, the Special Rapporteur presented a second report, entitled "The origin of international responsibility",²²⁸ which examined the following general rules governing

²²³ The Sub-Committee was composed of the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen (*ibid.*, pp. 230-231, paras. 70-73). The report of the Sub-Committee (A/CN.4/152) is reproduced as Annex I to the 1963 report of the Commission (*ibid.*, 1963, vol. II, p. 227, document A/5509).

²²⁴ *Ibid.*, 1969, vol. II, p. 125, document A/CN.4/217 and Add.1.

²²⁵ *Ibid.*, 1969, vol. II, p. 233, document A/7610/Rev.1, para. 80. The Commission's conclusions were contained in paras. 80-84.

²²⁶ An abridgement of the account given in the Commission's report in 1970 (*ibid.*, 1970, vol. II, p. 306, document A/8010/Rev.1, para. 66).

²²⁷ In resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended that the Commission should continue its work on the topic taking into account the relevant paragraph (para. 4 (c)) of resolution 2400 (XXIII) referred to in paragraph 175 above.

²²⁸ *Yearbook of the International Law Commission, 1970*, vol. II, p. 177, document A/CN.4/233.

the topic as a whole: the principle of the internationally wrongful act as a source of responsibility; the essential conditions for the existence of an internationally wrongful act; and the capacity to commit such acts. Draft articles were submitted in respect of these fundamental rules. The Commission's discussion of the report ranged over a number of issues, including those relating to the method to be followed.²²⁹ As regards the substance of the report, it was agreed that the work should continue to be based on the general notion of international responsibility, meaning thereby the set of legal relationships to which the commission of an internationally wrongful act by a State may give rise in various possible cases. Such relationships, it was pointed out, may arise between that State and the injured State or between the injured State and other subjects of international law, or possibly even with the international community as a whole.

178. Although there was support for the view that responsibility for lawful acts should be included, it was stressed by several members, including the Special Rapporteur, that this aspect should continue to be kept distinct; this would not, however, prevent the Commission from undertaking a study of this form of responsibility, either when the study on responsibility for wrongful acts had been completed, or even on a simultaneous but separate basis. The majority of members recognized the need to deal in the draft with the notion of "indirect" responsibility, or responsibility for the acts of others, although it was considered that that notion did not necessarily need to be taken into account specifically in defining the basic general rule on responsibility for wrongful acts.

179. In the course of further discussion, the Commission confirmed the agreement, already reached, that every internationally wrongful act contains both a subjective element and an objective element; these elements are logically distinct, even though indissolubly linked in any concrete situation. The Commission decided that the essential aspect of the subjective element—that is to say, the existence of positive conduct or of an omission which, in the specific case, must be ascribable to the State and thus figure as an act or omission by the State itself—should be designated the "attribution" rather than the "imputation" to the State. This aspect—the attribution of an act or omission to the State as an international legal person—is an operation which, of necessity, falls within the scope of international law, and is therefore distinct from the parallel operation which may take place under domestic law. This point was considered particularly important in relation to acts performed by State organs outside their competence or in violation of internal law, or by organs or public institutions distinct from the State.

180. As to the objective element, the Commission was in general agreement that this should be defined in terms of a violation or breach of an international

obligation, or of failure to fulfil such an obligation. Interest was expressed in this connexion in the notion of abuse of right; it was recognized that failure to fulfil an international obligation would also cover the case where the obligation in question is specifically an obligation not to exercise rights in an abusive or unreasonable manner.

181. The Commission also discussed the distinction between the cases where the conduct of an organ of the State is held to be sufficient in itself to constitute complete failure to fulfil an international obligation, and those where such failure comes to light only when the conduct, as such, is followed by an act or event connected with it but not included in it. As regards the question of whether the element of "injury" is a constituent element of an internationally wrongful act, it was recognized that under international law an injury, material or moral, is necessarily inherent in every impairment of an international right of a State. Any economic injury sustained may be taken into consideration *inter alia* for the purpose of determining the amount of reparation, but is not prerequisite for the determination that an internationally wrongful act has been committed.

182. With regard to what is sometimes referred to as the "capacity" of States to commit internationally wrongful acts and the possible limits of such "capacity", the Commission agreed that this notion has nothing to do with capacity to conclude treaties or more generally, to act internationally. What is meant or implied is a physical ability rather than a legal capacity to perform certain acts. The Special Rapporteur will examine the possibility of using a different formula, perhaps negative rather than positive, to deal with this point.

183. At the close of its consideration of the topic in 1970, the Commission encouraged the Special Rapporteur to continue his study and to submit a further report containing a revised version of the parts so far considered and a detailed analysis of the various subjective and objective conditions²³⁰ which must be met if an internationally wrongful act is to be attributed to a State as an act giving rise to international responsibility.

184. When, at the twenty-fifth session of the General Assembly, the Sixth Committee examined the report of the International Law Commission, the general conclusions reached by the Commission on the topic of State responsibility were considered broadly acceptable. In resolution 2624 (XXV) of 12 November 1970, adopted on the recommendation of the Sixth Committee, the General Assembly recommended that the Commission should continue its work on State responsibility, taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII), 1902 (XVIII) and 2400 (XXIII). With regard to the question of responsibility for lawful acts, the Sixth Committee's report summarized the views expressed as follows:

²²⁹ *Ibid.*, vol. I, 1074th to 1076th and 1079th to 1081st meetings. For a further summary of the Commission's discussion, see *ibid.*, vol. II, pp. 307 *et seq.* document A/8010/Rev.1, paras. 69-83.

²³⁰ Reference may be made in this connexion to the over-all plan contained in paragraph 91 of the Special Rapporteur's first report (see foot-note 224 above).

Some representatives stressed that, in addition to responsibility for wrongful acts, it was necessary to study responsibility for lawful acts. Some agreed that the Commission could consider the latter question separately at a later stage in its work. Others felt that the two questions should be dealt with simultaneously. It was also observed that the two forms of responsibility could be dealt with in parallel but separate studies. Some representatives felt that responsibility for lawful acts should cover all types of activities giving rise to such responsibility, such as the pollution of the oceans, and should not be restricted only to some of them (outer space and nuclear activities). Other representatives said that it would be useful to consider a third category of acts—such as pollution of the atmosphere or the oceans with radioactive substances or deadly gases—which, because of their dangerous nature, fell half way between lawful and wrongful acts.²³¹

185. In the light of its current work on the topic and the successive recommendations of the General Assembly, it may be assumed that the Commission will include this subject in its revised list and continue to give it a high degree of attention. The difficult task which is presented is to attempt to give an evaluation first of the scope of the Commission's work in this regard and, secondly, of the approximate length of time which may be required for its completion. On the latter aspect, the position is affected by the relative degree of priority which the Commission may choose to give to the various items it has before it. It may perhaps be recalled in this connexion, that the General Assembly has on several occasions emphasized the importance which it attaches to the subject of State responsibility. Even assuming that the Commission were to give a relatively high priority to this item, however, completion of the Commission's work in this sphere might nevertheless be expected to take several years.

186. With respect to the scope of the work, as the Commission has acknowledged, the approach now being followed by the Commission would entail or imply that, at some stage, consideration would have to be given to the task of determining how the general law governing State responsibility, once agreed upon, is to be related to the content of the rules the violation of which may generate international responsibility,—such as, for instance, the rules relating to the maintenance of international peace and security. If it is decided to undertake a separate study of the question of responsibility for lawful acts, this would presumably include responsibility for harm caused by various activities, such as those relating to outer space, the civil application of nuclear energy and activities resulting in marine pollution. The question would have to be considered whether responsibility for certain of those activities should be, at least in some instances, strict or absolute as opposed to the principle of reasonable foreseeability applied in respect of other activities involving the risk of harm.

²³¹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 84, document A/8147, para. 104.* At the conclusion of the debate, the Chairman of the Commission assured the representatives of the Sixth Committee that, in response to the wishes which had been expressed by some of them, the Commission would give due consideration to the question of responsibility for lawful acts (*ibid.*, *Sixth Committee*, 1193rd meeting, para 47.)

187. The approach which the Commission has decided to follow in its study of this topic may be summarized, in the light of the foregoing, as an attempt to achieve the formulation of a uniform set of rules governing the general law of State responsibility and, at the same time, to permit, as its work proceeds, the possibility of distinctions being drawn according to the category of cases involved so as to reflect the relevant substantive rules.

Chapter V

Succession of States and Governments

188. The 1948 Survey²³² dealt with both "succession of States" and "succession of Governments". With regard to the former, the 1948 Survey concluded as follows:

Considerations of justice and of economic stability in the modern world probably require that in any system of general codification of international law the question of State succession should not be left out of account. The law of State succession prevents the events accompanying changes of sovereignty from becoming mere manifestations of power. As such it would seem to deserve more attention in the scheme of codification than has been the case hitherto.²³³

189. Pointing out that the question of State succession, even more than that of recognition, had so far remained outside the work of codification, the 1948 Survey continued as follows:

One possible explanation of this fact is that State succession has often been regarded as a problem arising primarily as the result of war and that as such it ought, like the law of war itself, to remain outside the field of codification. This view is open to question. Experience has demonstrated that changes of sovereignty may take place in ways other than the liquidation of the aftermath of war—as has been shown, for instance, by the questions of State succession which have arisen as the result of the emergence of the independent States of India and Pakistan.²³⁴

190. The 1948 Survey suggested certain aspects of "succession of States" which might be studied by the Commission. In particular, it singled out the need to give a precise formulation to the general principle of respect for acquired private rights, such as those grounded in the public debt, in concessionary contracts, in relations of government service, and the like, and to study such exceptions to that principle as the obligations of the predecessor State in matters of tort and the public debt contracted for purposes inimical to the successor State. It was also added that the position with regard to rights and obligations arising out of treaties concluded by the predecessor State was in many respects obscure and should be clarified.

191. The 1948 Survey considered finally the question of the extent to which the codification of State succession ought to concern itself with "succession of Governments" and with the affirmation of the principle that

²³² See para. 4 above.

²³³ 1948 Survey, para. 46.

²³⁴ *Ibid.*, para. 44.

the obligations of the State continued notwithstanding any changes of government or of the form of government of the State in question. The conclusion reached in the matter was as follows:

Any attempt to codify the rules governing the latter principle would not be feasible without a parallel attempt to qualify some such rules as that the obligations in question must have been validly contracted or that their continuation cannot be inconsistent with any fundamental changes in the structure of the State accompanying the revolutionary change of government. It is clear that any attempt to formulate the principles—and their qualifications—in question would raise problems of great legal and political complexity. However, this need not necessarily constitute a decisive argument against including it within the scheme of codification.²³⁵

192. At its first session in 1949, the Commission included "Succession of States and Governments" in the list of topics selected for codification, but it did not give priority to its study.²³⁶ The Commission did not in fact revert to "Succession of States and Governments" until its fourteenth session, held in 1962, when it decided to include the topic in its future programme of work. This action of the Commission followed the adoption by the General Assembly of resolution 1686 (XVI) of 18 December 1961, paragraph 3 (a) of which recommended that the Commission "include on its priority list the topic of succession of States and Governments". In 1962 the Commission set up a Sub-Committee on the Succession of States and Governments, which was entrusted with the task of submitting suggestions on the scope of the subject and the method of approach for its study.²³⁷

193. 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.

In 1963, the Commission gave its general approval to the recommendations contained in the Sub-Committee's report and appointed Mr. M. Lachs as Special Rapporteur for the topic of "Succession of States and Governments".

194. In its resolution 1902 (XVIII) of 18 November 1963, the General Assembly recommended, in language

similar to that of resolution 1765 (XVII), that the Commission should continue its work on the topic. Subsequently, the General Assembly reaffirmed the recommendation in resolutions 2272 (XXII) of 1 December 1967, 2400 (XXIII) of 11 December 1968, 2501 (XXIV) of 12 November 1969 and 2634 (XXV) of 12 November 1970.

195. The main relevant conclusions reached by the Commission, when it endorsed the Sub-Committee's report on the topic in 1963, may be summarized as follows:

(a) The objectives should be a survey and evaluation of the present state of 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;

(b) In view of the modern phenomenon of decolonization, special attention should be given, in the view of several members, to problems of concern to the new States;

(c) Priority should be given to the study of the question of "succession of States";

(d) For the time being, the "succession of Governments" would be considered only to the extent necessary to supplement the study on State succession;

(e) Succession in matters of treaties should be considered in connexion with succession of States, rather than in the context of the law of treaties;

(f) Three headings were distinguished within the topic, namely:

(i) Succession in respect of treaties;

(ii) Succession in respect of matters other than treaties;²³⁸

(iii) Succession in respect of membership of international organizations.

196. At its nineteenth session, in 1967, the Commission made new arrangements for the work on the Succession of States and Governments. Taking into account the broad outline of the subject laid down in 1963 and the fact that Mr. Lachs, the Special Rapporteur, had ceased to be a member of the Commission, it was decided, in order to advance the study of the topic, to divide it into the three headings mentioned in the preceding paragraph and to appoint Special Rapporteurs for two of them: Sir Humphrey Waldock was appointed Special Rapporteur for "succession in respect of treaties" and Mr. M. Bedjaoui Special Rapporteur for "succession in respect of matters other than treaties". At the same time, the Commission decided to leave aside, for the time being, the third heading in the division, namely "succession in respect of membership of international organizations", which it considered to be related both to succession in respect of treaties and to

²³⁵ *Ibid.*, para. 47.

²³⁶ For a detailed historical background of the consideration of the question by the Commission, see *Yearbook of the International Law Commission, 1968*, vol. II, p. 213, document A/7209/Rev.1, paras. 29-42; *ibid.*, 1969, vol. II, p. 222, document A/7610/Rev.1, paras. 20-34; and *ibid.*, 1970, vol. II, p. 299 *et seq.*, document A/8010/Rev.1, paras. 27-36.

²³⁷ The Sub-Committee was composed 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 report of the Sub-Committee (A/CN.4/160 and Corr.1) is contained in annex II of the 1963 report of the Commission (*Yearbook of the International Law Commission, 1963*, vol. II, p. 260, document A/5509).

²³⁸ In 1963 the heading was formulated as follows: "Succession in respect of rights and duties resulting from sources other than treaties". In 1968 the Commission replaced this heading by the present title (see *Yearbook of the International Law Commission, 1968*, vol. II, p. 216, document A/7209/Rev.1, para. 46).

relations between States and international organizations, and did not appoint a Special Rapporteur for this aspect.

197. Before considering further the aspects of the topic currently under consideration by the Commission and those which, for the time being, have been left aside, reference should be made to one of the more significant phenomena which have occurred in international relations since the adoption of the United Nations Charter, namely the process of decolonization. Under the impact of the principles embodied in the Charter and numerous relevant resolutions and declarations adopted by the General Assembly—in particular resolution 1514 (XV) of 14 December 1960 containing the Declaration on the Granting of Independence to Colonial Countries and Peoples and resolution 2160 (XXI) of 30 November 1966 on the strict observance of the prohibition of the threat or use of force, in international relations and of the rights of peoples to self-determination—decolonization has become one of the aims of the international community and is proceeding under its supervision. It is not intended to deal in this context with the political, human, cultural, social and economic consequence of decolonization, nor, even, to analyse its present or future impact in the application, interpretation and development of international law. Particular reference has been made to the process of decolonization in the present context since, although only one amongst the possible causes of succession, it has in fact been the major reason why international attention has been given in recent years to the topic of State succession. This preoccupation explains also the priority given since 1962 to the study of the topic by the Commission, following the General Assembly and Commission decisions mentioned above. The records of recent sessions of the Commission and of the Sixth Committee of the General Assembly likewise reflect this preoccupation. In the words of General Assembly resolution 1765 (XVII), the Commission was requested to study the succession of States and Governments taking into consideration, *inter alia*, “the views of States which have achieved independence since the Second World War”, namely taking due account of the succession practice resulting from the recent process of decolonization.²³⁹

²³⁹ The Secretariat has prepared, in accordance with the Commission's request, the following documents and publications relating to succession of States and Governments and containing mainly recent practice on the subject: (a) a memorandum on “The succession of States in relation to membership in the United Nations” (*Yearbook of the International Law Commission*, 1962, vol. II, p. 101, document A/CN.4/149 and Add.1); (b) a memorandum on “Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary” (*ibid.*, p. 106, document A/CN.4/150); (c) a study entitled “Digest of the decisions of international tribunals relating to State Succession” (*ibid.*, p. 131 document A/CN.4/151) supplement in 1970 (*ibid.*, 1970, vol. II, p. 170, document A/CN.4/232); (d) a study entitled “Digest of decisions of national courts relating to succession of States and Governments” (*ibid.*, 1963, vol. II, p. 95, document A/CN.4/157); (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”

198. In this perspective, and bearing in mind that the main principle of international law involved in the decolonization is the “principle of equal rights and self-determination of peoples”, attention may be called to the work done in connexion with that principle by the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States. In its resolution 2625 (XXV) of 24 October 1970, containing the Declaration on Principles of Friendly Relations, the principle of equal rights and self-determination of peoples is formulated as follows:

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

Every State has the duty to promote, through joint and separate action, the realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned; and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the

(Study I); “Permanent Court of Arbitration and The Hague Conventions of 1889 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) (Studies I-V are contained in *ibid.*, 1968, Vol. II, p. 1, document A/CN.4/200 and Add.1 and 2); “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) (*ibid.*, 1969, vol. II, p. 23, document A/CN.4/210) and “International Telecommunication Conventions and subsequent revised Convention and Telegraph, Telephone, Radio and Additional Radio Regulations” (Study VIII) (*ibid.*, 1970, vol. II, p. 61, document A/CN.4/225); (f) three studies in the series “Succession of States in respect of bilateral treaties” entitled “Extradition treaties” (Study I) (*ibid.*, p. 102, document A/CN.4/229), “Air transport agreements” (Study II) and “Trade agreements” (Study III) (see below, pp. 118 and 149, documents A/CN.4/243 and A/CN.4/243/Add.1); (g) a volume of the United Nations Legislative Series entitled *Materials on succession of States* (United Nations publication, Sales No. E/F.68.V.5), containing the information provided or indicated by Governments of Member States in response to the Secretary-General's request.

emergence into any political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

1. SUCCESSION IN RESPECT OF TREATIES

199. In accordance with the decision of principle referred to in paragraph 195 above, the Commission decided in 1963 not to concern itself with succession in respect of treaties, in the context of the codification of the law of treaties.²⁴⁰ The introduction to the chapter dealing with the law of treaties in the Commission's report on its eighteenth session states that

... the draft articles do not contain provisions concerning either the succession of States in respect of treaties, which the Commission considers can be more appropriately dealt with under the item of its agenda relating to succession of States and Governments, or the effect of the extinction of the international personality of a State upon the termination of treaties. In regard to the latter question, as is further explained in paragraph 6 of its commentary to article 58 and in its 1963 report, the Commission "... did not think that any useful provisions could be formulated on this question without taking into account the problem of the succession of States to treaty rights and obligations."²⁴¹

²⁴⁰ In its work on the law of treaties, the Commission noted certain points to which the succession of States or Governments might be relevant. Examples which may be mentioned are the reference made at the Commission's fifteenth session to the succession of States and Governments in connexion with the extinction of the international personality of a State and the termination of treaties (*Yearbook of the International Law Commission*, 1963, vol. II, pp. 206-207, document A/5509, para. 3 of the commentary to draft article 43) and the reference to the territorial scope of treaties and the effects of treaties on third States (*ibid.*, 1964, vol. II, p. 175, document A/5809, para. 18).

²⁴¹ *Ibid.*, 1966, vol. II, p. 177, document A/6309/Rev.1, part II, para. 30.

200. Article 73 of the Vienna Convention on the Law of Treaties,²⁴² like article 69 of the Commission's draft, expresses the following reservation on this matter:

The provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty from succession of States...

201. The Special Rapporteur for succession in respect of treaties, Sir Humphrey Waldock, has submitted, since his appointment in 1967, three reports; the first report²⁴³ was considered by the Commission in 1968 and the second²⁴⁴ and third²⁴⁵ in 1970. The discussion in 1968 concerned general questions relating to the dividing line between succession in respect of treaties and succession in respect of matters other than treaties, the nature and the form of the work and the title of the topic.²⁴⁶ The second and third reports together contained twelve draft articles, with commentaries, covering questions such as the use of certain terms (for instance, "succession" and "new State"), the case of a territory passing from one State to another (the so-called principle of "moving treaty-frontiers"), devolution agreements, unilateral declarations by successor States, and the rules governing the position of "new States" in regard to multilateral treaties (the question of the rights or obligations of a "new State" with regard to multilateral treaties previously applied to its territory).

202. As explained by the Special Rapporteur: (a) the draft was based on the thesis that in regard to treaties the question of "succession" should be considered as a particular problem within the general framework of the law of treaties; (b) the concept of "succession" as it has so far emerged from his study of the subject was characterized first by the fact of the replacement of one State by another in the sovereignty of a territory or in the competence to conclude treaties in respect of it and, secondly, by a distinction between the fact of a succession and the transmission of treaty rights and obligations on its occurrence.²⁴⁷

203. The discussion in the Commission showed a large measure of general agreement with the solutions proposed by the Special Rapporteur as a basis for the study of

²⁴² *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

²⁴³ *Yearbook of the International Law Commission*, 1968, vol. II, p. 87, document A/CN.4/202.

²⁴⁴ *Ibid.*, 1969, vol. II, p. 45, document A/CN.4/214 and Add.1 and 2.

²⁴⁵ *Ibid.*, 1970, vol. II, p. 25, document A/CN.4/224 and Add.1.

²⁴⁶ It should be recalled that it was considered unnecessary to repeat in the context of succession in respect of treaties the general debate which took place, likewise in 1968, on several aspects of succession in respect of matters other than treaties (see para. 207 below). It was considered that it would be for the Special Rapporteur to take account of the views expressed by members of the Commission in that debate in so far as they might also have relevance for succession in respect of treaties.

²⁴⁷ For a summary of proposals by the Special Rapporteur, see *Yearbook of the International Law Commission*, 1970, vol. II, p. 301 *et seq.* document A/8010/Rev.1, paras. 37-48.

the topic.²⁴⁸ Some doubts or reservations were voiced on certain particular aspects of questions such as the use of the expressions "succession"²⁴⁹ and "new State" in the draft as a term of art; the relationship between a provision laying down the absence of any general obligation on a new State to take over the treaties of its predecessor, and the possible exceptions to that rule (in particular, with regard to so-called "dispositive", "territorial" or "localized" treaties and to the "moving treaty-frontier" principle); the right of a new State to consider itself a party to a multilateral treaty in force in respect of its territory at the date of the succession; the relationship between the present topic and succession in respect of matters other than treaties; the distinction between the treaty itself and the situation or régime established by it; and the convenience of a reservation similar to that contained in article 43 of the Vienna Convention on the Law of Treaties concerning rules in a treaty which were generally accepted customary law.

204. The Special Rapporteur pointed out that it was essential to see the whole draft before final conclusions were reached. Accordingly, in his next report he would give priority to dealing with all the remaining aspects of the topic, enumerating among them particular forms of succession relating to protected States, mandates and trusteeships and the question of "dispositive", "territorial" or "localized" treaties, including the problem of boundaries.²⁵⁰ The Special Rapporteur drew attention to the scope of the treaties to be covered by the draft and the need to reserve the application of any relevant rules governing succession to constituent instruments of international organizations or to treaties adopted within such organizations, assuming that (a) the draft, like the Vienna Convention on the Law of Treaties, would be limited to treaties between States and (b) the draft would contain a provision similar to that in article 5 of the Convention on the Law of Treaties reserving the application of any relevant rules of international organizations to those categories of treaties.²⁵¹

205. By resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the

²⁴⁸ For detailed summary of the debate, see *ibid.*, p. 303 *et seq.*, paras 49-63.

²⁴⁹ Some members felt that the draft articles should include a general reservation on the question of military occupation, just as the special cases of "aggression" and the "outbreak of hostilities" had been reserved from the Vienna Convention on the Law of Treaties.

²⁵⁰ The Special Rapporteur reminded the Commission that in its work on the law of treaties it had considered the analogous question of treaties establishing "objective" régimes in the context of "treaties" and third States". It seemed to him that the question of "objective" régimes presented itself from a somewhat different angle in the case of succession of States and had to be examined *de novo* on its own merits in dealing with succession in respect of treaties. See also paras. 49-52 above.

²⁵¹ For the views expressed in the Sixth Committee on the Commission's consideration of succession in respect of treaties

Commission should continue its work on succession of States, taking into account previous relevant resolutions, with a view, *inter alia*, to completing in 1971 the first reading of draft articles on succession of States in respect of treaties.

2. SUCCESSION IN RESPECT OF MATTERS OTHER THAN TREATIES

206. The Special Rapporteur for this topic, Mr. M. Bedjaoui, has submitted three reports to the Commission. The first report,²⁵² considered by the Commission in 1968, gave rise to a general debate involving questions of interest for the "succession of States and Governments" as a whole.²⁵³ The main points discussed during the debate were: title and scope of the topic; general definition of State succession; method of work; form of the work; origins and types of State succession; specific problems of new States; judicial settlement of disputes; order of priority or choice of certain aspects of the topic. A few preliminary comments were also made by some members of the Commission on certain particular aspects of the topic such as public property, public debts, legal régime of the predecessor State, territorial problems, status of the inhabitants and acquired rights.

207. Among the preliminary conclusions reached by the Commission in 1968 at the end of its debate, those relating to the order of priority or choice of certain aspects of the topic are particularly important for the purpose of the present document.²⁵⁴ They are summarized in the Commission's report on the session as follows:

In view of the breadth and complexity of the task entrusted to the Special Rapporteur, the members of the Commission were in favour of giving priority to one or two aspects for immediate study, on the understanding that this did not in any way imply that all the other questions coming under the same heading would not be considered later. It was also pointed out that the order in which subjects would be studied would not affect their positions in the draft finally adopted.

Among the aspects to which priority should be given, the following were mentioned: (a) public property and public debts; (b) the question of natural resources; (c) territorial questions which came under the heading; (d) special problems arising from decolonization; (e) nationality changes resulting from succession; (f) certain aspects of succession to the legal régime of the predecessor State. The predominant view was that the economic aspect of succession should be considered first. At the

in 1970, see *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 73-97.

²⁵² *Yearbook of the International Law Commission*, 1968, vol. II, p. 94, document A/CN.4/204.

²⁵³ For a detailed summary of the Commission's debate, see *ibid.*, p. 216, document A/7209/Rev.1, paras. 45-79.

²⁵⁴ For the relevant views expressed in the Sixth Committee on the Commission's debate in 1968, see *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 84, document A/7370, paras. 43-53.

outset, it was suggested that the problems of public property and public debts should be considered first. But, since that aspect appeared too limited, it was proposed that it should be combined with the question of natural resources [so] as to cover problems of succession in respect of the different economic resources (interests and rights) including the associated questions of concession rights and government contracts (acquired rights). The commission accordingly decided to entitle that aspect of the topic "Succession of States in economic and financial matters" and instructed the Special Rapporteur to prepare a report on it for the next session.²⁵⁵

208. In 1969, the Commission considered the second report by the Special Rapporteur, entitled "Economic and financial acquired rights and State succession".²⁵⁶ As indicated in his report, the Special Rapporteur took as his starting point the principle of equality of States and went on to show that the successor State possessed its own sovereignty, as an attribute that international law attached to statehood.

Finding no legal basis for the theory of acquired rights and convinced of the highly contradictory nature of the precedents, which needed re-examination, the Special Rapporteur held, in short, that the successor State was not bound by the acquired rights granted by the predecessor State, and that it was so bound only if it acknowledged those rights of its own free will or if its competence was restricted by treaty. But the competence of the successor State was obviously not arbitrary. In its actions, it must not depart at any time from the rules of conduct governing every State. For, before becoming a successor State, it was a State, in other words, a legal entity having in addition to its rights, international obligations the violation of which would engage its international responsibility.²⁵⁷

209. Different views were expressed by the members of the Commission on the approach and conclusions of the report during the several meetings devoted to its study.²⁵⁸ While some members supported in principle that approach and the conclusions drawn, or agreed with certain of the arguments advanced, others expressed reservations as to a number of issues dealt with in the report. In particular, some members were of the opinion that the report put too much emphasis on decolonization and that other types or causes of succession should be studied also. As far as the specific issues were concerned, the discussion focussed on the following points: the succession of States and the problem of acquired rights; economic and financial acquired rights and specific problems of new States; succession in economic and financial matters as a question of continuity or discontinuity of legal situations existing prior to the succession; relationship between succession in economic and financial matters, the rules governing the treatment of aliens and the topic of State responsibility.

210. At the end of the debate, most members of the Commission were of the opinion that the codification of the rules relating to succession in respect of matters other than treaties should not begin with the

preparation of draft articles on acquired rights. The topic of acquired rights was extremely controversial and its study, at a premature stage, could only delay the Commission's work on the topic as a whole. The efforts of the Commission should, therefore, be directed to finding a solid basis on which to go forward with the codification and progressive development of the topic, taking into account the differing legal interests and needs of States. Consequently most members of the Commission considered that an empirical method should be adopted for the codification of succession in economic and financial matters, preferably commencing with a study of public property and public debts. Not until the Commission had made sufficient progress, or perhaps had even exhausted the entire topic, would it be in a position to deal directly with the problem of acquired rights. The Commission requested the Special Rapporteur to prepare another report containing draft articles on succession of States in respect of economic and financial matters. The Special Rapporteur expressed the intention to devote his next report to public property and public debts.²⁵⁹

211. In 1970, the Commission was unable, owing to the lack of time, to study the third report²⁶⁰ submitted by the Special Rapporteur containing four draft articles, with commentaries, concerning certain aspects of the subject of succession to public property.

212. By its resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission should continue its work on succession of States, taking into account previous relevant resolutions, with a view, *inter alia*, to making progress in the consideration of succession of States in respect of matters other than treaties.

3. OTHER QUESTIONS RELATING GENERALLY TO SUCCESSION OF STATES AND GOVERNMENTS

213. In the light of the preceding paragraphs, it may be assumed that the Commission will continue to be concerned with the study of succession in respect of treaties and of succession in respect of matters other than treaties. Besides these aspects, the Commission may, however, like to consider, from the standpoint of its future long-term programme, certain other questions relating to the general heading of "Succession of States and Governments".

214. As has been mentioned above,²⁶¹ the Commission decided in 1967 to leave aside, for the time being, the question of "succession of membership of international organizations" and, in 1970, the Special

²⁵⁵ *Yearbook of the International Law Commission*, 1968, vol. II, p. 221, document A/7209/Rev.1, paras. 78-79.

²⁵⁶ *Ibid.*, 1969, vol. II, p. 69, document A/CN.4/216/Rev.1.

²⁵⁷ *Ibid.*, p. 225, document A/7610/Rev.1, para. 38.

²⁵⁸ *Ibid.*, pp. 225-229, paras. 35-63.

²⁵⁹ For the views expressed in the Sixth Committee on the Commission's consideration in 1969 of the question of economic and financial acquired rights and State succession, see *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, paras. 67-83.

²⁶⁰ *Yearbook of the International Law Commission*, 1970, vol. II, p. 131, document A/CN.4/226.

²⁶¹ See para. 196 above.

Rapporteur for succession in respect of treaties stated that he assumed that the draft articles on that topic would reserve the application of any relevant rules of international organizations governing succession to constituent instruments or to treaties adopted within such organizations.²⁶²

215. The Special Rapporteur assumed also that the draft articles on succession in respect of treaties would be limited to treaties concluded between States. If this assumption is finally endorsed by the Commission, treaties concluded between States and other subjects of international law, or between these other subjects, would remain outside the scope of the draft articles on succession in respect of treaties.

216. With regard to succession in respect of matters other than treaties, it is more difficult to determine the exact final scope of the draft articles which the Commission intends to prepare on the topic. In 1968 the Commission decided that succession in economic and financial matters should be considered first and, in 1969, it was agreed to begin with the study of public property and public debts and to postpone dealing directly with the problem of acquired rights. However, it should be recalled that the 1968 decision of the Commission was made on the understanding that it did not imply in any way that "all other questions" coming under the heading "succession in respect of matters other than treaties" would not be considered later.

217. So far as "succession of Governments" is concerned, the Commission in 1963 decided that the priority given to the study of State succession was fully justified and that succession of Governments would, for the time being, be considered only to the extent necessary to supplement the study on State succession. It should be noted that the present headings of the two topics currently under consideration omitted any reference to States or to Governments. However, in 1968, some members of the Commission recalled that "succession in respect of treaties" should cover only succession of States and leave succession of Governments aside.²⁶³ Likewise, when the Commission decided to give priority, within "succession in respect of matters other than treaties", to the economic and financial aspects of succession, it entitled these aspects "Succession of States in economic and financial matters".²⁶⁴ At present, the Commission is conducting its study of succession in respect of treaties and of succession in economic and financial matters on the basis of the general decision reached in 1963 and concentrating, therefore, its work on problems of State succession. This approach appears to have been endorsed by the General Assembly. The relevant paragraph (para. 4 (b)) of its resolution 2634 (XXV) refers only to "succession of States".

²⁶² *Yearbook of the International Law Commission, 1970*, vol. II, p. 27, document A/CN.4/224 and Add.1, para. 6.

²⁶³ *Ibid.*, 1968, vol. II, p. 222, document A/7209/Rev.1, para. 90.

²⁶⁴ *Ibid.*, p. 221, para. 79. (Italics supplied).

218. There are, accordingly, a number of questions coming under the general heading of "Succession of States and Governments" to which the Commission may like to give attention when planning its future long-term programme; the delimitation of such questions depends, however, to a large extent, upon the scope of the Commission's final draft articles on the two topics currently under consideration. Bearing this in mind, it would seem advisable to keep, for the time being, the general heading of "Succession of States and Governments" on the revised list of topics, which would permit the Commission to determine at a later stage how best to deal with such issues as may still be outstanding with respect to this branch of law in the light of the Commission's final draft articles on the two aspects now under study.

Chapter VI

Diplomatic and consular law

219. This general heading is intended to cover all major branches of international law concerning diplomatic and consular law, and questions related thereto. The matters dealt with have been divided in accordance with the work done, or being done, by the Commission. The final section concerns questions relating to the implementation of certain rules and which have recently attracted attention. The chapter is accordingly divided as follows:

- (1) Diplomatic relations;
- (2) Consular relations;
- (3) Special missions;
- (4) Representatives of States to international organizations;
- (5) Questions concerning the implementation of certain rules of diplomatic and consular law.

1. DIPLOMATIC RELATIONS

220. This topic was mentioned in the 1948 Survey²⁶⁵ and included in the 1949 list.²⁶⁶ As recommended by the General Assembly in resolution 685 (VII) of 5 December 1952, the Commission decided at its sixth

²⁶⁵ See para. 4 above.

²⁶⁶ *Idem.* The topic was entitled "The law of diplomatic intercourse and immunities" in the 1948 Survey and "Diplomatic intercourse and immunities" in the 1949 list. The Commission's final draft of 1958 was entitled "Draft articles on diplomatic intercourse and immunities".

At the United Nations Conference on Diplomatic Intercourse and Immunities (Vienna, 1961) it was decided to give the following title to the convention adopted: "Vienna Convention on Diplomatic Relations" (see *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II (United Nations publication, Sales No. 62.X.1), pp. 50 and 69, document A/CONF.20/L.2, para. 17 and annex 1); and *ibid.*, vol. I (United Nations publication, Sales No. 61.X.2), p. 7, 4th plenary meeting, para. 4). For the text of the Convention and of the two protocols, see United Nations, *Treaty Series*, vol. 500, pp. 95, 223 and 241.

session (1954) to treat it as a priority topic. The same year, it appointed Mr. A. E. F. Sandström as Special Rapporteur. The Commission considered the topic at its ninth session (1957) and tenth session (1958) on the basis of the reports submitted by the Special Rapporteur. A preliminary draft was adopted in 1957. In the light of comments on the preliminary draft received from Governments in 1958, the Commission adopted at its tenth session a final draft, containing forty-five articles with commentaries, and requested the General Assembly that the draft be recommended to Member States with a view to the conclusion of a convention. The General Assembly, by resolution 1450 (XIV) of 7 December 1959, decided to convene an international conference of plenipotentiaries to consider the question and to embody the results of its work in an international convention, together with such ancillary instruments as might be necessary. The relevant chapter of the Commission's report on its tenth session was referred by the Assembly to the conference as the basis for its consideration of the question.

221. The United Nations Conference on Diplomatic Intercourse and Immunities met in Vienna from 2 March to 14 April 1961. The Conference adopted a convention entitled the "Vienna Convention on Diplomatic Relations", consisting of fifty-three articles and covering, from a legal standpoint, most major aspects of permanent diplomatic relations between States. The Convention codifies and develops progressively the customary rules on the matter. The Convention deals with: (a) diplomatic relations in general, including the establishment of diplomatic relations and of diplomatic permanent missions; (b) diplomatic facilities, privileges and immunities relating to the mission and its work as well as to persons composing the mission and their families; (c) the conduct of the mission and of its members; (d) the end of the functions of a diplomatic agent; (e) non-discrimination in the application of the provisions of the Convention. The Conference adopted also an optional protocol concerning acquisition of nationality²⁶⁷ and an optional protocol concerning compulsory settlement of disputes.²⁶⁸ The Convention and both protocols entered into force on 24 April 1964. On 1 April 1971, ninety-nine States were parties to the Convention, and twenty-nine and forty States respectively were parties to the two protocols.

222. The conclusion of the 1961 Vienna Conference would appear to have marked the successful completion

of the codification work of the United Nations in this field.

2. CONSULAR RELATIONS

223. As in the case of diplomatic relations, this subject was referred to in the 1948 Survey and included by the Commission in its 1949 list.²⁶⁹ At its seventh session (1955) the Commission decided to begin the study of the topic and appointed Mr. J. Zourek as Special Rapporteur. The Special Rapporteur submitted his reports on the topic in 1957, 1960 and 1961. Although brief exchanges of views took place in 1956 and 1958, the Commission was not actually in a position to undertake a systematic and detailed study of the topic until its eleventh session in 1959. The Commission completed a provisional set of draft articles on consular intercourse and immunities at its twelfth session (1960). At its thirteenth session (1961) it adopted its final draft articles, taking the comments of Governments on the provisional draft into account, and recommended that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft and conclude one or more conventions on the subject.

224. The draft articles on consular relations, consisting of seventy-one articles accompanied by commentaries, was referred by General Assembly resolution 1685 (XVI) of 18 December 1961 to the international conference of plenipotentiaries convened by the Secretary-General pursuant to that resolution. A further discussion on the subject-matter of the draft articles took place in the Sixth Committee at the seventeenth session of the General Assembly in 1962. The United Nations Conference on Consular Relations, which met in Vienna from 4 March to 22 April 1963, adopted the Vienna Convention on Consular Relations, consisting of seventy-nine articles, an optional protocol concerning acquisition of nationality²⁷⁰ and an optional protocol concerning the compulsory settlement of disputes.²⁷¹ The Convention and both optional protocols came into force on 19 March 1967. On 1 April 1971, forty-six States were parties to the Convention, and fifteen and eighteen States respectively were parties to the two protocols.

225. The Convention deals comprehensively with the legal aspects of consular relations governed by international law. Like the draft articles prepared by the Commission, the provisions contained in the Convention are mainly based on customary law and concor-

²⁶⁷ The substantive provision of the protocol, namely that members of the mission not being nationals of the receiving States, and members of their families shall not acquire the nationality of that State "solely by the operation of the law of the receiving State" was included in the Commission's draft articles (article 35). The Conference decided, however, to make it the subject-matter of a separate optional protocol.

²⁶⁸ The Commission's draft articles contained a provision (article 45) concerning the settlement of disputes which established a compulsory settlement procedure. This provision was deleted from the Convention by the Conference and replaced by a separate optional protocol. The optional protocol adopted by the Conference regulates matters in a more detailed fashion than did the provision in the Commission's draft articles.

²⁶⁹ The topic was entitled "The law of consular intercourse and immunities" in the 1948 Survey and "Consular intercourse and immunities" in the 1949 list. In 1961, the Commission entitled its final draft articles on the topic "Draft articles on consular relations". The text adopted by the United Nations Conference on Consular Relations was entitled "Vienna Convention on Consular Relations". For the text of the Convention and of the two protocols, see United Nations, *Treaty Series*, vol. 596, pp. 261, 469 and 487.

²⁷⁰ This optional protocol replaces article 52 of the Commission's draft articles.

²⁷¹ This optional protocol was elaborated at the Conference. The Commission's draft articles did not contain provisions concerning the settlement of disputes.

dant rules to be found in international conventions, especially consular conventions. In formulating the Convention, due account was also taken of the practice of States as evidenced by internal consular regulations, in so far as these regulations are in conformity with the fundamental principles of international law. The broad division of matters covered by the Convention is as follows: (a) consular relations in general (establishment and conduct of consular relations and end of consular functions); (b) facilities, privileges and immunities relating to consular posts, career consular officers and other members of a consular post, as well as to members of their respective families; (c) the régime of honorary consular officers and consular posts headed by such officers; (d) general provisions, including non-discrimination and the relationship between the Convention and other international agreements.

226. The codification and progressive development of the rules of international law concerning consular relations has therefore been completed, at least for the foreseeable future. Drawing when the purposes and principles mentioned in the Preamble to the Charter of the United Nations—in particular the principle of the sovereign equality of States—the Vienna Convention consecrates implicitly the abolition of the former “capitulation régimes”. At the time of the adoption of the Convention such régimes had already disappeared from international relations, but the abrogation had been made by a series of particular legal acts concerning specific cases or groups of cases. By adopting a general consular convention inspired by the sovereign equality of States, the international community, through a Conference which was attended by delegations of ninety-five States, sealed this abolition by a collective act.

227. Following the Vienna Convention, the main significant development in the field of consular law has been the adoption of two multilateral regional conventions, namely the European Convention on Consular Functions (11 December 1967),²⁷² and the Convention on the Abolition of Legalization of Documents executed by Diplomatic Agents or Consular Officers (7 June 1968),²⁷³ both of them concluded within the framework of the Council of Europe.

3. SPECIAL MISSIONS

228. In submitting its final draft on diplomatic intercourse and immunities to the General Assembly in 1958,²⁷⁴ the Commission stated that although the draft dealt only with permanent diplomatic missions, diplomatic relations might also assume other forms, under the heading “*ad hoc* diplomacy”, covering itinerant envoys, diplomatic conferences and special missions

sent to a State for limited purposes.²⁷⁵ At its eleventh session (1959) the Commission decided to place the question of *ad hoc* diplomacy on the agenda of its twelfth session as a special topic, and Mr. A. E. F. Sandström, who had acted as Special Rapporteur for the subject of diplomatic intercourse and immunities, was appointed as Special Rapporteur for this further topic. On the basis of a report submitted by the Special Rapporteur, the Commission adopted, at its twelfth session (1960), draft articles 1 to 3 on special missions, together with commentaries. The Commission, although stating that the draft should be regarded as constituting only a preliminary study of the matter, recommended that it should nevertheless be referred to the United Nations Conference on Diplomatic Intercourse and Immunities (Vienna, 1961) for consideration. The Commission decided not to deal, at least at that juncture, with the topic of “diplomatic conferences” which, as the Commission observed, was linked both to “special missions” and to the topic of “relations between States and international organizations”. By resolution 1504 (XV) of 12 December 1960, the General Assembly referred the three draft articles on special missions to the Conference on Diplomatic Intercourse and Immunities.

229. The Sub-Committee established at the United Nations Conference to examine the question of special missions noted that, because of lack of time, the draft articles had not been submitted to governments for their comments and that, in substance, they did little more than indicate which of the rules on permanent missions applied to special missions. The Sub-Committee considered that, while the basis rules might be the same, it could not be assumed that this approach necessarily offered a complete solution. On the basis of the recommendation adopted by the Conference, the General Assembly, in resolution 1687 (XVI) of 18 December 1961, accordingly requested the Commission to study further the subject of special missions.

230. At its fifteenth session (1963) the Commission appointed Mr. M. Bartoš as Special Rapporteur for the topic. The Special Rapporteur submitted reports in 1964, 1965, 1966 and 1967. A provisional first set of draft articles was adopted by the Commission in 1964 and completed in 1965. At its eighteenth session (1966) the Commission considered certain questions of a general nature, amongst them the question of whether provisions should be included concerning the legal status of the so-called high-level special missions. Finally, at its nineteenth session (1967) the Commission re-examined the whole provisionnal draft, taking into account the comments and observations received from governments, and adopted a final draft on special missions, consisting of fifty articles with commentaries. The draft, which covered itinerant envoys but not delegates to conferences, was submitted by the Commission to the General Assembly with the recommen-

²⁷² Council of Europe, *European Treaty Series*, No. 61.

²⁷³ *Ibid.*, No. 63.

²⁷⁴ See para. 220 above.

²⁷⁵ For a detailed account of the Commission's consideration of the topic of special missions, see *Yearbook of the International Law Commission*, 1967, vol. II, pp. 345 *et seq.*, A/6709/Rev.1, paras. 9-32.

dation that appropriate measures be taken for the conclusion of a convention on special missions.

231. By resolution 2273 (XXII) of 1 December 1967, the General Assembly decided to include an item entitled "Draft convention on special missions" in the provisional agenda of its twenty-third session, with a view to the adoption of such a convention by the General Assembly. The draft articles on special missions were accordingly examined by the Sixth Committee during the General Assembly's twenty-third and twenty-fourth sessions, in 1968 and 1969. By resolution 2530 (XXIV) of 8 December 1969, the General Assembly adopted the Convention on Special Missions which had been agreed upon at the Sixth Committee, together with an Optional Protocol concerning the Compulsory Settlement of Disputes.²⁷⁶ The Convention will enter into force thirty days following the date of deposit of the twenty-second instrument of ratification or accession. The Convention was open for signature until 31 December 1970, by which date fourteen States had signed the instrument, and ten States had signed the Protocol. As of 1 April 1971 no instrument of ratification or accession had been deposited to either instrument.

232. The Convention provides a full legal framework for the operation of a special mission, defined in article 1, paragraph (a), as

a temporary mission, representing the State, which is sent by one to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task.

It regulates the sending and conduct of special missions as well as its facilities, privileges and immunities. Like the Commission's draft, the Convention contains a provision concerning the sending of special missions by two or more States to another State in order to deal at the same time with a question of common interest, but does not deal with the over-all question of conferences.²⁷⁷ A provision of the Convention, article

21,²⁷⁸ concerned the status of the Head of State and persons of high rank leading or taking part in a special mission.

233. Finally, it may be noted that the non-discrimination provision of the Commission's draft was in part amended, taking into consideration paragraph 1 (b), of article 41 (Agreements to modify multilateral treaties between certain of the parties only) of the Vienna Convention on the Law of Treaties.²⁷⁹

4. REPRESENTATIVES OF STATES TO INTERNATIONAL ORGANIZATIONS²⁸⁰

234. When the Commission submitted its draft articles on diplomatic intercourse and immunities in 1958, it pointed out in its report that, apart from diplomatic relations between States there was also the question of relations between States and international organizations.²⁸¹ The Commission noted, however, that these matters are, as regards most organizations, governed by special conventions.²⁸² In the course of the discussion in the Sixth Committee of the Commission's report, the proposal was made that the General Assembly should request the Commission to include in its agenda the subject of relations between States and international organizations. On the recommendation of the Sixth Committee, the General Assembly adopted resolution 1289 (XIII) of 5 December 1958, inviting the Commission

to give further consideration to the question of relations between States and inter-governmental international organizations at the

²⁷⁶ The text of the Convention and of the Protocol are annexed to General Assembly resolution 253 (XXIV).

²⁷⁷ An amendment submitted by the United Kingdom, the purpose of which was to add to the Convention a new article concerning conferences was considered at the Sixth Committee. The amendment was subsequently withdrawn, but the Sixth Committee decided, on the proposal of the United Kingdom representative, to include in its report on the topic to the General Assembly the following summary of the views expressed during the discussion of the question of conferences:

"The Committee was of the opinion that the question of legal status, privileges and immunities of members of delegations to international conferences and of the secretariat of conferences constituted a gap in the law relating to international representation which remained to be filled. Once again, it was necessary to start from the proposition that the status, privileges and immunities should be those necessary to ensure the efficient and independent exercise of their respective functions. There were a number of precedents which could serve as a starting point for the study of the problem—the conventions on the privileges and immunities of international organizations (including those relating to the United Nations and to the specialized agencies), together with the Vienna Conventions on Diplomatic and Consular Relations and the forthcoming Convention on Special Missions.

"The Committee noted that the International Law Commission's Special Rapporteur on relations between States and international organizations, Mr. El-Erian, had indicated his intention to include articles on the status of delegations to conferences in the draft articles on representatives to international organizations. The Committee also noted that the International Law Commission had discussed, and would discuss again at its next session, the general question of further work on the status, privileges and immunities of delegations to international conferences.

"The Committee requested the International Law Commission to take into account in its further work on the subject the interest and the views expressed in the debates in the Sixth Committee at the twenty-fourth session of the General Assembly." (*Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda item 87, document A/7799, para. 178).

²⁷⁸ Paragraph 1 of this article is quoted in paragraph 76 above.

²⁷⁹ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

²⁸⁰ As indicated below, the legal status, privileges and immunities of representatives of States to international organizations has been considered by the Commission within the framework of the topic "Relations between States and international organizations". For questions to other aspects of that topic, see chapter XIV below ("The law relating to international organizations").

²⁸¹ The Commission referred also to the question of the privileges and immunities of the organizations themselves. For this question, see likewise chapter XIV below.

²⁸² *Yearbook of the International Law Commission, 1958* vol. II, p. 89, A/3859, para. 52.

appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly.

235. At its fourteenth session (1962) the Commission decided to include the question in its programme of work, to place it on the agenda of its fifteenth session, and to appoint Mr. A. El-Erian as Special Rapporteur for the topic. The Special Rapporteur's first report,²⁸³ which was submitted in 1963, examined the subject with a view to defining its scope and the order in which its study should be undertaken. Three groups of questions were distinguished: (a) those relating to the general principles of the international personality of international organizations and their legal capacity; (b) issues concerning international immunities and privileges, comprising the institution of legations in respect to such organizations and diplomatic conferences as well as the privileges and immunities of international organizations themselves; (c) special questions concerning the law of treaties in respect to international organizations, responsibility of international organizations and succession between them. The Special Rapporteur suggested that a distinction should be made between questions concerning the juridical personality and immunities of international organizations, and the special questions referred to above; consideration of the latter, it was felt, should be deferred until the Commission had completed or made substantial progress in its work on the branches of law involved in relation to States.

236. The Commission's discussion at its fifteenth and sixteenth sessions revealed differences of interpretation and approach as to the scope of the topic "Relations between States and international organizations" and the concept of the international personality of international organizations. Some of the more interesting issues raised, from the standpoint of considering topics for inclusion in the Commission's future long-term programme, will be considered in the context of chapter XIV below ("The law relating to international organizations"). However, it may be noted here that, following the discussion at the sixteenth session, the majority of the Commission, while agreeing in principle that the topic had a broad scope, expressed the view that for the purpose of its immediate study the question of "diplomatic law", in its application to relations between States and international organizations, should receive priority. Subsequently, the Commission has concentrated its work with respect to the topic on the study of the status, privileges and immunities of representatives of States to international organizations.

237. The further study by the Commission of "diplomatic law" applicable in relations between States and international organizations was not resumed until its twentieth session (1968). In 1967, however, the Special Rapporteur submitted a second report²⁸⁴ which sum-

marized the previous discussion and surveyed the principal issues; the report also contained three draft articles of a general character. Thereafter the Special Rapporteur submitted a series of further reports,²⁸⁵ containing draft articles and commentaries, relating to the representatives of States to international organizations. The Commission adopted, at its twentieth, twenty-first and twenty-second sessions, a draft comprising, besides certain general provisions, draft articles on permanent missions to international organizations, permanent observers of non-member States, and delegations to organs of international organizations and to conferences convened by international organizations.²⁸⁶ This provisional draft, consisting of 116 articles with commentaries, has been transmitted to governments for comments. By resolution 2634 (XXV) of 12 November 1970, the General Assembly recommended that the Commission should continue its work, taking into account the views expressed at the twenty-third, twenty-fourth and twenty-fifth sessions of the General Assembly and the comments which may be submitted by Governments, with the object of presenting in 1971 a final draft on the topic.

238. The draft articles apply to representatives of States to international organizations of a universal character, defined in article 1 as organizations "whose membership and responsibilities are on a world-wide scale". It deals, therefore, with permanent missions and permanent observer missions to international organizations of a universal character, as well as with delegations of States to organs of an international organization of a universal character, and to conferences convened by or under the auspices of such organizations. The difference of opinion as to whether or not the Commission's work should extend to regional organizations was met by the adoption of an intermediate solution, to the effect that the limitation of the scope of the draft articles to international organizations of a universal character should not be deemed to entail their non-application to representatives to other organizations, if those representatives would be subject independently to the same rules as are contained in the Commission's draft.²⁸⁷

²⁸⁵ *Ibid.*, 1968, vol. II, p. 119, document A/CN.4/203 and Add.1-5; *ibid.*, 1969, vol. II, p. 1, document A/CN.4/218 and *ibid.*, 1970, vol. II, p. 1, document A/CN.4/227 and Add.1-2. At the Commission's twenty-second session (1970) the Special Rapporteur also submitted a working paper on temporary observer delegations and conferences not convened by international organizations (A/CN.4/L.151).

²⁸⁶ The Commission also decided, at its twentieth session in 1968, to change the word "inter-governmental" in the title of the item to "international", in accordance with the terminology used in other codification conventions (*ibid.*, 1968, vol. II, p. 195, document A/7209/Rev.1, para. 23). To avoid any misunderstanding, article 1, paragraph (a) of the draft states that, for the purposes of the present articles, and international organizations" means an intergovernmental organization.

²⁸⁷ The views expressed during the twenty-fifth session of the General Assembly, with regard to the scope of the draft articles, are summarized in *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 17.

²⁸³ *Ibid.*, 1963, vol. II, p. 159, A/CN.4/161 and Add.1.

²⁸⁴ *Ibid.*, 1967, vol. II, p. 133, document A/CN.4/195 and Add.1.

239. The draft articles contain provisions safeguarding existing rules and agreements concerning international organizations and permitting the conclusion of new agreements in the future. However, the issue raised since the beginning of the consideration of the topic by the Commission, regarding the effect that the adoption of a new convention would have on existing rules and agreements, such as the Conventions of 1946 and 1947 on the privileges and immunities of the United Nations and of specialized agencies, continues to be of major concern.²⁸⁸ The part dealing with delegations to organs and to conferences contains also a provision (article 80) concerning the rules of procedure of a conference. In the commentary to this provision, the Commission expressed the opinion that

in view of their nature, rules of procedure should not derogate from certain provisions, such as those relating to privileges and immunities or upon which the host State may have relied in making arrangements for the conference.²⁸⁹

Provisions concerning non-discrimination in the application of the draft have likewise been included.

5. QUESTIONS CONCERNING THE IMPLEMENTATION OF CERTAIN RULES OF DIPLOMATIC AND CONSULAR LAW

240. With the adoption of the Vienna Conventions on Diplomatic Relations and Consular Relations, together with the Convention on Special Missions, and with the expected successful completion of the Commission's work on representatives of States to international organizations, all major branches of the diplomatic and consular law are, or will be in the near future, codified by general codification conventions. Problems involving the protection and inviolability of diplomatic agents, representatives of States and consular officers have, however, attracted considerable attention in recent years.

241. The matter was placed before the General Assembly at its twenty-second session and discussed in the Sixth Committee. In resolution 2328 (XXII) of 18 December 1967, the General Assembly, besides urging States Members which had not yet done so to accede to the Convention on the Privileges and Immunities of the United Nations and to ratify or accede to the Vienna Convention on Diplomatic Relations, declared that it

1. *Deplores* all departures from the rules of international law governing diplomatic privileges and immunities and the privileges and immunities of the Organization;

...

3. *Urges* States Members of the United Nations, whether or not they have acceded to the Convention on the Privileges and Immunities of the United Nations, to take every measure necessary to secure the implementation of the privileges and immunities accorded under Article 105 of the Charter to the Organization, to the representatives of Members and to the officials of the Organization;

...

5. *Urges* States, whether or not they are parties to the Vienna Convention on Diplomatic Relations, to take every measure necessary to secure the implementation of the rules of international law governing diplomatic relations, and in particular to protect diplomatic mission and to enable diplomatic agents to fulfil their tasks in conformity with international law.

242. More recently, in a letter dated 5 May 1970, addressed to the President of the Security Council, the Permanent Representative of the Netherlands to the United Nations drew attention to the problem, in the light of the increasing number of attacks on diplomats which had inflicted great danger and hardship and might endanger the conduct of friendly relations between States. The President of the Security Council transmitted the letter to the President of the International Court of Justice and to the Chairman of the Commission. The letter was brought to the attention of members of the Commission. In the reply sent to the President of the Security Council, the Chairman referred to the work done by the Commission in this area, in particular in the Commission's draft on diplomatic intercourse and immunities; a quotation was given from the Commission's commentary to article 27 of its final draft, in which the Commission recorded its interpretation of the principle of the personal inviolability of diplomatic agents. At the conclusion of the letter it was stated that the Commission expected to continue to be concerned with this problem in the future.²⁹⁰

243. During the discussion of the Commission's report in the Sixth Committee at the General Assembly's twenty-fifth session, certain representatives referred to the serious attacks on diplomatic agents which had recently occurred and to the international tension they created. These speakers stressed the need that adequate measures be adopted to put an end to the situation and to ensure the protection and inviolability of such agents. The wish was expressed that the Commission would take the question of the protection of members of diplomatic missions and consular posts into consideration when determining the topics to be included in its future programme.²⁹¹

244. When attacks have actually been carried out on the person of a diplomatic agent, a representative of a State or consular agent (whether involving the direct infliction of physical injury or the deprivation of liberty, as by acts of kidnapping) by individuals or organized

²⁸⁸ For the views expressed on this question in the Sixth Committee during the twenty-fifth session of the General Assembly, see *ibid.*, para. 21. On this question, see also chapter XIV below.

²⁸⁹ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 286, document A/8010/Rev.1, chap. II, B, commentary to article 80.

²⁹⁰ *Ibid.*, p. 273, document A/8010/Rev.1, para. 11.

²⁹¹ See *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, paras. 14 and 113. It was also suggested that a statement on the issue should be included in the present document.

groups uncontrolled by the government or opposed to it, the duty of the receiving State to protect and restore the inviolability of the person concerned continues. In such circumstances, the government of that State is obligated, under general principles of law, to take all the measures which may reasonably be required to re-establish the inviolability of such person and to apprehend the offenders. Under article 29 of the Vienna Convention on Diplomatic Relations,²⁹² which reflects customary international law, the receiving government is required to take "all appropriate steps" to prevent any attack on the person, freedom or dignity of the diplomatic agent. As stated in the Commission's commentary on this provision,²⁹³ this may include the provision of a special guard, if circumstances so require. The issue, so far as the duties of the receiving State are concerned, thus becomes one of the proportionality of the measures taken in the particular case; in the event that the receiving State had advance knowledge of the attack, or ought reasonably to have foreseen its occurrence, then steps (such as provision of a special guard) are required which might otherwise not be regarded as appropriate.

245. Following the actual commission of an attack on a representative of another State, the receiving State is required to take all steps which may reasonably be required to apprehend the offenders. In the cases which have recently come into prominence the receiving government has had either to accede to the demands (for example, to free certain persons detained by the government) of the persons who have attacked or abducted the diplomat (or other agent, as the case may be), or to accept that he might suffer personal harm. Although various provisions of international law can be invoked, it cannot be said that international law provides a rule which automatically determines how this choice is to be exercised: whether, in all circumstances, preference

is to be given to the preservation of the safety of the diplomat, or to other considerations which might also be legitimate with respect to the State where the act has occurred.

246. It has been suggested, however, that the practical implementation of the obligation under international law, requiring the host State to respect, and to ensure respect for, the person of a diplomatic agent (or other person to whom a duty of special protection is owed), might be aided by the adoption of supplementary measures. Besides the references to the need that suitable measures should be taken to deal with the problem, expressed during the twenty-fifth session of the General Assembly,²⁹⁴ consideration has also been given to the matter by two regional organizations. The measures adopted at regional level emphasize the seriousness of the incidents in question, indicate, *inter alia*, collective means which may be taken to prevent attacks on diplomats, and call upon governments to punish those who make such attacks. The commission of deliberate acts which threaten the life or safety of diplomatic agents may thus come to assume the character of a recognized "common crime" or one which is acknowledged to be of international concern.²⁹⁵

247. Within the framework of OAS, a Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, was signed on 2 February 1971.²⁹⁶ Although cast in terms wider than that of protection of persons having diplomatic or consular status *per se*, the provisions of article 1 of the Convention may be noted here:

The contracting States undertake to co-operate among themselves by taking all the measures that they may consider effective, under their own laws, and especially those established in this convention, to prevent and punish acts of terrorism, especially kidnapping, murder, and other assaults against the life of physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connexion with those crimes.

248. In addition to the provisions relating to extradition and prosecution previously mentioned, contracting States agree to co-operate in preventing and punishing offences falling within the scope of the Convention by taking measures within their territories to prevent the commission of such offences in the territory of other contracting States; by exchanging information and taking administrative steps in order to protect persons to whom the State owes a duty to give special protection according to international law; to endeavour

²⁹² That article provides:

"The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

²⁹³ The Commission's commentary on article 27 of its draft (which became, without substantive amendment, article 29 of the Vienna Convention) includes the following:

This article confirms the principle of the personal inviolability of the diplomatic agent. From the receiving State's point of view, this inviolability implies, as in the case of the mission's premises, the obligation to respect, and to ensure respect for, the person of the diplomatic agent. The receiving State must take all reasonable steps to that end, possibly including the provision of a special guard where circumstances so required. Being inviolable, the diplomatic agent is exempted from measures that would amount to direct coercion. This principle does not exclude in respect of the diplomatic agent either measures of self-defence or, in exceptional circumstances, measures to prevent him from committing crimes or offences. (*Yearbook of the International Law Commission*, 1958, vol. II, p. 97, document A/3859, para. 53.)

This passage was quoted in the letter sent by the Chairman of the Commission to the President of the Security Council and mentioned in paragraph 242 above.

²⁹⁴ See para. 243 above. As regards the adoption of General Assembly resolution 2328 (XXII) of 18 December 1967, see para. 241 above.

²⁹⁵ The proposals have thus certain similarities with those put forward with respect to aerial hijacking, referred to in paras. 326-329 below. As regards other offences of international concern, see generally paras. 444-446 below.

²⁹⁶ For a further summary of the Convention (in particular as regards prosecution and extradition), see para. 85 above.

to have the criminal acts contemplated in the Convention included in their penal laws, if not already so included; and to comply expeditiously with requests for extradition with respect to the offences in question.

249. The Committee of Ministers of the Council of Europe adopted, on 11 December 1970, a series of recommendations addressed to member Governments, on the topic of protection of members of diplomatic missions and consular posts. They suggested that member Governments should survey the security measures in force for the protection of such persons and, whenever necessary, reinforce those measures, bearing in mind the provisions of the Convention on Diplomatic Relations, the Convention on Consular Relations and the Convention on Special Missions. Secondly, it was recommended that member Governments should examine the extent to which their national laws afforded the possibility of punishing severely the authors of attacks on the life and person of members of diplomatic missions and consular posts. Lastly, member Governments were asked to ensure close co-operation among themselves as regards the protection of members of diplomatic missions and consular posts against such attacks.

Chapter VII

The law of treaties

250. This chapter is subdivided as follows:

- (1) The Vienna Convention on the Law of Treaties;
- (2) International agreements not within the scope of the Vienna Convention on the Law of Treaties;
- (3) Question of participation in a treaty;
- (4) The most-favoured-nation clause.

A number of particular issues involving the application of the law of treaties in various specific contexts are dealt with elsewhere in the survey.²⁹⁷

1. THE VIENNA CONVENTION ON THE LAW OF TREATIES

251. The 1948 Survey,²⁹⁸ contained (in paragraphs 90-92) a summary of the efforts previously undertaken with a view to the codification of the law of treaties and listed the major reasons why the codification of this branch of law was of keen importance. Treaties occupied a leading place in the system of international law, and the majority of questions which had come before the Permanent Court of International Justice had concerned questions of treaty interpretation; nevertheless there was scarcely a branch of the law of treaties which was free from doubt and, in some cases, confusion. This applied to questions of terminology; to the legal consequences of the distinction drawn between treaties and other agreements; to the designation of parties; to the necessity, or otherwise, of ratification; to the relevance of

constitutional limitations upon the treaty-making power; to the conferment of benefits on third parties; and to the general field of rules to be followed regarding the interpretation of treaties. Above all, it was said, there was room for increased scientific effort to clarify the conditions of the operation of the doctrine *rebus sic stantibus*. This brief recital of the problems, as they were seen in 1948, and the Commission's success in drafting a set of articles which formed the basis for the adoption, in 1969, of the Vienna Convention on the Law of Treaties, serves to illustrate both the magnitude of that achievement and the range of issues which had to be considered and resolved in order to achieve a convention codifying this branch of law.

252. Following the inclusion of the topic "Law of treaties" in the 1949 list,²⁹⁹ the question was studied by four Special Rapporteurs in turn: Mr. Brierly (1949-1952), Mr. (later Sir Hersch) Lauterpacht (1952-1954), Sir Gerald Fitzmaurice (1955-1960), and Sir Humphrey Waldock (1961-1966).³⁰⁰ The Commission examined the reports submitted by these Rapporteurs at various sessions between 1950 and 1966. One feature of the discussion to which attention may be drawn, since the issue concerned is one of possibly general significance, was the question whether the work of the Commission should take the form of a draft convention or of an expository code. The third Special Rapporteur, Sir Gerald Fitzmaurice, favoured the latter approach, while the other Special Rapporteurs were of the opinion that the aim of the Commission should be to prepare a set of draft articles which could serve as a basis for a convention. The Commission decided at its thirteenth session (1961), when Sir Humphrey Waldock was appointed, to follow the latter course. At its following session, it pointed out that a convention would give a better opportunity than an expository code to consolidate the law, and that the adoption of a convention would give the many new States which had recently become members of the international community an opportunity to participate in the formulation of the law.³⁰¹ Between 1962 and 1966 the Commission gave priority to the study of the law of treaties and to the preparation of draft articles thereon.

253. By resolution 2166 (XXI) of 5 December 1966, the General Assembly decided to convene a plenipotentiary conference and to refer to it the final draft

²⁹⁹ *Idem*.

³⁰⁰ For a detailed history of the Commission's consideration of the topic and the various reports submitted, see *Yearbook of the International Law Commission, 1966*, vol. II, p. 173, document A/6309/Rev.1, part II, paras. 9 *et seq.* Besides examining the reports submitted and adopting draft articles, the Commission submitted reports to the General Assembly on the question of reservations to multilateral conventions and on extended participation in general multilateral treaties concluded under the auspices of the League of Nations. For a summary, see *The Work of the International Law Commission* (United Nations publication, Sales No. 67.V.4), pp. 22-24 and 41-43.

³⁰¹ See *Yearbook of the International Law Commission, 1966*, vol. II, p. 176, document A/6309/Rev.1, part II, paras. 23 *et seq.*

²⁹⁷ See in particular, as regards succession in respect of treaties, paras. 199-205 above.

²⁹⁸ See para. 4 above.

articles on the law of treaties, consisting of seventy-five articles with commentaries adopted by the Commission the same year. The General Assembly decided also to have a further discussion on the law of treaties before the conference was convened in 1968. Accordingly, the topic was discussed in the Sixth Committee at the General Assembly's twenty-second session; in the light of the discussion the Assembly adopted resolution 2287 (XXII) of 6 December 1967, supplementing the previous one. The United Nations Conference on the Law of Treaties was held at Vienna, the first session in 1968 (26 March–24 May) and the second session in 1969 (9 April–22 May). The Conference adopted the Vienna Convention on the Law of Treaties³⁰² on 23 May 1969, together with two declarations and five resolutions annexed to the Final Act of the Conference.³⁰³ The Convention was signed by forty-seven States. As of 1 April 1971, five States had ratified or acceded to the Convention, which will enter into force thirty days following the deposit of the thirty-fifth instrument of ratification or accession.

254. With regard to scope of the work undertaken, the Vienna Convention on the Law of Treaties, in line with the draft articles prepared by the Commission, applies to treaties between States.³⁰⁴ For the purposes of the Convention the term "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.³⁰⁵

255. The principal matters covered in the Convention are: part II: conclusion and entry into force of treaties (including reservations and provisional application of treaties); part III: observance, application and interpretation of treaties (including treaties and third States); part IV: amendment and modification of treaties; part V: invalidity, termination and suspension of the operation of treaties (including the procedure for the application of the provisions of that part and for the settlement of disputes concerning the application or interpretation of those provisions, and the consequences of the invalidity, termination or suspension of the operation of a treaty); part VI: miscellaneous provisions (dealing with cases of State succession, State responsibility and outbreak of hostilities, diplomatic and consular relations and the conclusion of treaties and the case of an aggressor State); and part VII: depositaries, notifications, corrections and registration. The conciliation pro-

cedure referred to in article 66 of part V is specified in an annex to the Convention.

2. INTERNATIONAL AGREEMENTS NOT WITHIN THE SCOPE OF THE VIENNA CONVENTION ON THE LAW OF TREATIES

256. Since the Vienna Convention as such applies only to treaties concluded between States in written form, the law applicable to other international agreements remains to be considered. Although there was some question during the Commission's consideration of the topic as to whether the draft articles should deal also with treaties or international agreements between States and other subjects of international law or between such subjects themselves, particularly with regard to international organizations, the Commission finally decided to exclude them from the scope of its draft articles on the law of treaties.³⁰⁶ The Commission also decided not to deal with international agreements not in written form. The United Nations Conference on the Law of Treaties endorsed the conclusions reached by the Commission on this question.

257. To prevent any misconception of the decisions mentioned above, the Commission included in its draft articles a provision containing a general reservation regarding (a) the legal force of international agreements concluded between States and other subjects of international law or between such other subjects of international law, and of international agreements not in written form; and (b) the application to them of any of the rules set forth in the draft articles to which they would be subject independently of these articles.³⁰⁷ The provision, in the form finally adopted by the Conference in article 3 of the Vienna Convention, is as follows:

The fact that the present Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law, or to international agreements not in written form, shall not affect:

(a) The legal force of such agreements;

(b) The application to them of any of the rules set forth in the present Convention to which they would be subject under international law independently of the Convention;

(c) The application of the Convention to the relations of State as between themselves under international agreements to which other subjects of international law are also parties.

258. The inclusion of sub-paragraph (b) of article 3 in the Convention, like the corresponding provision of the draft articles, may be explained by the fact that, in preparing a convention on the law of treaties concluded between States in written form, the Conference and the Commission were conscious that they were likewise engaged in the codification and progressive development of the general law of treaties and that,

³⁰² See *Official Records of the United Nations Conference on the Law of Treaties Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 287.

³⁰³ *Ibid.*, p. 285.

³⁰⁴ See article 1 of the Convention. The Convention does not define the term "State". The Commission, in paragraph 4 of its commentary to draft article 5, entitled "Capacity of States to conclude treaties" (*ibid.*, p. 12), indicates that the term "State" as used in paragraph 1 of the article means "a State for the purposes of international law". The Conference deleted paragraph 2 of draft article 5 relating to the capacity of States members of a federal union to conclude treaties.

³⁰⁵ Article 2, para. 1 (a), of the Convention.

³⁰⁶ *Yearbook of the International Law Commission, 1966*, vol. II, p. 176 *et seq.*, A/6309/Rev.1, part II, para. 28 and commentaries to articles 1, 2 and 3, *passim*.

³⁰⁷ See draft article 3 (and commentary); para. 4 of commentary to draft article 1; and paras 5 and 7 of commentary to draft article 2 (*ibid.*, pp. 187-191).

consequently, several rules set out in the Convention might have relevance in regard to international agreements formally excluded from the scope of the Convention itself. This matter is particularly important as regards any further work of the Commission in this sphere, since it implies that the starting point of any study of the law applicable to those international agreements should be the Vienna Convention on the Law of Treaties, or at least the substantive provisions in the Convention having a general character, and that such a study should concentrate rather on the special features of the agreements in question, and not on a reconsideration of the general issues already settled by the Convention. By adding sub-paragraph (c) to the provision proposed by the Commission, the Conference went still further in underlining the general nature of several substantive rules embodied in the Convention.

(a) *Treaties concluded between States and international organizations or between two or more international organizations*³⁰⁸

259. At the United Nations Conference on the Law of Treaties amendments were submitted with a view to extending the scope of the Convention to treaties concluded between two or more States or other subjects of international law. These amendments were withdrawn, but the Conference adopted a resolution entitled "Resolution relating to article 1 of the Vienna Convention on the Law of Treaties", annexed to the Final Act, recommending that the General Assembly should refer to the Commission the study of the question of treaties concluded between States and international organizations or between two or more international organizations. Acting on this suggestion, in resolution 2501 (XXIV) of 12 November 1969, the General Assembly recommended (paragraph 5):

that the International Law Commission should study, in consultation with the principal international organizations, as it may consider appropriate in accordance with its practice, the question of treaties concluded between States and international organizations or between two or more international organizations, as an important question.³⁰⁹

260. At its twenty-second session (1970) the Commission included this question in its general programme of work and set up a Sub-Committee to consider the preliminary problems involved in the study of the topic. The Sub-Committee's report, as adopted by the Commission,³¹⁰ requested the Secretariat to undertake

certain preparatory work, in particular as regards United Nations practice, and asked the Chairman (Mr. P. Reuter) to submit to members of the Sub-Committee a questionnaire concerning the method of treating the topic and its scope. The replies received, prefaced by an introduction by the Chairman, were to be circulated as a working paper at the Commission's session in 1971.³¹¹

261. The Commission is, therefore, already engaged in preliminary work necessary to undertake the substantive study of this new topic. Its future work on the question of treaties concluded between States and international organizations or between two or more international organizations may be expected to provide further clarification of this particular aspect of the law of treaties. At its twenty-fifth session, the General Assembly by resolution 2634 (XXV) of 12 November 1970 recommended that the Commission should continue its consideration of the question.

(b) *International agreements concluded with or between subjects of international law other than States or international organizations.*

262. The question presents itself as to whether international agreements concluded with or between subjects of international law other than States or international organizations is a matter which should be included by the Commission in its long-term programme of work. A prior necessity would appear to be a clarification or a definition of the "other subjects" concerned.

263. The Commission's commentaries to the set of draft articles on the law of treaties provisionally adopted in 1962, and the commentaries to the final draft articles on that topic adopted in 1966, contain some indications of what the Commission had in mind when referring to "other subjects" of international law. Paragraph 8 of the commentary to article 1 of the 1962 draft states:

The phrase "other subjects of international law" is designed to provide for treaties concluded by: (a) international organizations, (b) the Holy See, which enters into treaties on the same basis as States, and (c) other international entities, such as insurgents, which may in some circumstances enter into treaties. The phrase is not intended to include individuals or corporations created under national law, for they do not possess capacity to enter into treaties nor to enter into agreements governed by public international law.³¹²

264. Further, paragraph 2 of the commentary to article 3 of the same set of draft articles indicates:

The phrase "other subjects of international law" is primarily intended to cover international organizations, to remove any doubt about the Holy See and to leave room for more special cases such as an insurgent community to which a measure of recognition has been accorded.³¹³

265. Leaving aside the question of the Holy See and of international organizations, it should be recalled that

³⁰⁸ For a historical survey of the question, see document A/CN.4/L.161.

³⁰⁹ For a summary of views expressed in the Sixth Committee in connexion with this recommendation, see *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b) document A/7746, paras. 109-115.

³¹⁰ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89. The Sub-Committee was composed of the following thirteen members: Mr. P. Reuter (Chairman), Mr. G. Alcívar, Mr. E. Castrén, Mr. A. El-Erian, Mr. Nagendra Singh, Mr. A. Ramangasoavina, Mr. S. Rosenne, Mr. J. Sette Câmara, Mr. A. Tabibi, Mr. D. Thiam, Mr. S. Tsuruoka, Mr. E. Ustor and Sir Humphrey Waldock.

³¹¹ The replies are reproduced in annex II to document A/CN.4/250 (see below, p. 189).

³¹² *Yearbook of the International Law Commission, 1962*, vol. II, p. 162, document A/5209, chap. II, sect. II.

³¹³ *Ibid.*, p. 164.

paragraph 5 of the commentary to article 2 of the Commission's final draft articles on the law of treaties³¹⁴ refers expressly to "insurgent communities" and paragraph 2 of the commentary to article 3 of the same draft uses the expression "non-State subjects of international law".³¹⁵ As the Commission noted in 1962, the capacity of "insurgent communities" to conclude treaties is linked to the question of their recognition as such.³¹⁶

266. It may be, therefore, that before undertaking a study of the treaties so concluded, the Commission would wish to consider whether or not it should first make a study, on a wider basis, of the legal status of the "other subjects of international law" concerned, so as to determine (however broadly) which subjects of international law were under discussion, before examining the relatively specialized question of the degree to which international agreements to which they are parties are subject to particular rules. Although it was not necessary to follow this course in the case of treaties concluded between States, since acceptance of the notion of statehood and its attributes could be assumed, it will be noted from chapter XIV ("The law relating to international organizations") that some difficulty was experienced initially in deciding which international organizations should be dealt with in the Commission's work. This issue would appear to be even more fundamental as regards the other subjects of international law under discussion.

(c) *International agreements not in written form*

267. The question of whether oral or tacit international agreements should be the subject of a separate study by the Commission does not permit of an easy answer. The Commission itself

recognized that oral international agreements may possess legal force and that certain of the substantive rules set out in the draft articles may have relevance also in regard to such agreements.³¹⁷

This category of international agreements has not been greatly studied in the literature, and, virtually by definition, has been relatively little recorded in works dealing with State practice. Although no statistics are available, the main instances at the present time of oral agreements (as opposed to oral declarations of a unilateral character) are, in all probability, either agreements of a confidential political nature, made between leading figures (for example, during the visit of a head of State or government, or at foreign minister level) and often more in the nature of a mutual understanding than

an agreement having precise obligations of a legal character, or more commonly, an agreement reached (for example, during a visit of a diplomatic agent to the foreign ministry of the receiving State, or even by telephone) on relatively minor points, perhaps involving matters of detail concerning the application or interpretation of an existing treaty. It should, however, be recalled that a dispute involving an oral agreement reached the Permanent Court of International Justice, the "Hlen declaration" referred to in the *Legal Status of Eastern Greenland Case*.³¹⁸

268. Having regard to the fact that the legal force of those international agreements is not in question, their very nature, the relative minor importance of most of them, and the absence of any particular request from Member States or from members of the Commission to codify the topic, it is suggested that the Commission may like to decide not to take up the study of oral or tacit agreements, unless for some reason circumstances would advise on the contrary.

3. QUESTION OF PARTICIPATION IN A TREATY

269. The Commission considered this issue when preparing its draft articles on the law of treaties.³¹⁹ Article 8 of the 1962 draft provided that

1. In the case of a general multilateral treaty, every State may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization.

2. In all other cases, every State may become a party to the treaty:

(a) Which took part in the adoption of its text, or

(b) To which the treaty is expressly made open by its terms, or

(c) Which although it did not participate in the adoption of the text was invited to attend the conference at which the treaty was drawn up, unless the treaty otherwise provides.³²⁰

270. The Commission, commenting on this provision in its 1966 report, summarized its discussions as follows:

The second provision gave rise to no particular difficulty, but the Commission was divided with respect to the rule to be proposed for general multilateral treaties. Some members considered that these treaties should be regarded as open to participation by "every State" regardless of any provision in the treaty specifying the categories of States entitled to become parties. Some members, on the other hand, while not in favour of setting aside so completely the principle of the freedom of States to determine by the clauses of the treaty itself the States with which they would enter into treaty relations, considered it justifiable and desirable to specify as a residual rule that, in the absence of a contrary provision in the treaty, general multilateral treaties should be open to "every State". Other members, while sharing the view that these treaties should in principle be open to all States, did not think that a residuary rule in this form would be justified, having

³¹⁴ *Ibid.*, 1966, vol. II, pp. 188-189, document A/6309/Rev.1, part II, chap. II.

³¹⁵ *Ibid.*, p. 190.

³¹⁶ With regard to this question, see below chap. XVI ("The law relating to armed conflicts").

³¹⁷ *Yearbook of International Law Commission*, 1966, vol. II, p. 190, document A/6309/Rev.1, part II, para. 3 of commentary to draft article 3. Note also the reference made by the Commission to oral agreements in paragraph 4 of its commentary to article 35 in connexion with the theory of *acte contraire* (*ibid.*, pp. 232-233).

³¹⁸ *P.C.I.J.*, series A/B, No. 53, p. 20.

³¹⁹ For a summary, see *Yearbook of the International Law Commission*, 1966, vol. II, p. 200, document A/6309/Rev.1, part II, chap. II, where the matter was dealt with under the heading used in the present text.

³²⁰ *Yearbook of the International Law Commission*, 1962, vol. II, pp. 167-168, document A/5209, chap. II, sect. II.

regard to the existing practice of inserting in a general multilateral treaty a formula opening it to all Members of the United Nations and members of the specialized agencies, all parties to the Statute of the International Court of Justice and to any other State invited by the General Assembly. By a majority the Commission adopted a text stating that unless otherwise provided by the treaty or by the established rules of an international organization, a general multilateral treaty should be open to participation by "every State". In short, the 1962 text recognized the freedom of negotiating States to fix by the provisions of the treaty the categories of States to which the treaty may be open; but in the absence of any such provision, recognized the right of "every State" to participate.⁸²¹

271. As regards the views of Governments on this issue, the Commission's report stated that

A number of Governments in their comments on article 8 of the 1962 draft expressed themselves in favour of opening general multilateral treaties to all States, and at the same time proposed that this principle should be recognized also in article 9 so as automatically to open to all States general multilateral treaties having provisions limiting participation to specified categories of States. Certain other Governments objected to the 1962 text from the opposite point of view, contending that no presumption of universal participation should be laid down, even as a residuary rule, for cases when the treaty is silent on the question.⁸²²

272. At its seventeenth session the Commission re-examined the problem of participation in general multilateral treaties *de novo*; at the conclusion of the discussion a number of proposals were put to the vote but none was adopted. The Commission therefore requested its Special Rapporteur, with the assistance of the Drafting Committee, to try to submit a proposal for subsequent discussion. At its eighteenth session, in 1966, the Commission

concluded that in the light of the division of opinion it would not be possible to formulate any general provision concerning the right of States to participate in treaties. It therefore decided to confine itself to setting out pragmatically the cases in which a State expresses its consent to be bound by signature, ratification, acceptance, approval or accession. Accordingly, the Commission decided that the question, which has more than once been debated in the General Assembly, and recently in the Special Committees on the Principles of International Law concerning Friendly Relations among States,* should be left aside from the draft articles. In communicating this decision to the General Assembly, the Commission decided to draw the General Assembly's attention to the records of its 791st-795th meetings** at which the question of participation in treaties was discussed at its seventeenth session, and to its commentary on articles 8 and 9 of the draft articles in its report for its fourteenth session,*** which contains a summary of the points of view expressed by members in the earlier discussion of the question at that session.⁸²³

* A/5746, chap. VI, and A/6230, chap. V.

** *Yearbook of the International Law Commission, 1965*, vol. 1, pp. 113-142.

*** *Yearbook of the International Law Commission, 1962*, vol. II, pp. 168 and 169.

⁸²¹ *Ibid.*, 1966, vol. II, p. 200, document A/6309/Rev.1, part II, chap. II, "Question of participation in a treaty", para. 1 of commentary.

⁸²² *Ibid.*, para. 3 of commentary.

⁸²³ *Ibid.*, para. 4 of commentary. The foot-notes are those given in the 1966 *Yearbook*.

273. At the United Nations Conference on the Law of Treaties a "Declaration on Universal Participation in the Vienna Convention on the Law of Treaties" was adopted,³²⁴ whereby the Conference invited the General Assembly to give consideration to the matter of issuing invitations to States which are not Members of the United Nations or of any specialized agency or of IAEA, or parties to the Statute of the International Court of Justice, to become parties to the Convention.

274. At its twenty-fourth and twenty-fifth sessions the General Assembly decided to defer its consideration of the matter. In the preamble to resolution 2530 (XXIV) of 8 December 1969, adopting the Convention on Special Missions, the General Assembly declared however that it was

Convinced that multilateral treaties which deal with the codification and progressive development of international law, or the object and purpose of which are of interest to the international community as a whole, should be open to universal participation.

4. THE MOST-FAVOURLED-NATION CLAUSE

275. This topic was raised in 1964 when the Commission was examining the question of treaties and third States. After considering the matter, the Commission reached the conclusion recorded in paragraph 32 of the introduction to its final draft articles on the law of treaties. The paragraph in question states that the Commission

did not think it advisable to deal with the so-called "most-favoured-nation clause" in the present codification of the general law of treaties, although it felt that such clause might at some future time appropriately form the subject of a special study. Likewise the Commission, while recognizing the importance of not prejudicing in any way the operation of most-favoured-nation clauses, found it unnecessary to make a specific exception regarding such clauses in articles 30-33 [Treaties and Third States] of the present draft, since it did not consider that these clauses were in any way touched by these articles.³²⁵

276. In view of the manageable scope of the topic, of the interest expressed in it by representatives in the Sixth Committee, and of the fact that the clarification of its legal aspects might be of assistance to the work of UNCITRAL, the Commission decided at its nineteenth session (1967) to place on its programme the topic of the most-favoured-nation clause in the law of treaties. It also decided to appoint Mr. E. Ustor as Special Rapporteur on that topic.³²⁶ In 1968, after a general discussion on the matter, the Commission instructed the Special Rapporteur not to confine his studies to the domain of international trade but to explore the major fields of application of the clause.

³²⁴ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285.

³²⁵ *Yearbook of the International Law Commission, 1966*, vol. II, p. 177, document A/6309/Rev.1, part II, chap. II, sect. A.

³²⁶ *Ibid.*, 1967, vol. II, p. 369, document A/6709/Rev.1, para. 48. See also para. 165 above.

The Commission considered that it should clarify the scope and effect of the clause as a legal institution in the context of all aspects of its practical application.³²⁷

277. At its twenty-first session (1969), the Special Rapporteur presented his first report³²⁸ containing a history of the most-favoured-nation clause up to the time of the Second World War. The Commission instructed the Special Rapporteur to prepare next a study having regard, *inter alia*, to the three cases dealt with by the International Court of Justice relevant to the clause.³²⁹ The Special Rapporteur submitted in 1970 his second report³³⁰ dealing with the jurisprudence of the International Court and the experience of international organizations in respect to the clause. Owing to the lack of time the Commission was unable to consider the second report during its twenty-second session.

278. Finally it may be recalled that the General Assembly, by resolutions 2400 (XXIII) of 11 December 1968, 2501 (XXIV) of 12 November 1969, and 2634 (XXV) of 12 November 1970, recommended that the Commission should continue its study of the most-favoured-nation clause.

Chapter VIII

Unilateral acts

279. As is implicit in the title, the basic notion of the concept of "unilateral acts" consists in the affirmation that there are certain actions which a subject of international law may take unilaterally and which, *proprio motu*, have certain legal effects under international law, independent of the actions of any other subject or subjects. Although the topic, as a general and unified group of cases, has attracted attention in the doctrine of international law mainly in recent years,³³¹ the various acts included under the heading have long been familiar in the actual practice of international law,³³² and indeed may be said to have as

long a history as any other institution of international law. The literature of international law contains a large amount of material relating to the separate instance of unilateral acts.

280. As regards the scope and import of unilateral acts, there has been considerable discussion in the doctrine and it cannot be said that any broad consensus has yet emerged, either as regards their definition or their exact place in the operation of international law. With respect to the definition of unilateral acts, there has been agreement that, granted the wide degree of autonomy left to the subjects of international law (most notably as regards States), it was inevitable that many of the actions of individual States should have legal effects, creating (or preventing) changes in the existing legal situation. However, this definition in itself, regarded as a tool of legal analysis, leads easily to the position in which nearly all legal transactions (in particular those on the international plane) can be subdivided and refined into a series of unilateral acts: the formation of a treaty by means of distinct acts of offer and acceptance is the most obvious case in point. In order, therefore, to retain the usefulness of the concept, its application has normally been confined to acts which, at least for purposes of obtaining their immediate effect, were confined to action on the part of a single State. The examples most frequently cited are acts of recognition, protests, estoppel, proclamations or declarations, waivers and renunciations,³³³ whilst other authors have referred to acquiescence, unilateral promises or undertakings and notifications.

281. Having regard to the fact that these terms have not received an agreed and precise definition, it will be apparent that the instances referred to may frequently overlap in practice. The greatest obstacle to reaching agreement, at least as regards doctrine, has not however occurred with respect to the terms to be used, their legal significance, or their application in specific instances (although difficulties have arisen in this connexion also), but in determining the relationship of unilateral acts to the accepted sources of international law, most notably with respect to the operation and formation of customary rules. This problem has only to be stated for its difficulty to be apparent. Although international law is agreed on the existence of customary rules, the actual process (regarded as a series of acts, including acquiescence or silence, on the part of individual States) whereby

³²⁷ *Ibid.*, 1968, vol. II, p. 223, document A/7209/Rev.1, para. 93.

³²⁸ *Ibid.*, 1969, vol. II, p. 157, document A/CN.4/213.

³²⁹ *Ibid.*, p. 234, document A/7610/Rev.1, para. 89.

³³⁰ *Ibid.*, 1970, vol. II, p. 199, document A/CN.4/228 and Add.1.

³³¹ It has been suggested in the literature that the topic, as a general concept, owes its origin to certain concepts found in German, Italian and Swiss municipal law. However, this would appear to apply more to the particular titles and categories used for purposes of legal classification than to any particular institutions contained in those legal systems.

³³² In this connexion attention may be called to the fact that in many cases the International Court of Justice and other tribunals have purported to decide the matter before them on the basis of particular relationships and not solely or largely according to the application of general rules. This would appear to reflect not only the respect paid by international tribunals to the limits of the jurisdiction granted to them, but also the individualization of many international situations, and the consequent importance of unilateral actions in providing a means whereby general rules may be adjusted by States, in accordance with international law, to take account of particular circumstances.

³³³ These were the instances mentioned by a member of the Commission at its nineteenth session (1967) when it was suggested that the Commission should consider examining the topic, which greatly needed clarification and systematization.

"The topic covered recognition as a positive act acknowledging a given situation to be a legal situation and, conversely, protests rejecting changes in a legal situation. It also included the principle of estoppel applied by the International Court of Justice. Other unilateral acts which might possibly be dealt with in a systematic draft were proclamations, waivers and renunciations (*Yearbook of the International Law Commission*, 1967, vol. I, p. 179, 928th meeting, para. 6).

See also *ibid.*, p. 187, 929th meeting, para. 63. Estoppel may perhaps more accurately be regarded as not in itself a unilateral act but as the consequence of such an act or acts.

customary rules are created or exceptions allowed is one which can rarely if ever be exactly quantified, in relation to any particular rule, at any one time. Nevertheless, many customary rules appear to have been created or modified by a series of acts, many of which have been originally unilateral in character. Unilateral acts, regarded as a general concept, thus prove, on closer examination to be concerned not so much with acts *per se* but with the notion of the rights (or legal capacities) which States have under international law, including the right, or attribute, of characterizing particular legal actions as being either legal or illegal, both those which they themselves may take and the action of others, the whole operating within the framework of a general, normally customary, body of laws.

282. As regards any future study which the Commission might decide to undertake in this area, the Secretariat would offer only a few general observations. First, although, as has been indicated, it is difficult if not impossible to separate the notion of the unilateral act of a particular subject of international law from the acts, possibly also unilateral, taken by other subjects in regard to the same subject-matter, an initial distinction should be drawn—if only to reduce the subject to manageable proportions—between a unilateral act which occurs in relation to another unilateral act of the same order (for example, offer and acceptance of an agreement), or which may be part of a bilateral or multilateral transaction (for example, denunciation of or accession to a treaty), or the process of formation of a customary rule (for example, in establishing a general practice and its acceptance as law), and what may be regarded as unilateral acts in a narrower and more limited category. This would comprise unilateral acts with definite legal consequences emanating from a single subject of international law, and of which the main examples are recognition, protests, estoppel,³³⁴ proclamations or declarations, waivers and renunciations, in each case other than under the provisions of a treaty.³³⁵ Since this definition includes the unilateral acts of all subjects of international law, it may be deemed to include the performance of such acts not only by States but also by international organizations, possessed of a distinct legal personality. This inclusion (if not rejected on the ground of *petitio principii*) raises

additional issues, and it may therefore be that any study undertaken should be confined to cases involving States, in which the practice over a long period of time is more abundantly available and where the question of the personality (or extent of the personality) of the subject of international law itself is not controversial.

283. As regards the nature of any study which might be undertaken by the Commission, one further observation may be made. During recent years the Commission has chiefly concentrated on producing, in relation to the particular topic under discussion at the time, a series of draft articles which could form the basis of a convention to be adopted by States. Perhaps the most classic and definite statement of the reasons for following that course was that given with reference to its work on the law of treaties, contained in its report on its fourteenth session.³³⁶ The reasons given there are weighty: the existence of a convention serves to consolidate the law on a given branch of law, and its preparation gives an opportunity for the participation of the vast majority of States. Whilst it is clear that the Commission's work on unilateral acts, if undertaken, could take the form of draft articles—as indeed could its work in any sphere—the review, albeit brief, given above suggests that this is a topic on which other directions might also be explored. A study which examined the subject, or its different branches, and concluded with a series of definitions of the main forms of unilateral acts and their respective legal effects under international law, together with a succinct commentary, might prove to be of considerable practical value to States in their dealings with one another; at the moment no comparable agreed text exists to which reference can easily be made. The work of the Commission in this field might thus provide, or come to provide, a measure of authoritative clarification in this branch of the law, irrespective of the formal status of the text. The subject of unilateral acts appears, in any case, to be important enough to merit attention by the Commission at some stage in the future, whatever the precise form which may eventually be chosen for its codification.

284. While the choice in the matter rests of course with the Commission, and ultimately with the General Assembly, the consideration above are advanced in the hope that the Commission may find them of value in determining the scope of its long-term programme.

Chapter IX

The law relating to international watercourses

285. States have frequently adopted rules and agreements governing the use of rivers flowing through or between their respective territories. In addition, the numerous international river commissions established by treaty have contributed to the development of the law concerning international watercourses. Nevertheless,

³³⁴ Also referred to as preclusion. As previously noted, estoppel is perhaps more accurately to be regarded as the consequence of an act, rather than itself an act. A survey by Mr. Justice Alfaro of the jurisprudence (notably of the International Court of Justice) and of much of the literature relating to this question is to be found in his separate opinion in the Case concerning the Temple of Preah Vihear (*I.C.J. Reports 1962*, p. 39).

³³⁵ It may conceivably be possible to widen this last exception, so as to distinguish on the one hand situations where States are given unilateral powers by specific facultative rules of international law (e.g. to establish contiguous zones, or to exercise diplomatic protection) or under treaties, and on the other, situations where no specific rule exists but where the State can, under general international law, make a unilateral claim or surrender some interest. Further study would be required in order to determine how rigorously this distinction could be drawn and applied.

³³⁶ *Yearbook of the International Law Commission, 1962*, vol. II, p. 160, document A/5209, para. 17.

despite the number of treaties concluded,³³⁷ the general law relating to the utilization of international rivers has remained, in considerable part, customary law. With the exception of the Convention on the Régime of Navigable Waterways of International Concern (Barcelona, 1921)³³⁸ and the Convention relating to the Development of Hydraulic Power affecting more than one State (Geneva, 1923),³³⁹ no other general international conventions on the law relating to international watercourses has been concluded.

286. Having regard, on the one hand, to the increasing importance of the use of these watercourses for a variety of purposes—for navigation, water supply for irrigation and industrial needs, for the disposal of waste, and for production of hydroelectricity—and, on the other, the uncertainty, in many respects, of the generally applicable law, several proposals have been made in recent years that the codification and progressive development of the relevant rules of international law should be undertaken as a matter of general concern. As regards discussion in the framework of the United Nations,³⁴⁰ during the fourteenth session (1959) of the General Assembly, it was suggested in the Sixth Committee that the question of the utilization and exploitation of international waterways should be included in the agenda of the Commission; the view was also expressed that an attempt to codify the matter would be premature, and that it should be left to the Commission to decide whether the subject was an appropriate one for codification.

287. In the event, the General Assembly, considering that it would be desirable to initiate preliminary studies “with a view to determining whether the subject is appropriate for codification”, adopted resolution 1401 (XIV) of 21 November 1959, whereby it requested the Secretary-General to prepare a report on legal problems relating to the utilization and use of international rivers. The Secretary-General accordingly circulated to Member States a report (A/5409) containing, as requested by the resolution: information provided by Member States regarding their pertinent laws and legislation; a summary of existing bilateral and multilateral treaties; a survey of decisions of international tribunals; and a survey of the studies made or being made by non-governmental organizations. Annexes to

the report contained the text of declarations and resolutions adopted by intergovernmental bodies and reports and extracts from reports prepared by such bodies or by conferences of government experts, as well as a bibliography and list of documentation and detailed indexes. Having regard to the terms of the resolution, the expression “utilization and use” as employed in the report, was used as denoting

every possible utilization or use of an international river, excluding navigation, but including fishing, the floating of timber, flood control and the prevention of water pollution (A/5409, para. 8).

In the light of the discussion in the Sixth Committee, the report did not include documents dealing with technical aspects of the utilization of international rivers or with legal problems involved in the delineation of fluvial boundaries. Lastly, documentation relating to disputes between States regarding the utilization or use of international rivers was also excluded, except where the dispute in question had given rise to a treaty or been the subject of an international judicial decision.

288. A volume was subsequently issued in the *United Nations Legislative Series*, containing the full texts of the legislative enactments, forwarded by governments, and of existing bilateral and multilateral treaties.³⁴¹ Amongst the agreements more recently concluded, particular mention may be made of the Act regarding navigation and economic co-operation between the States of the Niger Basin,³⁴² done on 26 October 1963, and the Statute of the Organization of Senegal Riparian States, of 24 March 1968.

289. Following the adoption of General Assembly resolution 1401 (XIV), there were a number of suggestions at different times that the Commission should consider taking up the question.³⁴³ At the request of Finland the item “Progressive development and codification of the rules of international law relating to international watercourses” was included in the agenda of the twenty-fifth session of the General Assembly, held in 1970. In an explanatory memorandum,³⁴⁴ the Government of Finland called attention, *inter alia*, to the adoption by the International Law Association, at its fifty-second Conference (Helsinki, 1966) of a series of articles on the law of international drainage basins. These articles, known as the Helsinki Rules,³⁴⁵ con-

³³⁷ For instance, the relevant volume of the *United Nations Legislative Series* (see foot-note 341 below) contains some 253 treaties dealing solely with matters relating to the utilization of international rivers for purposes other than navigation. Virtually all these treaties related to particular rivers or boundary waters as conventionally defined; whereas some of these sought to provide a comprehensive regulation of the matter as between the parties, others dealt with limited aspects, such as particular problems or certain forms of utilization only.

³³⁸ League of Nations, *Treaty Series*, vol. VII, p. 35. As of 1 April 1971, twenty-three states were parties to the Convention.

³³⁹ *Ibid.*, vol. XXXVI, p. 75.

³⁴⁰ For further detailed references to the discussion in the Sixth Committee and in the International Law Commission prior to 1970, see *Yearbook of the International Law Commission*, 1970, vol. II, p. 266, document A/CN.4/230, paras. 123-129.

³⁴¹ 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).

³⁴² United Nations, *Treaty Series*, vol. 587, p. 9. Note also the Agreement concerning the Niger River Commission and the navigation and transport on the River Niger, done on 25 November 1964: *ibid.*, p. 19.

³⁴³ Including suggestions made in the Commission itself at its nineteenth session, (see *Yearbook of the International Law Commission*, 1967, vol. II, p. 369, document A/6709/Rev.1, para. 46). See likewise *ibid.*, 1970, vol. II, p. 266, document A/CN.4/230, paras. 126-129.

³⁴⁴ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 91, document A/7991.

³⁴⁵ International Law Association, *Helsinki Rules on the Uses of the Waters of International Rivers* (London, 1967).

tain provisions on the equitable utilization of the waters of an international drainage basin, on the abatement of pollution, on navigation and timber floating, and recommendations concerning the settlement of disputes. The Government of Finland also referred to the adoption by the Inter-American Juridical Committee in 1967 of a "draft convention concerning the industrial and agricultural use of international rivers and lakes", and to the adoption in 1969 by the Asian-African Legal Consultative Committee of a resolution establishing an intersessional sub-committee to consider the "law of international rivers". The time was therefore ripe, in the opinion of the Finnish Government, for a study of the matter to be undertaken by the United Nations on a world-wide basis. The Finnish Government suggested that the topic could be referred to the Commission, which would be the most appropriate body to prepare a draft "developing progressively and codifying the rules of international law relating to international watercourses, including international drainage basins".³⁴⁶ At a later stage the work might lead to the adoption of a convention. The Government of Finland expressed the view that existing legal texts and materials, including the Helsinki Rules, could be used as a basis for the codification of the topic and suggested that, without affecting the outcome of such work as the United Nations might undertake, the General Assembly might adopt a resolution, recommending that Member States should take into account or resort to the Helsinki Rules in cases where there were no rules binding on the parties.

290. During the discussions in the Sixth Committee a variety of views were put forward as to the desirability and feasibility of the progressive development and codification of the law on this topic at the present time, in particular on the question whether the subject was suitable for treatment in a general convention.³⁴⁷ In resolution 2669 (XXV) of 8 December 1970, adopted following discussion in the Sixth Committee, 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 deems it appropriate.

291. By the same resolution the Secretary-General was requested to continue the study initiated by General Assembly resolution 1401 (XIV)

in order to prepare a supplementary report on the legal problems relating to the utilization and use of international watercourses, 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.

292. A suggestion made by the Finnish Government in its explanatory memorandum concerning the adoption of a resolution recommending that, pending codification of the law relating to the topic, Member States should take into account or resort to the Helsinki Rules, was not endorsed by the General Assembly. During the discussion leading to the adoption of resolution 2669 (XXV), different views were expressed in connexion with the advisability of making an express reference in the text of the resolution to the Helsinki Rules as well as to a resolution entitled "Utilization of Non-Maritime International Waters (except for navigation)", adopted by the Institute of International Law in 1961.³⁴⁸ It was finally agreed to include the following in the report of the Sixth Committee to the General Assembly:

It was agreed in the Sixth Committee that intergovernmental and non-governmental studies on the subject, especially those which are of a recent date, should be taken into account by the International Law Commission in its consideration of the topic.³⁴⁹

Chapter X

The law of the sea

1. THE LAW OF THE SEA: THE 1958 GENEVA CONVENTIONS

293. The matters examined in this chapter were covered in the 1948 Survey³⁵⁰ under the titles "The régime of the high seas" and "The régime of territorial waters".³⁵¹ As regards the first, it was pointed out

³⁴⁸ See *Annuaire de l'Institut de droit international, Session de Salzbourg, septembre 1961* (Basel, 1961), vol. 49, tome II, p. 381.

The text of the resolution is reproduced in para. 1083 of document A/5409.

³⁴⁹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 91, document A/8202, para. 17.

³⁵⁰ See para. 4 above.

³⁵¹ As regards the law relating to territorial waters, the 1948 Survey recalled that this has been considered at the Hague Codification Conference of 1930, on the basis of the work of a League of Nations' Committee of Experts, but that full agreement had not been reached on that occasion. The Commission, it was stated, was in a somewhat different position from the earlier bodies; rather than, in effect, assuming agreement on issues for incorporation in a convention, the Commission would be enabled, under the terms of its Statute and in the light of what had gone before, to adopt a more thoroughgoing and analytical approach to the problem, taking account of all major factors involved—economic and strategic, as well as legal. The 1948 Survey concluded as follows:

"There need be no disposition to discard subjects with regard to which previous efforts are deemed to have failed. For the failure which attended one method and one object need not be decisive with regard to different methods and objects. Moreover, it would be unfortunate if the regulation of questions of obvious importance in the sphere of international transport and international economic intercourse

(Continued on next page)

³⁴⁶ *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 91, document A/7991, para. 6.

³⁴⁷ See below, p. 207, document A/CN.4/244/Rev.1. It may also be noted that, as part of the material prepared for the first session (22 February-5 March 1971) of the Committee on Natural Resources, the Secretary-General issued a report under the general heading of "Natural resources development and policies, including environmental considerations", containing an addendum entitled "Issues of international water resources development" (E/C.7/2/Add.6).

that the task of its comprehensive codification involved aspects of "codification", as well as of "development", within the meaning of these terms in the Statute of the International Law Commission. There was a body of widely accepted customary rules and of State practice concerning the freedom of the sea and various other elements of the law of the sea; in addition, there existed numerous multilateral conventions regulating specific questions relating to such matters as maritime transport and safety and the protection of submarine cables. There were also gaps, however, and certain subjects, particularly as regards the exploitation of the resources of the sea, would require a degree of development of the law. In the absence of an agreed international regulation aimed at producing clarity and a reconciliation of conflicting interests, the régime of the freedom of the seas might be conducive to a waste of resources and provoke unilateral measures of self-help. The 1948 Survey concluded its exposition on the régime of the high seas as follows:

In view of the already available substantial body of practice, in the form of conventions and otherwise, in these matters it would appear that they would more properly fall within the framework of codification rather than "development"—although it would be codification with a considerable element of "development" in it. As mentioned, there is in existence an imposing body of non-controversial rules and principles on other aspects of the international law of the sea. This being so, it must be a matter for consideration whether, of all the branches of international law, that of the law of the sea does not lend itself to comprehensive treatment by way of codifying the entire branch of the law. A codification—in its widest sense—of the entire field of the law of the sea in a unified and integrated "restatement" or similar, more ambitious, instrument, would go far towards enhancing the authority both of the work of codification and of international law as a whole.³⁵²

294. Since the 1948 Survey, four international conventions—the Geneva Conventions on the law of the sea—have been concluded. Their adoption in 1958 marked the first major success for the Commission in its work of ensuring the codification and progressive development of international law. Of all subjects so far tackled by the Commission, this has been the one which has involved most closely the immediate economic and other interests of States, and where specialized, extra-legal knowledge—as regards, for example, oceanography, marine biology, geology and other technical aspects—has been of obvious significance. In the short account which follows of the steps taken by the Commission between 1949 and 1956 in regard to this topic, mention has accordingly been made of the way in which the Commission's approach to the topic, or to parts of the topic, was adapted in the light of the views expressed by the General Assembly, as well as by States individually, and how measures were taken

to ensure that the Commission's drafts took appropriate account of technical factors.

295. At its first session in 1949, the Commission included in its list of topics selected for codification the two topics on the law of the sea referred to in the 1948 Survey, and gave priority to the study of the régime of the high seas, for which Mr. J. François was appointed Special Rapporteur. In response to the recommendation made by the General Assembly in resolution 374 (IV), the Commission decided at its second session (1950) to include in the list of priorities the topic of the régime of territorial waters. At its following session, in 1951, the Commission appointed Mr. J. François as Special Rapporteur for that topic also. Within the context of the régime of the high seas, the Commission dealt in its reports to the General Assembly in 1950 and 1951 with a wide range of subjects, including the resources of the sea, contiguous zones and continental shelf, and adopted at its third session (1951) a set of draft articles on "the continental shelf and related matters".³⁵³ The régime of the territorial waters began to be substantively considered by the Commission at its fourth session (1952). It decided to use the term "territorial sea" instead of "territorial waters", as the latter expression had sometimes been taken to include also inland waters, and further considered certain other questions relating to the topic.³⁵⁴ The Commission did not adopt, however, any draft article on the matter. At its fifth session (1953), the Commission prepared, taking into consideration the comments received from governments on its 1951 set of draft articles, final drafts on three questions: the continental shelf; fishery resources of the seas; and the contiguous zone. In its report, the Commission recommended the following actions in respect of those drafts: (a) that the General Assembly should adopt by resolution the part of the report and the draft articles (eight articles) relating

³⁵³ At its second session the Commission took the view that it could not undertake at once a codification of maritime law in all its aspects and that it would be necessary to select the subjects a study of which could be begun as a first phase of its work on the topic. The Commission thought also that it could for the time being leave aside all those subjects which were being studied by other United Nations organs or by specialized agencies as well as those which, because of their technical nature, were not suitable for study by it. The subjects selected for study by the Commission were: nationality of ships; criminal jurisdiction on matters of collision; safety of life at sea; the right of approach; slave trade; submarine telegraph cables; resources of the sea; right of pursuit; contiguous zone; sedentary fisheries; continental shelf. The 1951 set of draft articles on "the continental shelf and related matters" drawn up at the third session (see *Official Records of the General Assembly, Sixth Session, Supplement No. 9 (A/1858)*, annex) contained seven articles on the continental shelf, two articles on conservation of the resources of the sea, one article on sedentary fisheries and one on contiguous zones. At the same session (1951), the Commission considered likewise certain questions relating to nationality of ships, criminal jurisdiction on matters of collision on the high seas, safety of life at sea, the right of warships to approach foreign merchant vessels on the high seas, submarine telegraph cables and hot pursuit.

³⁵⁴ The juridical status of the territorial sea, of its bed and subsoil, and of the air space above it; the breadth of the territorial sea; the delimitation of the territorial sea of two adjacent States; base line; bays.

(Footnote 351 continued)

generally—such as the position of foreign merchantmen in territorial and national waters—were to suffer from the inability to achieve uniformity with regard to the breadth of territorial waters." (1948 Survey, para. 75).

³⁵² *Ibid.*, para. 73.

to the continental shelf; (b) that the General Assembly should adopt by resolution the part of the report and the draft articles (three articles) on fisheries, and enter into consultation with FAO with a view to the preparation of a draft convention on the subject incorporating the principles adopted by the Commission,³⁵⁵ and (c), that no action should be taken by the General Assembly with regard to the draft articles on the contiguous zone, since the Commission had not yet adopted draft articles on the territorial sea.³⁵⁶

296. However, the General Assembly, by resolution 798 (VIII) of 7 December 1953, noting that "the problems relating to the high seas, territorial waters, contiguous zones, the continental shelf and the superjacent waters are closely linked together juridically as well as physically", decided that any action to be taken by it should be deferred until the Commission had reported on "all the problems" involved in the study of the régime of the high seas and of the régime of territorial waters. The following year, the General Assembly, by resolution 899 (IX) of 14 December 1954, again deferred action and requested the Commission "to devote the necessary time to the study of the régime of the high seas, the régime of territorial waters and all related problems in order to complete its work on these topics" and to submit its final report for consideration by the Assembly at its eleventh session (1956).

297. The Commission, meanwhile, continued its study of the régime of the territorial sea and of the régime of the high seas and related matters. With regard to the former, it requested Governments to provide information concerning their attitude to the delimitation of the territorial sea of two adjacent States, and a meeting of a group of experts was held at The Hague from 14 to 16 April 1953, under the chairmanship of the Special Rapporteur, in order to elucidate technical questions relating to hydrographic aspects of the demarcation of marine boundaries. The Special Rapporteur's earlier draft on the régime of the territorial sea was revised in the light of the technical information received from the group of experts. At its sixth session (1954), the Commission adopted a number of provisional articles concerning the régime of the territorial sea, dealing with its judicial status and limits and with the rights of passage of vessels and warships. The Commission postponed, however, the formulation of draft articles on the breadth of the territorial sea and the connected questions of bays, groups of islands and delimitation of the territorial sea at the mouth of a river. On the

question of the breadth of the territorial sea, the Commission listed in its report³⁵⁷ the various suggestions made by its members at various sessions of the Commission and asked Governments to state, in their comments on the provisional draft articles on the régime of the territorial sea, what their attitude on the matter was and to suggest how it could be solved.

298. At its fifth session (1953), the Commission had invited the Special Rapporteur to undertake a further study of the régime of the high seas and to prepare a report on subjects within this field which were not covered in his previous reports. At its seventh session (1955), the Commission again considered the topic.³⁵⁸ The Commission adopted provisional articles concerning the régime of the high seas and an annex (draft articles relating to the conservation of the living resources of the sea)³⁵⁹ and submitted them to Governments for comments. In addition, the Commission communicated the provisions on the conservation of the living resources of the sea (namely, the relevant part of the provisional articles and annex) to the organizations represented by observers at the International Technical Conference on the Conservation of the Living Resources of the Sea, held at Rome from 18 April to 10 May 1955.³⁶⁰ In preparing provisions dealing with that subject-matter, the Commission had taken account of the report of this Conference. The provisional articles adopted by the Commission concerning the régime of the high seas dealt with the definition of the high seas, the freedom of the seas, navigation (including status of ships and related matters, collision, assistance, slave trade, piracy, right of visit, right of pursuit and pollution), fishing (including conservation of the living resources of the high seas) and submarine cables and pipelines.

299. At its eighth session (1956), the Commission was in a position to draw up its final report on the subjects dealt with by it in connexion with the "régime of the high seas" and "régime of the territorial sea", taking into consideration the replies received from Governments and international organizations on its 1955 provisional articles on the régime of the high seas, and from Governments on its 1954 provisional articles on

³⁵⁷ *Ibid.*, Ninth Session, Supplement No. 9 (A/2693).

³⁵⁸ For the report of the Commission on its seventh session, see *ibid.*, Tenth Session, Supplement No. 9 (A/2934).

³⁵⁹ The text of the "draft articles relating to the conservation of the living resources of the sea" were identical with articles 25 to 33 of chapter II of the "provisional draft articles concerning the régime of the high seas". In chapter II of the latter draft the nine articles were accompanied by commentaries. In the annex, the articles in question had a preamble, the whole being presented as a kind of draft resolution adopted by the International Law Commission. On the other hand, chapter II of the "provisional draft articles" contained an article, namely article 24 (Right to fish), which was not included in the articles of the annex because it did not deal with conservation of resources.

³⁶⁰ The Conference was convened by the Secretary-General pursuant to General Assembly resolution 900 (IX) of 14 December 1954.

³⁵⁵ In doing, so the Commission underlined that it "believes that the general importance and the recognized urgency of the subject matter of the articles in question warrant their endorsement by a formal act of approval on the part of the General Assembly" and that "an authoritative statement of the legal position on the subject, both *de lege data* and *de lege ferenda*, by the General Assembly is indicated as a basis of any future regulations which may be adopted" (*Official Records of the General Assembly, Eighth Session, Supplement No. 9 (A/2456)*, para. 103).

³⁵⁶ *Ibid.*, paras. 91, 102 and 114.

the régime of the territorial sea. In pursuance of General Assembly resolution 899 (IX) mentioned above, the Commission recast all the draft articles it adopted concerning the high seas, the territorial sea, the continental shelf, the contiguous zone and the conservation of the living resources of the sea, so as to constitute a single, co-ordinated and systematic body of rules and entitled them "Articles concerning the law of the sea".³⁶¹

300. The Commission's final draft on the law of the sea, containing seventy-three articles with commentaries, was prefaced by certain observations which are of interest. In particular, the Commission stated: (a) that although at the time of its establishment it had been thought that the Commission's work might have two different aspects concerning respectively the "codification" and the "progressive development" of international law, the Commission had become convinced that, in the domain of the law of the sea at any rate, "the distinction established in the statute between these two activities can hardly be maintained"; (b) that although it tried at first to specify which articles of the draft on the law of the sea fell into the category of "codification" and which into the category of "progressive development", the Commission had had to abandon the attempts, as several did not wholly belong to either; (c) that, in these circumstances, in order to give effect to the project as a whole, it was necessary to have recourse to conventional means.³⁶² Consequently, the Commission recommended that the General Assembly should summon an international conference of plenipotentiaries

to examine the law of the sea, taking into account not only the legal but also the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate.

Considering that the various sections on the law of the sea hold together, and are so closely interdependent that it would be extremely difficult to deal with only one part and leave the others aside, the Commission was of the opinion that the conference should deal with all the parts of the law of the sea covered by its final project. In addition, the Commission indicated that the answer to the question of the relationship between the proposed rules and existing conventions was to be found in the general rules of international law and the provisions drawn up by the international conference. Finally, as regards the substance of its draft on the law of the sea, the Commission pointed out that the articles regulated the law of the sea in time of peace only.³⁶³

301. The final draft articles on the law of the sea was

divided into parts, sections, sub-sections and articles as follows:

Part I: Territorial sea

Section I: General (articles 1 and 2)

Section II: Limits of the territorial sea (articles 3 to 14)

Section III: Right of innocent passage

Sub-section A: General rules (articles 15 to 18)

Sub-section B: Merchant ships (articles 19 to 21)

Sub-section C: Government ships other than warships (articles 22 and 23)

Sub-section D: Warships (articles 24 and 25)

Part II: High seas

Section I: General régime (articles 26 and 27)

Sub-section A: Navigation (articles 28 to 48)

Sub-section B: Fishing (articles 49 to 60)

Sub-section C: Submarine cables and pipelines (articles 61 to 65)

Section II: Contiguous zone (article 66)

Section III: Continental shelf (articles 67 to 73)

302. In accordance with a recommendation by the Commission, the General Assembly decided, by resolution 1105 (XI) of 21 February 1957, to convene an international conference of plenipotentiaries to examine the law of the sea, and to refer to it as a basis for its work the report on the topic submitted by the Commission. The operative paragraph of the resolution deciding that the conference be convened reproduced the language used by the Commission quoted in paragraph 300 above.

303. The United Nations Conference on the Law of the Sea, which met in Geneva in 1958, had before it, besides the final report of the Commission, some thirty preparatory documents drawn up by the Secretariat, by certain specialized agencies and by a number of independent experts. One matter which had not been covered in the Commission's report, namely, the question of the free access to the sea of land-locked countries, was the subject of a memorandum submitted by a preliminary conference of land-locked States³⁶⁴ which met prior to the convening of the Conference on the Law of the Sea.

304. The Conference agreed to embody the articles it adopted in four separate conventions the convention on the Territorial Sea and the Contiguous Zone;³⁶⁵ the Convention on the High Seas;³⁶⁶ the Convention on Fishing and Conservation of the Living Resources of the High Seas;³⁶⁷ and the Convention on the Continental Shelf.³⁶⁸ The recommendations made by the Fifth Committee (Question of Free

³⁶¹ See *Yearbook of the International Law Commission*, 1956, vol. II, p. 256 *et seq.*, document A/3159, chap. II, sect. II.

³⁶² On subsequent occasions when it has submitted final draft articles, the Commission has arrived at the same conclusions and followed the same or a similar course.

³⁶³ *Yearbook of the International Law Commission*, 1956, vol. II, pp. 255-256, document A/3159, paras. 25-32.

³⁶⁴ *Official Records of the United Nations Conference on the Law of the Sea*, vol. VII (United Nations publication, Sales No. 58.V.4, Vol. VII), p. 67, document A/CONF.13/C.5/L.1.

³⁶⁵ United Nations, *Treaty Series*, vol. 516, p. 205. Came into force on 10 September 1964. As of 1 April 1971, forty-one States were parties.

³⁶⁶ *Ibid.*, vol. 450, p. 82. Came into force on 3 January 1963. As of 1 April 1971, forty-eight States were parties.

³⁶⁷ *Ibid.*, vol. 559, p. 285. Came into force on 20 March 1966. As of 1 April 1971, thirty-two States were parties.

³⁶⁸ *Ibid.*, vol. 499, p. 311. Came into force on 10 June 1964. As of 1 April 1971, forty-six States were parties.

Access to the Sea of Land-locked Countries)³⁶⁹ were included in article 14 of the Convention on the Territorial Sea and the Contiguous Zone and in articles 2, 3 and 4 of the Convention on the High Seas. In addition to the four Conventions, the Conference adopted an Optional Protocol concerning the Compulsory Settlement of Disputes,³⁷⁰ and nine resolutions,³⁷¹ one of which concerned the convening of a second Conference to consider the question of the breadth of the territorial sea and issues relating to fisheries which it had not been possible to settle. Accordingly, in 1960 a second United Nations Conference on the Law of the Sea was held in an effort to reach agreement on the breadth of the territorial sea and fishery limits, but without success.

305. As this fact indicates, the four Conventions, though consolidating the bulk of the law of the sea, did not embody agreement on all aspects. Because of this, and by reason of technological advances since the Conventions were drafted, questions relating to the law of the sea have continued to receive international attention. Taking the four Conventions as the starting point, the present position is summarized briefly below.

306. The Convention on the High Seas, the preamble to which states that the Conference adopted the provisions contained therein "as generally declaratory of established principles of international law", deals with the definition and freedom of the high seas; the access to the sea of land-locked States; navigation, including a series of articles relating to nationality, status and operation of ships and warships; jurisdiction in matters of collision; assistance at sea; slavery; piracy; right of visit and hot pursuit; pollution of the seas; and submarine cables and pipelines. No major difficulties appear to have been encountered in the application of the treaty itself. Member States were requested, however, under the terms of General Assembly resolution 2574 A (XXIV) of 15 December 1969, to express their views regarding the desirability of holding a conference to review, *inter alia*, the régime of the high seas (that suggestion was made following discussion of developments in relation to the sea-bed which are referred to below).³⁷²

³⁶⁹ On the subject of transit rights of land-locked countries, the conclusion in 1965 of the Convention on Transit Trade of Land-Locked States may be noted (referred to in para. 53 above).

³⁷⁰ United Nations, *Treaty Series*, vol. 450, p. 169. As of 1 April 1971, ten States were parties to the Protocol.

³⁷¹ *Ibid.*, p. 58.

³⁷² See generally para. 315 below. It may be recalled that article 35 of the 1958 Convention on the High Seas states the following:

"1. After the expiration of a period of five years from the date on which this Convention shall enter into force, a request for the revision of this Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General of the United Nations.

"2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such request."

Similar provisions are contained in the final clauses of the other three conventions on the law of the sea.

307. One issue relating to the high seas régime which has been the cause of special attention is that of marine pollution. It may be noted that two conventions were drawn up in November 1969 under the auspices of IMCO, regulating, on the one hand, the conditions under which a State may intervene on the high seas to prevent oil pollution of its coasts caused or threatened by oil tankers, and, on the other, the system of financial reparation for any damage so caused.³⁷³ Under the terms of General Assembly resolution 2566 (XXIV) of 13 December 1969, the United Nations Secretariat is engaged in an extensive survey of the various forms and sources of marine pollution, and Member States were asked to express their views "on the desirability and feasibility of an international treaty or treaties on the subject".

308. The Convention on the Territorial Sea and the Contiguous Zone contains, besides certain general provisions, articles concerning the juridical status of the territorial sea, of the air space over the territorial sea and of its bed and subsoil; the limits of the territorial sea (base lines, outer limit, bays, ports, roadsteads, islands, low-tide elevations, delimitations of opposite coasts, mouth of rivers); the right of innocent passage (rules applicable to all ships and rules applicable to merchant ships, government ships other than warships, and warships) and the contiguous zone, (control and limits), but it does not, however, specify the breadth of the territorial sea. This issue has continued to be of international concern.³⁷⁴

309. The Convention on Fishing and Conservation of the Living Resources of the High Seas endeavoured, as its title indicates, to institute a system of conservation measures which might be adopted on a multilateral, bilateral or unilateral basis by the interested States or State, subject to the conditions laid down in the Convention, and also to establish a special disputes settlement procedure. Although some thirty-two States are now parties to the Convention, the fact that not all countries engaged in fishing have become parties, and the existence of a large (and still growing) number of agreements³⁷⁵ regulating fishing in particular areas of the high seas or as regards particular types of fish, has caused the Convention to play a somewhat residual role; whilst it has remained the only multilateral instrument of potential general application, in practice recourse has more often been had to the more particular agreements referred to, some of which provide for the establishment of standing bodies to deal with questions

³⁷³ The text of the International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties and of the International Convention on Civil Liability for Oil Pollution Damage are attached to the Final Act of the International Legal Conference on Marine Pollution Damage, 1969. IMCO has continued to give active attention to this matter. The International Convention for the Prevention of the Pollution of the Sea by Oil, which was concluded in 1954 and amended in 1962 and 1969, is referred to in para. 86 above.

³⁷⁴ See para. 315 below.

³⁷⁵ Article 1, para. 1, of the Convention specifies that "All States have the right for their nationals to engage in fishing on the high seas, subject (a) to their treaty obligations ...".

of management and conservation. Since 1958, moreover, the volume of fishing has almost doubled,³⁷⁶ technological advances have led to the intensification of long-distance operations, and many States which were not formerly engaged in large scale fishing have entered the industry.³⁷⁷ Questions have been raised as to the ability of the existing fishery arrangements to cope with the increased demand for living resources of the sea; different views have been expressed on this issue, some holding that the fishery agreements in force offer a viable and equitable way of meeting such difficulties as may arise, others that existing arrangements are insufficient. While resolution of the issue will require consideration of various factors, the international legal community generally, as well as the Commission, may be expected to be concerned with the problems raised and the solution eventually adopted in so far as this may entail changes in the existing body of law.

310. Dealing finally with the Convention on the Continental Shelf, this represents the most obviously innovatory of the four, although based on treaty provisions and unilateral declarations which States had made in order to establish a legal framework for the exploitation of mineral resources (most notably hydrocarbons) found in the continental shelf adjacent to their coasts. Under the Convention, coastal States were granted "sovereign rights" over the continental shelf "for the purpose of exploring it and exploiting its natural resources" (article 2, para. 1). The term "continental shelf" was used as referring to the sea-bed and subsoil adjacent to the coast but outside the area of the territorial sea "to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas" (article 1).³⁷⁸

2. HISTORIC WATERS, INCLUDING HISTORIC BAYS

311. Acting in response to a resolution adopted by the 1958 Conference,³⁷⁹ the General Assembly, by resolution 1453 (XIV) of 7 December 1959, requested the Commission

as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate.

³⁷⁶ FAO, *Yearbook of Fishery Statistics, 1969*, vol. 29, 1970.

³⁷⁷ For a general review of the present situation and trends, see the statement made by the FAO representative before the Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor beyond the Limits of National Jurisdiction (A/AC.138/SR.54).

³⁷⁸ As regards the question of continental shelf boundaries, see also the North Sea Continental Shelf Cases, *I.C.J. Reports 1969*, p. 3. Issues relating to the sea-bed and ocean floor beyond the limits of national jurisdiction are referred to in paras. 313-317 below.

³⁷⁹ See *Official Records of the United Nations Conference on the Law of the Sea*, vol. II (United Nations publication, Sales No. 58.V.4, Vol. II), p. 145, resolution VII. This resolution had its origin in the adoption by the Conference of paragraph 6 of article 7 of the Convention on the Territorial Sea and Contiguous Zone, providing that the Convention's rules on bays "shall not apply to so-called 'historic' bays".

The Commission requested the Secretariat to undertake a preliminary study of the topic³⁸⁰ and decided at its fourteenth session in 1962, to include the topic in its programme, but without setting any date for the start of its consideration or appointing a special rapporteur. At its nineteenth session (1967) the Commission considered whether to proceed with the study of this topic (and also that of the right of asylum, which had been referred to the Commission by the General Assembly). The Commission's report summarized the views expressed as follows:

Most members doubted whether the time had yet come to proceed actively with either of these topics. Both were of considerable scope and raised some political problems, and to undertake either of them at the present time might seriously delay the completion of work on the important topics already under study [...]³⁸¹

312. During the General Assembly's twenty-third session (1968), several representatives in the Sixth Committee referred to the topic in connexion with the future work of the Commission.³⁸²

3. THE SEA-BED AND OCEAN FLOOR AND THE SUBSOIL THEREOF, BEYOND THE LIMITS OF NATIONAL JURISDICTION, AND THE LAW OF THE SEA

313. The fact that, under the 1958 Convention on the Continental Shelf, no fixed limit was set to the outer limit of the continental shelf over which a coastal State might exercise sovereign rights was brought in issue when it became apparent, during the 1960s, that technical means now existed, or were being developed, which would enable the exploration and exploitation of natural resources to proceed at depths well beyond 200 metres, and, indeed, possibly extend far towards mid-ocean. After this matter had been raised in the First Committee of the General Assembly at its twenty-second session in 1967, it was discussed by an *Ad Hoc* Committee which met during 1968.

By resolution 2467 A (XXIII) of 21 December 1968, the General Assembly established the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction, composed of forty-two Member States. In operative paragraph 2 of the resolution the Committee was requested to study *inter alia*,

... the elaboration of the legal principles and norms which would promote international co-operation in the exploration and use of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction and ensure the exploitation of their resources for the benefit of mankind, and the economic and other requirements which such a régime

³⁸⁰ *Yearbook of the International Law Commission, 1962*, vol. II, p. 1, document A/CN.4/143.

³⁸¹ *Ibid.*, 1967, vol. II, p. 369, document A/6709/Rev.1, para. 45. See also *ibid.*, 1970, vol. II, p. 269, document A/CN.4/230, para. 144, where it is reported that at the nineteenth session (1967) a member of the Commission stated that the Commission might be requested by an appropriate organ of the United Nations to give its opinion on topics such as international bays and international straits.

³⁸² *Ibid.*, 1970, vol. II, p. 261, document A/CN.4/230, para. 79.

should satisfy in order to meet the interests of humanity as a whole.

314. On the basis of the Committee's work, including that of its Legal Sub-Committee, and following discussion by the First Committee, the General Assembly adopted under resolution 2749 (XXV) of 17 December 1970, a Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction. It is stated in paragraph 9 of the Declaration, that an international régime applying to the area and its resources, including appropriate machinery to give effect to its provisions, shall be established by an international treaty of a universal character, generally agreed upon. The text of the Declaration is as follows:

Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof, beyond the Limits of National Jurisdiction

The General Assembly,

Recalling its resolutions 2340 (XXII) of 18 December 1967, 2467 (XXIII) of 21 December 1968 and 2574 (XXIV) of 15 December 1969, concerning the area to which the title of the item refers,

Affirming that there is an area of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, the precise limits of which are yet to be determined,

Recognizing that the existing legal régime of the high seas does not provide substantive rules for regulating the exploration of the aforesaid area and the exploitation of its resources,

Convinced that the area shall be reserved exclusively for peaceful purposes and that the exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole,

Believing it essential that an international régime applying to the area and its resources and including appropriate international machinery should be established as soon as possible,

Bearing in mind that the development and use of the area and its resources shall be undertaken in such a manner as to foster healthy development of the world economy and balanced growth of international trade, and to minimize any adverse economic effects caused by fluctuation of prices of raw materials resulting from such activities,

Solemnly declares that:

1. The sea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind.

2. The area shall not be subject to appropriation by any means by States or persons, natural or juridical, and no State shall claim or exercise sovereignty or sovereign rights over any part thereof.

3. No State or person, natural or juridical shall claim, exercise or acquire rights with respect to the area or its resources incompatible with the international régime to be established and the principles of this Declaration.

4. All activities regarding the exploration and exploitation of the resources of the area and other related activities shall be governed by the international régime to be established.

5. The area shall be open to use exclusively for peaceful purposes by all States whether coastal or land-locked, without discrimination, in accordance with the international régime to be established.

6. States shall act in the area in accordance with the applicable principles and rules of international law including the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970, in the interests of maintaining international peace and security and promoting international co-operation and mutual understanding.

7. The exploration of the area and the exploitation of its resources shall be carried out for the benefit of mankind as a whole, irrespective of the geographical location of States, whether land-locked or coastal and taking into particular consideration the interests and needs of the developing countries.

8. The area shall be reserved exclusively for peaceful purposes, without prejudice to any measures which have been or may be agreed upon in the context of international negotiations undertaken in the field of disarmament and which may be applicable to a broader area. One or more international agreements shall be concluded as soon as possible in order to implement effectively this principle and to constitute a step towards the exclusion of the sea-bed, the ocean floor and the subsoil thereof from the arms race.

9. On the basis of the principles of this Declaration, an international régime applying to the area and its resources and including appropriate international machinery to give effect to its provisions shall be established by an international treaty of a universal character, generally agreed upon. The régime shall, *inter alia*, provide for the orderly and safe development and rational management of the area and its resources and for expanding opportunities in the use thereof and ensure the equitable sharing by States in the benefits derived therefrom, taking into particular consideration the interests and needs of the developing countries, whether land-locked or coastal.

10. States shall promote international co-operation in scientific research exclusively for peaceful purposes:

(a) By participation in international programmes and by encouraging co-operation in scientific research by personnel of different countries;

(b) Through effective publication of research programmes and dissemination of the results of research through international channels;

(c) By co-operation in measures to strengthen research capabilities of developing countries, including the participation of their nationals in research programmes.

No such activity shall form the legal basis for any claims with respect to any part of the area or its resources.

11. With respect to activities in the area and acting in conformity with the international régime to be established, States shall take appropriate measures for and shall co-operate in the adoption and implementation of international rules, standards and procedures for, *inter alia*:

(a) The prevention of pollution and contamination, and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment;

(b) The protection and conservation of the natural resources of the area and the prevention of damage to the flora and fauna of the marine environment.

12. In their activities in the area, including those relating to its resources, States shall pay due regard to the rights and legitimate interests of coastal States in the region of such activities, as well as of all other States which may be affected by such activities. Consultations shall be maintained with the coastal States concerned with respect to activities relating to the

exploration of the area and the exploitation of its resources with a view to avoiding infringement of such rights and interests.

13. Nothing herein shall affect:

(a) The legal status of the waters superjacent to the area or that of the air space above those waters;

(b) The rights of coastal States with respect to measures to prevent, mitigate or eliminate grave and imminent danger to their coastline or related interests from pollution or threat thereof resulting from, or from other hazardous occurrences caused by, any activities in the area, subject to the international régime to be established.

14. Every State shall have the responsibility to ensure that activities in the area, including those relating to its resources, whether undertaken by governmental agencies, or non-governmental entities or persons under its jurisdiction, or acting on its behalf, shall be carried out in conformity with the international régime to be established. The same responsibility applies to international organizations and their members for activities undertaken by such organizations or on their behalf. Damage caused by such activities shall entail liability.

15. The parties to any dispute relating to activities in the area its resources shall resolve such dispute by the measures mentioned in Article 33 of the Charter of the United Nations and such procedures for settling disputes as may be agreed upon in the international régime to be established.

315. Consideration of the question of the régime of the sea-bed beyond the limits of national jurisdiction has been accompanied by proposals that the law of the sea be reviewed. In paragraph 1 of resolution 2574 A (XXIV) of 15 December 1969, the Secretary-General was requested

to ascertain the views of Member States on the desirability of convening at an early date a conference on the law of the sea to review the régimes of the high seas, the continental shelf, the territorial sea and contiguous zone, fishing and conservation of the living resources of the high seas, particularly in order to arrive at a clear, precise and internationally accepted definition of the sea-bed and ocean floor which lies beyond the limits of national jurisdiction, in the light of the international régime to be established for that area.

In the light of the replies received⁸⁸³ and the progress made towards the elaboration of the international régime for the area of the sea-bed beyond the limits of national jurisdiction, the First Committee considered, *inter alia*, questions relating to the law of the sea during the twenty-fifth session (1970) of the General Assembly. Following the First Committee's debate the General Assembly, in paragraphs 2 and 3 of resolution 2750 C (XXV) of 17 December 1970, decided:

2. ... to convene in 1973, in accordance with the provisions of paragraph 3 hereof, a conference on the law of the sea which would deal with the establishment of an equitable international régime—including an international machinery—for the area and the resources of the sea-bed and the ocean floor and the subsoil thereof beyond the limits of national jurisdiction a precise definition of the area, and a broad range of related issues including those concerning the régimes of the high seas, the continental shelf, the territorial sea (including the question of its breadth and the question of international straits) and contiguous zone, fishing and conservation of the living resources of the high seas (including the question of the preferential

rights of coastal States), the preservation of the marine environment including, *inter alia*, the prevention of pollution) and scientific research;

3. ... to review at its twenty-sixth and twenty-seventh sessions the reports of the Committee referred to in paragraph 6 below on the progress of its preparatory work with a view to determining the precise agenda of the conference on the law of the sea, its definitive date, location and duration, and related arrangements; if the General Assembly, at its twenty-seventh session, determines the progress of the preparatory work of the Committee to be insufficient, it may decide to postpone the conference.

316. The General Assembly reaffirmed the mandate of the Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction set forth in resolution 2467 A (XXIII), as supplemented by resolution 2750 C (XXV), and enlarged the membership of the Committee from forty-two to eighty-six Member States. In paragraph 6 of resolution 2750 C (XXV) the General Assembly intrusted

the enlarged Committee ... to hold two meetings in Geneva, in March and July-August 1971, in order to prepare for the conference on the law of the sea draft treaty articles embodying the international régime including an international machinery—for the area and the resources of the sea-bed and the ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction, taking into account the equitable sharing by all States in the benefits to be derived therefrom, bearing in mind the special interests and needs of developing countries, whether coastal or land-locked, on the basis of the Declaration of Principles Governing the Sea-Bed and the Ocean Floor and the Subsoil Thereof beyond the Limits of National Jurisdiction and a comprehensive list of subjects and issues relating to the law of the sea referred to in paragraph 2 above, which should be dealt with by the conference, and draft articles on such subjects and issues.

317. In accordance with General Assembly resolution 2750 C (XXV), the question of the régime of the sea-bed beyond the limits of national jurisdiction, together with a range of issues concerning the law of the sea, have been referred to the enlarged Committee on the Peaceful Uses of the Sea-Bed and Ocean Floor beyond the Limits of National Jurisdiction. As indicated in paragraph 6 of the resolution, the Committee is required to act as a preparatory body for the Conference on the Law of the Sea, which is to be convened (subject to the provisions of the resolution) in 1973 and, in particular, to prepare draft articles on the matters to be considered by the Conference.

Chapter XI

The law of the air

318. The 1948 Survey⁸⁸⁴ did not include "fields already covered by existing international conventions such as ... air law".⁸⁸⁵ In order, however, that the present survey may be as comprehensive as possible and because, as is mentioned below, the Commission has in fact considered some aspects of air law, whilst

⁸⁸³ Reproduced in the Secretary-General's report (A/7925 and Add.1-3).

⁸⁸⁴ See para. 4 above.

⁸⁸⁵ 1948 Survey, para. 25.

others have been the object of concern on the part of the international community during recent years, it was thought that a brief summary of the question should be included.

319. The international law of the air can be divided in two: public international air law and private international air law. Provisions concerning both are to be found in a large number of treaties, some of which are considered to reflect, at least to some degree, what has become general international law in this area.

320. As regards public international air law, the basic instruments are the Convention on International Civil Aviation (Chicago, 1944)³⁸⁶ and the Convention relating to the Regulation of Aerial Navigation (Paris, 1919),³⁸⁷ which, for practical purposes, was replaced by the 1944 instrument. These treaties postulate the fundamental principle that States have complete and exclusive sovereignty over the air space above their territories.³⁸⁸ They also provide limited rights for the aircraft of States parties to fly over the territory of other States parties, establish certain other rules relating to flight over the territory of States parties, the nationality of aircraft and the facilitation of air navigation, and provide a method for the elaboration of international standards and recommended practices.

321. The rights granted in the Chicago Convention were supplemented by two other agreements signed in 1944: the International Air Transit Agreement³⁸⁹ and the International Air Transport Agreement.³⁹⁰ The first, which has been widely accepted, grants the air carriers of the parties the right to fly over, and make non-traffic stops in, the territories of the other States parties in the course of scheduled international flights; the second, which is in force between only a handful of States, grants the right to pick up and put down passengers and cargo. Since this second agreement has not been widely accepted³⁹¹ and since, as noted, it is recognized that States have complete and exclusive sovereignty over their air space, a very large number of bilateral agreements have been concluded granting, usually on a reciprocal basis, the commercially valuable rights to pick up and put down passengers and cargo. These agreements, which in nearly all instances follow certain standard forms, in addition to granting these rights, specify the routes on which, and the conditions according to which, the services are to be operated. In at least one instance a regional agreement has been concluded to grant traffic rights in respect of non-scheduled flights.³⁹² Bilateral treaties have also been

used by Governments to regulate related matters such as the recognition of pilots' licences and certificates of air-worthiness,³⁹³ and taxation of the income of air carriers.

322. The Commission had also been concerned, in a limited way, with the question of air traffic when engaged in the elaboration of the juridical status of certain zones or spaces. Article 2 of the Convention on the Territorial Sea and Contiguous Zone provides, similarly to the Paris and Chicago Conventions, that the sovereignty of the coastal State extends to the air space of the territorial sea.³⁹⁴ Since its draft dealt solely with the sea, the Commission did not study the conditions under which sovereignty over the air space is exercised.³⁹⁵ Article 2 of the Convention on the High Seas includes as an element of the freedom of the seas the freedom to fly over the high seas. The Commission included this reference because it considered that this freedom flowed directly from the principle of the freedom of the sea; it refrained from formulating rules on air navigation however, since its task in that phase of its work was confined to the codification and development of the law of the sea.³⁹⁶

323. The Continental Shelf Convention contains a provision which confirms article 2 of the High Seas Convention. Article 3 stipulates that the rights of the coastal State over the continental shelf do not affect

³⁸³ Largely replaced in practice by one of the standards adopted by ICAO and by provisions in the multilateral air transport agreements.

³⁸⁴ The Commission's draft article 2 was, with one change referred to below, identical. According to the commentary, the article was taken from the regulations proposed by the 1930 Codification Conference convoked by the League of Nations (*Yearbook of the International Law Commission*, 1954, vol. II, p. 154, document A/2693).

The Commission's draft article 2 contained the word "also", which was omitted in the version of the article eventually adopted in the Convention. If the word had been retained this could have been interpreted as establishing a link between the general reservation of article 1, paragraph 2, relating to the juridical status of the territorial sea, which provides that the sovereignty over the territorial sea is exercised subject to the provisions of the Convention and to other rules of international law, and article 2, which, by contrast, contains no such provision. The Commission rejected a proposal to include such a provision, several members expressing the view that there were no limitations on sovereignty over air space, except those found in particular treaties (*ibid.*, 1955, vol. I, pp. 70-71, 295th meeting, paras. 26-34). More specifically it would appear to have been accepted that, under general international law, there is no right of innocent passage through the air space above territorial waters (*ibid.*, 1952, vol. I, p. 187, 172nd meeting, paras. 15-32). At the 1958 Geneva Conference, an amendment submitted by the Netherlands according to which the "sovereignty of a State extends also to the air space over its territorial sea, without prejudice to existing conventions or other rules of international law relating to the exercise of this sovereignty" was withdrawn before voting. (See *Official Records of the United Nations Conference on the Law of the Sea*, vol. II (United Nations publication, Sales No. 58.V.IV, Vol. III), annexes, p. 234, and 59th meeting, p. 183, para. 13.)

³⁹⁵ *Yearbook of the International Law Commission*, 1956, vol. II, p. 265, document A/3159, chap. II, sect. III, commentary to article 2.

³⁹⁶ *Ibid.*, p. 278, commentary to article 27, para. 1.

³⁸⁶ United Nations, *Treaty Series*, vol. 15, p. 295.

³⁸⁷ League of Nations, *Treaty Series*, vol. XI, p. 173.

³⁸⁸ See also the Havana Convention on Commercial Aviation, of 20 February 1928 (League of Nations) *Treaty Series*, vol. CXXIX, p. 223.

³⁸⁹ United Nations, *Treaty Series*, vol. 84, p. 389.

³⁹⁰ *Ibid.*, vol. 171, p. 387.

³⁹¹ Note also the failure of early efforts to draft a multilateral convention granting traffic rights.

³⁹² Multilateral Agreement on Commercial Rights of Non-Scheduled Air Services in Europe (Paris, 1956) (United Nations, *Treaty Series*, vol. 310, p. 229).

the legal status of the superjacent waters as high seas, or that of the air space above those waters. The régime of the continental shelf, said the Commission, was "subject to and within the orbit of the paramount principle of the freedom of the seas and of the air space above them". The Commission added that "no modification of or exceptions to that principle are admissible unless expressly provided for in the various articles" of the draft.³⁹⁷

324. The Convention on the High Seas does, however, include two further groups of articles dealing with aircraft: those relating to piracy and to hot pursuit. Because it considered acts committed in the air by one aircraft against another could hardly be regarded as acts of piracy and because such acts were, in any event, outside the scope of the draft articles, the Commission did not include acts by an aircraft against another (as opposed to a ship) within its definition of piracy. At the first Conference on the Law of the Sea, however, the scope of the definition of piracy was widened and article 15 of the Convention on the High Seas now refers to acts by aircraft against other aircraft. The provisions on hot pursuit on the high seas authorize pursuit of ships "by aircraft" when there is good reason to believe that the ship has violated the laws and regulations of the coastal State and, *inter alia*, the pursuit is commenced when the foreign ship or one of its boats is within the internal waters or the territorial sea or the contiguous zone (if there is a violation of the rights for the protection of which the zone was established) of the pursuing State.

325. Many other treaties regulate aspects of international air transport. Thus there are agreements for air navigation services, regional agreements for safety and control purposes, a multipartite agreement establishing the method of fixing rates, agreements for the establishment of joint operating agencies and sanitary regulations.³⁹⁸ It does not appear to be necessary to pursue these matters since they are largely technical and fall within the continuing competence of various universal and regional expert agencies.

326. One area of concern in the public international law of the air which requires more detailed summary is the question of crimes committed on board aircraft or affecting international civil aviation, one aspect of which, it has been suggested, should be considered by the Commission.³⁹⁹ This matter has been considered by the competent bodies of ICAO, as well as by the

General Assembly and the Security Council, over a period of several years. In 1963 a Conference convoked by ICAO adopted the Convention on Offences and Certain other Acts committed on board Aircraft ("Tokyo Convention").⁴⁰⁰ This Convention, which entered into force in 1969, contains provisions concerning the jurisdiction of the State of registration and of certain other States affected by acts on board aircraft, the powers of the aircraft commander, the unlawful seizure of aircraft and the relevant powers and duties of States. Two points can be noted. First, the Convention does not require the States which have jurisdiction to exercise it or, alternatively, to extradite the offender; and, in the case of unlawful seizure in particular, it requires States in which the aircraft lands only to permit the passengers and crew to continue their journey as soon as practicable and to return the aircraft and its cargo to those entitled to it. (In other words, there is no obligation on any State to take any action against those who seize aircraft in flight). Second, the Convention does not deal specifically with all forms of attack on aircraft and their passengers and crew.

327. The question of the commission of crimes on board aircraft, in particular the forcible seizure of control in order to divert civil aircraft in flight, has also been considered by United Nations organs following a number of such incidents. On 12 December 1969, the General Assembly, having considered the item "Forcible diversion of civil aircraft in flight", adopted resolution 2551 (XXIV) in which, *inter alia*, it called upon States to take every appropriate measure to ensure that their national legislation provided an adequate framework for effective legal measures against unlawful interference with, seizure of, or other wrongful exercise of control by force or threat thereof over, civil aircraft in flight, urged full support for the efforts of ICAO in this area, and invited States to ratify or accede to the Tokyo Convention. The question was next considered within the United Nations in September 1970 when the Security Council took up the matter. The Council unanimously adopted resolution 286 (1970) in which it expressed its grave concern at the threat to innocent civilian lives from the hijacking of aircraft and any other interferences in international air travel, appealed to all parties concerned for the immediate release of all passengers and crews held as a result of the hijacking and interference in international air travel, and called on States to take all possible legal steps to prevent further hijackings or other acts of interference with such travel. In resolution 2645 (XXV) of 25 November 1970, adopted following debate in the Sixth Committee, the General Assembly condemned without exception all acts of aerial hijacking and other interference with civil air travel, called upon States to take all appropriate measures to deter, prevent and suppress such acts, and, *inter alia*, invited States to become parties to the Tokyo Convention and urged them to support the efforts of ICAO towards the strengthening of effective measures with respect to interference with civil air travel.

³⁹⁷ *Ibid.*, p. 298, commentary to article 69.

³⁹⁸ See also article 25, paragraph 2, of the Convention on the High Seas, which requires States to co-operate with the competent international organizations in taking measures for the prevention of pollution of the seas or air space above, resulting from any activities with radio active materials or other harmful agents.

³⁹⁹ In the course of the debate in the Sixth Committee on the report of the International Law Commission at the twenty-fifth session of the General Assembly, it was suggested that the Commission should study "aerial piracy" (see *Official Records of the General Assembly, Twenty-fifth Session, Annexes*, agenda item 84, document A/8147, para. 113).

⁴⁰⁰ United Nations, *Treaty Series*, vol. 704 (not yet published), No. 10106.

328. As regards the activities of ICAO,⁴⁰¹ a plenipotentiary conference was held at The Hague under that organization's auspices which resulted in the adoption, on 16 December 1970, of the Convention for the Suppression of Unlawful Seizure of Aircraft.⁴⁰² The draft text on which this instrument was based was prepared by the Legal Committee of ICAO. The Convention is to come into force thirty days following the deposit of instruments of ratification by ten States signatory to the Convention and which participated in The Hague Conference. The Convention recognizes the serious nature of the act of unlawful seizure of aircraft, establishes the principle of universal jurisdiction as regards prosecution of the offences in question, and provides for extradition procedures. Under the Convention any person who, by force or threat of force, unlawfully seizes control of a civil aircraft in flight, or is an accomplice of such a person, commits an offence which States parties to the Convention undertake to make punishable by severe penalties (articles 1 and 2). Every State party is required to establish its jurisdiction in the case of offences committed on board airplanes bearing its registration, when the aircraft lands in its territory with the alleged offender still on board, or where it does not extradite the alleged offender (article 4). Any State party in whose territory the offender or alleged offender is present is required to take him into custody, to make a preliminary inquiry, and to inform the State of registration of the aircraft, the State of nationality of the detained person, and any other interested States if it considers it advisable; such States are to be informed of the findings of the preliminary inquiry and whether the detaining State intends to exercise jurisdiction (article 6). If a Contracting State does not extradite the alleged offender it is obliged "without exception whatsoever and whether or not the offence was committed in its territory" to submit the case to its competent authorities for the purposes of prosecution (article 7). The offence defined in the Convention is to be deemed, however, to be included as an extraditable offence in any extradition treaty existing between the States parties; States parties under-

take to include the offence as an extraditable offence in any future treaties concluded between them (article 8).⁴⁰³ Lastly, the ICAO Council is to be informed of the circumstances of the offence, the steps taken to restore control of the aircraft to its commander and to facilitate the continuation of the journey of its passengers and crew, and the measures taken with respect to the offender or alleged offender (article 11). It should be further noted that the ICAO Legal Committee, at its eighteenth session (1970), adopted a draft convention on acts of unlawful interference with civil aviation (other than those covered by the Convention for the Suppression of Unlawful Seizure of Aircraft).⁴⁰⁴ This draft convention is to be considered by a diplomatic conference to be held at Montreal in September 1971.

329. With regard to the above it may be noted that reference was made by the General Assembly, and by many speakers during United Nations discussions of the item, to the importance of the co-ordination of efforts to prevent aerial hijacking, and also of deferring to the technical competence of ICAO in this sphere. At the same time, the humanitarian and political implications have been such that it was held appropriate for the General Assembly and the Security Council to consider the latter aspects. It may also be noted that the Commission has generally not itself prepared draft provisions concerning the methods of implementation of substantive rules unless it has considered the matter inseparable from the operation of the rule it is codifying.⁴⁰⁵

330. So far as the private international law of the air is concerned, reference is once again to be made to a large number of multilateral treaties. First, the Warsaw Convention of 1929,⁴⁰⁶ as supplemented,⁴⁰⁷ provides for the uniformity of certain documents (tickets and waybills) and states a set of rules for the determination of claims in respect of damage to person and property arising in the course of international air transport. Second, the two Rome Conventions (1933 and 1952) provide rules in respect of damage caused to third parties on the surface.⁴⁰⁸ These Conventions, along with the Warsaw Convention, also regulate jurisdiction in respect of claims arising under them. Third,

⁴⁰¹ Note also the resolution adopted by the ICAO Council on 1 October 1970, in which the Council called upon Contracting States:

"in order to ensure the safety and security of international civil air transport, upon request of a Contracting State, to consult together immediately with a view to deciding what joint action should be undertaken in accordance with international law, without excluding measures such as the suspension of international civil air transport services to and from any State which after the unlawful seizure of an aircraft, detains passengers, crew or aircraft contrary to the principles of Article 11 of the Tokyo Convention, for international blackmail purposes, or any State, which contrary to the principles of articles 7 and 8 of the Draft Convention on Unlawful Seizure of Aircraft fails to extradite or prosecute persons committing acts of unlawful seizure for international blackmail purposes."

ICAO, *Documents of the Legal Committee, eighteenth session* (London, 29 September-22 October 1970), Montreal, 1971, vol. II, p. 179 (LC/Working draft No. 770).

⁴⁰² For the text of the Convention, see ICAO, document 8920, p. 1.

⁴⁰³ Provision is also made, subject to certain conditions, for extradition in the absence of an extradition treaty between the parties.

⁴⁰⁴ See ICAO, document 8910 (LC/163), part II.

⁴⁰⁵ See paras. 130-144 above.

⁴⁰⁶ League of Nations, *Treaty Series*, vol. CXXXVII, p. 11.

⁴⁰⁷ In 1955 by the Hague Protocol (United Nations, *Treaty Series*, vol. 478, p. 371), in 1961 by the Guadalajara Convention (*ibid.*, vol. 500, p. 31), and in 1966 by the so-called Montreal Agreement which operates by way of amendments to the standard form of ticket; the text of the Montreal agreement is contained in *Yearbook of Air and Space Law*, 1966, p. 119. The ICAO Legal Committee is currently working on further amendments to the Warsaw Convention.

⁴⁰⁸ League of Nations, *Treaty Series*, vol. CXCI, p. 289, and United Nations, *Treaty Series*, vol. 310, p. 181. Neither Convention has been widely accepted and the later one is being reviewed by the ICAO Legal Committee with a view to its revision.

a convention signed at Geneva in 1948 requires parties to recognize certain legal rights with respect to aircraft.⁴⁰⁰ Finally, the Legal Committee of ICAO has before it such further questions as the law applicable to collisions, the liability of air control agencies and the legal status of aircraft. Much of the scope of private international air law—the law applicable to claims, jurisdiction, arrest and rights in aircraft—has thus been, or is being, subjected to consideration by the competent technical bodies and a number of general multilateral instruments have been adopted regulating the particular issues involved.

Chapter XII

The law of outer space

331. The development of means of space exploration, which began during the 1950s, raised, in essence, two questions for international law and, indeed, for the international community in general: first, what substantive rules were to be adopted to regulate activities in outer space; secondly, what means were to be used to reach agreement on those rules. As regards the second, the General Assembly, by resolution 1472 (XIV) of 12 December 1959, established a Committee on the Peaceful Uses of Outer Space (in succession to a previous *ad hoc* committee), composed of representatives of States, which was charged with the task of studying means for encouraging international co-operation and examining the legal problems involved in space exploration. In December 1963 the General Assembly adopted a "Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space" (resolution 1962 (XVIII) and, in connexion with the work of the Committee on the Peaceful Uses of Outer Space recommended that consideration should be given to incorporating in international agreement form, as appropriate, legal principles governing activities of States in the exploration and use of outer space (resolution 1963 (XVIII)).

332. The Outer Space Committee has established a Legal Sub-Committee which has prepared two major agreements relating to the substantive aspects of space activities, both of which were adopted by resolution of the General Assembly. The agreements concerned are the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies,⁴¹⁰ and the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space.⁴¹¹ Several provisions of the Treaty on Principles are based on principles set forth in the

Declaration mentioned in the preceding paragraph. Articles 1 to 3 of the Treaty provide as follows:

Article I. The exploration and use of outer space, including the Moon and other celestial bodies, shall be carried out for the benefit and in the interest of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind.

Outer space, including the Moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies.

There shall be freedom of scientific investigation in outer space, including the Moon and other celestial bodies, and States shall facilitate and encourage international co-operation in such investigation.

Article II. Outer space, including the Moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Article III. States Parties to the Treaty shall carry on activities in the exploration and use of outer space, including the Moon and other celestial bodies in accordance with international law, including the Charter of the United Nations, in the interest of maintaining peace and security and promoting international co-operation and understanding.

333. The Committee's Legal Sub-Committee has not yet succeeded in adopting the text of an agreement on liability for damage caused by the launching of objects into outer space, although the General Assembly has on several occasions indicated the importance it attaches to this question.⁴¹² In addition, the Committee has been entrusted with the study of questions "relative to the definition of outer space and the utilization of outer space and celestial bodies, including the various implications of space communications".⁴¹³ The legal problems of the utilization of outer space which have been suggested for international action include the registration of objects launched into outer space; the legal principles relating to space communications and, in particular, to broadcast satellites; and the rules governing man's activities on, and substances originating from, the moon and other celestial bodies.

334. In summary of this brief review of the international steps taken to regulate space activities, it may be said that the foundations have now been laid and that certain basic principles have been established and cast in treaty form. Although, as noted above, there are a number of outstanding issues, the Committee set up by the General Assembly is continuing its efforts to reach further agreement. More generally, it is probable that, the broad rules having been laid down, the future course of space law will, at least for the development of means of space communications and the establishment of multinational arrangements whereby space activities may be pursued. The legal arrangements in question, although having distinctive features, may

⁴⁰⁰ United Nations, *Treaty Series*, vol. 310, p. 151.

⁴¹⁰ Commended by the General Assembly in resolution 2222 (XXI) of 19 December 1966, to which the text of the Treaty is annexed.

⁴¹¹ Commended by the General Assembly in resolution 2345 (XXII) of 19 December 1967, to which the text of the Agreement is annexed.

⁴¹² Resolution 2260 (XXII) of 3 November 1967, resolution 2453 B (XXIII) of 20 December 1968, and resolution 2601 B (XXIV) of 16 December 1969.

⁴¹³ General Assembly resolution 2260 (XXII). Text repeated in resolution 2453 B (XXIII).

thus have much in common with developments in other fields affecting the interests of all or several States, where recourse has been had to a pooling of resources, on an agreed basis of international or regional co-operation, in order to achieve desired results which it would be difficult for one State to achieve on its own.

Chapter XIII

The law relating to the environment

335. The 1948 Survey⁴¹⁴ did not contain a chapter dealing with matters coming under this heading, nor did it have a section on the law of outer space, or on the law relating to the sea-bed and the ocean floor beyond national jurisdiction, while the reference to the legal aspects of the continental shelf was brief. Nevertheless, technological developments have raised problems which have now become familiar in each of these areas. The steps taken in order to provide an appropriate international legal framework for the development of space activities and for the exploration and exploitation of the natural resources of the sea-bed have been referred to earlier. In the case of the law relating to the preservation of the environment the "law" as such, regarded as a distinct segment of international law, is relatively less developed. Furthermore—unlike the case of outer space and the continental shelf and sea-bed beyond—the matters under discussion concern activities which are not confined to a single area, so as to be prescribed by reason of their geographical scope; by definition, matters affecting the environment are all-embracing. By the same token, the kind of law to be developed—treaty arrangements, regulatory bodies of various kinds, the co-ordination of national activities, for example—has (at least as yet) no special quality in itself which would enable attention to be concentrated on the particular character of the legal instruments *per se*. Nevertheless it is likely that, for a variety of reasons—including most notably the growth in industrial production, the rising volume of potential harmful agents transported (for instance oil), the accompanying rise in consumption and the steadily increasing figure of world population—greater attention will have to be paid in future to the problems of preserving, or conserving, the environment, so as to enable it to continue to support large numbers of people.

336. The body of law devoted to this end may be expected to grow accordingly in the course of the next ten to twenty years. Much of the law will be national, designed to reduce the pollution caused by industrial processes, the disposal of waste products, heating, vehicle exhaust, the indiscriminate use of insecticides and so forth, but international regulations will also be required, chiefly as regards marine pollution,⁴¹⁵ fresh water pollution in the case of rivers and lakes, and air pollution. A number of universal and regional bodies

are indeed already engaged in considering these questions. The full ramifications of the issues raised cannot easily be defined. For example, what attitude will States choose to adopt as regards increasing noise caused by aircraft, alterations in marine conditions (brought about by a combination of complex causes, which leads to a decline in fish stocks), or changes in the water table, affecting the water used for drinking and for irrigation in an area extending to several countries? The problems posed are many, and, if they are not all likely to happen at once, they are foreseeable enough to be the subject of concern.

337. The United Nations Conference on the Human Environment (Stockholm, 1972) is expected to call attention to the nature of the problems raised and to lead to the adoption of a declaration which will set out the basic principles to govern future policies in this area. At this stage it is not possible to say, in definitive terms, what further legal instruments may be adopted, either at that Conference or subsequently in the light of its work. Having regard, however, to the importance of the subject and the sizeable growth in the body of relevant law which may be expected to occur during the years which the Commission's future programme may cover, it has been thought that the Commission's attention should at least be called to this area.

338. There is, of course, a certain amount of customary law which may be referred to in this context and a number of cases⁴¹⁶ relating to the application of the general principles of international law which may be invoked, whilst many existing treaties contain provisions which may be pertinent (for example, article 25 of the Convention on the High Seas, and treaties referring to measures for plant protection or fisheries conservation). Nevertheless it is understood that the task confronting the international community entails the development of essentially new law, on what may eventually prove to be a considerable scale, and not merely the codification of existing legal rules and practices. It is difficult at this stage to say what form the arrangements to be made will take and whether the relationship between the component parts will be such as to result in a coherent body of law, or whether the eventual solution will be a series of piecemeal agreements, without any underlying general pattern or system. Nor is it possible to define, in exhaustive terms, all the areas and aspects which may need to be borne in mind in devising the legal arrangements in question. To provide, however, merely one example of the activities which are becoming realizable and where international regulation will surely be eventually required, mention may be made of weather modification. Weather forecasting has made rapid progress in recent years, greatly accelerated by the development of new instruments, the use of space satellite observations, and a more complete monitoring network. Whilst steps of this kind can be

⁴¹⁴ See para. 4 above.

⁴¹⁵ Already referred to in para. 307 above.

⁴¹⁶ For example, Trail Smelter Case (1941): *Reports of International Arbitral Awards*, vol. III (United Nations publication, Sales No. 1949.V.2), p. 1095; Lac Lanoux case (1957): *ibid.*, vol. XII (United Nations publication, Sales No. 63.V.3), p. 281.

conducted within the framework of WMO and the Intergovernmental Oceanographic Commission of UNESCO, on what grounds and in what circumstances might a State or group of States (even possibly acting under the auspices of an international body) seek to modify the weather for its (or their) own advantage?

339. The matter is referred to in the present document in order to show not only the full range of matters covered, or to be covered, by international law, but also with a view to suggesting—as is borne out by the course which has been followed with respect to outer space and the area of the sea-bed beyond national jurisdiction—that the needs of the international community in the field of the codification and progressive development of international law, as envisaged in the 1948 Survey, have changed to an appreciable degree. As was pointed out in the introduction, for a variety of causes States are now being impelled towards the adoption of a more active and deliberate approach to the development of international law than was formerly the case. Whereas international law was traditionally created largely by a series of individual acts, performed either by a single State or by two or more States and usually continued over an appreciable period, attempts are now made to tackle international problems on a more conscious, regular and collective basis. The requirement that, when drawing up its long-term programme, the Commission should take account of “the international community’s current needs”⁴¹⁷ may be recalled in this connexion. Although the tendency under discussion is one of general significance for the future course of the Commission’s work, the matters coming under the present heading raise the issue especially clearly.

Chapter XIV

The law relating to international organizations

340. It would appear to be agreed that there is now a body of law relating to international organizations having, in many respects, its own characteristics and being in any case of a scale such as to require that reference be made to it in the present survey. It is not, however, easy to relate the main features of this large and amorphous body of law to the objects of the study now being undertaken. International organizations provide at the present time—and here one may note a significant increase in activity, as well as in the number of participating States, since 1948—the principal means available for the conduct of multilateral relations and for the securing of agreement on, and implementation of, multilateral objectives, whether those objectives relate to the promotion of friendly relations and co-operation between States, to the progressive development and codification of international law, to economic development, or to the peaceful uses of the sea-bed or of outer space. Thus in every section of this

survey reference has been made to the work of one or other international body, or to resolutions or treaty instruments adopted within their framework.

341. It is not therefore proposed to attempt to describe the actual operations and structure of the many international organizations which exist, or to evaluate their role in the contemporary world, but to single out certain areas which may be of interest to the Commission. The wider approach which could be taken, so as to encompass the impact in different spheres of the acts of international organizations, would, in any case, despite its importance, necessarily include matters which would not appear to be susceptible to the processes of the codification and progressive development of international law, at least as these have normally been understood by the Commission. Account has been taken in the following chapter of the views expressed in the Commission during its preliminary discussion at its fifteenth session (1963) and sixteenth session (1964) of the scope of the topic “Relations between States and international organizations”.⁴¹⁸

342. The matters dealt with in the present chapter have been sub-divided as follows:

- (1) The legal status of international organizations, and the different types of organization.
- (2) Privileges and immunities of international organizations, and of entities and officials under their authority.
- (3) The law of treaties in respect to international organizations, responsibility of international organizations, succession between them, and other special questions.
- (4) Methodological approach to the codification of the law relating to international organizations.

1. THE LEGAL STATUS OF INTERNATIONAL ORGANIZATIONS, AND THE DIFFERENT TYPES OF ORGANIZATION

343. As has been recalled,⁴¹⁹ the Special Rapporteur on the topic “Relations between States and international organizations” dealt in his first report,⁴²⁰ submitted in 1963, with questions relating to the international personality of international organizations (including the definition of that personality), their treaty-making capacity, and the capacity to espouse claims.⁴²¹ The

⁴¹⁸ For the diplomatic law aspects of the position of representatives of States to international organizations, see paras. 234-239 above.

⁴¹⁹ See para. 235 above.

⁴²⁰ *Yearbook of the International Law Commission*, 1963, vol. II, p. 159, document A/CN.4/161 and Add.1.

⁴²¹ The report contains also a review (part III) of attempts to codify the international law relating to the legal status of international organizations. Section D of that part concerns the efforts made within the Commission in connexion with its work on topics selected for codification, particularly with regard to: the law of treaties (until 1962); law of the sea (the right of international organizations to sail vessels under their flag); State responsibility (reports of the first Special Rapporteur and work of the Sub-Committee on State responsibility); *ad hoc* diplomacy (report of the first Special Rapporteur); and succession of State and governments (work of the Sub-Committee

⁴¹⁷ *Yearbook of the International Law Commission*, 1970, vol. II, p. 309, document A/8010/Rev.1, para. 87. This paragraph is largely reproduced in paragraph 1 of the present document.

report likewise examined the evolution of the concept of international organizations, including the various ways in which they might be classified: temporary (or *ad hoc*) and permanent; public (intergovernmental) and private (non-governmental); according to the scope of membership (universal and regional) and to the procedures of admission; and according to functions (sub-divided according to the scope of activities; the nature of the division of power; and according to the extent of authority and power of the organization vis-à-vis States).

344. These matters gave rise to a certain discussion in the Commission at its fifteenth session (1963) and sixteenth session (1964),⁴²² which revealed differences of interpretation and approach as to the concept of international personality of international organizations. Speaking in connexion with the delimitation of the scope of the topic "Relations between States and international organizations" and the interpretation of General Assembly resolution 1289 (XIII),⁴²³ some members of the Commission, like some representatives in the Sixth Committee, sought to emphasize that international organizations were subjects of international law only to the extent that they needed that status in order to carry out their work; there could be no question of their having the same status as was enjoyed by States. Furthermore whereas all States possessed the same legal status, this was not the case as regards the various international organizations. Consistent with this approach, it was argued that since the legal personality of an international organization depends on its constitu-

tion, there were no "general principles" applicable, comparable to those relating to the international personality of States. The rules on the personality of an international organization based on its constitution were, accordingly, binding only on member States and States which accepted that international personality. The view was also put forward that whereas a number of fairly substantial general rules existed on diplomatic questions, there were few, if any, general rules for international organizations concerning treaty law, State responsibility and State succession. Others, by contrast, took issue with the strict concept expressed in these arguments and agreed with the Special Rapporteur's suggestion that the international personality of international organizations should be studied first. While recognizing that the general principles on the subject were rapidly evolving, these members were of the opinion that the problems which arose ought to be studied by the Commission.

345. The place of regional organizations in the work to be undertaken on the topic was also the subject of a division of opinion. Some considered that their omission would result in a serious gap, others that, since regional organizations showed ever greater differences among themselves than did universal bodies, attention should be concentrated primarily on international organizations of a universal character.⁴²⁴

346. There are other questions falling under the heading of the present section which may also be listed. There is, as the Special Rapporteur for the topic "Relations between States and international organizations" mentioned in his first report,⁴²⁵ the general topic of the classification of international organizations and of their respective legal capacity, although here too, as in other instances concerning the law relating to international organizations, it is difficult, having once distinguished the different types of organizations, to proceed to devise a separate law or legal system for each without, by the same token, impinging, or appearing to impinge, on the specific treaty régimes which exist in each case. Specific aspects of legal capacity, other than those relating to the capacity to conclude treaties or to incur responsibility, can, however, be separated: for example, contractual capacity, capacity to acquire and dispose of movable and immovable property, and capacity to engage in legal proceedings.⁴²⁶

2. PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS, AND OF ENTITIES AND OFFICIALS UNDER THEIR AUTHORITY

347. At the eighteenth session (1966), the Special Rapporteur on "Relations between States and international organizations" stated:

⁴²⁴ For the solution given to this question in the context of the draft articles on representatives of States to international organizations, see para. 238 above.

⁴²⁵ See foot-note 420 above.

⁴²⁶ These aspects were referred to by the Special Rapporteur in his first report.

on the Succession of States and Governments). At its fourteenth session (1962) the Commission decided to discuss the draft articles on the law of treaties on the understanding that treaties entered into by international organizations were not within its scope (see document A/CN.4/L.161, paras. 65-66). During the preparation and formulation of the draft articles on the law of treaties, the Commission was, from time to time, concerned with questions relating to international organizations mainly in connexion with provisions such as: the scope of the draft articles, the use of the term "treaty", the international agreements not within the scope of the draft articles treaties which are constituent instruments of international organizations or which have been drawn up within international organizations, the capacity to conclude treaties, full powers to represent the State in the conclusion of treaties, negotiation of a treaty and adoption and authentication of its text participation in a treaty, reservations, termination and amendment of multilateral treaties, registration, correction of errors and the functions of the depositary. During recent years, in addition to the consideration of the topics "Relation between States and international organizations", the Commission touched upon questions relating to international organizations when discussing the scope of the draft articles on special missions, as well as the delimitation of its initial work on State responsibility and Succession of States and governments. Problems of succession, including to some extent succession of international organizations, were involved in the "Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations" on which the Commission submitted its conclusions in at its fifteenth session (see *Yearbook of the International Law Commission* 1963, vol. II, p. 217, document A/5509, chap. III).

⁴²² For a more detailed summary, see *Yearbook of the International Law Commission*, 1967, vol. II, pp. 136 *et seq.*, document A/CN.4/195 and Add.1, paras. 12 *et seq.*

⁴²³ See relevant paragraph of the resolution cited in para. 234 above.

With regard to the status, privileges and immunities of the organizations themselves, he was taking into careful consideration the apprehensions expressed by the legal advisers of international organizations and by some members of the Commission when the topic had been discussed in 1963 and 1964; those apprehensions related to the position of the general Conventions on the privileges and immunities of the United Nations and the specialized agencies. A thorough study of that question in all its ramifications would therefore be necessary before deciding on the appropriate course of action on that second aspect.⁴²⁷

348. In proposing to give priority to the status, privileges and immunities of representatives of States to international organizations within the context of the topic, the Special Rapporteur pointed out that, from the doctrinal point of view, whereas the representatives of States to international organizations possess, by definition, a representational quality so as to make their status analogous to that of diplomatic representatives sent between States, this was not the case with respect to international organizations and persons connected with them.⁴²⁸ Lacking a representative character, their position was based on the functional theory. The Special Rapporteur considered that the study of the privileges and immunities of the United Nations and the specialized agencies should be deferred to a later stage, when it could be undertaken separately.

349. Since the adoption of the course outlined by the Special Rapporteur, the Commission has, as has been explained above, made considerable headway with its examination of questions relating to the representatives of States to international organizations. In so doing, the Commission has had to consider certain general issues which would also arise if a study were to be made of the privileges and immunities of international organizations and their agents, namely, the question of whether the Commission's work should be confined to organizations of a universal character or whether it should also extend to regional organizations, and, secondly, the question of the relationship between the Commission's work (in particular in so far as this might take the form of a set of draft articles intended to form the basis for a convention) on existing agreements, most notably, in the present context, the two Conventions of 1946 and 1947 relating to the privileges and immunities of the United Nations and the specialized agencies.⁴²⁹

⁴²⁷ *Yearbook of the International Law Commission*, 1966, vol. I, part II, p. 279, 886th meeting, para. 8. It should be added that the "immunities and privileges of international organizations as bodies corporate", and "of officials of international organizations", had been earlier distinguished by the Special Rapporteur, together with "immunities of representatives to international organizations and other related questions under the common general heading of 'immunities and privileges of international organizations'" (see, *Ibid.*, 1963, vol. II, p. 186, document A/CN.4/L.103, para. 4).

⁴²⁸ *Ibid.*, 1967, vol. II, p. 135, document A/CN.4/195 and Add.1, paras. 9-11.

⁴²⁹ United Nations, *Treaty Series*, vol. 1, p. 15, and *ibid.*, vol. 33, p. 261.

350. Although the Commission's earlier solution to these problems might make their consideration easier in relation to international organizations, there is a question of more basic importance which would also need to be decided at the outset, namely the extent to which there can be said to be a need to change or consolidate the relevant legal provisions relating to the privileges and immunities of international organizations. By comparison with many other branches of law, this area is already contained in treaties and, in the case of the organizations in the United Nations system, subsumed in the two Conventions relating to the privileges and immunities of the United Nations and of the specialized agencies. These basic instruments, to which the overwhelming majority of States are parties, are supplemented by more detailed agreements with the State in which the organization (or organizations as in the case of UNDP agreements) is working. In the opinion of the Secretary-General these agreements and basic Conventions provide on the whole a satisfactory framework for the operations of the United Nations family of organizations, and not strong case presents itself in his view for their revision on a large scale. In the case of the representatives of States, the 1946 and 1947 Conventions dealt only briefly or by implication with the institution of permanent missions, and with the division between permanent missions and delegations to regular sessions and to conferences convened by international organizations, while the practice of sending observer missions (whether on a permanent or *ad hoc* basis) was not mentioned. It is the development in these areas which gave rise to the need for study by the Commission of the question of representatives of States to international organizations and the preparation of a set of draft articles on the matter. Although international organizations forming part of the United Nations system have grown in number and in functions during the same period, the legal basis for their status, privileges and immunities has been more clearly provided by the 1946 and 1947 Conventions. In addition, the fact that, before operating in any given country the organization (or organizations) concludes an agreement with the host State, specifying in more detail the terms under which privileges and immunities are to be granted to the organization and its staff, has resulted, in most cases, in a more definite and precise basis for the legal relations involved than the relatively more piecemeal and summary approach followed with respect to State representatives.

351. That much being said, there are nevertheless specific areas where consideration might be given to the codification and progressive development of the law, most notably where activities are conducted which were not clearly envisaged at the time the initial instruments relating to privileges and immunities were drafted. Under various existing multilateral instruments the privileges and immunities of major bodies, such as the United Nations itself, the specialized agencies and the principal regional organizations, appear to be adequate to their needs, in particular in so far as these organizations function as "conference bodies", with a permanent sec-

retariat stationed at headquarters or major offices.⁴³⁰ There has, however, been a very considerable growth in the number of bodies which are to some degree operational, that is to say engaged in direct activities comparable to those conducted by State agencies, and whose status, privileges and immunities, although regulated in many instances by a special agreement, has not been considered from an over-all standpoint. Within the United Nations system, for example, assistance has been furnished, either within the framework of UNDP, or to refugees or other distressed persons (for example, following natural disasters), in circumstances which were not fully envisaged in the 1946 and 1947 Conventions. Frequently it has been necessary to employ large numbers of local citizens, thus raising questions of conditions of employment (wage rates, application of local social security provisions), as well as of the application of privileges and immunities to staff whose task may have, for day-to-day purposes, ostensibly little to distinguish it from that on which others may be engaged in the private sector, or in the service of the local government. Schools have been operated, as well as vocational training centres of all kinds, laboratories (as in the case of that run by IAEA for example, as well as the European Organization for Nuclear Research (CERN)⁴³¹ and the Joint Institute for Nuclear Research at Dubna (USSR)⁴³² and many other institutions of a similar nature, in some cases established on a basis of mixed participation between the State (or group of States) concerned and the parent organization. Besides these activities, often of a generally educational or scientific nature, organizations have also been formed (chiefly outside the United Nations) in order to conduct a joint enterprise. The arrangements made with respect to the development and operation of space satellites on a joint basis for example, have resulted in the establishment of international bodies whose structure and function, though governed by a special agreement, has borne relatively little comparison with that of the more general pattern presented by the United Nations and its specialized agencies. As a further distinct case, attention may be called to the establishment of a number of peace-keeping bodies during the past twenty-five years. Mostly, though not solely, set up within the framework of the United Nations, these bodies have operated under specific host agreements and an express set of rules relating, *inter alia*, to their legal status as well as to their privileges and immunities in terms of local law. The question of the conditions under which such bodies may be established and operate has been a matter of considerable debate and, on occasion, of profound disagreement.

⁴³⁰ For a comprehensive report on the position with respect to United Nations organizations, see the Secretariat study entitled "The practice of the United Nations, the specialized agencies and the International Atomic Energy Agency concerning their status, privileges and immunities", in *Yearbook of the International Law Commission*, 1967, vol. II, p. 154, document A/CN.4/L.118 and Add.1-2.

⁴³¹ United Nations, *Treaty Series*, vol. 200, p. 149.

⁴³² *Ibid.*, vol. 259, p. 132.

352. Whilst it would be possible to suggest that an examination of the privileges and immunities of operational organizations (excluding the conditions of their establishment and employment) could contribute to clarifying an area of the privileges and immunities of international organizations which has not yet been comprehensively explored, there is an additional question which would also have to be considered in this connexion, namely, whether, even if such an examination were to be made, it would be possible to proceed to any further degree of codification, having regard to the differing and individual nature of the organizations and other bodies concerned, and the existence of a series of separate treaty régimes.

3. THE LAW OF TREATIES IN RESPECT TO INTERNATIONAL ORGANIZATIONS, RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS, SUCCESSION BETWEEN THEM, AND OTHER SPECIAL QUESTIONS

353. In his first report on "Relations between States and international organizations"⁴³³ the Special Rapporteur specified the first three above-mentioned questions as "special questions" within the topic. Since then the question of "treaties concluded between States and international organizations or between two or more international organizations" has been referred to the Commission as an "important question" by the General Assembly, following a resolution adopted by the United Nations Conference on the Law of Treaties, and is now under study.⁴³⁴ As regards the two other questions, "responsibility of international organizations" and "succession between international organizations", the issue which arises may be put in basically the same terms as in respect of treaties, namely: to what extent is the law applicable to States in equivalent circumstances to be applicable, and to what extent must recourse be had to new legal arrangements and concepts? That there is an analogy in these instances with the parallel action of States—unlike, say, rules relating to voting within international organizations, which have no obvious inter-State equivalent—would appear to be undeniable. The precise ramifications of the analogy, however, are by no means clear. Although objections were raised to the assumption that instruments to which organizations are parties are treaties on the ground that this is a *petitio principii*, the similarity in the various practices would seem, at first sight, to be closer in the case of treaties than with respect to examples of the responsibility of, or succession between, organizations. Although there have been a number of examples of succession between different international organizations, it cannot be said that there have been so many as to provide a large body of cases from which general rules could be derived. In most if not all instances, the matter has been regulated by a special agreement (or series of agreements), tailored to fit the particular circumstances. That being so, the scope for codification and progressive development of the law with regard to

⁴³³ See foot-note 420 above.

⁴³⁴ See paras. 259-261 above.

this aspect would appear to be limited. Unless, therefore, the Commission were to be asked to consider a specific issue, there would not seem to be any pressing utility for the Commission to study this question.

354. As regards the topic of the responsibility of international organizations—to which may be added the subject of the capacity of international organizations to espouse international claims—⁴³⁵ there has been a somewhat greater (though still not very extensive) volume of practice, and the matter has most frequently been considered in the context of treaties providing for the possibility that operational activities (for example, in outer space) may be conducted under the auspices of an international organization. Having regard to the extremely varied sets of circumstances in which responsibility may be incurred by international organizations—ranging from acts vis-à-vis member States to those vis-à-vis non-member States, individuals and private bodies—there would appear to be considerable difficulties in arriving at a set of provisions on the matter which would be both specific enough in character to be useful and, at the same time, applicable to all or most international organizations. The questions raised in this context are, however, practical and continuing ones and the Commission may like to consider whether, as its work on State responsibility advances, ⁴³⁶ attention might at some stage be given to the study of the topic of the responsibility of international organizations, or of specific aspects of that topic.

355. Another issue is that of membership and representation in international organizations. ⁴³⁷ This and other topics pertaining to the over-all functioning of international organizations would appear, however, to raise doctrinal difficulties which might be difficult to solve, and to be dependent, as regards clarification and resolution, on a political process in which States are directly engaged.

4. METHODOLOGICAL APPROACH TO THE CODIFICATION OF THE LAW RELATING TO INTERNATIONAL ORGANIZATIONS

356. Proceeding from the above, a distinction may be drawn between the evolution of international law, regarded as a whole, ultimately fused with changes in the nature of international relations, and the more specific area of the codification and progressive development of international law, treated as a deliberate process within the general framework of international legal activity. While the Commission will certainly be concerned to follow the continued development of the law relating to international organizations—in the widest sense it can be said that the future course of international law will be largely determined by the part

to be played by these organizations, and by the extent of the responsibilities they assume—this over-all development is separate from the immediate part of the codification and progressive development of international law with which the Commission is engaged. It is therefore suggested that the course which the Commission has so far followed, with the approval of the General Assembly, with respect to the law relating to international organizations—namely to deal with specific aspects which have similarities to the parallel practices of States, after the relevant inter-State law has been examined—would appear to offer the best possibilities for the Commission to contribute to the codification and development of the law in this area. Having regard to the existence of treaties governing the establishment and functioning of intergovernmental (and some non-governmental) bodies, the Commission will nevertheless continue to need to examine carefully the relationship between any study it may make and the operation of the treaties in question—thus acknowledging what is, by necessity, the extremely particularist nature of the various international organizations.

Chapter XV

International law relating to individuals

357. The matters covered in the present chapters have been arranged under four headings:

- (1) The law of nationality;
- (2) Extradition;
- (3) Right of asylum;
- (4) Human rights.

358. Specific aspects of certain of these topics are also dealt with elsewhere in the present document. ⁴³⁸ The 1948 Survey ⁴³⁹ examined under the title “The individual in international law” the law of nationality, extradition, the right of asylum, and also the treatment of aliens. The latter topic has been referred to in the present document in chapter IV (“State responsibility”).

1. THE LAW OF NATIONALITY

359. The two central issues with respect to nationality remain those distinguished in the 1948 Survey, ⁴⁴⁰ namely, problems which arise owing to differences between the nationality laws applied by various countries (in particular as regards the conditions under which nationality may be accorded) and the question of statelessness. By way of general summary it may be said that the position with respect to matters involving conflicts between nationality laws remains basically

⁴³⁵ In this connexion see generally the Advisory Opinion given by the International Court of Justice, concerning reparation for injuries suffered in the service of the United Nations (*I.C.J. Reports* 1949, p. 174).

⁴³⁶ See chap. IV above.

⁴³⁷ Regarding a suggestion made in 1961, see *Yearbook of the International Law Commission*, 1970, vol. II, p. 256, document A/CN.4/230, para. 42.

⁴³⁸ In particular, see below chapter XVI (“The law relating to armed conflicts”) and chapter XVII (“International Criminal Law”).

⁴³⁹ See para. 4 above.

⁴⁴⁰ 1948 Survey, paras. 76-77. The 1948 Survey also referred to the whole of the 1930 Hague Codification Conference and the adoption there of a Convention and of a number of protocols relating to the law of nationality.

unchanged. Nevertheless there have been some efforts, largely of a regional or subregional character, designed to reduce the problems involved or, at least, to introduce practical measures which would render them less acute.⁴⁴¹ In the case of one specific issue, the nationality of married women, a convention was adopted by the General Assembly in 1957, which came into force in 1958.⁴⁴²

360. As regards the question of statelessness, it may be noted that at its first session (1949) the Commission agreed to include the topic of "nationality, including statelessness" in its long-term programme. In 1951 the Commission was requested by the Economic and Social Council to prepare a draft international convention or conventions for the elimination of statelessness. At the Commission's third session (1951), Mr. M. Hudson was appointed as Special Rapporteur for the subject of nationality, including statelessness, his place being taken at the end of the fourth session by Mr. R. Córdova. At its fifth session (1953), the Commission provisionally adopted two draft conventions, one on the elimination of future statelessness and another on the reduction of future statelessness, which were then transmitted to Governments for comment.

361. Having examined the comments made by Governments and re-drafted some of the articles, the Commission adopted at its sixth session (1954) the two final draft conventions for submission to the General Assembly. In doing so, the Commission said:

The most common observation made by Governments was that some provisions of their legislation conflicted with certain articles of the draft conventions. Since statelessness is, however, attributable precisely to the presence of those provisions in municipal law, the Commission took the view that this was not a decisive objection for, if Governments adopted the principle of the elimination, or at least the reduction, of statelessness in the future, they should be prepared to introduce the necessary amendments in their legislation.⁴⁴³

362. The draft conventions, each consisting of eighteen articles, aimed, on the one hand, at facilitating the acquisition of the nationality of a country by birth

within its borders and, on the other hand, at avoiding the loss of a nationality except when another nationality was acquired. The draft convention on the elimination of future statelessness sought to impose stricter obligations on the contracting parties than the one which aimed merely to reduce statelessness. The Commission stated in its report that it would be for the General Assembly to consider to which of the draft conventions preference should be given.

363. At the General Assembly's ninth session in 1954 the majority of representatives in the Sixth Committee expressed the opinion that the time was not ripe for immediate consideration of the draft conventions. In resolution 896 (IX) of 4 December 1954, the General Assembly expressed its desire that a plenipotentiary conference be held

to conclude a convention for the reduction or elimination of future statelessness as soon as at least twenty States have communicated to the Secretary-General their willingness to co-operate in such a conference.

364. The United Nations Conference on the Elimination or Reduction of Future Statelessness, held in 1959, in which some thirty-five States participated, took as the basis for its discussion the draft convention on the reduction of future statelessness. Although a number of provisions were adopted, the Conference did not reach agreement as to how to limit the freedom of States to deprive citizens of their nationality in cases where such deprivation would render them stateless. Consequently, the Conference recommended that it be reconvened in order to complete its work. The second part of the Conference, held in 1961, in which representatives from thirty States participated, was devoted to discussion of outstanding matters. The most controversial issue was the provision relating to the conditions under which a State might deprive a person of nationality. The text finally adopted (article 8 of the Convention) affirms the principle that "a contracting State shall not deprive a person of its nationality if such deprivation would render him stateless", but it adds a certain number of exceptions (nationality obtained by misrepresentation or fraud; long residence abroad; conduct inconsistent with duty of loyalty). This question having been settled, the Conference adopted, on 30 August 1961, the Convention on the Reduction of Statelessness.⁴⁴⁴ The instrument is a compromise between countries following the *ius soli* principle and those following that of the *ius sanguinis*, and attempts to reduce the causes of statelessness by a series of provisions regarding conditions for the granting and loss of nationality. The Convention, which was signed by five States, has not come into force, having been ratified or acceded to as of 1 April 1971, by only two States.

365. As for the question of present statelessness the Commission at its sixth session adopted a number of proposals, in the form of seven articles with comment-

⁴⁴¹ See, for example, the Convention on the reduction of cases of multiple nationality and military obligations in cases of multiple nationality, concluded under the auspices of the Council of Europe in 1963 (United Nations, *Treaty Series*, vol. 634, p. 221).

⁴⁴² *Ibid.*, vol. 309, p. 65. In 1950 the Commission was requested by the Economic and Social Council to undertake the drafting of a convention on the nationality of married women. A Special Rapporteur was appointed, who prepared a draft convention on the nationality of married persons in 1952. The Commission decided, however, that the question of the nationality of married women could only be considered in the context, and as an integral part, of the whole subject of nationality and did not therefore take further action with regard to the draft. Thereafter the question of the nationality of married women was considered by other United Nations organs, notably the Commission on the Status of Women, culminating in the adoption of the Convention referred to. As of 1 April 1971, forty-three States were parties to this instrument. (See *The Work of the International Law Commission* (United Nations publication, Sales No. 67.V.4), p. 28.)

⁴⁴³ *Yearbook of the International Law Commission, 1954*, vol. II, document A/2693, para. 12.

⁴⁴⁴ United Nations, *Human Rights: A Compilation of International Instruments of the United Nations* (United Nations publication, Sales No. E.68.XIV.6), p. 53.

aries, and submitted them to the General Assembly as part of its final report on nationality, including statelessness. In submitting the proposals, the Commission said:

In view of the great difficulties of a non-legal nature which beset the problem of present statelessness, the Commission considered that the proposals adopted, though worded in the form of articles, should merely be regarded as suggestions which Governments may wish to take into account when attempting a solution of this urgent problem.⁴⁴⁵

366. As regards present statelessness, it may also be noted that a Convention relating to the Status of Stateless Persons,⁴⁴⁶ adopted in 1954 by a conference convened by the Economic and Social Council, came into force in 1960. This Convention, however, as the title indicates, attempts to improve the status of stateless people and not to reduce or eliminate statelessness as such. As of 1 April 1971, twenty-two States were parties to the instrument.

367. Lastly it should be noted that when the Commission completed its task relating to statelessness in 1954, several members expressed the opinion that the Commission should content itself with the work it had done so far in the field of nationality, and the Commission thereupon decided to "defer any further consideration of multiple nationality and other questions relating to nationality."⁴⁴⁷ A particular aspect, namely the question of the acquisition of the nationality of the receiving State by members of diplomatic missions and of consular posts and their respective families, was, however, considered in the context of the codification of diplomatic and consular relations.⁴⁴⁸

2. EXTRADITION

368. At its first session the Commission decided not to include extradition in its 1949 list.⁴⁴⁹ The principal reason given was that extradition depended on the existence of similar political conditions in the two States concerned. It would accordingly be useless to attempt to create uniform rules for extradition and it would be preferable to maintain the existing method of bilateral or regional treaties.⁴⁵⁰

369. The 1948 Survey mentioned the regional treaties which had been drawn up within the American system.

Since then a regional treaty has been concluded by the members of the Council of Europe;⁴⁵¹ extradition among certain States in Africa formerly administered by France is governed by the General Convention for Co-operation in matters of Justice, of 12 September 1961,⁴⁵² and between those States and France by a series of almost identical bilateral treaties for co-operation in matters of justice; the members of the Commonwealth have drawn up a scheme for rendition between their territories which is dependent, not on formal agreement, but on uniform legislation which has been enacted by many of them;⁴⁵³ and the Asian-African Legal Consultative Committee in 1961 prepared a set of draft articles embodying the principles of extradition.⁴⁵⁴ Further, a number of new States, mainly in Africa and Asia, have indicated that they consider themselves party to bilateral extradition treaties which were concluded by the former administering Power and applied to them before independence.⁴⁵⁵ Finally it would appear that certain basic principles commonly reappear in extradition treaties and in the other instruments mentioned above; in other words, many of the treaties consist of generally similar clauses.

370. One can accordingly raise the question whether the reasons given for the Commission's decision in 1949 are now valid. The common interest in providing for the return and prosecution of alleged offenders would appear to be a major factor in the thinking of Governments, at least in a large proportion of the cases which arise in practice. Certain basic problems—such as the extradition of nationals and the scope of the exception with respect to political offences—tend to recur and, along with other issues, they might be usefully studied and distinguished. In examining again the question in the light of the revision of its 1949 list, the Commission might also wish to consider the suitability of undertaking a study on the meaning and scope of the several standard clauses included in extradition treaties.

371. Several multilateral conventions dealing with such matters as genocide, war crimes and crimes against humanity, traffic in women and children, narcotics, obscene publications and counterfeiting of cur-

⁴⁴⁵ *Yearbook of the International Law Commission, 1954*, vol. II, p. 147, document A/2693, para. 36.

⁴⁴⁶ United Nations, *Treaty Series*, vol. 360, p. 117. The Convention is designed to be complementary to the 1951 Convention relating to the Status of Refugees.

⁴⁴⁷ *Yearbook of the International Law Commission, 1954*, vol. II, p. 149, document A/2693, para. 39.

⁴⁴⁸ The matter is now dealt with in optional protocols, providing for the non-acquisition of nationality solely by operation of the law of the receiving State, concluded at the same time as the Vienna Conventions on Diplomatic and Consular Relations respectively. See chap. VI above ("Diplomatic and consular law").

⁴⁴⁹ See para. 4 above.

⁴⁵⁰ *Yearbook of the International Law Commission, 1949*, p. 47, 6th meeting, paras. 1-4.

⁴⁵¹ European Convention on Extradition, (Paris, 1957): United Nations, *Treaty Series*, vol. 359, p. 273.

⁴⁵² *Journal officiel de la République Malgache*, 23 December 1961, No. 201, p. 2242.

⁴⁵³ For further details, see *Yearbook of the International Law Commission, 1970*, vol. II, p. 102, document A/CN.4/229.

⁴⁵⁴ See *Asian-African Legal Consultative Committee, Fourth Session, Tokyo, 1961*, (New Delhi, 1961), pp. 18-41.

The Committee was divided on the question whether a multilateral treaty or a series of bilateral treaties should be concluded. It noted that the principles were formulated in the light of the State practice prevailing in various countries and particularly in the Member States participating in the Committee (*ibid.*, p. 22). The text of the draft articles is reproduced in *Yearbook of the International Law Commission, 1961*, vol. II, p. 82, document A/CN.4/139, annex 1.

⁴⁵⁵ *Ibid.*, 1970, vol. II, p. 102, document A/CN.4/229.

rency⁴⁵⁶ make provision for extradition, either by requiring extradition or, more commonly, by providing that the various activities proscribed by them should be considered to come within the scope either of any extradition treaties in force between the parties to the convention or, in the case of States which do not require any extradition treaty, the extradition law. This suggests that at least in respect of certain offences States are prepared to accept multilateral treaty provisions on extradition. In any consideration of the matter, pertinent multilateral treaties would, of course, need to be taken into account, and regard paid to the general question of extra-territorial jurisdiction.⁴⁵⁷

3. RIGHT OF ASYLUM

372. This topic, which was mentioned in the 1948 Survey, was included by the Commission in the 1949 list. In response to General Assembly resolution 1400 (XIV) of 21 November 1959, which requested the Commission "as soon as it considers it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum", the Commission, at its fourteenth session (1962), included the "principles and rules of international law relating to the rights of asylum" in its future work programme, but no date was set for the start of the Commission's consideration of the matter.⁴⁵⁸ At the Commission's nineteenth session (1967), when the question was re-examined, most members were of the opinion that the time had not yet come for the Commission to proceed actively with the topic, and that preference should be given to other subject already under study.

373. The general heading "right of asylum" covers two main questions, namely, "territorial asylum" and "diplomatic asylum". The first has been dealt with in several United Nations international instruments. Article 14 of the Universal Declaration of Human Rights (General Assembly resolution 217 A (III)) provides:

1. Everyone has the right to seek and to enjoy in other countries freedom from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

374. The major elaboration of the right of territorial asylum is contained in the Declaration on Territorial Asylum, adopted by the General Assembly under resolution 2312 (XXII) of 14 December 1967. The culmination of long efforts by the Commission on Human Rights, by the Third Committee and by the Sixth Com-

mittee in turn, the Declaration contains four articles on which States are recommended to base their practices relating to territorial asylum.⁴⁵⁹

375. Resolution 2312 (XXII) recalls in its second preambular paragraph "the work of codification" to be undertaken by the Commission under resolution 1400 (XIV). In this connexion the Sixth Committee's report indicates:

It was further explained that the sponsors had found it necessary, in order to stress that the adoption of a declaration on territorial asylum would not bring to an end the work of the United Nations in codifying the rules and principles relating to the institution of asylum, to make a reference at the very beginning of the draft resolution, in a preambular paragraph to the proposed declaration, to the work of codification of the right of asylum to be undertaken by the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 November 1959.

Some other delegations, while accepting such a reference, recorded their understanding that the preambular paragraph in question should not be understood as modifying or prejudicing in any way the order of priorities for the consideration of items,

⁴⁵⁹ The operative provisions of the Declaration are as follows:

"Article 1

"1. Asylum granted by a State, in the exercise of its sovereignty, to persons entitled to invoke article 14 of the Universal Declaration of Human Rights, including persons struggling against colonialism, shall be respected by all other States.

"2. The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

"3. It shall rest with the State granting asylum to evaluate the grounds for the grant of asylum.

"Article 2

"1. The situation of persons referred to in article 1, paragraph 1, is, without prejudice to the sovereignty of States and the purposes and principles of the United Nations, of concern to the international community.

"2. Where a State finds difficulty in granting or continuing to grant asylum, States individually or jointly or through the United Nations shall consider, in a spirit of international solidarity, appropriate measures to lighten the burden on that State.

"Article 3

"1. No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.

"2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.

"3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

"Article 4

"States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations."

⁴⁵⁶ Reference may also be made to the OAS Convention to Prevent and Punish the Acts of terrorism taking the Form of Crimes Against Persons and Related Extortion that are of International Significance (see paras. 247-248 above) and the Convention for the Suppression of Unlawful Seizure of Aircraft (see para. 328 above).

⁴⁵⁷ See generally paras. 80-99 above.

⁴⁵⁸ For detailed references, see *Yearbook of the International Law Commission*, 1970, vol. II, p. 260, document A/CN.4/230, paras. 70-74.

already established by the International Law Commission and by the General Assembly.⁴⁶⁰

376. The views expressed on the meaning of the Declaration on Territorial Asylum for the future codification of legal rules relating to the rights of asylum are summarized in the Sixth Committee's report as follows:

It was also said that the practical effect given to the declaration by States would help to indicate whether or not the time was ripe for the final step of elaborating and codifying precise legal rules relating to asylum. In this respect, many representatives expressed the conviction that the declaration, when adopted, should be regarded as a transitional step, which should lead in the future to the adoption of bringing rules of law in an international convention. They drew attention to the fact that asylum was on the programme of work of the International Law Commission pursuant to General Assembly resolution 1400 (XIV) of 21 November 1959. The declaration now to be adopted would be one of the elements to be considered by the Commission in its work. Certain of these representatives expressed the hope, that, when it took up the codification of the institution of asylum, the Commission would correct some of the ambiguities in the terms of the Declaration and would also extend the subject to cover other forms of asylum, such as diplomatic asylum, on which there was extensive Latin American treaty law and practice, both in Latin America and elsewhere. It was also said that the existence of the Declaration should not in any way diminish the scope or depth of the work to be undertaken when the International Law Commission took up the subject of asylum.⁴⁶¹

377. The institution of "diplomatic asylum" owes its customary and conventional evolution to the practice observed chiefly amongst Latin American States. The legal basis for the institution and its consequences have, however, been the subject of discussion and, on two occasions, cases have been placed before the International Court of Justice concerning particular aspects or instances over which disputes have arisen.⁴⁶² The question received regional codification at the inter-American conferences which adopted the 1928 Havana Convention, the 1933 and 1939 Montevideo Conventions and the 1954 Caracas Convention.

378. The Commission did not, during the preparation of its draft articles on diplomatic intercourse and immunities, consider directly the question of diplomatic asylum, although the matter was referred to by various speakers in the course of discussion, both in the Commission and at the United Nations Conference on Diplomatic Intercourse and Immunities, particularly in connexion with inviolability of mission premises.⁴⁶³ This followed a decision of the Sixth Committee in 1952, rejecting a proposal that asylum should be included amongst the diplomatic topics to be examined

by the Commission,⁴⁶⁴ and the adoption by the General Assembly of resolution 1400 (XIV) of 21 November 1959.⁴⁶⁵

4. HUMAN RIGHTS

379. The Preamble to the Charter expresses the determination of the peoples of the United Nations "to reaffirm faith in fundamental human rights" and Article 1 includes amongst the purposes of the Organization to achieve international co-operation in ... promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.⁴⁶⁶

Under Articles 55 and 56 Member States pledge themselves "to take joint and separate action in co-operation with the Organization" to achieve the promotion of universal respect for, and observance of, human rights and fundamental freedoms. In furtherance of these provisions, the Economic and Social Council, which is empowered to make recommendations and to establish commissions for the promotion of human rights (Article 62, para. 2 and Article 68 of the Charter) set up the Commission on Human Rights in 1946. The Commission on Human Rights,⁴⁶⁷ together with bodies subsequently established, such as the Commission on the Status of Women, has been responsible for the regular examination of matters relating to human rights and for the preparation of texts in this field.

380. Since the 1948 Survey, which dealt with the question of human rights chiefly in the context of the law relating to the treatment of aliens,⁴⁶⁸ a series of

⁴⁶⁴ See *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 58, document A/2252, paras. 15, 16, 31 and 32.

⁴⁶⁵ Referred to in para. 372 above.

⁴⁶⁶ A comprehensive account of United Nations activities in this sphere is contained in two studies prepared by the Secretary-General for the 1968 International Conference on Human Rights: "Measures taken within the United Nations in the field of Human Rights" (A/CONF.32/5 and Add.1) and "Methods used by the United Nations in the field of Human Rights (A/CONF. 32/6 and Add.1) where detailed references may be found. The instruments adopted up to 31 December 1966 are collected in *Human Rights: A Compilation of International Instruments of the United Nations* (United Nations publication, Sales No. E.68.XIV.6).

⁴⁶⁷ The Commission on Human Rights, which is now composed of the representatives of thirty-two States, holds annual sessions and submits annual reports to the Economic and Social Council and, through the Council, to the General Assembly. The Commission has established subordinate bodies, on a permanent or *ad hoc* basis. In addition, special committees have been appointed by the General Assembly or other major organs to consider particular questions relating to human rights (for example, as regards the observance of human rights in given countries or territories, or as regards specific issues).

The Commission on the Status of Women, which is likewise now composed of the representatives of thirty-two States, meets as from 1970, every other year, and submits its reports to the General Assembly through the Economic and Social Council.

A detailed account of the method used within the framework of the United Nations for the development of human rights is to be found in the Secretary-General's study A/CONF. 32/6 and Add.1 (referred to in the preceding foot-note).

⁴⁶⁸ 1948 Survey, paras. 81-82.

⁴⁶⁰ *Official Records of the General Assembly, Twenty-second Session, Annexes* agenda item 89, document A/6912, paras. 64 and 65.

⁴⁶¹ *Ibid.*, para. 16.

⁴⁶² Colombian-Peruvian Asylum Case (*I.C.J. Reports* 1950, p. 266) and Haya de la Torre Case (*I.C.J. Reports* 1951, p. 71).

⁴⁶³ See *Official Records of the United Nations Conference on Diplomatic Intercourse and Immunities*, vol. II, (United Nations publication, Sales No. 62.X.1), p. 57, document A/CONF.20/L.2, para. 105.

instruments have been drawn up and a distinct body of law relating to human rights has emerged, as a separate branch of international law. The following paragraphs give a brief account of the main features of this development.

381. When the Commission on Human Rights was established it was decided that its first task would be the preparation of an "International Bill of Rights". After lengthy discussions in 1947 and 1948, the decision was taken that the "Bill" would consist of a Declaration, together with a Covenant or Covenants, and measures of implementation. By resolution 217 A (III), the General Assembly adopted the Universal Declaration of Human Rights, as the first part of the "Bill", on 10 December 1948; completion of the scheme, by the adoption (resolution 2200 A (XXI)) of three treaty instruments, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Optional Protocol to the international Covenant on Civil and Political Rights, did not follow until 1966.

382. As regards its contents, the Universal Declaration proclaims not only political and civil rights (equality before the law, protection against arbitrary arrest, right to a fair trial, the right to own property, freedom of thought, conscience and religion, freedom of opinion and expression, and of peaceful assembly and association), but also certain economic, social and cultural rights (such as the right to work, to free choice of employment, equal pay for equal work, the right to education), to which all individuals are entitled. The Universal Declaration is not a treaty instrument. It describes itself both as "a common understanding" of the rights and freedoms which Member States have pledged themselves to promote, and as a "common standard of achievement for all peoples and all nations". During the years since its adoption the Declaration has come, through its influence in a variety of contexts, to have a marked impact on the pattern and content of international law and to acquire a status extending beyond that originally intended for it. In general, two elements may be distinguished in this process: first, the use of the Declaration as a yardstick by which to measure the content and standard of observance of human rights; and, second, the reaffirmation of the Declaration and its provisions in a series of other instruments. These two elements, often to be found combined, have caused the Declaration to gain a cumulative and pervasive effect. Historically this development was due in part to the delay which occurred between the adoption of the Declaration in 1948 and the completion of the Covenants in 1966, and the fact that the intervening years were ones of great formative legal activity, both nationally and internationally. Thus most (indeed probably the majority) of the many national constitutions adopted since 1948 embody an endorsement of the Declaration or reflect its provisions, and numerous conventions include or refer to its articles. Besides being incorporated in acts of national legislation and cited before national tribunals, it has been used in United

Nations resolutions and declarations,⁴⁶⁹ and in the constitutive instruments of international organizations.⁴⁷⁰

383. The preparation of the Covenants proved a difficult task and although the Commission on Human Rights submitted preliminary texts to the General Assembly in 1954, final agreement was not reached until 1966. The process was, however, hastened by the successful preparation and approval by the General Assembly, in resolution 2106 A (XX) of 21 December 1965, of the International Convention on the Elimination of All Forms of Racial Discrimination. Under the Convention, which came into force in 1969,⁴⁷¹ the States parties condemn racial discrimination⁴⁷² and undertake to pursue, by all appropriate means and without delay, a policy of eliminating such discrimination in all its forms and promoting understanding among all races. The measures which States agree to take in pursuance of this objective include the making of a review of governmental, national and local policies, amending, rescinding or nullifying laws and regulations which have the effect of creating or perpetuating racial discrimination (article 2, para. 1 (c)). The Convention provides, *inter alia*, that States parties shall declare

an offence punishable by law dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof (article 4, subparagraph (a))

384. Besides requiring States to take, on the one hand, steps to prohibit activities (such as those referred to in the provision quoted) which are based on, or may incite, racial discrimination, the Convention also specifies, as a positive injunction, that legal, political, civil, economic, social and cultural rights are to be

⁴⁶⁹ For example the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV) of 14 December 1960), provides in paragraph 7:

"All States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights and the present Declaration on the basis of equality, non-interference in the internal affairs of all States, and respect for the sovereign rights of all peoples and their territorial integrity."

⁴⁷⁰ Thus in the Preamble of the Charter of OAU, Heads of African States and Governments "reaffirm" their adherence to the principles of the United Nations Charter and of the Universal Declaration, which instruments "provide a solid foundation for peaceful and positive co-operation among States".

⁴⁷¹ As of 1 April 1971 forty-eight States had submitted instruments of ratification or accession to the Convention. The Convention was preceded by the unanimous adoption by the General Assembly, on 20 November 1963, of the United Nations Declaration on the Elimination of All Forms of Racial Discrimination (resolution 1904 (XVIII)).

⁴⁷² Defined in article 1, para. 1 as

"any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

accorded to all, without distinction as to race, colour, or national or ethnic origin (article 5). The Convention provides (article 8) for the establishment of a Committee on the Elimination of Racial Discrimination, composed of eighteen experts,⁴⁷³ which is authorized to consider reports from States parties on the legislative, judicial, administrative and other measures they have taken to give effect to the Convention.⁴⁷⁴ The Committee, which has so far held three sessions, reports annually, through the Secretary-General, to the General Assembly on its activities and

may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly, together with comments, if any, from States Parties. (Articles 9, para. 2.)

385. Under article 15 of the Convention the Committee acts in an advisory capacity to United Nations bodies dealing with dependent territories, such as the Trusteeship Council and the Committee of Twenty-four.⁴⁷⁵ For this purpose, the Committee receives from these bodies copies of relevant petitions and reports concerning these territories; and it receives from the Secretary-General all relevant information available to him regarding those territories. The Committee is empowered to express its opinions and make recommendations to these bodies.

386. Besides examining reports, the Committee may also deal, under article 11, with allegations brought by a State party that another State party is not giving effect to the Convention. Such matters may only be taken up after the Committee has ascertained that all domestic remedies have been exhausted, unless the application of these remedies is "unreasonably prolonged". An *ad hoc* conciliation commission may be appointed in such cases after the Committee has obtained and collated information (article 12). So far no communication has been received under article 11.

387. Finally, it may be noted that the Committee may, in certain circumstances, and upon special acceptance of one of the Convention's provisions by the State concerned (article 14) deal with communications received from individuals, or groups of individuals, within the jurisdiction of a State party, claiming to be victims of

a violation by that party of any of the rights set forth in the Convention.⁴⁷⁶

388. Under the terms of resolution 220 A (XXI) of 16 December 1966, the General Assembly adopted and opened for signature and ratification or accession the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,⁴⁷⁷ together with the Optional Protocol to the International Covenant on Civil and Political Rights.⁴⁷⁸ The Covenants are intended to provide a more systematic means for the application of the human rights listed in the 1948 Universal Declaration, and thus to complete the design of the "International Bill of Human Rights" originally envisaged. The two Covenants differ, not only in their respective subject-matter, but also to some extent in the character of the obligations they impose. Whereas the obligations set out in the International Covenant on Civil and Political Rights are meant, by and large, to be implemented immediately,⁴⁷⁹ under the International Covenant on Economic, Social and Cultural Rights each State party agrees to take steps with a view to achieving progressively the full realization of the rights recognized therein.⁴⁸⁰

389. The civil and political rights listed in the relevant Covenant include those traditionally guaranteed and contained in the Universal Declaration. The rights referred to in the two instruments do not fully coincide however: the right to own property and the right of asylum, included in the Declaration, are not recognized in the Covenant; and, on the other hand, the Covenant defines a number of rights not specified in the Declaration, among them the right of all peoples to self-determination and the right of ethnic, religious or linguistic minorities to enjoy their own culture, to

⁴⁷⁶ This provision is to come into force when at least ten States parties have made declarations of acceptance. As of 1 April 1971, no State Party had done so.

⁴⁷⁷ The Covenants will enter into force when thirty-five States have become parties. As of 1 April 1971, ten States had submitted instruments of ratification or accession with respect to each instrument.

⁴⁷⁸ Subject to the entry into force of the International Covenant on Civil and Political Rights, the Optional Protocol will enter into force when ten States parties to the Covenant have also become parties to the Protocol. As of 1 April 1971, four States had submitted instruments of ratification.

⁴⁷⁹ Under article 2, para. 1, each State Party undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁴⁸⁰ The actual text of article 2, para. 1, provides that each State Party

undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including the adoption of legislative measures.

The prohibition of discrimination in the enjoyment of the rights in question, and certain other obligations, are intended to be of immediate application, however.

⁴⁷³ Article 8 provides that the experts shall be of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.

⁴⁷⁴ Under Article 9 of the Convention reports are to be submitted to the Secretary-General, and through him, to the Committee: (a) within one year of the Convention coming into force for the State concerned; and (b) "thereafter every two years and whenever the Committee so requests".

At its first session in 1970, the Committee drew up a set of suggestions which Governments might follow in drafting their reports.

⁴⁷⁵ Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples.

practice their own religion, and to use their own language. As regards its implementation, the International Covenant on Civil and Political Rights provides for the establishment of a Human Rights Committee (article 28), composed of eighteen members,⁴⁸¹ which will consider reports submitted by the States parties on the measures they have adopted to give effect to the rights recognized in the Convention. The Committee will transmit its reports "and such general comments as it may consider appropriate" to the States parties; the Committee may also transmit to the Economic and Social Council its general comments, together with the reports it has received (article 40). In addition the Committee may, under an optional procedure which will come into force when ten States have accepted it (article 41), consider communications from a State party alleging that another is not fulfilling its obligations under the Covenant. If the Committee is not able to resolve the dispute through the use of its good offices, the matter may be referred to an *ad hoc* conciliation commission (article 42).

390. Under the Optional Protocol accompanying the International Covenant on Civil and Political Rights, the Human Rights Committee may also consider communications from individuals claiming to be victims of a violation by a State party to the Protocol (and to whose jurisdiction they are subject) of any of the rights set forth in the Covenant (article 1 of the Protocol).⁴⁸² The views of the Committee are to be communicated to the State party and to the individual concerned (article 5, para. 4), and an annual report, containing, *inter alia*, a summary of the Committee's activities under the Optional Protocol, is to be made to the General Assembly (article 6).

391. The rights set forth in the International Covenant on Economic, Social and Cultural Rights are based on those proclaimed in the Universal Declaration. States parties undertake to submit reports to the Economic and Social Council on the measures they have adopted and the progress made in achieving the observance of the rights in question (article 16, para. 1). The Council, upon consideration of the reports and in co-operation with the specialized agencies, may promote appropriate international action to assist States parties with respect to full realization of these rights. The Council may, in particular, transmit reports to the Commission on Human Rights, for study and general recommendation or for information, and submit reports to the General Assembly (articles 19 and 21).⁴⁸³

⁴⁸¹ The members are to be "persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of same persons having legal experience" and are to serve in their personal capacity (article 28). They are to be elected by secret ballot from a list of persons possessing these qualifications and nominated by States parties (article 29).

⁴⁸² Complaints may only be considered after the Human Rights Committee has ascertained that the same matter is not being examined under another international procedure and that the individual has exhausted all local remedies (article 5, para. 2).

⁴⁸³ In article 18 provision is also made for the submission

392. Besides the adoption of these general multilateral instruments, providing, *inter alia*, for comprehensive methods of implementation,⁴⁸⁴ a series of other measures have been drawn up relating to the promotion and protection of human rights in more specific contexts. Thus the ILO and UNESCO have adopted conventions designed to ensure legal recognition of the principle of equality and non-discrimination.⁴⁸⁵ As regards the status of women, reference may be made to the conclusion of the Convention on the Political Rights of Women,⁴⁸⁶ the Convention on the Nationality of Married Women,⁴⁸⁷ and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages.⁴⁸⁸ The Convention on the Prevention and Punishment of the Crime of Genocide and the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity are referred to in chapter XVII below ("International criminal law").⁴⁸⁹ Other instruments concluded have dealt, *inter alia*, with slavery and similar institutions and practices, prostitution and traffic in women and children, and forced labour.

393. Besides the conclusion, through the United Nations and the specialized agencies, of instruments intended to be of universal application, a considerable body of law relating to human rights has also been built up at regional level. A comprehensive set of provisions, together with institutions to ensure implementation, has been created under the aegis of the Council of Europe.⁴⁹⁰ Under the major agreement, the European Convention for the Protection of Human Rights and Fundamental Freedoms,⁴⁹¹ which was signed on 4 November 1950, provision was made for the creation

of reports by the specialized agencies on the progress made in achieving the observance of the provisions of the Covenant falling within the scope of their activities.

⁴⁸⁴ It may be noted that proposals have also been made for the creation of the post of United Nations High Commissioner for Human Rights; see resolution 2595 (XXIV) of 16 December 1969 and the resolutions cited therein. At its twenty-fifth session (1970), the General Assembly decided to defer consideration of the item to its twenty-sixth session (see *Official Records of the General Assembly Twenty-fifth Session, Supplement No. 28* (A/8028), p. 86).

⁴⁸⁵ See, for example ILO Convention (No. 100) concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (United Nations, *Treaty Series*, vol. 165, p. 303) and Convention (No. 111) concerning Discrimination in respect of Employment and Occupation (*ibid.*, vol. 362, p. 31), and, as regards UNESCO, the Convention against Discrimination in Education (*ibid.*, vol. 429, p. 93).

⁴⁸⁶ *Ibid.* vol. 193, p. 135.

⁴⁸⁷ *Ibid.*, vol. 309, p. 65. See also para. 359 above.

⁴⁸⁸ *Ibid.*, vol. 521, p. 231.

⁴⁸⁹ Paras. 442-443 and 447-449 below.

⁴⁹⁰ For a detailed survey see *Report of the Council of Europe to the International Conference on Human Rights (1968)* (A/CONF.32/L.9), to which the text of the main instruments is annexed.

⁴⁹¹ United Nations, *Treaty Series*, vol. 213, p. 221. Further rights were covered in successive protocols; see the report mentioned in the preceding foot-note. Note also the conclusion of the European Social Charter (1961) and the rights specified therein (*ibid.*, vol. 529, p. 89).

of both a European Commission and a European Court of Human Rights, and to confer certain additional powers on the Committee of Ministers and the Secretary-General of the Council of Europe. The European Commission, which has, over the years, developed a considerable body of case law on the questions regulated in the Convention, is empowered to consider applications submitted by States parties alleging violations of the Convention by another State party, and also complaints by private individuals or organizations if the State complained of has expressly declared its acceptance of the Commission's competence in this regard. If, following examination by the European Commission, an application is declared admissible, the case is referred to a sub-commission which is required to establish the facts and to seek, through conciliation, to effect a friendly settlement of the case. In the event that this attempt is unsuccessful, the plenary Commission draws up a report in which it gives its opinion as to whether the facts disclose a breach of the Convention. This report is transmitted to the Committee of Ministers. Thereafter the case may be referred to the European Court on Human Rights, either by the Commission or by a State concerned; if, however, it is not referred to the Court within three months, the Committee of Ministers must take a decision on the case. The Commission's report may thus be the starting point of proceedings before the European Court of Human Rights. Such proceedings are dependent, however, on acceptance of the Court's jurisdiction, which may either be general or limited to the purposes of a particular case.

394. Developments in the field of human rights have also been undertaken by regional organizations in other parts of the world. Particular reference may be made to the signature, on 22 November 1969, of the Convention on Human Rights, which was prepared under the aegis of OAS.⁴⁹² The Convention makes provision for the maintenance of the already established Inter-American Commission on Human Rights and for the setting up of an Inter-American Court of Human Rights. The human rights to be accorded are similar to those included in the United Nations and European instruments. The American convention includes, however, as an integral part of its provisions, a right of individual petition to the Inter-American Commission, unlike the position with respect to the International Covenant on Civil and Political Rights, and its Optional Protocol, and as regards the European Commission. Proceedings before the Inter-American Court of Human Rights are dependent, however, on a special declaration of acceptance by States parties.

395. By way of general conclusion, it may be said that the law relating to human rights, which had scarcely been initiated when the 1948 Survey was written, now constitutes a distinct and rapidly growing branch of international law. The process for the formulation and adoption of this law exists, furthermore, both at uni-

versal and regional level. The efforts made in this sphere over the past twenty to twenty-five years have thus accompanied those relating to the codification and progressive development of other branches of international law with which the Commission itself has been engaged. The broad division of functions between bodies concerned with human rights and those occupied with other areas of international law may be expected to continue. As the law in one or other sphere develops, there may be an increasing need, however, to reflect the progress made elsewhere—for the law relating to human rights to take account of developments in other areas of international law, and, *vice versa*, for efforts undertaken with respect to the codification and development of other branches of international law to take cognizance of the degree of recognition now given to human rights in a series of specific texts. To a greater extent than hitherto the various instruments which may be proposed may thus require to be formulated in the light of existing provisions of codified law, drawn from a variety of sources, as codification becomes a more elaborate and cumulative process.

Chapter XVI

The law relating to armed conflicts

396. International law traditionally distinguished between the general body of principles and rules applicable in time of peace and those applicable with respect to war, the latter being divided into the *ius ad bellum*, the right of a State to declare and wage war, and the *ius in bello*, or laws governing the conduct of war and matters such as relations between combatant and non-combatant States. The *ius ad bellum* has been replaced, under modern international law, by the prohibition of the threat or use of force, embodied in Article 2, paragraph 4, of the United Nations Charter, whilst the Charter also provides for the institution of a comprehensive system of international peace and security.⁴⁹³ The question therefore arises as to the operation of what was formerly called *ius in bello*. The issues involved are of extreme difficulty, as well as of great importance for the preservation of the lives and safety of the many thousands of individuals who may be affected by the outbreak of armed conflicts. Bearing these factors in mind, the following chapter is not so much a summary, with conclusions, regarding a body of well-settled law, but rather in the nature of a survey which seeks to distinguish some of the principal areas on which recent attention has centred.

397. The hope that, under the system of international security established under the Charter, the laws regulating the conduct of armed conflict might be of diminishing importance was one which was current during the years shortly after the United Nations Organization was founded; a more general preoccupation, however, and one which has contrived to receive attention, was

⁴⁹² OAS Official Records, OEA/Ser.K/XVI/1.1, Doc.65 Rev. 1 (Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 1969).

⁴⁹³ See above, chapter II ("The law relating to international peace and security", sections 1 and 2).

the question of the relationship of this body of law to the operation of the United Nations system. These two notions were both conveyed during the Commission's first session (1949), when the Commission discussed whether to include the laws of war in its list of topics for codification. The Commission decided not to select the topic, for the reasons expressed in the following passage:

The Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct has ceased to be relevant. On the other hand, the opinion was expressed that, although the term "law of war" ought to be discarded, a study of the rules governing the use of armed force—legitimate or illegitimate—might be useful. The punishment of war crimes, in accordance with the principles of the Charter and Judgment of the Nürnberg Tribunal, would necessitate a clear definition of those crimes and, consequently the establishment of rules which would provide for the case where armed force was used in a criminal manner. The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.⁴⁹⁴

398. As this passage indicates, the Commission did not appear to consider that the prohibition placed on resort to armed force had itself abolished the laws governing the actual use of armed force or that a study of the rules concerned might not be useful at some stage. The codification of a large part of the laws relating to the conduct of armed conflict was in fact already proceeding at the Conference held to draw up the four Geneva Conventions of 1949, when the Commission took its decision.⁴⁹⁵ The four Conventions⁴⁹⁶ deal respectively, in a series of detailed provisions, with the amelioration of the condition of the wounded and sick in armed forces in the field, with the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, with the treatment of prisoners of war, and with the protection of civilian persons in time of war. As regards the scope of the Conventions, article 2, common to all four instruments, provides that

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Article 3, which is also common to the four Conventions and deals with the provisions to be applied by parties to an armed conflict not of an international character, is considered below.

399. The Geneva Conventions, which have been widely accepted and applied,⁴⁹⁷ constitute indeed the major portion of codified law in this sphere. They did not, however, entirely replace instruments concluded earlier,⁴⁹⁸ some of which dealt with aspects not directly covered by the 1949 Conventions. Since the 1949 Conventions were prepared, however, the only major multi-lateral treaty adopted relating to the conduct of parties to an armed conflict was that drawn up in 1954, under the aegis of UNESCO, namely, the Convention for the protection of cultural property in the event of armed conflict.⁴⁹⁹ Having regard to the unparalleled speed and destructiveness of modern weapons, the large number of conflicts which have actually occurred over the past twenty years, and the fact that present-day conflicts, even if initially internal or confined to a single area, tend to have international ramifications, questions have been raised in recent years as to the adequacy of existing agreements, including the 1949 Conventions, to meet the demands placed upon them.

⁴⁹⁷ It may be noted in this connexion that the regulations promulgated by the Secretary-General as regards the United Nations forces in the Middle East, in the Congo and in Cyprus, provided that the forces were to observe the principles and spirit of the general international conventions applicable to the conduct of military personnel. The International Committee of the Red Cross expressed the hope that the United Nations may

by regular accession, formally undertake to have applied the Geneva Convention and the other provisions of a humanitarian character each time the forces of the United Nations are engaged in military operations. Such a gesture would have value as an example which would without doubt have a favourable effect. [A/7720, annex I, sect. D.]

For comments on this suggestion, see A/7720, para. 114.

⁴⁹⁸ See foot-note 501 below.

⁴⁹⁹ The principal instances, prior to the 1949 Geneva Conventions, were the instruments adopted at the Hague Peace Conferences of 1899 and 1907, and the Geneva Protocol of 1925 (see foot-note 522 below). (Document A/7720, referred to in foot-note 501 below, contains in chapter II a detailed historical survey of the question.) The General Assembly has called on States which have not done so to become parties to the earlier instruments, as well as to the 1949 Geneva Conventions (see, for example, resolution 2444 (XXIII) of 19 December 1968).

⁵⁰⁰ United Nations, *Treaty Series*, vol. 249, p. 240.

⁴⁹⁴ *Yearbook of the International Law Commission, 1949*, p. 281 (A/925), para. 18. For the Commission's discussion, see *ibid.*, pp. 51-53, 6th meeting, paras. 45-68. For the reasons indicated at the Commission's sixth meeting (*ibid.*, para. 67), the 1948 Survey (see para. 4 above) did not deal with the laws of war. For the Commission's work with respect to the formulation of the Nürnberg Principles, see paras. 434-436 below.

⁴⁹⁵ The four Geneva Conventions were adopted by a Diplomatic Conference, convened by the Swiss Federal Council, held between 21 April and 12 August 1949; the period of the Conference thus overlapped with the Commission's first session. For the Final Act of the Conference, the resolutions adopted and the four Conventions, see United Nations, *Treaty Series*, vol. 75, pp. 2 *et seq.*

⁴⁹⁶ For an account of the history and operation of these and earlier conventions, *qua* legal instruments, in relation to the work of the International Red Cross, see *Yearbook of the International Law Commission, 1968*, vol. II, pp. 32 *et seq.*, document A/CN.4/200 and Add.1-2, and in particular paras. 128-132.

400. The initiating move as regards recent United Nations activity in this sphere was taken at the 1968 International Conference on Human Rights. Affirming that "peace is the underlying condition for the full observance of human rights and war is their negation", and recalling the purpose of the United Nations "to prevent all conflicts and to institute an effective system for the peaceful settlement of disputes", the Conference noted that armed conflicts continue to plague humanity. It stated that

the widespread violence and brutality of our times, including massacres, summary executions, tortures, inhuman treatment of prisoners, killing of civilians in armed conflicts and the use of chemical and biological means of warfare, including napalm bombing, erode human rights and engender counter-brutality.

The Conference expressed its conviction "that even during the periods of armed conflicts, humanitarian principles must prevail".⁵⁰⁰

Taking note of the views expressed at the Conference, the General Assembly adopted resolution 2444 (XXIII) of 19 December 1968, in which *inter alia*, it requested the Secretary-General, in consultation with the International Committee of the Red Cross and other appropriate international organizations, to study

(a) Steps which could be taken to secure the better application of existing humanitarian international conventions and rules in all armed conflicts;

(b) The need for additional humanitarian international conventions or for other appropriate legal instruments to ensure the better protection of civilians, prisoners and combatants in all armed conflicts and the prohibition and limitation of the use of certain methods and means of warfare.

401. The two reports which the Secretary-General has since submitted,⁵⁰¹ to which further reference should be made in the present connexion, constitute an extensive survey of the current state of the law and contain a number of suggestion for the better protection of human rights in armed conflicts, as requested by resolution 2444 (XXIII) of the General Assembly. As the Secretary-General indicated,⁵⁰² the maintenance of peace and security remains the basic purpose of the United Nations, and the activities of the Organization are directed to enabling it, directly or indirectly, to achieve this primary objective. As in the earlier studies therefore, nothing in the latter document is meant to condone resort to armed force in any form, in violation of the provisions of the Charter. On the contrary, it is the belief of the Secretary-General

that resort to force or armed conflict would not be necessary if Governments and responsible individuals everywhere complied with the principles and purposes of the United Nations Charter and with the decisions of the United Nations organs taken in pursuance of the relevant Charter provisions, in particular those relating to procedures for peaceful settlement of disputes.⁵⁰³

⁵⁰⁰ Conference resolution XXIII. See United Nations, *Final Act of the International Conference on Human Rights* (United Nations publication, Sales No. E.68.XIV.2), p. 18.

⁵⁰¹ Documents A/7720 (20 November 1969) and A/8052 (18 September 1970).

⁵⁰² A/8052, para. 12.

⁵⁰³ *Ibid.*

Having regard, however, to the immediate humanitarian considerations raised by the actual infliction of harm to individuals, on a widespread scale, during the cases of armed conflict which have occurred, and continue to occur, in many parts of the world, the Secretary-General has concluded that efforts should be made to strengthen the legal means designed to regulate instances or resort to force.

The aim of the United Nations and of the Governments concerned should be to prevent such conflicts from breaking out, but when they erupt to make all possible efforts by national and international measures to limit as far as possible unnecessary sufferings to human beings.⁵⁰⁴

402. Since the 1968 International Conference on Human Rights the General Assembly has in fact adopted a series of resolutions emphasizing and reaffirming the humanitarian principles which are to be observed during armed conflicts. In resolution 2677 (XXV) of 9 December 1970, the General Assembly welcomed the decision of the International Committee of the Red Cross to convene, from 24 May to 12 June 1971, a conference on the reaffirmation and development of international humanitarian law applicable to armed conflicts, to be attended by government experts, and expressed the hope that the conference would make specific recommendations in this respect for consideration by governments. The Secretary-General was requested to invite early comments by Governments on his reports (A/7720 and A/8052) and to transmit those reports and the comments thereon, together with records of the relevant discussions and resolutions of the General Assembly, the Economic and Social Council and the Commission on Human Rights, to the International Committee of the Red Cross for consideration, as appropriate, by the conference. The Secretary-General was also requested to report to the twenty-sixth session of the General Assembly on the results of the conference and on any other relevant developments.

403. The following account (which, as already indicated, does not attempt to constitute a comprehensive or definitive survey of the full range of issues which may be examined under the heading "the law relating to armed conflicts") has been arranged in the following sections:

- (1) The notion of "armed conflict" and the effects of armed conflict on the legal relations between States;
- (2) Issues relating to internal armed conflicts;
- (3) The status and protection of specific categories of persons in armed conflicts;
- (4) The prohibition and limitation of the use of certain methods and means of warfare.

1. THE NOTION OF "ARMED CONFLICT" AND THE EFFECTS OF ARMED CONFLICT ON THE LEGAL RELATIONS BETWEEN STATES

404. The progress made in the prohibition of resort to war, as a legally permitted institution, has been

⁵⁰⁴ *Ibid.*, para. 13.

accompanied by a tendency to obliterate the clear distinction formerly drawn between peace and war, as two entirely separate situations or sets of conditions. States have rarely, over the past quarter of a century, issued a formal declaration of war before engaging in armed hostilities. In most major instruments concluded since 1945 the concept of "war" has been largely replaced by formulations which seek to cover a wider range of instances of armed hostilities. Thus Chapter VII of the Charter uses the expressions "threats to the peace", "breach of the peace" and "act of aggression". The draftsmen of the 1949 Geneva Conventions, partly in an attempt to avoid the difficulties in the "war" concept, added in article 2 what was thought to be a more objective test: the Conventions were to apply not only to all cases of declared war, but also to "any other armed conflict" which might arise between two or more of the parties, and "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance". Various other terms have been used in other contexts, including municipal law and treaties.

405. The question of the effects of armed conflict on the legal relations of States, which, under the simple dichotomy of war or peace, received the relatively straightforward answer that either States were belligerents or were in a position of neutrality vis-à-vis the combatants, cannot now be answered quite so easily. Under the system of international peace and security established by the Charter it is possible to envisage the adoption of decisions by the Security Council which would determine not only the nature of the conflict but also the steps (including the nature of the legal relations) which States were to maintain with one or other (or both) of the combatants, but this has mostly not formed a feature of the Council's practice.

406. It is of interest to note in this connexion the pattern followed in the various codification conventions adopted on the basis of the Commission's drafts. In the report accompanying its final draft on the law of the sea, the Commission pointed out that the articles regulated the law of the sea in time of peace only;⁵⁰⁵ this qualification was accepted by the United Nations Conference on the Law of the Sea. While the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations, and the 1969 Convention on Special Missions,⁵⁰⁶ contain no explicit provision on the effect of war on the relations so regulated, all provide, however, for the continuity of certain privileges, immunities and facilities "even in case of armed conflict".⁵⁰⁷ In this context the provisions concerned reflect previous customary law; there have, furthermore, been several instances in recent years when States engaged in armed conflict have continued

to maintain diplomatic relations and to accord immunities.

407. The effect of armed conflict on treaties raises complex issues as regards the termination of treaties and the suspension of their operation. In this instance the Commission did not include in its draft articles on the law of treaties a provision concerning the effect of the outbreak of hostilities.

The Commission considered that the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question; and it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties.⁵⁰⁸

408. The United Nations Conference on the Law of Treaties included in article 73 of the Convention the following general reservation:

The provisions of the present Convention shall not prejudice any question that may arise ... from outbreak of hostilities between States.⁵⁰⁹

The issues which may be raised thus stand formally unregulated by the Vienna Convention on the Law of Treaties, although some of the problems might, in certain instances, be solved by reference to the rules of treaty law codified by the Convention, such as fundamental change of circumstances, and breach, or supervening impossibility of performance.

409. Whilst the provisions contained in the various conventions on diplomatic law, and the Convention on the Law of Treaties, are concerned primarily with the effect, as between the combatant States, of the outbreak of hostilities, the question also arises as to the rights and duties of third States in such circumstances. There is a great body of customary law and practice with respect to the status of neutrality which, traditionally, States might choose to adopt with respect to a war or armed conflict between two or more States; once that status had been assumed, certain obligations were imposed on the conduct of neutral States vis-à-vis the combatants and of combatants vis-à-vis neutral States. A distinction was drawn between neutrality with respect to a particular conflict and the adoption by a State of the status of permanent neutrality.

410. As regards the legal position of States in general at the present time, it may be recalled that Article 2, paragraph 5, of the Charter provides that

All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any State against which the United Nations is taking preventive or enforcement action.

This provision is in some respects central to the United Nations role in securing peace, and reference has on

⁵⁰⁵ See para. 300 above.

⁵⁰⁶ For the reference to the text of these Conventions, see above, foot-notes 266, 269 and 276 respectively.

⁵⁰⁷ Convention on Diplomatic Relations, articles 44 and 45 (a); Convention on Consular Relations, article 53, para. 3; and the Convention on Special Missions, articles 45 and 46.

⁵⁰⁸ *Yearbook of the International Law Commission, 1966*, vol. II, p. 176, document A/6309/Rev.1, part II, para. 29, quoting the 1963 (*ibid.*, 1963, vol. II, p. 189, document A/5509, para. 14).

⁵⁰⁹ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 299.

occasions been made to it (or to the first portion of the obligation) with respect to actions taken by the United Nations organs. The effect of Article 2, paragraph 5, of the Charter with regard to neutrality has, however, not received any interpretation in the practice of United Nations organs. It may be nevertheless recalled that in the case of one Member State (Austria), that State was admitted to membership after it had adopted a status of permanent neutrality. As regards the actual behaviour of States with respect to armed conflicts between two or more other States, there has been considerable variation in the practice followed. States have on occasion issued enactments or decrees, informing their nationals (including shipowners) that an armed conflict had broken out in a certain area and warning them that trade with the countries in question was at their own risk, but without necessarily indicating whether the official policy was one of formal neutrality. Such enactments have, for example, been cited before courts in cases involving the interpretation of the war exemption clause in commercial contracts. The doctrinal position, as to the extent of the rights and duties of third States with respect to instances of armed conflict (which may of course vary greatly in intensity) is uncertain,⁵¹⁰ but in general would appear to support the view that, subject to observance of the fundamental principles of international law and the relevant provisions of the Charter, third States have a considerable liberty in determining their policies in this regard.

411. The question of the effect of armed conflicts on the legal relations of States (both as between combatant States and as between combatant and non-combatant States) is thus one of very considerable difficulty, involving *inter alia*, issues relating to the operation of the system of international security created under the Charter. It would appear that the practice so far adopted by the Commission of dealing with the question as it presents itself in particular contexts, and of not attempting to deal with the matter from the standpoint of its over-all codification and development, would continue to represent the best way for the Commission to proceed at least for the present time.

2. ISSUES RELATING TO INTERNAL ARMED CONFLICTS

412. In accordance with the traditional pattern whereby the *ius ad bellum* was a right which belonged only to States, the position as regards internal or civil conflicts was uncertain: under general principles of international law regarding the duty of non-intervention, other States were obliged not to render assistance to those engaged in armed revolt against the established government, while the extent to which the laws of war were applicable as

between the actual combatants remained an unsettled branch of the law. If the rebels were recognized as belligerents by the *de jure* government, the laws and customs of war were henceforth applicable, but the conflict might not necessarily be converted into an international one (although such a decision would of course indicate that the instance was no longer one of mere insurgency, and might indeed be treated as weighty evidence that the conflict had in fact become international). In the event, on the other hand, that an outside State recognized the belligerent group opposing the existing government as the *de facto* authority (whether of whole or of part of the territory in dispute), the conflict might to that degree be converted into an international one, with a consequent obligation on the part of the combatants to observe the laws of war.

413. Subject to what was said earlier regarding the impact on the law relating to armed conflicts of the system of international security established under the Charter, the position under present-day law continues to reflect part of the former pattern, even while changes have been grafted on it.

414. As regards the obligation of other countries not to intervene, this remains the general duty imposed by international law. The problem of the definition of what, in such circumstances, constitutes "intervention" on the side of those opposing the *de jure* governments remains an unsettled issue. With respect to the question of the circumstances in which another State may decide to recognize the combatants as belligerents, this too remains governed by general principles. Thus, in its resolution 10 the Geneva Diplomatic Conference of 1949 declared that it

considers that the conditions under which a Party to a conflict can be recognized as a belligerent by Powers not taking part in this conflict, are governed by the general rules of international law on the subject and are in no way modified by the Geneva Conventions.⁵¹¹

415. As regards the application of the laws of war, the situation is apparently little changed: while recognition by the *de jure* government of the belligerent status of those opposed to it results in the full application of the rules governing armed conflicts, recognition by outside parties is more uncertain and limited in its effects. The question of the consequences, as regards the applicability of the laws of war, of recognition of the belligerent status of those opposed to the *de jure* government was to some extent mitigated however by the adoption of the Geneva Conventions. Article 3, which is common to the four Conventions, provides:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race,

⁵¹⁰ It would appear that, in so far as the law of neutrality is associated with the former sharp distinction between war and peace, the replacement of the concept of "war" by other concepts has, as an indirect consequence, made it difficult to determine whether, as a matter of law, the status of neutrality may be claimed (or is imposed) with respect to specific instances of armed conflicts, or, if it is applicable, the precise content of the rights and duties accompanying that status.

⁵¹¹ United Nations, *Treaty Series*, vol. 75, p. 26.

colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

416. The introduction, by the Geneva Conventions, of the requirements that henceforth both parties to an internal conflict were to observe the minimum standards of conduct indicated, constituted a novel element in international law. Such minimum standards are indeed the most basic requirements; as stated in article 3, the parties to the conflict are required to endeavour to bring into force, by means of special agreements, all or part of the other provisions. International Red Cross Conferences and other meetings, including those of United Nations bodies concerned with human rights,⁵¹² have considered various issues relating to internal armed conflicts in recent years, in particular the question of the means which might be used to extend the "minimum standards" laid down in article 3 (for example, by the preparation of special agreements in a standard form) and to ensure the observance of humane standards of conduct. Since 1949, internal conflicts have occurred which, in the view of the government concerned, did not come within the scope of article 3 of the Geneva Conventions. In others the provisions of article 3 were applied. The need for procedures and machinery which might determine objectively whether a given situation comes within the purview of article 3 was referred to by the Secretary-General in his report of 18 September 1970.⁵¹³ The part which can be played by "an impartial humanitarian body" such as the International Committee of the Red Cross, and ways in which its

services may be used by the parties, have also been discussed. It may be recalled in this connexion that the Secretary-General has, on occasions, engaged in various humanitarian activities with respect to internal armed conflicts and, in one instance, provided a representative, by agreement with the Government, who visited the war-affected areas to observe the situation of the population there and assisted in arranging relief for the civilian victims of the hostilities.

417. It may also be noted that, in resolution 2444 (XXIII), entitled "Respect for human rights in armed conflicts", the General Assembly recognized "the necessity of applying basic humanitarian principles in all armed conflicts" and affirmed resolution XXVIII of the XXth International Conference of the Red Cross, which laid down certain principles "for observance by all governmental and other authorities responsible for action in armed conflicts".

3. THE STATUS AND PROTECTION OF SPECIFIC CATEGORIES OF PERSONS IN ARMED CONFLICTS

418. The four Geneva Conventions of 1949 laid down, in an extensive series of provisions, the standard of conduct to be observed by parties to an international armed conflict with respect to four categories of persons: the wounded and sick in armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilians. As previously indicated, a large part of this body has recently been the subject of extensive studies by the Secretary-General (A/7720 and A/8052) in connexion with the item "Respect for human rights in armed conflict", which has been before the Third Committee of the General Assembly and the Commission on Human Rights. The debates which have taken place and the resolutions adopted have ranged over a variety of subjects; as noted in the previous section, however, there has been a tendency to require that the same standard of behaviour be observed, irrespective of the nature of the armed conflict. Whilst the various resolutions which have been drawn up by the General Assembly therefore to some extent overlap, three broad areas of particular concern may be distinguished: the protection of civilians (and, as a special category of non-combatants, journalists engaged in missions in places where armed conflicts are occurring); the status and protection of persons engaged in liberation movements in southern Africa and in colonial territories; and the protection of prisoners of war.

419. Before referring to the resolutions which the General Assembly has recently adopted regarding these matters, it may be pointed out that the International Committee of the Red Cross, which was responsible for the drafting of the Geneva Conventions and which performs functions under those instruments, has continued, together with the periodic International Conferences of the Red Cross, to be vitally concerned with all aspects of the law relating to the conduct of armed conflicts. The General Assembly has, on a number of occasions, recognized the need for co-operation with, and expressed support for, the efforts of the Com-

⁵¹² See A/7720, paras. 168-177, and also paras. 21, 61 and 104-108, and A/8052, paras 127-165.

⁵¹³ See A/8052, paras. 159-162, where some of the proposals which have been made in this connexion are listed. The question of the role which the International Committee of the Red Cross or other international bodies or agencies might perform in order to help ensure the observance of the Geneva Conventions and of humanitarian rules generally (in respect of both international and internal conflicts) has received considerable attention; see A/7720, paras. 202-227 and A/8052, paras. 238-250.

mittee.⁵¹⁴ As noted in paragraph 402 above, in resolution 2677 (XXV) of 9 December 1970, the General Assembly welcomed the decision of the Committee to convene a conference during 1971 to consider steps which might be taken to reaffirm and develop international humanitarian law.

420. As regards the protection of civilians in armed conflicts, besides the affirmation, in resolution 2444 (XXIII) of 19 December 1968, of the principles that it is prohibited to launch attacks against the civilian population as such and that the distinction must at all times be made between combatants and civilians, in resolution 2675 (XXV) of 9 December 1970 the General Assembly laid down a series of "basic principles for the protection of civilian populations in armed conflicts".⁵¹⁵ After recalling, *inter alia*, the Geneva Conventions of 1949, the General Assembly affirmed the following basic principles "without prejudice to their future elaboration within the framework of progressive development of the international law of armed conflict":

1. Fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply fully in situations of armed conflict.

2. In the conduct of military operations during armed conflicts, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations.

3. In the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to the civilian populations.

4. Civilian populations as such should not be the object of military operations.

5. Dwellings and other installations that are used by civilian populations should not be the object of military operations.

6. Places or areas designed for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.

7. Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.

8. The provision of international relief to civilian populations is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights. The Declaration of Principles for International Humanitarian Relief to the Civilian Population in Disaster Situations, as laid down in resolution XXVI, adopted by the twenty-first International Conference of the Red Cross, shall apply in situations of armed conflict, and all parties to a conflict should make every effort to facilitate this application.

421. As regards the particular case of journalists working in areas of armed conflict, in resolution 2673 (XXV) of 9 December 1970 the General Assembly

invited "all States and all authorities parties to an armed conflict" to respect and apply the provisions of the 1949 Geneva Conventions "in so far as they are applicable, in particular, to war correspondents who accompany armed forces but are not actually a part of them". The General Assembly invited the Economic and Social Council to request the Commission on Human Rights

to consider ... the possibility of preparing a draft international agreement ensuring the protection of journalists engaged on dangerous missions and providing, *inter alia*, for the creation of a universally recognized and guaranteed identification document.

A draft agreement was considered by the Commission on Human Rights at its session held in March 1971 and transmitted to the Economic and Social Council and to the General Assembly.

422. The General Assembly, and various other United Nations bodies have recognized and supported the legitimacy of the struggle of peoples and patriotic liberation movements in southern Africa and in colonial territories.⁵¹⁶ Two principal, though interconnected, issues may be distinguished in this regard: the question of the international status of such movements, and the treatment to be accorded to those engaged in armed conflicts in connexion with them. As regards the first, the international character of the movements in question—and, in particular, the process by which that character is to be determined—has been the subject of extensive discussion. The various arguments which have been put forward are set out in the Secretary-General's report submitted to the twenty-fifth session of the General Assembly.⁵¹⁷ As stated there, whether or not, as various experts have tentatively suggested, the relevant pronouncements of the General Assembly and other United Nations organs

are sufficient to render conflicts "international" (that is, inter-State) in the sense of the Geneva Conventions, or whether they merely stress a strong concern of the international community for adequate measures of protection for [those] involved in such conflicts is a basic and difficult question which the General Assembly itself and the States parties to the Conventions might wish to consider.⁵¹⁸

423. As regards the treatment to be accorded, the General Assembly has recognized the right of freedom fighters in southern Africa and in colonial territories to be treated when captured as prisoners of war under the 1949 Conventions.⁵¹⁹ In its most recent resolution

⁵¹⁴ Resolution 2444 (XXIII), para. 2; resolution 2597 (XXIV), para. 2; resolution 2675 (XXV), para. 8; and resolution 2676 (XXV), para. 2.

⁵¹⁵ It may be recalled that in his report of 18 September 1970 the Secretary-General set out various proposals with regard to the protection of civilians, in particular concerning the establishment of safety zones for civilians (see A/8052, paras. 30-87).

⁵¹⁶ See, for example, para. 1 of resolution 2649 (XXV) of 30 November 1970.

⁵¹⁷ A/8052, paras. 195-237, and especially 205-212.

⁵¹⁸ *Ibid.*, para. 212.

⁵¹⁹ See resolution 2446 (XXIII) of 19 December 1968 and others cited in A/8052, paras. 197-203.

Under article 4 of the Geneva Convention relative to the Treatment of Prisoners of War, prisoners of war are defined as persons belonging to various categories who have fallen into the hands of the enemy. These categories include (sub-paragraph A, 2) members of "organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied", provided that such movements fulfil the following conditions:

dealing with the subject, resolution 2674 (XXV) of 9 December 1970, the General Assembly affirmed

that the participants in resistance movements and freedom fighters in southern Africa and territories under colonial and alien domination and foreign occupation, struggling for their liberation and self-determination, should be treated, in case of their arrest, as prisoners of war in accordance with the principles of the Hague Conventions of 1907 and the Geneva Conventions of 1949

424. The General Assembly also recognized

the necessity of developing additional international instruments providing for the protection of civilian populations and freedom fighters against colonial and foreign domination as well as against racist régimes

425. As regards the treatment to be accorded to prisoners of war, in resolution 2676 (XXV) of 9 December 1970, the General Assembly called upon "all parties to any armed conflict" to comply with the 1949 Geneva Convention relative to the Treatment of Prisoners of War and *inter alia*,

to permit regular inspection, in accordance with the Convention, of all places of detention of prisoners of war by a protecting Power or humanitarian organization, such as the International Committee of the Red Cross

426. The General Assembly endorsed the continuing efforts of the International Committee to ensure the effective application of the Convention and requested the Secretary-General

to exert all efforts to obtain humane treatment for prisoners of war, especially for the victims of armed aggression and colonial suppression⁵²⁰

427. In paragraph 4, the General Assembly urged

compliance with article 109 of the Geneva Convention of 1949, which requires the repatriation of seriously wounded and seriously sick prisoners of war and which provides for agreements with a view to the direct repatriation or internment in a neutral country of able-bodied prisoners of war who have undergone a long period of captivity.

they are commanded by a person responsible for his subordinates; have a fixed distinctive sign recognizable at a distance; carry arms openly; and conduct their operations in accordance with the laws and customs of war. Treatment as prisoners of war under the Geneva Conventions, in accordance with the General Assembly resolutions referred to, has as its consequence, that persons engaged in liberation movements may not be treated as criminals and are to receive a standard of protection above that provided for in common article 3 of the Geneva Conventions.

The question of the ability of liberation movements to satisfy the conditions laid down in article 4 has been much discussed (see A/8052, paras. 204-237 and also, as regards guerilla warfare generally, paras. 166-194; and A/7720, paras. 158-167). It may be noted in this connexion that in paragraph 5 of resolution 2676 (XXV) the General Assembly expressly urged

"that combatants in all armed conflicts not covered by article 4 of the Geneva Convention [relative to the Treatment of Prisoners of War] be accorded the same humane treatment defined by the principles of international law applied to prisoners of war."

⁵²⁰ Note also paragraph 5 of the resolution, quoted in the preceding foot-note, referring to combatants in armed conflicts not covered by article 4 of the Geneva Convention relative to the Treatment of Prisoners of War.

4. THE PROHIBITION AND LIMITATION OF THE USE OF CERTAIN METHODS AND MEANS OF WARFARE⁵²¹

428. In expressing its concern for the better protection of civilians, prisoners and combatants in all armed conflicts, the General Assembly in resolution 2444 (XXIII) of 19 December 1968, mentioned in particular "the prohibition and limitation of the use of certain methods and means of warfare". As already noted, the same resolution affirmed certain principles which are relevant to this problem, notably the principle that the right of parties to an armed conflict to adopt means of injuring the enemy is not unlimited and that the distinction between combatants and civilians must be made at all times, with a view to sparing the latter as much as possible.

429. The methods and means of warfare to which the General Assembly referred would appear to include those weapons of mass destruction which, owing to the indiscriminate nature of their effects, strike not only enemy combatants but also those not engaged in the fighting, and which may, in addition, cause unnecessary suffering. Certain other weapons which, though precise in their effects, entail unnecessary suffering, have been prohibited for a long time by international law.⁵²² In so far as the problems involved concern the military uses of nuclear and thermonuclear energy, the work of the United Nations in the field of disarmament may be considered relevant. The conventions adopted with regard to measures of disarmament and arms control were noted earlier in the present survey.⁵²³ As regards

⁵²¹ See generally A/7720, paras. 183-201 and A/8052, paras. 122-126. (The question of napalm is considered in A/7720, paras. 196-201, and in A/8052, paras. 125-126.)

At its session held in 1969 the Institute of International Law adopted a resolution entitled "The distinction between military objectives and non-military objectives in general and particularly the problems associated with weapons of mass destruction" (*Annuaire de l'Institut de droit international*, 1969 (Basel, 1969), vol. 53, t. II, p. 375).

⁵²² See for instance the Hague Declaration of 1899, which prohibited the use of bullets "which expand or flatten in the human body".

In resolution 2674 (XXV) of 9 December 1970 the General Assembly considered *inter alia*

"that air bombardments of civilian population and the use of asphyxiating, poisonous or other gases and of all analogous liquids materials and devices, as well as bacteriological (biological) weapons, constitute a flagrant violation of the Hague Convention of 1907,^b the Geneva Protocol of 1925^c and the Geneva Conventions of 1949".

^a Declaration concerning the prohibition of the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, signed at The Hague on 29 July 1899. The text is reproduced in A.P. Higgins, *The Hague Peace Conferences and other International Conferences concerning the Laws and Usages of War - Texts of Conventions with Commentaries* (Cambridge, University Press, 1909), p. 494.

^b Convention for the Pacific Settlement of International Disputes, signed at The Hague on 18 October 1907. Text in *ibid.*, p. 95.

^c Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (League of Nations, *Treaty Series*, vol. XCIV, p. 65).

⁵²³ See para. 118 above.

nuclear and thermonuclear weapons, it may however be recalled that in its resolution 1653 (XVI) of 24 November 1961, the General Assembly declared, *inter alia*, that the use of such weapons

would exceed even the scope of war and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity.

The question of the legal effect of this resolution, which was adopted by a divided vote, has however been subject to discussion.⁵²⁴

430. As regards the use of poisonous gases, it may be recalled that in the Geneva Protocol of 1925 the contracting parties stated that the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, had been justly condemned by the general opinion of the civilized world and that such use had been prohibited in treaties to which the majority of Powers of the world were parties. To the end that this prohibition should be universally accepted as part of international law, binding alike the conscience and practice of nations, the contracting parties declared that so far as they were not already parties to treaties prohibiting such use, they accepted this prohibition, agreed to extend it to the use of bacteriological methods of warfare and agreed to be bound as between themselves according to the terms of the instrument.

431. The provisions and principles of the 1925 Geneva Protocol have been repeatedly endorsed in proceedings of United Nations organs. In resolution 2162 B (XXI) of 5 December 1966, the General Assembly called for strict observance by all States of the principles and objectives of the Protocol, condemned all activities contrary to these objectives and invited all States to accede to it. These recommendations were reaffirmed in resolution 2454 A (XXIII) of 20 December 1968, when the General Assembly also requested the Secretary-General to prepare, with the assistance of qualified consultant experts, a report on chemical and bacteriological (biological) weapons and the effects of their possible use. The Secretary-General accepted the consultants' unanimous report,⁵²⁵ which was submitted to the twenty-fourth session of the General Assembly and to the Security Council. The Secretary-General also felt it incumbent upon him to urge that Member States undertake the following measures: (a) to renew the appeal to all States to accede to the Protocol; (b) to make a clear affirmation that the prohibition contained in the Protocol applies to the use in war of all chemical, bacteriological and biological agents (including tear gas and other harassing agents) which now exist or which may be developed in the future; and (c) to call upon all countries to reach agree-

ment to halt the development, production and stockpiling of all chemical, bacteriological (biological) agents for purposes of war and to achieve their effective elimination from the arsenal of weapons.

432. In the preamble to resolution 2603 A (XXIV) of 16 December 1969, the General Assembly noted specifically that: (a) the majority of States then in existence had adhered to the 1925 Protocol; (b) that since then other States had become parties; (c) that still other States had declared that they would abide by its principles and objectives; (d) that these principles and objectives had commanded broad respect in the practice of States; (e) that the General Assembly (in resolution 2162 B (XXI) of 5 December 1966) had called for the strict observance by all States of those principles and objectives. The Assembly recognized

therefore, in the light of all the above circumstances, that the Geneva Protocol embodies the generally recognized rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments

and declared "as contrary to the generally recognized rules of international law, as embodied" in the Geneva Protocol, the use in international armed conflict of certain specified chemical and biological agents of warfare described in the resolution. In resolution 2603 B (XXIV) the General Assembly took note of several draft conventions which had been submitted concerning the weapons or methods of warfare in question and requested the Conference of the Committee on Disarmament to give urgent consideration to reaching agreement on the prohibitions and other measures referred to in the draft conventions mentioned. The Conference of the Committee on Disarmament has continued its examination of the matter, in the light of various draft proposals which have been put forward.

Chapter XVII

International criminal law

433. The following chapter deals with various offences which, while they have certain characteristics as relating to the commission of acts which the international community regards with special severity, have nevertheless a series of distinguishing features. The matters covered have been sub-divided as follows:

- (1) Principles of international law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal;
- (2) Draft code of offences against the peace and security of mankind;
- (3) Convention on the Prevention and Punishment of the Crime of Genocide;
- (4) Other offences of international concern;
- (5) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity;
- (6) Question of an international criminal jurisdiction.

⁵²⁴ See *Official Records of the General Assembly, Sixteenth Session, Annexes*, agenda items 73 and 72, document A/4942/Add.3; and *ibid.*, *Sixteenth Session, Plenary meetings*, vol. II, 1063rd meeting.

⁵²⁵ *Chemical and Bacteriological (Biological) Weapons and the Effects of their Possible Use* (United Nations publication, Sales No. E.69.I.24).

1. PRINCIPLES OF INTERNATIONAL LAW RECOGNIZED IN THE CHARTER OF THE NÜRNBERG TRIBUNAL AND IN THE JUDGMENT OF THE TRIBUNAL

434. Under resolution 95 (I) of 11 December 1946 the General Assembly affirmed that the principles contained in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal constituted principles of international law. At its second session the General Assembly adopted resolution 177 (II) of 21 November 1947, requesting the Commission to formulate these principles. The Commission undertook a preliminary consideration of the subject at its first session in 1949. As regards the question of the extent to which the principles contained in the Charter and in the judgment constituted principles of international law, the Commission concluded that, since the Nürnberg principles had been unanimously affirmed by the General Assembly, the task entrusted to the Commission was not to express any appreciation of those principles as principles of international law but merely to formulate them. The Commission completed its work at its second session and submitted its report, with commentaries, to the General Assembly. By resolution 488 (V) of 12 December 1950, the General Assembly decided to send the formulation to Member States for comments and requested the Commission, in preparing the draft code of offences against the peace and security of mankind, to take account of the views expressed.

435. The Commission's formulation⁵²⁶ consists of seven principles. Principle I provides that

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

436. Principle VI defines the following crimes under international law:

a. Crimes against peace:

- (i) Planning, preparation, initiation or waging of a war aggression or a war in violation of international treaties, agreements or assurances;
- (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i).

b. War crimes:

Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave-labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

c. Crimes against humanity:

Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connexion with any crime against peace or any war crime.

2. THE DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND

437. The task of preparing a draft code of offences against the peace and security of mankind was entrusted to the Commission under General Assembly resolution 177 (II) of 21 November 1947. At its third session (1951), the Commission completed the draft code and submitted it, together with the commentaries, to the General Assembly.⁵²⁷

438. The Commission considered that it was not necessary to indicate the exact extent to which the Nürnberg principles had been incorporated in the draft code. As regards the scope of the term "offences against the peace and security of mankind", the view of the Commission was that

... the meaning of this term should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security.⁵²⁸

The draft code did not therefore deal with such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting of currency and damage to submarine cables. The Commission also decided that it would deal only with criminal responsibility of individuals and that no provisions should be included with respect to crimes by abstract entities. The Commission refrained from providing for institutional arrangements for implementing the code; in that case, pending the establishment of an international criminal court, the code might be applied by national courts.

439. At its sixth session (1951) the Second Assembly postponed consideration of the draft code until its next session and, in 1952, omitted the item from its agenda on the understanding that the matter would continue to be considered by the Commission.

440. The Commission accordingly took up the matter again at its fifth session (1953) and, at its following session, a report was again submitted to the General Assembly.⁵²⁹ In the final form submitted the draft code consisted of four articles. Article 1 declares that the offences defined in the code "are crimes under international law, for which the responsible individuals shall be punished". Articles 3 and 4 provide that the fact of having acted as head of state, responsible government official, or in response to official orders, shall not relieve the person concerned of responsibility. Article 2 defines the various acts which constitute offences against the peace and security of mankind: in brief terms, these include any act or threat of aggression;⁵³⁰ the preparation by the authorities of a State of the employment of armed force against another; the organization, or the encouragement of the organization, by State authorities, of armed bands for incursions into the territory of

⁵²⁷ *Ibid.*, 1951, vol. II, p. 133, document A/1858.

⁵²⁸ *Ibid.*, p. 134, para. 58 a.

⁵²⁹ *Ibid.*, 1954, vol. II, p. 149, document A/2693.

⁵³⁰ The relevant provisions are quoted in paragraph 112 above.

⁵²⁶ *Yearbook of the International Law Commission, 1950*, vol. II, p. 374, document A/1316.

another; the undertaking or encouragement by State authorities of activities calculated to foment civil strife in another State, or of terrorist activities; acts in violation of treaty obligations "designed to ensure international peace and security by means of restrictions or limitations on armaments, or on military training, or on fortifications, or of other restrictions of the same character"; the annexation of territory belonging to another State, by means contrary to international law; intervention in the internal or external affairs of another State "by means of coercive measures of an economic or political character in order to force its will and thereby obtain advantages of any kind"; acts committed with intent to destroy national, ethnic, racial or religious groups; inhuman acts committed against any civil population by the authorities of a State; acts in violation of the laws and customs of war; and conspiracy, direct incitement or attempts to commit any of the above offences, or complicity in them.

441. By resolution 897 (IX) of 4 December 1954 the General Assembly postponed consideration of the draft code until the Special Committee on the question of defining aggression established by resolution 895 (IX) had submitted its report.⁵³¹ The General Assembly, by resolution 1186 (XII) of 11 December 1957, transmitted the text of the draft code to Member States for comment and further deferred the consideration of the topic until such time as the General Assembly again took up the question of defining aggression. The matter was subsequently brought to the attention of Member States when, at its twenty-third session (1968), the question of defining aggression was taken up again by the General Assembly.⁵³² The General Committee decided, however, that it would not be desirable at that stage, prior to the completion of the Assembly's consideration of the question of defining aggression, for the items "Draft code of offences against the peace and security of mankind" and "International criminal jurisdiction"⁵³³ to be included in the agenda and that these items should be taken up only at a later session when further progress had been made in arriving at a generally agreed definition of aggression.⁵³⁴ The General Assembly adopted its agenda as proposed by the General Committee. No further action has since been taken with respect to the draft code.

3. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

442. In resolution 260 A (III) of 9 December 1948 the General Assembly approved the Convention on the Prevention and Punishment of the Crime of Genocide⁵³⁵ and proposed it to States for signature and ratification

or accession. Genocide, "whether committed in time of peace or in time of war" (article I), is defined as follows in article II:

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

443. The Convention provides that, in addition to genocide, conspiracy, direct and public incitement and attempts to commit genocide, as well as complicity in genocide, shall also be punishable. The States Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated ... (article V).⁵³⁶

Under Article VI

Persons charged with genocide or any of the other acts enumerated [...] shall be tried by a competent tribunal of the State in the territory which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

As of 1 April 1971, seventy-five States were parties to the Convention.⁵³⁷

4. OTHER OFFENCES OF INTERNATIONAL CONCERN

444. The offences referred to in the previous headings relate to matters immediately affecting international peace and security on a widespread scale. There are also a large number of other offences, which, though of a less far-reaching character, are also of international concern and have been made the subject to particular treaty régimes. The following account, which does not attempt to be exhaustive, notes some of the principal instances, several of which have in fact been referred to earlier in this study.

445. The crime of piracy *iure gentium*, which dates back to the origins of modern international law, remains perhaps the paradigm example of an offence of international concern and which States are called upon to seek to repress. The customary rule, permitting punishment by any State, has now been embodied in the

⁵³¹ See para. 113 above.

⁵³² *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 8, document A/BUR/171/Rev.1, para. 4.

⁵³³ See para. 450 below.

⁵³⁴ *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 8, document A/7250, para. 10.

⁵³⁵ *United Nations Treaty Series*, vol. 78, p. 277.

⁵³⁶ Under Article VII genocide is not to be considered as a political crime for the purposes of extradition. "The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force."

⁵³⁷ At the request of the General Assembly, the International Court of Justice gave an advisory opinion on the question of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (*I.C.J. Reports 1951*, p. 15).

articles 14 to 21 of the Convention on the High Seas.⁵³⁸ The question of what is sometimes referred to as air piracy has recently been made the subject of a convention designed to strengthen measures of international co-operation to prevent and punish this offence.⁵³⁹ As regards attacks on diplomatic agents and others to whom the receiving State owes a duty of special protection under international law, the convention concluded within the framework of OAS has already been noted.⁵⁴⁰

446. There is, in addition, a very considerable number of instruments relating to the prevention of offences of an anti-social nature. Examples of these include the conventions designed to prevent slavery and slave trading, traffic in persons, and the illicit traffic in narcotic drugs.⁵⁴¹ Provision is made in many of these instruments for the punishment of persons responsible for these offences.

5. CONVENTION ON THE NON-APPLICABILITY OF STATUTORY LIMITATIONS TO WAR CRIMES AND CRIMES AGAINST HUMANITY

447. At its twenty-first session (1965), the Commission on Human Rights requested the Secretary-General to undertake a study of the problems raised in international law by war crimes and crimes against humanity, and, by priority, a study of legal procedures to ensure that no period of limitation shall apply to such crimes;⁵⁴² the matter arose out of the commission of such crimes during the Second World War. Following the submission of this study, the Economic and Social Council invited the Commission on Human Rights to prepare a draft convention on the topic. In resolution 2391 (XXIII) of 26 November 1968, the General Assembly adopted a Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁵⁴³ In resolution 2392 (XXIII) of the same date the General Assembly decided to take up a draft Optional Protocol to the Convention, which raised issues related to the question of international criminal jurisdiction, when it resumed consideration of the latter question. As of 1 April 1971, twelve States were parties to the Convention.

448. The General Assembly has continued to concern itself with the topic of the punishment of war criminals. In resolution 2712 (XXV) of 15 December 1970 the General Assembly drew attention to the fact that many war criminals and persons who have committed crimes

against humanity had continued to take refuge in the territories of certain States and called upon all States to take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them to the countries where they have committed war crimes and crimes against humanity, so that they can be brought to trial and punished in accordance with the laws of those countries.

449. States were requested to intensify their co-operation in the collection and exchange of relevant information; to take the necessary measures for the investigation of war crimes and crimes against humanity and to become parties (if they had not yet done so) to the Convention on the Non-Applicability of Statutory Limitations, and to inform the Secretary-General of the measures they had taken or were taking to become parties. An appeal was made to States which had not become parties to observe strictly the provisions of General Assembly resolution 2583 (XXIV), to the effect that they should refrain from action running counter to the main purposes of the Convention. The Secretary-General was asked to continue to study the question of the punishment of war crimes and crimes against humanity, and also of the criteria for determining compensation to be paid to the victims of such crimes.

6. QUESTION OF AN INTERNATIONAL CRIMINAL JURISDICTION

450. At the request of the General Assembly, contained in resolution 260 B (III) of 9 December 1948, the Commission examined during its first two sessions the question of international criminal jurisdiction. At its second session (1950), the Commission decided by a majority that it would be desirable and possible to establish an international juridical organ for the trial of persons charged with genocide, or other crimes over which the tribunal might be given jurisdiction by international convention. It recommended against such an organ being set up as a chamber of the International Court of Justice.⁵⁴⁴ The task of preparing concrete proposals relating to the creation and statute of an international criminal court and of studying the implications and consequences of establishing such a court was entrusted by the General Assembly to two successive Committee, each composed of representatives of seventeen Member States, set up by resolution 489 (V) of 12 December 1950 and 687 (VII) of 5 December 1952 respectively. Although a draft statute was prepared, the General Assembly decided by resolution 1187 (XII), of 11 December 1957, to defer consideration until such time as it would take up again the question of defining aggression and the draft code of offences against the peace and security of mankind. Although the General Assembly has since resumed its consideration of the question of defining aggression, it was decided at the twenty-third session (1968) not to take up the item "International criminal jurisdiction" until further progress had been made in arriving at a generally agreed definition of aggression.⁵⁴⁵

⁵³⁸ For the reference to the text of the Convention, see footnote 366 above.

⁵³⁹ See para. 328 above.

⁵⁴⁰ See paras. 247-248 above.

⁵⁴¹ Detailed references to many of the instruments in question are to be found in chapters VI (Narcotic drugs), VII (Traffic in persons), VIII (Obscene publications) and XVIII (Slavery), of *Multilateral treaties in respect of which the Secretary-General performs depositary functions: List of signatures, ratifications, accessions, etc., as at 31 December 1970* (United Nations publication, Sales No. E.71.V.5).

⁵⁴² See *Official Records of the Economic and Social Council, Thirty-ninth Session, Supplement No. 8 (E/4024)*, para. 567.

⁵⁴³ The text of the Convention is annexed to resolution 2391 (XXIII).

⁵⁴⁴ *Yearbook of the International Law Commission, 1950*, vol. II, pp. 378-379, document A/1316, paras. 128-145.

⁵⁴⁵ See para. 441 above and references there cited.

RELATIONS BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS

[Agenda item 1]

DOCUMENT A/CN.4/L.166

Consideration by the International Law Commission of the question of the possible effects of exceptional situations such as absence of recognition, absence or severance of diplomatic and consular relations, or armed conflict on the representation of States in international organizations: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur

[Original text: English]
[5 May 1971]

I. TWENTY-FIRST SESSION (1969)

1. The discussion on the above-mentioned question arose from the reference to armed conflict in draft articles 47 (Facilities for departure) and 48 (Protection of premises and archives), as prepared by the Drafting Committee.¹ The texts prepared by the Drafting Committee read as follows:

Article 47. Facilities for departure

The host State must, even in case of armed conflict, grant facilities in order to enable persons enjoying privileges and immunities, other than nationals of the host State and members of the families of such persons irrespective of their nationality, to leave at the earliest possible moment. It must, in particular, in case of need, place at their disposal the necessary means of transport for themselves and their property.

Article 48. Protection of premises and archives

1. When the functions of the permanent mission come to an end, the host State must, even in case of armed conflict, respect and protect the premises as well as the property and archives of the permanent mission. The sending State must withdraw that property and those archives within a reasonable time.

2. The host is required to grant the sending State, even in case of armed conflict, facilities for removing the archives of the permanent mission from the territory of the host State.

2. At the 1026th meeting of the Commission, the Chairman of the Drafting Committee suggested that the Commission consider the possibility of a separate article which would state that, in case of armed conflict, all the privileges and immunities accorded under the convention must be granted.

3. At the 1027th meeting of the Commission, one member suggested a possible text for the new article, drawing on the wording of article 74 of the Vienna

Convention on the Law of Treaties² and of article 7 of the Convention on Special Missions;³ that text read as follows:

The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The establishment or continued existence of a permanent mission on the territory of the host State does not in itself affect the situation in regard to diplomatic or consular relations between the host State and the sending State.⁴

4. Comments on the substance of the question were made by a number of the members of the Commission. One member pointed out that the difficulty lay in the reference, in both articles 47 and 48, to the possibility of armed conflict. In bilateral relations, if a war broke out between the two countries concerned, diplomatic relations were automatically severed and the diplomats had to leave the receiving State. The position was quite different for members of permanent missions who were representatives of the sending State, not to the host State, but to an international organization. What was essential was to safeguard such representation even in case of armed conflict between the host State and the sending State. The mere fact that in articles 47 and 48, based on the Vienna Convention on Diplomatic Relations,⁵ the hypothesis of armed conflict was mentioned would entail a serious risk of implying that, in case of armed conflict between the host State and the sending State, members of the permanent mission of the sending State would have to leave the territory of the host State, whereas, quite obviously, any such implication must be avoided. The best solution would be to deal with that

² Article 74 of the Vienna Convention on the Law of Treaties reads as follows:

*"Diplomatic and consular relations
and the conclusion of treaties"*

"The severance or absence of diplomatic or consular relations between two or more States does not prevent the conclusion of treaties between those States. The conclusion of a treaty does not in itself affect the situation in regard to diplomatic or consular relations."

(Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference (United Nations publication, Sales No. E.70.V.5), p. 299.)

³ Article 7 of the Convention on Special Missions reads as follows:

"Non-existence of diplomatic or consular relations"

"The existence of diplomatic or consular relations is not necessary for the sending or reception of a special mission." (General Assembly resolution 2530 (XXIV), annex.)

⁴ Yearbook of the International Law Commission, 1969, vol. I, p. 191, 1027th meeting, para. 2.

⁵ United Nations, Treaty Series, vol. 500, p. 95.

¹ In the draft articles adopted by the Commission in 1969 (Yearbook of the International Law Commission, 1969, vol. II, p. 207, document A/7610/Rev.1, chap. II, B), these two articles were numbered 48 and 49 respectively.

situation in a separate article; articles 47 and 48 could then be made more concise. One point to be decided was whether the article was to deal solely with the severance of diplomatic relations or whether it was to deal with armed conflict as well. In any event, great caution was required. The difficulty could not be evaded by arguing that the position of the permanent mission of the sending State to an international organization was in no way altered by the development of an abnormal situation such as war or the severance of diplomatic relations between the host State and the sending State. Even less could it be argued that its position was completely changed. That was the delicate question to be decided.⁶

5. Another member supported the suggestion that the phrase "even in case of armed conflict" be replaced in article 47 by the words "whenever required" and in article 48 by the words "at all times", because the retention of that phrase would make it necessary to take into account a great many situations, including the possibility of a conflict in which the organization itself was involved. He stated that he was in favour of the Drafting Committee considering the new proposed article, which stated two important points: first, that the absence of diplomatic or consular relations between the host State and the sending State did not affect the obligations of either State under the draft articles, and second, that the existence of a permanent mission on the territory of the host State did not imply the existence of diplomatic relations between the host State and the sending State.⁷

6. A third member said that articles 47 and 48 would lose some of their importance if a new article were introduced containing general provisions to deal with the permanent mission and its personnel in extraordinary circumstances. He thought the proposed new article might be interpreted as being inapplicable to cases other than the severance or absence of diplomatic or consular relations. In fact, an article of that kind was necessary to cover all cases, including armed conflict.⁸

7. A fourth member stated that a text on the lines of the proposed new article was necessary, but it would be quite independent of articles 47 and 48. He pointed out that since the question of armed conflict was covered in a corresponding article of the Vienna Convention on Diplomatic Relations, there would be an obvious gap in the present draft if no provision on the subject were included. It was, furthermore, the one case where really serious difficulties were likely to arise in connexion with the application of articles 47 and 48. The application of the proposed general article to such matters as freedom of communication would, of course, give rise to delicate problems, and the Drafting Committee should give careful consideration to the whole question.⁹

8. A fifth member said he was still convinced that reference should be made to the case of armed conflict, but had no strong views on the particular form it should take. He did not think, on the other hand, that a reference to the absence of relations or to the severance of diplomatic or consular relations would be sufficient.¹⁰

9. A sixth member stated that an important discussion had taken place on articles 47 and 48 and expressed the view that the Commission should not adopt any position at that stage, but should refer those articles to the Drafting Committee together with the proposed new article.¹¹

10. The question was then referred to the Drafting Committee which prepared the following text for the new article:

The severance, modification or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles, even in the case of armed conflict. The establishment or maintenance of a permanent mission on the territory of the host State does not in itself imply recognition or affect the situation in regard to diplomatic or consular relations between the host State and the sending State.¹²

11. When the text of the new article as prepared by the Drafting Committee was introduced to the Commission at the 1035th meeting, one member submitted an amendment which read as follows:

1. The termination, modification or absence of diplomatic or consular relations between the host State and the sending State shall not affect the obligations of either State under the present articles. The establishment or maintenance of a permanent mission on the territory of the host State does not in itself imply recognition or affect the situation in regard to diplomatic or consular relations between the host State and the sending State. In the absence of diplomatic or consular relations, however, either the host State or the sending State may require that all communications with the other be carried on through the Organization and the host State may limit the freedom of movement of the members of the permanent mission on its territory to within fifty miles of the Headquarters of the Organization.

2. In the case of armed conflict between the host State and the sending State, the status of the permanent mission and the privileges and immunities of the members of the permanent mission shall be unimpaired except that the host State may impose the following limitations for the protection of the permanent mission and its own security:

(a) That the permanent mission and its members be housed within the Headquarters area of the Organization or, if this is not feasible, within specified areas immediately adjacent to the Headquarters of the Organization;

(b) That the movement of members of the permanent mission be limited to specified routes in the immediate vicinity of the Headquarters of the Organization;

(c) That the permanent mission cease using its own wireless transmission facilities;

(d) That the importation of articles for the personal use of members of the permanent mission be terminated;

(e) That a neutral members of the Organization be designated

⁶ *Yearbook of the International Law Commission*, 1969, vol. I, p. 191, 1027th meeting, paras. 7, 8 and 9.

⁷ *Ibid.*, pp. 191-192, paras. 10 and 11.

⁸ *Ibid.*, p. 192, paras. 12 and 13.

⁹ *Ibid.*, paras. 15 and 16.

¹⁰ *Ibid.*, para. 22.

¹¹ *Ibid.*, para. 21.

¹² *Ibid.*, p. 232, 1035th meeting, para. 9.

to inspect the bag of the mission in the presence of a member of the mission to insure that no prohibited or contraband articles are brought in, and that the bag be brought in at specified places and times;

(f) That members of the mission who leave its territory may not return;

(g) That there be no increase in the size of the permanent mission;

(h) That permanent residents of the host State may not be employed by the permanent mission.¹³

12. In support of this amendment, its author adduced the following considerations: the absence of diplomatic or consular relations between the two States did not necessarily indicate the existence of difficulties between them, but in many cases the breaking off of such relations did occur as a result of substantial disagreements. It was usually accompanied by rising tension in public opinion and by hostility, and these factors must be taken into account in devising provisions to cover cases of severance of diplomatic or consular relations. The same type of psychological difficulty might arise when one State refused to recognize either the government or the existence of another State. If such a situation persisted for any length of time, it was almost invariably in consequence of some profound political disagreement. The Commission could not ignore the possibility of such disagreements between the host State and the sending State and was bound to provide for certain limitations in such cases. The author of the amendment pointed out that in dealing with the possibility of armed conflict, the Commission was treading on dangerous ground. He added that provision must also be made for the protection of members of a permanent mission in the event of public opinion becoming so hostile that rioting and attacks on members of the mission might occur: to avoid such dangers, it was only reasonable to limit the freedom of movement of members of permanent missions. He lastly stressed that sub-paragraphs (a) to (c) of paragraph 2 were mainly designed to safeguard the security of the host State, but also in some measure the security of the permanent mission of the sending State.¹⁴

13. Another member submitted the following amendment:

The severance or absence of diplomatic or consular relations between the host State and the sending State shall not affect the rights or obligations of either State under the present articles, even in the case of armed conflict. The establishment or maintenance of a permanent mission by the sending State does not in itself imply recognition by that State or by the latter State of the sending State, nor does it affect the situation in regard to diplomatic or consular relations between the host State and the sending State."¹⁵

14. Several members of the Commission expressed views on the substance of the question. One member stated that, though he appreciated the practical reasons and the concern underlying the text reproduced in paragraph 11 above, he thought it went too far: for example, it was unnecessary to restrict the freedom of communica-

tion or any other privilege of a permanent mission or its members in the absence of diplomatic or consular relations between the sending State and the host State. That member noted that in cases of armed conflict, the problem was more serious, so the restrictions provided for in paragraph 2, sub-paragraphs (a), (b) and (h) might be accepted and possibly that in sub-paragraph (e), though it was more debatable because of the abuses to which the interpretation of the notion of contraband had given rise during the two world wars. Sub-paragraph (c) on the other hand was, in his opinion, not acceptable; the permanent mission should be permitted to use its own wireless transmission facilities even during an armed conflict. It was also hard to see why the importation of articles for the personal use of members of the permanent mission should be terminated during a conflict, especially if inspection by a neutral member of the organization was accepted, as provided in sub-paragraph (e). In the opinion of that same member, the prohibitions in sub-paragraphs (f) and (g) were the most difficult to accept, since a member of a mission might be called upon to leave the territory of the host State to engage in important negotiations for the re-establishment of normal relations between the belligerents and it might be necessary to increase the size of the permanent mission to enable the sending State to take more effective action in the organization with a view to putting an end to the conflict or obtaining the organization's assistance in overcoming difficulties caused by the conflict.¹⁶

15. Another member stated that the amendment reproduced in paragraph 13 above considerably improved the drafting of the article but that all the substantive questions were not settled. He still thought that in case of severance of diplomatic or consular relations, and even more so in that of armed conflict, a permanent mission should not be withdrawn; but neither could its situation remain absolutely unchanged. In his view, the Drafting Committee's text went too far in providing that the severance of diplomatic or consular relations did not affect the obligations of the host State and the sending State in any way. Although he did not wholly endorse the amendment quoted in paragraph 11 above, he thought it should be taken into account.¹⁷

16. A third member stated that it was quite right to try to safeguard the freedom of representatives to international organizations to perform their functions, but it should not be forgotten that in the event of armed conflict, the national defence of host States was of vital importance. In general, the Commission had tried to equate the position of representatives of States to international organizations with that of diplomatic agents, but in that particular instance, representatives to international organizations would be in the more favourable position.¹⁸

17. A fourth member thought that the article embraced too many different problems, including, as it did, the

¹³ *Ibid.*, p. 233, para. 13.

¹⁴ *Ibid.*, pp. 233-234, paras. 17-19, 20 and 24.

¹⁵ *Ibid.*, p. 233, para. 14.

¹⁶ *Ibid.*, p. 235, paras. 28, 29 and 30.

¹⁷ *Ibid.*, p. 236, paras. 46, 47 and 48.

¹⁸ *Ibid.*, para. 50.

severance of diplomatic or consular relations, the non-recognition of a government and the case of armed conflict. In his opinion, it was clear that the severance of diplomatic or consular relations should not affect the rights and obligations laid down in the draft. The absence of diplomatic relations, which was sometimes due to non-recognition of a government, had been little discussed by legal writers or illustrated by practices, so that it would be difficult to draft rules on the subject. The case of armed conflict had also been almost entirely neglected by writers and the Commission itself had reserved its position on the matter more than once. It had taken that line, for example, during the preparation of the Convention on the Law of Treaties. Consequently, the effects of an armed conflict between the host State and one of the sending States should be examined in detail, and it would take a long time to formulate them. It might be said that an armed conflict should not deprive the sending State of its mission or of everything the mission needed for performing its functions, but the privileges and immunities provided for in the draft articles were certainly not all based on the notion of function. In the case of armed conflict, therefore, certain restrictions might be accepted in the interests of the host State.¹⁹

18. A fifth member stated that the article raised three different types of problem and, when the time came, it would be more appropriate to deal with them in three separate articles. The first article would state that the establishment or maintenance of a permanent mission did not imply recognition. The second would state the rule that the severance or absence of diplomatic or consular relations between the host State and the sending State did not affect the rights and obligations of either State under the draft articles. The third article would deal with the problem of armed conflict. In the third article, it would be necessary to draw a distinction between two types of conflict: a conflict between a sending State and the host State, and a conflict between a member State and the organization resulting from measures of coercion taken against that State. The two situations were different and raised very delicate problems in regard to which it would be extremely difficult to strike a balance between the interests of the host State, the sending State and the organization. The same member added that when the time came to draft an article on the subject of armed conflict, he would himself favour a general formula rather than an attempt to deal with specific points as in the proposal quoted in paragraph 11 above. The method followed in that proposal raised a number of problems. For example, the limitation imposed in paragraph 2 (b) was already covered by the provisions of article 27 and that in paragraph 2 (c) by the last sentence of paragraph 1 of article 28; in addition, the measure provided for in paragraph 2 (d) could be applied in the same way as that in paragraph 2 (e).²⁰

19. A sixth member pointed out that all the members of the Commission seemed to agree that the severance

of diplomatic or consular relations should not in itself affect the rights and obligations of the host State and the sending State. But the severance of relations always implied some other situation which might justify certain steps. Armed conflict was not the only one; there were also states of tension, for example. The Commission should consider the problems involved at length. For instance, some armed conflicts were localized and bilateral, so that their consequences were not nearly so grave as those of major conflicts without recourse to arms. International organizations usually established their headquarters in countries which, in normal circumstances, were liberal in various respects; but when circumstances became abnormal, the organization suffered directly.²¹

20. A seventh member said that, where armed conflict was concerned it would be very difficult to formulate a general rule, because of the variety of cases which arose in practice. It might perhaps be best to adopt the course which had been followed in other drafts of the Commission and include an article simply stating that the draft related only to the law of peace and did not deal with the problem of armed conflict.²²

21. Several members expressed the opinion that consideration of the subject should be deferred until the following year. The Commission finally decided to include in its report the following statement:

"The Commission also briefly considered the desirability of dealing, in separate articles, with the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on the representation of States in international organizations. In view of the delicate and complex nature of those questions, the Commission decided to resume their examination at a future session and to postpone any decision on them for the time being."²³

II. TWENTY-SECOND SESSION (1970)

22. At the twenty-second session, the question of exceptional situations was referred to in connexion with articles 60 and 61 as they appeared in part III, on permanent observer missions to international organizations, in the fifth report of the Special Rapporteur.²⁴ At the 1051st meeting of the Commission, one member recalled that at its previous session the Commission had decided to postpone examination of the possible effects of exceptional situations on the representation of States in international organizations. He suggested that it might be worth considering whether it would not be advisable to do likewise in regard to permanent observer missions by deferring consideration of the question until the second reading of the draft articles.²⁵

²¹ *Ibid.*, paras. 63 and 65.

²² *Ibid.*, para. 68.

²³ *Ibid.*, vol. II, p. 206, document A/7610/Rev.1, para. 18.

²⁴ *Ibid.*, 1970, vol. I, p. 45, 1051st meeting, para. 2.

²⁵ *Ibid.*, p. 46, para. 6.

¹⁹ *Ibid.*, pp. 236-237, paras. 52-55.

²⁰ *Ibid.*, p. 237, paras. 57-59.

23. The question was also referred to in connexion with part IV of the draft (Delegations of States to organs and conferences). Introducing at the 1078th meeting of the Commission the text prepared by the Drafting Committee for article 78 (which became article 108), the Chairman of the Drafting Committee stated that a reference would be made in the commentary to the possibility of an armed conflict; it would follow the same lines as the references in paragraph 1 of the commentary to article 48.²⁶

24. In its report on its twenty-second session (1970), the Commission stated:

The Commission also briefly considered the desirability of dealing, in separate articles within the present group, with the possible effects of exceptional situations—such as absence of recognition, absence or severance of diplomatic relations or armed conflict—on permanent observer missions and on delegations to organs of international organizations and to conferences convened by international organizations. In view of the decision taken at the twenty-first session, the Commission decided to examine at its second reading the question of the possible effects of exceptional situations on the representation of States in international organizations in general and to postpone for the time being any decision in the context of parts III and IV.²⁷

III. CONCLUSIONS

25. From the foregoing account of the discussion in the Commission, the following conclusions may be drawn.

26. The Commission does not consider it appropriate to deal with exceptional situations such as armed conflict in connexion with the articles on facilities of departure and protection of premises and archives. It is keen to avoid the risk of implying that in case of armed conflict between the host State and the sending State, members of the permanent mission of the sending State would have to leave the territory of the host State. The mention of the case of armed conflict in article 45 of the Convention on Diplomatic Relations is based on the assumption that in bilateral relations, if a war breaks out between two States, diplomatic relations are usually severed and the diplomats of the sending State have to leave the receiving State. The position is quite different for members of permanent missions who are representatives of the sending State, not to the host State, but to the organization.

27. There is general agreement in the Commission on the desirability of dealing in one or more articles with the implications of the severance or absence of diplomatic or consular relations between the host State and the sending State as well as the question of recognition.

28. As regards armed conflict, the discussion reveals that opinion in the Commission is divided and that the attempt to deal with the effects of armed conflict in the present draft articles would raise complex problems owing to the great variety of situations which may arise in the context of multilateral diplomacy. Several

members tend to consider that the Commission should not depart from the course which it has previously taken when it decided not to include provisions on the effects of armed conflict in its drafts on the law of the sea and the law of treaties.

29. The Special Rapporteur, therefore, submits to the consideration of the Commission the following new articles:

[For the text of articles 49 *bis*, 77 *bis* and 116 *bis*, see *Yearbook of the International Law Commission*, 1971, vol. I, p. 84, 1099th meeting, para. 12.]

30. The Commission may also wish to consider the possibility of consolidating the three new articles and merging them in one article to be placed in the part containing general provisions.

DOCUMENT A/CN.4/L.171

Question of the inclusion in article 50 of a provision on the settlement of disputes: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur

[Original text: English]
[9 June 1971]

1. The discussion on the above-mentioned question at the 1100th, 1101st and 1102nd meetings of the Commission¹ arose from the reference in the commentary to article 50 that the Commission had "reserved the possibility of including at the end of the draft articles a provision concerning the settlement of disputes which might arise from the application of the articles".²

2. Some members suggested that article 50 be complemented by a provision for recourse to arbitration, judicial settlement or request for an advisory opinion of the International Court of Justice. References were made to similar provisions in the Convention on the Privileges and Immunities of the United Nations,³ the Convention on the Privileges and Immunities of the Specialized Agencies,⁴ the Headquarters Agreement of the United Nations,⁵ the 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas⁶ and article 66 of the Vienna Convention on the Law of Treaties and the annex to that Convention.⁷

3. Other members were of the opinion that the question should be left to the General Assembly or the plenary conference.

4. A third group of members thought that article 50 did not go far enough and that it would be useful to

¹ See *Yearbook of the International Law Commission*, 1971, vol. I, pp. 89 *et seq.*

² *Ibid.*, 1969, vol. II, p. 222, document A/7610/Rev.1, chap. II, B.

³ United Nations, *Treaty Series*, vol. I, p. 15.

⁴ *Ibid.*, vol. 33, p. 261.

⁵ *Ibid.*, vol. 11, p. 11.

⁶ *Ibid.*, vol. 559, p. 285.

⁷ *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), pp. 298 and 301 respectively.

²⁶ *Ibid.*, p. 203, 1078th meeting, para. 11.

²⁷ *Ibid.*, vol. II, p. 276, document A/8010/Rev.1, para. 22.

provide for a conciliation machinery to be utilized if the consultations envisaged in that article did not result in a satisfactory solution.

5. In preparing a text as requested by the Commission, the Special Rapporteur has taken into account the divergent views expressed in the Commission and the need to produce a provision which may reconcile these views. It is the submission of the Special Rapporteur that, given the multiplicity and variety of international organizations to which these articles would apply, it would be difficult to provide for a standing uniform machinery for a rigid procedure of settlement. He therefore thought that a solution could be sought through providing for the principle of submitting the question of an impartial procedure like conciliation, while leaving it to every organization to establish the conciliation machinery or any other related machinery which it may consider appropriate.

6. In the light of the above, the Special Rapporteur wishes to submit the following text:

[For the text of article 50, see *Yearbook of the International Law Commission*, 1971, vol. I, p. 222, 1119th meeting, para. 81.]

DOCUMENT A/CN.4/L.173

Draft articles on observer delegations of States to organs and to conferences: working paper prepared by Mr. Abdullah El-Erian, Special Rapporteur

[Original text: English]
[14 June 1971]

PART V. OBSERVER DELEGATIONS OF STATES TO ORGANS AND TO CONFERENCES

SECTION 1. OBSERVER DELEGATIONS IN GENERAL

Article 117. Use of terms

For the purposes of the present part:

(a) An "organ" means a principal or subsidiary organ of an international organization and any commission, committee or sub-group of any such organ, in which States are members;

(b) A "conference" means a conference of States convened by or under the auspices of an international organization, other than a meeting of an organ;

(c) An "observer delegation to an organ" means the delegation designated by a State not member of the organ to represent it therein;

(d) An "observer delegation to a conference" means the delegation sent by a State not participating in the conference to represent it therein;

(e) An "observer delegation" means an observer delegation to an organ or to a conference;

(f) An "observer representative" means any person designated by a State not member of an organ or not

participating in a conference to represent it in that organ or at that conference.

Article 118. Sending of observer delegations

[For the text of article 118, see *Yearbook of the International Law Commission*, 1971, vol. I, p. 235, 1121st meeting, para. 66.]

Article 119. Composition of the observer delegation

An observer delegation to an organ or to a conference shall consist of one or more observer representatives of the sending State from among whom the sending State may appoint a head. It may also include diplomatic staff, administrative and technical staff and service staff.

Article 120. Size of the observer delegation

The size of an observer delegation to an organ or to a conference shall not exceed what is reasonable or normal, having regard to the functions of the organ, or, as the case may be, the tasks of the conference, as well as the needs of the particular delegation and the circumstances and conditions in the host State.

Article 121. Appointment of the members of the observer delegation

Subject to the provisions of articles 120 and 122, the sending State may freely appoint the members of its observer delegation to an organ or to a conference.

Article 122. Nationality of the members of the observer delegation

The observer representatives and members of the diplomatic staff of an observer delegation to an organ or to a conference should in principle be of the nationality of the sending State. They may not be appointed from among persons having the nationality of the host State, except with the consent of that State which may be withdrawn at any time.

Article 123. Letters of appointment of observer representatives¹

1. The letters of appointment of an observer representative to an organ shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed by the practice followed in the Organization, and shall be transmitted to the Organization.

2. The letters of appointment of an observer representative in the delegation to a conference shall be issued either by the Head of State or by the Head of Government or by the Minister for Foreign Affairs or by another competent authority if that is allowed in relation to the conference in question, and shall be transmitted to the conference.

¹ The Special Rapporteur is requesting the United Nations Secretariat to let him know whether in practice observer representatives submit letters of appointment or credentials and by what authorities of the sending State the documents in question are issued. He will review article 123 in the light of the information he will receive from the Secretariat.

Article 124. Notifications

The provisions of article 89 shall apply also in the case of an observer delegation to an organ or to a conference.

SECTION 2. FACILITIES, PRIVILEGES AND IMMUNITIES OF OBSERVER DELEGATIONS

*Article 125. Facilities, privileges and immunities
of observer delegations*

The provisions of articles 91 to 111 shall apply also in the case of an observer delegation to an organ or to a conference.

SECTION 3. CONDUCT OF THE OBSERVER DELEGATION AND ITS MEMBERS

*Article 126. Conduct of the observer delegation
and its members*

The provisions of articles 112 and 113 shall apply also in the case of an observer delegation to an organ or to a conference.

SECTION 4. END OF FUNCTIONS

Article 127. End of functions

The provisions of articles 114 to 116 shall apply also in the case of an observer delegation to an organ or to a conference.

DOCUMENT A/CN.4/L.174 and ADD.1-6

Reports of the Working Group on Relations between States and International Organizations

DOCUMENT A/CN.4/L.174

First report

[Original text: English, French, Spanish]
[22 June 1971]

FOREWORD

1. The Working Group on Relations between States and International Organizations, established by the Commission on 25 May 1971, has so far held three meetings on 10, 11 and 14 June 1971 under the chairmanship of Mr. Richard D. Kearney. In addition to its Chairman, the Working Group consists of the following members: Mr. Roberto Ago, Chairman of the Drafting Committee, Mr. Nikolai Ushakov and Sir Humphrey Waldock.

2. The Working Group submits herewith, for the consideration of the Drafting Committee, the results of its work to date, in the form of a provisional set of consolidated draft articles, renumbered 1 to 50, covering parts II and III of the Commission's draft (permanent missions and permanent observer missions to international organizations) as well as the provisions of part I, made generally applicable for the time being to both kinds of missions.

3. The Working Group decided to consider initially the question of the consolidation of the provisions concerning missions of a permanent character (permanent missions and permanent observer missions) and to defer to a subsequent stage its consideration of the question whether the provisions concerning delegations of States to organs and to conferences (part IV of the Commission's draft) can be consolidated with those emerging from its initial work.

4. The basis for the consolidation of the provisions of parts II and III was the inclusion in article 1 on the use of terms two new definitions. The terms "mission" and "head of mission", which amalgamate, respectively, the specific terms "permanent mission" and "permanent observer mission", and "permanent representative" and "permanent observer" were added as sub-paragraphs. In all cases where, apart from minor drafting differences, the only difference from part II and part III was the use of the word "observer", the new generic terms were used—thus facilitating the merger of the two parts. In the few cases where the substantive differences between the corresponding provisions of parts II and III did not allow for such consolidation, a single article was established, including in separate paragraphs, under a common heading, the provisions particular to each kind of mission. In these instances, the original terminology ("permanent mission", "permanent observer mission", "permanent representative", "permanent observer") was maintained. Only in the case of the functions of each kind of mission did the Working Group preserve the format of the original provisions in two separate, though consecutive, articles.

5. The approach taken by the Working Group has permitted the reduction of the number of articles covering parts I, II and III from the original seventy-seven to fifty, while avoiding the technique of drafting by reference, originally employed by the Commission.

6. The Working Group will consider whether techniques similar to those described above can be applied to the provisions of part IV.

7. The text of the consolidated draft articles reflects the decisions thereon taken by the Commission and the Drafting Committee as of the date of submission of the present report. It must be understood that the present text is provisional, as it is subject both to the Commission's final decision on the texts of specific articles and the decision with respect to whether part IV is susceptible to the consolidation process.

8. The Working Group wishes to commend highly its Secretary, Mr. Eduardo Valencia-Ospina, whose intelligence, inventiveness and hard work have made a very substantial contribution to the work that has been and is being carried out.

CONSOLIDATED DRAFT ARTICLES

[Texts not examined by the Commission. Replaced by the draft articles contained in the second report below (A/CN.4/L.174/Add.1-2).]

DOCUMENT A/CN.4/L.174/Add.1-2

Second report

[Original text: English, French, Spanish]
[5 and 2 July 1971]

FOREWORD

1. Following the submission of its first (interim) report¹ the Working Group on Relations between States and International Organizations has held six meetings on 22, 23, 24, 25 and 29 June and 2 July 1971.

2. As already indicated in the previous report, at this second stage of its work the Working Group considered the question whether the provisions concerning delegations to organs and to conferences could be consolidated with those concerning missions of a permanent character to international organizations, as they emerged from its initial work. With this in view the Working Group, when it found it appropriate and practicable, applied to the provisions of part IV of the Commission's draft (delegations of States to organs and to conferences) techniques similar to those described in the first report. This involved, in particular, the inclusion of three new terms in article 1: "delegation", "delegate", and "head of delegation". The results of this work to date are submitted herewith, for the consideration of the Commission, in the form of a set of consolidated draft articles, renumbered 1 to 81, covering missions to international organizations (permanent missions and permanent observer missions—originally parts II and III of the Commission's draft) and delegations to organs and to conferences, as well as the general provisions of part I of the Commission's draft.

3. The present set of consolidated draft articles is divided into four parts: part I, entitled "Introduction", concerns the introductory provisions of the Commission's draft included mainly in part I of that draft, which are intended to apply to the draft articles as a whole; part IV, entitled "General provisions", contains those further provisions which, in the opinion of the Working Group, are generally applicable to missions to international organizations and to delegations to organs and to conferences; part II, entitled "Missions to international organizations", contains provisions dealing specifically with missions as they emerged from the process of consolidating the rules on permanent missions with those on permanent observer missions, explained in the Working Group's first report; part III, entitled "Delegations to organs and to conferences", contains provisions dealing specifically with delegations to organs and to conferences.

4. Except as regards the provisions contained in part I which have not yet been considered by the Commission and article 50, for which the Working Group intends to prepare additional paragraphs concerning conciliation procedures, the texts of the articles included in the consolidated set reflect the decisions thereon taken by the Commission at the present session on the basis of the reports of the Drafting Committee. In some instan-

ces, however, the Working Group has introduced drafting changes which it considered necessary or advisable in the light of the consolidating process.

5. The approach taken by the Working Group has permitted the reduction of the number of articles from the one hundred and twenty-one originally before the Commission to eighty-one, while avoiding the technique of drafting by reference.

6. The question of observer delegations remains under consideration by the Working Group.

CONSOLIDATED DRAFT ARTICLES

Articles 1-80

[Texts reproduced in the summary records of the 1130th to 1135th meetings (see *Yearbook of the International Law Commission*, 1971, vol. I, pp. 287 *et seq.*.)]

Article 81

[Not examined by the Commission. Replaced by the text contained in the third report below (A/CN.4/L.174/Add.3).]

DOCUMENT A/CN.4/L.174/Add.3

Third report

[Original text: English, French, Spanish]
[13 July 1971]

FOREWORD

1. Following the submission of its second report,¹ the Working Group on Relations between States and International Organizations has held two meetings on 7 and 9 July 1971. Those meetings were mainly devoted to the preparation of texts concerning the question of consultations between the host State, the sending State and the organization and the question of conciliation. As had been already indicated, the Working Group had provisionally included in its two previous reports a provision concerning consultations which reproduced the text of article 50 as originally adopted by the Commission at its twenty-first session.²

2. The Working Group submits herewith, for the consideration of the Commission, the texts established for articles 81 and 82 on consultations and conciliation. It must be understood that the present text of article 81 is intended to replace that included in the first and second reports of the Working Group. Also, in view of the language used in article 82, the Working Group deemed it necessary to prepare the text of a new provision concerning the meaning of the term "executive head", to be inserted in article 1.

3. The question of observer delegations remains under consideration by the Working Group.

¹ See above, document A/CN.4/L.174/Add.1-2.

² See *Yearbook of the International Law Commission*, 1969, vol. II, p. 221, document A/7610/Rev.1, chap. II, B.

¹ See above, p. 107, document A/CN.4/L.174.

*Article 81**Article 82**New sub-paragraph 3 bis of article 1, paragraph 1*

[Texts reproduced in the summary record of the 1136th meeting (see *Yearbook of the International Law Commission, 1971*, vol. I, pp. 332-333).]

DOCUMENT A/CN.4/L.174/Add.4-5

Fourth report

[Original text: English, French, Spanish]
[15 July 1971]

FOREWORD

1. Following the submission of its third report¹ the Working Group held one meeting on 13 July 1971, devoted mainly to the consideration of the question of observer delegations to organs and conferences. At that meeting, the Working Group established the texts of twenty-three new draft articles on the subject (articles A to W) which it submits herewith for the consideration of the Commission. The Working Group decided to present those articles in a separate set, to be annexed to the set of consolidated draft articles, in view of the fact that, being new texts, Governments and secretariats of international organizations have not as yet had the opportunity to express their view thereon. Nevertheless, the articles have been drafted in a manner such as to facilitate their eventual integration into the consolidated draft if that is the decision of the General Assembly or of a future plenipotentiary conference. Apart from the text of article A, which is susceptible of insertion in article 1, such integration could be made in a number of ways, including in particular: the insertion of articles B to W as a separate part, between parts III and IV of the consolidated draft articles; where appropriate, the inclusion as additional paragraphs, in the texts of the articles presently constituting part III, of the corresponding provisions of the new set, under suitable headings or making the present texts of part III generally applicable to delegations and to observer delegations by introducing the necessary drafting changes.

2. Article A (use of terms), which corresponds to article 1 of the consolidated draft, contains provisions concerning the meaning of three new terms: "observer delegation to an organ"; "observer delegation to a conference", and "observer delegate", as well as a complementary provision regarding the meaning of the term "sending State" as this is defined in sub-paragraph 13 of paragraph 1 of article 1. Articles B to W contain provisions corresponding to those of articles included in part III of the consolidated draft (Delegations to organs and to conferences). In some instances, the new texts reflect changes which the Working Group deemed necessary or advisable to make in view of the difference in nature and tasks between delegations and

observer delegations. The Working Group did not establish texts corresponding to those included in part IV of the consolidated draft (General provisions) as it is of the opinion that, if it is so desired by the General Assembly or the future plenipotentiary conference, those provisions can be made generally applicable as well to observer delegations, with minor drafting changes.

3. The present articles have been prepared taking into account the Commission's latest decisions on the texts of the consolidated draft.

4. As a result of the establishment of the new texts concerning observer delegations, the Working Group found it necessary to redraft sub-paragraphs 9 and 10 of paragraph 1 of article 1 (use of terms) of the consolidated draft. The texts of the new provisions concerning the meaning of the terms "delegation to an organ" and "delegation to a conference" are included following those of the draft articles on observer delegations.

5. The Working Group decided to propose that the set of final draft articles which the Commission is to submit to the General Assembly be entitled "Draft articles on the representation of States in their relations with international organizations". Such language was already included in the texts of articles 2 and 4 as submitted by the Working Group on second reading² and has received the endorsement of the Commission in the context of those two articles.

OBSERVER DELEGATIONS TO ORGANS AND CONFERENCES

Articles A to E and T

[Texts reproduced in the summary record of the 1139th meeting (see *Yearbook of the International Law Commission, 1971*, vol. I, pp. 351 *et seq.*).]

Articles F to S and U to W

[Not examined by the Commission. Replaced by the texts contained in the fifth report below (A/CN.4/L.174/Add.6).]

Sub-paragraphs 9 and 10 of article 1, paragraph 1

[Text reproduced in the summary record of the 1139th meeting (see *Yearbook of the International Law Commission, 1971*, vol. I, p. 352).]

TITLE OF DRAFT

"Draft articles on the representation of States in their relations with international organizations."

DOCUMENT A/CN.4/L.174/Add.6

Fifth report

[Original text: English, French, Spanish]
[21 July 1971]

¹ See above, p. 109, document A/CN.4/L.174/Add.3.

² See *Yearbook of the International Law Commission, 1971*, vol. I, p. 324, 1134th meeting, para. 75; and p. 327, 1135th meeting, para. 2.

FOREWORD

In its fourth report¹ the Working Group submitted to the Commission a new set of twenty-three draft articles (articles A to W) on observer delegations to organs and to conferences. Following the submission of that report, the Working Group held two meetings on 20 and 21 July 1971. During those meetings, it considered on second reading the texts of articles E (Composition of the observer delegation) and T (Privileges

and immunities of other persons) of the new set. As a result of such consideration, the Working Group decided to establish a revised set of twenty-four draft articles (articles A to X), which it submits herewith for the consideration of the Commission.

OBSERVER DELEGATIONS TO ORGANS AND TO CONFERENCES

Articles A to X

[Texts reproduced in the summary record of the 1142nd meeting (see *Yearbook of the International Law Commission, 1971*, vol. I, pp. 365 *et seq.*.)]

¹ See above, p. 109, document A/CN.4/L.174/Add.4-5.

SUCCESSION OF STATES:
(a) Succession in respect of treaties
[Agenda item 2(a)]

DOCUMENT A/CN.4/243 AND ADD.1 *

Succession of States in respect of bilateral treaties: second and third studies
prepared by the Secretariat [Air transport agreements and Trade agreements]

[Original text: English]
[9 April and 24 March 1971]

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* A few minor changes have been made in the original text of this document.

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ABBREVIATIONS

BOAC	British Overseas Airways Corporation (United Kingdom)
ECA	Economic Commission for Africa
GATT	General Agreement on Tariffs and Trade
ICAO	International Civil Aviation Organization
KLM	Royal Dutch Airlines (Netherlands)
Misrair	Egyptian Airlines
MOCI	<i>Moniteur officiel du commerce et de l'industrie</i> As from 1961: <i>Moniteur officiel du commerce international</i> , France
SABENA	Société anonyme belge d'exploitation de la navigation aérienne (Belgian World Airlines)
SAS	Scandinavian Airlines System (Denmark, Norway, Sweden)

Note

To assist the International Law Commission in its work on the topic "Succession of States and Governments", the Secretariat has carried out some research relative to succession in respect of bilateral treaties in selected areas of inter-State relations for the purpose of ascertaining recent practice in the field. A first study, entitled "Extradition treaties", was published in 1970 as a document of the twenty-second session of the Commission.¹ The present document contains the second and third studies of the series, entitled "Air transport agreements" and "Trade agreements" respectively.

As in the case of the first study, these new studies on succession of States in respect of bilateral treaties cannot be said to be exhaustive. Published practice on bilateral treaties does not allow of the preparation of studies as comprehensive as those in the series "Succession of States to multilateral treaties".² Though the sources of the information are varied, in most cases they are official and primary. When private or secondary sources have been used, that has been indicated.

The designations used, the dates mentioned, and the presentation of the material in this document do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country or territory or the position which the States concerned may have with regard to the particular treaties or agreements mentioned.

¹ See *Yearbook of the International Law Commission 1970*, vol. II, p. 102, document A/CN.4/229.

² *Ibid.*, 1968, vol. II, p. 1, document A/CN.4/200 and Add.1 and 2; *ibid.*, 1969, vol. II, p. 23, document A/CN.4/210; and *ibid.*, 1970, vol. II, p. 61, document A/CN.4/225.

II. Air transport agreements

(Document A/CN.4/243)

Introduction

1. Article 6 of the Convention on International Civil Aviation, concluded at Chicago in 1944³ states:

No scheduled international service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the term of such permission or authorization.

The attempts made at the Chicago Conference to conclude a viable *multilateral* agreement granting such authorizations were, in the end, unsuccessful. The only widely accepted agreement relating to air transport rights, the International Air Services Transit Agreement (Chicago, 1944),⁴ requires its parties to grant the first

two freedoms of the air (relating to transit rights) in respect of scheduled international air services namely, the "privilege to fly across [the Parties'] territory without landing" and the "privilege to land for non-traffic purposes". It does not, however, grant the other three other freedoms of the air (relating to traffic rights) which are commercially valuable and which are set out in the International Air Transport Agreement (1944), article I, section 1:⁵

(3) The privilege to put down passengers, mail and cargo taken on in the territory of the State whose nationality the aircraft possesses;

(4) The privilege to take on passengers, mail and cargo destined for the territory of the State whose nationality the aircraft possesses;

(5) The privilege to take on passengers, mail and cargo destined for the territory of any other contracting State and the privilege to put down passengers, mail and cargo coming from any such territory.

³ United Nations, *Treaty Series*, vol. 15, p. 295.

⁴ *Ibid.*, vol. 84, p. 389. Seventy-eight States parties to the Agreement are listed in United States of America, Department of State, *Treaties in Force—A list of Treaties and other International Agreements of the United States in Force on January 1, 1971* (Department of State publication 8567 (Washington, D.C., U.S. Government Printing Office), p. 276.

⁵ United Nations, *Treaty Series*, vol. 171, p. 387.

The International Air Transport Agreement (1944) failed to obtain general acceptance⁶ and, as a result, a vast network of bilateral agreements granting traffic rights was subsequently negotiated.

2. The great majority of these agreements are in almost every respect virtually identical and follow the standard agreement recommended by the Chicago Conference (Recommendation VIII of the Final Act)⁷ as supplemented by the Bermuda Agreement of 1946 between the United Kingdom and the United States of America.⁸ In fact, of the more than 1,100 intergovernmental air transport agreements registered with the International Civil Aviation Organization⁹ as at 1 January 1969, about 90 per cent are classified as agreements of the "Chicago type";¹⁰ many of the remainder are agreements concluded by States not members of ICAO. In the foreword to the *Handbook on Administrative Clauses in Bilateral Air Transport Agreements* (1962)¹¹ it is stated that the ICAO secretariat's analysis "shows that there is on the whole a large measure of uniformity in the drafting of the administrative and technical clauses in the bilateral agreements concluded between ICAO States".¹²

3. These agreements usually consist of two parts: the agreement itself and the schedule to the agreement. The schedule to the agreement sets out the routes on which the designated airlines of the parties are entitled to exercise traffic rights. The route lists the stopping places in the territories of the parties and, in some cases, other points between and beyond those territories. The agreement itself usually consists of about fourteen or fifteen articles which set out the conditions on which the rights

are to be exercised: designation of airlines, grant of operating authorization, exemption from customs duties etc. of supplies used by the airline, provision and sharing of capacity, change of gauge, tariffs, exchange control, statistics, consultation, settlement of disputes, and modification, termination and registration of the agreement. Although differences sometimes arise in relation to the frequency of flights, the sharing of traffic,¹³ and the fixing of tariffs¹⁴ it is the route schedules annexed to the agreement which more often give rise to difficulties both at the time of negotiation and during the agreement's application.

4. On the other hand, the agreements generally incorporate certain provisions which have become "standard provisions" in bilateral air transport agreements. One of the standard provisions defines "territory" for the purposes of the agreements either as "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or trusteeship or [the] State", or simply by reference to article 2 of the Chicago Convention which contains an almost identical definition.¹⁵

5. It accordingly follows that the question of succession arises in the case of every territory which has undergone a change of status, if the State formerly or newly responsible for its international relations is a party to a bilateral air transport agreement containing a standard provision such as that mentioned above. Particularly, it arises for the States which have become independent since 1946, with regard to bilateral air transport agreements concluded by States formerly responsible for their international relations. However, three factors limit the practical significance of this: first, the most important element in the agreement—the route annex—would not necessarily grant traffic rights to, from and through all the non-self-governing territories of the parties;¹⁶ secondly, since first and second freedom rights are granted by the multilateral Air Services Transit Agreement, mentioned in paragraph 1 above.

⁶ Twenty-nine states signed the International Air Transport Agreement, but few of them were major carriers; see United Nations, *Treaty Series*, vol. 171, p. 388. At 31 December 1970, the following twelve States were parties to the Agreement: Bolivia, Burundi, Costa Rica, El Salvador, Ethiopia, Greece, Honduras, Liberia, Netherlands, Paraguay, Sweden, Turkey; see ICAO document 7965.

⁷ Provisional Civil Aviation Organization, *International Civil Aviation Conference Final Act and Related Documents* (Doc. 2187), pp. 19-20.

⁸ United Nations, *Treaty Series*, vol. 3, p. 253. The Bermuda Agreement, especially its annex setting out the routes, has been amended on several occasions, but its fundamental principles are unchanged.

⁹ Article 83 of the Chicago Convention requires parties to register "arrangement not inconsistent with" it, with the Council of ICAO forthwith.

¹⁰ ICAO, *Aeronautical Agreements and Arrangements—Fourth Annual Supplement (for the year 1968) to "Tables of Agreements and Arrangements registered with the Organization" (Documents 8473—LGB/215) and to First Supplement (Doc 8563—LGB/228), Second Supplement (Doc 8648—LGB/239), Third Supplement (Doc 8727—LGB/252), Doc 8789—LGB/265 Montreal, January 1969)*, pp. 19-20. (Hereinafter referred to as "Fourth Annual Supplement (1968).")

¹¹ ICAO, Circular 63-AT/6 *Handbook on Administrative Clauses in bilateral air transport agreements* (Montreal, 1962 (hereinafter referred to as the "Handbook")).

¹² *Handbook*, p. 4. See also the study preparer by the Legal Studies Section of ICAO, *Bilateral agreements "Chicago Type"* (23 October 1947), document 4798-AT/526, especially paras. 1-6 and 61.

¹³ See ICAO, Circular 72-AT, *Handbook on Capacity Clauses in Bilateral Air Transport Agreements* (Montreal, 1965); and e.g. the Exchange of Notes between India and the United States of America relating to capacity (United Nations, *Treaty Series*, vol. 533, p. 334). In that case, the Bermuda model had not been followed. See O. J. Lissitzyn, "Bilateral agreements on air transport" in *The Journal of Air Law and Commerce* (Dallas, Texas), vol. 30 (summer, 1964), pp. 248 and 250-252. See also the 1960 Amendment to the Netherlands-Pakistan Agreement (United Nations, *Treaty Series*, vol. 412, p. 318).

¹⁴ Fares are, in fact, usually dealt with largely outside the framework of the bilateral agreement by the International Air Transport Association, whose role is indeed recognized in many bilateral agreements. See also the International Agreement on the Procedure for the Establishment of Tariffs for Scheduled Air Services (Paris, 10 July 1967 in United Kingdom, *Treaty Series*, No. 79, Cmnd. 3746 (London, H.M.S.O., 1968).

¹⁵ The Chicago Convention refers to mandated rather than to trust territories.

¹⁶ See, for example, the original Bermuda Agreement (referred to in paragraph 2 above); of United Kingdom administered territories which have since become independent, it gave United States airlines third, fourth and fifth freedom rights only in Trinidad, Tobago, British Guiana, Jamaica, Singapore, Lydda, Accra and Lagos.

to which many new States have become parties either by acceptance or succession,¹⁷ the grant of these rights in bilateral agreements seems unnecessary in those cases;¹⁸ and thirdly, the remaining provisions of the agreements being largely standard, they are, in most cases, included without change in the bilateral agreements concluded by new States; that is to say, the networks of rights and obligations—the routes apart—will in all probability be the same, whether the old agreement remains in effect or a new one is negotiated. Thus it is not surprising that most of the relevant available practice concerning succession problems and bilateral air transport agreements relates to the comparatively limited number of cases where a point in a territory, the status of which has been changed, was specifically included in the route referred to in the schedule to the agreement in question.

6. Before examining this practice, a number of other general points may be mentioned. In some situations, it may be difficult to carve out of the route schedule to a bilateral agreement a set of reciprocal routes giving the new State and the other party to the agreement roughly similar rights and obligations. Thus, under the original Bermuda Agreement between the United States of America and the United Kingdom,¹⁹ United States carriers were authorized to fly between New York and Accra. United Kingdom carriers, however, had no comparable route. On becoming independent, Ghana accordingly had no obvious route on which its carriers could operate to the United States. On the other hand, there were comparable routes in the Caribbean;²⁰ and, in several other cases, separate airlines, domiciled in a dependent territory, have operated on the routes assigned to the administering State, in respect of traffic to, through and from the territory. Assignments of routes to the predecessor State granting it traffic rights to and from its dependent territories—third and fourth freedom rights—become, on independence, fifth freedom rights (although their continued exercise would be dependent on the consent of the former dependent territory which might, of course, wish to exercise the rights itself). The other party might argue that it never intended to grant such rights and that the routes should consequentially be amended. That is to say, independence may create problems for the predecessor State, as well as for the successor. On the other hand, traffic between points within the former dependent territories of one of the parties will no longer be cabotage and as such forbidden

—by the usual, express provision of the agreement—to the carriers of the other party.

7. The great majority of bilateral agreements provide that a party to the agreement may withhold the exercise of rights by an airline designated by the other party, if it is not satisfied that substantial ownership and effective control of the airline are vested in the contracting party designating the airline or in its nationals.²¹ These provisions are discretionary and do not appear to relate to the nationality of the aircraft,²² nevertheless, they could conceivably cause difficulties for new States which may, instead of owning and operating their own airlines, take part in some pooling or other co-operative arrangement as provided for by chapter XVI of the Chicago Convention.²³

8. The statistics show that foreign carriers have continued to operate on the routes provided for in air transport agreements which applied to the territories of new States before they became independent. Thus a study entitled *Air Transport in Africa* prepared in 1964 by ICAO and ECA,²⁴ shows that, according to the information then available, 34 non-African carriers were providing intercontinental services to Africa. Moreover, the traffic volume continued to grow at a high rate,²⁵ although not as fast as economic factors and demand seemed to require.²⁶

²¹ See e.g. *Handbook*, pp. 26-33; Bin Cheng, *op. cit.*, pp. 375-379.

²² Bin Cheng, *op. cit.*, pp. 375-376. See also the exchange of letters between Tunisia, on the one hand, and the Netherlands, Norway and Switzerland, on the other, wherein it was agreed that "effective control" in the above formula did not refer to the technical and commercial management of any designated airline (United Nations, *Treaty Series*, vol. 497, pp. 61, 77 and 109).

²³ Air Afrique, operated by 12 African States under the Treaty of Yaoundé of 28 March 1961; Central Airways Corporation (Malawi, Zambia and Southern Rhodesia), dissolved on 31 August 1967; East African Airways Corporation (Kenya, Tanzania and Uganda); Malayan Airways Ltd. and Malaysia-Singapore Airlines Ltd. See also *Summary of Material Collected on Co-operative Agreements and Arrangements* (1967) ICAO, Circular 84 - AT/14 for the forms this co-operation may take. The introduction suggests that the material might be of particular value to developing countries, since they have a great interest in such arrangements. See also para. 33 (f) (vi) and table 11 of the study cited in foot-note 24 below; and the *Report of the African Air Transport Conference* (Addis Ababa, November 1964) (ICAO document 8462-AT/719 - ECA document E/CN.14/TRANS/26), paras. 19-24.

²⁴ ECA document E/CN.14/TRANS/20 — ICAO document 8419-AT/718, p. 67.

²⁵ *Ibid.*, para. 20. See also ICAO, *Digest of Statistics No. 135, Traffic 1960-1967*, Series T, No. 27, p. 80.

²⁶ One writer has observed:

"Almost all newly independent States have continued the air policies of their predecessors for a period after independence, although the wish to become their own flag-carriers gradually leads towards restriction upon foreign carriers. The latter have not been immediately interfered with in the exercise of existing commercial rights, and there is normally a 'twilight' period without any particular termination date, during which new agreements are negotiated to replace the old, or new permits are accepted by the carriers. There has, therefore, been an almost universal continuity of air transport agreements, enduring for the least the period normally covered by termination (D.P. O'Connell, *State Succession in*

¹⁷ See United Nations, *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5) (hereafter referred to as *Materials on Succession of States*); pp. 224-226; and United States of America, Department of State, *Treaties in Force... 1969*, Department of State publication 8432 (Washington, D.C., U.S. Government Printing Office), p. 264.

¹⁸ See B. Cheng, *The Law of International Air Transport* (London, Stevens, 1962), pp. 291-292; *Shawcross and Beaumont on Air Law*, 3rd ed., (London, Butterworth, 1966), p. 286; and paragraphs 3 and 4 of the 1953 revised schedule to the United Kingdom-France Agreement (United Nations, *Treaty Series*, vol. 175, p. 350); and paragraph 2 of the note dated 27 November 1961 addressed by Czechoslovakia to Mali (*ibid.*, vol. 466, p. 62).

¹⁹ See foot-note 8 above.

²⁰ See below as to Jamaica and Trinidad and Tobago.

9. Although the traffic statistics published by ICAO show for the most part both continuity and expansion, of air transport services,²⁷ especially by the airlines of the new States, Governments seem only rarely to have taken a public position on the continuity of air transport agreements formerly applicable to territories which have become independent. Thus few of the many new agreements which often grant identical or similar traffic rights to those accorded by pre-independence agreements refer to the earlier agreements, or instance, by expressly revoking them. Also there are few published instances of exchanges of diplomatic correspondence on the subject.

10. The present study records, as appropriate, (a) such specific relevant diplomatic practice as has been discovered and (b) evidence of continued or discontinued air services between the countries concerned. The value as evidence of continued or discontinued services is relative; it may reveal the legal position of the countries concerned vis-à-vis the agreement in question, but it may also be due to other reasons, including reasons quite unrelated to succession problems. The collected materials are divided into two groups "Cases of independence of former non-metropolitan territories" (section A) and "Cases other than cases of independence of former non-metropolitan territories" (section B). Section A is subdivided according to the State which was responsible for the international relations of the former non-metropolitan territories at the time when they attained independence. Within each of the subdivisions, cases are generally listed chronologically. Cases in section B are listed chronologically. The grouping has been made simply for reasons of convenience and without prejudice to any particular situation.

A. Cases of independence of former non-metropolitan territories

(a) FORMER NON-METROPOLITAN TERRITORIES FOR THE INTERNATIONAL RELATIONS OF WHICH THE UNITED KINGDOM WAS RESPONSIBLE

1. India and Pakistan

11. Air transport agreements were concluded by the Government of India with France, the Netherlands and the United States of America between 14 November 1946 and 15 August 1947, the date on which the two independent States of India and Pakistan were established. Each of the agreements was signed for the Government of India by the Indian members for External Affairs and for Communications "in agreement with His Majesty's Representative for the exercise of the

functions of the Crown in its relations with the Indian States". All provided for their termination on the giving of 12 months' notice.

France—India Agreement of 1947²⁸

12. The Agreement relating to air services was signed and came into force on 16 July 1947. It authorized French carriers *inter alia*, to operate, from France or Tunis via various points to Karachi, Delhi, Calcutta and beyond. Indian carriers were authorized to operate from points in India to Marseilles and Paris and beyond, and from India to Hanoi and Saigon and beyond. The Indian and, it appears, the French carriers were not exercising rights on these routes at the time of partition and independence.²⁹ Subsequently, however, Air France began operating on routes from Paris and Tunis which included Karachi and Calcutta, and was exercising traffic rights there,³⁰ while an Indian carrier later began operating through, and exercising traffic rights at, Paris.³¹

13. In 1950, France and Pakistan concluded a new agreement relating to air services³² French rights were almost identical with those granted in the 1947 Agreement, which is not mentioned, but with the addition of one new route. Pakistan's rights were identical except that Karachi and Dacca replaced India as the points of departure for the routes.

14. In relations between France and India, the 1947 Agreement was amended in 1961.³³ The Agreement, as thus amended in the case of India, was still listed under both India and Pakistan in the 1965 ICAO list of aeronautical agreements and arrangements.³⁴

Netherlands—India Agreement of 1947³⁵

15. The Agreement relating to air services which was signed and entered into force on 31 May 1947, gave Netherlands carriers *inter alia*, the right to operate, from Europe via intermediate points to Karachi, Delhi and Calcutta and points beyond. KLM was operating on a route which included Karachi and Calcutta before independence.³⁶ After a suspension of services about the time of independence, it began operating through, and,

²⁸ United Nations, *Treaty Series*, vol. 27, p. 325.

²⁹ See ICAO, *Digest of Statistics*, No. 17, *Traffic Flow - September 1947* Series TF, No. 2, *Supplement* (Supplementary Data), pp. 16 a - 16 b; there is no entry for French carriers.

³⁰ *Ibid.*, No. 23 *Traffic Flow - March 1948*, Series TF, No. 3, pp. 22 and 148; *ibid.*, No. 24, *Traffic Flow - September 1948*, series TF No. 4, pp. 21 and 174; and *ibid.*, No. 26, Series TF No. 5, pp. 32 and 187.

³¹ *Ibid.*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, Add.1, p. 37 a.

³² United Nations, *Treaty Series*, vol. 96, p. 23.

³³ *Ibid.*, vol. 496, p. 319.

³⁴ ICAO, *Aeronautical Agreements and Arrangements—Tables of Agreements and Arrangements registered with the Organization (January 1st - December 31st 1964)* Document 8473—LGB/215, (Montreal, January 1965) (hereafter referred to as *Tables of Agreements* (1964)), pp. 29 and 48.

³⁵ United Nations, *Treaty Series*, vol. 17, p. 65.

³⁶ See ICAO, *Digest of Statistics*, No. 16, *Traffic Flow - March 1947*, Series TF, No. 1, pp. 18 and 19.

Municipal Law and International Law (Cambridge, University Press, 1967), vol. II, p. 329). The usual period for termination is one year (*Handbook*, pp. 93-98). See also International Law Association, *The Effect of Independence on Treaties* (London, Stevens, 1965), p. 3; but cf. Lester, in *Shawcross and Beaumont on Air Law*, pp. 35 and 36.

²⁷ See e.g. the *Digest of Statistics* cited in foot-note 25 above.

it seems, exercising traffic rights at, Karachi and Calcutta a few months later.³⁷

16. An agreement was concluded between the Netherlands and Pakistan in 1952.³⁸ It provided for somewhat different routes. An exchange of notes accompanying the new agreement stated and confirmed in the following terms the "understanding" of the Governments with regard to the 1947 Indian—Netherlands Agreement:³⁹

[The agreement] which continued to be binding on the Government of Pakistan by virtue of the Indian Independence (International Arrangements) Order, 1947, will cease to be effective between Pakistan and the Netherlands with the coming into force of the Agreement signed today.

In 1951 India and the Netherlands concluded a new air transport agreement⁴⁰ which, according to ICAO,⁴¹ replaces the 1947 instrument.

*United States—India Agreement of 1946*⁴²

17. The Agreement relating to air services, signed on 14 November 1946, authorized United States airlines *inter alia*, to operate to, through and from Karachi. The route for the Indian carrier was to be agreed later. In a note of 1 June 1948 to the United States, Pakistan confirmed

that under the Indian Independence (International Agreements) Order, the Air Agreement, which was concluded and signed before the partition of India on behalf of the United India and the United States of America, should be deemed to have been concluded between Pakistan and United States of America. The Government of Pakistan consider themselves bound by the provisions of that Agreement and request... a similar confirmation on behalf of the Government of the United States of America...⁴³

The United States in its reply recalled that the United States had, in September 1947, stated that it considered the 1946 Agreement to be in effect as between Pakistan and the United States, thereby permitting the carriage of air traffic between Pakistan and India. It reaffirmed that

United States considers itself bound to comply with the terms of the ... agreement developing upon Pakistan under the Indian Independence (International Arrangements) Order of 1947.⁴⁴

³⁷ *Ibid.*, No. 17, *Traffic Flow - September 1947*, Series TF, No. 2, p. 124 (KLM operated through Colombo at that time); *ibid.*, No. 23 *Traffic Flow - March 1948*, Series TF No. 3, pp. 35, 36 and 151; *ibid.*, No. 24, *Traffic Flow - September 1948*, Series TF, No. 4, pp. 35-36; and ICAO, *Statistical Summary, No. 14, Origin and Destination of Passengers - March and September [1947 and] 1948*, document 7094-AT/708, pp. 127, 158, 162, 168, 191, 193, 202-203 and 218.

³⁸ United Nations, *Treaty Series*, vol. 150, p. 277.

³⁹ *Ibid.*, p. 294. Note also that on 5 September 1951, the Government of the Netherlands stated to ICAO that the 1947 agreement was still in force between the Netherlands and Pakistan (*ibid.*, vol. 108, p. 152, note 1).

⁴⁰ United Nations, *Treaty Series*, vol. 108, p. 151.

⁴¹ *Ibid.*, p. 152, note 1 and *Tables of Agreements (1964)*, p. 29.

⁴² United Nations, *Treaty Series*, vol. 22, p. 55.

⁴³ *Ibid.*, vol. 235, p. 30.

⁴⁴ *Ibid.*, p. 32.

18. The statistics confirm this continuity of service by one of the two United States carriers and also show that the United States carrier was carrying fifth freedom traffic on routes between Pakistan and India, traffic which before independence was prohibited to it as cabotage.⁴⁵ In 1961 Pakistan designated Pakistan International Airlines under the Agreement and proposed a specific route to the United States. The two Governments agreed to a route.⁴⁶

19. On 14 January 1954, India gave notice of the termination of the 1946 Agreement, which accordingly ceased to have effect a year later.⁴⁷

2. Ceylon

*United States—United Kingdom Agreement of 1946*⁴⁸

20. By an exchange of notes of 14 January 1948,⁴⁹ the United Kingdom and the United States "formalized" the right of United States airlines to enjoy all five freedoms in Ceylon by adding "a point in Ceylon" on two of the routes scheduled to the Bermuda Agreement as a destination in United Kingdom territory. (The United Kingdom had no parallel rights.) Ceylon became independent only 21 days later, on 4 February 1948. A United States Civil Aeronautics Board document states that "air rights at... Ceylon became ineffective upon... acquisition of dominion status by Ceylon".⁵⁰ And the ICAO statistics indicate that United States carriers exercised no rights at all at Colombo either immediately before or immediately after independence.⁵¹ Nevertheless, the Bermuda Agreement and the 1948 modification are still listed under Ceylon in *Treaties in Force*.⁵²

⁴⁵ ICAO, *Digest of Statistics No. 16, Traffic Flow - March 1947*, Series TF, No. 1, pp. 73-74 and 95; *ibid.*, No. 17, *Traffic Flow - September 1947*, Series TF, No. 2, pp. 82, 109 and 111; *ibid.*, No. 23, *Traffic Flow - March 1948*, Series TF, No. 3, pp. 104-105; *Statistical Summary No. 14, Origin and Destination of Passengers - March and September [1947 and] 1948*, document 7094-AT/708, pp. 158 and 202. The second United States carrier ceased operating through Karachi between September 1947 and March 1948.

⁴⁶ United Nations, *Treaty Series*, vol. 410, p. 310.

⁴⁷ United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XXXII, No. 813 (24 January 1955), p. 157. A new agreement was concluded in 1956 (United Nations, *Treaty Series*, vol. 272, p. 75).

⁴⁸ *Ibid.*, vol. 3, p. 253.

⁴⁹ *Ibid.*, vol. 71, p. 264.

⁵⁰ Bureau of International Affairs, Civil Aeronautics Board, "Route Grants in United States Bilateral Air Transport Agreements" in United States of America, Senate *Air Laws and Treaties of the World* (Washington, D.C., U.S. Government Printing Office, 1965) (89th Congress, 1st session), vol. III, pp. 4401 and 4421).

⁵¹ ICAO, *Digest of Statistics, No. 16, Traffic Flow - March 1947*, Series TF, No. 1, pp. 133 and 136; *ibid.*, No. 17, *Traffic Flow - September 1947*, Series TF, No. 2, pp. 143, 145 and 147; *ibid.*, No. 23 *Traffic Flow - March 1948*, Series TF, No. 3, pp. 171 and 176; and *Statistical Summary No. 14, Origin and Destination of Passengers, March and September [1947 and] 1948*, document 709-AT/708, pp. 104-105.

⁵² United States of America, Department of State, *Treaties in Force... 1971*, Department of State publication 8567 (Washington, D.C., U.S. Government Printing Office), p. 43.

So far as relations between the United Kingdom and the United States are concerned, the route schedule was revised in 1966 and no longer contains the routes including Ceylon.⁵³

3. Israel

*Netherlands—United Kingdom Agreement of 1946*⁵⁴

21. In October 1947 the Agreement of 13 August 1943 was further amended⁵⁵ to authorize a carrier designated by the Netherlands to operate to Lydda. It appears that KLM ceased to exercise these rights between March and September 1948.⁵⁶

*United States—United Kingdom Agreement of 1946*⁵⁷

22. The Bermuda Agreement gave United States airlines specific routes to, through and from Lydda. The United States Civil Aeronautics Board document mentioned above with reference to Ceylon notes that these rights too "became ineffective upon establishment of the independent State of Israel. . .".⁵⁸ Trans World Airlines stopped operating through Lydda at about the date of the independence of Israel.⁵⁹

23. The United States and Israel concluded an agreement on 13 June 1950,⁶⁰ under which airlines designated by both countries were authorized to operate between—and in the case of the United States beyond—their territories.

24. When the United Kingdom and the United States revised the schedule to their 1946 Agreement in 1966,⁶¹ they omitted those routes which included Lydda as a stopping place.

4. Ghana

*France—United Kingdom Agreement of 1946*⁶²

25. Under the Agreement of 28 February 1946, as amended in 1953, French designated carriers had traffic rights between Dakar and Douala, on the one hand, and Accra, on the other. United Kingdom carriers could operate between the Gold Coast and Fort Lamy and Abéché. According to the United Kingdom Government:

As a consequence of certain difficulties with the French over air services in West Africa, the Ghana Government in-

quired of the United Kingdom Government whether as a result of the exchange of letters concerning treaty rights and obligations signed on independence, the Ghana Government inherited obligations under various bilateral air agreements undertaken by the United Kingdom which were relevant to the territory of Ghana.

The United Kingdom Government in reply stated that, in their view, the exchange of letters referred to covered air services agreements, including the Anglo-French Agreement of 1946. The French Government, by exercising in Ghana rights under the Agreement, had tacitly accepted the inheritance by Ghana of the former obligations of the United Kingdom under the Agreement and were thereby estopped from maintaining that Ghana could not claim any rights on her side under the said Agreement.⁶³

*United Kingdom—Lebanon Agreement of 1951*⁶⁴

26. Under this Agreement signed on 15 August 1951, carriers designated by Lebanon were permitted to operate on a route including Beirut, Khartoum, Kano and Accra. The designated carrier continued to provide services after Ghana attained independence.⁶⁵ When the schedule to the Agreement was revised by Lebanon and the United Kingdom in 1959,⁶⁶ Accra was omitted from the relevant route.

*United States—United Kingdom Agreement of 1946*⁶⁷

27. Under the Bermuda Agreement, United States airlines had traffic rights from New York and Boston via specified points to Accra, Lagos or Kano and beyond to Léopoldville and Johannesburg. On 19 June 1957, the Permanent Secretary of the Ghanaian Ministry of External Affairs wrote as follows to the American *Chargé d'Affaires* at Accra:

I have the honour to address you on the subject of the international scheduled air services operated by Pan American Airways which call at Accra Airport.

2. As you will be aware, these services operate through Ghana under the terms of bilateral Agreement made between your Government and that of the United Kingdom. It is the desire of my Government that these arrangements should continue until such time as a bilateral Agreement is concluded between our Governments or until they are otherwise varied by mutual agreements.⁶⁸

28. Ghanaian officials had earlier stated that they would regard United Kingdom—United States treaties

⁵³ United Nations, *Treaty Series*, vol. 573, p. 274.

⁵⁴ *Ibid.*, vol. 4, p. 367 and vol. 11, p. 407.

⁵⁵ *Ibid.*, vol. 17, p. 358.

⁵⁶ See ICAO, *Digest of Statistics*, No. 17, *Traffic Flow - September 1947*, Series TF, No. 2, pp. 21 and 124; *ibid.*, No. 23, *Traffic Flow - March 1948*, Series TF No. 3, pp. 43 and 153; *ibid.*, No. 24, *Traffic Flow - September 1948*, Series TF, No. 4, pp. 177 and 179.

⁵⁷ See foot-note 48 above.

⁵⁸ Bureau of International Affairs, *op. cit.*, p. 4421.

⁵⁹ See ICAO, *Digest of Statistics*, No. 23, *Traffic Flow - March 1948*, Series TF, No. 3, pp. 133, 135, and 176; and *ibid.*, No. 24, *Traffic Flow - September 1948*, Series TF, No. 4, pp. 160, 162 and 206.

⁶⁰ United Nations, *Treaty Series*, vol. 212, p. 93.

⁶¹ See foot-note 53 above.

⁶² United Nations, *Treaty Series*, vol. 27, p. 173; *ibid.*, vol. 175, p. 346.

⁶³ United Nations, *Materials on Succession of States*, p. 192.

⁶⁴ United Nations, *Treaty Series*, vol. 160, p. 327.

⁶⁵ ICAO, *Digest of Statistics*, No. 68, *Traffic Flow - September 1956*, Series TF, No. 20, p. 128; *ibid.*, Nos. 69-70, *Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, p. 93 (Corr.1) and *ibid.*, No. 74, *Traffic Flow - September 1958*, Series TF, No. 24, p. 90.

⁶⁶ United Nations, *Treaty Series*, vol. 351, p. 406.

⁶⁷ See foot-note 48 above.

⁶⁸ Ch. I. Bevans, "Ghana and United States-United Kingdom agreements", in *American Journal of International Law* (Washington, D.C.), vol. 59, No. 1 (January 1965), pp. 93-94 and *International Law Association, op. cit.*, pp. 382-383. Bevans adds:

"The Ghanaian request appears to have been made in anticipation of a request from Pan American Airways for certain route and schedule changes for its services operating through Ghana."

affecting Ghana as remaining in effect for three months from 6 March 1957, the date of independence, pending the conclusion of more permanent arrangements.⁶⁹ This informal understanding remained in effect after that time and on 4 September 1957 the United States proposed that a formal undertaking should replace the informal agreement and that certain treaties, which it listed, should be continued in force. Included in the list was the Bermuda Agreement. In its reply, Ghana referred to its devolution agreement of 25 November 1957 with the United Kingdom⁷⁰ whereby, it said, the international rights and obligations under treaties and agreements entered into between the Government of the United Kingdom of Great Britain and Northern Ireland on the one hand and any other Government on the other and applied to the Gold Coast have been formally transferred to Ghana with effect from 6 March 1957 in so far as their nature admits of such transfer.

The Ghanaian note concluded by pointing out that the devolution agreement did not "preclude the possibility of negotiating about the continuing in force of any particular clause or clauses of any existing treaties or any reservations that either party might wish to raise at some future date," and by asking the United States to confirm that this procedure was acceptable to it, and also that the specific treaties listed by the United States in its note were considered as covered by the devolution agreement.⁷¹ In its reply, the United States confirmed both that the procedure was acceptable and that the devolution agreement was considered to cover the treaties listed in the earlier note dated 4 September 1957.⁷² The statistics show that Pan American Airways flights continued on the same route (New York—Boston—Santa Maria—Lisbon—Dakar—Robertsfield—Accra—Léopoldville—Johannesburg) after independence, with an increasing frequency and capacity through Accra.⁷³

5. Federation of Malaya.

*Thailand—United Kingdom Agreement of 1950*⁷⁴

29. Under the Agreement for air services signed on 10 November 1950, the airlines designated by Thailand were authorized to operate between Bangkok and Singapore via optional intermediate points (Songkhla, Penang and Kuala Lumpur). The United Kingdom routes included Singapore to Bangkok and points beyond, via Penang, Songkhla, Mergui and Kuala Lumpur.⁷⁵ The Thai airline continued to provide services on a route

which included Bangkok and Penang after the Federation of Malaya became independent on 31 August 1957, at approximately the same frequency.⁷⁶

6. Cyprus

*United Kingdom—Greece Agreement of 1945*⁷⁷

30. Under a 1950 amendment,⁷⁸ to the Agreement for air services in Europe (of 26 November 1945), United Kingdom carriers were authorized to operate services on the route Nicosia—Rhodes or Crete—Athens (the intermediate stop could be omitted if desired), while Greek carriers were authorized to operate services on the same route and on either the route Athens—Rhodes or Crete—Nicosia—Lydda or the route Athens—Rhodes or Crete—Nicosia—Beirut; a choice had to be made within a prescribed period. In fact in March 1960, Cyprus Airways, the airline designated by the United Kingdom, was operating on the Athens—Nicosia route and also to points beyond, while Olympic Airways, designated by Greece, was operating on both the Athens—Nicosia—Beirut and the Athens—Nicosia—Tel Aviv routes.⁷⁹ Services on substantially similar routes at similar frequencies were operated by both airlines following the attainment of independence by Cyprus in 1960: Cyprus Airways continued to operate between Athens and Nicosia and beyond, while Olympic Airways continued to operate services on the Athens—Nicosia—Beirut route and between Athens and Tel Aviv without calling at Nicosia. This practice is in accordance with the 1950 amendment to the Greece—United Kingdom Agreement.⁸⁰

31. On 23 December 1961, Greece and Cyprus concluded an Agreement on Commercial Scheduled air transport which stated in article 18:

The present Agreement shall supersede and cancel any previous agreements concerning air services between the Contracting Parties.^{81, 82}

The routes assigned were similar to those fixed in the 1950 amendment for Greece.

⁷⁶ See ICAO, *Digest of Statistics*, Nos. 69-70, *Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, p. 197, and *ibid.*, No. 72, *Traffic Flow - March 1958*, Series TF, No. 23, p. 173. These statistics do not indicate whether Malayan Airways, which was operating a service on the Penang-Bangkok route before independence, continued to do so immediately afterwards.

⁷⁷ United Nations, *Treaty Series*, vol. 35, p. 163.

⁷⁸ *Ibid.*, vol. 77, p. 352.

⁷⁹ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, pp. 36 and 102.

⁸⁰ *Ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF No. 28, pp. 29 and 45 and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, pp. 27 and 35.

⁸¹ United Nations, *Treaty Series*, vol. 497, p. 336.

⁸² No provision to this effect is to be found in the following agreements concluded by Cyprus with States whose airlines had no traffic rights in that country before it became independent: with Denmark, on 27 April 1963 (United Nations, *Treaty Series*, vol. 529, p. 255); with Hungary, on 2 June 1964 (*ibid.*, vol. 602, p. 3); with Norway, on 5 March 1963 (*ibid.*, vol. 563, p. 305); and with the USSR on 29 February 1964 (*ibid.*, vol. 602, p. 45).

⁶⁹ United Nations, *Materials on Succession of States (op. cit.)*, pp. 211-212.

⁷⁰ United Nations, *Treaty Series*, vol. 287 and *Materials on Succession of States (op. cit.)*, p. 30.

⁷¹ United Nations, *Materials on Succession of States (op. cit.)*, pp. 212-213.

⁷² *Ibid.*, pp. 211 and 213.

⁷³ See ICAO, *Digest of Statistics*, No. 68, *Traffic Flow - September 1956*, Series TF, No. 20, p. 295; and *ibid.*, Nos. 69-70, *Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, pp. 287-288.

⁷⁴ United Nations, *Treaty Series*, vol. 96, p. 77.

⁷⁵ Kuala Lumpur was added by amendments accepted in 1960 and 1961 (*ibid.*, vol. 412, p. 312 and vol. 420, p. 342).

*United Kingdom—Israel Agreement of 1950*⁸³

32. Airlines designated by the United Kingdom and Israel under the Agreement for air services of 6 December 1950 had the right to provide air services between Cyprus and Israel. Cyprus Airways and El-Al continued to operate on this route after the attainment of independence by Cyprus.⁸⁴

*United Kingdom—Lebanon Agreement of 1951*⁸⁵

33. The Agreement of 15 August 1951, as amended in 1959,⁸⁶ authorized a United Kingdom designated carrier to operate on the route: Doha—Bahrein—Kuwait—Basra or Baghdad or Amman—Damascus—Beirut—Nicosia. The Lebanese airline was authorized to provide services between Beirut, Nicosia and Ankara. (Intermediate points might be omitted provided the services began in United Kingdom and Lebanese territory respectively.)

34. Cyprus Airways was operating on the above United Kingdom route immediately before, and continued to operate at about the same frequency after, the attainment of independence by Cyprus.⁸⁷ Air Liban and Middle East Airlines, designated by Lebanon, also continued to exercise traffic rights at Nicosia.⁸⁸

35. Apparently, no new agreement has been concluded between Cyprus and Lebanon.⁸⁹ When Lebanon and the United Kingdom further revised the schedule to their 1951 Agreement in 1962, i.e. following Cyprus's accession to independence, Nicosia was omitted from the relevant routes.⁹⁰

*United Kingdom—Syria Agreement of 1954*⁹¹

36. The Agreement of 30 January 1954 for scheduled civil air services provided, *inter alia*, that designated United Kingdom airlines might operate, on the following routes:

Nicosia—Damascus—Bagdad—Basra or Abadan—Kuwait—Bahrain;
Nicosia—Aleppo and/or Damascus.

(As usual, intermediate points on any route might be

omitted.) Syrian designated carriers were to operate from Syria to United Kingdom territory and beyond on routes to be determined later. In the period prior to the independence of Cyprus, Cyprus Airways, a carrier designated by the United Kingdom, was operating on a route which included Nicosia and Damascus.⁹² Following independence it was providing a direct Nicosia—Damascus service.⁹³

37. On 22 December 1964, Cyprus and the Syrian Arab Republic concluded an agreement article 20 of which provides that

The present Agreement shall supersede and cancel any previous agreements concerning air services between the Contracting Parties.^{94, 95}

Carriers designated by the Syrian Arab Republic may operate on the Syria—Nicosia route and beyond to certain specified cities; Cypriot airlines may operate on the following routes: points in Cyprus—Damascus or Aleppo; points in Cyprus—Damascus or Aleppo—Bahrain—Doha—Dubai; points in Cyprus—Damascus or Aleppo—Baghdad—Bahrain.

*United Kingdom—Turkey Agreement of 1946*⁹⁶

38. By amendments of 1948⁹⁷ and 1951⁹⁸ to the Agreement for air services of 12 February 1946, carriers designated by the United Kingdom and by Turkey were authorized to operate on the Nicosia—Ankara—Istanbul route and on the Istanbul and/or Ankara—Nicosia—Beirut and/or Damascus—Cairo route, respectively. Cyprus Airways, which was designated by the United Kingdom before Cyprus attained independence,⁹⁹ continued to operate on the first route after independence¹⁰⁰ at the same frequency and capacity.

7. Nigeria

*Belgium—United Kingdom Agreement of 1951*¹⁰¹

39. Under the Agreement for air services of 8 May 1951, the Belgian carrier SABENA had non-traffic rights through Kano. (United Kingdom carriers had no equivalent route.) SABENA continued to provide services through Kano after Nigeria became independent.¹⁰²

⁸³ *Ibid.*, vol. 151, p. 33.

⁸⁴ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, series TF, No. 27, pp. 43 and 102; *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 29 and Add.1, p. 54 b and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, pp. 27 and 44.

⁸⁵ United Nations, *Treaty Series*, vol. 160, p. 327.

⁸⁶ *Ibid.*, vol. 351, p. 406.

⁸⁷ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, p. 102; *ibid.* No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 29; and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 27.

⁸⁸ *Ibid.*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, Add.1, p. 48 a and Add.2, p. 48 a and *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, Add.1, p. 58 a and c and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, Add.1, p. 50 a, b and c.

⁸⁹ None appears either in the *Tables of Agreements* (1964) or in any of its four annual supplements (1965-1969).

⁹⁰ United Nations, *Treaty Series*, vol. 457, p. 302.

⁹¹ *Ibid.*, vol. 449, p. 47.

⁹² ICAO, *Digest of Statistics*, No. 78, *Traffic Flow - September 1959*, Series TF, No. 26, p. 111 and *ibid.*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, p. 102.

⁹³ *Ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 29 and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 27.

⁹⁴ United Nations, *Treaty Series*, vol. 602, p. 40.

⁹⁵ See also para. 31 and foot-note 82 above.

⁹⁶ United Nations, *Treaty Series*, vol. 6, p. 79.

⁹⁷ *Ibid.*, vol. 35, p. 364.

⁹⁸ *Ibid.*, vol. 108, p. 310.

⁹⁹ *Ibid.*, p. 312.

¹⁰⁰ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, p. 102; *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 29 and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 27.

¹⁰¹ United Nations, *Treaty Series*, vol. 158, p. 451.

¹⁰² ICAO, *Digest of Statistics*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 8; and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 10.

According to one writer,¹⁰⁸ Nigeria then negotiated a more liberal permit, without questioning the validity of the earlier one.

*United Kingdom—Federal Republic of Germany Agreement of 1955*¹⁰⁴

40. Under the Agreement for air services of 22 July 1955, carriers designated by the United Kingdom could operate services on a route: points in the United Kingdom—Frankfurt, Dusseldorf, Munich—via intermediate stops to points in West Africa and in South Africa. West African Airways Corporation (Nigeria) operated services on a route including London, Frankfurt, Kano and Lagos before Nigeria became independent and continued to do so afterwards. Apparently no carrier was designated by the Federal Republic of Germany for the parallel route. When the routes in the 1955 Agreement were revised by the United Kingdom and the Federal Republic of Germany in 1962, after Nigeria became independent, the two routes mentioned above were deleted.¹⁰⁵

*United Kingdom—Ghana Agreement of 1958*¹⁰⁶

41. Several of the routes assigned to Ghanaian and United Kingdom carriers by the Agreement for air services of 24 September 1958 allowed traffic between Accra and Lagos/Kano and beyond at either end. West African Airways Corporation (Nigeria) and Ghana Airways continued to provide services on these routes after Nigeria had become independent.¹⁰⁷

*United Kingdom—Lebanon Agreement of 1951*¹⁰⁸

42. Under the 1959 revised schedule,¹⁰⁹ carriers designated by Lebanon were permitted to operate on a route including Beirut, Khartoum, Kano and Lagos and beyond. Lebanese carriers continued to provide this service after the independence of Nigeria at the same frequency.¹¹⁰ When the schedule was again revised by Lebanon and the United Kingdom in 1962,¹¹¹ the above route was deleted.

*United Kingdom—Libya Agreement of 1953*¹¹²

43. Two of the routes assigned to United Kingdom carriers by the Agreement for air services of 21 February 1953 were: "London—Rome—Tripoli—Kano—Lagos

—Accra—Freetown", and "Points in British West Africa—Tripoli". West African Airways Corporation (Nigeria) did not apparently exercise these rights at Tripoli before September 1960,¹¹³ but it did subsequently (at about the time Nigeria became independent) start to provide services on a Lagos—Tripoli—London route.¹¹⁴ Kingdom of Libya Airlines did not commence international operations until 1965.¹¹⁵

*United Kingdom—Portugal Agreement of 1945*¹¹⁶

44. Under the Agreement for air services of 6 December 1945, as revised in 1952,¹¹⁷ carriers designated by Portugal were permitted to operate on a route including Lisbon, Kano, Luanda and Lourenço Marques. The airlines designated by Portugal continued to provide this service after Nigeria became independent.¹¹⁸

*United Kingdom—Spain Agreement of 1950*¹¹⁹

45. The 1959 schedule¹²⁰ to the Agreement for air services of 20 July 1950 authorized an air carrier designated by the United Kingdom to provide services on a route including London, Frankfurt, Barcelona, Kano and Lagos. A Spanish carrier was authorized to operate on a route including Madrid—Monrovia—Lagos or Kano.¹²¹ West African Airways Corporation (Nigeria) continued to operate on the above-mentioned route for a United Kingdom designated air carrier following Nigeria's accession to independence.¹²²

*United States—United Kingdom Agreement of 1946*¹²³

46. Under this Agreement, carriers designated by the United States were authorized to operate from New York via specified points to Lagos and beyond to Léopoldville and Johannesburg. Pan American apparently did not operate services on this route in the period imme-

¹¹³ ICAO, *Digest of Statistics*, No. 77, *Traffic Flow - March 1959*, Series TF, No. 25, p. 101; *ibid.*, No. 78, *Traffic Flow - September 1959*, Series TF, No. 26, p. 113; *ibid.*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, p. 105; *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 116.

¹¹⁴ *Ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, Add.1, p. 66 a.

¹¹⁵ *Ibid.*, No. 135, *Traffic, 1960-1967*, Series T, No. 27, p. 457.

¹¹⁶ United Nations, *Treaty Series*, vol. 6, p. 3.

¹¹⁷ *Ibid.*, vol. 136, p. 378.

¹¹⁸ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, p. 68; *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 78; *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 71 and *ibid.*, No. 92, *Traffic Flow - September 1961*, Series TF, No. 30, p. 89.

¹¹⁹ United Nations, *Treaty Series*, vol. 398, p. 101.

¹²⁰ *Ibid.*, p. 130.

¹²¹ Apparently none was operating services on the prescribed route at the time Nigeria became independent.

¹²² ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, p. 105; *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 116 and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, Add.1, p. 66 a.

¹²³ See foot-note 48 above.

¹⁰⁸ D.P. O'Connell, *op. cit.*, pp. 329-330.

¹⁰⁴ United Nations, *Treaty Series*, vol. 269, p. 189.

¹⁰⁵ *Ibid.*, vol. 449, p. 10.

¹⁰⁶ *Ibid.*, vol. 411, p. 145.

¹⁰⁷ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, p. 105; *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 116 and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, Add.1, p. 66 a and Add.3, p. 34 a.

¹⁰⁸ See foot-note 85 above.

¹⁰⁹ See foot-note 86 above.

¹¹⁰ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27 Add.2, p. 48 a and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, Add.1, p. 50 a.

¹¹¹ United Nations, *Treaty Series*, vol. 457, p. 302.

¹¹² *Ibid.*, vol. 311, p. 115.

diately before Nigeria became independent,¹²⁴ but it did subsequently provide them.¹²⁵ The United States Civil Aeronautics Board has stated that Nigeria, on 1 October 1960, agreed to assume the applicable provisions of international agreements of the United Kingdom "including the United States—United Kingdom Air Transport Agreement. . .".¹²⁶

8. Jamaica and Trinidad and Tobago

*United Kingdom—Canada Agreement of 1949*¹²⁷

47. Air carriers designated by Canada under the Agreement for air services of 19 August 1949 were permitted to operate on routes from Toronto and Montreal to Jamaica and Trinidad. Trans-Canada Air Lines continued to operate at the same frequency the services it had been providing from Toronto before the independence of Jamaica and Trinidad and Tobago, and later provided services from Montreal as well.¹²⁸

France—United Kingdom Agreement of 1946

48. The 1946 Agreement, as amended in 1953,¹²⁹ provided for French routes between Fort-de-France and Barbados, Trinidad and British Guiana and to certain points beyond. The United Kingdom carrier was permitted to operate from Trinidad via specified points to Guadeloupe and Martinique and beyond to specified points, and from British Guiana via Paramaribo to Cayenne and beyond to Brazil.

49. Prior to the accession of Trinidad and Tobago to independence, British West Indian Airways was operating on two routes which included Guadeloupe and Martinique. It continued to provide almost identical services, at the same frequency, following the attainment of independence by Trinidad and Tobago.¹³⁰

50. On 12 October 1964, Trinidad and Tobago concluded an air transport agreement with France providing

for similar routes;¹³¹ this agreement does not mention the earlier France—United Kingdom Agreement. Trinidad and Tobago has since concluded an agreement with the United Kingdom¹³² in which its right to operate to points in United Kingdom territories on the above routes is provided for.

*Netherlands—United Kingdom Agreement of 1946*¹³³

51. Under this Agreement, Netherlands carriers were authorized to operate services on a route Curaçao, Trinidad, Georgetown to Paramaribo. KLM, which had been operating services on this route and other in the Caribbean prior to the independence of Trinidad and Tobago, continued to provide services at the same frequency.¹³⁴

52. On 3 July 1967, the Netherlands and Trinidad and Tobago concluded an Agreement for the establishment and operation of air services.¹³⁵ This Agreement authorized Dutch carriers to operate services on the routes provided for in the 1946 Agreement, together with some new routes. The 1967 Agreement also gave rights to Trinidad and Tobago, more extensive than those allowed to United Kingdom carriers in the 1946 Agreement. The new Agreement did not refer to the 1946 Agreement.

*United States—United Kingdom Agreement of 1946*¹³⁶

53. Under the Bermuda Agreement as amended up to 1956, airlines designated by the United Kingdom had traffic rights between various points in its Caribbean territories, including Trinidad and Jamaica, and various points in the United States. United States carriers had rights between various United States cities and, among other territories Jamaica and Trinidad. In June 1961, delegations representing the West Indies, the United Kingdom and the United States reached provisional agreement on additional air services. The United States was given the right to operate service on two new routes to Jamaica. According to a United States press statement at the time,

A route between Antigua and New York is granted to the United Kingdom until the West Indies achieves independent status, now scheduled to take place May 31, 1962. At the time, it will become a route for the West Indies [. . .]

This arrangement will run until October 1, 1962, and is subject to further extension by mutual agreement of the West Indies and the United States.¹³⁷

By an exchange of notes of 22 November 1961, the Governments of the United Kingdom and the United

¹²⁴ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, pp. 116-117 and *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 128.

¹²⁵ *Ibid.*, No. 95, *Traffic Flow - March 1962*, Series TF, No. 31, p. 138.

¹²⁶ Bureau of International Affairs, *op. cit.*, p. 4414; also *ibid.*, pp. 4430 and 4439, note 7. The Agreement is also listed under Nigeria in United States of America, *Treaties in Force...* 1971, p. 172, which also reproduces the relevant provisions of the Agreement of 1 October 1960 between Nigeria and the United Kingdom concerning the devolution of treaty obligations. The United States Civil Aeronautics Board statement appears to refer to this Agreement.

¹²⁷ United Nations, *Treaty Series*, vol. 44, p. 223.

¹²⁸ ICAO, *Digest of Statistics*, No. 95, *Traffic Flow - March 1962*, Series TF, No. 31, p. 19; *ibid.*, No. 98, *Traffic Flow - September 1962*, Series TF, No. 32, p. 20; and *ibid.*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, p. 18.

¹²⁹ See foot-note 62 above.

¹³⁰ ICAO, *Digest of Statistics*, No. 95, *Traffic Flow - March 1962*, Series TF, No. 31, Add.1, p. 114 a and *ibid.*, No. 98, *Traffic Flow - September 1962*, Series TF, No. 32, p. 108. The only difference is that, in September, one of the routes included an additional stop in a territory for the international relation of which the United Kingdom was responsible.

¹³¹ United Nations, *Treaty Series*, vol. 535, p. 25.

¹³² *Ibid.*, vol. 606, p. 149.

¹³³ See foot-note 54 above.

¹³⁴ ICAO, *Digest of Statistics* No. 95, *Traffic Flow - March 1962*, Series TF, No. 31, p. 71; *ibid.*, No. 98, *Traffic Flow - September 1962*, Series TF, No. 32, p. 77 and *ibid.*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, p. 80.

¹³⁵ United Nations, *Treaty Series*, vol. 646, p. 117.

¹³⁶ See foot-note 48 above.

¹³⁷ United States of America, *Department of State Bulletin* (Washington, D.C.), vol. XLV, No. 1151 (17 July 1961), pp. 118-119.

States of America confirmed this agreement.¹³⁸ In fact, however, the Federation of the West Indies was dissolved and did not become independent as a single entity. Instead, Jamaica and Trinidad and Tobago became separate, independent States and Antigua (which was to have become part of the independent Federation) remained a territory administered by the United Kingdom.

54. Following their accession to independence in August 1962, Trinidad and Tobago and Jamaica exchanged notes with the United States of America relating to the continued application of the 1946 Agreement, as amended, and the collateral exchange of notes dated 22 November 1961. The United States note to Trinidad and Tobago, after referring to the 1946 and 1961 instruments, reads in part as follows:

With the assumption by the Government of Trinidad and Tobago of pertinent international civil aviation rights and obligations of the United Kingdom, it is understood that the provisions of the agreements under reference will continue to apply to the operation of scheduled services between the United States and the Caribbean area by the airlines of the United States and Trinidad and Tobago pending the conclusion of a new air transport agreement between the two Governments. While the Government of the United States of America wishes to register its willingness to negotiate a new agreement with the Government of Trinidad and Tobago at a mutually convenient future date, there is no urgency with respect to the basic Agreement, which is of indefinite duration. On the other hand, with the expiration of the collateral exchange of notes on October 1, 1962, it appears beneficial to both Governments to make some interim arrangement assuring the temporary continuance of the rights exercised thereunder.¹³⁹

The United States note to Jamaica contains a similar passage.¹⁴⁰ In both, the United States proposed an extension of the rights accorded, until a further agreement should supersede them.

55. In its note to Trinidad and Tobago, the United States "accordingly" undertook to concur in the continuation of services by British West Indian Airways between New York and Antigua "pending conclusion of suitable underlying intergovernmental arrangements".¹⁴¹

56. In its note to Jamaica the United States concluded:

Accordingly, it would be understood that the Government of Jamaica would assent to the continuance of present airline services operated between New York and Jamaica by Pan American World Airways, Inc. It is further understood that, pending conclusion of a bilateral air transport agreement, or other suitable arrangements, the United States Government, to the extent of its legal powers, would pose no objection to the continuance for the time being of airline services to the United States originating in Jamaica and operated by British West Indian Airways, although the latter bears the nationality of Trinidad and Tobago.¹⁴²

¹³⁸ United Nations, *Treaty Series*, vol. 425, p. 296.

¹³⁹ United Nations, *Materials on Succession of States (op. cit.)*, p. 220.

¹⁴⁰ *Ibid.*, pp. 221-222.

¹⁴¹ *Ibid.*, pp. 220-221.

¹⁴² *Ibid.*, p. 222. Jamaica and the United States, on 2 October 1969, concluded a new agreement which "superseded prior agreements relating to air transport agreements in effect between the United States of America and Jamaica", with a

57. Both Trinidad and Tobago and Jamaica agreed to the proposal for the extension of the rights accorded under the earlier arrangements. Delta Airlines and Pan American (designated by the United States) and British West Indian Airways continued to provide substantially the same services as before independence.¹⁴³

58. On 27 May 1966 the United Kingdom and the United States revised the schedule (as amended) to the 1946 Agreement.¹⁴⁴ The new schedule contains no United States routes corresponding to those discussed above.

9. Kenya

*Agreements of 1952 and 1946 between the United Kingdom and Denmark, Norway and Sweden*¹⁴⁵

59. Under these Agreements, the carrier designated by Denmark, Norway and Sweden (SAS) was authorized to operate services on a route from points in Scandinavia via specified European and Middle Eastern points, Khartoum, Nairobi, to Durban or Johannesburg. SAS had been providing a service on this route before Kenya became independent and continued to provide it afterwards at the same frequency and capacity.¹⁴⁶

*United Kingdom—Ethiopia Agreement of 1958*¹⁴⁷

60. Under this Agreement, air lines designated by Ethiopia and the United Kingdom were authorized, *inter alia*, to operate services between Nairobi and Addis Ababa, Ethiopian Air Lines continued to operate services on this route after Kenya became independent.¹⁴⁸

*United Kingdom—Israel Agreement of 1950*¹⁴⁹

61. Under this Agreement, an airline designated by Israel was authorized to operate from Lydda via Nairobi

reservation in respect of existing services (United States of America, *Department of State Bulletin* (Washington, D.C.) vol. LXI, 1969, p. 430).

¹⁴³ ICAO, *Digest of Statistics, No. 95, Traffic Flow - March 1962*, Series TF, No. 31, pp. 132, 141-142, 143-144, 148; and Add.1, p. 114 a; *ibid.*, No. 98, *Traffic Flow - September 1962*, Series TF, No. 32, pp. 108, 141, 148, 150, 151, 156-157; *ibid.*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, pp. 110, 143, 149, 150-151, 157.

¹⁴⁴ United Nations, *Treaty Series*, vol. 573, p. 274.

¹⁴⁵ Agreement between the United Kingdom and Denmark for air services between and beyond their respective territories, signed on 23 June 1952 (United Nations, *Treaty Series*, vol. 151, p. 3), amended in 1953 (*ibid.*, vol. 172, p. 392); Agreement between the United Kingdom and Norway for air services between and beyond their respective territories, signed on 23 June 1952 (*ibid.*, vol. 151, p. 81); amended in 1953 (*ibid.*, vol. 172, p. 396); Agreement between the United Kingdom and Sweden relating to air services, signed on 27 November 1946 (*ibid.*, vol. 11, p. 229, vol. 35, p. 367 and vol. 53, p. 408), amended in 1952 (*ibid.*, vol. 150, p. 336) and in 1953 (*ibid.*, vol. 172, p. 328).

¹⁴⁶ ICAO, *Digest of Statistics, No. 108, Traffic Flow - September 1963*, Series TF, No. 34, p. 107 and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, p. 104.

¹⁴⁷ United Nations, *Treaty Series*, vol. 331, p. 3.

¹⁴⁸ ICAO, *Digest of Statistics, No. 98, Traffic Flow - September 1962*, Series TF, No. 32, p. 26 and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, p. 35.

¹⁴⁹ See foot-note 83 above.

to Johannesburg. After Kenya became independent,¹⁵⁰ El-Al continued to provide this service at about the same frequency.

10. Botswana and Lesotho

*United States—United Kingdom Agreement of 1946*¹⁵¹

62. This Agreement was covered by the exchange of notes between the United States and Botswana, of 30 September 1966,¹⁵² the date when Botswana attained independence, and the exchange of notes between the United States and Lesotho of 4 October 1966,¹⁵³ the date when Lesotho attained independence, concerning the continuance in force of agreements which applied to Botswana and Lesotho before they became independent. Under the terms of these exchanges of notes, the 1946 Bermuda Agreement was to remain in force for twenty-four months, i.e., until 30 September 1968 in the case of Botswana, and for twelve months, subsequently extended to twenty-four, i.e., until 4 October 1968, in the case of Lesotho. The United States publication *Treaties in Force... 1969* listed the Bermuda Agreement under both Botswana and Lesotho, and noted in each case, that an extension of the Agreement relating to the continuance of treaties was under negotiation as at 1 January 1969.¹⁵⁴ *Treaties in Force... 1970* and *Treaties in Force... 1971* continue to list the Agreement, with the same note, but only under Botswana.¹⁵⁵

63. The United States was not granted any traffic rights in either Botswana (formerly Bechuanaland Protectorate) or Lesotho (formerly Basutoland) by the Bermuda Agreement.

11. Gambia

*United Kingdom—Portugal Agreement of 1945*¹⁵⁶

64. Under this Agreement the carrier designated by Portugal was authorized to operate between Lisbon and Lourenço Marques via Bathurst. According to one report,¹⁵⁷ Portugal continued to exercise these rights after Gambia became independent. Gambia has not

denied continuity but it may wish to reserve its position so far as the possible future termination of the agreement is concerned.

12. Guyana

*Netherlands—United Kingdom Agreement of 1946*¹⁵⁸

65. Carriers designated by the Netherlands under this Agreement were authorized to operate on a route including Curaçao, Trinidad, Georgetown and beyond. After Guyana became independent, KLM continued to operate services on this route at the same frequency.¹⁵⁹

*United States—United Kingdom Agreement of 1946*¹⁶⁰

66. The Bermuda Agreement authorized carriers designated by the United States to operate on a route from New York and Miami, with certain optional intermediate points, to a number of points including British Guiana and beyond. Pan American continued to operate services, at the same frequency, through Georgetown after Guyana became independent on 26 May 1966.¹⁶¹ The Agreement was listed under Guyana in the 1970 and 1971 editions of *Treaties in Force*.¹⁶² When the schedule to the 1946 Agreement was revised by the United Kingdom and the United States on 27 May 1966,¹⁶³ this route was no longer included.

13. Barbados

*United Kingdom—Canada Agreement of 1949*¹⁶⁴

67. Under this Agreement a carrier designated by Canada had the right to fly on a route from Toronto or Montreal to Barbados and beyond. Air Canada continued to provide this service after Barbados became independent.¹⁶⁵

United Kingdom—United States Agreement of 1946

68. One of the United States routes in the schedule to the Bermuda Agreement as revised on 27 May

¹⁵⁸ See foot-note 54 above.

¹⁵⁹ ICAO, *Digest of Statistics*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, table 144; *ibid.*, No. 130, *Traffic Flow - September 1966*, Series TF, No. 40, tables 147 and 148; *ibid.*, No. 134, *Traffic Flow - March 1967*, Series TF, No. 41, tables 144 and 145.

¹⁶⁰ See foot-note 48 above.

¹⁶¹ ICAO, *Digest of Statistics*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, table 272; *ibid.*, No. 130, *Traffic Flow - September 1966*, Series TF, No. 40, table 283; *ibid.*, No. 134, *Traffic Flow - March 1967*, Series TF, No. 41, table 282.

¹⁶² United States of America, Department of State, *Treaties in Force... 1970*, p. 99 and *ibid.*... 1971, p. 101, in which is set out the Statement made by Guyana concerning on 27 May 1966 by the United Kingdom and the United States is also listed.

¹⁶³ United Nations, *Treaty Series*, vol. 573, p. 274.

¹⁶⁴ See foot-note 127 above.

¹⁶⁵ ICAO, *Digest of Statistics*, No. 130, *Traffic Flow - September 1966*, Series TF, No. 40, table 33; *ibid.*, No. 134, *Traffic Flow - March 1967*, Series TF, No. 41, tables 32 and 33.

¹⁵⁰ ICAO, *Digest of Statistics*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34, p. 70 and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, p. 69. According to O'Connell (*op. cit.*, vol. II, p. 332), Israel sought negotiations, but they were discontinued, and El-Al operates under a provisional licence.

¹⁵¹ See foot-note 48 above.

¹⁵² For the relevant passage of the exchange of notes, see *Yearbook of the International Law Commission*, 1970, vol. II, p. 119, document A/CN.4/229, para. 91.

¹⁵³ *Ibid.*, para. 92.

¹⁵⁴ United States of America, Department of State, *Treaties in Force... 1969*, pp. 20 and 136.

¹⁵⁵ *Id.*, *Treaties in Force... 1970* (Washington, D.C., U.S. Government Printing Office pp. 20 and 140; *Treaties in Force... 1971*, pp. 22 and 143.

¹⁵⁶ See foot-note 116 above.

¹⁵⁷ International Law Association, *op. cit.*, p. 37. See also Shearer, "La Succession d'Etats et les traités non localisés", in *Revue générale du droit international public* (Paris, 3^e série, t. XXXV, No. 1 (January-March 1964) pp. 20-21.

1966¹⁶⁶—about six months before Barbados became independent—was New York via various intermediate points to Barbados. Pan American continued to provide flights on this route after Barbados became independent.¹⁶⁷

14. *Cyprus, Gambia, Malta, Mauritius, Sierra Leone, Swaziland, United Republic of Tanzania and Zambia*

*United States—United Kingdom Agreement of 1946*¹⁶⁸

69. This Agreement, with any relevant amendments, is listed under each of the above States¹⁶⁹ in the United States publication, *Treaties in Force*.¹⁷⁰ The list also reproduces in each case the relevant provisions of either the devolution agreement concluded by the new State (Cyprus, Gambia, Malta, Sierra Leone)¹⁷¹ or the unilateral declaration by the new State, addressed to the Secretary-General of the United Nations, concerning its treaty rights and obligations, (Mauritius, Swaziland, United Republic of Tanzania and Zambia).¹⁷² An Assistant Legal Adviser to the United States Department of State has described the practice as follows:

Where a new State has signed a devolution agreement with the parent country or otherwise undertaken in general terms to acknowledge the continuance in force of agreements applied to it as a territory, that fact is noted in "Treaties in Force". The Department of State undertakes, with due regard for practical considerations, to determine which bilateral agreements of the parent country with the United States may clearly be considered as covered by the new State's general acknowledgement. These are listed under the name of the new State in "Treaties in Force".¹⁷³

The foreword to United States *Treaties in Force* reads, in part, as follows:

¹⁶⁶ See foot-note 163 above.

¹⁶⁷ ICAO, *Digest of Statistics, No. 130, Traffic Flow - September 1966*, Series TF, No. 40 table 284; *ibid.*, No. 134, *Traffic Flow - March 1967*, Series TF, No. 41, tables 282 and 286.

¹⁶⁸ See foot-note 48 above.

¹⁶⁹ Also Botswana (para. 62 above), Ceylon (para. 20 above), Ghana (para. 25 above), Guyana (para. 66 above), Jamaica (until a new agreement was concluded in 1969) (para. 54 above), Nigeria (para. 46 above) and Trinidad and Tobago (para. 54 above).

¹⁷⁰ United States of America, Department of State, *Treaties in Force*... 1971, pp. 61, 85, 153, 155, 212, 218 and 259. The Relevant air transport agreements concluded by the United States with Belgium and France respectively, are also listed under the People's Republic of the Congo, the Democratic Republic of the Congo and Madagascar (*ibid.*, pp. 55 and 150). In the case of Gambia, it is also noted that the United States has taken cognizance of the Gambia-United Kingdom devolution agreement and is currently reviewing its own position in the matter.

¹⁷¹ For the full texts of the agreements, see United Nations, *Treaty Series*, vol. 382, p. 8; vol. 420, p. 11; vol. 525, p. 221; *Materials on Succession of State*, pp. 21 and 176.

¹⁷² For the text of the unilateral declarations, see *Materials on Succession of States*, p. 177 and the second report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur, (*Yearbook of the International Law Commission*, 1969, vol. II, pp. 62-65, document A/CN.4/214 and Add.1 and 2, section II, paras. 1 to 11 of the commentary to article 4).

¹⁷³ Ch. I. Bevans, *op. cit.*, p. 97.

In case of new countries, the absence of a listing for the country or the absence of any particular treaty, should not be regarded as an absolute determination that a certain treaty or certain treaties are not in force.¹⁷⁴

70. A document published in 1965, prepared by the United States Civil Aeronautics Board,¹⁷⁵ lists among others, agreements with Ghana, Nigeria and Pakistan.¹⁷⁶ The differences between this partial list and that in United States *Treaties in Force* may be explained partly by the fact that they were prepared at different times, but more importantly by the fact that the Civil Aeronautics Board list is limited to route grants. It accordingly does not include countries such as Cyprus and Sierra Leone where the United States, under its 1946 Agreement with the United Kingdom, had no traffic rights.

(b) FORMER NON-METROPOLITAN TERRITORIES FOR THE INTERNATIONAL RELATIONS OF WHICH FRANCE WAS RESPONSIBLE

15. *Senegal*

71. One commentator¹⁷⁷ has said that, pending negotiations concerning air transport agreements, Senegal has considered that the agreements concluded by France remain provisionally applicable.

*Argentina—France Agreement of 1948*¹⁷⁸

72. Thus on 19 February 1962, the Senegalese Ambassador at Paris wrote to the Argentine Ambassador at Paris as follows:

The Senegalese Government provisionally recognizes certain rights at Dakar granted to Aerolineas Argentinas by France by the Agreement between Argentina and France of 30 January 1948.

The letter add that this authorization was precarious and revocable and without prejudice to any future negotiations.

¹⁷⁴ United States of America, 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, p. iii).

¹⁷⁵ Bureau of International Affairs, *op. cit.*

¹⁷⁶ Also the People's Republic of the Congo and the Democratic Republic of the Congo.

¹⁷⁷ See J.-C. Gautron, "Sur quelques aspects de la succession d'Etat au Sénégal", in *Annuaire français de droit international* 1962, vol. VIII, pp. 845 and 846, on which the paragraphs relating to the agreements concluded with Argentina, the Federal Republic of Germany and Italy are largely based. See also Blondel, "Problèmes posés par le développement de l'aviation en Afrique" in *Université de Dakar, Annales africaines*, 1962, No. 1, *Colloques des facultés de droit de mai 1962*, "Développement économique et évolution juridique" (Paris, Pedone, 1963), pp. 139 and 147, who notes, in addition, that Iberia was operating from Santa Isabel to Douala, and that KLM and South Africa Airways were operating services through Brazzaville on routes from Johannesburg to Europe.

¹⁷⁸ See Argentina, *Instrumentos Internacionales Suscritos por Argentina*, vol. 3, p. 1929 and D. P. O'Connell, *op. cit.*, vol. II, p. 330.

*France—Federal Republic of Germany Agreement of 1955*¹⁷⁹

73. Under an exchange of notes, pursuant to the Air Transport Agreement of 4 October 1955, determining the routes of the airlines of the two parties, the German carrier had, it seems, rights in Dakar.¹⁸⁰ On 7 June 1961, the Senegalese Ministry of Transport wrote as follows to Lufthansa, the carrier designated by the Federal Republic of Germany:

The Government of Senegal recognizes the rights acquired by Germany under the Agreement between the French Republic and the Federal Republic of Germany of 4 October 1955. It does not consider that additional commercial rights can be granted without further negotiations.

Accordingly, the Lufthansa flights continued at the same frequency, as before.¹⁸¹

*France-Italy Agreement of 1949*¹⁸²

74. On 21 March 1961 Senegal replied to the Italian *Chargé d'Affaires* that, pending future negotiations, the provisions of the France—Italy Agreement would provisionally continue in force.

*France—Switzerland Agreement of 1945*¹⁸³

75. Before the attainment of independence by the Federation of Mali and later by Senegal, Swissair enjoyed traffic rights at Dakar.¹⁸⁴ They excluded third and fourth freedom traffic, but included the right to load and unload traffic to and from South America. This traffic continued at the same frequency after Senegal became independent.¹⁸⁵ Under an Agreement between Senegal and Switzerland signed on 23 January 1963¹⁸⁶ which makes no mention of the earlier Agreement, the Swiss designated airline has rights to, through and from Dakar on a route from Switzerland to South and Central America. The Senegal airline has rights from Dakar to Switzerland and beyond.

*France—United Kingdom Agreement of 1946*¹⁸⁷

76. Under this Agreement, as amended in 1953, carriers designated by the United Kingdom were authorized to operate services from points in the United Kingdom via intermediate points to Dakar and beyond to South

America BOAC continued to provide this service, at the same frequency and capacity, after Senegal became independent.¹⁸⁸

77. A second route available for airlines designated by the United Kingdom was between points in Nigeria and Dakar/Abidjan. A French designated airline was also authorized to operate between Dakar and Kano/Lagos and Douala and Lagos. Before Nigeria became independent in October 1960, the former set of routes was operated by West African Airways Corporation (Nigeria) Ltd. (WAAC),¹⁸⁹ which continued to provide the service at the same frequency and capacity after Nigeria and Senegal became independent.¹⁹⁰

*United States—France Agreement of 1946*¹⁹¹

78. An airline designated by the United States was authorized by the Agreement relating to air services, signed on 27 March 1946, as revised in 1959,¹⁹² to operate between the United States and, among other points, Dakar and beyond. Pan American continued, after the attainment of independence by the Federation of Mali and the subsequent dissolution of the Federation, to operate this service at the same frequency.¹⁹³ In a document prepared by the United States Civil Aeronautics Board in the early 1960s, it was stated that Pan American was operating these services in the absence of an air transport agreement.¹⁹⁴

16. Madagascar

*France—United Kingdom Agreement of 1946*¹⁹⁶

79. Under this Agreement, as amended in 1953, carriers designated by the United Kingdom were authorized to operate from British East Africa via Portuguese East Africa to Madagascar and the Comoro Islands and beyond to Mauritius. These rights were not exercised before Madagascar became independent.¹⁹⁶ This fact was cited by Madagascar in refusing BOAC rights to

¹⁷⁹ United Nations, *Treaty Series*, vol. 353, p. 203.

¹⁸⁰ See also e.g., ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, p. 33.

¹⁸¹ *Ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 44 and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 34.

¹⁸² Italy, *Gazzetta Ufficiale della Repubblica Italiana* (Rome, 20 April 1953), 94th year, No. 91, part one, p. 1502 and *Tables of Agreements*, 1964, p. 24.

¹⁸³ *Annuaire suisse de droit international*, 1946, vol. III, p. 217, and *Tables of Agreements*, 1965, p. 24.

¹⁸⁴ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, p. 80; D. P. O'Connell, *op. cit.*, p. 330.

¹⁸⁵ ICAO, *Digest of Statistics*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 90, and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, pp. 82-83.

¹⁸⁶ United Nations, *Treaty Series*, vol. 524, p. 23.

¹⁸⁷ See foot-note 62 above.

¹⁸⁸ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, pp. 95-96; *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, pp. 109-110 and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 95.

¹⁸⁹ This company, controlled by the Nigerian Government, was formed in 1958 to take over the Nigerian activities of WAAC, at the time when Ghana Airways Ltd. was established (see Cheng, *op. cit.*, pp. 261-262).

¹⁹⁰ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, p. 105; *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 116 and *ibid.*, No. 88, *March 1961*, Series TF, No. 29, Add.1 and Corr. 1, p. 66 a.

¹⁹¹ United Nations, *Treaty Series*, vol. 139, p. 114.

¹⁹² *Ibid.*, vol. 358, p. 274.

¹⁹³ ICAO, *Digest of Statistics*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, p. 105; *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 128 and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 121.

¹⁹⁴ Bureau of International Affairs, *op. cit.*, pp. 4422 and 4440.

¹⁹⁵ See foot-note 62 above.

¹⁹⁶ See Bardonnet, "La succession aux traités à Madagascar", in *Annuaire français de droit international*, 1966 (Paris, 1967), vol. XII, p. 663, note 263 on which this paragraph is largely based.

operate services on a route Nairobi—Madagascar—Mauritius.

*United States—France Agreement of 1946*¹⁹⁷

80. This Agreement, as amended, is listed under Madagascar in *United States, Treaties in Force*.¹⁹⁸

17. *People's Republic of the Congo*

*United States—France Agreement of 1946*¹⁹⁹

81. The United States considers that this Agreement is in force between it and the People's Republic of the Congo.²⁰⁰ It will be recalled that the People's Republic of the Congo stated in a note of 5 August 1961 to the United States that it considered itself to be a party to the treaties and agreements signed by France and extended to it before it became independent.²⁰¹

82. The Agreement authorizes the United States designated carriers to operate from the United States via intermediate points to Dakar, Pointe Noire, Brazzaville and beyond to South Africa. It would appear that no United States carrier was designated to operate through Brazzaville at the relevant time.²⁰²

(c) FORMER NON-METROPOLITAN TERRITORY FOR THE INTERNATIONAL RELATIONS OF WHICH BELGIUM WAS RESPONSIBLE

18. *Democratic Republic of the Congo*

*United States—Belgium Agreements of 1946*²⁰³

83. Under the Agreement relating to air services of 1 February 1946, United States carriers were authorized to operate services from the United States via specified intermediate points to Léopoldville and beyond, via intermediate points, to South Africa. Pan American continued to operate services on this route at the same frequency following the independence of the Democratic Republic of the Congo.²⁰⁴ According to the publication

of the United States Civil Aeronautics Board already quoted:

On October 16, 1969, the former Belgian Congo recognized informally the rights and obligations of the United States—Belgium Air Transport Agreement...²⁰⁵

(d) FORMER NON-METROPOLITAN TERRITORY FOR THE INTERNATIONAL RELATIONS OF WHICH NEW ZEALAND WAS RESPONSIBLE

19. *Western Samoa*

*United Kingdom—New Zealand Agreement of 1961*²⁰⁶

84. In this Agreement, signed on 13 June 1961, "for air services between and beyond United Kingdom Territory and the Trust Territory of Western Samoa", "territory", contrary to the usual practice,²⁰⁷ was defined in relation to New Zealand as meaning Western Samoa alone. Designated airlines of the two parties had the right to operate services between Fiji and Western Samoa. The Agreement could be terminated at one year's notice. Under the New Zealand practice then current, such an agreement would not have been concluded without consultation of the Western Samoan authorities. Western Samoa became independent—as had been expected for some time²⁰⁸—just over six months later, on 1 January 1962. The airlines designated under the Agreement continued to operate after that date.²⁰⁹

B. Cases other than cases of independence of former non-metropolitan territories

1. UNION OF NEWFOUNDLAND WITH CANADA (1949)

85. From 1933 until 1949 Newfoundland was a territory for the international relations of which the United Kingdom Government was responsible.²¹⁰ On 31 March 1949, following two referendums, it became the tenth province of Canada.²¹¹ According to the Legal Division of the Canadian Department of External Affairs:

²⁰⁵ Bureau of International Affairs, *op. cit.*, p. 4406; see also p. 4430 and 4439, note 8. The Agreement is also listed under Democratic Republic of the Congo in *United States of America, Department of State, Treaties in Force... 1971*, p. 56.

²⁰⁶ United Nations, *Treaty Series*, vol. 497, p. 293.

²⁰⁷ See para. 4 above.

²⁰⁸ See e.g. General Assembly resolution 1569 (XV) of 18 December 1960.

²⁰⁹ D.P. O'Connell, *op. cit.*, p. 163. See also ICAO, *Digest of Statistics No. 135, Traffic 1960-1967*, series T, No. 27, p. 414.

²¹⁰ See the Newfoundland Act 1933 (21 December 1933) (*The Public General Acts and the Church Assembly Measures, 1933-1934*, (London, H.M.S.O., 24 Geo.5, chap. p. 5). Newfoundland had previously enjoyed Dominion status; see e.g. the Statute of Westminster 1931 (11 December 1931) (*ibid.*, 1931-1932, 22 Geo. 5, chap. 4, p. 13).

²¹¹ British North America Act 1949 (23 March 1949) (*ibid.*, 1949, vol. I, 12 and 13 Geo.6, chap. 22, p. 52), to which are annexed the terms of union agreed to by Canada and Newfoundland.

¹⁹⁷ See foot-notes 191 and 192 above.

¹⁹⁸ United States of America, Department of State, *Treaties in Force... 1971*, p. 150, which also reproduces the Madagascar note of 4 December 1962, stating Madagascar's position with regard to treaties concluded by France before Madagascar became independent. See *Yearbook of the International Law Commission, 1970*, vol. II, p. 121, document A/CN.4/229, para. 102.

¹⁹⁹ See foot-notes 191 and 192 above.

²⁰⁰ See United States of America, Department of State, *Treaties in Force... 1971*, p. 55; Bureau of International Affairs, *op. cit.*, pp. 4405-4406.

²⁰¹ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 121, document A/CN.4/229, para. 104.

²⁰² See e.g., Bureau of International Affairs, *op. cit.*, pp. 4426 and 4440 and ICAO, *Digest of Statistics, No. 82, Traffic Flow - March 1960*, Series TF, No. 27, p. 117.

²⁰³ United Nations, *Treaty Series*, vol. 4, p. 125.

²⁰⁴ ICAO, *Digest of Statistics, No. 82, Traffic Flow - March 1960*, Series TF, No. 27, p. 117; *ibid.*, No. 84, *Traffic Flow - September 1960*, Series TF, No. 28, p. 128 and *ibid.*, No. 88 - *March 1961*, Series TF, No. 29, p. 121.

... The view of the Government on the question of Newfoundland treaty succession has in the past been that 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 proprietary or quasi-proprietary rights, and Newfoundland became bound by treaty obligations of general application to Canada. ...²¹²

86. The air transport agreements concluded before Newfoundland became part of Canada, by the United Kingdom with China, France, Ireland, Italy, the Netherlands, Norway, Sweden and the United States, and, it seems, Belgium,²¹³ all allowed airlines designated by these countries to operate through and, in some cases, to and from Gander. Carriers designated by China, Ireland and Italy were not exercising any rights at the relevant time and those designated by France were making only a non-traffic stop at Gander.²¹⁴ Accordingly, the agreements with those countries²¹⁵ are not further considered here.

87. Before 31 March 1949, Canada had concluded air transport agreements with four of the above countries: Ireland,²¹⁶ the Netherlands,²¹⁷ Sweden,²¹⁸ and the United States of America.²¹⁹ These agreements provided for the grant of third and fourth freedom rights between Montreal and the territory of the other party, and in the case of the agreement with the Netherlands, for fifth freedom rights for the carrier designated by the Netherlands.²²⁰

88. Canada had also concluded air transport agreements with Newfoundland.²²¹ It was accepted that they

were terminated by the union of Newfoundland with Canada.²²²

89. The "Terms of Union" signed by Canada and Newfoundland provided that Canada was to take over responsibility for civil aviation, including Gander airport which became the property of Canada.²²³ Canada declared its intention to apply in Newfoundland the same policy concerning international agreements and the granting of commercial rights. It accordingly entered into discussions with those countries whose carriers already operated through Gander with a view to bringing previous agreements applying to Newfoundland into line with Canadian policy.²²⁴

90. As an interim measure, arrangements were made, covering a three-months period ending 30 June 1949, allowing foreign airlines to continue to exercise their traffic rights. Any exercise of traffic rights after that date would be dependent upon the reciprocal agreements which the Government of Canada might make before then with these Governments in cases when Canada wished to receive reciprocal rights in foreign territory.²²⁵

91. In fact, the important right for the foreign carriers operating through Gander was the second freedom, the freedom to stop for non-traffic purposes on flights from Europe to North America. Except for flights between Gander and the United States of America, they exercised the rights of picking up and discharging passengers at Gander comparatively rarely.²²⁶ This second freedom was ensured by Canada's and their own States acceptance of the multilateral International Air Services Transit Agreement (1944) which, after the union, would apply to Newfoundland as it applied to the remainder of Canada.²²⁷ Nevertheless there was some exercise of third, fourth and fifth freedoms at Gander and the relevant practice is reviewed below.

*Belgium—United Kingdom Agreement*²²⁸

92. According to one writer,²²⁹ this Agreement conferred certain rights on Belgian carriers at Gander. It is possible that, immediately before the union of Newfoundland with Canada, SABENA exercised traffic rights at Gander on its Brussels—Shannon—Gander—New York route.²³⁰ By an agreement of 30 August

²¹² Letter of 27 November 1967, quoted in *Canadian Yearbook of International Law*, 1968 (Vancouver, B.C., 1968) vol. VI, p. 276.

²¹³ See D. P. O'Connell, *op. cit.*, p. 66, who also mentions an unpublished agreement with Switzerland. This is not discussed here, as no Swiss carrier was operating services on the relevant route at the time of Newfoundland's change of status.

²¹⁴ ICAO, *Statistical Summary No. 14, Origin and Destination of Passengers - March and September [1947 and] 1948*, document 7094-AT/708, pp. 195 and 196.

²¹⁵ China, 23 July 1947 (United Nations, *Treaty Series*, vol. 9, p. 207); Ireland, 5 April 1946 (*ibid.*, vol. 72, p. 57); Italy, 25 June 1948 (*ibid.*, vol. 94, p. 239); France, 24 February 1946 (*ibid.*, vol. 27, p. 173).

The agreement for air services concluded on 1 August 1950 between Canada and France (*ibid.*, vol. 73, p. 21) contains the usual provisions granting non-traffic rights in the territory of the other party (article II, paragraph 2 (b)), but otherwise grants no rights at Gander.

The agreement for air services between Ireland and Canada, concluded on 8 August 1947 (see foot-note 216 below), was amended on 9 July 1951, *inter alia* to grant the airlines designated by Ireland traffic rights at Gander (United Nations, *Treaty Series*, vol. 128, p. 294).

²¹⁶ 8 August 1947 (*ibid.*, vol. 28, p. 47).

²¹⁷ 2 June 1948 (*ibid.*, vol. 32, p. 215).

²¹⁸ 27 June 1947 (*ibid.*, vol. 27, p. 312).

²¹⁹ 17 February 1945 (*ibid.*, vol. 122, p. 261); and 10 and 12 April 1947 (*ibid.*, p. 229).

²²⁰ See, however, the exchange of notes accompanying the agreement (*ibid.*, vol. 32, p. 224).

²²¹ E.g., Agreement of 29 July 1946 (*ibid.*, vol. 17, p. 169).

²²² e.g., *Tables of Agreements* (1965), pp. 156, 158 and 164.

²²³ Terms 31 and 33.

²²⁴ Dominion of Canada, *Twentieth Parliament, 5th Session, Official Report of Debates, House of Commons* (16 February 1949) (Ottawa, Controller of Stationery, 1949), vol. 266, p. 597.

²²⁵ *Ibid.*, (29 March 1949), vol. 268, p. 2105.

²²⁶ ICAO, *Statistical Summary No. 14, Origin and Destination of Passengers - March and September [1947 and] 1948*, document 7094-AT/708, pp. 85, 89, 97, 101, 117, 119, 127, 136, 145, 148, 156, 164, 168, 190, 194-196, 205, 218, 229, 234, 245 and 254.

²²⁷ See e.g. the statement in the letter from the Canadian Department of External Affairs (para. 85 above).

²²⁸ It seems that the Agreement has not been published.

²²⁹ D. P. O'Connell, *op. cit.*, p. 66.

²³⁰ ICAO, *Digest of Statistics, No. 26, Traffic Flow - March 1949*, Series TF, No. 5, p. 10.

1949,²³¹—the Belgian airline was granted third and fourth freedom rights at Gander.²³² The airline designated by Canada was authorized to exercise third and fourth freedom rights between Canada and Belgium.

*Netherlands—United Kingdom Agreement of 1946*²³³

93. The carrier designated by the Netherlands was authorized by this Agreement to operate from Amsterdam via intermediate points to Gander and New York. Under its Agreement of 2 June 1948 with Canada, Netherlands airlines had traffic rights at Montreal and non-traffic rights "in Canada".²³⁴ Before 31 March 1949, KLM exercised third, fourth and fifth freedom rights at Gander,²³⁵ it is not clear whether it exercised those rights afterwards.²³⁶ Canada and the Netherlands did not, it seems, amend their 1948 Agreement to take account of Newfoundland's change of status.²³⁷

*United Kingdom—Norway Agreement of 1946*²³⁸ and
*United Kingdom—Sweden Agreement of 1946*²³⁹

94. Under the agreement concerning air communications to, through and from Great Britain and Norway, signed on 31 August 1946, and the agreement between the United Kingdom and Sweden relating to air services, signed on 27 November 1946, airlines designated by Norway and Sweden had the right to operate on routes from Stockholm, Oslo and Copenhagen via Prestwick and Gander to New York, other points and beyond. Under the agreement for air services concluded between Canada and Sweden on 27 June 1947,²⁴⁰ the airline designated by Sweden also had third and fourth freedom rights between Stockholm and Montreal. It did not in fact exercise these latter rights until 1958,²⁴¹ but SAS

was, at the time of Newfoundland's change of status, exercising very limited traffic as well as non-traffic rights at Gander.²⁴²

95. On 30 June 1949 (that is, at the end of the three months extension of existing rights mentioned in paragraph 90 above), Sweden in a note to Canada advised that SAS was not yet in a position to exercise the rights at Montreal granted by their 1947 Agreement, and proposed that the Stockholm—Montreal route be replaced by the route from Stockholm to Gander and points beyond.²⁴³ On 5 July Canada accepted this proposal,²⁴⁴ and SAS continued to operate through Gander to New York, occasionally exercising traffic rights at Gander.²⁴⁵

96. Canada subsequently (in 1949 and 1950) concluded agreements with Denmark²⁴⁶ and Norway²⁴⁷—exchanging similar third and fourth freedom rights.

*United Kingdom—United States Bases Agreement of 1941*²⁴⁸

97. The Agreement of 27 March 1941, relating to the Naval and Air Bases leased to the United States of America, provided for the lease to the United States of certain bases, including bases in Newfoundland. Article XI, paragraph 5 of the Agreement provides:

Commercial aircraft will not be authorized to operate from any of the Bases (save in case of emergency or for strictly military purposes under the supervision of the War or Navy Departments) except by agreement between the United States and the Government of the United Kingdom; provided that in the case of Newfoundland, such agreement shall be between the United States and the Government of Newfoundland.

98. Canada has acknowledged that the Agreement remains in effect, notwithstanding the fact that Newfoundland has become a province of Canada. Thus the Canadian Prime Minister on 8 February 1949 stated:

The leases are in existence. The government of the United Kingdom, the government of Newfoundland and the government of Canada alone can do nothing to modify those terms. They create a condition for years in certain areas in Newfoundland; and they must be respected, ...²⁴⁹

99. In a note of 4 June 1949, the United States, after referring to the 1941 Agreement and quoting the provision from it reproduced in paragraph 97 above, went on to say:

²⁴² ICAO, *Statistical Summary No. 14, Origin and Destination of Passengers, March and September [1947 and] 1948*, document 7094-AT/708, pp. 12, 13 and 194; ICAO, *Digest of Statistics, No. 24, Traffic Flow - September 1948*, Series TF, No. 4, p. 66 and *ibid.*, No. 26, *Traffic Flow, - March 1949*, Series TF, No. 5 p. 69.

²⁴³ United Nations, *Treaty Series*, vol. 53, p. 424.

²⁴⁴ *Ibid.*, p. 426.

²⁴⁵ ICAO, *Digest of Statistics, No. 27, Traffic Flow - September 1949*, Series TF, No. 6, pp. 72-73.

²⁴⁶ United Nations, *Treaty Series*, vol. 72, p. 247.

²⁴⁷ *Ibid.*, vol. 53, p. 329.

²⁴⁸ League of Nations, *Treaty Series*, vol. CCIV, p. 15.

²⁴⁹ Canada, Department of External Affairs, (Ottawa, Controller of Stationery), vol. I, No. 3 (March 1949), p. 24.

²³¹ United Nations, *Treaty Series*, vol. 53, p. 221.

²³² Again it appears that very limited use was made of these rights: ICAO, *Digest of Statistics, No. 27, Traffic Flow - September 1949*, Series TF, No. 6, pp. 15 and 16.

²³³ See foot-note 54 above.

²³⁴ United Nations, *Treaty Series*, vol. 32, p. 222.

²³⁵ ICAO, *Statistical Summary, No. 14, Origin and Destination of Passengers, March and September [1947 and] 1948*, document 7094-AT/708, p. 23. The origin and destination statistics for March and September 1949 do not record any figures for KLM. ICAO, *Digest of Statistics, No. 26, Traffic Flow - March 1949*, Series TF, No. 5, suggests that passengers were picked up at Gander on the outward flight.

²³⁶ ICAO, *Digest of Statistics, No. 27, Traffic Flow - September 1949*, Series TF, No. 6, pp. 43-45, shows exactly the same number of passengers being carried into and out of Gander by KLM in that month. This is not conclusive, since equal numbers may have embarked and disembarked. As noted, the origin and destination statistics do not include KLM figures. R. W. G. de Muralt (*The Problem of State Succession with regard to Treaties* (The Hague, Stockum and Zoon, 1954), pp. 118-119), says that Netherlands commercial aircraft no longer exercised commercial rights at Gander. See also D. Rauschning, *Das Schicksal Völkerrechtlicher Verträge bei der Änderung des Status ihrer Partner* (Kiel, Heitmann, 1963), pp. 127-128 and D. P. O'Connell, *op. cit.*, p. 66.

²³⁷ *Tables of Agreements 1964*, pp. 13 and 42 records only the 1948 Agreement.

²³⁸ United Nations, *Treaty Series*, vol. 6, p. 235.

²³⁹ *Ibid.*, vol. 11, p. 229.

²⁴⁰ *Ibid.*, vol. 27, p. 313.

²⁴¹ *Ibid.*, vol. 353, p. 312.

As a result of the Union which became effective on April 1, 1949 the Government of Canada has replaced the Government of Newfoundland in the making of laws for certain purposes including the regulation of civil aviation,²⁵⁰

and proposed that an Agreement be concluded providing for the use by civil aircraft of the United States military air bases in Newfoundland. It then set out its terms. Canada accepted the proposals.

*United States—United Kingdom Agreement of 1946*²⁵¹

100. The Bermuda Agreement did not provide for traffic rights at Gander, which was listed only as an intermediate stop. A supplementary agreement²⁵² granting United States carriers traffic rights at Gander was concluded on 21 and 23 May 1947; it also provided for a reciprocal route for an airline designated by the United Kingdom on behalf of Newfoundland. This agreement dealt explicitly with the question of change of status of Newfoundland. If as a result of such a change, the Government of the United Kingdom were to cease to act for Newfoundland in aviation matters, the United Kingdom agreed that the Agreement should no longer apply. A new agreement should be negotiated between the United States, on the one hand, and Newfoundland or the State responsible for it, on the other.

101. The new agreement was concluded on 4 June 1949 between the United States of America and Canada²⁵³ before the end of the three months period during which rights existing on 31 March continued. The agreement authorized United States carriers to operate on the route United States—Gander—Europe (including the Azores) and beyond. Canadian carriers were also granted additional rights to operate between Canadian and United States territory. United States traffic rights could be exercised at any of the specified points (including, of course, Gander). Accordingly, the carriers designated by the United States continued to exercise traffic rights at Gander.²⁵⁴

2. Formation of Malaysia (1963) and separation of Singapore (1965)

102. The Federation of Malaya became independent on 31 August 1957. It was joined on 16 September 1963 by the State of Singapore and by the British dependencies of Sabah (North Borneo) and Sarawak, and became Malaysia. On 9 August 1965, Singapore withdrew from Malaysia.

103. Foreign and local air carriers were exercising traffic rights in relation to the relevant territories under air transport agreements at each of these three dates. Before the practice is reviewed, three possibly relevant constitutional provisions may be noted.

104. First, under the Malaysian Constitution in force in 1963 and later, the Federal Legislature has exclusive authority to enact legislation to implement treaties and legislation relating to communications and transport, including airways, aircraft and air navigation.

105. Secondly, article 104 of the 1963 Constitution of Singapore provided as follows:

All rights, liabilities and obligations of Her Majesty in respect of the Government shall on and after the coming into operation of this Constitution be rights, liabilities and obligations of the State.²⁵⁵

106. Thirdly, article 13 of the Constitution and Malaysia (Singapore Amendment) Act 1965 (Malaysia), which in bill form was annexed to the Agreement between Malaysia and Singapore for the independence of Singapore, states in part:

Any treaty, agreement or convention entered into before Singapore Day between the Yang di-Pertuan Agong or the Government of Malaysia and another country or countries, including those deemed to be so by Articles 169 of the Constitution of Malaysia shall in so far as such instruments have application to Singapore, be deemed to be a treaty, agreement or convention between Singapore and that country or countries, and any decision taken by an international organization and accepted before Singapore Day by the Government of Malaysia shall in so far as that decision has application to Singapore be deemed to be a decision of an international organization of which Singapore is a member...²⁵⁶

107. Some facts about the carrier designated by Malaysia and Singapore should also be noted. In 1960 the Annual Report of BOAC stated:

Since April 1, 1958, . . . BOAC Associated Companies, Limited, and Qantas Empire Airways Limited, have had equal shareholdings in this company and between them hold the majority interest. The Malayan, Singapore and Borneo Governments are the main shareholders of the balance:²⁵⁷

108. The company, which had its headquarters in Singapore, became Malaysian Airways Limited on the formation of the Federation in 1963. Following the independence of Singapore in August 1965, it became Malaysia-Singapore Airways Limited (MSA). MSA, registered in Singapore, is jointly owned and operated by Malaysia and Singapore.²⁵⁸

(a) Effect of formation of Malaysia

109. The relevant agreements can be further divided into two categories: (1) those which granted rights in respect of the Federation of Malaya (Malayan agree-

²⁵⁵ Singapore, *State of Singapore Government Gazette - Subsidiary Legislation, Supplement No. 1* (Singapore), September 1963, p. 38. See also article 169 of the Constitution of Malaysia 1963 and section 76 of the Malaysia Act, in United Nations, *Materials on Succession of States (op. cit.)*, pp. 87 and 93.

²⁵⁶ Singapore, *State of Singapore Government Gazette Extraordinary*, (Singapore, 9 August 1965), vol. VII, No. 66, p. 2198.

²⁵⁷ British Overseas Airways Corporation, *Annual Report and Accounts for the Year ended 31st March 1959* (London, H.M.S.O., 1959), p. 19 and *id.*, *Annual Report . . . 31st March 1960* (London, H.M.S.O., 1960), pp. 18-19, as quoted by B. Cheng, *op. cit.*, p. 259.

²⁵⁸ ICAO, *Digest of Statistics, No. 142, Traffic 1960-1968*, Series T, No. 28, pp. 142 and 482.

²⁵⁰ United Nations, *Treaty Series*, vol. 200, p. 202.

²⁵¹ See foot-note 48 above.

²⁵² United Nations, *Treaty Series*, vol. 11, p. 211.

²⁵³ *Ibid.*, vol. 122, p. 237. See also paragraph 92 above.

²⁵⁴ ICAO, *Digest of Statistics, No. 27, Traffic Flow - September 1949*, Series TF, No. 6, pp. 126-128, 138-143 and 170-173.

ments with Australia ²⁵⁹ and the United Kingdom, and the Thailand—United Kingdom agreement); and (2) those which granted rights in respect of the new territory added to Malaya (United Kingdom agreements with Australia, Ceylon, India, Indonesia, Japan, the Netherlands, Thailand and the United States of America).

(i) *Agreements granting rights in respect of the territory of the Federation of Malaya*

United Kingdom—Federation of Malaya Agreement of 1957 ²⁶⁰

110. The Agreement for air services, concluded on 18 October 1957, authorized both Malayan and United Kingdom carriers to operate from points in the Federation to Singapore and Hong Kong. Various intermediate points and points beyond were also provided for. A note to the Schedule, recognizing that the structure of Malayan Airways Limited was such that substantial ownership and control was not vested in either Malaya or the United Kingdom, recorded the parties' agreement that they nevertheless would not object to the designation of the company to operate those routes. Further, United Kingdom carriers could operate from points in the United Kingdom via intermediate points to Kuala Lumpur, Penang ("Points in the territory of the Federation of Malaya . . .") and to "points beyond". Traffic rights could not be exercised between Kuala Lumpur or Penang and Singapore on some (including this final route)—but not all—of the above routes. BOAC continued to operate its services from London via various intermediate points to Kuala Lumpur and Singapore and beyond at increasing frequency and capacity. Canadian Pacific Airlines likewise continued to operate similar services, *inter alia* between Hong Kong, Kuala Lumpur and Singapore. At about the time of the establishment of Malaysia, Malaysian Airways began operating from Singapore via Kuala Lumpur to Hong Kong. ²⁶¹

Thailand—United Kingdom Agreement of 1950 ²⁶²

111. This Agreement authorized Thai carriers to operate between Bangkok and Singapore via the optional intermediate points, Songkhla, Penang and Kuala Lumpur. The United Kingdom routes included Singapore to

Bangkok and beyond via Penang, Songkhla, Mergui and Kuala Lumpur. ²⁶³

112. It would appear that the Thai carriers continued to operate to and through Singapore after the formation of Malaysia. ²⁶⁴ Malaysia Airlines also continued to operate between Penang and Medan and Bangkok and at about the time of the formation of Malaysia began to operate on a route Bangkok—Kuala Lumpur—Singapore. ²⁶⁵

(ii) *Agreements granting rights in respect of other territories of Malaysia* ²⁶⁶

United Kingdom—Australia Agreement of 1958 ²⁶⁷

113. Under the Agreement for air services of 7 February 1958, the airlines designated by Australia were authorized to operate on routes from Australia via specified intermediate points to Singapore, and from Australia via Singapore and other intermediate points to London.

114. Qantas was operating on routes from Australia via Singapore and other points to London and exercising traffic rights at Singapore at the time Singapore became part of the Federation. It continued to exercise these rights, at the same frequency, after that time. ²⁶⁸

115. On 19 March 1964 Australia concluded a new agreement with Malaysia. ²⁶⁹ This agreement, which did not mention the Australian agreements with Malaya and the United Kingdom, authorized Australian carriers to operate from points in Australia via Djakarta (if desired) to Kuala Lumpur and Singapore and beyond, and from points in Australia to Jesselton and beyond to Manila and Hong Kong and other points. The Malaysian

²⁶³ Kuala Lumpur was added by 1960 and 1961 amendments to the Agreement (see foot-note 75 above).

²⁶⁴ ICAO, *Digest of Statistics*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34 and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, contain no information for Thai International, but a comparison of the services provided in March 1963 (*ibid.*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, p. 108) with those provided in September 1964 (*ibid.*, No. 114, *Traffic Flow - September 1964*, Series TF, No. 36, p. 107), together with its mounting traffic in the years 1963-1964 (*ibid.*, No. 142, *Traffic 1960-1968*, Series T, No. 28, p. 364) suggest that it continued to operate through Singapore.

²⁶⁵ ICAO, *Digest of Statistics*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, p. 70; *ibid.*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34, Add.2, p. 78 a; and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, Add.2, p. 79 a.

²⁶⁶ For Agreement between Thailand and the United Kingdom, see paragraphs 111 above and 148-149 below; for the Agreement between the Federal Republic of Germany and the United Kingdom, see paragraph 133 below. The Agreement of 5 April 1950 between Switzerland and the United Kingdom (United Nations, *Treaty Series*, vol. 99, p. 107) granted Swiss carriers rights at Singapore, but no subsequent practice has been discovered and the case is not discussed.

²⁶⁷ United Nations, *Treaty Series*, vol. 335, p. 23.

²⁶⁸ ICAO, *Digest of Statistics*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, p. 3; *ibid.*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34, p. 4 and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, p. 6.

²⁶⁹ Australia, *Treaty Series*, No. 9, 1964.

²⁵⁹ This agreement (Agreement relating to air services, of 29 September 1959), (United Nations, *Treaty Series*, vol. 357, p. 29), authorized carriers designated by Australia to operate on a route including Australia, Singapore to Kuala Lumpur, Penang and beyond. The agreement prohibited the exercise of traffic rights between Singapore and Kuala Lumpur and Penang. Accordingly, there was no question of Australia having cabotage rights after 1963. In fact, no Australian carrier was operating to Kuala Lumpur or Penang at the time (ICAO, *Digest of Statistics* No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, pp. 3-4; and *ibid.*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34, pp. 4-5). A new agreement with Malaysia was concluded in 1964 (see paras. 126-128 below).

²⁶⁰ United Nations, *Treaty Series*, vol. 335, p. 3.

²⁶¹ ICAO, *Digest of Statistics*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, pp. 136-138, 151 and Add.2, p. 78 a; and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, pp. 127-129, 140 and Add.2, p. 79 a.

²⁶² See foot-note 74 above.

carriers were authorized to operate from points in Malaysia via Djakarta (if desired) to Darwin, Perth and Sydney.

*United Kingdom—Ceylon Agreement of 1949*²⁷⁰

116. Under the Agreement for air services of 5 August 1949, airlines designated by Ceylon were authorized to operate, between Ceylon and Singapore and from Ceylon to Singapore and beyond to specified points. Airlines designated by the United Kingdom were authorized to provide services between Singapore and Colombo.

117. At the time Malaysia was formed, Air Ceylon was operating on a route Singapore—Kuala Lumpur—Colombo via intermediate points to London. It continued after that time to provide the same service at the same frequency.²⁷¹

*India—United Kingdom Agreement of 1951*²⁷²

118. Under the Agreement relating to air services, of 1 December 1951, airlines designated by India were authorized to operate on routes from India to Singapore via specified intermediate points and beyond to specified points. Immediately before the formation of Malaysia, Air India was operating on routes to, from and through Singapore and exercising traffic rights there. It continued to operate substantially the same services at much the same frequency after that date.²⁷³

*United Kingdom—Indonesia Agreement of 1960*²⁷⁴

119. Under the Agreement for air services signed on 23 November 1960, airlines designated by the United Kingdom were authorized to operate, on the route Singapore—Penang—Medan and on a route including Singapore and Djakarta. Those designated by Indonesia were authorized to provide services on the routes Medan—Singapore and Djakarta—Singapore and beyond to specified points.

120. Malayan Airlines was operating on the Penang—Medan and Singapore—Djakarta routes at the time of the formation of Malaysia but it is not clear whether the services continued after that time; certainly by March 1964 none were being provided.²⁷⁵ Similarly, the Indonesian Airline was providing services on several of the above routes at the time the Federation was formed,

but it is not clear whether these services continued after that date; and again, by March 1964, no services were being provided.²⁷⁶

121. As will be seen, both the Indonesian Airline and Malaysia—Singapore Airways began operations on the above routes again in 1966-67.²⁷⁷

*United Kingdom—Japan Agreement of 1952*²⁷⁸

122. One of the routes to be operated by the designated Japanese airline or airlines under the Agreement for air services of 29 December 1952 was as follows: "Tokyo—Osaka—Fukuoka—Okinawa—points on the mainland of China to be agreed and/or on the island of Formosa—Hong Kong—Saigon or Bangkok—[Kuala Lumpur²⁷⁹—Singapore—Djakarta". Any of these points could be omitted provided the service stated from Japan. The designated United Kingdom airline or airlines had the right to operate on substantially similar routes.²⁸⁰ In accordance with the schedule, Japan Air Lines began to operate on the Singapore route in 1958 and in 1962 extended its service to Djakarta.²⁸¹ Following the formation of Malaysia in 1963, the question arose whether Malaysia was obliged to recognize Japan's traffic rights in Singapore. One writer has noted:

The Government of Japan maintained that its traffic rights into Singapore had been conceded in return for the rights conceded by Japan to the United Kingdom, and that in so far as the rights conceded by Japan to the United Kingdom remained intact. Japan's traffic rights into Singapore should also remain intact. Moreover, Article 104 of the Constitution of the State of Singapore provided that: "All rights, liabilities and obligations of Her Majesty in respect of the Government shall on and after the coming into operation of this Constitution be rights, liabilities and obligations of the State." Thus also Japan asserted that its traffic rights into Singapore should remain uninterrupted until a new agreement could be concluded between Japan and Malaysia.

In response, the Government of Malaysia informed Japan on October 18, 1963, that Malaysia hoped to enter into a new agreement regulating air services between the two countries. Japan was also notified that "... pending the conclusion of the agreement the traffic rights to be exercised by the national

²⁷⁰ United Nations, *Treaty Series*, vol. 35, p. 137.

²⁷¹ ICAO, *Digest of Statistics*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, p. 19; *ibid.*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34, p. 26; *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, p. 25. See also para. 129 below.

²⁷² United Nations, *Treaty Series*, vol. 128, p. 39.

²⁷³ ICAO, *Digest of Statistics*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, p. 56; *ibid.*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34, p. 61; and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, p. 60. See also para. 136 below.

²⁷⁴ United Nations, *Treaty Series*, vol. 398, p. 71.

²⁷⁵ ICAO, *Digest of Statistics*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, p. 70; *ibid.*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34, Add.2, p. 78 a; and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, Add.2, p. 79 a.

²⁷⁶ *Ibid.*, No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, Add.2, p. 57a; *ibid.*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34, p. 63; and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, p. 62.

²⁷⁷ Para. 137 below.

²⁷⁸ United Nations, *Treaty Series*, vol. 175, p. 129.

²⁷⁹ Added in the revision to the schedule referred to in foot-note 280 below.

²⁸⁰ The schedule was revised by an Exchange of Notes of 22 August 1967 (United Kingdom, *Treaties Series*, No. 103, Cmd. 3469 (London, H.M.S.O., 1967)).

²⁸¹ See S. Tabata, "The Independence of Singapore and her succession to the agreement between Japan and Malaysia for Air Services", in *The Japanese Annual of International Law*, 1968 (Tokyo, 1968), No. 12, pp. 36-38, on which much of the remainder of this section is based. See also S. Oda and H. Owada, "Annual review of Japanese practice in international law", *ibid.*, 1967 (Tokyo, 1967), pp. 72-74; ICAO, *Digest of Statistics No. 74, Traffic Flow - September 1958*, Series TF, No. 24, p. 87; and *ibid.*, No. 98, *Traffic Flow - September 1962*, Series TF, No. 32, Add.4, p. 64 a.

airline of Japan will be limited from 1st January, 1964 to third and fourth freedom rights between points in Japan and Singapore." That is to say, the so-called fifth freedom right would not be recognized, with the result that Japan would be limited to the direct transportation of passengers and goods between points in Japan and Singapore and would not be allowed to transport the same between points in Hong Kong, Bangkok, Jakarta, and Singapore. Japan replied by maintaining that its rights under the Japan-United Kingdom Agreement should be respected as vested rights, even after the establishment of Malaysia. Malaysia then agreed tentatively to withdraw the the above-mentioned restriction until a new agreement could be reached.²⁸²

The statistics show the exercise of traffic rights and continuity of service at the same frequency and capacity as before the formation of Malaysia.²⁸³

123. Following the temporary suspension of negotiations for a new agreement, Malaysia, in accordance with article 17 of the 1952 Agreement, gave notice of the termination of the Agreement. In its notice, Malaysia referred to its "voluntary" acceptance of the obligations of the United Kingdom Agreement. The notice would become effective on 23 March 1965, one year after Japan received it. Negotiations were resumed and a new agreement was signed between Japan and Malaysia, subject to ratification, on 11 February 1965.²⁸⁴

*Netherlands—United Kingdom Agreement of 1946*²⁸⁵

124. The carriers designated by the Netherlands were authorized by the Agreement regarding certain air services, signed on 13 August 1968, to operate from Amsterdam via specified points to Singapore and beyond to a specified point. KLM was operating on such a route immediately before the formation of Malaysia and continued to provide substantially the same service after that time, at the same frequency and capacity. It also continued to exercise traffic rights at Singapore.²⁸⁶ On 7 April 1964 Malaysia concluded an agreement with the Netherlands.²⁸⁷

*United States—United Kingdom Agreement of 1946*²⁸⁸

125. One of the routes for carriers designated by the United States of America, under this Agreement, was San Francisco and Los Angeles via various intermediate points to Singapore and, optionally, beyond. There was a similar United Kingdom route. After the formation of Malaysia in 1963,²⁸⁹ Pan American Airways continued

to provide service on this route at about the same frequency and capacity and to exercise traffic rights. On 1 June 1965, the Government of Malaysia gave notice of the termination of the 1946 Agreement.²⁹⁰

(b) Effect of separation of Singapore

*Australia—Malaysia Agreement of 1964*²⁹¹

126. This Agreement, it will be recalled, authorized Australian carriers to operate on various routes to and through Kuala Lumpur and Singapore.²⁹² Qantas was still operating on the routes from Australia to Singapore and beyond to London immediately before Singapore became independent in 1965, and continued to provide the same services afterwards.²⁹³

127. According to the Australian Government, the 1964 Agreement "had to be revised after the separation of Singapore from the Federation of Malaysia in August 1965". As a result, revised agreements were concluded with Malaysia and Singapore in 1967.²⁹⁴

128. Neither agreement makes any express reference to the 1964 Agreement. That with Malaysia authorizes Australian flights from points in Australia via Indonesia and Singapore to Kuala Lumpur and beyond and that with Singapore for a route from Australia via Indonesia to Singapore and beyond (including Kuala Lumpur). The airlines designated by Malaysia and Singapore have rights which are slightly more extensive than those granted in the 1964 Agreement.

*United Kingdom—Ceylon Agreement of 1949*²⁹⁵

129. It will be recalled that, after the formation of Malaysia, Air Ceylon continued to operate from Singapore and Kuala Lumpur to Colombo and beyond. Such a route was provided for in the above Agreement. Air Ceylon also continued to provide substantially the same service (with slightly increased capacity) after Singapore became independent in August 1965.²⁹⁶ There appear to have been no relevant agreements concluded be-

September 1963, Series TF, No. 34, p. 180; and *ibid.*, No. 112, Traffic Flow - March 1964, Series TF, No. 35, p. 166.

²⁹⁰ United States of America, *Department of State Bulletin*, Vol. LIII, No. 1362 (Washington, D.C.) (2 August 1965), p. 222.

²⁹¹ See foot-note 269 above.

²⁹² See para. 115 above.

²⁹³ ICAO, *Digest of Statistics No. 118, Traffic Flow - March 1965*, Series TF, No. 37, p. 5; *ibid.*, No. 121, *Traffic Flow - September 1965*, Series TF, No. 37, pp. 6-7; and *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, tables 6-7.

²⁹⁴ Australia, *Department of External Affairs, Annual Report 1 July 1966-30 June 1967* (Canberra, 1967), p. 39. The Agreement with Malaysia was signed on 9 October and that with Singapore on 3 November (Australia, *Treaty Series*, Nos. 23 and 25, 1967).

²⁹⁵ See foot-note 270 above.

²⁹⁶ ICAO, *Digest of Statistics No. 118, Traffic Flow - March 1965*, Series TF, No. 37, p. 23; *ibid.*, No. 121, *Traffic Flow - September 1965*, Series TF, No. 38, p. 29; and *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, Table 38.

²⁸² S. Tabata, *op. cit.*, pp. 38-39.

²⁸³ ICAO, *Digest of Statistics No. 105, Traffic Flow - March 1963*, Series TF, No. 33, p. 68; *ibid.*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34, p. 77; and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, p. 76.

²⁸⁴ See paras. 138-143 below.

²⁸⁵ See foot-note 54 above.

²⁸⁶ ICAO, *Digest of Statistics No. 105, Traffic Flow - March 1963*, Series TF, No. 33 p. 76; *ibid.*, No. 108, *September 1963*, Series TF, No. 34; p. 86; and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, p. 85.

²⁸⁷ See paras. 144-146 below.

²⁸⁸ See foot-note 48 above.

²⁸⁹ ICAO, *Digest of Statistics No. 105, Traffic Flow - March 1963*, Series TF, No. 33, p. 156; *ibid.*, No. 108 *Traffic Flow -*

tween Ceylon on the one hand and Malaysia and Singapore on the other.²⁹⁷

*Denmark—Malaysia Agreement*²⁹⁸ and *Norway—Malaysia Agreement*²⁹⁹ of 1965

130. Denmark and Norway concluded agreements for air services with Malaysia on 26 March 1965. Both entered into force on signature and authorized the carrier designated by Denmark and Norway to operate from points in Scandinavia via specified intermediate points to Kuala Lumpur and/or Singapore and beyond. The understanding that SAS had the right to operate the service on the route was confirmed by an exchange of letters.

131. SAS did not in fact exercise these rights through Singapore before Singapore became independent, and on 27 and 28 May 1966, respectively, both Malaysia and Singapore gave twelve months' notice to Denmark and Norway of the termination of their 1965 Agreements.³⁰⁰

132.. Several new agreements have since been concluded between the Scandinavian countries and Singapore and Malaysia.³⁰¹ They provide for similar services by the airlines designated by the Scandinavian countries. Unlike the earlier agreements, they do not provide any routes for the Malaysian and Singapore airlines.

*United Kingdom—Federal Republic of Germany Agreement of 1955*³⁰²

133. One of the routes made available to German carriers by the 1962 amendment to this Agreement was from points in the Federal Republic via specified intermediate points to Singapore and beyond to Indonesia and Australasia. The German airline began operating on a route from Frankfurt to Singapore and, in some cases, beyond to Darwin and Sydney at about the time that

Singapore withdrew from Malaysia and continued operating at the same frequency after that time.³⁰³

*France—Malaysia Agreement of 1964*³⁰⁴

134. The Agreement relating to air services, of 21 May 1964, which did not mention the France—United Kingdom Agreement of 1946 (which, as amended in 1953, conferred traffic rights on French carriers at Noumea),³⁰⁵ authorized French carriers to operate from France via specified intermediate points to Kuala Lumpur and/or Singapore and beyond to Djakarta, Biak, Sydney, Auckland or Christchurch to Noumea.³⁰⁶ There were some restrictions on fifth freedom traffic. A French carrier began operating on this route and continued to exercise traffic rights, with increasing frequency, after Singapore became independent.³⁰⁷

135. On 27 May 1966, Malaysia gave notice of the termination of the 1964 Agreement, and Singapore did so on 28 May 1966. This notice was, under the terms of the Agreement, effective twelve months later.³⁰⁸ On 22 May 1967 and 29 June 1967 France concluded new agreements with Malaysia and Singapore respectively.³⁰⁹ These agreements, which are similar to one another and to the 1964 Agreement, authorized the French carriers to operate on routes almost identical with those provided for in that Agreement.

India—United Kingdom Agreement of 1951

136. It will be recalled that this Agreement authorized airlines designated by India to operate on routes from India to Singapore and beyond, and that Air India continued to operate to, from and through Singapore.³¹⁰ Air India also continued to provide similar services through Singapore after Singapore became independent in August 1965.³¹¹ India does not appear to have

²⁹⁷ ICAO, "Chart of Air Transport Agreements registered with ICAO 1 January 1969" in *Fourth Annual Supplement 1968*.

²⁹⁸ United Nations, *Treaty Series*, vol. 540, p. 205.

²⁹⁹ *Ibid.*, vol. 602, p. 157.

³⁰⁰ ICAO, *Aeronautical Agreements and Arrangements - Second Annual Supplement (for the year 1966) to "Tables of Agreements and Arrangements registered with the Organization" (Doc. 8473 - LGB/215) and to First Supplement (Doc. 8563 - LGB/228)*, Document 8648 - LGB/239 (Montreal, January 1967), pp. 10 and 32. (This publication will be referred to hereafter as "Second Annual Supplement (1966)".)

³⁰¹ Agreement between Denmark and Singapore for air services, signed on 20 December 1966 (United Nations, *Treaty Series*, vol. 593, p. 125); Agreement between Singapore and Norway for air services, signed on 20 December 1966 (*ibid.*, vol. 646, p. 3); Agreement between Singapore and Sweden for air services, signed on 20 December 1966 (*ibid.*, p. 25); Agreement between Denmark and Malaysia for air services, signed on 19 October 1967 (United Nations, *Treaty Series*, vol. 614, p. 25); Agreement of 19 October 1967, between Norway and Malaysia (ICAO registration No. 2037); Agreement of 19 October 1967 between Sweden and Malaysia (ICAO registration No. 2006).

³⁰² See foot-notes 104 and 105 above.

³⁰³ ICAO, *Digest of Statistics*, No. 121, *Traffic Flow - September 1965*, Series TF, No. 38, p. 58; and *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, tables 86 and 87.

³⁰⁴ France, *Journal officiel de la République française, Lois et décrets* (Paris, 3 July 1964), 96th year, No. 154, p. 5814.

³⁰⁵ No French airline was operating through Singapore at the time Malaysia was established. ICAO, *Digest of Statistics* No. 105, *Traffic Flow - March 1963*, Series TF, No. 33, pp. 32-46; *ibid.*, No. 108, *Traffic Flow - September 1963*, Series TF, No. 34, pp. 38-40; and *ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, pp. 38-51.

³⁰⁶ Rights were also granted to Malaysian carriers, but they were not exercised.

³⁰⁷ ICAO, *Digest of Statistics* No. 118, *Traffic Flow - March 1965*, Series TF, No. 37, p. 44; *ibid.*, No. 121, *Traffic Flow - September 1965*, Series TF, No. 38, p. 55; *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, table 79.

³⁰⁸ See *Second Annual Supplement (1966)*, p. 32.

³⁰⁹ France, *Journal officiel de la République française, Lois et décrets*, Paris, 5 August 1967, 99th year, No. 181, p. 7836; 11 October 1967, 99th year, No. 237, p. 10005.

³¹⁰ See para. 118 above.

³¹¹ ICAO, *Digest of Statistics* No. 118, *Traffic Flow - March 1965*, Series TF, No. 37, Add. 1, p. 51 b; *ibid.*, No. 121, *Traffic Flow - September 1965*, Series TF, No. 38, p. 69; and *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, table 103.

concluded an agreement with Malaysia;³¹² it has however concluded one with Singapore.³¹³

United Kingdom—Indonesia Agreement of 1960

137. This Agreement, it will be recalled, granted Indonesian carriers rights in Singapore and United Kingdom carriers rights in Medan and Djakarta.³¹⁴ Malayan Airways and the Indonesian airline ceased operating on routes including these stops in 1963-1964. Following the independence of Singapore, services were renewed by the airline designated by Indonesia in late 1966 or early 1967,³¹⁵ and by Malaysia—Singapore Airways later in 1967.³¹⁶ Malaysia, but not Singapore,³¹⁷ has (in 1968) concluded a new agreement with Indonesia.³¹⁸

*Japan—Malaysia Agreement of 1965*³¹⁹

138. The Agreement for air services was signed, subject to ratification, on 11 February 1965. By an exchange of notes it was agreed that the Agreement should, pending ratification (if later than 23 March), be provisionally implemented. Under the Agreement, the designated Japanese airline or airlines may operate the following route in both directions: points in Japan—Taipei—Hong Kong—Manila—Saigon—Bangkok—Kuala Lumpur—Singapore—Djakarta—Darwin—Sydney. The Malaysian route is as follows: points in Malaysia—Bangkok—Saigon—Hong Kong—Manila—Taipei—Osaka—Tokyo. The services are to begin in the territory of the designating party, but other points can be omitted. The Agreement was not ratified and did not formally enter into force until November, some months after Singapore separated from Malaysia.

139. In a letter to the Japanese Government the Malaysian Foreign Ministry took the view, that:

The Agreement between the Government of Malaysia and the Government of Japan for Air Services falls under paragraph 13 of the Constitution of Malaysia (Singapore Amendment) Act, 1965, since the Agreement was signed and ratified by both Governments before Singapore Day and an exchange of instruments of ratification merely constitutes a ceremonial formality.³²⁰

140. The Japanese Government on 25 August 1965 addressed a letter to the Singapore Government, which read in part:

The Japanese Government and the Malaysian Government are now exchanging views on whether the above-mentioned Agreement falls under Paragraph 13 Annex B of the Agreement relating to the separation of Singapore from Malaysia as

an independent and sovereign State. The Japanese Government takes the stand that the Agreement comes into effect at a date when the instruments of ratification shall be exchanged in accordance with the provisions of the Agreement which has not yet taken place. The Malaysian Government takes the stand that since the Agreement was signed and ratified by both Governments before Singapore Day, and because an exchange of instruments of ratification merely constitutes a ceremonial formality, it shall be construed as an "agreement entered into before Singapore Day between the Government of Malaysia and another country".

The Japanese Government would like to know whether the Government of Singapore shares the above-mentioned understanding of the Government of Malaysia and whether the Government of Singapore takes the stand that she shall be bound by the provisions of the Agreement if the Agreement comes into effect between the Japanese Government and the Malaysian Government. If so, I would be very grateful if Your Excellency could let me know whether you have any objection to the attached draft of a letter to be sent by me to Your Excellency.³²¹

141. In its reply of 20 September 1965, the Singapore Government confirmed that it accepted the Agreement as an agreement between it and the Japanese Government, notwithstanding the fact that the instruments of ratification had not been exchanged. Further, on the date of ratification, the Singapore Government also exchanged letters with Japan in which it was stated that:

... the understanding has been reached between the Government of Japan and the Government of Singapore that both Japan and Singapore shall be bound, as from the 4th November, 1965, by the provisions of the Agreement between the Government of Japan and the Government of Malaysia for Air Services signed at Kuala Lumpur on 11th February, 1965.³²²

142. Japan appears to take the view that this exchange did no more than confirm the position under the law. Thus an official publication of the Japanese Ministry of Foreign Affairs stated that:

The [air services] Agreement... was succeeded to by the Government of the Republic of Singapore on the basis of the Agreement of Independence from Malaysia... For the purpose of confirming this succession, [the above] letters were exchanged...³²³

The statistics show that the Japanese carrier continued to operate through Singapore at approximately the same frequency and capacity.³²⁴

143. Finally, on 28 May 1966, the Singapore Government gave notice of the termination of the 1965 Agreement, which it said it had voluntarily accepted.³²⁵ A new Agreement for air services was signed on 14 February 1967.³²⁶ The traffic points in this Agreement are

³¹² See the chart in *Fourth Annual Supplement (1968)*, pp. 19 and 20.

³¹³ Agreement of 23 January 1968 (ICAO registration No. 2057).

³¹⁴ See para. 119 above.

³¹⁵ ICAO, *Digest of Statistics No. 134, Traffic Flow - March 1967*, Series TF, No. 41, tables 105-106.

³¹⁶ *Ibid.*, No. 138, *Traffic Flow - September 1967*, Series TF, No. 42, tables 165-166.

³¹⁷ See *Fourth Annual Supplement (1968)* pp. 9 and 19-20.

³¹⁸ Agreement of 6 May 1968 (ICAO registration No. 2078).

³¹⁹ United Nations, *Treaty Series*, vol. 666, p. 49. See also para. 123 above.

³²⁰ Tabata, *op. cit.*, p. 41.

³²¹ *Ibid.*, pp. 41-42.

³²² *Ibid.*, pp. 42-43.

³²³ Japan, Ministry of Foreign Affairs, *Waga Gaiko no Kynkyo* [Annual Report of the Japanese Diplomacy], vol. 10, (1966), p. 115, quoted by Oda and Owada, *op. cit.*, p. 74.

³²⁴ ICAO, *Digest of Statistics No. 118, Traffic Flow - March 1965*, Series TF, No. 37, p. 64; *ibid.* No. 121, *Traffic Flow - September 1965*, Series TF, No. 38, p. 85; and *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, tables 126-127.

³²⁵ Tabata, *op. cit.*, p. 44.

³²⁶ United Nations, *Treaty Series*, vol. 646, p. 33.

substantially the same as those in the 1952 and 1965 Agreements: for the airlines designated by Japan, points in Japan—Taipei—Hong Kong—Manila—Saigon—Bangkok—Kuala Lumpur or Singapore—Djakarta; and for that designated by Singapore, Singapore—points in Malaysia—Bangkok—Saigon—Hong Kong—Manila—Taipei—Tokyo—Seoul. Moreover, the Agreement provided that the services were to begin in the territory of the party designating the airline, provided, however, that if Singapore and Malaysia designated the same airline, that airline could originate its services in Malaysia and operate through Singapore.³²⁷ On 14 March 1967, Japan and Malaysia exchanged notes amending the routes to their 1965 Agreement. The amendments were in part consequential on the separation of Singapore from Malaysia.

*Netherlands—Malaysia Agreement of 1964*³²⁸

144. The Agreement for air services of 7 April 1964, which did not refer to the Netherlands—United Kingdom Agreement of 1946,³²⁹ provided for substantially the same services as the 1946 Agreement for the Netherlands carrier, with the addition that it could also stop at Kuala Lumpur. The Malaysian carrier was also authorized to operate on substantially the same route.

145. KLM continued to provide services on the routes through Singapore after Singapore became independent. At that time it increased the frequency of the flights and began to exercise its rights through Kuala Lumpur.³³⁰

146. On 27 and 28 May 1966, Malaysia and Singapore gave notice of the termination of this 1964 Agreement.³³¹ In accordance with the Agreement's provisions, the notice would become effective twelve months later. New agreements were signed later in 1966.³³² That with Malaysia provides for substantially the same services by Netherlands carriers as the 1964 Agreement; one difference is, of course, that Singapore is now a "point beyond" and not a point in Malaysia. It provides for no route for Malaysia, however.

*Malaysia—New Zealand Agreement of 1965*³³³

147. This Agreement, which entered into force on 27 July 1965, the date of signature, authorized carriers

designated by New Zealand to operate between points in New Zealand and Kuala Lumpur, Singapore and Jesselton and beyond. The New Zealand carrier did not in fact exercise these rights,³³⁴ and on 28 May 1966 both Malaysia and Singapore gave notice of their termination of the Agreement.³³⁵ In accordance with its provisions, the Agreement terminated one year later. New agreements were concluded with Malaysia on 29 February 1968³³⁶ and Singapore on 4 March 1968.³³⁷ Together they confer rights on New Zealand, Malaysian and Singapore airlines which are similar to, although not identical with, those conferred by the earlier Agreement.

*Thailand—United Kingdom Agreement of 1950*³³⁸

148. It will be recalled that following the establishment of Malaysia. Thai carriers continued or began to operate on routes prescribed in the above Agreement.

149. Following Singapore's attainment of independence. Thai International continued to operate on routes Bangkok—Singapore and Bangkok—Kuala Lumpur—Singapore and beyond to Djakarta.³³⁹ Similarly, Malaysian Airways (later Malaysia—Singapore Airways) continued to provide services on the Singapore—Penang—Bangkok and Singapore—Kuala Lumpur—Bangkok routes at an increasing frequency.³⁴⁰ Both Malaysia and Singapore have subsequently concluded new agreements with Thailand.³⁴¹

United States—United Kingdom Agreement of 1946

150. It will be recalled that this Agreement granted United States carriers certain rights in Singapore and that Pan American Airways had continued to exercise such rights after the formation of Malaysia.³⁴² It also continued to provide substantially the same service on

³²⁷ Notwithstanding this indirect reference to Malaysia—Singapore Airlines Ltd., the Agreement contains, in article 3, paragraph 4, the usual provision concerning substantial ownership and effective control.

³²⁸ United Nations, *Treaty Series*, vol. 524, p. 81.

³²⁹ See para. 124 above.

³³⁰ ICAO, *Digest of Statistics*, No. 118, *Traffic Flow - March 1965*, Series TF, No. 37, pp. 71-72; *ibid.*, No. 121, *Traffic Flow - September 1965*, Series TF, No. 38, pp. 97; and *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, table 149.

³³¹ See *Second Annual Supplement* (1966), p. 32.

³³² Agreement of 15 December between Malaysia and the Netherlands relating to air services (Netherlands, *Tractatenblad van het Koninkrijk der Nederlanden* (The Hague, 1967) No. 14); Agreement of 29 December 1966 between Singapore and the Netherlands relating to air services (*ibid.*, No. 15) (ICAO registration No. 1947).

³³³ New Zealand, Department of External Affairs, *Treaty Series*, 1965, No. 7, Publication No. 316 (Wellington 1965).

³³⁴ See e.g. ICAO, *Digest of Statistics* No. 121, *Traffic Flow - September 1965*, Series TF, No. 38, p. 103; *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, tables 155 and 156; *ibid.*, No. 134, *Traffic Flow - March 1967*, Series TF, No. 41, tables 160 and 161; *ibid.*, No. 138, *Traffic Flow - September 1967*, Series TF, No. 42, tables 189 and 190.

³³⁵ New Zealand, Department of External Affairs, *Treaty Series*, 1968, No. 5, publication No. 350 (Wellington, 1968), p. 3.

³³⁶ *Ibid.*, No. 5.

³³⁷ *Ibid.*, No. 6, publication No. 35 (Wellington, 1968).

³³⁸ See foot-note 74 above.

³³⁹ ICAO, *Digest of Statistics* No. 114, *Traffic Flow - September 1964*, Series TF, No. 36, p. 107; *ibid.*, No. 118, *Traffic Flow - March 1965*, Series TF, No. 37, p. 103; *ibid.*, No. 121, *Traffic Flow - September 1965*, Series TF, No. 38, p. 135; *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, table 197.

³⁴⁰ *Ibid.*, No. 114, *Traffic Flow - September 1964*, Series TF, No. 36, Add.2, p. 67 a; *ibid.*, No. 121, *Traffic Flow - September 1965*, Series TF, No. 38, p. 90; *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, table 133.

³⁴¹ Agreement of 18 November 1966 between Malaysia and Thailand (ICAO registration No. 1918); Agreement of 2 September 1968 between Singapore and Thailand (ICAO registration No. 2076).

³⁴² See para. 125 above.

the route after the attainment of independence by Singapore in August 1965.³⁴³

151. It was also noted that on 1 June 1965, the Government of Malaysia gave notice of the termination of the 1946 Agreement. This notice, which took effect one year later, was apparently accepted by the United States as terminating the Agreement for Singapore as well, although in the interim Singapore had become independent.³⁴⁴ Notwithstanding the termination of the Agreement and the fact that no new agreement was immediately concluded, Pan American Airways continued to provide substantially the same services to, from and through Singapore.³⁴⁵ Subsequently, on 2 February 1970, an Air Transport Agreement was concluded between Malaysia and the United States of America.³⁴⁶ This agreement authorizes an airline or airlines designated by the United States to operate on the following route: from the United States via intermediate points in Japan, Hong Kong, Thailand, South Viet-Nam and Cambodia to Kuala Lumpur and beyond, Singapore, Indonesia, Australia, New Zealand and, via points in the South Pacific, to the United States in both directions.

3. FORMATION OF THE UNITED ARAB REPUBLIC (1958) AND SEPARATION OF THE SYRIAN ARAB REPUBLIC (1961)

152. Following the establishment of the United Arab Republic, its Foreign Minister, in a note of 1 March 1958 addressed to the Secretary-General of the United Nations, stated *inter alia* 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.³⁴⁷

³⁴³ ICAO, *Digest of Statistics*, No. 118, *Traffic Flow - March 1965*, Series TF, No. 37, pp. 153-154; *ibid.*, No. 121, *Traffic Flow - September 1965*, Series TF, No. 38, p. 187; and *ibid.*, No. 125, *Traffic Flow - March 1966*, Series TF, No. 39, tables 276-277.

³⁴⁴ Thus, the Agreement is not listed under Singapore in United States of America, Department of State, *Treaties in Force... 1970*, p. 200, although other pre-1965 agreements are listed.

³⁴⁵ See United States of America, *Treaties in Force... 1970*, under Malaysia (p. 349) and Singapore (p. 201), and *Fourth Annual Supplement (1968)*, pp. 19-20. See also ICAO *Digest of Statistics*, No. 134, *Traffic Flow - March 1967*, Series TF, No. 41, table 277; and *ibid.*, No. 138, *Traffic Flow - September 1967*, Series TF, No. 42, table 320.

³⁴⁶ United Nations, *Treaty Series*, vol. 740 (not yet issued), No. 10620. The English text of the agreement also appears in United States of America, Department of State, *United States Treaties and Other International Agreements* (Washington, D.C., U.S. Government Printing Office, 1970), vol. 21, part 1, p. 379.

³⁴⁷ See *Yearbook of the International Law Commission*, 1962, vol. II, p. 104, document A/CN.4/149 and Add.1, paragraph 18. See also Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States" in *International and Comparative Law Quarterly* (London, 1959), vol. 8, p. 346; and United States of America, Department of State, *Digest of International Law*, Department of State publication 7553 (Washington, D.C., U.S. Government Printing Office, 1963), vol. 2, pp. 232-233, and 957-964.

153. Article 69 of the provisional constitution of the United Arab Republic of 5 March 1958³⁴⁸ also provided that:

The coming into effect of the present Constitution shall not infringe upon the provisions and clauses of the international treaties and agreements concluded between each of Syria and Egypt or the foreign powers.

These treaties and agreements shall remain valid in the regional spheres for which they were intended at the time of their conclusion, according to the rules and regulations of the international law.

154. At the end of September 1961, Syria separated from the United Arab Republic and resumed its independence under the name, Syrian Arab Republic. Legislative Decree No. 25 of 13 June 1962 provided as follows:

Article 1

The obligations assumed under any bilateral international treaty, agreement or convention during the period of the Union with Egypt are considered to be in force in the Syrian Arab Republic until such instrument is amended or denounced by the Syrian Arab Republic or by the other Parties in accordance with its provisions.

Article 2

The obligations assumed under any multilateral treaty, agreement, convention or instrument of participation in an international institution or organization during the period of the Union with Egypt are considered to be in force in the Syrian Arab Republic until such instrument is denounced in accordance with its provisions.³⁴⁹

155. According to ICAO records,³⁵⁰ at the time of the formation of the United Arab Republic, Egypt was party to air transport agreements with the following nineteen States: Australia, Belgium, Ceylon, Denmark, France, Greece, India, Iraq, Jordan, Netherlands, Norway, Pakistan, Sweden, Switzerland, Syria, Turkey, United Kingdom, United States of America and Yugoslavia. Syria at that time was party to such agreements with the following eleven States: Czechoslovakia, Denmark, Egypt, Greece, Netherlands, Norway, Sweden, Switzerland, Turkey, United Kingdom and the United States. Between the time of the formation of the United Arab Republic and of Syria's withdrawal from it, the United Arab Republic concluded air transport agreements with seven States: Bulgaria, Czechoslovakia, the Federal Republic of Germany, Ghana, Japan, Romania and Switzerland.³⁵¹ rights were not always exercised under these agreements at the relevant times, and not all the information concerning the exercise of rights is available. It may be noted that in 1965 ICAO listed the agreements concluded by Egypt and Syria before

³⁴⁸ Cotran, *op. cit.*, p. 380.

³⁴⁹ *Yearbook of the International Law Commission*, 1962, vol. II, p. 128, document A/CN.4/150, annex, No. 13.

³⁵⁰ ICAO, *Aeronautical Agreements and Arrangements - Tables of Agreements and Arrangements registered with the Organization* (1 January 1946-31 December 1959) Document 8066 - LGB/155 (Montreal, January 1960), pp. 20-21.

³⁵¹ It also entered into an agreement with Sweden modifying the Egypt-Sweden agreement of 1949, and an agreement with Switzerland modifying the Egypt-Switzerland agreement of 1950 (see paras. 168-170 below).

1958 and by the United Arab Republic between 1958 and 1961 as in force, except in so far as they had been superseded by later instruments.³⁵²

*Australia—Egypt Agreement of 1952*³⁵³

156. Under the Agreement for the establishment of scheduled air services, as amended in 1955,³⁵⁴ the airlines designated by Australia had the right to operate from Australia via specified points in Asia and the Middle East to Cairo and optionally beyond via Rome and Frankfurt to the United Kingdom and/or other points in Western Europe.³⁵⁵ They were permitted to exercise traffic rights at Cairo. Qantas provided such a service before the formation of the United Arab Republic and, after a period in which it provided no service, began to operate through Cairo at about the time the United Arab Republic was established at much the same frequency and capacity as before. It also once again exercised traffic rights there.³⁵⁶

*Belgium—Egypt Agreement of 1949*³⁵⁷

157. Under the Agreement relating to regular air transport services, as amended in 1956,³⁵⁸ Belgian carriers were authorized to operate services on the following routes: "Belgian territory—intermediate points—Egyptian territory—and points beyond"; and the Egyptian carrier on the following: "Egyptian territory—intermediate points—Belgian territory—and points beyond." SABENA, the Belgian carrier, did not, it seems, exercise these rights before the formation of the United Arab Republic,³⁵⁹ but at about the beginning of 1959 it began to provide services on routes including Cairo, at which it also exercised traffic rights.³⁶⁰

*Ceylon—Egypt Agreement of 1950*³⁶¹

158. Under the Agreement for the establishment of scheduled air services, as amended in 1957,³⁶² the airlines designated by Ceylon were authorized to exercise traffic rights at Cairo on a route from Colombo via specified points to London and Amsterdam.³⁶³ Air

Ceylon was operating on such a route before the formation of the United Arab Republic and continued to exercise traffic rights and to provide its services at the same frequency after that time.³⁶⁴

*Egypt—Sweden Agreement of 1949; Egypt—Norway and Egypt—Denmark Agreements of 1950; Syria—Denmark Agreement of 1955; Syria—Norway Agreement of 1956*³⁶⁵

159. Under the Scandinavian-Egyptian Agreements SAS was authorized to operate from points in Scandinavia via various points in Europe to Cairo and beyond to points in Africa and Asia. The agreements with Syria provided for routes from Scandinavia via European points to Syria and other Middle Eastern points and to Egypt and beyond.³⁶⁶

160. SAS was operating through Damascus and to, through and from Cairo when the United Arab Republic was established, and was exercising traffic rights in both places. It continued to provide these services after that time and after Syria separated from the United Arab Republic in 1961.³⁶⁷ On 28 May 1958, the Swedish Embassy, in a note to the Minister for Foreign Affairs of the United Arab Republic, referred to an understanding that had been reached between the aeronautical authorities of Sweden and those of the Egyptian province of the United Arab Republic concerning amendment of the 1949 Agreement between Egypt and Sweden. It then proposed that the Agreement be amended in accordance with this understanding; the Minister accepted this proposal on 28 May 1958.³⁶⁸

³⁶⁴ ICAO, *Digest of Statistics Nos. 69-70, Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, p. 38; *ibid.*, No. 72, *Traffic Flow - March 1958*, Series TF, No. 23, p. 38; and *ibid.*, No. 74, *Traffic Flow - September 1958*, Series TF, No. 24, p. 38.

³⁶⁵ Agreement of 12 December 1949 between Egypt and Sweden for the establishment of scheduled air services (United Nations, *Treaty Series*, vol. 108, p. 15), amended in 1952 (*ibid.*, vol. 150, p. 389), in 1954 (*ibid.*, vol. 200, p. 302) and in 1957 (*ibid.*, vol. 327, p. 56); Agreement of 11 March 1950 between Egypt and Norway for the establishment of scheduled air services (*ibid.*, vol. 95, p. 157), amended in 1952 (*ibid.*, vol. 163, p. 370, and in 1954 (*ibid.*, vol. 200, p. 284); Agreement of 14 March 1950 between Egypt and Denmark for the establishment of scheduled air services (*ibid.*, vol. 95, p. 197), amended in 1952 (*ibid.*, vol. 150, p. 374) and in 1954 (*ibid.*, vol. 200, p. 291); Agreement of 20 October 1955 between Denmark and Syria concerning regular air transport services (*ibid.*, vol. 95, p. 197) and Agreement of 25 February 1956 between Norway and Syria concerning scheduled air services (*ibid.*, vol. 463, p. 217).

³⁶⁶ The ban on traffic rights between Egypt and Syria resulting from the exclusion of Syria as a point on the routes in the Egyptian agreements was made explicit in an exchange of notes accompanying Syria's agreement with Norway.

³⁶⁷ ICAO, *Digest of Statistics Nos. 69-70, Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, pp. 160-163 and 168-169; *ibid.*, No. 72, *Traffic Flow - March 1958*, Series TF, No. 23, pp. 145-148 and 152-153; *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 74; *ibid.*, No. 92, *Traffic Flow - September 1961*, Series TF, No. 30 pp. 92-94 and *ibid.*, No. 95, *Traffic Flow - March 1962*, Series TF, No. 31, pp. 84-85.

³⁶⁸ United Nations, *Treaties Series*, vol. 392, p. 348.

³⁵² See *Tables of Agreements (1964)* and annual supplements.

³⁵³ United Nations, *Treaty Series*, vol. 173, p. 241.

³⁵⁴ *Ibid.*, vol. 335, p. 302.

³⁵⁵ The Egyptian route, between Egypt and Australia, was to be agreed at a later date.

³⁵⁶ ICAO, *Digest of Statistics No. 68, Traffic Flow - September 1956*, Series TF, No. 20, pp. 26-27; *ibid.*, No. 69-70, *Traffic Flow - March and September 1957*, Series TF, No. 21-22, pp. 7-9; and *ibid.*, No. 72, *Traffic Flow - March 1968*, Series TF, No. 23, pp. 6-7.

³⁵⁷ United Nations, *Treaty Series*, vol. 137, p. 189.

³⁵⁸ *Ibid.*, vol. 271, p. 395.

³⁵⁹ See e.g., ICAO, *Digest of Statistics Nos. 69-70, Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, pp. 13-21; *ibid.*, No. 74, *Traffic Flow - September 1958*, Series TF, No. 24, pp. 8-18.

³⁶⁰ *Ibid.*, No. 77, *Traffic Flow - March 1959*, Series TF, No. 25, p. 4; *ibid.*, No. 78, *Traffic Flow - September 1959*, Series TF, No. 26, p. 7; and *ibid.*, No. 82, *Traffic Flow - March 1960*, Series TF, No. 27, pp. 9-10.

³⁶¹ United Nations, *Treaty Series*, vol. 192, p. 53.

³⁶² *Ibid.*, vol. 327, p. 370.

³⁶³ The Egyptian routes were to be determined later.

*Egypt—France Agreement of 1950*³⁶⁹

161. French carriers designated under the Agreement of 6 August 1950 relating to regular air transport services were authorized to operate on the following routes (amongst others): Paris—Cairo or Alexandria (direct); Paris—Rome—Cairo or Alexandria; and Paris—Rome and/or Athens—Cairo to various specified points in Africa. Air France had exercised these rights before the establishment of the United Arab Republic and, after a period, began to operate again at about the beginning of 1959, i.e. after the formation of the United Arab Republic.³⁷⁰

*Egypt—Greece Agreement of 1950*³⁷¹

162. Under the Agreement of 24 April 1950 for the establishment of scheduled air services, the carriers designated by the Greek Government were authorized to operate from points in Greece to Alexandria and Cairo. The Greek carrier continued to operate on these routes after the formation of the United Arab Republic, at approximately the same frequency.³⁷² The Egyptian airlines were authorized to operate from points in Egypt to Athens and points beyond. Misrair continued to operate at about the same frequency, from Cairo and Alexandria to Athens, after the formation of the United Arab Republic, and subsequently began to exercise rights beyond.³⁷³ By an exchange of notes of 29 November 1962 and 6 May 1963, Greece and the United Arab Republic agreed to amend the schedule to the 1950 agreement.³⁷⁴

*India—Egypt Agreement of 1952*³⁷⁵

163. Carriers designated by India had, under the Agreement of 14 June 1952 for the establishment of scheduled air services, the right to operate from points in India via specified intermediate points to Cairo or Alexandria and beyond to specified European points. Air India continued to exercise these rights (including traffic rights) after the formation of the United Arab Republic.³⁷⁶

*Iraq—Egypt Agreement of 1955*³⁷⁷

164. The Iraqi carriers were authorized by the Agree-

ment of 23 March 1955 for the establishment of scheduled air services to operate, *inter alia*, from Baghdad to Cairo direct or via Beirut and/or Damascus. The Iraqi carrier continued to operate on this route, and for a short time to exercise traffic rights between Cairo and Damascus. Later, however, it operated between Baghdad and Cairo direct without a stop in Damascus and between Baghdad and Damascus.³⁷⁸ The Egyptian carriers were authorized to operate between Cairo and Baghdad (either direct or via Beirut and for Damascus) and beyond to specified points. Misrair continued to operate between Cairo and Baghdad via Damascus, at about the same frequency, following the establishment of the United Arab Republic.³⁷⁹

*Egypt—Jordan Agreement of 1952*³⁸⁰

165. The Egyptian designated airlines were authorized by the Agreement of 2 January 1952 for the establishment of scheduled air services to operate between Cairo and Jerusalem and/or Amman and to specified points beyond. Misrair continued to operate from Cairo to Jerusalem after the formation of the United Arab Republic, and also began to operate to specified points beyond Jerusalem.³⁸¹ The airlines designated by Jordan were authorized to operate from Amman or Jerusalem to Cairo and/or Alexandria and beyond to specified points. The Royal Jordanian Carriers, which did not commence operations until the end of 1961,³⁸² included Amman—Cairo, Jerusalem—Cairo and Amman—Jerusalem—Cairo in their services.³⁸³

*Egypt—Netherlands Agreement of 1949*³⁸⁴ and *Netherlands—Syria Agreement of 1950*³⁸⁵

166. Under the Agreement for the establishment of scheduled air services concluded between Egypt and the Netherlands on 8 December 1949, as amended,³⁸⁶ the carriers designated by the Netherlands were authorized to operate from the Netherlands via specified European and Middle Eastern points (not including Syria) to Cairo and to specified points beyond and from the Netherlands via Cairo to Iraq, Pakistan and India or to Aden and Ceylon and beyond in both cases. The Egyptian airlines were to operate on a route to be determined at

³⁶⁹ United Nations, *Treaty Series*, vol. 127, p. 293.

³⁷⁰ ICAO, *Digest of Statistics No. 68, Traffic Flow - September 1956*, Series TF, No. 20, pp. 73-74 and 79-81; *ibid.*, No. 77, *Traffic Flow - March 1959*, Series TF, No. 25, p. 25 and *ibid.*, No. 78 *Traffic Flow - September 1959*, Series TF, No. 26, p. 27.

³⁷¹ United Nations, *Treaty Series*, vol. 163, p. 229.

³⁷² ICAO, *Digest of Statistics Nos. 69-70, Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, p. 59; and *ibid.*, No. 72, *Traffic Flow - March 1958*, Series TF, No. 23, pp. 69-70.

³⁷³ *Ibid.* pp. 42 and 40 respectively; *ibid.*, No. 78, *Traffic Flow - September 1959*, Series TF, No. 26, Add.1, p. 93 a.

³⁷⁴ United Nations, *Treaty Series*, vol. 533, p. 324.

³⁷⁵ *Ibid.* vol. 173, p. 209. See also the amendment, (*ibid.*, p. 236).

³⁷⁶ ICAO, *Digest of Statistics Nos. 69-70, Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, p. 59; *ibid.*, No. 77, *Traffic Flow - March 1959*, Series TF, No. 25, p. 34.

³⁷⁷ United Nations, *Treaty Series*, vol. 311, p. 199.

³⁷⁸ ICAO, *Digest of Statistics Nos. 69-70, Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, p. 70; *ibid.*, No. 72, *Traffic Flow - March 1958*, Series TF, No. 23, p. 72 and *ibid.*, No. 74, *Traffic Flow - September 1958*, Series TF, No. 24, p. 71.

³⁷⁹ *Ibid.*, Nos. 69-70, *Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, p. 41; *ibid.*, No. 74, *Traffic Flow - September 1958*, Series TF, No. 24, p. 205 and *ibid.*, No. 75, *Traffic Flow - March 1959*, Series TF, No. 25, p. 82.

³⁸⁰ United Nations, *Treaty Series*, vol. 192, p. 157.

³⁸¹ ICAO, *Digest of Statistics No. 68, Traffic Flow - September 1956*, Series TF, No. 20, pp. 61-63 and *ibid.*, No. 72, *Traffic Flow - March 1958*, Series TF, No. 23, pp. 40-42.

³⁸² *Ibid.*, No. 135, *Traffic 1960-1967*, Series T, No. 27, p. 457.

³⁸³ *Ibid.*, No. 112, *Traffic Flow - March 1964*, Series TF, No. 35, p. 77.

³⁸⁴ United Nations, *Treaty Series*, vol. 95, p. 123.

³⁸⁵ *Ibid.*, vol. 108, p. 53.

³⁸⁶ In 1953 (*ibid.*, vol. 163, p. 379), 1954 (*ibid.*, vol. 200, p. 278) and 1956 (*ibid.*, vol. 311, p. 338).

a later date. Under the Agreement relating to civil services between their respective territories, concluded between the Netherlands and Syria on 13 February 1950, as amended,³⁸⁷ carriers designated by the Netherlands were entitled to operate from the Netherlands via specified intermediate points to Syria, to specified points in the Middle East and Asia and beyond. Egypt was not included in the specified points. The details of the Syrian routes were to be agreed later. KLM was operating on several routes to, from and through Cairo and Damascus before the establishment of the United Arab Republic and it continued to provide services and to exercise traffic rights after that time. It also continued to exercise rights at Damascus after Syria withdrew from the United Arab Republic.³⁸⁸

167. On 5 August 1965, the Netherlands and the United Arab Republic concluded a new air transport Agreement.³⁸⁹ In an exchange of notes accompanying the Agreement, it was agreed that the new Agreement superseded that concluded between Egypt and the Netherlands in 1949.

*Egypt—Switzerland Agreement of 1950*³⁹⁰ and *Switzerland—Syria Agreement of 1954*³⁹¹

168. Carriers designated by Switzerland were authorized by the Agreement concerning regular air transport services, concluded between Egypt and Switzerland on 15 May 1950, to operate between Zurich and Geneva via specified optional points in Europe and North Africa to Alexandria and Cairo, and beyond to specified points in the Middle East and Africa. The specified points did not include Syria. The Egyptian carriers were authorized to operate from Cairo and Alexandria via specified points in Europe to Geneva and beyond to London and beyond. Under the Agreement concerning regular civil air services concluded between Syria and Switzerland on 26 May 1954, as amended in 1957,³⁹² the Swiss airlines were authorized to operate from Switzerland via specified points to Damascus and beyond to specified points including Egypt.

169. Swissair continued to provide services, at the same frequency, to and from Damascus and to, through and from Cairo, after the formation of the United Arab Republic. It also continued to operate, at the same frequency, to and from Damascus after Syria left the United Arab Republic.³⁹³ Misrair was not exercising its

rights in Switzerland at the time of the formation of the United Arab Republic, but it subsequently began to exercise them.³⁹⁴

170. The continuation in force of the Agreement between Egypt and Switzerland after the formation of the United Arab Republic is confirmed by subsequent diplomatic action. By an exchange of letters of 16 February and 13 April 1959, Switzerland and the United Arab Republic agreed to the terms of a new schedule to that Agreement.³⁹⁵ The schedule gave Swiss carriers rights only in Cairo and Alexandria and not in the Syrian region.

*Egypt—United Kingdom Agreement of 1951*³⁹⁶ and *United Kingdom—Syria Agreement of 1954*³⁹⁷

171. Carriers designated by the United Kingdom were authorized by the Agreement with Egypt to operate to and through specified points in Egypt and beyond on several routes. Egyptian carriers were also given several routes to and through United Kingdom territory. United Kingdom carriers designated under the Agreement with Syria (Agreement for scheduled civil air services of 30 January 1954) were entitled to operate to and through Damascus and Aleppo. The Syrian route or routes were to be determined later.

172. United Kingdom carriers had exercised these rights prior to the formation of the United Arab Republic³⁹⁸ subsequently, after a period in which they provided no service, they began operating again through

189-190; *ibid.*, No. 72, *Traffic Flow - March 1958*, Series TF, No. 23, pp. 164, 166 and 168; *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 83; *ibid.*, No. 92, *Traffic Flow - September 1961*, Series TF, No. 30, pp. 103-104; and *ibid.*, No. 95, *Traffic Flow - March 1962*, Series TF, No. 31, pp. 94-95.

³⁹⁴ E.g., *ibid.*, No. 72, *Traffic Flow - March 1958*, Series TF, No. 23, pp. 40-42; *ibid.*, No. 78, *Traffic Flow - September 1959*, Series TF, No. 26, Add.1, p. 93 a and *ibid.*, No. 92, *Traffic Flow - September 1961*, Series TF, No. 30, p. 106.

³⁹⁵ United Nations, *Treaty Series*, vol. 496, p. 345. A new Agreement, which was concluded on 14 July 1960 and entered into force on 30 April 1962, made no references to the earlier agreements with Egypt and Syria (*ibid.*, vol. 497, p. 161). The ICAO document *Tables of Agreements, 1964*, however, lists the 1950 Agreement with Egypt (and its 1959 amendment) as superseded by the 1960 Agreement (p. 161). The 1954 Agreement with Syria (as amended) is still listed under Syria; routes in the 1960 Agreement with the United Arab Republic for both parties included points in the United Arab Republic.

³⁹⁶ Cmd. 8319. It appears that this agreement, which was to enter into force when the Egyptian Government notified the British Government that the constitutional requirements had been fulfilled, has not entered into force. Thus the ICAO document *Tables of Agreements 1964* (pp. 21 and 66) lists no date of entry into force for it (although under the Rules for Registration with ICAO of aeronautical agreements and arrangements, only agreements which are in force are registrable (*ibid.*, p. xiii) and the agreement was indeed registered. It has not been published in the United Kingdom *Treaty Series*, and has not been registered under Article 102 of the Charter of the United Nations.

³⁹⁷ United Nations, *Treaty Series*, vol. 449, p. 47.

³⁹⁸ e.g., ICAO, *Digest of Statistics No. 68, Traffic Flow - September 1956*, Series TF, No. 20, pp. 226, 230, 231, 240, 241-242, 248-251.

³⁸⁷ In 1952 (*ibid.*, vol. 163, p. 379) and in 1956 (*ibid.*, vol. 311, p. 340).

³⁸⁸ ICAO, *Digest of Statistics Nos. 69-70, Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, pp. 100-103, 105-107, 124 and 136-139; *ibid.*, No. 72, *Traffic Flow - March 1958*, Series TF, No. 23, pp. 86-90, 92-95, 105 and 117-120; *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, pp. 56-58; *ibid.*, No. 92, *Traffic Flow - September 1961*, Series TF, No. 30, p. 75 and *ibid.*, No. 95, *Traffic Flow - March 1962*, Series TF, No. 31, p. 66.

³⁸⁹ Netherlands, *Tractatenblad van het Koninkrijk der Nederlanden* (The Hague, 1965) No. 175.

³⁹⁰ United Nations, *Treaty Series*, vol. 95, p. 255.

³⁹¹ *Ibid.*, vol. 255, p. 145.

³⁹² *Ibid.*, vol. 602, p. 314.

³⁹³ ICAO, *Digest of Statistics Nos. 69-70, Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, p. 186-187,

Damascus and Cairo.³⁹⁹ The carrier operating through Damascus also continued to exercise traffic rights there after Syria withdrew from the United Arab Republic.⁴⁰⁰ It will be recalled that Cyprus Airways had continued to operate between Nicosia and Damascus—a route granted by the 1954 Agreement between Syria and the United Kingdom—after Cyprus became independent. It maintained this service after Syria's separation from the United Arab Republic.⁴⁰¹ Misrair was not exercising the rights granted by the Egypt—United Kingdom Agreement at the time that the United Arab Republic was established, but it subsequently began to operate between Cairo and London.⁴⁰²

*United States—Egypt Agreement of 1946*⁴⁰³ and *United States—Syria Agreement of 1947*⁴⁰⁴

173. United States carriers designated under the Air Transport Agreement of 15 June 1946 with Egypt, as amended in 1957,⁴⁰⁵ were authorized to operate from the United States to Cairo and beyond to specified points in the Middle East, Europe and North Africa. These points did not include Syria. The Air Transport Agreement of 28 April 1947 with Syria, as amended in 1956 and 1957,⁴⁰⁶ authorized United States carriers to operate from the United States via Europe and Turkey to Syria and beyond, via intermediate points.

174. The two United States carriers operating to, from and through Cairo and through Damascus continued to provide the same services after the formation of the United Arab Republic.⁴⁰⁷ Both Agreements continued to be listed in the United States publication, *Treaties in Force*.⁴⁰⁸ That which was operating through Damascus ceased to do so before Syria withdrew from the United Arab Republic.⁴⁰⁹ The 1947 Agreement was still listed after that time in *Treaties in Force*.⁴¹⁰

³⁹⁹ e.g., *ibid.*, No. 72, *Traffic Flow - March 1968*, Series TF, No. 23, pp. 190, 191-192, 194-195, 210-212; and *ibid.*, No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, pp. 86, 95-98.

⁴⁰⁰ *Ibid.*, p. 97; *ibid.*, No. 92, *Traffic Flow - September 1961*, Series TF, No. 30, p. 115; and *ibid.*, No. 95, *Traffic Flow - March 1962*, Series TF, No. 31, pp. 105 and 108.

⁴⁰¹ *Ibid.*, No. 92, *Traffic Flow - September 1961*, Series TF, No. 30, p. 27; and *ibid.*, No. 95, *Traffic Flow - March 1962*, p. 23. See also paragraphs 36 and 37 above.

⁴⁰² *Ibid.*, No. 92, *Traffic Flow - September 1961*, Series TF, No. 30, p. 106.

⁴⁰³ United Nations, *Treaty Series*, vol. 71, p. 157.

⁴⁰⁴ *Ibid.*, vol. 262, p. 121.

⁴⁰⁵ *Ibid.*, vol. 290, p. 303.

⁴⁰⁶ *Ibid.*, vol. 283, p. 332.

⁴⁰⁷ ICAO, *Digest of Statistics*, Nos. 69-70, *Traffic Flow - March and September 1957*, Series TF, Nos. 21-22, pp. 299 and 324; *ibid.*, No. 72, *Traffic Flow - March 1958*, Series TF, No. 23, pp. 245-246 and 287-288; and *ibid.*, No. 77, *Traffic - March 1959*, Series TF, No. 25, pp. 116 and 125.

⁴⁰⁸ United States of America, Department of State, *Treaties in Force - A List of Treaties and other International Agreements of the United States in Force on January 1, 1959*, Department of State publication 6762, (Washington, D.C., U.S. Government Printing Office), p. 165; *Treaties in Force... 1960*, Department of State publication 6959, p. 173; *Treaties in Force... 1961*, Department of State Publication, 7132, p. 179. *Treaties in Force... 1960* and *Treaties in Force... 1961* also set out the relevant constitutional provisions.

175. On 5 May 1964 the United Arab Republic and the United States concluded a new Air Transport Agreement,⁴¹¹ article 17 of which provided that it was to replace that signed in 1946 by Egypt and the United States which was thereby terminated.

4. Dissolution of the Federation of Mali (1960)

*France—Federation of Mali Agreement of 1960*⁴¹²

176. This Agreement (Constituent Agreement between the French Republic and the Federation of Mali) of 22 June 1960, concluded a few days after the Federation had attained independence, was concerned with co-operation in matters relating to civil aviation; it did not grant traffic rights. Following the dissolution of the Federation, Senegal, in a note of 16 September 1960, stated that it:

[...] considers 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 which may be deemed necessary by mutual agreement.⁴¹³

In its reply⁴¹⁴ the French Government stated that it shared this view.

Summary

A. CASES OF INDEPENDENCE OF FORMER NON-METROPOLITAN TERRITORIES

177. At least 14 new States and 24 parties to bilateral air transport agreements—other than predecessor States—have taken the position that for one reason or other airlines designated by the new State and the party concerned had the right to continue, at least for a certain period, to provide services in accordance with agreements concluded before independence between that party and the predecessor State and involving the exercise of air traffic rights in the dependent territory which later on became the new State.

178. This continuity of services has been achieved or recognized by several procedural devices related to the subject-matter of succession in respect of treaties. In some cases there have been exchanges of views, either on the diplomatic or technical level, between the new State and the party concerned. These exchanges have

⁴⁰⁹ ICAO, *Digest of Statistics* No. 88, *Traffic Flow - March 1961*, Series TF, No. 29, p. 123; *ibid.*, No. 92, *Traffic Flow - September 1961*, Series TF, No. 30, p. 142 and United States of America, Bureau of International Affairs, *op. cit.*, p. 4428.

⁴¹⁰ United States of America, Department of State, *Treaties in Force... 1962*, Department of State publication 7327 (Washington, D.C., U.S. Government Printing Office), p. 182, *Treaties in Force... 1963*, Department of State Publication 7481, p. 201.

⁴¹¹ United Nations, *Treaty Series*, vol. 531, p. 229.

⁴¹² France, *Journal officiel de la République française, Lois et décrets*, Paris, 20 July 1960, 92nd year, No. 167, p. 6640. The Federation of Mali became independent on 20 June 1960.

⁴¹³ *Ibid.*, 2 June 1961, 93rd year No. 129, p. 4971.

⁴¹⁴ *Ibid.*

taken several forms, such as the following: (a) the new State has stated its desire, on condition of reciprocity, to continue to apply the agreement in question, and the other State has agreed (for instance, Botswana—United States of America and Lesotho—United States of America); (b) the new State and the other State have amended or extended the pre-independence agreement and have acknowledged that it remained in effect at least up until its abrogation (for instance, France—India; Pakistan—United States of America; Pakistan—Netherlands; Jamaica and Trinidad and Tobago—United States of America; see also the agreements between Cyprus and Greece and Cyprus and Syria).

179. In other cases, interested States have taken unilateral action concerning the continuation in force of the pre-independence agreement. Thus, two States have given formal notice of the termination of agreements which were applicable to them before independence (India and Malaya to the United States of America). Another, through diplomatic correspondence with the other States, has recognized, in some instances provisionally, the rights of the foreign carriers under pre-independence agreements (Senegal with Argentina and Italy).⁴¹⁵ On the national level, one State (the United States of America) lists as still in force pre-independence agreements to which it was an original party, with regard to some new States to which the agreements were applicable before independence.

180. In most cases, no express statement, of either a bilateral or unilateral character has been discovered. Evidence, however, has been recorded in those cases that the air carriers in question have continued, or have begun, to exercise rights as provided for in pre-independence agreements, although what weight ought to be attached from a legal standpoint, to this continuity of services is, of course, open to question.

181. Finally, in many cases also, a new agreement has been concluded some time after independence. The contents of these new agreements, which only rarely refer to the pre-independence agreement, are, in most cases, very similar to the contents of earlier agreements. In fact, the substantive part of the large majority of bilateral air transport agreements follows a standard form, and the route schedules to new agreements are usually much the same as those to pre-independence agreements.

182. Cases of formal denial of continuity which have been collected are limited in number. In one instance the denial was made in bilateral exchanges on the basis of the non-exercise of rights before independence (Madagascar and the United Kingdom). In another instance the position of the new State (the United States with regard to Israel).⁴¹⁶

183. No instances of a clear invocation of general principles were discovered, except in the Senegal note

to France concerning the treaties concluded by the Federation of Mali with France, in which the Government of Senegal considered that, by virtue of the principles of international law concerning State succession, the Republic of Senegal was subregarded to the rights and obligations deriving from those treaties.

184. Sometimes the States concerned have referred to a devolution agreement concluded by the new State with the predecessor State; thus it was stated that a pre-independence air transport agreement continued to be binding on the new State by virtue of the devolution agreement (Pakistan—Netherlands; Pakistan—United States of America; Ghana—United States of America).⁴¹⁷ Reference has been made in one case to a unilateral declaration made by a new State concerning its treaty rights and obligations; the parties concerned, in an exchange of notes, confirmed that the air transport agreement fell within the scope of the statement (Lesotho—United States of America).

185. It may also be noted that, in a number of cases an agreement has been concluded by the predecessor State with the participation, in one form or another, of officials of the dependent territory, shortly before the territory's independence (for instance, India (in agreement with His Britannic Majesty's Representative)—France, Netherlands and the United States of America; United Kingdom—United States of America concerning the West Indies; New Zealand—United Kingdom concerning Western Samoa).

186. Finally, it may be briefly recalled that the change in the international status of territory has other effects with respect to bilateral air transport agreements. Thus, traffic on routes between territories under the sovereignty or administration of the predecessor State and the territory of the new State which was previously prohibited as cabotage becomes fifth freedom traffic which, depending on the terms of the agreement, can now be carried by foreign carriers (see the practice relevant to India and Pakistan). On the other hand, the original agreement often needs to be amended, so far as the original parties are concerned, in order to delete references to points within the territory of the new State.

187. Bilateral air transport agreements, as has been noted, include a set of provisions which seem generally acceptable and which are or have been applicable, whether as a matter of law or of fact, to a large part of the air transport relations of the new States. One possible exception to this general acceptability arises from the common provision, mentioned in the introduction, that the parties to the agreement are entitled to reject carriers designated by the other party if the carrier is not under the substantial ownership and effective control of that party or of its nationals.⁴¹⁸ Several new States have found it convenient to enter into co-operation arrangements of various kinds, including the joint ownership and operation of airlines. If

⁴¹⁵ Note also the informal recognition by the Democratic Republic of the Congo of the United States rights.

⁴¹⁶ Note also the position taken by the United States Civil Aeronautics Board concerning Ceylon and Senegal.

⁴¹⁷ See also the reference to the devolution provisions in the relevant constitutional instruments in the exchanges between Japan and Malaysia and between Japan and Singapore.

⁴¹⁸ See para. 7 above.

such an airline were designated, it would be possible for the other State, if the pre-independence agreement regulated the question, to refuse to allow the airline to exercise rights in its territory. In fact, however, so far as is known, this has happened only once; South Africa, it has been said, terminated the traffic rights of East African Airways when it ceased to be under the effective control of the United Kingdom and came under the effective control and ownership of Kenya, Tanganyika and Uganda through the East African Common Services Organization.⁴¹⁹ In many agreements, provisions have been included qualifying the ownership and control provision in the case of certain joint operations: thus in an agreement with France, Senegal, referring to articles 77 and 79 of the Chicago Convention and to the Yaoundé Convention of 1961, reserved its right to designate Air Afrique which is jointly owned by twelve States.⁴²⁰ Cameroon, People's Republic of the Congo, Ivory Coast, Kenya, Malawi, Malaysia, Mali, Singapore, the United Republic of Tanzania and Uganda have included similar provisions in their agreements.⁴²¹

B. CASES OTHER THAN CASES OF INDEPENDENCE OF FORMER NON-METROPOLITAN TERRITORIES

188. The number of cases recorded within this section is not sufficient to allow a general summary concerning practices relating to bilateral air transport agreements in cases other than cases of independence of non-metropolitan territories. However, one or two points may be made.

189. So far as the Malaysian (1963) and, to a much lesser extent, the Newfoundland cases are concerned,⁴²² it seems that the rule that the treaties of the predecessor State are replaced by the successor's treaties should be treated, in some situations at least, with caution. The

continuance in effect of some treaties in the cases of Malaysia and Newfoundland tends to support the proposition that certain kinds of rights created by some treaties, including air transport agreements, may survive the change in the international status of the territory in question.

190. In the case of the formation of the United Arab Republic (1958), notwithstanding the formation of a unitary State with no relevant power reserved for constituent parts, the air transport agreements of Egypt and Syria continued to have effect; and this was consistent with the declared position of the United Arab Republic. This practice might support the point suggested above that certain treaty rights may survive in situations where the State party to them forms a union with another State or becomes incorporated in another State.

191. The cases of Senegal, Syria and Singapore tend to support the proposition that, in principle, an air transport agreement remains in force for a State which secedes, as an independent State, from another State which was bound by the agreement.

192. The Japan—Malaysia and Japan—Singapore cases throw some light on the question of succession to a treaty which is in existence but not formally in effect at the relevant date. The cases suggest, consistently with other practice,⁴²³ that succession is possible in such situation.

and partly because the principal right being exercised in Newfoundland before and after the union was also granted by the International Air Services Transit Agreement (1944) to which Canada and the other interested States were parties.

⁴²³ See (a) the declarations of succession made by Jamaica, Nigeria and Sierra Leone in respect of three of the Conventions on the Law of the Sea: those declarations, which were made before the Conventions entered into force (but, of course, following the United Kingdom's ratification which preceded independence) were included in the twenty-two "ratifications and succession" for the purpose of determining the date of entry into force of the Conventions (*Multilateral Treaties in respect of which the Secretary-General performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1968* (United Nations publication, Sales No. E.69.V.5), pp. 333-334, 339-340 and 345; (b) the similar statements made by Pakistan in respect of the Special Protocol concerning Statelessness of 1930 (*ibid.*, p. 363) and by Cameroon, the Central African Republic, the Democratic Republic of the Congo, the Ivory Coast and the People's Republic of the Congo concerning the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium of 1953 (*ibid.*, pp. 128-129); the former instrument is considered not yet to have entered into force (see *Yearbook of the International Law Commission, 1962*, vol. II, p. 123, document A/CN.4/150, para. 143); (c) the declarations made in 1961 and 1962 by Cameroon, Dahomey, Ivory Coast, Madagascar, Niger and the People's Republic of the Congo in respect of the 1955 Hague Protocol to the Warsaw Convention on Carriage by Air (1929), prior to the entry into force of the Protocol in 1963 (ICAO, *Annual Report of the Council to the Assembly for 1962, Supporting Documentation for the Fifteenth Session of the Assembly*, document 8317 A 15-P/1, April 1963, p. 90); (d) a decision of the Tribunal de grande instance de la Seine that Senegal, which became independent in 1960, was a party to the Hague Protocol, although the Protocol, ratified by France, in 1958, did not enter into force until 1963 (*Veuve Mackinnon v. Air France, Revue française de droit aérien*, Paris, vol. 18, July-September 1964, p. 402).

⁴¹⁹ D. P. O'Connell, *op. cit.*, pp. 333-334 and cf. ICAO, *Digest of Statistics No. 108, Traffic Flow - September 1963*, Series TF, No. 34, p. 156 and *ibid.*, No. 114, *Traffic Flow - September 1964*, Series TF, No. 36, p. 36.

⁴²⁰ Air Transport Agreement of 15 June 1962 (United Nations, *Treaty Series*, vol. 524, p. 3), article 13. See also the Czechoslovakia—Senegal Agreement of 20 June 1962 (*ibid.*, vol. 498, p. 145), article 12; the Senegal—Switzerland Agreement of 23 January 1963 (*ibid.*, vol. 524, p. 23), article 14, and the Senegal—Mali Agreement of 7 February 1963 (*ibid.*, p. 41), article 14.

⁴²¹ See e.g., the Cameroun—Israel Agreement of 9 August 1963 (*ibid.*, vol. 499, p. 121), article XIV; the Ivory Coast—Mali Agreement of 9 July 1964 (*ibid.*, vol. 524, p. 121), article 14; the Kenya—France Agreement of 28 July 1964 (France, *Journal officiel de la République française, Lois et décrets* (Paris, 25 November 1965), 97th year, No. 273, p. 10403), article 3; the Malawi—Ghana Agreement of 4 March 1965 (United Nations, *Treaty Series*, vol. 541, p. 163), article 3; the Mali—Niger Agreement of 15 January 1964 (*ibid.*, vol. 499, p. 197), exchange of notes; the Uganda—France and Tanzania—France Agreements of 28 July 1964 (France, *Journal officiel*... 25 November 1965), pp. 10401 and 10406), article 3, and the Denmark—Republic of the Congo Agreement of 27 February 1967 (United Nations, *Treaty Series*, vol. 600, p. 189), article 4.

⁴²² The case of Newfoundland is somewhat different, partly because of Canada's grant of three months' period of grace,

III. Trade agreements

(Document A/CN.4/243/Add.1)

Introduction

1. A wide range of treaties falls within the scope of the present study on bilateral trade agreements; nevertheless, three main categories can be distinguished. In the first category are full-scale treaties of amity, commerce and navigation which often go beyond the narrow areas of trade. The second category comprises trade or commercial conventions or agreements regulating various aspects of trade between the parties, usually by reference to most-favoured-nation treatment, national treatment, and reciprocity. The third category consists of short and long-term trade agreements (usually one to five years) which may contain most-favoured-nation provisions but which are generally limited to determining the volume and nature of the two parties' exports to each other and to establishing procedures for such determinations in the future.

2. Several factors militate against extensive evidence concerning succession to bilateral trade agreements. First, the General Agreement on Tariffs and Trade with its provisions for most-favoured-nation and national treatment in the areas of tariffs and other trade restrictions supersedes in practice many provisions of the full-scale treaties of amity, commerce and navigation and many of the trade of commercial conventions.¹ Accordingly, given the wide membership of GATT and the procedures which have been developed for the continued participation in it of new States,² it will often not be necessary for new States and the States parties to pre-independence treaties to take any position concerning such bilateral treaties. Second, comparatively few treaties falling within the first and second categories mentioned above have been concluded by new States; accordingly, they have had less occasion to adopt an express position concerning any relevant earlier treaty. Third, since many of the treaties in the third category are short-term, they might expire around the time of independence without the interested States taking any explicit position: they can merely conclude new treaties, which they have done in considerable numbers.³ Fourth, some States having responsibility for the international

relations of dependent territories (for instance, the United Kingdom) appear to have concluded only a few trade agreements falling within that third category. And, finally, many of the agreements are not published in regular treaty series or registered with the United Nations.

3. Nevertheless, there is some relevant treaty practice which is of undoubted interest for the study of succession problems: (a) some pre-GATT practice; (b) practice concerning the British preferential system, based to some extent on bilateral treaties and permitted by GATT;⁴

⁴ Article T, sub-paragraphs 2 (a) and 2 (b), of GATT exempts from the general most-favoured-nation provision of article I, paragraph 1, preferences in force exclusively between two or more of the territories listed in four annexes to the Agreement. It is this provision which allowed the preferential systems. (For the text of GATT, see United Nations, *Treaty Series*, vol. 55, p. 187. For the annexes, see *ibid.*, pp. 284 *et seq.*) Annex A to the Agreement lists the territories of the British preferential system including "dependent territories" of the United Kingdom, of Australia and of New Zealand; annex B lists the territories of the French Union including French Equatorial Africa, French West Africa, Cameroons under French Mandate, French Somali Coast and Dependencies, Indo-China, Madagascar and Dependencies, Morocco (French Zone), Togo under French Mandate and Tunisia; and annex C lists the territories of the Benelux Customs Union including Belgian Congo, Ruanda Urundi, and Netherlands Indies. The coming to independence of "dependent territories" of the United Kingdom has not affected generally the exemption from the general most-favoured-nation treatment. Thus, for annex A, the Treaty concerning the Establishment of the Republic of Cyprus, of 16 August 1960 (*ibid.*, vol. 382, p. 8), *inter alia*, undertook in annex F, part II (*ibid.*, p. 144) to treat United Kingdom, Greek and Turkish trade on a most-favoured-nation basis, provided that Cyprus was not obliged by this provision to extend the preferences it granted to listed Commonwealth countries (including Ceylon, Ghana, Malaya, Pakistan, Rhodesia and Nyasaland), Burma and Ireland. See also, by way of example, the Pakistan agreements mentioned in section 6 below, and the following trade agreements: Japan-Malaya, 10 May 1960 (United Nations, *Treaty Series*, vol. 383, p. 293), Cyprus-Greece, 23 August 1962 (*ibid.*, vol. 609, p. 15), Israel-Singapore, 24 April 1968 (*ibid.*, vol. 642, p. 235) and India-Switzerland, 14 August 1948 (*ibid.*, vol. 33, p. 3). For annex B (the French customs area) see, for example, article 5, paragraph 1, of the Albania-France treaty of commerce and navigation, of 14 December 1963 (France, *Journal officiel de la République française* (Paris), 97th Year, No. 93 (19, 20 and 21 April 1965), p. 3101) and the many agreements concluded between France and its former dependent territories providing for preferences. For annex C, see for example, the trade agreement between the Benelux and the Philippines, of 14 March 1967 (Netherlands, *Tractatenblad van het Koninkrijk der Nederlanden*, Year 1967, No. 49).

In several treaties this point has been met by a specific provision. Thus the Treaty of Friendship, Commerce and Navigation between the United States of America and Ireland, of 21 January 1950 (United Nations, *Treaty Series*, vol. 206, p. 269) expressly provides in paragraph 13 of the Protocol (*ibid.*, p. 302) that the preferences conferred on Puerto Rico by the United States shall continue to apply regardless of any change in Puerto Rico's political status. For further examples, see

¹ See, for example, the exchanges between the United Kingdom and Chile, Denmark and Greece (United Nations, *Treaty Series*, vol. 109, p. 332; *ibid.*, vol. 68, p. 105; and *ibid.*, vol. 88, p. 205); and New Zealand, Department of Statistics, *Official Yearbook*, 1968, 73rd issue (Wellington, Shearer, 1968), pp. 675-676.

² See *Yearbook of the International Law Commission*, 1968, vol. II, pp. 72 *et seq.*, document A/CN.4/200 and Add.1-2, paras. 315 *et seq.*

³ "... since 1955, African countries have become partners to some three hundred bilateral [trade and payments] agreements" ("Bilateral trade and payments agreements in Africa", E/CN.14/STC/24/Rev.1, para. 3). The *Ghana Treaty Series* for 1961-1963 sets out nineteen trade agreements and several supplementary protocols.

(c) the positions taken by some States, including new States, concerning pre-independence treaties of amity, commerce and navigation; and (d) some practice relevant to short-term trade agreements. Some of the relevant treaty practice is available elsewhere than in the regular treaty series.⁵

4. As in previous studies of the series, the collected materials are divided into two groups, namely "cases of independence of former non-metropolitan territories" (section A) and "cases other than cases of independence of former non-metropolitan territories" (section B). Section A is sub-divided according to the State which was responsible for the international relations of the former non-metropolitan territories when they attained independence. Within each of the sub-divisions, cases are in principle listed chronologically. Cases in section B are listed chronologically. The grouping of the cases is made for reasons of convenience and is without prejudice to any particular situation.

A. Cases of independence of former non-metropolitan territories

(a) FORMER NON-METROPOLITAN TERRITORIES FOR THE INTERNATIONAL RELATIONS OF WHICH THE UNITED KINGDOM WAS RESPONSIBLE

1. *Australia, Canada, New Zealand and South Africa*

5. Until 1880 commercial treaties concluded by the United Kingdom were frequently applicable to all British possessions ("territories", "dominions", "foreign possessions").⁶ By 1882 it was established that the self-governing colonies—Canada, Newfoundland, the colonies in South Africa and Australia, and New Zealand—were not to be bound by commercial treaties unless they consented, usually within a year. In 1899 it was agreed further that the self-governing colonies should also have a separate right of withdrawal from commercial treaties

concluded in the future. This right was also granted in respect of several treaties concluded before 1899, by separately negotiated protocols.⁷

6. Although they might not be bound by the commercial treaties either because they had not acceded to them or because they had withdrawn, the self-governing colonies in some cases had rights under them: first, the treaties often conferred rights on "British subjects" and since British nationality law made no distinction depending on the part of the Empire in which a British subject lived or was born, it was argued that the "British subjects" who benefited from these provisions included those who were inhabitants of those non-self-governing territories to which the treaty in question had not been extended.⁸ In some cases this wide scope of the phrase "British subject" was made express by the definition in the treaty. Thus the Treaty of Friendship and Mutual Co-operation between His Majesty in respect of the United Kingdom and of India and the King of Yemen of 11 February 1934, which confers certain rights on the subjects of the high contracting parties, defines British subjects as "all subjects of His Majesty wherever domiciled, all the inhabitants of countries under His Majesty's protection. . .".⁹ This practice appears to have ceased, for the most part, around 1945-1947.¹⁰ The second way in which a self-governing colony which had not acceded to a commercial treaty could obtain rights under it was by invoking the so-called "nevertheless" clause which was incorporated in many commercial treaties after 1880.¹¹ Under this provision, goods from territories which had not acceded to the treaty would nevertheless enjoy in the territory of the other party

⁷ See R. B. Stewart, *op. cit.*, pp. 97-106; D. P. O'Connell, *State Succession in Municipal Law and in International Law*, (Cambridge, University Press, 1967), vol. I, pp. 41-43; Canada, Department of External Affairs, *Documents on Canadian External Relations* (Ottawa, 1967) vol. I 1909-1918), pp. 255-266.

⁸ See, for example, the view taken by the British Government in 1899, on the advice of the Law Officers of the Crown, concerning the Treaty of Commerce and Navigation with Japan, of 16 July 1894 (New Zealand, *New Zealand Gazette* (1900), vol. I, p. 552, and D. P. O'Connell, *op. cit.*, vol. II, pp. 321-322); but cf. the view expressed by the United States Supreme Court in the *Sullivan v. Kidd* case (United States Supreme Court, *United States Reports*, vol. 254: *Cases Adjudged in the Supreme Court at October Term, 1920* (New York, Banks Law Publishing, 1921), p. 433).

⁹ United Kingdom, *Treaty Series* (London, H.M.S.O., 1934), No. 34 (1934), Cmd. 4752.

¹⁰ In 1946 Canada enacted an Act establishing a separate Canadian citizenship. A Commonwealth conference on nationality was held in 1947 and in subsequent years most Commonwealth countries have enacted nationality laws which, while often maintaining some common status (Commonwealth citizen, British subject) established separate citizenships.

¹¹ See, for example, R. B. Stewart, *op. cit.*, pp. 107-108; D. P. O'Connell, *op. cit.*, vol. II, pp. 319-323. The "nevertheless" clause was sometimes included in the declarations providing for withdrawal by the self-governing colonies. See the declarations with Greece, Liberia, Paraguay and Sweden in United Kingdom, Foreign Office, *Handbook of Commercial Treaties, etc., between Great Britain and Foreign Powers*, 3rd ed. (London, H.M.S.O., 1924), pp. 417, 475, 609 and 836 respectively.

(Footnote 4 continued)

the Treaty of Amity and Economic Relations between the United States of America, and Togo, of 8 February 1966 (United States of America, Department of State, *United States Treaties and Other International Agreements* (Washington D.C., U.S. Government Printing Office, 1968), vol. 18, part 1 (1967), p. 1). the Treaty of Amity and Economic Relations between the United States of America and Thailand, of 29 May 1966 (*ibid.*, (Washington D.C., U.S. Government Printing Office, 1969), vol. 19, part 5 (1968), p. 5843), and the Treaty of Amity, Economic Relations and Consular Rights between the United States of America and Muscat and Oman, of 20 December 1958 (United Nations, *Treaty Series*, vol. 380, p. 181). In the last three treaties, provisions are more general than in the treaty between the United States and Ireland: they apply to all the territories and possessions of the United States.

⁵ No extensive use has been made, however, of national laws. The customs law and especially the tariffs, would often show whether pre-independence tariffs were still being applied. See, for example, the publications of the International Customs Tariffs Bureau.

⁶ See R. B. Stewart, *Treaty Relations of the British Commonwealth of Nations* (New York, Macmillan, 1939), pp. 96-97, who cites the list of treaties of commerce and navigation between Great Britain and foreign Powers (United Kingdom, *British Parliamentary Papers*, Commercial No. 27, 1879, C.2424).

complete and unconditional most-favoured-nation treatment so long as [the territories] accord to goods [from the other party] treatment as favourable as it is given to the similar produce or manufacture of any other foreign country.¹²

7. Before the practice is considered it is convenient to note one point about the drafting of the most-favoured-nation clause in British treaties: it is almost invariably¹³ drafted in terms of the most favoured *foreign* nation, which is interpreted, on occasion by an express provision, as excluding from the scope of the clause preferences granted within the Commonwealth.¹⁴

8. The Australian and New Zealand *Treaty Lists* and lists of commercial treaties prepared by the Canadian Government include, as still in force, those commercial treaties which were concluded by the United Kingdom before 1919, which applied to them and which have not been denounced. The Australian *List* records treaties with Argentina (1825), Ethiopia (1897 and 1909), Iran (1857), Morocco (1856), Peru (1850), Switzerland (1855, certain articles only), and Venezuela (1834, confirming an 1825 treaty with Colombia).¹⁵ The New Zealand *List* contains all these treaties and, in addition, those with Colombia (1866 and 1912), Costa Rica (1849 and 1913), France (1826, certain articles only, and 1912), Iran (1903), Liberia (1848 and 1908), Nicaragua (1805) and Sweden (1826).¹⁶ The explanation of the differences between the two lists is that between 1910 and 1920 Australia withdrew from the treaties concluded with all those latter States¹⁷ other than with Nicaragua and that the treaty with that country was never applicable to Australia. In addition, both *Lists* note that treaties with Bolivia (1911) and Portugal (1914) give Australia and New Zealand, although they are not parties, most-favoured-nation treatment on the basis of reciprocity (the "nevertheless" clause).¹⁸

Canadian lists prepared in 1930 and 1968¹⁹ vary somewhat from the Australian and New Zealand lists: they include treaties with Denmark (1660-1661 and 1670) and Norway (1826)²⁰ and do not include the treaties with Ethiopia, France and Nicaragua. As it will be seen, Canada terminated relevant treaties with France, and the Nicaragua treaty was never applicable to it.

9. Australia exercised in 1919-1920 the power of separate withdrawal with regard to some trade or commercial treaties concluded by the United Kingdom;²¹ and, in the 1930s, New Zealand indicated also its withdrawal from several such treaties.²² New Zealand, by exchanges of notes in 1933, 1935 and 1938, agreed to reciprocal most-favoured-foreign-nation treatment of commerce with Norway, Sweden, and Switzerland respectively.²³ Treaties with those States had earlier been terminated.

10. In 1934, the then Canadian Prime Minister, in rebutting arguments that the 1932 Ottawa agreements would lead to retaliation pointed out that in the case of the more than twenty treaties including most-favoured-nation clauses that had been in force for years, no country had asked that they be abrogated.²⁴ Between 1919 and 1932 Canada had concluded trade agreements with Belgium and Luxembourg Czechoslovakia, France, Italy and the Netherlands.

*Colombia—United Kingdom Treaty (1825) as confirmed by United Kingdom—Venezuela Convention on Amity, Commerce and Navigation (1834)*²⁵

11. Canada, Australia and New Zealand have negotiated with Venezuela under these treaties. In 1941 Canada concluded a new commercial treaty, Venezuela considering that the 1825 Treaty was not sufficiently comprehensive. It seems that Venezuela in 1953 and 1956 took the position that the treaty did not apply to

¹² Commercial Convention, Protocol and Declaration between the United Kingdom and Bulgaria, 9 December 1905 (United Kingdom, *Treaty Series* (London, H.M.S.O., 1908), No. 1 (1908), Cd. 3858, p. 12). See also, for example, the treaties of commerce and navigation concluded by the United Kingdom with Finland, Austria, Czechoslovakia, Hungary and the Kingdom of the Serbs, Croats and Slovenes (League of Nations, *Treaty Series*, vol. XXIX, p. 129; vol. XXXV, p. 175; vol. XXIX p. 377; vol. LXVII, p. 183; and vol. LXXX, p. 165).

¹³ The exceptions are the treaties with Belgium of 1862 and Germany of 1865. See R. B. Stewart, *op. cit.*, chap. III, and United Kingdom, *British and Foreign State Papers, 1902-1903* (London, H.M.S.O., 1906), vol. XCVI, pp. 323-368.

¹⁴ It has been already noted in foot-note 4 above that GATT provides for a similar exception.

¹⁵ Australia, *Treaty Series*, 1956, No. 1.

¹⁶ New Zealand, Department of External Affairs, *New Zealand Treaty List, 31 March 1948*, New Zealand, *Treaty Series*, 1948, No. 11 (Wellington, 1948), publication No. 63. See also New Zealand, Department of Statistics, *Official Yearbook 1968* (*op. cit.*), p. 675.

¹⁷ See the Australian *Treaty List*.

¹⁸ The Australian list also states, with reference to Portugal, that in 1930 both countries gave assurances that most-favoured-nation treatment was accorded.

¹⁹ See Canada, Department of Trade and Commerce, *Empire Tariff Preferences on Canadian Goods* (1930), pp. 33-34, and International Law Association (Canadian Branch), *The Canadian Yearbook of International Law*, 1969 (Vancouver, 1969),

vol. VII (1969), pp. 321-322. See also International Law Association, *The Effect of Independence on Treaties* (London, Stevens, 1965) p. 56, and Canada, Department of External Affairs, *Treaties and Agreements affecting Canada in force between His Majesty and the United States of America, 1814-1925* (Ottawa, 1927) pp. 9 and 17.

²⁰ The 1930 list (see preceding foot-note) includes a treaty with Japan (1911) and treaties with the United States of America relating particularly to Canada.

²¹ See United Kingdom, *British and Foreign State Papers, 1920* (London, H.M.S.O., 1923), vol. CXIII, p. 318, and Australia, *Treaty List*, pp. 113 and 119-120.

²² See United Kingdom, *British and Foreign State Papers, 1933* (London, H.M.S.O., 1938), vol. CXXXVI, pp. 327, 412, 440 and 461.

²³ League of Nations, *Treaty Series*, vol. CXLIX p. 428, vol. CLIX, p. 143, vol. CLXXXIX, p. 167.

²⁴ See W. A. Riddell, ed, *Documents on Canadian Foreign Policy 1917-1939* (Toronto, Oxford University Press, 1962), pp. 629-630. The United Kingdom also took the view that the Dominions remain bound by commercial treaties: see United Kingdom, Foreign Office, *Handbook of Commercial Treaties...* (*op. cit.*).

²⁵ United Kingdom, *British and Foreign State Papers, 1833-1834* (London, 1847), vol. XXII, p. 151. For the 1825 treaty, see D. P. O'Connell, *op. cit.*, vol. II, pp. 165-167, and A. D. McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), pp. 606-612.

its relations with Australia and New Zealand.²⁶ As noted,²⁷ Australia and New Zealand list the treaty in their *Treaty Lists*.

*Colombia—United Kingdom Treaty of Commerce and Navigation (1866)*²⁸

12. In 1938 Colombia and New Zealand exchanged Notes prolonging this treaty²⁹ which, as noted above,³⁰ is included in the New Zealand *Treaty List*.

*Denmark—Great Britain Treaties of Peace and Commerce of 1660-1661 and 1670*³¹

13. South Africa in 1928 acknowledged in a Note to the Danish Ministry of Foreign Affairs that the above two treaties were in force between South Africa and Denmark. Iceland also considers that the treaties are in force between it and South Africa and Canada. Canada is also of this view. New Zealand withdrew from the treaties.³²

*France—United Kingdom Convention respecting the Commercial Relations between Canada and France (1907) and Supplementary Convention (1909)*³³

14. In 1918 France gave notice of denunciation of twelve commercial treaties with the United Kingdom including two conventions concerning commercial relations between France and Canada.³⁴ It proposed however that after the denunciation period, the treaties should remain in effect subject to the giving of three months' notice. This proposal having been accepted, Canada, on 19 March 1920, gave notice of the termination of the two conventions.³⁵

Honduras—United Kingdom Treaty of Commerce and Navigation (1910)

15. This treaty was denounced by Honduras in 1929. The notification of denunciation referred to the fact that New Zealand as well as certain specific British colonies and protectorates had acceded to the treaty and noted that it would remain in force until 16 December 1930.³⁶

²⁶ D. P. O'Connell, *op. cit.*, vol. II, pp. 125-126, and "New Zealand in the Law of State succession", in Northey, ed., *The A. G. Davis Essays in Law* (1965), pp. 180 and 186.

²⁷ See para. 8 above.

²⁸ United Kingdom, *British and Foreign State Papers*, 1865-1866 (London, 1870), vol. LVI, p. 13.

²⁹ D. P. O'Connell, "New Zealand in the law of State succession" (*loc. cit.*), pp. 180 and 185.

³⁰ See para. 8 above.

³¹ United Kingdom, *British and Foreign State Papers*, 1812-1814 (London, 1841), vol. I, part I, pp. 375 and 381.

³² Ireland, *Treaty List*, pp. 102 and 105; for Canada and New Zealand, see paras. 8 and 9 above, respectively.

³³ United Kingdom, *British and Foreign State Papers*, 1907-1908 (London, H.M.S.O., 1912), vol. CI, p. 764, and *ibid.*, 1908-1909 (London, H.M.S.O., 1913), vol. CII, p. 81.

³⁴ *Ibid.*, 1917-1918 (London, H.M.S.O., 1921) vol. CXI, p. 197.

³⁵ *Ibid.*, 1920 (London, H.M.S.O., 1923), vol. CXIII, pp. 64 and 280.

³⁶ League of Nations, *Treaties Series*, vol. C, p. 265.

*Italy—United Kingdom Treaty of Commerce and Navigation (1883)*³⁷

16. In an Exchange of Notes supplementary to a commercial agreement which they signed on 21 May 1935,³⁸ Italy and South Africa stated their understanding that the concessions made to Italy in the agreement were made

subject to the continuing in force of the grant of most-favoured-nation treatment by [the two] countries to each other under the Italian-British Treaty of 1883, in so far as it applies between the Union and Italy.

*Muscat—United Kingdom Treaty of Friendship, Commerce and Navigation (1891)*³⁹

17. This treaty, which provided, *inter alia*, for most-favoured-nation treatment in matters of trade was open to accession by the self-governing colonies. It also applied generally to "subjects of Her Britannic Majesty". Natal, Queensland, Newfoundland and Canada acceded. The treaty was never specifically amended to allow colonies the right of separate withdrawal. However, in a series of agreements to prolong the treaty, signed every year from 1923 to 1938,⁴⁰ the parties stated their understanding that it was open to the Dominion of Canada, the Commonwealth of Australia, the Irish Free State and South Africa (in respect of Natal, the Transvaal and Orange Free State),⁴¹ to withdraw by the giving of notice to Muscat. (The rights of Canada and Australia were first accorded in 1923, that of the Irish Free State in 1925, and that of South Africa in 1932.) Australia and South Africa exercised these rights in 1923 and 1932 respectively.⁴² The treaty expired on

³⁷ United Kingdom, *British and Foreign State Papers*, 1882-1883 (London, 1890), vol. LXXIV, p. 63.

³⁸ League of Nations, *Treaty Series*, vol. CLXXXIX, p. 31.

³⁹ United Kingdom, *British and Foreign State Papers*, 1890-1891 (London, H.M.S.O., 1897), vol. LXXXIII, p. 11.

⁴⁰ Signed on 11 February of each year from 1923 to 1937. (The agreement for 1938 was signed on 27 November 1937 and took effect from 11 February 1938.) See United Kingdom, *British and Foreign State Papers*, 1923 (London, H.M.S.O., 1926), vol. CXVII, p. 336; *ibid.*, 1924 (London, H.M.S.O., 1927), vol. CXIX, p. 447; *ibid.*, 1925 (London H.M.S.O., 1929), vol. CXXI, p. 816; *ibid.*, 1926 (London, H.M.S.O., 1931) vol. CXXIII, p. 544; *ibid.*, 1927 (London, H.M.S.O., 1932), vol. CXXVI, p. 269; *ibid.*, 1928 (London, H.M.S.O., 1932), vol. CXXVIII, p. 322; *ibid.*, 1929 (London, H.M.S.O., 1934), vol. CXXX, p. 171; *ibid.*, 1930 (London, H.M.S.O., 1935), vol. CXXXII, p. 305; *ibid.*, 1931 (London H.M.S.O., 1936), vol. CXXXIV, p. 284; *ibid.*, 1932 (London, H.M.S.O., 1937), vol. CXXXV, p. 296; *ibid.*, 1933 (London, H.M.S.O., 1938) vol. CXXXVI, p. 411; *ibid.*, 1934, (London, H.M.S.O., 1939), vol. CXXXVII, p. 176; *ibid.*, 1935 (London, H.M.S.O., 1948), vol. CXXXIX, p. 204; *ibid.*, 1937 (London, H.M.S.O., 1950), vol. 141, p. 399; *ibid.*, 1938 (London, H.M.S.O., 1951), vol. 142, p. 156.

⁴¹ Neither of the latter two territories had the right of accession to the Treaty of 1891. But article 21 provided that it was to apply to all the colonies and foreign possessions of Her Britannic Majesty (except those which could separately accede) and the United Kingdom took the general position that treaties applied to subsequently acquired territory.

⁴² See, for example, United Kingdom, *British and Foreign State Papers*, 1933 (London, H.M.S.O., 1938), vol. CXXXVI, p. 411.

11 February 1939 when a new treaty, under which British subjects were again given certain rights came into force.⁴³

*Switzerland—United Kingdom Treaty of Friendship, Commerce and Reciprocal Establishment (1855)*⁴⁴

18. A Canadian note of 19 May 1947⁴⁵ to Switzerland began "As you are aware the [above] Treaty [...] is applicable to Canada.", referred to an additional convention of 1914, and proposed that their most-favoured-nation provisions be applied also to Liechtenstein which since 1923 had been an integral part of the Swiss Customs Union. Switzerland accepted this proposal. Australia and New Zealand withdrew from two articles of the treaty in 1920 and 1933 respectively.⁴⁶

2. Ireland⁴⁷

*Italy—United Kingdom Treaty of Commerce and Navigation (1883)*⁴⁸ and *Portugal—United Kingdom Treaty of Commerce and Navigation (1914)*⁴⁹

19. The treaty with Italy applied to all territories, colonies and possessions of the United Kingdom except the self-governing colonies (in India, North America, South Africa and Australasia). Notice of the extension of the treaty to self-governing colonies could, however, be given within twelve months. The treaty with Portugal did not extend to any of the dominions, colonies, possessions or protectorates of either contracting party unless notice of such extension was given within twelve months. The treaty also contained a "nevertheless" clause. Separate notice of termination could be given by either contracting party in respect of the dominions etc., to which the treaty had been extended. No such termination provision appears to have been drawn up in respect of the treaty with Italy. On 14 April 1927, Ireland gave notice of its withdrawal from the 1883 treaty with Italy. The notice would be effective one year later, but the two States agreed in about 1929 to prolong the treaty indefinitely pending the conclusion of a new treaty between them.⁵⁰ On 26 September 1929, Ireland gave notice to Portugal of its withdrawal from the 1914 Treaty.⁵¹

⁴³ See para. 26 below.

⁴⁴ United Kingdom, *British and Foreign State Papers* (London), vol. XLV, p. 21.

⁴⁵ United Nations, *Treaty Series*, vol. 43, p. 103.

⁴⁶ See para. 9 above. See also Switzerland, Chancellerie fédérale, *Recueil systématique des lois et ordonnances, 1848-1947* (Berne, 1953), vol. 14, pp. 358, 390, 545 and 659.

⁴⁷ The case of Ireland is considered in this section for reasons of convenience.

⁴⁸ United Kingdom, *British and Foreign State Papers, 1882-1883* (London, 1890), vol. LXXIV, p. 63.

⁴⁹ *Ibid.*, 1914, part II (London, H.M.S.O., 1918), vol. CVIII, p. 369.

⁵⁰ *Ibid.*, 1927, part I (London, H.M.S.O., 1932), vol. CXXXVI, p. 266, and *ibid.*, 1929, part I (London, H.M.S.O., 1934), vol. CXXX, p. 168.

⁵¹ *Ibid.*, 1929, p. 175.

*United Kingdom—United States Convention of Commerce and Navigation (1815)*⁵²

20. This convention provided for reciprocal liberty of commerce and most-favoured-nation treatment in certain respects, between the territories of the United States and "all the territories of His Britannic Majesty in Europe".⁵³ During discussions in 1938 of Irish-American trade, the Government of Ireland referred to this Convention, based on most-favoured-nation treatment, to show that this policy had long been in effect between the two countries.⁵⁴ On 21 January 1950, Ireland and the United States negotiated a new Treaty of Friendship, Commerce and Navigation.⁵⁵ Article XXIV of this Treaty, which according to the United States, "replaces, greatly expands and modernizes several old treaties concluded by Great Britain with the United States which previously governed Irish-American economic relations",⁵⁶ provided in part:

The present Treaty shall replace the following agreements concluded between the United States of America and the United Kingdom of Great Britain and Ireland, in so far as the provisions thereof are in force between the United States of America and Ireland: Convention of Commerce and Navigation [...] 1815, as continued in force ...

Later in the year, but some time before the 1950 Treaty of Friendship entered into force, Ireland and the United States concluded a Consular Convention (1 May 1950)⁵⁷ article 29 of which provided, *inter alia*, that

The provisions of Article IV of the Treaty of Commerce and Navigation ... 1815 ... are hereby superseded as regards relations between the High Contracting Parties in respect of the territories to which this Convention applies.⁵⁸

⁵² United States of America, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers, 1776-1909* [W. M. Malloy, comp.] (Washington D.C., U.S. Government Printing Office, 1910), vol. I, p. 624. The convention was continued in force on 6 August 1827 (*ibid.*, p. 645).

⁵³ Article III relating to trade and vessel applied to various British territories in Asia and is discussed below (see foot-note 77 below). Article IV provided, without territorial restriction, for the appointment of consuls: it is still considered by the United States to be in force for several Commonwealth States which were not subject to the 1951 United Kingdom-United States Convention relating to consular officers (United Nations, *Treaty Series*, vol. 165, p. 121) or which have not concluded new consular conventions with the United States. See United States of America, Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1970*, Department of State Publication 8513 (Washington D.C., U.S. Government Printing Office, 1970), pp. 7, 28, 34, 44, 107, 165 and 203.

⁵⁴ See United States of America, Department of State, *Foreign Relations of the United States: Diplomatic Papers 1938*, vol. II: *The British Commonwealth, Europe, Near East and Africa* (Washington D.C., U.S. Government Printing Office, 1955), p. 191.

⁵⁵ United Nations, *Treaty Series*, vol. 206, p. 269.

⁵⁶ United States of America, Department of State, *Department of State Bulletin*, Publication 3976 (Washington D.C.), vol. XXIII, No. 587 (2 October 1950), pp. 550-551.

⁵⁷ United Nations, *Treaty Series*, vol. 222, p. 107.

⁵⁸ The United Kingdom was apparently of the view that the Irish Free State remained bound, after its establishment, by trade agreements; thus it is listed (in United Kingdom, Foreign Office, *Handbook of Commercial Treaties, etc.* (op. cit.))

3. Iraq

France—United Kingdom San Remo Oil Agreement (1920)⁵⁹ and France—United Kingdom Convention (1920) concerning the Mandates for Syria and the Lebanon, Palestine and Mesopotamia (1920)⁶⁰

21. In a protocol to the San Remo Agreement, signed on 10 October 1932,⁶¹ the Governments of France, Iraq and the United Kingdom stated that they were agreed

in recognizing that the rights and obligations devolving upon the Government of the United Kingdom under the [above agreements] . . . are henceforth transferred to the Government of Iraq in so far as the provisions of those instruments relate to Iraq.

4. Jordan

Syria and Lebanon—Transjordan Customs Agreement (1923)⁶²

22. This agreement was signed by "The Representative of the Country under French Mandate" and by "The Representatives of the Government of Transjordan". In a 1950 Agreement between Jordan and Syria relating to the transport of supplies for refugees,⁶³ Syria expressly waived its rights under the 1923 Agreement and permitted certain transport procedures. In 1953 Syria and Jordan entered into a new Agreement of Commerce and Transit,⁶⁴ article 24 of which provided: "This Agreement shall, upon its entry into force, supersede the Customs Agreement of 10 May 1923 . . .".

5. India

23. The list of treaties drawn up for the partition proceedings in 1947 included several treaties concerning commerce. The earliest were the Great Britain—Denmark Treaty of Peace and Commerce of 1660-1661, the Sweden—United Kingdom Treaty of Commerce and Alliance of 1766, and the Nepal—English Company Commercial Treaty of 1792. Most of the treaties applied automatically or by extension to British India as part of the United Kingdom's colonial territory while the remainder were negotiated specifically for India.⁶⁵

(Foot-note 58 continued)

among the territories to which all pre-1921 agreements which had applied to the United Kingdom of Great Britain and Ireland are currently applicable.

⁵⁹ United Kingdom, *British and Foreign State Papers*, 1920 (London, H.M.S.O., 1923), vol. CXIII, p. 350.

⁶⁰ *Ibid.*, p. 355.

⁶¹ *Ibid.*, 1932 (London, H.M.S.O., 1937) vol. CXXXV, p. 293.

⁶² Syria, Office arabe de presse et de documentation, Bureau des documentations syriennes et arabes, *Recueil des accords internationaux conclus par la Syrie depuis 1946*, 4th ed. (Damas, Bureau des documentations syriennes et arabes, 1953), VII.

⁶³ *Ibid.*,

⁶⁴ *Ibid.*, XXIV.

⁶⁵ See International Law Association, *The Effect...* (op. cit.), p. 36. See also Samuel, comp., *India Treaty Manual* (1966), which lists—often with references to the partition proceedings—many old commercial agreements.

Argentina—United Kingdom Treaty of Amity, Commerce and Navigation (1825)⁶⁶

24. In 1958 the Argentine Government in response to a request that Article XIII of this Treaty be kept in force took the following position:

"Treaties concluded by a State do not extend *ipso jure* to its colonies. In the Argentine-United Kingdom Treaty of 1825, no reference was made to the colonies apart from the statement in article 2 that 'there shall be between all the Territories of His Britannic Majesty in Europe, and the Territories of the United Provinces of Rio de la Plata...'. Hence, it must be concluded that India could in no way claim the right to enjoy the benefits of a treaty to which it was never a party and which was not even applicable to its territory." Moreover, the legal continuity between British India and present-day India is very much open to question. While it is true India remained in the United Nations as a Member after becoming independent, it must be remembered that this was a compromise solution, which was not recommended by the Legal Committee of the Organization (see A/C.1/212 of 11 October 1947). Furthermore, the Argentine Republic stated in the First Committee at that time that the partition between India and Pakistan had meant the extinction of British India and that, therefore, neither of the new States should be regarded as the successor (see A/C.6/156 of 2 October 1947).⁶⁷

Denmark—Great Britain Treaty of Peace and Commerce (1960-1961)⁶⁸

25. Both India and Iceland consider this treaty to be in force between them.⁶⁹

Treaty of Friendship, Commerce and Navigation between Great Britain and Northern Ireland and India and Muscat (1939)⁷⁰

26. This treaty, which replaced the 1891 Treaty, as prolonged,⁷¹ was signed for India as well as for Great Britain and provided, *inter alia*, for most-favoured-nation treatment. In March 1950, according to the Permanent Representative of India to the United Nations

the Government of the United Kingdom informed the Government of India that His Highness the Sultan of Muscat had given a formal notice of termination of the Treaty on the expiry of its twelve years, i.e., 11th February 1951. In view of the constitutional changes in India, the Sultan had also expressed a desire to enter into a new and separate Treaty with India. India, accordingly, entered into a Treaty with the Sultan to replace the old Treaty.⁷²

The new Treaty of Friendship, Commerce and Navigation was signed on 15 March 1953.⁷³

⁶⁶ United Kingdom, *British and Foreign State Papers*, 1824-1825 (London, 1846), vol. XII, p. 29.

⁶⁷ United Nations, *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), p. 7.

⁶⁸ See foot-note 31 above.

⁶⁹ Ireland, *Treaty List*, p. 100.

⁷⁰ League of Nations, *Treaty Series*, vol. CXCVI, p. 303.

⁷¹ See para. 17 above.

⁷² *Official Records of the General Assembly, Nineteenth Session, Annexes*, annex No. 16, document A/5846, para. 415. For the termination of the 1939 Treaty, see United Nations, *Treaty Series*, vol. 149, p. 430.

⁷³ United Nations, *Treaty Series*, vol. 190, p. 69. A treaty concluded by the United Kingdom in 1951 (*ibid.*, vol. 149, p. 247) accorded limited rights to Commonwealth subjects including Indian citizens. These rights were abrogated in 1958,

Nepal—United Kingdom agreements

27. Article 9 of the Treaty of Trade and Commerce signed by India and Nepal on 31 July 1950⁷⁴ provides:

So far as matters dealt with herein are concerned this Treaty cancels all previous treaties, agreements or engagements concluded between the British Government on behalf of India and the Government of Nepal.

Thailand—United Kingdom Treaty of Friendship, Commerce and Navigation (1937)

28. Thailand agreed with India in 1948 to apply this treaty provisionally until a new treaty could be negotiated. It has been said that this action negated the suggestion of succession. Thailand also took the position that Indian citizens were not "British subjects" within the 1937 Treaty.⁷⁵

*United Kingdom—United States Convention of Commerce and Navigation (1815)*⁷⁶

29. In discussions in 1939 concerning American-Indian trade, the United States Secretary of State, referring to this Convention, made the point that it was now obsolete and inadequate,⁷⁷ and suggested that it be brought up to date.⁷⁸ The relevant article of the Convention is listed in United States *Treaties in Force*.⁷⁹

6. Pakistan

30. As in the case of other members of the Commonwealth, Pakistan continued after independence to participate in the preference system allowed by article I, paragraph 2 (a), of the General Agreement on Tariffs and Trade and based, at least in part, on bilateral agreements. One instance of an agreement recognizing this is the exchange of letters constituting a commercial agreement with the Belgium-Luxembourg Economic Union (15 March 1952),⁸⁰ paragraph 4 (d) of which excepted from the most-favoured-nation obligations in the agreement

so far as India was concerned, by an Exchange of Notes between India, Muscat and Oman and the United Kingdom (*ibid.*, vol. 305, p. 430).

⁷⁴ *Ibid.*, vol. 104, p. 3.

⁷⁵ See International Law Association, *The Effect... (op. cit.)*, p. 193, and D. P. O'Connell, *op. cit.*, vol. II, pp. 6-7, footnote 1. For further discussion of the 1937 Treaty, see paras. 33-35 below.

⁷⁶ See para. 20 above.

⁷⁷ The Convention, so far as trade was concerned, relates mainly to United Kingdom territories in Europe. Article III (concerning shipping) applied to certain ports in India. Article IV (relating to consuls) is of general geographic scope and is listed under India in United States of America, Department of State, *Treaties in Force...* 1970 (*op. cit.*), p. 107.

⁷⁸ See United States of America, Department of State, *Foreign Relations of the United States: Diplomatic Papers 1939*, vol. II: *General—The British Commonwealth and Europe* (Washington D.C., U.S. Government Printing Office, 1956), pp. 350-351.

⁷⁹ United States of America, Department of State, *Treaties in Force...* 1970 (*op. cit.*), p. 109.

⁸⁰ United Nations, *Treaty Series*, vol. 316, p. 65. See also, for example, Pakistan's agreements with Egypt, 22 May 1949 (Pakistan, *Treaty Series* (1949), No. 7, p. 73); with France,

the favours, advantages, concession or exemptions which derive from any special arrangements that exist or may exist between Pakistan and any other Commonwealth country and between Pakistan and India as recognized in the General Agreement on Tariffs and Trade.

India—Poland Convention (1931)

31. On 4 April 1949, Pakistan and Poland concluded a Trade Agreement.⁸¹ Its preamble read in part as follows:

Whereas the [two Governments] are desirous of developing trade between their respective countries on a mutually advantageous basis in conformity with the Convention of May 8, 1931, signed between Poland and India...

India—United Kingdom Agreement (1939)

32. On 2 April 1951, Pakistan and the United Kingdom signed a new Trade Agreement.⁸² Article XIV provided, in part, that

On the coming into force of the present Agreement, the Agreement concluded between the United Kingdom Government and the Government of India in London on the 20th March, 1939, shall cease to have effect in relation to Pakistan.

A British letter of the same date opened with a reference to the "Trade Agreement which has been signed to-day, to replace the United Kingdom/India Agreement, 1939".⁸³

*Thailand—United Kingdom Treaty of Friendship, Commerce and Navigation (1937)*⁸⁴

33. This treaty provided for the reciprocal and most-favoured-nation treatment of the nationals of the two parties in a wide range of activities. It applied, on the British side, to Great Britain and Northern Ireland and to any territories to which the treaty was extended or which acceded. (The right of accession was reserved to members of the British Commonwealth of Nations; the power to extend applied to any of the colonies, overseas territories or protectorates of the King and to any mandated territory in respect of which the mandate was exercised by the United Kingdom.) It was also provided that so long as the treaty was not applicable to such territories, most-favoured-nation treatment would be applied to the goods produced or manufactured in those territories on a basis of reciprocity. Further, "subjects" of a high contracting party meant, in relation to Britain, "all the subjects of His Majesty and all persons under His Majesty's protection".⁸⁵ "Vessels were also

29 November 1949 (*ibid.*, No. 19, p. 141); with the Federal Republic of Germany, 4 March 1950 (*ibid.*, (1950), No. 3 (i), p. 5); with Italy, 29 June 1950 (*ibid.*, No. 10, p. 64); with Austria, 19 October 1950 (*ibid.*, No. 22 (i) p. 172); with Spain, 22 January 1951 (*ibid.*, (1951), No. 3, p. 8); with Iraq, 31 March 1951 (*ibid.*, No. 8, p. 47); with Italy 18 December 1951 (*ibid.*, No. 28, p. 157); with Syria, 18 December 1955 (*ibid.*, (1855), No. 32); and with Italy, 8 February 1956 (*ibid.* (1956), No. 2).

⁸¹ Pakistan, *Treaty Series* (1949), No. 4, p. 50.

⁸² United Nations, *Treaty Series*, vol. 168, p. 281.

⁸³ *Ibid.*, p. 302.

⁸⁴ League of Nations, *Treaty Series*, vol. CLXXXVIII, p. 333.

⁸⁵ *Ibid.*, p. 352.

defined in these wide terms. Under the above provisions the treaty was applied, *inter alia*, to the Straits Settlements, the Federated and Unfederated Malay States,⁸⁶ India,⁸⁷ Ceylon,⁸⁸ and Burma.⁸⁹

34. In an Agreement of 1 January 1946 for the termination of the state of war between the United Kingdom, India and Siam,⁹⁰ Siam undertook to negotiate as soon as practicable a new treaty of establishment, commerce and navigation with the United Kingdom and a new treaty of commerce and navigation with India. Pending the conclusion of these treaties, Siam undertook to observe the 1937 Treaty. This undertaking was to terminate within three years if the new treaties were not concluded. "British" subjects was again defined as meaning all subjects of His Majesty the King of Great Britain, Ireland and the British Dominions beyond the seas, Emperor of India, and all persons under His Majesty's protection. No record has been found of the treaties foreshadowed in the above agreement. Rather, in 1952 the United Kingdom and Thailand further extended the 1937 Treaty indefinitely subject to the right of either party to terminate it by the giving of twelve months' notice,⁹¹ and by an Exchange of Notes in 1948 India and Thailand agreed to apply the treaty pending the conclusion of a new treaty between them.⁹²

35. The United Kingdom Government has stated as follows.

During the course of negotiations with the Siamese Government concerning the Anglo-Siam Treaty of Commerce and Navigation signed at Bangkok on 23 November 1937, the United Kingdom Government reminded the Siamese Government that if the latter agreed to the proposals forwarded by the United Kingdom Government concerning the above Treaty, it would apply in respect of all territories to which it had been previously made applicable either under Article 23 or Article 24 thereof.

This applied to both India and Pakistan, the Governments of which were successor Government of undivided India, as the latter was constituted at the time when the 1937 Treaty was made applicable to India.

The Siamese Government would not agree that the 1937 Treaty was applicable to Pakistan. In their view, a new State was not bound by the treaties of Commerce and Navigation concluded by the State of which it was formerly an integral part. They had, however, no objection to Pakistan acceding to the 1937 Treaty in accordance with the relevant provisions thereof.

The United Kingdom Government, in reply, reiterated their view that the Government of Pakistan equally with the Government of India was a successor Government to the former Government of undivided India as constituted at the time when the 1937 Treaty was made applicable to India. The readiness and desire of the Government of Pakistan to succeed to the international obligations and rights of the former Government of undivided India was made clear in the Indian Independence

(International Arrangements) Order, 1947. The United Kingdom Government found it hard to understand how the Siamese Government differentiated between India and Pakistan since both were former parts of undivided India and both alike should have been entitled to succeed to the rights and obligations of the 1937 Treaty.

The United Kingdom Government also stated that if the Siamese Government were not prepared to recognize Pakistan's rights as a co-equal successor State with India, then the position of Pakistan would seem otherwise only to be analogous to that of the old dominions when they became separate international persons. In the case of the "old dominions", they were generally recognized as succeeding to the rights and obligations which had been assumed by the United Kingdom Government on behalf of the territories from which the new States were constituted. This applied not only to treaties which referred to the territories concerned but also to treaties, such as commercial treaties, whose provisions applied territorially to the whole Empire.

The Siamese Government, however, adhered to their original view, namely denying the right of Pakistan to succeed to the Treaty but expressing willingness that she should accede. The Government of Pakistan did not, in the event, accede to the Treaty and the matter was dropped.

During the course of consultations with the Government of Pakistan concerning these same negotiations, they expressed the view, *inter alia*, that by virtue of the Indian Independence (International Arrangements) Order, 1947, rights and obligations under all agreements to which the Government of undivided India was a party, had devolved upon both the Governments of Pakistan and of India except in so far as any such agreement could be held to have had an exclusive territorial application to an area now comprised in either of the two new territories. The Anglo-Siam Treaty of 1937 had been applied generally to undivided India and did not therefore come within the terms of the exception.

The United Kingdom Government, while agreeing in general with the views of the Government of Pakistan, pointed out, however, to the latter that the position of Pakistan vis-à-vis Siam could not be governed by the 1947 Order which only had, and only could have, validity as between Pakistan and India. The United Kingdom Government would have hoped, however, that the Siamese Government would have accepted the position as set out in the Order.⁹³

36. Thailand concluded a new commercial treaty with Pakistan on 28 August 1956.⁹⁴

7. Ceylon

*Denmark—Great Britain Treaties of Peace and Commerce of 1660-1661 and 1670*⁹⁵

37. Both Iceland and Ceylon consider these treaties to be in force between them.⁹⁶

*United Kingdom Treaties of Commerce and Navigation with Finland, Hungary and Romania*⁹⁷

38. These were amongst the treaties which Ceylon,

⁸⁶ *Ibid.*, p. 370.

⁸⁷ *Ibid.*, vol. CXCVII, p. 402.

⁸⁸ *Ibid.*, p. 404.

⁸⁹ *Ibid.*, vol. CC, p. 563, and United Nations, *Treaty Series*, vol. 2, p. 215.

⁹⁰ United Nations, *Treaty Series*, vol. 99, p. 131.

⁹¹ *Ibid.*, vol. 173, p. 31.

⁹² D. P. O'Connell, *op. cit.*, vol. II, pp. 6-7, foot-note 1.

⁹³ United Nations, *Materials on Succession of States (op. cit.)*, pp. 190-191.

⁹⁴ See foot-note 92 above.

⁹⁵ See para. 13 above.

⁹⁶ Iceland, *Treaty List*, p. 97.

⁹⁷ With Finland, 14 December 1923 (League of Nations, *Treaty Series*, vol. XXIX, p. 129); with Hungary, 23 July 1926 (*ibid.*, vol. LXVII p. 183); and with Romania, 6 August 1930 (*ibid.*, vol. CXXIII, p. 307).

through the United Kingdom, requested should be kept in force or revived under the Peace Treaties of 1947. It will be recalled⁹⁸ that Ceylon reserved the right to enter into negotiations to alter or revoke the treaties so kept in force or revived, since they were signed before Ceylon became independent.⁹⁹

8. Ceylon, Ghana and Malaya

*Ottawa Agreements concluded by the United Kingdom with other Commonwealth countries (1932)*¹⁰⁰

39. The Agreements concluded by the United Kingdom at Ottawa in 1932 provided broadly speaking for the grant of the same preferences, as established in the Agreements, by and to its colonies, on a basis of reciprocity. Subsequent practice suggests that these preferences continued after Ceylon, Ghana and Malaya became independent.

40. In 1957 (before Ghana and Malaya became independent), Australia concluded a new trade agreement with the United Kingdom replacing the 1932 instrument.¹⁰¹ This agreement provided in article 11:

The provisions of this Agreement do not affect the Agreement between the United Kingdom Government and the Australian Government signed at Ottawa on 20 August, 1932, as in force between the Governments of Ceylon and Australia.

41. New Zealand and the United Kingdom concluded a new trade agreement in 1959.¹⁰² The 1932 Agreement was not affected, according to article 17, in so far as any of its provisions "may be" in force in respect of Ceylon, Ghana and Malaya; the New Zealand official publication setting out the 1959 Agreement states that despite constitutional changes these three States continue to have rights and obligations under the 1932 Agreement.¹⁰³

42. Next, in 1958, Australia and Malaya signed a trade agreement.¹⁰⁴ Its agreed minutes record that the two Governments agree that with the entry into force of this Agreement the provisions of the United Kingdom and Australia Trade Agreement, 1932, no longer have applications [*sic*] as between the Federation and Australia.¹⁰⁵

43. The Malayan-New Zealand Agreement of 1961¹⁰⁶ is more cautiously worded. It supersedes and replaces any provisions of the Ottawa Agreement which "may hitherto have been in force in relations between" the two countries (article XV, para. 2).

9. Burma

*Denmark—Great Britain Treaties of Peace and Commerce of 1660-1661 and 1670*¹⁰⁷

44. By Notes of 29 April 1948 and 17 April 1950 between the Danish and Burmese Ambassadors in London, it was established that these Treaties, including their most-favoured-nation clauses, were in effect between Burma and Denmark, since Burma had succeeded to them; the Burma-United Kingdom Treaty of 17 October 1947¹⁰⁸ (which contains an inheritance provision) was mentioned.¹⁰⁹

10. Sudan

45. On 1 January 1956 both Egypt and the United Kingdom, when recognizing the independence of the Sudan, stated:

... the [Egyptian/United Kingdom] Government trust that the Government of the Sudan will continue to give full effect to the agreements and conventions made on behalf of, or applied to, the Sudan by the Co-Domini and will be grateful for confirmation that this is the intention of the Sudan Government.¹¹⁰

According to one writer, the customs agreements concluded between Egypt and the United Kingdom are in force in the Sudan.¹¹¹

11. Nigeria

*Liberia—United Kingdom Treaty of Friendship and Commerce (1848)*¹¹²

46. Following the conclusion of a devolution agreement with the United Kingdom, the Nigerian authorities have undertaken a study of those treaties applicable to Nigeria before independence. Among those recognized as binding "by virtue of United Kingdom's signature or ratification" is the above treaty.¹¹³

⁹⁸ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 111, document A/CN.4/229, para 37.

⁹⁹ United Nations, *Treaty Series*, vol. 104, pp. 29, 35 and 117.

¹⁰⁰ See United Kingdom, *Imperial Economic Conference at Ottawa, 1932: Summary of the Proceedings and Copies of Trade Agreements* (Cmd. 4174) (London, H.M.S.O., 1932).

¹⁰¹ United Nations, *Treaty Series*, vol. 265, p. 197. See also the note under Ceylon in the 1966 Supplement to the Australian *Treaty List*, p. 7 (Australia, *Treaty Series* (1966), No. 21).

¹⁰² United Nations, *Treaty Series*, vol. 354, p. 161.

¹⁰³ New Zealand, Department of External Affairs, *Trade Agreement between the Government of New Zealand and the Government of the United Kingdom...*, New Zealand Treaty Series, 1959, No. 4 (Wellington, 1959), publication No. 202, p. 24. Note that the new agreement also did not affect the continued operation of the 1932 Agreement between New Zealand and any territory in the Federation of Rhodesia and Nyasaland.

¹⁰⁴ United Nations, *Treaty Series*, vol. 325, p. 253.

¹⁰⁵ *Ibid.*, p. 270.

¹⁰⁶ New Zealand, Department of External Affairs, *Trade Agreement between the Government of New Zealand and the Government of the Federation of Malaya*, New Zealand Treaty Series, 1961, No. 6 (Wellington, 1961), publication No. 242.

¹⁰⁷ See para. 13 above.

¹⁰⁸ United Nations, *Treaties Series*, vol. 70, p. 183.

¹⁰⁹ Denmark, *Lovtidende for Kongeriget Danmark*, 1950, Part C: *Danmarks Traktater* (Copenhagen, 1951), p. 316, No. 37.

¹¹⁰ United Nations, *Materials on Succession of States* (op. cit.), pp. 152 and 203. It is not known what, if any, substantive response the Sudan made. See *ibid.*, p. 203 for a Sudan reply to the United Kingdom seeking further information.

¹¹¹ A. G. Mochi Onory, *La succession d'Etats aux traités et notes sur la succession entre organisations internationales* (Milano, Giuffrè, 1968), p. 126.

¹¹² United Kingdom, *British and Foreign State Papers, 1847-1848* (London, H.M.S.O., 1861), vol. XXXVI, p. 394.

¹¹³ Nigeria, Federal Ministry of Justice, *Nigeria's Treaties in Force for the Period 1st October 1960 to 30th June 1968*

12. *Tanganyika*¹¹⁴

47. Tanganyika's practice and position with regard to commercial treaties have been described as follows:

53. There were seventeen bilateral commercial treaties which, prior to independence, had been concluded on behalf of, or had been extended to, Tanganyika. Because of the vicissitudes of trade and commerce, treaties dealing with such matters are generally regarded as having a less than permanent character, even though containing no express provision for termination.

54. It was observed that these treaties had been concluded with British, rather than Tanganyika particular needs and desires in mind. Many were outdated or with countries with which Tanganyika shared no strong ties or desire for association. After independence, *notes verbales* were sent to each of the other parties to the bilateral treaties notifying them that Tanganyika did not consider itself bound by such arrangements.

55. Many of the third parties who were the addressees of the notes relating to the commercial treaties replied merely taking note of the Tanzania Government's communication. There were some addressees who replied expressing the wish that the treaties be kept in force until such time as new agreements could be negotiated between the two Governments concerned.

56. In some instances, it was considered desirable to continue the treaties in force and arrangements were made for so doing, while negotiations proceeded for the conclusion of a new treaty. Thus in the cases of Czechoslovakia, the Soviet Union and Yugoslavia, the old commercial treaties signed by them with Britain replaced by post-independence treaties which entered into force on 20th September 1963, 2nd December 1963, and 8th January 1964, respectively.

57. Where no further treaty relationships were desired, the Tanganyika Government, by note addressed to the third party prior to the expiration of two-year grace period, indicated its view that the continuation in force of the treaties concerned would benefit neither of the two Governments. The Tanganyika Government also, where appropriate, pointed out that the pre-existing treaty in question was a comprehensive document designed to fit the needs of a major trading partner of the United Kingdom. Were Tanganyika to be substituted for the United Kingdom as one of the parties, large portions of the treaty would become devoid of meaning and impossible of fulfilment.

58. An example of such a case was the 1928 Treaty which had been concluded between His Majesty in respect of the United Kingdom and the President of the Government of the Republic of China. On 23rd November 1963, the Tanganyika Government addressed a Note to the Government of the People's Republic of China, through its Embassy in Dar-es-Salaam, referring to the statement of the Prime Minister of Tanganyika in the National Assembly of 30th November 1961.

59. The note expressed the view of the Tanganyika Government that under the rules of customary international law, this treaty would not survive the attainment of independence by Tanganyika. The Government of the People's Republic of China were therefore informed that, as from 8th December 1963, the Government of Tanganyika considered it had neither rights nor obligations under the treaty which would

have no force and effect in Tanganyika from the date. (The Note referred in the same terms to two other treaties, namely, the 1904 Convention between the United Kingdom and China respecting the Employment of Chinese Labour in British Colonies and Protectorates, and a 1943 treaty between His Majesty in respect of the United Kingdom and India and His Excellency the President of the National Government of the Republic of China for the Relinquishment of Extra-Territorial Rights in China.)

60. It does not appear that any of the third parties to these commercial treaties objected to the views expressed therein by the Tanganyika Government as to the legal consequences of succession. In some cases, strong appeals were reiterated for the continuation of treaty arrangements pending negotiation of new treaties in substitution, despite the expressed unwillingness of the Tanganyika Government. The appeals were not successful. By 25th April 1964, when Tanganyika and Zanzibar merged to become a United Republic, there were none of the old treaties relating to commerce or trade which were recognized by the Tanganyika Government as being valid or any longer applicable to Tanganyika.¹¹⁵

13. *Guyana, Jamaica and Trinidad and Tobago**Canada—West Indies Trade Agreement (1925)*¹¹⁶

48. In May 1964, the Canadian Government stated that this agreement—as well as an agreement of 1958 concerning economic development—was still in force, *inter alia*, for Jamaica and Trinidad and Tobago.¹¹⁷ On 8 July 1966, Canada and several Commonwealth Caribbean countries, including Guyana, Jamaica and Trinidad and Tobago, signed a Protocol to it.¹¹⁸ The parties to the Protocol recognized the important changes which had taken place in their trade relations since 1925, agreed to examine the 1925 Agreement with a view to its further amendment or renegotiation, and to continue it in force, with certain modifications, for the meantime.

¹¹⁵ E. E. Seaton and S. T. M. Maliti [both of Tanzania's Department of External Affairs], "Treaties and succession of States and governments in Tanzania", in *African Conference on International Law and African Problems* (Lagos, 1967), pp. 84-85. At the beginning of their paper they state that the views in it are personal and do not necessarily reflect the official position of the Tanzanian Government (*ibid.*, p. 79). The "old commercial treaties" mentioned in paragraph 56 quoted above are not identified but the agreement with Czechoslovakia appears to be the Trade and Financial Agreement signed on 28 September 1949 (United Nations, *Treaty Series*, vol. 86, p. 141); see, in particular, articles 3 and 6; see also the 1923 Treaty of Commerce mentioned in the preamble to the 1949 Agreement (*ibid.*, p. 142). The agreement with the USSR appears to be the Five Year Trade Agreement signed on 24 May 1959 (*ibid.*, vol. 374, p. 305); and that with Yugoslavia, the Trade Agreement of 26 December 1949 (*ibid.*, vol. 87, p. 71). For the new Trade Agreement (signed on 14 August 1963) between Tanganyika and USSR, see *ibid.*, vol. 493, p. 195. This agreement does not expressly refer to pre-independence treaties.

¹¹⁶ United Kingdom, *British and Foreign State Papers, 1926, Part I* (London, H.M.S.O., 1931), vol. CXXIII, p. 578.

¹¹⁷ *The Canadian Yearbook of International Law, 1966* (Vancouver B. C., 1966), vol. IV, pp. 255-256.

¹¹⁸ Canada, *Treaties Series*, 1966, No. 15.

(Foot-note 113 continued)

(Lagos Federal Ministry of Information 1969), p. 9. See also the statement by Dr. T. O. Elias, Nigerian Minister of Justice, in *Yearbook of the International Law Commission, 1962*, vol. I, pp. 4-5, 629th meeting, paras. 25-27, and Nigerian Government Notice No. 1881.

¹¹⁴ The effect of the formation of the United Republic of Tanzania is discussed in section B, 11, below.

14. Kenya

Commercial treaties of the United Kingdom with Czechoslovakia, Egypt, Hungary, Poland, Romania and the USSR

49. According to one writer, the position as at 31 December 1964, was that

All [these] treaties ... had been renegotiated. Of these countries, only Romania had taken the position that Kenya had not succeeded to the relevant United Kingdom treaty, and therefore this did not need to be expressly superseded in the new agreement. No action had been taken with respect to other commercial treaties, but their termination by notice was envisaged.¹¹⁹

15. Malawi¹²⁰

Japan—Federation of Rhodesia and Nyasaland Trade Agreement

50. On 6 October 1964 Malawi wrote to Japan stating that it hoped to conclude a trade agreement in the future, but would "within the scope of the laws and regulations of Malawi, continue to apply in practice, *mutatis mutandis*, the provisions"¹²¹ of the above agreement.

*Nyasaland—Southern Rhodesia Agreement (1964)*¹²²

51. This agreement, which was signed at a time when it was expected that Nyasaland would become independent on 6 July 1964¹²³ provided for its termination on the giving of six months' notice. The Agreement was amended on 31 January 1964, 2 July 1964, 11 June 1965 and 11 August 1965; in the two latter cases both the Malawi and Southern Rhodesian Notes referred to the "Trade Agreement between the Government of Malawi and the Government of Southern Rhodesia".¹²⁴ On 26 November 1965 Salisbury announced that

notwithstanding the provisions of Article IX of the Trade Agreement between the Government of Malawi and the Government of Rhodesia, the Government of Malawi has terminated the said agreement with effect from the 18th November, 1965.¹²⁵

¹¹⁹ D. P. O'Connell, *op. cit.*, vol. II, p. 118, O'Connell notes United Kingdom treaties with Czechoslovakia, 1925 (*Cmd.* 2254); Egypt, 1930 (*Cmd.* 3662); Hungary, 1926 (*Cmd.* 2933); Poland, 1923 (*Cmd.* 2219); Romania, 1930 (*Cmd.* 3945) and USSR, 1934 (*Cmd.* 4567) (*ibid.*, foot-note 2).

¹²⁰ For the effect of the formation and dissolution of the Federation of Rhodesia and Nyasaland on treaties applicable to Nyasaland, see section B, 8, below. Following the dissolution of the Federation, the United Kingdom acted on behalf of Nyasaland in confirming the continuity of all federal commercial treaties except that with Japan (D. P. O'Connell, *op. cit.*, vol. II, p. 175).

¹²¹ D. P. O'Connell, *op. cit.*, vol. II, p. 175.

¹²² Southern Rhodesia Government Notice No. 25 A (1964).

¹²³ An announcement by the British Government to this effect was made on 27 September 1963: see *Keesing's Contemporary Archives* (London), vol. XIV (1963-1964), 23-30 November 1963, p. 19758 A.

¹²⁴ Southern Rhodesia Government Notice No. 238 (1964); No. 601 (1964); No. 506 (1965); and No. 594 (1965).

¹²⁵ *Idem*, Notice No. 782 (1965).

United Kingdom and Federation of Rhodesia and Nyasaland—Portugal Trade Agreements

52. On 19 August 1964 Malawi stated:

In the past, this country's trade relationship with Portugal has been governed by agreements entered into with Portugal by the British Government and subsequently the Federal Government. Now that Malawi is independent it is necessary for it to negotiate its own trade agreements.¹²⁶

Pending negotiation, Malawi continued the preferential treatment due under the Federal agreements.¹²⁷

16. Malta

*United Kingdom—United States Convention of Commerce and Navigation (1815)*¹²⁸

53. It will be recalled that the general trade provisions of this Convention applied only to His Majesty's territories in Europe.¹²⁹ The Convention (along with the 1827 Convention) is listed under Malta in the United States publication *Treaties in Force*, which also sets out the substance of the Exchange of Notes between Malta and the United Kingdom concerning the former's treaty rights and obligations.¹³⁰

17. Zambia

54. At the end of 1965 Zambia gave notice of the termination of the trade agreements made by the Federation of Rhodesia and Nyasaland other than that mentioned in paragraph 55 below. That with Australia required previous consultation and Australia took the attitude that Zambia should have consulted it before issuing the notice. One effect was the abolition, so far as Zambia was concerned, of Commonwealth preference.¹³¹

*Federation of Rhodesia and Nyasaland—South Africa Trade Agreement*¹³²

55. In December 1964 Zambia gave twelve months' notice, in terms of the above agreement, of its intention to terminate it.¹³³

¹²⁶ Malawi Press Release No. 1339 (1964), quoted in D. P. O'Connell, *op. cit.*, vol. II, p. 175.

¹²⁷ D. P. O'Connell, *op. cit.*, vol. II, p. 176.

¹²⁸ See foot-note 52 above.

¹²⁹ See para. 20 above.

¹³⁰ See United States of America, Department of State, *Treaties in Force ... 1970* (*op. cit.*), pp. 150-151. The Convention is not listed under Cyprus (*ibid.*, pp. 60-61). Malta came under British sovereignty in 1813, i.e. before the Convention was signed. Sovereignty over Cyprus was acquired in 1915. Note that the article concerning consuls, which was of general geographic scope, is listed under States which came under British sovereignty after 1815, (*ibid.*, pp. 28, 44, 165). The Malta-United Kingdom Exchange of Notes is published in United Nations, *Treaty Series*, vol. 525, p. 221.

¹³¹ D. P. O'Connell, *op. cit.*, vol. II, foot-note 1.

¹³² Federation of Rhodesia and Nyasaland, Federal Government Notice No. 172 (1960).

¹³³ D. P. O'Connell, *op. cit.*, vol. II, p. 115.

18. *Botswana and Lesotho**Basutoland, Bechuanaland Protectorate and Swaziland-South Africa Trade Agreement (1910)*

56. South African legislation enacted on 24 October 1966 shortly after Botswana (previously the Bechuanaland Protectorate) and Lesotho (formerly Basutoland) became independent, treated the above agreement as still in force.¹³⁴

(b) FORMER NON-METROPOLITAN TERRITORIES FOR THE INTERNATIONAL RELATIONS OF WHICH FRANCE WAS RESPONSIBLE

19. *Lebanon and Syria*¹³⁵*France—United States Convention concerning Rights in Syria and the Lebanon (1924)*¹³⁶ and *Exchange of Notes constituting an Agreement regarding Customs Privileges for Educational, Religious and Philanthropic Institutions in Syria and Lebanon (1937)*¹³⁷

57. In the 1924 Convention the United States of America consented to the administration by France of Syria and the Lebanon under the Mandate (which was set out in the Convention). The United States and its nationals were to have the same rights as members of the League of Nations and their nationals, and vested American property rights were to be respected. The Mandate required the mandatory to see that there was no discrimination against the nationals of members of the League, as compared with its own nationals or with the nationals of any foreign State, in matters concerning taxation or commerce, the exercise of professions or industries, navigation, or in the treatment of ships or aircraft. Goods originating in, or destined for, such States were also not to be discriminated against. The 1937 Exchange of Notes stated in detail, by reference to a Decree enacted in Syria and Lebanon and subsequently modified, the treatment which the United States and France agreed the United States was entitled to: the Exchange spoke of "satisfactory interpretations"¹³⁸ of the rights granted by the Convention.

58. Following the establishment of the Syrian and Lebanese Governments in November 1943, the United States exchanged Notes with them concerning the recognition of the independence of the two States.¹³⁹ The United States Notes contained the following passage:

¹³⁴ Customs and Excise Act 1964, section 51 (3), as enacted by the Customs and Excise Amendment Act 1966, section 7 (b).

¹³⁵ For Syria, see also paras. 21 and 22 above.

¹³⁶ United States of America, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers*, vol. IV: 1923-1937 [preface by E. J. Trenwith] (Washington D.C., U.S. Government Printing Office, 1938), p. 4169.

¹³⁷ League of Nations, *Treaty Series*, vol. CLXXXIV, p. 479.

¹³⁸ *Ibid.*, p. 480.

¹³⁹ United Nations, *Treaty Series*, vol. 124, pp. 187 and 251.

The United States is, therefore, prepared to extend full and unconditional recognition of the independence of Lebanon [Syria], upon receipt from Your Excellency's Government of written assurances that the existing rights of the United States and its nationals, particularly as set forth in the treaty of 1924 between the United States and France, are fully recognized and will be effectively continued and protected by the Lebanon [Syrian] Government, until such time as appropriate bilateral accord may be concluded by direct and mutual agreement between the United States and Lebanon [Syria].¹⁴⁰

The replies which were, *mutatis mutandis*, identical read, in part, as follows:

It is my pleasant task to convey to you the assurances of the Lebanese [Syrian] Government that the existing rights of the United States and its nationals, particularly as set forth in the Treaty of 1924 between the United States and France, are fully recognized and will be effectively continued and protected, until such time as appropriate bilateral accord may be concluded by direct and mutual agreement between Lebanon [Syria] and the United States.¹⁴¹

59. The United States continues to list the 1924 Convention and the 1937 Exchange of Notes under Lebanon and the Syrian Arab Republic.¹⁴² In the introduction to the Lebanese Treaty Series of 1951 the general statement is made that most pre-1943 treaties "are no longer relevant, having been denounced or implicitly cancelled by independence or by subsequent actions." [Translation from French.]¹⁴³

The above-mentioned treaties are not included in the collection.

20. *Cambodia, Laos and Viet-Nam*

60. Article 17 of the Convention on Foreign Trade signed by the three States and France in December 1950 reads:

The foreign trade agreements already concluded by the Government of the French Republic, which are listed in the annex, shall remain in force until their expiry.

The part of these agreements concerning Cambodia, Laos and Viet-Nam shall be applied in the manner specified in this Convention.

¹⁴⁰ *Ibid.*, pp. 188 and 252.

¹⁴¹ *Ibid.*, pp. 190 and 254. The United States had for some years been pressing for the recognition of its treaty rights after the granting of independence to the two territories. In 1941, General Catroux, the Free Delegate General and Plenipotentiary in Syria and Lebanon, declared that each of the two States, in becoming independent "assumes of course the rights and obligations heretofore subscribed to in its name". See, for example, United States of America, Department of State, *Foreign Relations of the United States: Diplomatic Papers 1941*, vol. III: *The British Commonwealth, the Near East and Africa* (Washington D.C., U.S. Government Printing Office, 1959), pp. 785-813; M. M. Whiteman, *Digest of International Law* (Washington D.C., U.S. Government Printing Office, 1963), vol. 2, pp. 218-225; and D. P. O'Connell, *op. cit.*, vol. II, p. 158.

¹⁴² See United States of America, Department of State, *Treaties in Force . . . 1970* (*op. cit.*), pp. 139, 140 and 215. For the effect of the changes in Syria's status in 1958 and 1961 on its treaty obligation, see paras. 149-166 below.

¹⁴³ Lebanon, Ministry of Justice and Foreign Affairs, *Recueil des traités et conventions bilatérales* (Beirut, 22 November 1951), p. vi.

The Government of the French Republic undertakes to facilitate the accession of Cambodia, Laos and Viet-Nam to international trade conventions. [Translation from French.]¹⁴⁴

The annex to the article listed short-term trade agreements with nineteen countries.¹⁴⁵

61. The Legal Committee of the French Union on 13 April 1950 expressed the following opinion:

In both cases whether we are concerned with States which are new, transformed or even subjected to changes in the circumstances of the exercise of their international capacity, the general principles of international law yield a conclusion. Treaties regularly concluded under the previous régime and which were hitherto applicable to these States continued to bind them as a matter of law despite subsequent changes.

...

The maintenance in force of treaties recognized by this principle does not deprive interested States of all legal means to disengage themselves from previous treaty obligations.

In the first place it is clear that in acceding to the exercise of international competences the associated States can, according to the conditions to which they are accustomed in the negotiation and signature of international agreements utilise on their own account the faculties of denunciation which have been inserted in previous treaties.

In the second place, in addition to this right included in the express terms of the treaties, the importance of the changes which have occurred in their constitution and in their relations with foreign powers could eventually justify in certain cases the invocation by the States of Indo China of the clause *rebus sic stantibus* in order to disengage themselves from a treaty which would have ceased to correspond with the circumstances contemplated after performance. The operation of this clause of course is subjected to the customary conditions which international law imposes on its exercise.¹⁴⁶

21. Morocco

Morocco—Sardinia Treaty of Friendship and Commerce (1825)

62. In the opinion of the Italian Ministry of Foreign Affairs, this Treaty must be deemed to be still in force, together with the Notes exchanged at Tangier and Tetuan on 9 March and 10 and 16 May 1857 concerning the extension to Sardinia of the privileges provided for in the British-Moroccan Treaty of 9 December 1856. Nevertheless, the provisions of articles 18 and 22 on consular jurisdiction, abolished after Italy's renunciation in a declaration signed at Paris on 9 March 1916, have definitely lapsed.¹⁴⁷

¹⁴⁴ France, Ministère d'Etat chargé des relations avec les Etats associés, *La Documentation française: Notes et études documentaires* (Paris, 24 January 1951), No. 1,425 (Série Outre-Mer XXIX), p. 27.

¹⁴⁵ No practice relevant to these trade agreements and concerning Cambodia, Laos and Viet-Nam has been discovered.

¹⁴⁶ Reproduced in International Law Association, *The Effect ... (op. cit.)*, pp. 168-169. See also the general bilateral provisions relating to succession: France—Laos, *Traité d'Amitié et d'Association*, 22 October 1953 (United Nations, *Materials on Succession of States (op. cit.)*, pp. 72 and 188); France—Viet-Nam, *Traité d'Indépendance*, 4 June 1954 (France, Ministère des affaires étrangères, *La Documentation française: Articles et documents* (Paris, 15 June 1954), No. 067 (Documents de politique internationale XCVII-XCVIII), p. 1).

¹⁴⁷ M. Giuliano, F. Lanfranchi and T. Treves, *Corpo-indice*

*Morocco-United Kingdom Convention of Commerce and Navigation (1856)*¹⁴⁸

63. This Convention granted British subjects and the British Government certain rights and privileges in respect of Moroccan trade.¹⁴⁹ In a Note of 1 March 1957 it was stated that

... Her Majesty's Government in the United Kingdom renounce their rights under Article 7 of the Convention of Commerce and Navigation signed on December 9, 1856, since they recognise that the limitations imposed by this Article on the right of the Moroccan Government to determine rates of custom duties and other charges imposed on or in connexion with the importation of products of the United Kingdom and its dependent territories into the Shereefian Empire are inappropriate to existing political and economic conditions.¹⁵⁰

In its reply, Morocco noted this declaration and proposed (a) that article 7 of the Convention should be regarded as abrogated; (b) that a new treaty of commerce and navigation should be negotiated; (c) rules to regulate trade in the meantime. The United Kingdom accepted these proposals.¹⁵¹

*Morocco—United States Treaty of Peace and Friendship (1836)*¹⁵²

64. This treaty, *inter alia*, placed United States commerce on the same footing as Spain's, or the most favoured nation's and granted the United States consular jurisdiction over certain questions. Early in 1956 the United States announced that it was following closely the progress which France and Morocco were making in working out their future relationships:

We consider that to modernize our own treaty relationship with Morocco [including the 1836 Treaty] with respect to extra-territorial rights would be the only course in keeping with this evolution.¹⁵³

Following the recognition by France and Spain of Morocco's independence,¹⁵⁴ the United States, in October 1956, "in keeping with the desire to modernize [the consular jurisdiction] aspect of the treaty relationship

degli accordi bilaterali in vigore tra l'Italia e gli stati esteri (Milano, Giuffrè, 1968), p. 303.

¹⁴⁸ G. F. de Martens, ed., *Nouveau Recueil général de Traités* (Göttingen, Dietrich, 1861), t. XVII, part I, p. 143.

¹⁴⁹ These provisions were given general effect by the Act of Algeciras.

¹⁵⁰ United Nations, *Treaty Series*, vol. 310, p. 4.

¹⁵¹ *Ibid.*, pp. 6 and 8. On 22 November 1956 the United Kingdom had renounced certain rights conferred, so far as the Spanish zone of Morocco was concerned, by treaties of 1721, 1760 and 1824. See United Kingdom, Central Office of Information, *Commonwealth Survey: A Record of United Kingdom and Commonwealth Affairs*, vol. 2, No. 24 (27 November 1956), pp. 1034-1035.

¹⁵² United States of America, *Treaties, Conventions, International Acts ... 1776-1909 (op. cit.)*, vol. I, p. 1212. The continued force of the Treaty during the period of the French protectorate was affirmed by the International Court of Justice in the Case concerning rights of nationals of the United States of America in Morocco (*I.C.J. Reports 1952*, p. 176).

¹⁵³ United States of America, Department of State, *Department of State Bulletin* (Washington D.C.), vol. XXXIV, No. 867 (6 February 1956), p. 204.

¹⁵⁴ *Ibid.*, No. 873 (19 March 1956), pp. 466 and 667.

between Morocco and the United States", accordingly relinquished its jurisdictional rights.¹⁵⁵ The 1836 Treaty is still listed in United States, *Treaties in Force*, with a note about the relinquishment of extraterritorial jurisdiction.¹⁵⁶ United States *Treaties in Force* also cites the provision of the France-Morocco Agreement on general relations concerning Morocco's treaty rights and obligations (article 11).¹⁵⁷

22. Tunisia

*France—Tunisia Economic and Financial Convention (3 June 1955) and Protocol of Application of the Economic and Financial Agreement in respect of the Customs Union*¹⁵⁸

65. The Convention is listed in Duparc's list of treaties in force for France as at 1 January 1958.¹⁵⁹ In 1959 France and Tunisia concluded a new trade convention which abrogated the customs union and replaced it by a most-favoured-nation régime.¹⁶⁰ In an Exchange of Notes accompanying the new Convention the two parties, referring to the fact that the territory of the customs union had been defined by the 1955 protocol of application, agreed that the new Convention would apply to the same territory.¹⁶¹

23. Morocco and Tunisia

French trade agreements

66. France was party to at least seventeen "accords commerciaux"¹⁶² which, it appears, affected Morocco and Tunisia at the time they became independent in 1956.¹⁶³ In nearly all these cases the agreement itself

or an instrument amending or renewing the original agreement was concluded only a few months before independence, in a period when independence was in prospect.

67. In several cases Morocco and Tunisia continued to participate in the application of the agreements. This continued participation took several forms. First, in some instances the mixed commissions established under the agreements to draw up lists of goods, meeting after independence, have prepared lists which applied to Morocco or Tunisia or both. Secondly, post-independence renewals of some of the agreements applied to Morocco or Tunisia or both. Thirdly, some of the agreements were expressly abrogated in relations between the States involved by later agreements applicable to Morocco or Tunisia or both. Fourthly, some post-independence agreements which were applicable to Morocco or Tunisia or both referred to earlier agreements in a way which indicated that they continued to be in effect for Morocco or Tunisia or both. These groups of cases are now considered in turn.

(i) *Drawing up of new lists of goods within the framework of the pre-independence agreements*

68. Several of the agreements provided for the establishment of a Mixed Commission which was to meet regularly and draw up new or supplementary lists of goods for import and export. In a number of cases these subsequent texts have affected Morocco or Tunisia or both. Thus the Agreement of 5 August 1955 with the Federal Republic of Germany was originally concluded for the period 1 April 1955 to 30 September 1958. Within that time the Mixed Commission met on 21 June 1956, 15 December 1956 and 18 October 1957.¹⁶⁴ Annexed to the original Agreement was list C

¹⁵⁵ *Ibid.*, vol. XXXV, No. 909 (26 November 1956), p. 844.

¹⁵⁶ United States of America, *Treaties in Force ... 1970* (op. cit.), p. 159 and foot-note 1.

¹⁵⁷ *Ibid.*, p. 158. Article 11 is also reproduced in *Yearbook of the International Law Commission*, 1962, vol. II, p. 127, document A/CN.4/150, annex No. 6.

¹⁵⁸ France, *Journal officiel de la République française: Lois et décrets* (Paris), 87th Year, No. 210 (6 September 1955), p. 8933, and *ibid.*, 87th Year, No. 307 (30 December 1955), p. 12737.

¹⁵⁹ See P. Duparc, *Traités et accords en vigueur: Liste des engagements bilatéraux souscrits par la France en vigueur au 1^{er} janvier 1958* (Paris, Pedone, 1962), p. 106. Mr. Duparc was the archivist of the French Ministry of Foreign Affairs. The list is not, however, official (see "Engagements internationaux en vigueur souscrits par la France" in *Revue générale de droit international public* (Paris), 3rd series, t. XXIX, No. 2 (April-June 1958), p. 277, foot-note 1).

¹⁶⁰ *Recueil des traités et accords de la France*, 1959, No. 37.

¹⁶¹ *Ibid.*,

¹⁶² For a brief account of the distinction, under French constitutional law between "accords commerciaux" and more formal treaties of commerce involving amendments to the tariff, see D. Bardonnet, "La succession aux traités à Madagascar", in *Annuaire français de droit international* (Paris 1967), vol. XII (1966), pp. 593 and 664. See also K. Holloway, *Modern Trends in Treaty Law* (London Stevens, 1967), pp. 156-172 and 341. It seems that many of the constitutions of new States formerly administered by France contain similar provisions (*ibid.*, pp. 202-208).

¹⁶³ Agreements with Austria of 9 November 1955 (France, Ministère des finances et des affaires économiques, *Moniteur*

officiel du commerce et de l'industrie (Paris), No. 1743 (24 November 1955), p. 3779); Brazil of 1946 and 1953 (see para. 70 below); Chile of 16 September 1955 (MOCI, No. 1732 (17 October 1955), p. 3358); Czechoslovakia of 25 June 1955 (*ibid.*, No. 1703 (7 July 1955), p. 2210); Federal Republic of Germany of 5 August 1955 (*ibid.*, No. 1715 (18 August 1955), p. 2689); Greece of 28 June 1955 (*ibid.*, No. 1705 (14 July 1955), p. 2309); Iceland of 1951 (see para. 69 below); Israel of 10 July 1953 (MOCI, No. 1556 (23 July 1953), p. 1943; see also *ibid.*, No. 1642 (6 December 1954), p. 3460), and the Agreement of 16 May 1955 (*ibid.*, No. 1703 (7 July 1955), p. 2209); Italy of 14 May 1955 (*ibid.*, No. 1690 (23 May 1955), p. 1661); see also *ibid.*, No. 1742 (21 November 1955), p. 3743, and *ibid.*, No. 1745 (1 December 1955), p. 3872); The Netherlands of 1955, (see para. 68 below); Norway of 1951 (*idem*); Pakistan of 17 October 1955 (MOCI, No. 1708 (25 July 1955), p. 2411, and *ibid.*, No. 1734 (24 October 1955), p. 3440); Portugal of 16 March 1956 (after the independence of Morocco but before that of Tunisia) (*ibid.*, No. 1780 (2 April 1956), p. 1103); Spain of 10 November 1955 (*ibid.*, No. 1741 (17 November 1955), p. 3701); Sweden of 1949 and 1951 (see para. 68 below); and Switzerland of 29 October 1955 (*ibid.*, No. 1737-1738 (7 November 1955), p. 3567). See also the general list of 25 October 1956 (*ibid.*, No. 1839 (25 October 1956), pp. 3462-3463).

* As from 1961, the title of this publication became *Moniteur officiel du commerce international*. Both titles are hereinafter referred to as MOCI.

¹⁶⁴ MOCI, No. 1812 (23 July 1956), p. 2387; *ibid.*, No. 1858 (28 December 1956), p. 4183; *ibid.*, No. 1945 (30 October 1957), p. 3423. See also the prorogation in March 1956 (*ibid.*, No. 1777 (22 March 1956), p. 997).

providing for German imports into Morocco, Tunisia and other territories. In the December 1956 Protocol this list was divided and became C1 (Morocco), C2 (Tunisia) and C3 (Territoires d'Outre-Mer and Départements d'Outre-Mer). This pattern was continued in the 1957 *procès-verbal* of the Mixed Commission. There is no indication that the Moroccan and Tunisian authorities participated directly in the Mixed Commission when it drew up the new lists. The practice relevant to the Agreements with the Netherlands,¹⁶⁵ Norway,¹⁶⁶ Spain¹⁶⁷ and Sweden¹⁶⁸ appears to be similar.

(ii) *Renewal or amendment of pre-independence agreements which were about to expire*

69. In November 1955 France and Austria signed a commercial agreement which included lists for Austrian exports to Morocco and Tunisia.¹⁶⁹ In October 1956 the Agreement was prorogued for a further three months and all the lists were augmented *pro rata*.¹⁷⁰ On 19 January 1957 Austria and France and Morocco, following a meeting of the Mixed Commission established under the 1955 Agreement, concluded a new agreement which, *inter alia*, was applicable to Tunisia. Morocco and Austria at the same time signed a separate Protocol.¹⁷¹ Similarly the 1951 Agreement with Iceland has been prorogued on several occasions with application to Morocco and Tunisia.¹⁷²

¹⁶⁵ Mixed Commission, established under the 1949 Agreement, supervised the operation of an Agreement signed on 28 May 1956 and applicable to Morocco and Tunisia (*MOCI*, No. 1798 (4 June 1956), p. 1837). See the renewal of 1957 (*ibid.*, No. 1891 (24 April 1957), p. 1335); but note that the 1958 renewal did not apply to Morocco and Tunisia (*ibid.*, No. 1995 (23 April 1958) p. 1359).

¹⁶⁶ French and Norwegian delegations meeting in accordance with the 1951 Agreement on 2 May 1956, signed a Protocol applying to the "Territoires d'Afrique du Nord" (*MOCI*, No. 1794 (21 May 1956), p. 1678).

¹⁶⁷ Mixed Commission, established under the 1955 Agreement, met in March and July 1956 and augmented the 1955 lists. The new lists applied at least to Tunisia (*MOCI*, No. 1782 (9 April 1956), p. 1188, and *ibid.*, No. 1811 (19 July 1956), p. 2345). A new Agreement initialled on 2 November 1956, applied to neither Morocco or Tunisia (*ibid.*, No. 1846 (19 November 1956), p. 3727).

¹⁶⁸ Mixed Commission, established under 1949 and 1951 Agreements, met in March 1956. A protocol was signed on 30 March 1956 which included a list for "Afrique du Nord" (*MOCI*, No. 1782 (9 April 1956), p. 1181). It is not clear whether later renewals applied to Morocco and Tunisia (*ibid.*, No. 1891 (24 April 1957), p. 1335; *ibid.*, No. 1991 (9 April 1958), p. 1207; *ibid.*, No. 2110 (30 May 1959), p. 1819). The 1959 list is for "other States and Territories of the Franc Zone".

¹⁶⁹ *MOCI*, No. 1743 (24 November 1955), p. 3779.

¹⁷⁰ *ibid.*, No. 1839 (25 October 1956), p. 3461.

¹⁷¹ *ibid.*, No. 1866 (28 January 1957), pp. 308 and 313. A 1959 agreement (see para. 81 below) applied, *inter alia*, to the "Etats et Territoires d'Outre Mer". (*MOCI*, No. 2115 (17 June 1959), p. 2059).

¹⁷² e.g. Agreement of September 1956 (*MOCI*, No. 1832 (1 October 1956), p. 3169); the Agreement continued to be applicable to Morocco until at least 1966. See also the renewals of the Agreements with Chile, Portugal and Switzerland, all of which applied to Tunisia and Morocco. It is not clear whether the renewals after independence also applied to Morocco and Tunisia (*ibid.*, No. 1732 (17 October 1955), p. 3358; No. 1903 (5 June 1957), p. 1839; No. 2108 (23 May

(iii) *Negotiation of new agreements which expressly replace pre-independence agreements*

70. A commercial agreement signed by Czechoslovakia and France and Morocco on 29 December 1956 expressly replaced the 1955 Agreement.¹⁷³ A subsequent prorogation of the 1956 Agreement was stated not to be applicable to those provisions of the agreement affecting Morocco and Tunisia.¹⁷⁴ 1946 and 1953 Agreements between Brazil and France were similarly replaced in August 1956.¹⁷⁵

(iv) *References in post-independence agreements to pre-independence agreements*

71. Most cases could be said to fall under this heading. But there are other instances which do not come under categories (i), (ii) and (iii) above, and which might be mentioned. For instance, the Agreement with Czechoslovakia of December 1956 provides that payments under the Agreement be made in accordance with a 1946 Agreement as amended.¹⁷⁶ The agreements of June 1956 between France and Greece¹⁷⁷ and of December 1956 between France and Poland¹⁷⁸ contain a similar provision. Two other cases should finally be noted. In both, the pre-independence agreement which was applicable to Morocco and Tunisia expired, by its own terms, some months after their independence; and in both cases at about that time a new agreement, applying to Morocco and Tunisia, was concluded.¹⁷⁹

24. *Cameroon, Central African Republic, Chad, Congo (People's Republic of), Dahomey, Gabon, Ivory Coast, Madagascar, Mali, Mauritania, Niger, Senegal, Togo, Upper Volta*

French trade agreements

72. At the time when many of its African territories were becoming independent, France was party to more

1959), p. 1756; No. 1780 (2 April 1956), p. 1103; No. 1991 (9 April 1958), p. 1207; No. 1737-8 (7 November 1955), p. 3567; and No. 2102 (2 May 1959), p. 1513.

¹⁷³ *Ibid.*, No. 1860 (7 January 1957), p. 58.

¹⁷⁴ *Ibid.*, No. 1944 (26 October 1957), p. 3375.

¹⁷⁵ *Ibid.*, No. 1826 (10 September 1956), p. 2935.

¹⁷⁶ See foot-note 163 above.

¹⁷⁷ *MOCI*, No. 1811 (19 July 1956), p. 2353.

¹⁷⁸ *Ibid.*, No. 1852 (10 December 1956), p. 3971.

¹⁷⁹ *Italy*: Agreement of May 1955 effective to 31 March 1956 (*MOCI*, No. 1690 (23 May 1955), p. 1661; some of the quotas fixed in a *procès-verbal* signed in November applied for the whole year: *ibid.*, No. 1742 (21 November 1955), p. 3743, and No. 1745 (1 December 1955), p. 3872); Agreement of 21 April 1956, effective from 1 April 1956 (*ibid.*, No. 1788 (30 April 1956), p. 1430 (see also the later prorogation: *ibid.*, 1891 (24 April 1957) p. 1335; *Pakistan*: Agreement of July 1955, effective to 30 June 1956 (*ibid.*, No. 1734 (24 October 1955), p. 3440); Agreement of June 1956 (*ibid.*, No. 1801 (14 June 1956), p. 1981). (The 1958 renewal was not applicable to Morocco and Tunisia: *ibid.*, No. 1978 (22 February 1958) p. 655). The Agreements with *Greece* of 1955 and 1956 appear to provide a similar case (*ibid.*, No. 1705 (14 July 1955), p. 2309 and No. 1811 (19 July 1956), p. 2353.) See also the Agreement concluded between *Austria* and Morocco in 1957 following the expiration of the 1955 Austria-Morocco Agreement (para. 69 above).

than thirty "accords commerciaux", some long-term, others short-term.¹⁸⁰ Nineteen of these appear to have applied to its territories in Africa.¹⁸¹ France was also party to several financial agreements, regulating trade payments. Some of the long-term trade agreements provided for the negotiation (usually annually) of lists of goods in respect of which import licences would be granted; other agreements were automatically renewed from year to year in the absence of denunciation, while others were for a short fixed term of one or two years. The newly independent States have continued to participate in the operation of the agreements. The continued participation has taken, generally speaking, the same forms as in the case of Morocco and Tunisia.

(i) *Drawing up of new lists of goods within the framework of the pre-independence agreements*

73. The Mixed Commission established by the France—Sweden Agreement of 3 March 1949,¹⁸² and by a 1956 Agreement, met in 1959 and established lists for the period 1 April 1959 to 31 March 1960.¹⁸³ Further lists including one providing for Swedish exports, *inter alia*, to the "States of the Community" were drawn up in March 1960. This instrument was effective until 31 December 1960.¹⁸⁴ The Mixed Commission next met in March 1961 and its *procès-verbal* was signed by representatives of Sweden and by representatives of France and certain African States.¹⁸⁵ The *procès-verbal* stated that it applied to Cameroon, the Central African Republic, Chad, the Congo (Brazzaville), Dahomey, Gabon, the Ivory Coast, Madagascar, Mauritania, Niger, Senegal and Upper Volta. The agreed Swedish exports to those countries were listed, but it was stated that the list was only "indicative". Cameroon, Gabon, Ivory Coast, Mauritania, Niger and Upper Volta, authorized France to represent them in the Mixed Commission and to sign the instrument; the other six States signed on their own behalf.

74. This 1961 Agreement was subsequently extended for each of the years 1962 to at least 1966.¹⁸⁶ Ivory Coast and Senegal did not participate in these renewals; Cameroon and Niger were not party to the 1963 and later renewals; and Madagascar did not sign the 1964 extension. The remaining seven States—Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Mauritania and Upper Volta—were party to subsequent renewals, including that of 1966.

¹⁸⁰ See the lists in *MOCI*, No. 2175 (13 January 1960), pp. 118-119 and *ibid.*, No. 22 (22 April 1961), pp. 1008-1009.

¹⁸¹ Those with Austria, Bulgaria, Czechoslovakia, Denmark, Finland, Greece, Hungary, Iceland, Ireland, Israel, Japan, Norway, Poland, Portugal, Spain, Sweden, Switzerland, the USSR and Yugoslavia.

¹⁸² *MOCI*, No. 1338 (10 March 1949), p. 451.

¹⁸³ *Ibid.*, No. 2110 (30 May 1959), p. 1819.

¹⁸⁴ *Ibid.*, No. 2199 (6 April 1960), p. 1107.

¹⁸⁵ *Ibid.*, No. 10 (11 March 1961), p. 457.

¹⁸⁶ *Ibid.*, No. 138 (2 June 1962), p. 2034; No. 215 (27 February 1963), p. 816; No. 323 (11 March 1964), p. 1037; No. 441 (22 April 1965), p. 1650 and No. 567-8 (13 and 16 July 1966),

75. The history of the France—Israel Agreement of 10 July 1953 provides a similar case of the negotiation of new lists under a pre-independence agreement and their prorogation after independence.¹⁸⁷

76. Also similar is the history of the Bulgaria—France Commercial Agreement of 28 July 1955¹⁸⁸ which was concluded for a year, but which was to be automatically renewed unless denounced. The two parties met in March 1960, the Government of the Republic of France acting on behalf of France and the Community, and drew up, with reference to the 1955 Agreement, new lists which were to be effective for the period 1 August 1960-31 July 1963.¹⁸⁹ Later Protocols, in the framework of the 1955 and 1960 Agreements, were signed on 16 July 1960 (by France again on behalf of the Community),¹⁹⁰ 29 June 1961 (by France and ten newly independent States)¹⁹¹ and on 17 September 1962.¹⁹²

(ii) *Renewal or amendment of pre-independence agreements which were about to expire*

77. The Czechoslovakia—France Agreement of 23 November 1959, concluded by France in its own name and in the name of the Community was originally valid for the period 1 November 1959 to 31 October 1960.¹⁹³ One of the lists provided for Czech exports, *inter alia*, to the Community and to Togo and Cameroon. By an Exchange of Letters in October 1960 and October 1961, France and Czechoslovakia prorogued the Agreement for a further year.¹⁹⁴ In 1962 the Mixed Commission established by the 1959 Agreement met and renewed for 1961-1962, with certain modifications, the 1959 Agreement. This renewal was expressly stated to be applicable to the Central African Republic, Chad, Dahomey, Gabon, Madagascar, Mauritania and Upper Volta.¹⁹⁵ With the exception of Dahomey, these States

¹⁸⁷ Agreement (*MOCI*, No. 1566 (23 July 1953), p. 1943), Protocols of Mixed Commission of 21 January 1960 for 1960 (*ibid.*, No. 2185 (17 February 1960), p. 531), of 29 December 1960 for 1961 (twelve African State parties: Central African Republic, Chad, Gabon, Madagascar—these four States signed on their own behalf—Cameroon, Congo (Brazzaville), Dahomey, Ivory Coast, Mali, Niger, Senegal and Upper Volta—these eight States authorized France to sign for them); the French authorities advised that Mauritania wished no longer to participate in the Agreement (*ibid.*, No. 2280 (14 January 1961), p. 148); Protocols of 5 December 1961 for 1962 (applied to the above-mentioned twelve States with the exception of Ivory Coast, Mali and Senegal) (*ibid.*, No. 94 (30 December 1961), p. 4248); and of 9 April 1965 for 1965 (applied to Central African Republic, Chad, Congo (Brazzaville), Dahomey and Gabon) (*ibid.*, No. 448 (22 May 1965), p. 1949).

¹⁸⁸ *MOCI*, No. 1714 (15 August 1955), p. 2657.

¹⁸⁹ *Ibid.*, No. 2193 (16 March 1960), p. 877.

¹⁹⁰ *Ibid.*, No. 2232 (30 July 1960), p. 2369.

¹⁹¹ *Ibid.*, No. 43 (5 July 1961), p. 2003.

¹⁹² *Ibid.*, No. 169 (19 September 1962), p. 3385 (which refers only to "Certain African States and Malagasy"). See further *ibid.*, No. 184 (10 November 1962), p. 4030. For the subsequent history of the Agreement, see para. 83 below.

¹⁹³ *Ibid.*, No. 2163 (2 December 1959), p. 3992.

¹⁹⁴ *Ibid.*, No. 2260 (5 November 1960), p. 3425; and No. 77 (1 November 1961), p. 3478.

¹⁹⁵ *Ibid.*, No. 144 (23 June 1962), p. 2295.

were also parties to the renewal of the Agreement for 1962-1963.¹⁹⁶ With the exception of Madagascar and Dahomey, these States and the Congo (Brazzaville) were parties to a new two-year commercial agreement signed on 16 January 1964.¹⁹⁷ Payments under the agreement were to be effected, until 1 March 1964, in accordance with a payments agreement of 1946 and, thereafter, by the new payments agreement concluded at the same time.

78. The France—Denmark Agreement of 29 March 1959,¹⁹⁸ which originally had effect until 31 December 1960, was similarly prorogued for 1961, 1962, 1963, 1964, 1965 and 1966¹⁹⁹ by instruments to which several of the new States were parties: Cameroon, the Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Madagascar, Mauritania, Niger, Senegal and Upper Volta, to the 1961 prorogation; these States, with the exception of the Ivory Coast Niger and Senegal, to the 1962 prorogation; these States, with the added exception of Cameroon, to the 1963 prorogation; and these States, with the further exception of Madagascar, to the 1964, 1965 and 1966 prorogations. These States were not, however, parties to a 1969 modification of the 1966 Agreement.²⁰⁰

79. The Finland—France Agreement of 23 December 1958²⁰¹ was similarly prorogued by agreements, to which several African States were parties, in 1961, 1962, 1963, 1964 and 1965:²⁰² Cameroon (1961-1963), Central African Republic (1961-1965), Chad (1961-1965), Congo (Brazzaville) (1961-1965), Dahomey (1961-1963), Gabon (1962-1965), Ivory Coast (1961), Madagascar (1961-1962), Mauritania (1961-1965), Niger (1961-1962), Senegal (1961) and Upper Volta (1961-1963).

80. Practice relevant to France's Agreements concluded before independence with Hungary,²⁰³ Iceland,²⁰⁴ Ire-

land,²⁰⁵ Japan,²⁰⁶ Norway,²⁰⁷ Spain,²⁰⁸ and Switzerland²⁰⁹ is similar.²¹⁰

1963 (Central African Republic, Congo (Brazzaville), Chad, Gabon, Ivory Coast and Upper Volta) (*ibid.*, No. 249 (26 June 1963), p. 2476); prorogation for 1964-1965 of 1963 Agreement, 15 May 1964 (*ibid.*, No. 345 (27 May 1964), p. 2126); prorogation for three months, 8 December 1965 (*ibid.*, No. 505 (8 December 1965), p. 4461); long-term Agreement of 15 February 1966 (Central African Republic, Chad, Gabon, Mauritania and Upper Volta) (*ibid.*, No. 528 (26 February 1966), p. 861); Additional Protocols of 12 May 1967 and 10 May 1968 (same five African State parties) (*ibid.*, No. 656 (27 May 1967), p. 2309, and No. 757-758 (12 and 15 June 1968), p. 2158); and Additional Protocol of 29 April 1969 (Central African Republic, Chad and Gabon) (*ibid.*, No. 850 (12 May 1969), p. 1920).

²⁰⁴ Agreement of 6 December 1951 prorogued for further nine months to 31 December 1960 by Agreement of 7 July 1960 (*MOCI*, No. 2227 (13 July 1960), p. 2209); for 1961 by an Exchange of Letters of 5 May 1961 (Cameroon, Mauritania, Niger, Senegal, as well as Morocco) (*ibid.*, No. 29 (17 May 1961), p. 1339); for 1962 by an Exchange of Letters of 24 May 1962 (Cameroon, Central African Republic, Congo Brazzaville), Dahomey, Gabon, Mauritania, Niger, Upper Volta as well as Morocco) (*ibid.*, No. 138, 2 June 1962), p. 2035); for 1963 by an Agreement of 5 April 1963 (same nine States with the exception of Upper Volta and Niger) (*ibid.*, No. 227 (10 April 1963), p. 1383); for 1964, *ibid.*, No. 323 (11 March 1964), p. 1040); for 1965 by an Agreement of 9 June 1965 (same States with additional exception of Cameroon) (*ibid.*, No. 460 (3 July 1965), p. 2473); and for 1966 by Agreement of 24 May 1966 (same parties, renewable tacitly) (*ibid.*, No. 566 (9 July 1966), p. 2738).

²⁰⁵ Agreement of 10 November 1959 prorogued by Letters of 7 July 1960 until 31 December 1960; by Letters of 24 May 1961 for 1961 (Cameroon, Chad, Central African Republic, Congo (Brazzaville), Dahomey, Ivory Coast, Madagascar, Mauritania, Niger, Senegal and Upper Volta) (*MOCI*, No. 36 (10 June 1961), p. 1658); by Letters of 10 May 1962 for 1962 (same parties with the exception of Chad, Ivory Coast and Senegal, and the addition of Gabon) (*ibid.*, No. 136 (26 May 1962), p. 1948); by Letters of 8 July 1964 for 1964; of 11 February 1965 for 1965, and of 20 June 1966 for 1966 (in all three years same parties with additional exceptions of Cameroon, Madagascar, Niger and Upper Volta) (*ibid.*, No. 364 (1 August 1964), p. 3017; No. 424 (27 February 1965), p. 854; and No. 567-568 (13 and 16 July 1966), p. 2823); and by Letters of 22 December 1967 for 1967 and 1968 (Congo (Brazzaville), Dahomey, Gabon and Mauritania) (*ibid.*, No. 728 (10 February 1968), p. 603).

²⁰⁶ Agreement of 10 July 1959 between France and the Community and Japan (applicable to all States members of the Community—Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Madagascar, Mauritania, Niger, Senegal, Sudan, Upper Volta—and to Cameroon and Togo) (*MOCI*, No. 2131 (12 August 1959), p. 2684); prorogued to 30 September 1960 (*ibid.*, No. 2227 (13 July 1960), p. 2209); prorogued until 31 March 1961, by an Exchange of Letters of 28 October 1960 between France and Japan and stated to be applicable to all the above States (*ibid.*, No. 2261 (9 November 1960), p. 3480); prorogued until 30 September 1961 by an Exchange of Letters of 28 April 1961 stated to be applicable to all the above States other than Mali and Togo; (Central African Republic, Dahomey, Gabon, Madagascar, Senegal and Upper Volta signed the relevant note); prorogued until 30 September 1962 by a Protocol of 23 January 1962 (same parties as to 1961-1962 prorogation with the added exception of Cameroon, (*ibid.*, No. 104 (3 February 1962), p. 443); prorogued until 31 March 1963 by an Agreement of 14 December 1962 (same parties with added exceptions of Dahomey, Ivory Coast, Niger and Senegal) (*ibid.*, No. 196 (22 December 1962), p. 4549). The Agreement of 14 May 1963 does not apply to any African States (*ibid.*, No. 237 (15 May 1963), p. 1873).

¹⁹⁶ *Ibid.*, No. 180 (27 October 1962), p. 3863; see also No. 289 (13 November 1963), p. 4423.

¹⁹⁷ *Ibid.*, No. 310 (25 January 1964), p. 341. Note the Protocols signed by specific African States. See also the Agreement signed on 29 June 1965 and its 1967 and 1969 renewals; the Central African Republic and Gabon are parties (*ibid.*, No. 467 (28 July 1965), p. 2792; No. 604 (26 November 1966), p. 4487; and No. 804 (2 December 1968), p. 4610).

¹⁹⁸ *Ibid.*, No. 2115 (17 June 1959), p. 2057.

¹⁹⁹ *Ibid.*, No. 14 (25 March 1961), p. 652; No. 147 (4 July 1962), p. 2430; No. 215 (27 February 1963), p. 814; No. 332 (11 April 1964), p. 1485; No. 441 (28 April 1965), p. 1652; and No. 564 (2 July 1966), p. 2648.

²⁰⁰ *Ibid.*, No. 838 (31 March 1969), p. 1398.

²⁰¹ *Ibid.*, No. 2070 (10 January 1959), p. 111; see also No. 2175 (13 January 1960), p. 115.

²⁰² *Ibid.*, No. 8 (4 March 1961), p. 361 (five of the new States signed the Agreement; the remaining five indicated their wish to see the régime apply) No. 101, (24 January 1962), p. 309; No. 208 (2 February 1963), p. 459; No. 318 (22 February 1964), p. 725; No. 428 (13 March 1965), p. 1045 (in 1962-1965 the new States signed separately).

²⁰³ Agreement of 17 April 1959 (*MOCI*, No. 2108 (23 May 1959), p. 1747); extensions of May and October 1960 (*ibid.*, No. 2214 (28 May 1960), p. 1682, and No. 2269 (7 December 1960), p. 3773); Agreement of 18 May 1961 (Cameroon, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Madagascar, Mauritania, Niger, Senegal and Upper Volta) (*ibid.*, No. 32 (27 May 1961), p. 1465); Agreement of 17 June

(iii) *Negotiation of new agreements which expressly replace pre-independence agreements*²¹¹

81. The Austria—France Agreement of 29 May 1959 which regulated, *inter alia*, Austrian exports to the French "États et Territoires d'Outre-Mer" was automatically prorogued until notice of termination was given.²¹² On 26 July 1963 a new Commercial Agreement was initiated by Austria and France, the Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Mauritania and Upper Volta.²¹³ It expressly stated that it replaced the 1959 Agreement.

(Foot-notes from p. 165 continued)

²⁰⁷ Protocol of 2 April 1960 valid to 31 December 1960 (MOCI, No. 2200 (6 April 1960), p. 1139); prorogued for 1961 by Letters of 23 March 1961 (Cameroon, Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Madagascar, Mauritania, Niger, Senegal and Upper Volta) (*ibid.*, No. 14 (25 March 1961), p. 649; prorogued for 1962 by Letters of 24 May 1962 (same parties with the exception of Ivory Coast and Senegal) (*ibid.*, No. 138 (2 June 1962), p. 2031); prorogued for 1963 and 1964 by Letters of 2 February 1963 and 6 December 1964 respectively (same parties with added exceptions of Cameroon and Niger) (*ibid.*, No. 215 (27 February 1963), p. 813 and No. 315 (12 February 1964), p. 607); prorogued for 1966 (same parties with added exceptions of Madagascar and Upper Volta) (*ibid.*, No. 560 (18 June 1966), p. 2404). For 1965 see *ibid.*, No. 435 (7 April 1965), p. 1404 (no indication of any African parties). This Agreement might also be included under category (i) above: the 1961 and 1966 Agreements indicate that the Protocol and extensions may have been negotiated in the framework of an Agreement of 26 March 1956.

²⁰⁸ 1959 Agreement renewed on 17 October 1960 by Agreement of France and Spain (France apparently represented at least some of its former dependent territories on this occasion); subsequent France-Spain Agreements did not, however, apply to the African States, some of which in 1961 concluded separate agreements with Spain: see J.-C. Gautron, "Sur quel ques aspects de la succession d'Etat au Sénégal" in *Annuaire français de droit international* (Paris, C.N.R.S.), vol. VIII (1962), pp. 844-845; MOCI, No. 1 (8 February 1961), p. 31; No. 15 (29 March 1961), p. 702; No. 78 (4 November 1961), p. 3514; France, Secrétariat Général du Gouvernement, *La Documentation française : Chroniques étrangères - Espagne*, No. 237 (30 November 1961), p. 19; and *ibid.*, No. 249 (30 November 1962), p. 23.

²⁰⁹ 1955 Agreement (MOCI No. 1737-8 (7 November 1955), p. 3567) prorogued for 1961 by an Agreement of 22 December 1960 (Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Madagascar, Mali, Mauritania, Niger, Senegal and Upper Volta), (*ibid.*, No. 2274 (24 December 1960), p. 3958); for 1962 by an Agreement of 14 December 1961 (same parties plus Cameroon, with the exception of Ivory Coast, Mali, Niger and Senegal) (*ibid.*, No. 91 (20 December 1961), p. 4131); for 1963 by Letters of 30 March 1963 (same parties with added exception of Cameroon) (*ibid.*, No. 227 (10 April 1963), p. 1379); for 1964 by Letters of 23 December 1963 (*ibid.*, No. 306 (11 January 1964), p. 143); for 1965 by Agreement of 23 April 1965 (same parties with added exceptions of the Congo (Brazzaville) and Madagascar) (*ibid.*, No. 441 (28 April 1965), p. 1647). The 1968 Agreement applies to France and Switzerland only (*ibid.*, Nos. 715-716 (27 and 30 December 1967), p. 5589).

²¹⁰ According to D. Bardonnet ("La succession aux traités à Madagascar", in *Annuaire français de droit international* (Paris, 1967), vol. XII (1966), pp. 666-668), the pre-independence agreements with Romania were also prorogued with application to certain new States.

²¹¹ See also the France-Bulgaria Agreement discussed in para. 76 above.

²¹² MOCI, No. 2115 (17 June 1959), p. 2059; see also *ibid.*, No. 2175 (9 January 1960), p. 120.

²¹³ *ibid.*, No. 260 (3 August 1963), p. 3022.

82. The Agreement of 29 September 1959 between France (acting on behalf of France and the French Community) and Yugoslavia fixed the terms of trade, *inter alia*, for the Community, the overseas territories and Cameroon and Togo for the year 1 October 1959 to 30 September 1960.²¹⁴ On 28 December 1960 a new Agreement was negotiated for the year 1 October 1960 to 30 September 1961.²¹⁵ Twelve African States—Cameroon, Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Madagascar, Mauritania, Niger, Senegal and Upper Volta—were parties to the agreement, which expressly stated that it replaced the 1959 Agreement. This new agreement was prorogued on several occasions with application to certain new States.²¹⁶

83. In June 1963 Bulgaria and France and several African States negotiated a long-term agreement (for 1963-1965). The new agreement expressly replaced the 1955 and 1960 agreements discussed above.²¹⁷ The parties to the new agreement were Bulgaria and France, the Central African Republic, Chad, Congo (Brazzaville), Ivory Coast and Gabon.²¹⁸ This agreement was supplemented and prorogued by instruments signed in 1964 and 1965.²¹⁹ A further long-term agreement was concluded in 1966.²²⁰ The Central African Republic, Chad, Gabon, and Mauritania were among the parties. These States, with the exception of Mauritania, have also participated in the 1968 and 1969 Protocols to the agreement.²²¹

(iv) *References in post-independence agreements to pre-independence agreements*

84. Most cases come also within this category. Here it remains to note some other cases which do not fit into categories (i), (ii) and (iii), above. The Czechoslovak Agreement of 16 January 1964²²² (to which six African States were parties) provided that payments were to be made, up to a certain point of time, under the 1946 payments agreement. The Hungary agreement of 1961²²³ (eleven African States parties) contains a similar reference to a 1953 payments agreement as amended in

²¹⁴ *Ibid.*, No. 2148 (10 October 1959), p. 3370.

²¹⁵ *Ibid.*, No. 2278 (7 January 1961), p. 53. See also the earlier prorogation for three months of the 1959 Agreement (*ibid.*, No. 2252 (5 October 1960), p. 3105).

²¹⁶ *Ibid.*, No. 71 (11 October 1961), p. 3183; No. 174 (6 October 1962), p. 3582; No. 193 (12 December 1962), p. 4416. Six African States were parties to this final (1963) instrument. See also the six year Agreement of 25 January 1964 to which six African States are parties (*ibid.*, No. 312 (1 February 1964), p. 433).

²¹⁷ See para. 76 above.

²¹⁸ MOCI, No. 252 (6 July 1963), p. 2633. Note that Gabon, which was not a party to the 1961 Protocol, signed this new agreement.

²¹⁹ *Ibid.*, No. 355 (1 July 1964), p. 2621 and No. 472 (14 August 1965).

²²⁰ *Ibid.*, No. 538 (2 April 1966), p. 1360.

²²¹ *Ibid.*, No. 761 (26 June 1968), p. 2928 and No. 845 (24 April 1969), p. 1736.

²²² See para. 77 above.

²²³ MOCI, No. 32 (27 May 1961), p. 1465.

1956. Norwegian agreements of 1961 and 1966 (twelve and six African parties respectively) ²²⁴ affirmed the role of the Mixed Commission set up under an agreement of 1956. The Polish Agreements of December 1960, 1962, 1963 and 1964-1965 ²²⁵ (thirteen, nine, five and six African States parties respectively) provided for payments in accordance with a financial convention of February 1960. It might also be noted that the Greece and Iceland agreements ²²⁶ provided for payments in accordance with the European Payments Convention of 1955.

85. Agreements concluded by France with three other countries might finally be mentioned. ²²⁷ They provide cases of the negotiation of new agreements, applicable to the new States, taking the place of—although not expressly abrogating—pre-independence agreements which applied to the territories in question. A commercial agreement concluded on 17 February 1960 ²²⁸ for 1960 between Poland and the French Republic and the Community (the Government of France acted on behalf of both) granted Poland the right to export listed goods, *inter alia*, to the Community. In a new agreement signed on 10 December 1960 ²²⁹ Poland and France, Cameroon, the Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Mauritania, Madagascar, Mali, Niger, Senegal and Upper Volta determined their trade arrangements for 1961. Protocols concluded for 1962, for 1963, and for 1964 and 1965 ²³⁰ were also signed by several of the above African States: all the above listed thirteen States other than the Ivory Coast, Mali, Niger and Senegal in 1962; the Central African Republic, Chad, Congo (Brazzaville), Gabon and Madagascar in 1963; and the Central African Republic, Chad, Congo (Brazzaville), Gabon, Mauritania and Upper Volta in 1964.

86. A somewhat similar chain of events resulted from the expiry in 1960 of the France—Portugal Agreement of 5 August 1959. ²³¹ France and Portugal on 11 July 1960 signed a Protocol which, like the Agreement, applied to the whole of the Franc zone other than Morocco and Tunisia, and which had effect to the end of the year. ²³² In 1961 a further protocol was signed

to regulate commerce for that year. ²³³ It applied to Cameroon, the Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Mauritania, Madagascar, Niger, Senegal and Upper Volta. France signed for five of these States (Cameroon, Ivory Coast, Mauritania, Niger and Upper Volta). The remainder signed the protocol themselves. ²³⁴

87. An agreement between France (acting on behalf of France and the Community) and Greece, effective for the period 1 July 1960-30 June 1961, was signed on 28 June 1960 (during the period in which the French African territories were becoming independent). ²³⁵ The new agreement, regulating trade between 1 July 1961 and 30 June 1962, ²³⁶ was signed by Cameroon, Central African Republic, Chad, Dahomey, Ivory Coast, Mauritania, Madagascar, Niger, Senegal and Upper Volta.

(v) *Denial of continued participation in pre-independence agreements*

88. Continued participation of new States in commercial agreements applied to their territories, before they became independent, seems to have been denied by the other party with regard to the long-term France-USSR Agreement of 15 July 1953. According to one commentator (writing about Madagascar):

During the colonial period, [commercial relations] were governed by the long-term France-USSR Agreement of 15 July 1953, which had been renewed periodically and supplemented in the meantime. The protocol, applicable to 1960, had been signed in Moscow, on 1 December 1959 "for the French Republic and the Community". Since no negotiations were held for 1961, the quotas were fixed on the basis of the provisions in the earlier protocol. On 29 December 1961, the Malagasy Government agreed to participate in the negotiations between France and the Soviet Union to decide the quotas for 1962. When the plenipotentiaries met in Paris in February 1962, however, the Soviet delegates refused to negotiate with the African and Malagasy representatives, because the African and Malagasy States had become independent since the signature of the previous protocol and no longer had to negotiate on a Franco-African basis. A few days later, a member of the Soviet Embassy in Paris contacted a Malagasy delegate and explained the Soviet viewpoint to him. In particular, he suggested that a bilateral trade agreement should be concluded between the USSR and Madagascar, based in principle on balanced trade but with the possibility of exceptions in favour of Madagascar, and that there should be a "strictly commercial" Soviet delegation at Tananarive. A decision had to be taken, since the Franco-Soviet protocol existing on 31 December 1961 could be considered as applicable until 31 December 1962, in so far as the foreign currency needed for the application of the protocol in 1962 had been set aside under the import programme. After lengthy consideration of the economic and political issue involved, the Council of Ministers decided to continue the negotiations with the Soviet Union and a trade agreement for a period of three years renewable by tacit consent for a further period of three years unless denounced six months before its

²²⁴ See foot-note 207 above.

²²⁵ *MOCI*, No. 102 (27 January 1962), p. 345; No. 220 (16 March 1963), p. 1037; and No. 296 (7 December 1963), p. 4761. See further No. 496 (3 and 6 November 1965), p. 4009; No. 712 (16 December 1967), p. 5431; No. 834 (17 March 1969), p. 1174.

²²⁶ See foot-notes 204 above and 235 below.

²²⁷ The Agreement with Hungary (foot-note 223 above) could be included here as well.

²²⁸ *MOCI*, No. 2187 (24 February 1960), p. 621.

²²⁹ *Ibid.*, No. 2275 (28 December 1960), p. 4006.

²³⁰ See foot-note 225 above.

²³¹ *MOCI*, No. 2131 (12 August 1959), p. 2679; see also No. 2212 (21 May 1960), p. 1605.

²³² *Ibid.*, No. 2227 (13 July 1960), p. 2201; see also No. 2283 (25 January 1961), p. 288 (extension to 31 March 1961 by Exchange of Letters between French Ambassador at Lisbon and Portuguese authorities).

²³³ *Ibid.*, No. 24 (29 April 1961), p. 1101.

²³⁴ *Ibid.*, No. 101 (24 January 1962), p. 311 and No. 313 (February 1964), p. 513.

²³⁵ *Ibid.*, No. 2228 (16 July 1960), p. 2241.

²³⁶ *Ibid.*, No. 52 (5 August 1961), p. 2406.

expiry, was eventually signed at Tananarive on 23 October 1964.²³⁷

Summary

89. The fourteen States in Africa for the international relations of which France was responsible and which became independent during 1960 have, since independence, participated in actions affecting pre-independence commercial agreements concluded by France, and, in some cases, payments agreements which formerly applied to their territory.²³⁸ This practice, supporting the continued application of these pre-independence agreements which, it will have been noted, were often concluded when independence was in prospect, is consistent with the following views expressed by two commentators who have examined the practice of *Madagascar* and *Senegal*:

In principle, the Malagasy Government did not expressly reject any of France's trade agreements when it attained independence.²³⁹

It appears that, upon attaining independence, Senegal did not expressly reject any trade agreement; indeed, several agreements were renewed, which presupposes implicit accession to the original agreements concluded by France. This situation is gradually disappearing, as Senegal concludes new agreements with third States.²⁴⁰

As seen above, it seems that generally the other parties to the agreements (along with France) have accepted that these newly independent African States continue to participate in the commercial agreements in question.

90. The means of participation of most African States could be summarized as follows: (a) agreements concluded as late as October 1960²⁴¹ were signed by France alone or on behalf of itself and the Community or on behalf of all the countries of the Franc zone other than Morocco and Tunisia; (b) thereafter either French representatives were expressly authorized to represent and sign the agreements on behalf of the new States or the agreements were signed by representatives of new States. When a new State decided not to participate in the renewal of an agreement, a separate agreement was

frequently negotiated with the other party to the original agreement.

91. So far as the substance of the agreements is concerned, it might be noted that the list of goods in respect of which import licences were to be granted by the new States was often subject to a provision to the following effect:

Because of the changes which have taken place in the pattern of trade of these States, the quotas in this list are merely indicative.

Nevertheless, those States usually recorded their intention to maintain traditional commercial patterns.²⁴²

92. One factor which may be relevant to the continued participation of the new States in the above agreements is their undertaking, in agreements with France, to co-operate, *inter alia*, in the field of trade. Thus, several declared their wish to pursue their development in close association with France, while benefiting from the trade possibilities offered by other countries, and all undertook either to co-ordinate their external economic, monetary and financial policies, or to consult with this end in view. Provision was made in some cases for the establishment of a mixed commission to supervise this process. At the same time each State retained intact, according to the agreements, the economic, monetary and financial powers of sovereign States.²⁴³ Further, in diplomatic conventions, treaties of co-operation and agreements of co-operation concerning foreign policy, each of the new States agreed with France that the latter would, at the State's request, "represent it in relations with States and organizations in which it does not have its own representation". In such cases, the French diplomatic and consular agents

²³⁷ D. Bardonnet, *op. cit.*, pp. 668-669. For the long-term Agreement of 11 February 1957 and Protocols of 14 November 1958 and 21 January 1961 (applicable to 1959 and 1960-1962), see: *MOCI*, No. 1872 (18 February 1957), p. 547; No. 2056 (22 November 1958), p. 3769; and No. 2282 (21 January 1961), p. 229.

²³⁸ Togo would appear to have been involved in only two of the above cases. It was a trust territory and not a part of the Community (see, for example, annex I, paragraphs 3 and 4, to the France-Israel Protocol of 21 January 1960, *MOCI*, No. 1566 (23 July 1953), p. 1943). Cameroon however was a party to several of the later instruments. It might be noted here that Algeria did not participate in any of the above subsequent actions after it became independent in July 1962.

²³⁹ D. Bardonnet, *op. cit.*, p. 664. He reviews the various steps which have been taken relevant to the pre-independence agreements.

²⁴⁰ J.-C. Gautron, *op. cit.*, p. 845.

²⁴¹ See its agreements with Hungary of 30 October 1960 (*MOCI*, No. 2269 (7 December 1960), p. 3773); and with Japan of 28 October 1960 (*ibid.*, No. 2261 (9 November 1960), p. 3480).

²⁴² Agreement with Denmark of 22 March 1961 (*MOCI*, No. 14 (25 March 1961), p. 652). Similar provisions are to be found in the agreements for 1962, 1963, 1964, 1965 and 1966. See also the Agreements with Austria of 1963; with Finland of 1961, 1962, 1963, 1964, and 1965; with Ireland of 1961, 1962, 1964, 1966 and 1967; with Norway of 1961, 1962, 1963 and 1966; with Portugal of 1961; with Sweden of 1961, 1963 and 1965; with Switzerland of 1961, 1963 and 1965 and with Yugoslavia of 1964.

²⁴³ See the agreements on co-operation in economic monetary, and financial matters concluded by France with Cameroon, 13 November 1960 (France, *Journal officiel de la République Française : Lois et décrets* (Paris), 93rd Year, No. 186 (9 August 1961), p. 7429); Central African Republic, Chad and Congo (Brazzaville), 13 August 1960 (*ibid.*, 92nd Year, No. 273 (24 November 1960), p. 10459); Dahomey, 24 April 1961 (*ibid.*, 94th Year, No. 30 (6 February 1962), p. 1277); Gabon, 17 August 1960 (*ibid.*, 92nd Year, No. 273 (24 November 1960), p. 10480); Ivory Coast, 24 April 1961 (*ibid.*, 94th Year, No. 30 (6 February 1962), p. 1262); Madagascar 27 June 1960 (*ibid.*, 92nd Year, No. 167 (20 July 1960), p. 6612); Federation of Mali, 22 June 1960 (*ibid.*, p. 6634) [after the breakdown of the Federation, *Senegal* declared that it considered itself bound, *inter alia*, by this Agreement; *Mali* denounced the Agreements and later, in March 1962, concluded a new Agreement on Co-operation in Economic, Monetary and Financial Matters (*ibid.*, 95th Year, No. 185 (8 August 1963), p. 7354)]; Mauritania, 19 June 1961 (*ibid.*, 94th Year, No. 30 (6 February 1962), p. 1328); Niger, 24 April 1961 (*ibid.*, p. 1292); Togo, 10 July 1963 (*ibid.*, 96th Year, No. 134 (10 June 1964), p. 5000); and Upper Volta, 24 April 1961 (*ibid.*, 94th Year, No. 30 (6 February 1962), p. 1307).

were to act in accordance with the directions and instructions of the new State.²⁴⁴

93. These agreements were concluded in most cases some little time after independence, and after some of the events set out above occurred. However, several of the new States, on independence, also signed agreements containing transitory provisions intended to remain in effect until co-operation agreements entered into force. They contained an article to the following effect:

The existing régimes for trade and the issue of currency, the arrangements for co-operation within the franc zone, the status of property and the general organization of sea and air transportation and telecommunications shall remain the same.²⁴⁵

The significance of this close relationship of co-operation is emphasized by the fact that in some instances post-independence agreements have been applicable to particular States which were not parties to intervening post-independence instruments.

25. Madagascar

*France—United States Convention of Commerce and Navigation (1822)*²⁴⁶

94. This Convention, which became applicable to Madagascar in 1896,²⁴⁷ is listed in United States, *Treaties in Force*, which also reproduces the Malagasy Note of 4 December 1962 concerning succession to treaties.²⁴⁸

(c) FORMER NON-METROPOLITAN TERRITORY FOR THE INTERNATIONAL RELATIONS OF WHICH THE NETHERLANDS WAS RESPONSIBLE

26. Indonesia

95. The Financial and Economic Agreement signed by

²⁴⁴ The relevant conventions, agreements and treaties were signed at the same time as, and published in the *Journal officiel* along with, the agreements listed in the previous footnote.

²⁴⁵ Article 4 of the France—Madagascar Agreement of 2 April 1960 (France, *Journal officiel* ... (op. cit.), 92nd Year No. 153 (2 July 1960), p. 5968). For similar examples, see the Agreements with the Central African Republic, 12 July 1960 (*ibid.*, 92nd Year, No. 176 (30 July 1960), p. 7042); Chad, 12 July 1960 (*ibid.*, p. 7044); Congo Brazzaville, 12 July 1960 (*ibid.*, p. 7043); Gabon, 15 July 1960 (*ibid.*, p. 7048); 92nd Year, No. 153 (2 July 1960), p. 5969).

²⁴⁶ United States of America, *Treaties, Conventions, International Acts ... 1776-1909* (op. cit.), vol. I, p. 521.

²⁴⁷ When France annexed Madagascar it stated that the annexation abrogated the Madagascar-United States Treaty of 1881 which was "inconsistent with the present order of things", and had the effect of extending to Madagascar, France-United States treaties. See United States of America, Department of State, *Papers relating to the Foreign Relations of the United States, with the Annual Message of the President Transmitted to Congress December 7, 1896, and the Annual Report of the Secretary of State* (Washington D.C., U.S. Government Printing Office, 1897, pp. 117-135 (especially pp. 123 and 133); see also A.-Ch. Kiss, *Répertoire de la pratique française en matière de droit international public* (Paris, C.N.R.S., 1966), t. II, pp. 437-439.

²⁴⁸ See United States of America, Department of State, *Treaties in Force ... 1970* (op. cit.), p. 147. For the text of the

Indonesia and the Netherlands at their Round Table Conference in December 1949 provided, in article 21, paragraph 7, that

The trade and monetary agreements in force at the transfer of sovereignty shall, as far as these agreements concern Indonesia, be taken over and implemented by the Government of the Republic of the United States of Indonesia.²⁴⁹

The Agreement then listed trade agreements with twenty-four States and monetary agreements with twenty-six. Most of the trade agreements were short term: only two were indefinite in term and, of the remainder, only one lasted beyond 1950. The list does not include long-term treaties and conventions of commerce and navigation.

96. In 1955 it was said that in the majority of cases the nomination of an Indonesian delegation to the mixed commissions established under the Netherlands commercial agreements has been recognized by the other party. Also, Indonesia has always taken the necessary steps to give effect to the commercial and monetary agreements concluded by the Netherlands.²⁵⁰ In 1956 the Republic of Indonesia adopted a law purporting to abrogate all the agreements adopted at the Round Table Conference of 1949.²⁵¹

Czechoslovakia—Netherlands Commercial Arrangement (1949)

97. A Protocol signed by Czechoslovakia, Indonesia and the Netherlands on 15 July 1950²⁵² began

In accordance with articles 1, 2 and 22 of the Statute of the Union between the Republic of the United States of Indonesia and the Kingdom of the Netherlands and by virtue of article 21 of the Financial and Economic Agreement attached thereto; ... with which the Government of the Czechoslovak Republic is familiar ...

an Indonesian delegation had participated in the commercial negotiations. Article 1 of the resulting Protocol provided that the provisions of the 1949 Agreement "shall also apply" to the exchange of goods between Czechoslovakia and Indonesia. Under article 2, the Mixed Commission provided for in the 1949 Agreement

Malagasy Note, see also *Yearbook of the International Law Commission; 1970*, vol. II, p. 121, document A/CN.4/229, para. 102.

²⁴⁹ United Nations, *Treaty Series*, vol. 69, p. 248. See also the more general provision in article 5 of Agreement on Transitional Measures (*ibid.*, p. 268).

²⁵⁰ H. F. Van Panhuys, "La succession de l'Indonésie aux accords internationaux conclus par les Pays-Bas avant l'indépendance de l'Indonésie", in *Nederlands Tijdschrift voor Internationaal Recht* (Netherlands International Law Review) (Leyden), vol. II (1955), January 1955, pp. 55, 70 and 73.

²⁵¹ See United Nations, *Materials on Succession of States* (op. cit.), p. 36. Note also that according to one writer it appears that no question has ever been officially raised in Indonesia that [the treaties concerning shipping and commerce which affected it at the time of independence] are not still in force ... D. P. O'Connell, op. cit., vol. II, p. 138, who refers to a list of treaties prepared by an official of the Netherlands Indies Ministry of Shipping, Luiking, *De Dienst van Scheepvaart in Indonisië* (n.d.) pp. 259-282).

²⁵² Netherlands, *Tractatenblad van het Koninkrijk der Nederlanden* (The Hague 1951), vol. II, No. 163, p. 2.

would consist of Czechoslovak, Indonesian and Netherlands delegations. Further, under article 9, payments between Czechoslovakia and the Netherlands "shall be made" according to the rules agreed to by Czechoslovakia and the Netherlands in 1946 and 1949. As in the Danish and Swedish agreements discussed below, it was provided that Indonesia could end its participation in the Protocol after 31 December 1950 by giving timely notice. When the Mixed Commission next met in April and May 1951, it consisted only of Czechoslovakia and Netherlands delegations.²⁵³

Denmark—Netherlands Commercial Agreement (1946)

98. This agreement provided for the establishment of a joint commission which was to meet each year to determine the quotas of imports and exports between the two countries. The Commission met in May 1950 under this provision. Its Protocol concerning the Exchange of Commodities²⁵⁴ read, in part, as follows:

In accordance with Articles 1, 2 and 22 of the Union Statute between the Kingdom of the Netherlands and the Republic of the United States of Indonesia of December 27th, 1949 and in virtue of Article 21 of the Financial and Economic Agreement attached thereto of which instruments the Royal Danish Government, after due notification, has taken note, a delegation representing the Republic of the United States of Indonesia has participated in the work as a member of the Commission.

...

If the Republic of the United States of Indonesia as a result of the consultation foreseen in Article 21 of the Financial and Economic Agreement with the Kingdom of the Netherlands should not be in a position to participate in the Protocol after December 31st, 1950, the Indonesian Delegation will notify the Danish Delegation to that effect before November 30th, 1950. In that case the quotas agreed upon between the two countries shall only be applicable with half of the amounts or quantities indicated in lists III and IV.

The operative provisions of the Protocol recorded the undertakings, *inter alia*, of Denmark and Indonesia relating to the volume of trade between them and lists annexed to it stated the goods, their quantities and their values. The Commissions which met in 1951 and 1952 consisted of representatives of Denmark and the Netherlands only.²⁵⁵

Hungary—Netherlands Payments Agreements (1947)

99. By an Exchange of Notes of 31 July and 14 August 1950 between Hungary and the Netherlands a Protocol drawn up by the delegations of Hungary, Indonesia and the Netherlands was confirmed. Under this Protocol, payments between Hungary and Indonesia were to be effected in accordance with the arrangements in the above agreement in force between Hungary and the Netherlands. Further, on 18 April 1951, in a Payments Protocol, Hungary and the Netherlands made

provision for the establishment of an account, "Compte marchandise indonésien".²⁵⁶

Netherlands—Norway Trade Agreement (1947)

100. Following Indonesia's accession to independence it participated in the operations of the Mixed Commission established under above agreement. In particular, an Indonesian delegation was a party to the negotiations which led to the conclusion of the Protocol of July 1950. A new Protocol of 1951 however was signed only by the delegations of the Netherlands and Norway.²⁵⁷

*Netherlands—Sweden Commercial Agreement (1947)*²⁵⁸

101. This agreement also provided for the establishment of a joint commission which would prepare the list of goods to be traded between the two countries. The agreement applied, *inter alia*, to the Netherlands Indies, and remained in effect after 1 January 1949 subject to the right of either party to terminate it by the giving of three months' notice.²⁵⁹

102. When the joint commission met in February 1950 it included a delegation representing the Republic of the United States of Indonesia.²⁶⁰ The Protocol drawn up by the Commission contained passages identical, *mutatis mutandis*, to that already quoted from the Protocol of May 1950 between Denmark, Indonesia and the Netherlands.²⁶¹ The provisions in the Protocol were to remain in effect for the Netherlands and Sweden until 1 March 1951 and for Indonesia and Sweden until 1 January 1951. Indonesia was to advise Sweden in the course of November 1950 whether it wished the Protocol to continue to 1 March 1951, in which event the quotas as between those two countries would be increased by one fifth. Again, two of the lists set out the proposed items of trade between Denmark and Indonesia.

103. In April 1951 Indonesia and Sweden concluded a commercial agreement²⁶² which in structure is very similar to the 1947 Netherlands-Swedish Agreement. The 1951 Agreement—which made no reference to the earlier arrangement—had effect from 1 March 1951. Lists were drawn up by Indonesian-Swedish joint commissions under this 1951 Agreement.²⁶³ At about the same time the Netherlands-Swedish commission met

²⁵⁶ Netherlands, *Tractatenblad van het Koninkrijk der Nederlanden* (The Hague, 1951), vol. II, No. 95.

²⁵⁷ *Ibid.*, No. 77.

²⁵⁸ Sweden, *Sveriges Överenskommelser med Främmande Makter*, 1947 (Stockholm, Norstedt, 1948), No. 48, p. 583.

²⁵⁹ See also article 6 of the Protocol of 17 November 1949 (*ibid.*, 1949 (Stockholm, Norstedt, 1952), No. 67, p. 625).

²⁶⁰ *Ibid.*, 1950 (Stockholm, Norstedt, 1950), No. 38, p. 781 and note on p. 816.

²⁶¹ See para. 98 above.

²⁶² Sweden, *Sveriges Överenskommelser med Främmande Makter*, 1951 (Stockholm, Norstedt, 1953), No. 24, p. 193.

²⁶³ e.g. *ibid.*, and *ibid.*, 1952 (Stockholm, Norstedt, 1954), No. 26, p. 265.

²⁵³ *Ibid.*, p. 5.

²⁵⁴ United Nations, *Treaty Series*, vol. 74, p. 95.

²⁵⁵ Denmark, *Lovtidende for Kongeriget Danmark*, 1951, Part C: *Danmarks Traktater* (Copenhagen, 1952), p. 1124, No. 36, and *ibid.*, 1952, Part C: *Danmarks Traktater* (Copenhagen, n.d.), p. 614, No. 33.

under the 1947 Agreement and drew up new lists for 1951-1952.²⁶⁴

*Netherlands—United Kingdom Agreement concerning the Regulation of Trade and Payments between Singapore and the Federation of Malaya and the Netherlands Indies (1948)*²⁶⁵

104. In 1961, the United Kingdom gave notice to Indonesia, on behalf of Singapore, of the termination of this agreement. The termination was effective on 29 June 1961,²⁶⁶ on which day the new Basic Arrangements on Trade and Economic Relations signed by Indonesia and Singapore became effective.²⁶⁷ (The Agreement was not listed in the 1949 Indonesia-Netherlands Financial Economic Agreement.)²⁶⁸

(d) FORMER NON-METROPOLITAN TERRITORY FOR THE INTERNATIONAL RELATIONS OF WHICH THE UNITED STATES OF AMERICA WAS RESPONSIBLE

27. Philippines

Switzerland—United States Trade Agreements

105. In a Note of 2 July 1946, the Minister of Switzerland stated:

... in the meantime Switzerland will continue to apply the agreements and regulations which governed the commerce between the two countries prior to the Philippine Declaration of Independence.²⁶⁹

In a memorandum of 28 September 1946, the Philippine Secretary of Foreign Affairs expressed agreement with the Swiss statement.²⁷⁰

B. Cases other than cases of independence of former non-metropolitan territories

1. SECESSION OF FINLAND (1917)

Russia—Sweden Agreements

106. The Exchange of Notes of 11 November 1919²⁷¹

²⁶⁴ *Ibid.*, 1951 (Stockholm, Norstedt, 1953), No. 36, p. 253. See similarly the 1952 Protocol (*ibid.*, 1952 (Stockholm, Norstedt, 1954), No. 11, p. 167).

²⁶⁵ United Nations, *Treaty Series*, vol. 66, p. 183.

²⁶⁶ United Kingdom, *Treaty Series* (London, H.M.S.O., 1962), No. 119 (1961), Cmd. 1627, p. 15.

²⁶⁷ United Nations, *Treaty Series*, vol. 443, p. 255.

²⁶⁸ Cf. para. 95 above.

²⁶⁹ H. B. Yorak, comp., *Philippine Treaty Series: A Collection of the Texts of Treaties and Other International Agreements to which the Philippines is a Party* (Law Center, University of the Philippines, 1968), vol. I (1944-1948), p. 319.

²⁷⁰ *Ibid.*, p. 320. The correspondence does not indicate what the agreements in question were. Article XIII, paragraph 2, of the 1936 Trade Agreement between Switzerland and the United States of America provided for the most-favoured-nation treatment of trade between the Philippines and Switzerland (United States of America, *The Statutes at Large of the United States of America from January 1935 to June 1936*, vol. XLIX, Part 2 (Washington D.C., U.S. Government Printing office, 1936), p. 3917).

²⁷¹ United Kingdom, *British and Foreign State Papers, 1919* (London H.M.S.O., 1922), vol. CXII, p. 1023; see also Year-

by which Finland and Sweden declared that certain agreements concluded between Russia and Sweden were to be deemed to have been valid and to continue to be valid as between Finland and Sweden, listed among those agreements an Exchange of Notes of 26 June 1900 regarding the duty-free importation of consular requisites,²⁷² and an Agreement of 29 May 1915 regarding the recognition of limited companies.²⁷³

Russia—United Kingdom Agreements

107. It will be recalled²⁷⁴ that the United Kingdom was advised that Finland was not bound by the treaties concluded by Russia. Amongst those treaties was one regulating commercial relations between Russia and Zanzibar.²⁷⁵

2. ASSOCIATION OF ICELAND WITH DENMARK IN A REAL UNION (1918); DISSOLUTION OF THE UNION (1944)

108. It appears to have been generally accepted²⁷⁶ that Iceland's constitutional development from an integral part of Denmark, via the real union, to full independence had no effect on the continued force of treaties.

109. The list prepared by the Icelandic Foreign Ministry of the treaties in force as of 31 December 1964 includes treaties and agreements concerning trade concluded before 1914 by Denmark with Belgium, Chile, France,²⁷⁷ Hungary, Italy, Liberia, Netherlands, Norway, Sweden, Switzerland and the United Kingdom²⁷⁸ (also listed under Canada, Ceylon, India and

book of the International Law Commission, 1970, vol. II, p. 122, document A/CN.4/229, para. 108.

²⁷² S. Lewenhaupt, *Recueil de traités, conventions et autres actes diplomatiques de la Suède entièrement ou partiellement en vigueur au 1^{er} janvier 1926* (Stockholm, Norstedt, 1927), t. II, p. 362. The preface to the second volume of the collection (published by Count Sten Lewenhaupt, Conseiller de Légation, Chef de Section, at the Swedish Ministry of Foreign Affairs) contains the following passages of general import:

"With regard to the validity of treaties for States created by the dismemberment of other States, the position of the Swedish Government is well known: in the absence of a special and explicit stipulation to the contrary, when a State came into being by breaking away from a political unit already existing, the treaty rights and obligations of that unit vis-à-vis foreign Powers pass *de plano* to the said State, except in the case of agreements which by their very nature can be binding only on the Government of the State which concluded them.

"Nevertheless, this collection reproduces the text of agreements of this kind only when it was clear that their applicability continued to be recognized by both parties concerned.

²⁷³ *Ibid.*, p. 366.

²⁷⁴ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 122, document A/CN.4/229, para. 109.

²⁷⁵ See D. P. O'Connell, *op. cit.*, vol. II, p. 99.

²⁷⁶ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 122, document A/CN.4/229, para. 110.

²⁷⁷ See also P. Duparc, *op. cit.*, pp. 64-65.

²⁷⁸ See also article 4 of a 1933 Trade Agreement between Iceland and the United Kingdom:

"Nothing in this Agreement shall be deemed to affect the rights and obligations arising out of any treaty at present in force between the United Kingdom and Iceland and, in

South Africa), and trade treaties and agreements concluded between 1918 and 1944 with Austria,²⁷⁹ Bolivia, Brazil, Czechoslovakia, Finland, Greece,²⁸⁰ Haiti, Poland, Romania, Spain, the USSR and the United States of America.²⁸¹ 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.²⁸²

3. PEACE SETTLEMENT FOLLOWING THE FIRST WORLD WAR (1919)

(a) Austria and Hungary

110. In so far as the question²⁸³ was not regulated by specific provisions in the Peace Settlement, Austria took a generally negative view of treaty continuity²⁸⁴ and Hungary a positive one.²⁸⁵ Practice relevant to trade and similar agreements reflects the suggested difference in position of the two States.

Austria/Hungary—Denmark Trade and Navigation Convention (1887)

111. By Notes of 27 and 30 June 1923 Austria and Denmark stated that they were agreed that thenceforward the provisions contained in the above Convention were to apply to their commercial relations. The exchange was accompanied by an amendment and under-

standing.²⁸⁶ Iceland lists the treaty as in force under Hungary—but not under Austria—in its Treaty List.²⁸⁷

Austria/Hungary—Germany Commercial and Customs Treaty (1905)

112. The preamble to a provisional agreement concluded by Germany and Hungary on 1 June 1920 to regulate their economic relations read in part as follows:

Whereas the conditions prevailing at the time of the conclusion of the [above] Treaty [...] have, as a result of the world-war, undergone profound changes which clearly render the continuance of this Treaty impracticable, the [two] Governments ... have decided to enter into the following provisional Agreement ...²⁸⁸

*Austria—Netherlands Treaty of Friendship and Commerce (1867)*²⁸⁹

113. In Notes of 3 and 5 September 1923, the Dutch and Austrian Governments confirmed that they were in agreement

in ... stating that, in the commercial relations between the Netherlands and the Austrian Republic, the provisions contained in the [above] Treaty ..., in so far as they have not been modified by the Consular Convention dated November 6, 1922 [290] shall continue ["continuent"] to be applicable.²⁹¹

*Austria/Hungary—Sweden and Norway Treaty of Commerce and Navigation (1873) as modified in 1892 and 1911*²⁹²

114. In Notes of 10 November 1924 Austria and Sweden declared that in commercial relations between them the above Treaty "shall continue in force..." with an amendment and understanding.²⁹³ The Treaty with its amendments is accordingly reproduced under Austria in the Swedish collection of treaties in force as at 1 January 1926.²⁹⁴ That collection also includes the Treaty with its amendments under Hungary, along with a statement made in 1922 by the Hungarian Government to the effect that Hungary, which is said to be identical to the former Kingdom of Hungary, remains bound by the treaties which were in force during the time of the Dual Monarchy.

Austria/Hungary—Switzerland Treaty of Commerce (1906)

115. By its own terms this treaty was to remain in effect until 31 December 1917 and would remain operative thereafter being subject to termination by the giving of one year's notice. Notice to take effect from 6 March

(Foot-note 278 continued)

particular, the Treaty of Peace and Commerce signed at Whitehall on 13 February 1660/1, or the Treaty of Peace and Commerce signed at Copenhagen on 11 July 1670, including the Declaration amending the said treaties signed at Copenhagen on 9 May 1912."

United Kingdom, *Treaty Series* (London, H.M.S.O., 1933), No. 16 (1933), Cmd. 4331, p. 4.

²⁷⁹ See also the Exchange of Notes in 1923 between Denmark ("which is responsible for the conduct of the foreign affairs of Iceland") and Austria, in which they stated their agreement that thenceforward and pending a definitive agreement the Austria-Hungary-Denmark trade and shipping Convention of 1887 was to be applied in relations between Austria and Iceland (League of Nations, *Treaty Series*, vol. XVIII, p. 195). This exchange and the related one concerning Austria-Denmark relations were mainly, if not solely, concerned with the effect of the dissolution of the Dual Monarchy.

²⁸⁰ Article 3 of the Treaty of Commerce and navigation of 28 January 1930 provided that tonnage measurement was to be regulated by a declaration of 18/30 November 1895 (League of Nations, *Treaty Series*, vol. CXVIII, p. 285).

²⁸¹ The agreement (Trade Agreement of 27 August 1943), concluded between the Regent of Iceland and the President of the United States of America, was signed and entered into force shortly before the termination of the Union. It provided that it was to remain in force for at least three years (United Nations, *Treaty Series*, vol. 29, p. 317). It was amended in 1963 (*ibid.*, vol. 527, p. 45).

²⁸² Bolivia, Brazil, Chile, Czechoslovakia, Finland, Greece, Haiti, Hungary, Liberia and Poland.

²⁸³ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 123, document A/CN.4/229, para. 112.

²⁸⁴ See, for example, Ch. Rousseau, *Droit international public* (Paris, Sirey, 1953), p. 283.

²⁸⁵ See, for example, the note addressed by Hungary to Sweden (*Yearbook of the International Law Commission*, 1970, vol. II, p. 123, document A/CN.4/229, para. 115..

²⁸⁶ League of Nations, *Treaty Series*, vol. XVIII, p. 189. See the similar exchange concerning Iceland (*ibid.*, p. 195).

²⁸⁷ Iceland, *Stjórnartíðindi*, 1964, (Reykjavik), C 2, No. 17 (31 December 1964), p. 107.

²⁸⁸ League of Nations, *Treaty Series*, vol. VII, p. 219.

²⁸⁹ United Kingdom, *British and Foreign State Papers, 1867-1868* (London, Foreign Office, 1873), vol. LVIII, p. 646.

²⁹⁰ League of Nations, *Treaty Series*, vol. XVII, p. 375. The Convention makes no express references to the 1867 treaty.

²⁹¹ *Ibid.*, vol. XX, p. 149.

²⁹² S. Lewenhaupt, *op. cit.*, pp. 87 and 91.

²⁹³ League of Nations, *Treaty Series*, vol. XXXI, p. 59.

²⁹⁴ See foot-note 272 above.

1920 was given on 7 March 1919, but Hungary and Switzerland, by an Exchange of Notes of April 1921, kept the treaty in effect. At the same time they agreed to abrogate the annexes to the agreement. The treaty, as thus amended, was included in the collection of Swiss laws 1848-1947 under Hungary with a note stating that it is in effect only for Hungary.²⁹⁵

*Austria/Hungary—Switzerland Treaty of Establishment (1875)*²⁹⁶

116. By a treaty of 1925, Austria and Switzerland agreed that the 1875 Treaty and others "shall be applied" by the parties.²⁹⁷ The Treaty is included under Hungary in the Swiss collection of laws 1848-1947. There is no reference to any agreement to keep the treaty in force.²⁹⁸

(b) *Czechoslovakia and Poland*

117. The treaties concluded in 1919 relevant to Czechoslovakia and Poland do not suggest the continuity or succession for them of the treaty rights and obligations of Austria-Hungary.²⁹⁹ This suggestion of non-continuity is also confirmed by practice relating to commercial treaties. Both Czechoslovakia and Poland concluded a great number of treaties of commerce and navigation and trade and customs conventions with States which had concluded similar treaties with Austria-Hungary. These new treaties made no reference to such earlier treaties.³⁰⁰ Courts in Germany and Poland also agreed that, in the absence of action to the contrary by interested States, Czechoslovakia and Poland would not be bound by Austria-Hungary's treaties.

²⁹⁵ League of Nations, *Treaty Series*, vol. VII, p. 235; Switzerland, Chancellerie fédérale, *Recueil systématique* ... (op. cit.), p. 497. Switzerland and Austria, on 17 August 1946, concluded a Trade Agreement, which makes no reference to the 1906 Treaty (*ibid.*, p. 369).

²⁹⁶ Switzerland, Chancellerie fédérale, *Recueil systématique* ... (op. cit.) (Berne, 1953), vol. 11, p. 569.

²⁹⁷ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 123, document A/CN.4/229, para. 116. See also the Agreement between Austria and Switzerland of 5 January 1950 concerning the validity of earlier treaties. It states that the two Governments "have agreed that the following treaties [...] shall remain in force". Amongst the treaties is that of 1875 (Switzerland, *Recueil officiel des lois et ordonnances de la Confédération suisse, Année 1950* (Berne, 1951), p. 87).

²⁹⁸ Switzerland, Chancellerie fédérale, *Recueil systématique* ... (op. cit.), vol. 11, p. 639.

²⁹⁹ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 124, document A/CN.4/229, para. 117.

³⁰⁰ e.g. Czechoslovakia-Italy (League of Nations, *Treaty Series*, vol. XXXII, p. 183); Denmark-Poland (*ibid.*, vol. XXXI, p. 13); Iceland-Poland (*ibid.*, p. 35); Czechoslovakia-Sweden (*ibid.*, vol. XXXVI, p. 289); Czechoslovakia-Romania (*ibid.*, vol. XV, p. 235); Poland-Switzerland (*ibid.*, vol. XII, p. 305); Czechoslovakia-Greece (*ibid.*, vol. XXI, p. 217 and vol. XXXVIII, p. 291); Czechoslovakia-Netherlands (*ibid.*, vol. XXXI, p. 93); Czechoslovakia-United Kingdom (*ibid.*, vol. XXIX, p. 377); Czechoslovakia-Norway (*ibid.*, vol. XX, p. 355); Bulgaria-Poland (*ibid.*, vol. LX, p. 103); Italy-Poland (*ibid.*, vol. LIX, p. 293); Czechoslovakia-France (*ibid.*, vol. XLIV, p. 21); Czechoslovakia-Switzerland (*ibid.*, vol. LXIV, p. 7).

Austria/Hungary—Germany Treaty of Commerce (1891)

118. This treaty regulated the collection of customs on the border between the two countries. In a case in which it was argued that the treaty was no longer in effect so far as the border between Czechoslovakia and Germany was concerned, the *Reichsgericht* (Supreme Court of the German Reich) held that it was true that as a result of the dissolution of Austria-Hungary one of the parties to the treaty ceased to exist. Czechoslovakia was not the successor to Austria-Hungary. But there was nothing to prevent either Czechoslovakia or Germany from maintaining the contractual relation; this could be expressly agreed; but it could also be achieved tacitly. The Court held that this had actually happened as a result of the actions of the Czechoslovak State.³⁰¹

Austria/Hungary—Russia Treaty of Commerce (1906)

119. The Polish Supreme Administrative Court held that this treaty was not in effect between the Republic of Poland and the Soviet Union as regards such parts of Polish territory as had been under Austro-Hungarian sovereignty: there was a lack of identity of the parties to the treaty; the treaty was binding neither on Poland with regard to Russia nor on Russia with regard to Poland.³⁰²

Austria/Hungary—Switzerland Treaty of Commerce (1906)

120. In this case the usual pattern appears not to have been followed. On 7 March 1919 (before the Peace Treaties were signed) the Swiss Envoy in Vienna gave notice of the denunciation of the above treaty of commerce. The notice was to take effect one year later. On 6 March 1920, however, Czechoslovakia and Switzerland agreed that the treaty was "re-validated" for successive three-month periods, with the possibility of termination by the giving of one month's notice.³⁰³

(c) *Yugoslavia*

121. So far as the Allied and Associated Powers were concerned, the question of the continued force of the treaties concluded by Serbia was resolved by treaty in favour of their continuity and their extension to the

³⁰¹ Customs House (State Succession) Case (1922). See J. Fischer Williams and H. Lauterpacht, ed., *Annual Digest of Public International Law Cases, 1919-1922* (London, 1932), vol. I, p. 68 and *Yearbook of the International Law Commission*, 1963, vol. II, p. 108, document A/CN.4/157, paras. 114-115. For a further decision of the *Reichsgericht* in a similar case in 1932, see *ibid.*, para. 116.

³⁰² *Gil v. Polish Ministry of Industry and Commerce* (1923). See J. Fischer Williams and H. Lauterpacht, ed., *Annual Digest of Public International Law Cases, 1923-1924* (London, 1933), vol. 2, p. 83 and *Yearbook of the International Law Commission*, 1963, vol. II, p. 108, document A/CN.4/157, paras. 112-113.

³⁰³ International Law Association, *The Effect* ... (op. cit.), p. 20. For related action by Hungary and Switzerland concerning the same treaty, see para. 115 above.

whole of the territory of the Kingdom.⁸⁰⁴ The same attitude seems to have been taken generally by the Kingdom of Serbia. Croats and Slovenes and by those States which were not Allied and Associated Powers.⁸⁰⁵

*Norway—Serbia Declaration concerning Commercial Relations (1909)*⁸⁰⁶

122. On 1 February 1923, the Serb-Croat-Slovene Minister in London asked the Norwegian Minister whether his Government recognized the above treaty as now being applicable to the whole of the Kingdom or as relating only to that part which concerned Serbia.⁸⁰⁷ In his reply the Norwegian Minister stated that his Government considered that the Declaration applied to the whole Kingdom; it would remain in force until denounced. The Serb-Croat-Slovene Minister confirmed that his Government agreed with the Norwegian view.

Serbia—Sweden Declaration concerning Commercial Relations (1907)

123. This Declaration, which provides for reciprocal most-favoured-nation treatment, is listed, under the Kingdom of the Serbs, Croats and Slovenes, in the Swedish collection of treaties in force on 1 January 1926.⁸⁰⁸

Serbia—Switzerland Convention concerning Establishment and Consuls (1888)

124. This Convention is included under Yugoslavia in the Swiss collection of laws 1848-1947.⁸⁰⁹

Serbia—Switzerland Treaty of Commerce (1907)

125. This Treaty, which was included in the Swiss collection of laws 1848-1947 under Yugoslavia,⁸¹⁰ was expressly replaced by a Treaty of Commerce of 27 September 1948.⁸¹¹

*Serbia—United States Treaty of Commerce (1881)*⁸¹²

126. Yugoslavia and the United States of America have acknowledged on several occasions that this treaty remained in effect after 1919. Thus in 1927 there were

discussions—ultimately unsuccessful—for the revision of the treaty.⁸¹³ At the time of the granting of independence to the Philippines, the United States wished to grant it certain trade preferences. This policy required the beneficiaries of certain of the most-favoured-nation treaties to agree to a waiver of their rights in favour of the Philippines. One of the States which the United States of America approached for such a waiver was Yugoslavia, and both agreed that

the most-favoured-nation provisions of the Treaty for Facilitating and Developing Commercial Relations between the United States and Yugoslavia signed October 2/14, 1881, shall not be understood to require the extension to Yugoslavia of advantages accorded by the United States to the Philippines.⁸¹⁴

Article 5 of the United States of America-Yugoslavia Agreement regarding pecuniary claims of the United States and its nationals (19 July 1948)⁸¹⁵ contains the following provision:

The Government of Yugoslavia agrees to accord to nationals of the United States lawfully continuing to hold, or hereafter acquiring assets in Yugoslavia, the rights and privileges of using and administering such assets and the income therefrom within the framework of the controls and regulations of the Government of Yugoslavia, on conditions not less favourable than the rights and privileges accorded to nationals of Yugoslavia, or of any other country, in accordance with the Convention of Commerce and Navigation between the United States of America and the Prince of Serbia, signed at Belgrade, October 2-14, 1881.

The 1881 Treaty is listed in United States, *Treaties in Force*.⁸¹⁶ Several United States courts have recognized the continued force of the treaty. Thus, the Supreme Court in 1961, referring to the 1948 Agreement, affirmed that the 1881 Treaty was still in effect between the United States and Yugoslavia.⁸¹⁷

4. ESTABLISHMENT OF THE MANDATE FOR WESTERN SAMOA (1920)

*Convention between the United States, Great Britain and Germany, relating to Samoa (1899)*⁸¹⁸

127. Under this Convention, United States nationals in Western Samoa were entitled to national treatment in

⁸⁰⁴ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 124, document A/CN.4/229, para. 121; and, for example, the Exchange of Notes of 18 June 1926 between the United Kingdom and the Serb-Croat-Slovene State (League of Nations, *Treaty Series*, vol. LVII, p. 23).

⁸⁰⁵ See, for example, the passage from the Serb-Croat-Slovene Note of 29 September 1921 to the United States of America, quoted in *Yearbook of the International Law Commission*, 1970, vol. II, p. 124, document A/CN.4/229, para. 121.

⁸⁰⁶ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1911), 3rd series, t. V, p. 461.

⁸⁰⁷ *Ibid.*, (Leipzig, Weicher, 1931), 3rd series, t. XXIV, p. 651.

⁸⁰⁸ S. Lewenhaupt, *Recueil des traités ... 1926 (op. cit.)*, vol. II, p. 899.

⁸⁰⁹ Switzerland, Chancellerie fédérale, *Recueil systématique ... (op. cit.)*, vol. 11, p. 724.

⁸¹⁰ *Ibid.*, vol. 14, p. 665.

⁸¹¹ Switzerland, *Recueil officiel des lois et ordonnances de la Confédération suisse, Année 1948* (Berne, 1948), p. 986.

⁸¹² United States of America, *Treaties, Conventions, International Acts ... 1776-1909 (op. cit.)*, vol. II, p. 1613.

⁸¹³ United States of America Department of State, *Foreign Relations of the United States*, 1927, vol. III (Washington D.C., U.S. Government Printing Office, 1942), pp. 828-865. See also G. H. Hackworth, *Digest of International Law* (Washington D.C., Government Printing Office, 1943), vol. V, p. 375.

⁸¹⁴ Exchange of Notes of 4 May and 3 October 1946 (United Nations, *Treaty Series*, vol. 13, pp. 86 and 88).

⁸¹⁵ *Ibid.*, vol. 89, p. 43.

⁸¹⁶ United States of America, Department of State, *Treaties in Force ... 1970 (op. cit.)*, p. 254.

⁸¹⁷ *Kolovrat v. Oregon* (1961). See United States Supreme Court, *United States Reports*, vol. 366: Cases Adjudged in the Supreme Court at October Term, 1960 (Washington D.C., U.S. Government Printing Office, 1961), pp. 187, 190 and foot-note 4; and *Yearbook of the International Law Commission*, 1963, vol. II, p. 111, document A/CN.4/157, paras. 135-136. See also the court decisions mentioned by M. M. Whiteman (*op. cit.*, p. 944).

⁸¹⁸ United States of America, Department of State, *Papers relating to the Foreign Relations of the United States*, with

certain respects. Following the First World War, Samoa, until then a German colony, became a mandated territory administered by New Zealand. New Zealand introduced a preferential tariff system which, it was said, discriminated against United States nationals, contrary to the provisions of the Convention. In the dispute which followed, New Zealand deferred to the opinion of the Law Officers of the Crown in England that Samoa's transition from German sovereignty to mandated status did not affect the obligations created by the Convention.⁸¹⁹

5. ANNEXATION OF ETHIOPIA (1936) AND RESTORATION OF ITS INDEPENDENCE

*Ethiopia—France Treaty of Friendship and Commerce (1908)*⁸²⁰

128. The Ethiopian Ministry of Foreign Affairs informed the American Legation by a Note of 6 June 1944 that

... this [Ethiopian] Government has no other alternative but to hold that the Convention of the 10th January, 1908, between the Empire of Ethiopia and the Republic of France has been terminated by act of the latter contracting party.

The Minister of the Legation commented that

The act referred to was the recognition by France of the Italian conquest of Ethiopia, the Treaty being held to have become void by the disappearance of one of the parties thereto, namely Ethiopia, and not to have been revived automatically by the liberation and reconstitution of the country, or by the restoration of the Emperor to his rule and sovereignty, followed by formal recognition of that status by France.⁸²¹

6. ANNEXATION OF AUSTRIA (1938) AND RESTORATION OF ITS INDEPENDENCE

129. The State Treaty for the re-establishment of an independent and democratic Austria, signed on 15 May

the *Annual Message of the President Transmitted to Congress, December 5, 1899* (Washington D.C., U.S. Government Printing Office, 1901), p. 667.

⁸¹⁹ United States of America, Department of State, *Papers relating to the Foreign Relations of the United States, 1924*, vol. II, (Washington D.C., U.S. Government Printing Office, 1939), pp. 245-246. See further *ibid.*, 1927, vol. II, (Washington D.C., U.S. Government Printing Office, 1942), pp. 760-775; *ibid.*, 1928, vol. II (Washington D.C., U.S. Government Printing Office, 1943), pp. 982-985; *ibid.*, 1934, vol. I (Washington D.C., U.S. Government Printing Office, 1951), pp. 1003-1010; and *ibid.*, 1936, vol. I: *General: The British Commonwealth* (Washington D.C., U.S. Government Printing Office, 1953), pp. 852-854. New Zealand, it would appear, maintained the discriminatory tariff, but on the ground that because of United States non-compliance with another provision of the Convention New Zealand was released from its obligations, and not on the ground that the Convention had not survived Samoa's change of status.

⁸²⁰ G. F. de Martens, ed., *Nouveau Recueil général de traités* (Leipzig, Weicher, 1910), 3rd series, t. II, p. 833.

⁸²¹ M. M. Whiteman, *op. cit.*, pp. 937-938. The Treaty is listed, however, in P. Duparc, *op. cit.*, p. 46.

1955,⁸²² contains no express comprehensive provision concerning the treaties applicable to Austria before 1938 and between 1938 and 1945, but it appears to follow from the Treaty and to be widely accepted that the treaties concluded before 1938 are, in general, now in effect.⁸²³ The cases recorded below are concerned with the effect, as seen in 1938, of the annexation of Austria on relevant treaties.

Austria—France and France—Germany treaties

130. The legal department of the French Foreign Ministry expressed the following view on 18 March 1938 concerning the situation created by the incorporation of Austria into the German Reich:

1. Austria has, in fact, ceased to exist as an independent State.

2. The Reich in fact exercises its authority over Austria, which it has incorporated by making it a region—which is roughly equivalent to a province—even if this does not preclude at least temporary survival of separate legal, customs, financial and other arrangements.

...

IV. Fate of treaties concluded with Austria ...

...

(b) If we admit that Austria no longer exists, the consequence is that, in principle and with few exceptions, treaties concluded by Austria have lapsed.

(c) If, in addition, we recognize the authority of the Reich in Austria, the consequence is that, in principle and with certain exceptions, the effect of treaties concluded by the Reich would extend to Austria, whether or not this is to our advantage.

Consequences (b) and (c) may be modified by any special agreements which we may conclude with Germany.⁸²⁴

Austria—Netherlands and Germany—Netherlands treaties

131. Following the incorporation in 1938 of Austria into the Reich, Germany and the Netherlands, in an Arrangement signed at Berlin on 25 May 1938,⁸²⁵ agreed that the German Government was to advise the Dutch Government of the day on which the customs frontier between the former State of Austria and the other parts of the German Reich ceased to exist. From that date, it was agreed,

the treaties concluded between Germany and the Kingdom of the Netherlands ... shall apply equally to the territory of the former Federal State of Austria save in so far as hereinafter otherwise agreed [article 1].

A further provision stated that the Germany-Netherlands Treaty concerning Clearing Transactions⁸²⁶ was to apply to the territory of the former Federal State of Austria from 1 June 1938. Finally it was provided that the Government Committees established under the Dutch-German economic treaties were to make any necessary adjustments to quotas.

⁸²² United Nations, *Treaty Series*, vol. 217, p. 223.

⁸²³ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 125, document A/CN.4/229, para. 126.

⁸²⁴ Ch. Kiss, *op. cit.*, p. 435.

⁸²⁵ League of Nations, *Treaties Series*, vol. CXCI, p. 143.

⁸²⁶ *Ibid.*, vol. CXC, p. 29.

*Austria—United Kingdom Treaty of Commerce and Navigation (1924)*³²⁷ and *Germany—United Kingdom Treaty of Commerce and Navigation 1924*³²⁸

132. In the Notes exchanged between Germany and the United Kingdom "in consequence of the German Law of the 13th March, 1938, relating to the union of Austria with the German Reich"³²⁹ the two Governments confirmed that the German Treaty extended to cover Austria and that the Austrian Treaty had lapsed.

*Austria—United States Treaty of Friendship, Commerce and Consular Rights (1928)*³³⁰ and *Germany—United States Treaty of Friendship, Commerce and Consular Rights (1923)*³³¹

133. Under both Treaties the parties promised to accord to the exports of the other most-favoured-nation treatment. By an amendment to the German Treaty this right was withdrawn in 1935.³³² On the other hand, Austria had continued to obtain the benefit of most-favoured-nation treatment. On 14 April 1938 the German Embassy wrote as follows to the State Department:

Despite reunion with the Reich, Austria has remained for the present an independent tariff area, at the border of which tariffs are collected according to Austrian laws and treaties. Even for imports from Germany, the tariff line has been maintained for the time being. In this state of affairs, according to Article 2 of the Law on the Reunion, all Austrian treaties with third states concerning trade and payments actually continue to be applied, on the presupposition of reciprocity.

Under these circumstances, the German Government therefore considers itself justified in expecting that upon importation into the United States of America, Austrian goods will continue to be granted the tariff concessions on the basis of the "Trade Agreement Act". The United States Government will be notified in due time by the German Government of the time at which the German tariff and exchange regulations will be extended to Austria.

The German Ambassador would be obliged to the Secretary of State of the United States if all steps required under these circumstances were taken to bring it about that the country of Austria is, up to that time left on the list of those countries enjoying the tariff concessions of the "Trade Agreement Act", the instructions issued to the Treasury Department being changed.³³³

134. In its reply, the Department of State referred to the fact that it had notified the other Departments of the United States Government and the German Government that "for all practical purposes the disappearance of the Republic of Austria as an independent State and its incorporation in the [German Reich] must be accepted as a fact". And the reply continued:

³²⁷ *Ibid.*, vol. XXXV, p. 175.

³²⁸ *Ibid.*, vol. XLIII, p. 89.

³²⁹ *Ibid.*, vol. CXCIV, p. 313. the text of the Notes is set out in *Yearbook of the International Law Commission*, 1970, vol. II, p. 126, document A/CN.4/229, para. 128.

³³⁰ United States of America, *Treaties, Conventions, International Acts...*, vol. IV: 1923-1937 (*op.cit.*), p. 3930.

³³¹ *Ibid.*, p. 4191.

³³² *Ibid.*, p. 4221.

³³³ G. H. Hackworth, *op. cit.*, p. 370.

It is in this relation that the President's letter of April 6 directed the elimination of Austria from the list of countries to the products of which the duties proclaimed on March 15, 1938, in connection with the Trade Agreement signed on March 7, 1938, with Czechoslovakia, and all other duties therefore proclaimed in connection with trade agreements (other than the trade agreement with Cuba signed on August 24, 1934, and the trade agreements with Nicaragua signed on March 11, 1936) signed under the authority of the Trade Agreements Act shall be applied.

In view of the above-stated facts regarding the incorporation of Austria into the German Reich, the Government of the United States does not regard as conclusive on, or even as pertinent to, the execution of the Trade Agreements Act the extent to which German tariff and exchange regulations have been extended to Austria.³³⁴

The reply went on to point out that in any event the German and Austrian authorities had taken certain steps, which were specified, to reduce Austrian customs autonomy.

135. In a further Note of 27 March 1939, the German Embassy informed the Department of State that the special transitional customs régime applicable to Austria would terminate on 1 April 1939 when a new German tariff applicable to the whole of Germany would go into effect.

In view of this state of affairs, the German Government believes itself to be in agreement with the Government of the United States, that from that time on the German-American Commercial Treaty of December 8, 1923 ... will apply with all its provisions also to the territory of the former Federated State of Austria ...³³⁵

136. At present, the 1928 Austrian Treaty is listed under Austria in United States, *Treaties in Force*.³³⁶

7. UNION OF NEWFOUNDLAND WITH CANADA (1949)

*Australia—Newfoundland Trade Agreement (1929)*³³⁷

137. The Australian Treaty List of 1956 notes that the above Agreement lapsed following the union of Newfoundland with Canada in 1949 and that the Canada-Australia Trade Agreement of 1931³³⁸ became applicable to Newfoundland.³³⁹ This is consistent with the general position adopted by Canada concerning the effect of the Union of Newfoundland with Canada on the former's treaties.³⁴⁰

³³⁴ *Ibid.*, p. 371. See also United States of America, Department of State, *Foreign Relations of the United States: Diplomatic Papers 1938*, vol. II (*op. cit.*), pp. 504-505.

³³⁵ G. H. Hackworth, *op. cit.*, p. 377. The United States response, if any, is not reproduced.

³³⁶ United States of America, Department of State, *Treaties in Force ... 1970* (*op. cit.*), p. 13.

³³⁷ Australia, *The Acts of the Parliament of the Commonwealth of Australia, 1939*, (vol. XXXII (Canberra, Commonwealth Government Printer, 1939), p. 151, No. 49.

³³⁸ *Ibid.*, 1931, vol. XXIX (Canberra, Commonwealth Government Printer, 1931), p. 33, No. 13; Canada, *Treaty Series, 1931*, No. 5 (Ottawa, 1933).

³³⁹ Australia, *Treaty Series 1956*, No. 1, p. 95.

³⁴⁰ See above, p. 132, document A/CN.4/243, para. 85.

8. THE FORMATION (1953) AND DISSOLUTION (1963) OF THE FEDERATION OF RHODESIA AND NYASALAND

138. Southern Rhodesia, before the formation of the Federation, had certain limited treaty-making powers and had, in its own right, concluded at least three trade agreements which were still in force at the time of the establishment of the Federation.³⁴¹ The United Kingdom had also concluded several trade agreements which were either expressly applicable to the constituent territories of the Federation or applied generally to all non-self-governing territories.³⁴² Accordingly when the Federation was formed the question of succession arose in relation to both groups of treaties. The Federation, although not independent, had limited treaty-making capacity. During the time it was in existence it concluded trade agreements with at least six countries.³⁴³ Agreements with all six were still in force when the Federation was dissolved on 31 December 1963 and accordingly the question of succession arose again at that point. The practice reviewed below relates, first, to the effect of the formation of the Federation and, second, to the effect of its dissolution.

(a) Effect of formation of the Federation on existing treaties

Australia—Southern Rhodesia Trade Agreement (1941); ³⁴⁴ *Australia—United Kingdom Trade Agreement (1932)* ³⁴⁵

139. On 30 June 1955 Australia and the Federation concluded a new trade agreement.³⁴⁶ According to statements made by the Australian and Federation Gov-

ernments, the new Agreement replaced the 1941 Agreement and those provisions of the 1932 Agreement which related to the exchange of tariff preferences between Australia and Northern Rhodesia and Nyasaland.³⁴⁷

Customs Agreement (1915) between Northern and Southern Rhodesia, on the one hand, and Basutoland, the Bechuanaland Protectorate and Swaziland, on the other, and the Agreement of 1937 (as amended) between Southern Rhodesia and the Bechuanaland Protectorate ³⁴⁸

140. On 29 June 1955 the High Commissioner of the Federation in London, in a Note ³⁴⁹ to the British Secretary of State for Commonwealth Relations, pointed out that, with the introduction of a new federal customs tariff on 1 July, the above Customs Agreement would become difficult to apply. He proposed a temporary understanding largely based on the above arrangement: the agreement with Bechuanaland would, for that provisional period, apply to the whole of the Federation (other than, in the case of imports, the Congo Basin treaty area),³⁵⁰ and the existing arrangement with Basutoland and Swaziland would continue. The Secretary of State agreed to this proposal.³⁵¹

New Zealand—United Kingdom Trade Agreement (1932) ³⁵²

141. The principal provisions of this agreement applied only to trade between the metropolitan territories of the two parties. In addition, however, New Zealand undertook, in article 12, to accord, *inter alia*, to the non-self-governing colonies and protectorates certain preferences, on condition of reciprocity. New Zealand and the United Kingdom concluded a new trade agreement in 1959 ³⁵³ which, for the most part, ³⁵⁴ superseded the 1932 Agreement. However, the 1959 Agreement provided (article 16) that it was not to have any effect in relation to any territory in the Federation

³⁴¹ Agreements with Australia, the Bechuanaland Protectorate, and South Africa.

³⁴² Thus the *Handbook of Commercial Treaties* (see above, foot-note 11) contains many statements to the effect that the treaties in question apply to Northern and Southern Rhodesia and Nyasaland. It appears, however that few if any of these older bilateral treaties were considered to be of practical significance at the relevant times. Thus an ECA paper entitled "Bilateral trade and payments agreements in Africa" (E/CN.14/STC/24 (4 November 1963) and E/CN.14/STC/24/Rev.1 (25 June 1965)), prepared on the basis, *inter alia*, of information provided by the Federation, lists none of them. It was suggested earlier that most of them would in practice be superseded by the GATT (see para. 2 above) and no practice relevant to them has been discovered. Notice, however, that the 1932 Ottawa Agreements concluded by the United Kingdom and other Commonwealth countries (see above, foot-note 100) gave preferences *beyond* those due under the most-favoured-nation clause to be found in the GATT.

³⁴³ Australia, the High Commission territories (Basutoland, Bechuanaland Protectorate and Swaziland), Canada, Japan, Portugal and South Africa. See paras. 144-148 below and "Bilateral trade and payments agreements in Africa" (E/CN.14/STC/24 and E/CN.14/STC/24/Rev.1). The revision, although published eighteen months after the dissolution of the Federation, does not indicate the effect of dissolution on the listed treaties.

³⁴⁴ Australia, *The Acts of the Parliament of the Commonwealth of Australia, 1941*, vol. XXXIX (Canberra, Commonwealth Government Printer, 1941), p. 43, No. 10; GATT document L/48 (10 October 1955), annex III, p. 17.

³⁴⁵ Cf. paras. 39-40 above.

³⁴⁶ United Nations, *Treaty Series*, vol. 226, p. 215.

³⁴⁷ GATT, document L/394 (24 August 1955); see also Australia, *Treaty Series*, 1956, No. 1, p. 108.

³⁴⁸ Both reproduced in Federation of Rhodesia and Nyasaland Notice No. 153 of 1955.

³⁴⁹ *Ibid.*, See also the extension (*ibid.*, No. 193 of 1955).

³⁵⁰ This exception is to be found generally in the trade agreements of the Federation before 1963; it was accepted that the treaty of 1885 relating to the Congo Basin (General Act of the Conference of Berlin (26 February 1885); see G. F. de Martens, ed., *Nouveau Recueil général de traités* (Göttingen, Dieterich, 1885-1886), 2nd series, t. X, p. 414) continued to have effect notwithstanding the various changes in the status of the territories affected by it. See for example, in addition to the bilateral agreements, GATT document L/293 (1 December 1954). By 1963 the Contracting Parties to GATT had agreed that the Federation could apply a common tariff to its whole area, thus removing the internal barriers which had existed under the treaty of 1885. See, for example, Federation of Rhodesia and Nyasaland, *Federal Government Gazette Extraordinary* (Salisbury, Government Printer), vol. XI (1963) No. 54 (10 December 1963), p. 498.

³⁵¹ See foot-note 349 above.

³⁵² United Kingdom, *Imperial Economic Conference at Ottawa, 1932 ... (op. cit.)*.

³⁵³ See foot-note 102 above.

³⁵⁴ See also para. 41 above.

and accordingly, in so far as any provisions of the [1932] Agreement ... may apply in relation to any such territory, they shall continue to be applicable until such time as their application may be terminated in accordance with that Agreement, or until other arrangements are made as a result of discussions between the New Zealand Government and the Government of the Federation of Rhodesia and Nyasaland.

A note in the New Zealand official publication of the Agreement³⁵⁵ states that the 1932 Agreement and, in particular, article 12 referred to above, applied in respect of the territories now (i.e. in 1959) comprising, *inter alia*, Northern Rhodesia and Nyasaland. The note goes on to explain that notwithstanding the change in constitutional status of these territories (the Federation "enjoys a wider measure of self-government including the responsibility for the conduct of some of its external relations"), the rights and obligations set out in article 12 of the 1932 Agreement continue to have effect pending the making of other arrangements.

*Portugal—United Kingdom Agreement (1950)*³⁵⁶

142. In 1958 the Federation and Portugal, acting pursuant to the provisions of the above agreement which called for negotiations between "the Contracting Parties" to conclude such agreements, signed a trade agreement.³⁵⁷

*United Kingdom (Southern Rhodesia)—Union of South Africa Customs Union (Interim) Agreement (1948)*³⁵⁸

143. This agreement provided that it was to remain in effect for five years and that, unless terminated by notice at the end of that time, it would be tacitly renewed for a further five years. On 1 October 1953 the parties, noting that with the formation of the Federation responsibility for trade would pass to the federal authorities, agreed that the agreement would continue until the federal Government established its economic policy, and that the agreement could be terminated at any time on six months' notice.³⁵⁹ In October 1954 the Governments of the Federation and of South Africa advised GATT that it had not been possible for them to submit by 1 July 1954 a definite plan for the establishment of a customs union, as required by the decision taken by the Contracting Parties in 1949 in reference to the South Africa-Southern Rhodesia Agreement. They requested postponement of any further consideration of the question.³⁶⁰ In other words they considered that not only the agreement but also the decision continued in

effect.³⁶¹ Finally, in a joint statement, the two Governments advised that as a result of the forthcoming introduction of its new tariff, the Federation had given the stipulated six months notice of the termination of the 1948 Agreement.³⁶² A new agreement was accordingly negotiated and was signed on 28 June 1955.³⁶³

(b) *Effect of dissolution of the Federation on existing treaties*

Australia—Federation of Rhodesia and Nyasaland Trade Agreement (1955)

144. By Notes exchanged on 27 and 30 December 1963,³⁶⁴ Australia and the Federation agreed that the 1955 Agreement, as amended, would "continue to apply on a provisional basis as between Southern Rhodesia and the Commonwealth of Australia". The two Notes were said to constitute an Agreement between the Government of Australia and the Government of Southern Rhodesia. On 31 December 1965, Salisbury announced that the provisions of the 1955 Agreement, as amended, "which have been continued by the Government of Rhodesia since the dissolution of the said Federation shall cease to have effect as from the 31st December, 1965".³⁶⁵

Agreements between the High Commission Territories (Basutoland, Bechuanaland Protectorate and Swaziland) and the Federation of Rhodesia and Nyasaland

145. On 14 and 27 November 1963 the Federation, which was to be dissolved a few weeks later, and the Bechuanaland Protectorate concluded a new agreement.³⁶⁶ On 23 June 1964 Southern Rhodesia proposed that this agreement continue to apply to Southern Rhodesia, with effect from the dissolution of the Federation and with the reduction of Southern Rhodesia's import quota depending on the quotas of Northern Rhodesia and Nyasaland. This proposal was accepted.³⁶⁷

³⁶¹ The Contracting Parties and the Executive Secretary also shared this view concerning the decision: see, for example, (a) the decision of the Contracting Parties of 17 November 1954 in which they took into consideration the exceptional circumstances which prevented the Governments of South Africa and of the Federation of Rhodesia and Nyasaland, "which succeeded to the rights and obligations of Southern Rhodesia under the Agreement," from submitting the plan required by the 1949 decision, and authorized the two Governments to continue to avail themselves of that decision until the next session of the Contracting Parties (GATT documents L/288 (23 November 1954) and G/91 (29 March 1955), p. 8); and (b) the Executive Secretary's view that the termination of the 1948 Agreements "renders invalid" the 1949 decision relating to it (GATT document L/426 (19 October 1955), p. 5).

³⁶² GATT document L/345 (4 March 1955).

³⁶³ United Nations, *Treaty Series*, vol. 267, p. 270. It may be that this agreement replaced the 1930 Northern Rhodesia-South Africa Agreement: the Executive Secretary in his note on the new tariff and the agreements with Australia and South Africa expressly states that it did (GATT document L/426 (19 October 1955)).

³⁶⁴ Australia, *Treaty Series*, 1964, No. 2.

³⁶⁵ Rhodesia, Government Notice No. 895 (1965).

³⁶⁶ Federation of Rhodesia and Nyasaland, Government Notices Nos. 372 and 373 of 1963.

³⁶⁷ Southern Rhodesia, Government Notice No. 602 (1964).

³⁵⁵ For the reference, see foot-note 103 above.

³⁵⁶ See GATT document L/914 (14 November 1958), where it is noted that with the creation of the uniform Federal tariff the application of the earlier arrangements between Southern Rhodesia and Mozambique was necessarily extended to the whole Federation.

³⁵⁷ GATT document L/1026 (7 August 1959).

³⁵⁸ United Nations, *Treaty Series*, vol. 118, p. 183; see also foot-note 363 below as to the 1930 Trade Agreement, between Northern Rhodesia and South Africa (text in GATT document L/418 (10 October 1955), annex II, p. 9).

³⁵⁹ GATT Document L/152 (1 October 1953).

³⁶⁰ GATT document L/259/Rev.1 (28 October 1954).

*Canada—Federation of Rhodesia and Nyasaland Trade Agreement (1958)*³⁶⁸

146. In this agreement, the Federation, in consideration of Canada's continuing to extend the benefits of the British preferential tariff to it, made certain trade concessions. Following the dissolution of the Federation, the Canadian Government took the view that the Territories were bound by the Federation's treaties and that accordingly an exchange confirming devolution (such as those between Southern Rhodesia and Australia and South Africa) was unnecessary.³⁶⁹ On 31 December 1965, Salisbury announced that the provisions of the 1958 Agreement "which have been continued by the Government of Rhodesia since the dissolution of the said Federation shall cease to have effect as from the 31st December, 1965".³⁷⁰

Japan—Federation of Rhodesia and Nyasaland Trade Agreement 1963

147. This agreement, which was concluded at a time when the dissolution of the Federation was already planned, provided that it would remain in effect until 1 August 1964 and that thereafter it could be further extended by agreement. In a Note of 1 August 1964 Southern Rhodesia proposed, in accordance with this provision, that the agreement "which is now in force between two Governments" should be extended until the end of the year. Japan agreed to this proposal.³⁷¹

*Federation of Rhodesia and Nyasaland—Union of South Africa Trade Agreement (1960) as amended*³⁷²

148. On 23 December 1963 the Governments of South Africa and Southern Rhodesia agreed, in view of the pending dissolution of the Federation and the reversion to the Southern Rhodesian Government of functions relating to customs and excise, that the above Agreement "continue to apply as between Southern Rhodesia and the Republic of South Africa" until new terms were agreed upon.³⁷³ On 30 November 1964 Southern Rhodesia and South Africa concluded a trade agreement,³⁷⁴ article 15 of which provided in part as follows:

on the coming into operation of this Agreement, the provisions of all former agreements relating to trade between the countries of the parties shall cease to have force or effect.

The subsidiary legislation enacted to give effect to this agreement in Southern Rhodesia³⁷⁵ identifies the 1960 Agreement (as amended) as the "former agreements" and repeals the legislation giving effect to them.

9. FORMATION OF THE UNITED ARAB REPUBLIC (1958) AND SEPARATION OF THE SYRIAN ARAB REPUBLIC (1961)

149. It will be recalled that the United Arab Republic and the Syrian Arab Republic took the general position in domestic instruments and in diplomatic correspondence that the formation of the Union in 1958 and the separation of Syria in 1961 had no effect on the continued application of the treaties concluded before either of those two dates. This general position is supported by specific practice relating to commercial treaties.

Bulgaria—Syria Trade Agreement (1956)

150. A long-term trade agreement signed by Bulgaria and the Syrian Arab Republic on 12 June 1966³⁷⁶ provided that it replaced the 1956 Agreement.

Ceylon—United Arab Republic Trade and Payments Agreement (1960)

151. A Trade and Payments Agreement signed by Ceylon and the Syrian Arab Republic on 9 October 1966 provided that upon its coming into force the 1960 Agreement and a related Exchange of Notes "shall cease to be valid in so far as they apply to the Syrian Arab Republic".³⁷⁷

Chinese People's Republic—Egypt Commerce Agreement (1955) and Payments Agreement (1956); and Chinese People's Republic—Syria Commerce Agreement and Payments Agreement (1955) as modified

152. On 15 December 1958, the Chinese People's Republic and the United Arab Republic signed new commerce and payments agreements. They expressly state that they replace the agreements listed above.³⁷⁸

Czechoslovakia—Egypt Trade Agreement (1930)³⁷⁹ and Czechoslovakia—Syria Treaty of Commerce (1952)

153. A Treaty of Commerce and Navigation, providing for most-favoured-nation treatment, was signed by Czechoslovakia and the United Arab Republic on 7 February 1959.³⁸⁰ It expressly provided that the above two agreements "shall cease to be valid" on the entry into force of the Treaty.

Czechoslovakia—Egypt Payment and Trade Agreements (1955 and 1957) and Czechoslovakia—Syria Long-Term Trade Agreement (1957)

154. Czechoslovakia and the United Arab Republic concluded new payments and trade agreements on 28 October 1959.³⁸¹ The payments agreement expressly replaced the 1955 Czechoslovakia-Egypt Payments Agreement. The trade agreements of 1955 and 1957

³⁶⁸ United Nations, *Treaty Series*, vol. 392, p. 27.

³⁶⁹ D. P. O'Connell, *op. cit.*, vol. II, p. 175.

³⁷⁰ Rhodesia, Government Notice No. 894 (1965).

³⁷¹ Southern Rhodesia, Government Notice No. 1183 (1964).

³⁷² United Nations, *Treaty Series*, vol. 376, p. 217; amendment of 2 February 1961 (*ibid.*, vol. 394, p. 314), amendment of 27 February 1963 (GATT document L/1993 (23 April 1963).

³⁷³ GATT document L/2211 (21 April 1964).

³⁷⁴ Southern Rhodesia, Government Notice No. 811 (1964).

³⁷⁵ *Ibid.*

³⁷⁶ *Recueil des accords internationaux syriens*, No. 252.

³⁷⁷ *Ibid.*, No. 265.

³⁷⁸ *Ibid.*, No. 109. Note that the 1958 Agreement referred to the 1956 Agreement between the Ex-Republic of Egypt ... etc.

³⁷⁹ League of Nations, *Treaty Series*, vol. CVII, p. 179.

³⁸⁰ United Nations, *Treaty Series*, vol. 372, p. 243.

³⁸¹ *Recueil des accords internationaux syriens*, No. 120.

were also replaced by the new trade agreement, with limited exceptions: scientific and technical co-operation would still be governed by the Protocol annexed to the Syrian Agreement (and by the Czechoslovakia-Egypt Agreement of 6 May 1957), a further provision of the Syrian Agreement would remain in effect, and contracts already entered into would remain subject to the old agreements.

Egypt—German Democratic Republic Long-Term Agreement (1955) and German Democratic Republic—Syria Commerce and Payment Agreement (1955)

155. On 13 December 1958, the German Democratic Republic and the United Arab Republic concluded a long-term agreement for the development of commercial exchanges. It expressly provided that it replaced the above 1955 instruments.³⁸² At the same time a new payments agreements was signed. In 1965, the German Democratic Republic and the Syrian Arab Republic concluded new long-term trade and payments agreements which expressly replaced the 1958 instruments.³⁸³

*Egypt—Greece Trade Agreement (1955)*³⁸⁴

156. The Mixed Commission established by this agreement continued to meet after the formation of the United Arab Republic. Thus on 3 August 1961 the Greece—United Arab Republic (Egyptian Region) Commission concluded an Additional Protocol No. 3.³⁸⁵

*Egypt—United States Provisional Commercial Agreement (1930)*³⁸⁶

157. This Agreement is listed in United States, *Treaties in Force*.³⁸⁷

Egypt—Union of Soviet Socialist Republics Trade Agreement (1954) and Payments Agreement (1953)

158. Trade and payments agreements concluded by the United Arab Republic and the USSR on 23 June 1962 expressly superseded the above Agreements.³⁸⁸

*France—United States Convention concerning Rights in Syria and Lebanon (1924),*³⁸⁹ *Syria—United States Exchange of Notes (1944),*³⁹⁰ *and France—United States Exchange of Notes constituting an Agreement regarding Customs Privileges for Educational, Religious and Philanthropic Institutions in Syria and Lebanon (1937)*³⁹¹

³⁸² *Ibid.*, No. 108. Note also the Exchange of Letters accompanying the Agreements: the trade missions of the two parties were to be renamed, and that in Damascus was changed in status.

³⁸³ *Ibid.*, Nos. 237 and 238.

³⁸⁴ United Nations, *Treaty Series*, vol. 256, p. 17.

³⁸⁵ *Ibid.*, vol. 483, p. 317.

³⁸⁶ League of Nations, *Treaty Series*, vol. CXVII, p. 419.

³⁸⁷ United States of America, Department of State, *Treaties in Force* ... 1970 (*op cit.*), p. 229.

³⁸⁸ United Nations, *Treaty Series*, vol. 472, pp. 19 and 43.

³⁸⁹ Foot-note 136 above.

³⁹⁰ United Nations, *Treaty Series*, vol. 124, p. 251.

³⁹¹ League of Nations, *Treaty Series*, vol. CLXXXIV, p. 479.

159. As noted above³⁹² these agreements are listed under the Syrian Arab Republic in United States, *Treaties in Force*.³⁹³

Hungary—Syria Trade Agreement (1956) and Egypt—Hungary Financial Agreement (1949)

160. On 2 April 1959, Hungary and the United Arab Republic signed long-term trade and payments agreements. The trade agreement expressly stated that, for the Syrian province, it replaced the 1956 Agreement, and the payments agreement provided that, from its entry into force, the 1949 Agreement would no longer be valid.³⁹⁴

Iraq—United Arab Republic Trade and Payments Agreements (1958)

161. Iraq and the Syrian Arab Republic concluded a new agreement on economic co-operation on 3 November 1961.³⁹⁵ It provides (article 7, para. 1) that the 1958 Payments Agreement "shall, in so far as relates to the Syrian Arab Republic, be deemed to be in force until the date on which effect is given to the present Agreement". Second, it states (article 12) that the 1958 Trade Agreement "shall remain in force with respect to commercial exchanges between the two Contracting Parties until the entry into force of the present Agreement".

*Jordan—Syria Economic Agreement (1953); Jordan—Syria Agreement concerning questions of Transport and Transit (1950),*³⁹⁶ *and Jordan—United Arab Republic Agreement (1959)*

162. The 1959 Agreement apparently determined the details of the application of, *inter alia*, the 1950 Agreement. Further, on 26 April 1965 Jordan and the Syrian Arab Republic concluded an agreement amending the existing agreement for economic exchanges, transport and transit. This was stated to be without prejudice to the 1950 and 1959 Agreements and specifically amended the lists annexed to the 1953 Agreement.³⁹⁷

Pakistan—United Arab Republic Trade and Payments Agreement (1960)

163. A trade agreement concluded by Pakistan and the Syrian Arab Republic in August 1969 provided that the 1960 Agreement would be terminated from the entry into force of the new agreement.³⁹⁸

Romania—Syria Commerce and Payments Agreement (1956)

164. In November and December 1964 the Mixed Commission established by this agreement met and drew up a Protocol which, along with an Exchange of Letters,

³⁹² Para. 59 above.

³⁹³ United States of America, Department of State, *Treaties in Force* ... 1970 (*op cit.*), p. 215.

³⁹⁴ *Recueil des accords internationaux syriens*, No. 116.

³⁹⁵ United Nations, *Treaty Series*, vol. 489, p. 45. The Agreement entered into force on 20 December 1961.

³⁹⁶ As to this agreement, see also para. 22 above.

³⁹⁷ *Recueil des accords internationaux syriens*, No. 211.

³⁹⁸ *Ibid.*, No. 398.

was to be considered as an integral part of the 1956 Agreement.³⁹⁹

Saudi Arabia—United Arab Republic (Northern Province) Trade Agreement (20 January 1961)

165. On 16 November 1961, Saudi Arabia and the Syrian Arab Republic concluded a new agreement on economic co-operation.⁴⁰⁰ It provided that, from its entry into force, it would supersede the agreement concluded in January 1961.

*Syria—Union of Soviet Socialist Republics Trade and Payments Agreement (1955)*⁴⁰¹

166. A long-term commerce agreement concluded on 4 November 1965 expressly replaced the above agreement.⁴⁰²

10. DISSOLUTION OF THE FEDERATION OF MALI (1960)

*France—Federation of Mali Agreement for Co-operation on Economic, Monetary and Financial Questions (1960)*⁴⁰³

167. As has already been noted⁴⁰⁴ Senegal, following the dissolution of the Federation, in a Note of 16 September 1960 (with which France agreed), stated that it considered that as a result of the principles of international law concerning State succession it was "so far as it was concerned, bound by the rights and obligations" resulting from the co-operation agreements.⁴⁰⁵

11. FORMATION OF THE UNITED REPUBLIC OF TANZANIA (1964)

*Muscat—United States Treaty of Amity and Commerce (1833); Zanzibar—United States Treaty relating to Consuls and Import Duties (1886); United Kingdom—United States Treaty relating to the Establishment of Import Duties (1902); and United Kingdom (on behalf of the Sultan of Zanzibar)—United States Treaty, amending the 1833 Agreement (1903)*⁴⁰⁶

³⁹⁹ *Ibid.*, No. 199. See also the 1968 Technical and Economic Co-operation Agreement which provided for certain actions to be taken in accordance with the 1956 Agreement (*ibid.*, No. 340).

⁴⁰⁰ United Nations, *Treaty Series*, vol. 491, p. 163.

⁴⁰¹ *Ibid.*, vol. 259, p. 71.

⁴⁰² *Recueil des accords internationaux syriens*, No. 235. Note also the reference in the payments agreement to a shipping agreement of 18 September 1958: it is treated as still being in force.

⁴⁰³ France, *Journal officiel de la République française: Lois et décrets* (Paris), 92nd Year, No. 167 (20 July 1969), p. 6634.

⁴⁰⁴ See above, foot-note 243 and p. 146 document A/CN.4/243, para. 176.

⁴⁰⁵ Apparently, Mali denied that it remained bound by the agreements of 22 June 1960 (see R. Cohen, "Legal problems arising from the dissolution of the Mali Federation" in *British Year Book of International Law 1960* (London, 1961), pp. 375 and 382).

⁴⁰⁶ United States of America, *Treaties, Conventions, International Acts ... 1776-1909 (op cit.)*, vol. I, p. 1228; *ibid.*, vol. II, p. 1899 and *ibid.*, vol. I, pp. 784 and 785, respectively.

168. The above treaties are listed, with others, under Tanzania in United States, *Treaties in Force*, which notes that as of 1 January 1968 the continuance in force of certain of the agreements listed there was under negotiation between the United States and Tanzania. *Treaties in Force* also reproduces the substance of the declarations made in 1961 by Tanganyika and in 1964 by the United Republic of Tanzania concerning their treaty obligations.⁴⁰⁷ The latter provided for the continuance in effect of treaties in force between Tanganyika or Zanzibar and other States

to the extent that their implementation is consistent with the constitutional position established by the Article of Union, [...] within the regional limits prescribed on their conclusion and in accordance with the principles of international law.⁴⁰⁸

The view that these treaties continued in effect during the period of the protectorate and after Zanzibar's accession to independence has been advanced by Tanzanian officials. However, they have expressed the following opinion on the effect of the revolution in Zanzibar and its union with Tanganyika:

It is not considered that any of the pre-existing commercial and trade treaty relationships affecting Zanzibar survived the revolution. They were incompatible with the new patterns of trade and financing which accompanied the establishment of a socialist system in the Republic of Zanzibar. Hence, none of these pre-existing treaties were inherited by the Union after 12 April, 1964.⁴⁰⁹

On the other hand, they take the view that the three commercial agreements concluded by Tanganyika before 1964 continued in force within the Tanganyika region.⁴¹⁰

Summary

A. CASES OF INDEPENDENCE OF FORMER NON-METROPOLITAN TERRITORIES

169. In the light of the relevant materials collected in the present study, about forty new States and thirty-four original parties, other than predecessor States, have taken a position concerning the continued force of bilateral trade agreements which were applicable to former non-metropolitan territories before independence. In most of the recorded cases continuity has been achieved or recognized at least during a certain period of time after independence.

170. To assure of recognize continuity several procedural devices have been followed. In many cases, there have been exchanges of views on the diplomatic level between the interested States. These have taken several forms:

⁴⁰⁷ United States of America, Department of State, *Treaties in Force ... 1970 (op cit.)*, pp. 215-217.

⁴⁰⁸ *Ibid.*, p. 215.

⁴⁰⁹ See, for example, E. E. Seaton and S. T. M. Maliti, *loc. cit.*, p. 85, para. 63.

⁴¹⁰ *Ibid.*

(a) Sometimes the new State gave assurances to the original party concerned that the rights set forth in a pre-independence agreement between that party and the predecessor State were fully recognized and would be continued (Lebanon and Syria to the United States of America); or in some instances, the new State and the original party other than the predecessor State stated that they were prepared in the meantime to continue to apply the pre-independence agreements (Philippines-Switzerland); in other instances, the original parties and the new State stated that they were agreed in recognizing that the relevant rights and duties of one of the original parties were thenceforth transferred to the new State (France-Iraq-United Kingdom); and in other cases the new State and the original party other than the predecessor State established that the agreements were in effect between themselves since the new State had succeeded to them (Burma-Denmark).

(b) In a number of cases the interested States have, at about the time the pre-independence agreement ceased to have effect, concluded a new agreement which makes no reference to the pre-independence instrument but which is to similar effect (Indonesia, Morocco, Tunisia and the States formerly under French administration which became independent in 1960).

(c) In several cases the new State and the original party other than the predecessor State have negotiated amendments to the pre-independence agreement (Canada-Switzerland; Morocco-United Kingdom; Morocco, Tunisia and the States formerly under French administration which became independent in 1960; Canada-Guyana, Jamaica and Trinidad and Tobago; Malawi-Southern Rhodesia.⁴¹¹

(d) In some cases, the original parties have recognized that a territory to which the treaty had applied before independence was a party to it (Muscat-United Kingdom (grant of right of withdrawal); Australia-United Kingdom and New Zealand-United Kingdom with reference to Ceylon, Ghana, and Malaya).

(e) In several cases, one or both of the original parties and the new State have, within the framework of the pre-independence agreement, negotiated new agreements (Indonesia, Morocco, Tunisia and the States formerly under French administration which became independent in 1960).

(f) In a number of instances, the new State and the original party, other than the predecessor State have negotiated a new agreement expressly replacing the pre-independence agreement in question (Ireland-United States; Jordan-Syria; Nepal-India; Pakistan-Poland; Pakistan-United Kingdom; Australia-Malaya; New Zealand-Malaya; and Morocco, Tunisia and the States formerly under French administration which became independent in 1960).

(g) In several cases a new agreement concluded by one or both of the original parties and the new State has referred to a pre-independence agreement as still in force (Italy-South Africa; Jordan-Syria; and Morocco,

Tunisia and the States formerly under French administration which became independent in 1960).

(h) The original parties and the new State on a number of occasions renewed the pre-independence agreement (Morocco, Tunisia and the States formerly under French administration which became independent in 1960).

171. In some instances interested States have taken unilateral action concerning the continued force of the pre-independence agreement. Thus a number have given notice terminating the agreement in accordance with its terms (Australia; New Zealand; Ireland; Muscat and Oman to India; United Kingdom to Indonesia). Others have referred to the agreements as still in force in negotiations (Ireland to United States of America; United States of America to India). Several interested States have listed the agreements as still in effect (Australia; Canada; New Zealand; Iceland; India; United States of America; see also the position adopted by the United Kingdom in respect of Australia, Canada, Ireland, New Zealand and South Africa). Other States, following the independence of a State formerly under protection relinquished certain of their rights vis-à-vis that State (United Kingdom and United States of America-Morocco). And one new State exercised the right under peace treaties (to which it was not a formal party) to revive trade agreements applicable to it before independence (Ceylon).

172. The recorded practice denying continuity has occurred mainly in a bilateral context (Venezuela to Australia, Canada and New Zealand; Argentina to India; Thailand to Pakistan; USSR to States formerly under French administration which became independent in 1960). In all those cases, the denial of continuity has been invoked by the interested original party to the pre-independence agreement. Only one of the forty new States referred to above⁴¹² seems to have taken it as a general view that pre-independence bilateral trade agreements applicable to its territory were no longer in effect after independence (Tanganyika). It is possible, however, that other new States also take this position; for instance, Algeria and Guinea have not participated in the renewal, etc., of the short-term trade agreements concluded by France.

173. In some of the above instances express reference has been made to some further relevant elements which can be mentioned. First, there has been some reference to general principles. Thus one State (Argentina) denied succession by a formerly dependent territory arguing that the legal continuity between the new State and the previous entity was much open to question. In its view the prior entity had been extinguished by the partition of the former dependent territory.⁴¹³ Another State (Thailand) argued that a new State was not bound by treaties of commerce and navigation concluded by the

⁴¹² See para. 169.

⁴¹³ Argentina's position was also based on the view that the treaty in question was not applicable to British India before the partition.

⁴¹¹ Note also the renegotiation by Kenya of pre-independence treaties.

State of which it was formerly a part. This was met by the contention that the new State, which had moreover indicated its readiness and desire to succeed, was a successor (Pakistan). One new State (Tanganyika) has claimed that it was not bound by the pre-independence commercial treaties since, it seems (a) they are generally regarded as being less than permanent; (b) they were concluded with the interests of the predecessor State and not those of the new State in mind; (c) in some cases, if the new State were substituted for the predecessor in the treaty, large parts of the treaty would become devoid of meaning and impossible of fulfilment; and (d) in other cases, the agreements were obsolete.

174. Reference to general principles in the cases where continuity has been recognized or ensured has, it seems, been rare,⁴¹⁴ but in one case the United Kingdom stated that the old British Dominions (Australia, Canada, Ireland, New Zealand, Newfoundland, and South Africa) were generally recognized as succeeding to the rights and obligations which had been assumed by the United Kingdom on behalf of the territories from which the new States were constituted; no distinction was drawn in this regard between treaties which specifically mentioned the territories concerned and those which applied territorially to the whole Empire.

175. In a number of cases, States have referred to the devolution agreement concluded between the new State and the predecessor State. In one group of cases (Indonesia) the original parties to the treaty and the new State, acting within the framework of the earlier treaty, concluded instruments which recited that the new State had participated in the negotiations, *inter alia*, by virtue of the devolution agreement of which the original party other than the predecessor State had taken note. In another instance the new State (Pakistan) expressed the view that *by virtue of* the devolution agreement the treaty rights and obligations had devolved. The predecessor State (United Kingdom) pointed out, however, that the relations between the new State and the other original party (Thailand) to the treaty in question could not be *governed* by the devolution agreement. In a further case the new State and the original party other than the predecessor State, in establishing that the pre-independence treaty was in force, referred to a treaty containing a devolution provision (Burma-Denmark). One State, in compiling its treaty list, has also taken account of devolution agreements (United States of America).

176. In one instance weight has been given to a unilateral declaration made by the new State concerning its treaty rights and obligations. The new State in question (Tanganyika) stated that under customary international law the treaty would not survive that State's attainment of independence. It nevertheless took the position that under at least some of the pre-independence treaties it continued to have rights and duties for the period fixed by the unilateral declaration.

177. The economic relations established at the time of independence, often on a treaty basis, between the new State and the predecessor State, appear to have been of significance—at least procedurally—to the continued participation of new States in the pre-independence agreements in three groups of cases (Indonesia; Morocco and Tunisia; and the States formerly under the administration of France which became independent in 1960).

B. CASES OTHER THAN CASES OF INDEPENDENCE OF FORMER NON-METROPOLITAN TERRITORIES

178. Generally, the practice reviewed above suggests, as in the case of extradition treaties,⁴¹⁵ that the effect of secession, the formation and dissolution of a union or of a federation, annexation and the other forms of change of sovereignty (or of treaty-making power) on pre-existing bilateral trade agreements depends on the intention of the parties, the nature of the change and the circumstances surrounding the particular case.

179. The specific practice relative to trade agreements also tends to be parallel to, and confirm, that concerning extradition treaties. Thus it appears that trade agreements applicable to a State or territory which is annexed or ceded no longer have effect (Ethiopia (1936), Austria (1938) and Newfoundland). It also appears to be accepted in practice that the trade agreements of the new sovereign will extend to the newly added territory if their terms are generally applicable (the Serb-Croat-Slovene State, Austria (1938) and Newfoundland).⁴¹⁶

180. The practice relating to cases of *secession of metropolitan territory* suggests that it is probably necessary to distinguish between evolutionary, constitutional secessions (Iceland) and other secessions (Finland) and to take account of the relationship of the new State to the pre-secession entity (Hungary considered itself to be the same entity during and after the Dual Monarchy; compare the cases of Poland and Czechoslovakia), as well as of its relationship to the State from which it seceded (Iceland).

181. The cases of the establishment and break-up of various forms of relationships between two or more territories are—apart from the cases of dissolution of a union discussed in the next paragraph—rather heterogeneous: Iceland and Denmark (1918), Federation of

⁴¹⁴ Of course, it could be said that in many of the cases reviewed in paragraphs 170 (especially sub-para. (c) to (h) and 171 above, a general position is clearly implied.

⁴¹⁵ See *Yearbook of the International Law Commission*, 1970, vol. II, p. 129, document A/CN.4/229, para. 146.

⁴¹⁶ Note also that in this practice the States formerly administered by the United Kingdom do not appear to distinguish between those treaties concluded before and those concluded after they became part of the British Empire, and that the *Handbook of Commercial Treaties* (*op. cit.*) (see foot-note 11 above) records treaties as applicable to the Dominions and colonies without distinction based on the date of their conclusion. In the one instance reviewed above of the effect of the establishment of a mandate on a pre-existing treaty it was accepted that the treaty remained in effect (Western Samoa: see para. 127 above). This case is perhaps to be explained by reference to the nature of the treaty in question. In no other instances has practice been found indicating that trade agreements concluded by the former colonial Power continued after the establishment of the mandate.

Rhodesia and Nyasaland (1953 and 1963), United Arab Republic (1958 and 1961), Federation of Mali (1960), United Republic of Tanzania (1964). The first is the case of the formation of a union between an entity formerly an integral part of a metropolitan State and that State; the second, the formation and dissolution of a federation which was not independent but which had limited treaty-making capacity and which comprised three territories which were not independent, but one of which had limited treaty-making capacity before the formation of the federation and after its dissolution, the other two becoming some time after the dissolution independent States; the third the joining of two States into a united republic having rather the character of a unitary State, but with special provision being made concerning the treaties of the two States, and the subsequent departure by one of the two original States from the new State; the fourth the break-up of a federation; and the fifth, the formation by two States of a united republic, with special provision again being made in respect of the treaties of the two constituent States. The cases are perhaps too different to enable any general points to be made. But it is possible first to note that in the three cases of the formation of a new relationship between previously separate entities most of the practice⁴¹⁷ supports the view that the previous treaties continue within their original territorial limits.⁴¹⁸ Second it can be noted that in the four cases of the termination of the relationship the trade agreements applicable prior to termination generally continued.

182. Again as in the case of extradition treaties, limited practice tends to support the proposition that

in general the members of a *union* remain bound by the trade agreements of the union following its *dissolution*, at least if there is a clear continuity of the entity involved. Thus the practice of Hungary and Iceland can be compared with that of Austria.

183. In some instances, the interested States have regulated questions of treaty continuity by formal agreements. Thus treaties concluded by the Allied and Associated Powers with the Serb-Croat-Slovene State established general rules governing the matter between the parties. In other instances two States agreed in a bilateral agreement to apply the treaty in their mutual relations (Austria with Denmark, the Netherlands, Sweden and Switzerland; Czechoslovakia with Switzerland; Southern Rhodesia with Australia, Bechuanaland Protectorate and South Africa). Exchanges of notes and letters on the diplomatic level have also been used to ascertain or confirm positions of the interested States concerning the force of particular trade agreements (Finland and Sweden; Germany and the United Kingdom and the United States of America concerning Austria; France and Senegal). In other cases the existence or the continued or discontinued effect of the treaties in question has been acknowledged in new agreements concluded between the States involved: these may refer to the old treaty, amend it or abrogate it (Iceland and United Kingdom; Austria and the United States of America; Yugoslavia and Switzerland and the United States of America; Portugal and the Federation of Rhodesia and Nyasaland; the United Arab Republic and Chinese People's Republic, Czechoslovakia, German Democratic Republic and Hungary; United Arab Republic and the USSR; Syria and Iraq, Jordan, Ceylon, Pakistan and Saudi Arabia; and Syria and Romania; Bulgaria and the USSR). Parties to trade agreements have, after the relevant constitutional change, taken action to terminate them (Austria and Switzerland; Southern Rhodesia and Australia; Canada and Malawi). The position of interested States has also been expressed in unilateral statements (e.g. Ethiopia) and in national treaty lists and collections (Australia, Iceland, Sweden, Switzerland, the United States of America).

⁴¹⁷ Some of the agreements relating to specific territories of the Federation of Rhodesia and Nyasaland became applicable to the whole Federation, especially after the establishment of a common tariff.

⁴¹⁸ On the other hand, when one of the entities involved in the establishment of a State can be said to be central and predominant in the relationship, the treaties previously applicable to it may become applicable to the whole territory of the State (Serb-Croat-Slovene State).

QUESTION OF TREATIES CONCLUDED BETWEEN STATES AND INTERNATIONAL ORGANIZATIONS OR BETWEEN TWO OR MORE INTERNATIONAL ORGANIZATIONS

[Agenda item 5]

DOCUMENT A/CN.4/250

Report of the Sub-Committee on treaties concluded between States and international organizations
or between two or more international organizations

[Original text: English and French]

[1 July 1971]

ABBREVIATIONS

OAS	Organization of American States
OAU	Organization of African Unity

[The text of the report is reproduced in the report of the Commission on its twenty-third session. See *Yearbook of the International Law Commission*, 1971, vol. II (Part One), p. 71, document A/8410/Rev.1, chap. IV, annex.]

ANNEX I

Questionnaire prepared by the Chairman of the Sub-Committee

[Original text: French]

Introduction

1. At its twenty-second session, the International Law Commission adopted, with several drafting changes, a report of the Sub-Committee which it had established to study the question of treaties concluded between States and international organizations or between two or more international organizations.^a The report contained the following proposal:

That, by 1 November, the Chairman submit to members of the Sub-Committee a questionnaire regarding the method of treating the topic and its scope, accompanied by an introduction. Members would be asked to send their replies to this questionnaire, together with any other comments they might wish to make, to the Sub-Committee, if possible by 1 February 1971.^b

2. The purpose of this document is to meet the request implicit in the text quoted above. It has been drafted in a very concise form, not only because time is short but also in view of the necessity, before studying the question in depth, of having the preliminary working paper requested of the Secretary-General available in principle by 1 January 1971.^c

3. The topic has already been studied and discussed in the Commission and at the United Nations Conference on the Law of Treaties. From an examination of the studies, reports, papers and statements on the question, two conflicting trends are immediately discernible.

4. On the one hand, the rules relating to treaties between international organizations appear to be the same as those relating to treaties between States. What would

^a See *Yearbook of the International Law Commission*, 1970, vol. II, p. 310, document A/8010/Rev.1, para. 89.

^b *Ibid.*

^c *Ibid.*

be needed, therefore, would simply be an editing of the articles of the Vienna Convention on the Law of Treaties^d which would merely need a few drafting changes and adaptations to fit the special nature of international organizations, particularly and primarily as regards the rules concerning the conclusion of treaties. This procedure had been mooted when the Commission had expressed its intention, at the first reading of the draft articles, to extend them to treaties to which international organizations were the parties, and it was also the underlying idea behind the statements of those at the Conference on the Law of Treaties who favoured that solution.

5. On the other hand, however, the topic appears to be fraught with difficulties: not only is the practice applied in that connexion less well-known, but it is very diversified and raises complicated juridical problems. From the juridical standpoint, every organization has features quite different from those of any other organization, and only by taking the greatest precautions can there be any hope of formulating general rules. It is not correct to consider the organization as being on a par with a State, for it is made up of States which have not ceased to be States by reason of their membership of the organization, and to regard the organization as a subject of law is no more than a technical means of reducing the will of the several member States to a single will. To give only one example of the problems which cannot be avoided, one need only consider the final phase of the work to be undertaken. The normal outcome would be to produce a series of draft articles which could be embodied in a future convention; but is it conceivable that the parties to a convention concerning treaties between organizations would be the organizations themselves? Or would States be the parties? Not to speak of the question whether the States are members of the organization concerned or not?

6. At the moment, these questions are entirely premature, quite apart from the fact that neither the Commission nor the States participating in the Conference on the Law of Treaties had any hesitation about proposing and adopting articles bound to have an impact on the status of intergovernmental organizations generally. Nevertheless, it is impossible to disregard the fact that the international organizations which were consulted on the articles subsequently embodied in the Convention on the Law of Treaties were almost unanimous in stressing their desire not to have their "present practices" or even their "evolving practices" challenged; and they asked, accordingly, to be brought in at all stages of an undertaking which might culminate in the preparation of draft articles concerning their agreements.

7. It is not unlikely that the Commission will find a middle way, as it has done in the past, and under more arduous conditions, in respect of other topics.

8. To assist the Commission in drawing up a rough outline of how the work should proceed, the following commented questionnaire has been prepared on the basis of certain elementary subdivisions. The members of the Sub-Committee are requested to express their views on the question, to reply to the questionnaire and to develop it.

Questionnaire

I. DELIMITATION OF THE SCOPE OF THE COMMISSION'S WORK

A. *What treaties should the studies cover?*

1. What the General Assembly had in mind, in resolution 2501 (XXIV), were treaties between States and international organizations and treaties between two or more international organizations. That interpretation is clear. However, a few quick thoughts about the text of the Vienna Convention on the Law of Treaties raise two kinds of questions concerning certain possible *exclusions* as well as certain *distinctions* which could greatly facilitate the study of the subject. Both types of question could be put in the following manner:

(1) *Should unwritten agreements be excluded?*

2. In the case of treaties between States, the International Law Commission, and then the United Nations Conference on the Law of Treaties, excluded unwritten agreements from the Vienna Convention^e but without defining what constituted an unwritten agreement. A study of practice in this connexion will undoubtedly confirm the fact that verbal agreements or agreements resulting from one written text and verbal consent thereto, tacit consent or behaviour, or a combination of verbal consent, tacit consent and behaviour, occupy a very large place in the life of organizations, where they assume even more diversified forms than in State practice; consequently, there might be a temptation to include them. On the other hand, it is a little odd for the Commission to treat this subject differently from the way it dealt with treaties between States. Furthermore, it must be recognized that unwritten treaties cannot be discussed without dealing with difficult problems beyond the scope of the law of treaties: acquiescence, custom, estoppel, etc. Might it not be advisable, therefore, to deal only with written agreements? But might it not then be necessary to define what constitutes a written agreement in more precise terms?

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

3. The Vienna Convention on the Law of Treaties applies to constituent instruments of an international organization and to any treaty adopted within an international organization without prejudice to any relevant rules of the organization (article 5). It also contains other provisions (article 3, sub-paragraph (c) and arti-

^d For the text of the Convention on the Law of Treaties, see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

^e *Ibid.*, pp. 7 and 289 (article 2 of the draft articles adopted by the International Law Commission and of the Vienna Convention on the Law of Treaties).

cle 20, para. 3) covering one particular point relating to international organizations.

4. Obviously, the rules of the Vienna Convention should as far as possible not now be called into question; they have been validated by the signatures of States, and any inquiry or proposal which would alter the texts adopted would inevitably feed arguments to those who oppose its ratification. The only question is whether it will be possible to avoid, not modifying the articles, but taking up points which the authors of the Vienna Convention, for the purposes of that Convention, had not felt should be elucidated. There may be difficulty in replying to this question pending a thorough study. The simplest example is that of the scope of the formula "any relevant rules of the organization". Certain opinions have been expressed on this subject in connexion with article 5, but it may not be possible to avoid raising that again on a broader basis in a study which will deal with the competence of organizations to conclude treaties.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

5. This question, which goes to the heart of the subject, may be altogether premature, but it may still be useful to make exploratory comments on it.

6. It has been pointed out time and again that as far as possible the Vienna Convention avoided any classification of treaties, particularly any classification based on the purpose of the treaty, although the purpose of the treaty is very often referred to in the abstract in order to compel respect for the régime by which the treaty is to be governed. And there is no doubt that the Commission should be guided by the same approach in this case. It should be noted, however, that not only is the distinction already made between treaties between States and international organizations, on the one hand, and treaties between international organizations, on the other, but that treaties concluded by an international organization always raise the question of the position of the organization in relation to its own members, which is not the case with treaties between States (except if we consider federal States). The probability is, therefore, that it will be necessary to explore certain distinctions based on the actual purpose of the treaty. To illustrate the problem: an organization could accede to a treaty under conditions exactly paralleling those applying to a State so that if an organization was internationally responsible for certain territories, it would on their behalf be able to accede to conventions designed to apply to those territories under the same conditions as States in respect of public health, postal services, protection of the environment, etc. Or to take another example, an international loan granted under a treaty to an international organization does not, on the face of it, call for a régime different from that applied in the case of the same loan made by a State. A reservation has to be made in both these examples, of course, in respect of the rules relating to the conclusion of the agreement itself. Similar observations are surely appro-

priate in the case of the many agreements on administrative and technical co-operation concluded between international organizations; true, their purpose is specific, but in practice organizations behave in the same way as any two national administrations which have decided, under comparable agreements, to give each other mutual aid in such fields as administration, waterways, technology and the like. They actually are second-degree co-operation agreements, so to speak; the States co-operate within the two organizations concerned, and the two organizations in turn co-operate with each other.

7. Much more difficult are the problems which may arise where the field of activity is one in which the organization is acting as surrogate for its own members to a certain extent, but not completely. This happens in cases where the international organization organizes armed forces for the purpose of intervention, or where it engages in joint technical or scientific projects. In such cases, assuming that its statutes authorize it to do so, would an organization be able to become a party to specific international conventions governing the use of armed force or the exploration of space? And even assuming that it can only accede to such conventions if the latter expressly authorize it to do so, what should be the particular modalities for its accession if we are to respect the position of States members of the organization but not parties to the particular convention? Various attitudes may be adopted towards those questions; would it be preferable, for instance, for the Commission to disregard those problems for the moment? Current practice already provides certain indications in this connexion.

B. To what international organization will the Commission's proposals apply?

8. The Commission is faced at the outset with a choice between two solutions, each of which can claim support because the Commission opted in its favour on a previous occasion.

9. The Vienna Convention on the Law of Treaties contains certain rules relating to the role of international organizations in respect of treaties; it covers all governmental international organizations. On the other hand, the draft articles on representatives of States to international organizations applies only to representatives of States to organizations of universal character, i.e., those with a membership and responsibilities on a world-wide scale (article 1, para. (b) and article 2).¹

10. It might be argued that it is impossible to agree on a solution without taking account of the organizations which will be required to participate in the studies to be conducted. The point may also be made that everything depends on the nature of the proposals which the Commission will decide to adopt. Should it decide not to go beyond very general proposals, it would be easier to allow very wide scope for developing them; on the other hand, the likelihood is that it would be possible

¹ See *Yearbook of the International Law Commission, 1968*, vol. II, pp. 196-197, document A/7209/Rev.1, chap. II, sect. E.

to cover only certain organizations belonging to a category which may be determined by criteria other than its universal character.

II. HOW TO DEAL WITH THE SUBJECT

11. It is obvious that the only way of approaching the question of methodology is to deal only with the present stage of preparation of the subject-matter, in other words, to give the Rapporteur who would presumably be appointed at the Commission's next session some guidelines for his initial approach to the subject without committing the Commission or any future Rapporteur regarding the methods which should be employed. Two different groups of questions can be singled out.

A. How to determine the subject-matter

(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

12. The only possible answer seems to be in the affirmative. In the first place, the unanimous view already expressed, in particular in connexion with the United Nations Conference on the Law of Treaties, is that the rules applicable to treaties to which international organizations are parties differ only slightly from the rules laid down in the Convention on the Law of Treaties, and should differ from them as little as possible. There is the further point that the rule stated in sub-paragraph (c) of article 3 of this Convention precludes any marked discrepancy between the rules applicable respectively to treaties between States and to treaties to which international organizations are parties. Still another point is that the organizations which submitted observations at the Conference on the Law of Treaties took the draft articles as a point of departure, and that this would be the simplest method, for them at any rate, of attacking a problem which they have already touched on.

13. This would imply a careful reading of the articles of the Vienna Convention in order to sort out those which would require only drafting changes, those requiring changes in substance or major additions and those which would remain unchanged.

(2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

14. Although purportedly substantive inquiries on this problem would be premature, it is most important that a tentative idea be obtained as soon as possible of the number of major points involved. This is one of the areas for which the views of all the members of the Sub-Committee and the Commission would be most welcome, however tentative. The following paragraph provides examples, in question form, of the sort of suggestions which might be made.

15. Should a text be formulated on the subject of the competence of international organizations to conclude

treaties? We know that they do not have the same competence as States: it is limited by the organization's constituent instrument. Can it be developed on the basis of practice? Must the delicate balance provided in respect of States in article 46 of the Vienna Convention be called into question in the case of international organizations? This, incidentally, is a problem which cannot be discussed without considering the position taken by the parties to the treaty to which the organization is to accede. Should we consider the possibility of a particular mode of participation in treaties by organizations? And if so, to which treaties would this apply?

16. It is fairly evident that the rules embodied in articles 7-17 of the Vienna Convention have to be revamped, but the question is whether this should be done by amending each article or by using another method. For the time being, no opinion can be expressed on this point.

17. The rules laid down by the Vienna Convention in articles 34-38, on the other hand, require careful study in the light of the close relations existing between an organization and its members. A preliminary question arises under the Convention itself. Can an organization be said to be a third party in relation to its constituent instrument? Or in relation to a treaty concluded within it? Or to any treaty affecting its operation? This problem is a familiar one in practice and has already been raised in the Commission, but it does not form part of the subject-matter now being discussed, for it bears on treaties which are definitely governed by the Convention. However, it is not unrelated to the inverse problem: how far and for which treaties can it be said that a State member of an organization is a third party in respect of a treaty concluded by the organization? Or, to put it more simply, do the strict rules laid down in articles 34-38 of the Vienna Convention apply to the effects of a treaty concluded by an international organization on the member States of the organization?

18. Is it possible to maintain the strict rule established in article 47 in the case of a treaty concluded by an organization with its own members? If so, would not articles 48 and 50 require certain adjustments? Would not violation of the constituent charter of the organization in an agreement of this kind constitute a further reason for invalidation?

19. Article 54 has made provision a very broad application of the right of States to withdraw by common agreement from the obligations of a treaty by terminating it. There may be some doubt whether this rule applies to certain constituent instruments, although this is a question which concerns the Vienna Convention. However, can so liberal a rule be laid down in respect of treaties concluded by an organization with certain member States, regardless of the interests of other member States not parties to the agreement?

20. Should an examination be made, by analogy with the rule laid down in article 63, of the effect on the application of a treaty concluded between an organization and a State of the latter's ceasing to be a member of the organization?

21. Would it be advisable to envisage procedures for conciliation, arbitration and judicial settlement, other than those provided for in article 66?

22. Should a study be made of the provisions concerning depositaries, notifications, registration and correction or errors, possibly by differentiating between the various kinds of treaties to which an organization may be party?

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

23. The Vienna Convention (article 73) deliberately did not deal with most of the questions relating to international responsibility, and all of the questions relating to State succession and "the outbreak of hostilities". In so far as the aim is to remain faithful to the approach of the Vienna Convention, the same course will be followed. However, since texts will presumably be drawn up for certain of these subjects, the normal thing would be to incorporate the results in the study to be undertaken. This seems to apply to the subject of State succession. One might consider whether problems of the succession of organizations should not likewise be considered. Although the problem does not seem to arise except as regards succession in the functions of depositary of treaties between States, it might also arise in the case of agreements between organizations and States. The question of the effect of hostilities on a headquarters agreement is not a theoretical one, either, but it is not clear whether it would

be of sufficient interest to warrant its study, since the Commission has not even considered undertaking a study of any kind on the more important and more general problem of the effect of measures of coercion on treaties between States in the case of armed coercion or international sanctions.

B. PARTICIPATION OF THE INTERNATIONAL ORGANIZATIONS IN THE WORK

24. This is a very difficult question. The request made to the Secretary-General to provide information and studies has provided a tentative solution. Perhaps it could be agreed that until the future rapporteur arrives at the stage where he can say he is in a position to propose draft articles, the Commission will need additional briefing before undertaking other measures. This, indeed, is a problem. Subject to the needs which the future rapporteur might feel as his work progresses, the tendency might be to show circumspection before considering any consultation or official participation of organizations other than the United Nations in a study whose precise purpose can only gradually become apparent. If that point of view is accepted, the conclusion would be that there is no reason to propose any measures to the Commission other than those which it adopted at its twenty-second session.⁸

⁸ *Ibid.*, 1970, vol. II, p. 310, document A/8010/Rev.1, para. 89.

ANNEX II

Replies by Members of the Sub-Committee to the Questionnaire prepared by its Chairman

1. Mr. Castrén (18 November 1970)

[Original text: French]

1. I should like at the outset to congratulate Professor Reuter, who has prepared an excellent preliminary working paper. He raises several preliminary problems that should be studied before we deal with the main subject.

I. DELIMITATION OF THE SCOPE OF THE COMMISSION'S WORK

A. What treaties should the studies cover?

(1) *Should unwritten agreements be excluded?*

2. I consider that unwritten agreements should be excluded from the Commission's study despite their prevalence in the practice of international organizations. The study should be confined, as at the United Nations Conference on the Law of Treaties, to the most important agreements, which, as a general rule, are concluded in written form. Furthermore, it does not seem neces-

sary at this stage to define what constitutes a written agreement in terms more precise than those in article 2, paragraph 1 (a) of the Vienna Convention on the Law of Treaties.^a As to mixed agreements, resulting from written consent on the one hand and verbal or tacit consent on the other, I should be inclined to place them in the category of verbal agreements.

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

3. I agree with Professor Reuter that the rules of the Vienna Convention should not now be called into question but that it might perhaps be desirable, without modifying the articles of the Convention, to elucidate some of its rules and expressions which are of particular importance for international organizations parties to a given treaty.

^a See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

- (3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

4. The question whether distinctions will have to be made between the categories of treaties to be considered appears to be linked with the problem of the competence of international organizations to conclude treaties. Since this competence is more limited than that of sovereign States, the probability is that it will be necessary to explore certain distinctions based on the actual purpose of the treaty. As to the question whether an organization would be able to become a party to specific international conventions governing the use of armed force or the exploration of space—a question which is now of immediate interest—I think it could be studied in due course.

B. To what international organizations will the Commission's proposals apply?

5. It is difficult to decide whether the Commission's study should include all governmental international organizations or only the most important ones. I tend to favour the first alternative, and that seems to be the intention of those who participated in the Vienna Conference and adopted the text of the Convention on the Law of Treaties and the resolution on international organizations.^b It does not seem necessary for the Commission to limit itself to very general proposals. It is always possible to include in the draft rules an escape clause permitting any necessary derogation. Experience has shown how difficult it is to divide governmental international organizations into different categories, such as universal organizations and others.

II. HOW TO DEAL WITH THE SUBJECT

A. How to determine the subject-matter

- (1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

6. I agree that the Commission should tackle the subject by taking the articles of the Vienna Convention as the starting point and then considering which of them would require changes or additions of a different character.

- (2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

7. It follows from what I have indicated above that special rules would have to be formulated concerning the competence of international organizations to conclude treaties. It is possible that this competence could be developed on the basis of the relevant practice established within the organization concerned. It would appear that article 46 of the Vienna Convention might be applied *mutatis mutandis* in the case of international organizations. I hesitate to say whether we should con-

sider the possibility of a particular mode of participation by international organizations in treaties or certain categories of treaties. This question deserves careful study.

8. I consider that the rules embodied in articles 7-17 of the Vienna Convention will have to be revamped, account being taken of the particular characteristics of international organizations. In some cases it would appear that the adaptation could be made simply by replacing the State by the international organization and the representative of the State by the Secretary-General or another competent organ of the organization in the various acts relating to the conclusion of treaties, but certain of these articles would require more substantial changes.

9. The application to international organizations of articles 34-38 of the Vienna Convention raises complex questions. At first sight it would appear that, strictly speaking, an international organization is a third party in relation to its constituent instrument, a treaty concluded within it or a treaty affecting its operation, but in the first case (constituent instrument) the treaty binds the organization without its consent. A State member of an international organization, on the other hand, could not be considered a third party in relation to a treaty concluded by that organization, since the latter acts on behalf of its members. Member States are not formally parties to such treaties but they are bound to respect them.

10. The rule established in article 47 of the Vienna Convention is clearly valid in the case of a treaty concluded by an international organization with its own members in so far as they are concerned. As to the organization itself, it could be argued that member States should know the limits of the competence of the organization to conclude treaties. Articles 48 and 50 would also appear to be applicable without adjustment to the contractual relations between international organizations and their members. The violation of the constituent instrument of the international organization in an agreement concluded between the organization and its members does not, in my opinion, constitute a further reason for invalidation but rather falls within the scope of article 46.

11. I see no reason why article 54 of the Vienna Convention should not apply to treaties concluded by an international organization with certain member States. In this case too, the organization acts on behalf of all its members, and the States not parties to the agreement have the right to participate in the discussions concerning the termination of the agreement.

12. I think an examination should be made of the effects of a State's ceasing to be a member of an international organization on the application of a treaty concluded between the organization and that State, but not in the context of the rule laid down in article 63 of the Vienna Convention, since there is no real analogy between these two cases. In principle, such a treaty should remain in force if it does not imply continued membership or if the ground of fundamental change of circumstances cannot be invoked.

^b *Ibid.*, p. 285, Resolution relating to article 1 of the Vienna Convention on the Law of Treaties.

13. It is, of course, possible in the case of international organizations to envisage procedures for conciliation, arbitration and judicial settlement other than those provided for in article 66 of the Vienna Convention, but I am not now in a position to make any suggestion in that connexion.

14. It would seem at first glance that the provisions of the Vienna Convention concerning depositaries, notifications, corrections and registration could be applied, with certain drafting changes, to all categories of treaties the parties or certain of the parties to which are international organizations.

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

15. I agree that there is no need for a study of points of treaty law which were deliberately neglected by the Vienna Convention, namely, most of the questions relating to international responsibility and all the questions relating to State succession and the outbreak of hostilities. However, I also agree with the suggestion that, since texts will presumably be drawn up for certain of these subjects, the results could be incorporated in the study to be undertaken. As to the problems of the succession of international organizations, it should be remembered that the Commission decided to deal with them at a later date in connexion with international succession.

B. Participation of the international organizations in the work

16. As regards the question of the participation of international organizations in our work, I share Professor Reuter's view that there is no reason to propose any measures to the Commission other than those which it adopted at its twenty-second session. °

2. Mr. Tsuruoka (13 January 1971)

[Original text: French]

I. DELIMITATION OF THE SCOPE OF THE COMMISSION'S WORK

A. What treaties should the studies cover?

(1) *Should unwritten agreements be excluded?*

1. The studies should be confined to written agreements. As to the question whether it is necessary to define what constitutes a written agreement in more precise terms, the Commission would do well to wait until a later stage in its work before taking a decision on this subject.

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

2. It is desirable, in principle, to avoid reverting to questions which were the subject of articles of the Vienna Convention. However, the Commission should not hesitate to take up certain points the study of which it considers necessary or useful in order to accomplish its work. In such cases, it should seek formulations which would not be incompatible with the rules of the Vienna Convention. It can be expected to be successful in this task, as it has been in the past.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

3. Distinctions will have to be made between the categories of treaties to be considered. A distinction could, for example, be made between two categories of treaties: on the one hand, treaties which an international organization may conclude just as if it were a State; on the other, treaties which an international organization concludes as a special entity different from a State.

B. To what international organizations will the Commission's proposals apply?

4. The Commission's proposals should cover every kind of governmental international organization having competence to conclude treaties, for most of the proposals will be applicable to conventional relations between States and organizations or between two or more organizations without distinction as to the type or importance of the organizations, provided the organizations are competent to conclude treaties.

II. HOW TO DEAL WITH THE SUBJECT

A. How to determine the subject-matter

(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

5. The only possible answer is in the affirmative, as the author of the questionnaire very correctly states.

(2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

6. A text should be formulated on the subject of the competence of international organizations to conclude treaties. The following three hypotheses should be considered: (a) the hypothesis according to which the constituent instrument expressly indicates that the international organization has competence to conclude treaties; (b) the hypothesis according to which it is clear from the provisions of the constituent instrument that the international organization has competence to conclude certain treaties; (c) the hypothesis according to which the constituent instrument does not bar the international organization from concluding treaties and

° See *Yearbook of the International Law Commission, 1970*, vol. II, p. 310, document A/8010/Rev.1, para. 89.

the conclusion of treaties by the organization is sanctioned by practice.

7. For the time being, it is very difficult to express an opinion on the points referred to in paragraph 16 of the questionnaire.

8. On the other hand, one is tempted to say that an organization is a third party in relation to its constituent instrument, as it is in relation to a treaty concluded within it and a treaty affecting its operation. It should be noted here that articles 34-38 of the Vienna Convention do not apply to international organizations; they apply only to sovereign States.

9. The rights and obligations of a State member of an organization in respect of a treaty concluded by that organization would appear to be determined by the constituent instrument and the treaty in question.

10. So liberal a rule as that embodied in article 54 of the Vienna Convention could not be laid down in respect of treaties concluded by an organization with certain member States regardless of the interests of other member States not parties to the agreement.

11. An examination could be made, by analogy with the rule laid down in article 63 of the Vienna Convention, of the effect on the application of a treaty concluded between an organization and a State of the latter's ceasing to be a member of the organization.

12. With regard to judicial settlement, article 66 of the Vienna Convention as it is formulated does not apply to international organizations (see Article 96 of the United Nations Charter). As to the procedures for conciliation and arbitration provided for in the annex to the Vienna Convention, they accord so important a role to the United Nations Secretary-General that the objectivity of the system in relation to international bodies is likely to be called into question.

13. The provisions concerning depositaries, notifications, corrections and registration will not require any major modification.

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

14. It would be better not to deal with questions relating to international responsibility because international responsibility and conventional relations, which are the two fields of international law, are quite distinct one from the other.

15. Succession in relation to treaties is a field of international law which consists of two parts: the succession of States and the succession of organizations. It would therefore be reasonable to incorporate the results obtained from the study of the succession of States in the study of the succession of organizations.

16. The question of the effect of hostilities on a headquarters agreement could be left aside for the reasons given by the author of the questionnaire.

B. *Participation of the international organizations in the work*

17. There would be no reason to propose any measures to the Commission other than those which it adopted at its twenty-second session.

3. Mr. Sette Câmara (14 January 1971)

[Original text: English]

I. DELIMITATION OF THE SCOPE OF THE COMMISSION'S WORK

A. *What treaties should the studies cover?*

(1) *Should unwritten agreements be excluded?*

1. During its twenty-second session the International Law Commission made arrangements to start the consideration of the preliminary problems concerning the question of treaties concluded between States and international organizations, or between two or more international organizations, in pursuance of General Assembly resolution 2501 (XXIV), of 12 November 1969. In particular, the Commission approved a decision to defer the consideration of those preliminary problems to a sub-committee. At its 1078th meeting, the Commission adopted, with several drafting changes, the report of the Sub-Committee, according to which a questionnaire drawn up by its Chairman, Professor Paul Reuter, regarding the method of treating the topic and its scope, should be submitted to the members of the Sub-Committee.^a The following are the views of José Sette Câmara, member of the Sub-Committee, concerning the questions proposed by Professor Reuter.

2. The first problem raised in the questionnaire deals with the form of treaties within the context of the present studies, namely, the question of unwritten agreements.

3. In the previous presentation of the problem before us—i.e. the agreements between international organizations and States, and between two or more organizations—the word "treaty" has always been retained. Therefore we are dealing with "treaties", even though with a special kind of treaty, in the conclusion of which a subject of international law other than States intervenes.

4. The Vienna Convention on the Law of Treaties has expressly excluded unwritten agreements from its scope, according to the wording of article 2, sub-paragraph 1 (a). During the exhaustive discussion of the several reports and drafts on the law of treaties in the Commission, it was never seriously contended that the draft convention should include oral agreements. In fact, that special kind of agreement is nothing but a rare curiosity, of which some writers succeed in digging up one or two historical examples. That is the case with Fauchille, who mentions the interview of Pillau, in 1697, in which

^a See *Yearbook of the International Law Commission, 1970*, vol. II, p. 310, document A/8010/Rev.1, paras. 88-89.

the Tsar Peter the Great and the Elector of Brandenburg pledged mutual assistance against foreign aggressors through a verbal understanding.^b

5. The Vienna Convention rightly confined itself to written agreements since it would have brought confusion to its text to include the somewhat diffuse area of unwritten agreements, with problems of tacit consent and even pure silence (*qui tacet consentire videtur*) as a means for the conclusion of international conventions.

6. If the validity of this dictum applies to treaties between States, it should do so even more in dealing with treaties between States and international organizations and between two or more international organizations.

7. International agreements, since primitive times, have required some form of solemn expression, so that the manifestation of will on one side or the other can be clearly ascertained in case of dispute. In modern times, since the League of Nations, a device was introduced in the procedure of treaty-making: registration of treaties. The idea of registration of treaties with universal organizations was inspired by the need to suppress secret diplomacy. Article 18 of the League of Nations Covenant carried a categorical statement, according to which no treaty or international engagement should be binding until registered. Article 102 of the Charter of the United Nations adopted a more realistic approach, which makes registration necessary only for the invocation of a treaty before an organ of the United Nations. With the twenty-five years of effective existence of the Organization, registration became an institution of international life, and the thousands and thousands of treaties registered and published in the United Nations *Treaty Series* made of this collection an indispensable repository of international legislation, a sort of living *corpus* of positive international law.

8. If that is so, it would indeed be inadmissible that the very treaties in which international organizations, amongst which the United Nations is for obvious reasons the leading body, appear as contracting parties, should be concluded in an unwritten form, and thereby escape registration.

9. Moreover, treaties entered into by international organizations lack the historical sedimentation of the procedure of conclusion, which is so characteristic of the treaties between States. The formal and solemn stage of ratification, for which parliamentary approval, through constitutional procedures, is necessary, does not appear in clear form. Therefore unwritten treaties would be less admissible in the field which is the object of our present studies than in agreements between States.

10. In previous work of scientific research and codification it seems clear that oral agreements were excluded. The draft convention on the law of treaties prepared by the Research in International Law of the Harvard

Law School^c contains in article 1, paragraph (a), a definition of a treaty as a "formal instrument of agreement". In article 2, paragraph (b), it states that an agreement by exchange of notes is not included in the term "treaty". It is obvious that oral agreements, with more reason, are considered to be outside the scope of the draft convention.

11. The Convention on Treaties adopted by the Sixth International Conference of American States, at Havana on 20 February 1928,^d states expressly in article 2: "The written form is an essential condition of treaties". The draft of the International Commission of American Jurists^e as it was called at the time—drawn up at Rio de Janeiro, 1927, on which the Havana Convention was based, also stipulates in article 2: "Treaties must be in writing".

12. For all those reasons, question 1 should be answered by an emphatic affirmative: yes, unwritten agreements should be excluded.

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

13. The Vienna Convention is the result of twenty years of patient work of research and of extended debates in the International Law Commission, starting in 1949 and finishing with the adoption of the final text on May 23, 1969. It would be a mistake to reopen discussion on the substance of articles approved therein. Moreover as the commentary accompanying Professor Reuter's questionnaire underlines, the articles contained in the Convention have been validated by the signature of State plenipotentiaries and confirmed by a number of ratifications. If doubt is raised concerning the context of some of the articles, ratification by new States will probably be withheld.

14. It is nonetheless necessary that a few points emerging from the articles be taken apart and thoroughly dissected. These relate to the articles which deal directly with problems concerning treaties concluded by international organizations, like article 3, paragraph (c), article 5, article 20, paragraph 3. A deep exploration of the problems related thereto will be only natural, as they touch the scope of our work, and could hardly raise new difficulties concerning the forthcoming ratifications. Apart from those specific articles, the Convention should be respected in its present form. That does not exclude, of course, the examination of the wording of the articles, one by one, with a view to determine which points should be developed and completed to cover the problems within our sphere of work.

^c *Supplement to the American Journal of International Law* (Washington, D.C.), vol. 29, No. 4 (October 1935), pp. 686 and 698.

^d See *Sixth International Conference of American States, Final Act* (Havana, Rambla, 1928), p. 138.

^e See Comisión Internacional de Jurisconsultos (Sesiones celebradas en Rio de Janeiro, Brasil, 18 de abril—20 de mayo de 1927), *Derecho Internacional Público* (Washington, D.C., Pan-American Union, 1927), p. 11 [Spanish text].

^b P. Fauchille, *Traité de droit international public* (Paris, Rousseau, 1926), t. I, p. 306.

- (3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

15. Treaties do not lend themselves to being classified in categories, types or classes. They cover a limitless field, since they spring from the will of States, and other subjects of international law, and circumstances may cause that will to vary *ad infinitum*. Traditional doctrine has always been hesitant about the classification of treaties. Some authors have tried to group them under different labels, according to a scale of importance, which produced enumerations such as "treaty", "convention", "protocol", "agreement", "arrangement", "declaration", "act", "covenant", "statute", etc. But practice rejected this kind of classification, since the name given to the instrument was almost always the mere result of the momentary whims of the contracting parties. Codification has departed from attempts at classification. The Vienna Convention does not deal with the establishment of treaty categories.

16. If it has been so with treaties concluded by States, where sound practice could favour their distribution into different categories, one should with much more reason avoid stepping on the quicksand of international organization treaty practice, with the mind set on classifying such treaties. To show how difficult it is to undertake such a task, it is enough to refer to the position taken by Clive Parry, who tries to survey the treaty relations of the United Nations under what he calls "the more or less precise heads of the treaty-making power which are to be found in the Charter".¹ He starts with the reference to agreements under Article 43 of the Charter—a class which so far does not include any signed instrument—since there has been no understanding on the organization of the armed forces to be made available to the Security Council, according to that article. In the second group, he includes agreements with other organizations concluded under Article 57, which made it mandatory upon specialized agencies "to be brought into relationship" with the United Nations. The article in question provides "an agreement to agree", and, of course, it opens the way for an enormous range of international treaties on the most varied subjects. The next category is the one dealing with agreements related to privileges and immunities. It is obvious that Parry's classification is based on early practice of the United Nations and that it is confined to treaties within the framework of the world organization. It is a rather narrow distribution into categories, to which we could hardly subscribe.

17. If distinction has to be made between categories of treaties, let us make it as the work progresses, without trying to establish a classification *a priori*. Even though, as Professor Reuter's paper suggests, "it will be necessary to explore certain distinctions based on the actual purpose of the treaty",² let us avoid the fetters of a rigid distribution into different categories.

18. The examples provided by Professor Reuter³ do demonstrate that distinction should be made between certain kinds of treaties, but they hardly prove that treaties should be grouped in different categories.

19. We should follow the example of the previous work of codification the Convention adopted by the Sixth International American Conference, the International Commission of American Jurists draft, the Harvard draft convention, and the Vienna Convention itself) and avoid a casuistic approach to the problem. It would be impossible to ascertain and foresee all sorts of treaties in which international organizations will play the role of contracting party. Professor Reuter wonders about the legal status, as far as it concerns international organizations, of international conventions governing the use of armed forces or the exploration of space. In the near future we may have international organizations engaged directly in the exploration of mineral resources of celestial bodies, or even in some kind of special agriculture to be developed on the surface of the moon, or in isolating, collecting and preparing for human use, the immense riches of the oceans. The future scope of conventions in which international organizations will be contracting parties is vast indeed.

20. What the Commission should do is to try to formulate the essential principles that will fit the present practice of international organizations and which can be adapted to future use, so as to provide a legal directive for the treaty-making power of international organizations.

B. *To what international organization will the Commission's proposals apply?*

21. Professor Reuter's paper rightly points out that the Vienna Convention "contains certain rules relating to the role of international organizations in respect to treaties"⁴ covering all international organizations. He stresses the different approach adopted in the draft articles on representatives of States to international organizations, which are deemed to apply only to representatives of States to organizations of a universal character.

22. The different treatment is logical and realistic. The draft articles contemplate a special status to be extended to the representatives of States, entailing a series of immunities and privileges. The Commission chose the right way when it tried to restrict to the minimum possible, the number of people enjoying such a special status. It is even in the interests of the representatives themselves that their status should not be extended to all kinds of organizations. Otherwise, host States could hardly ensure complete respect for the provisions dealing with the matter.

23. The case of the future rules on treaties to which international organizations are parties, is completely different. Those will be norms purporting to give a legal

¹ C. Parry, "The treaty-making power of the United Nations", in the *British Year Book of International Law*, 1949 (London), p. 131.

² See above, annex I, Questionnaire, para. 6.

³ *Ibid.*

⁴ *Ibid.*, para. 9.

and uniform directive to the law of treaties to be applied to instruments to which international organizations are parties. The future articles that will complement the Vienna Convention should be open to all international organizations without limitations of any kind, provided that they are intergovernmental organizations. One could go as far as to say that regional organizations like OAS and OAU, for example, should be able to accept those rules if they chose to do so. International law will be only enhanced by the widest possible acceptance of the future rules on the formulation of which we are engaged. After all, treaties are a means of developing peaceful co-operation among nations, as the preamble of the Vienna Convention clearly states.

II. HOW TO DEAL WITH THE SUBJECT

A. How to determine the subject matter

- (1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as a starting point?*

24. In fact, the future work on treaties concluded by international organizations should be carried out within the framework of the Vienna Convention. As has been said before, the Vienna Convention represents the crystallization of years and years of research, reporting, debating and drafting in the field of the law of treaties. Anything that will be done on codification of the law of treaties outside the Convention will be complementary to it and should be adjusted to its contours. Article 3, paragraph (c), of the Convention provides the guide to the kind of treaties with which we will be dealing in relation to it. Moreover paragraph (b) of the same article makes reference to the rules of international law embodied in the Convention which will be valid for treaties in which subjects of international law other than States are parties, independent of the Convention.

25. The Resolution relating to article 1 of the Vienna Convention on the Law of Treaties,¹ which underlines the importance of the task the Commission is about to embark on, as a complement to the Convention itself, is another indication of the strong ties that bind together the work previously done and the study on treaties concluded by international organizations with States or between two or more international organizations.

26. The Commission should avoid plunging into a theoretical discussion of the problem of international personality in order to define the subjects of international law other than States. That has been done by writers in the past, and nobody is disputing the fact that international organizations possess international personality, that is to say, are able to act as subjects of international law.

27. At the fourteenth session of the Commission, a

long debate took place on whether the draft convention should include an article affirming that subjects of international law other than States might be invested with the capacity of becoming a party to treaties by dispositions of particular international law or custom.² During that debate the majority of members supported the position maintained by Professor Rosenne, according to which "the topic of international personality was a vast subject, which the Commission might eventually investigate, but at that stage it might simply be taken as existent".³

28. The trend of the discussions during the fourteenth session of the Commission was to avoid the drafting of a special article on the definition of international personality. The capacity of international organizations to make treaties was widely recognized, as arising from express provisions in the constitutions of the said organizations (which are international treaties themselves) or from implicit powers contained in those constitutions.

29. The International Court of Justice stated very clearly the fact that the United Nations possesses international personality to permit it to claim for damages as a result of injuries done to its servants in the course of their duties. The Advisory Opinion (11 April 1949) on reparation for injuries suffered in the service of the United Nations duly clarifies the problems of international personality of international organizations, though making the point of stressing that their personality, rights and duties are not the same as those of a State.⁴

30. This point has been developed by Clive Parry so as to reach the conclusion that the natural person of international law is the State, and that international organizations may be described as detaining a *sui generis* personality.⁵

31. Therefore, though we should avoid going deep into a detailed discussion of the problem of the legal personality of international organizations, and though we should accept it as definitively affirmed by doctrine and practice, we are bound, nonetheless, to consider the question of the sources of the treaty-making power of international organizations as a basic point for the future development of our work.

- (2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

32. There is no doubt that the articles of the Vienna Convention should be the starting point of the Commission's exploration of the ground left aside, for the time being, by the Conference on the Law of Treaties. It is by their perusal, and by considering their sources and consequences, that the Commission will be in a position to formulate the new rules governing treaties

¹ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285, document A/CONF.39/26, annex.

² See *Yearbook of the International Law Commission, 1962*, vol. I, pp. 57 *et seq.*, 639th-640th meetings.

³ *Ibid.*, p. 62, 639th meeting, para. 59.

⁴ *I.C.J. Reports 1949*, p. 179.

⁵ C. Parry, *op. cit.* pp. 110-111.

concluded by international organizations with States or between two or more international organizations.

33. Before we undertake the work of examination of the articles of the Vienna Convention with a view to modifying and adapting them to the problems of treaties to which international organizations are parties, a decision must be taken on the way to be followed. It is important to know if we are going to take the Vienna Convention as a whole, as the substance of positive international law, whose rules are applicable to subjects of international law other than those which are parties to the Convention, according to article 3, paragraph (b), or if we are going to try to draft a new complete text, including all provisions of the Vienna Convention adapted and completed to cover the problem of treaties in which international organizations are parties. If the preference of the Commission should be in favour of drawing up a whole and complete series of texts, I think a point should be made of not altering the wording of the articles of the Vienna Convention, with the exception of the modifications and additions called for by the problem of international organizations. Otherwise, our work will be tantamount to the gigantic task of drafting a new convention on the law of treaties. As has been said in replying to question I, A, 2 of the questionnaire, we should avoid reverting to the questions which were the subject of the articles of the Vienna Convention. If discussion is opened anew on the basic problems of the law of treaties, controversy may take place in the Commission on some of the approved articles, jeopardizing the efforts that are under way to speed up the procedure of ratification of such an important Convention by as many States as possible.

34. I think that the Commission should start the examination of the articles of the Vienna Convention one by one, with a view to drafting new articles when necessary, or to introducing changes in the present articles, so as to cover the scope of our task, without forgetting the need to respect the phraseology of the rules already approved.

35. With this in mind I venture to present a few observations on some of the articles of the Vienna Convention.

PART I. INTRODUCTION

[articles 1-5]

Article 1: A similar wording should be found, so as to state that the future draft shall apply to treaties concluded between States and international organizations, or between two or more international organizations.

Article 2: Paragraph 1 (a); The text should be revamped so as to cover the kind of treaties which will be the object of our studies. Unwritten treaties should continue to be excluded for reasons already given.

Paragraph 1 (b): The text on the means of expressing consent to be bound by a treaty should be retained, though the concept of "ratification" may require some exploration, because as far as it regards international organizations, the accomplishment of ratification through all its stages, including parliamentary approval, may differ substantially from the current practice in relation to States.

Paragraph 1 (c): Needs re-drafting to specify the authority empowered with the right to issue the authorization to conclude treaties in international organizations.

Paragraph 1 (d): Nothing prevents international organizations from making reservations to treaties. Therefore, this text (as well as articles 19 to 23) might be studied with a view to being retained in a future draft with minor changes.

Paragraph 1 (g): Needs reformulation to cover international organizations.

Paragraph 1 (i): Should be kept in the future text.

Article 3: Must be redrafted in the affirmative form so as to state that the future articles would apply to treaties to which international organizations are parties, reserving the validity of agreements included in sub-paragraphs (a), (b) and (c) as far as they are not already covered by articles 1 and 3.

Article 4: It would be advisable to maintain the non-retroactivity rule without prejudice to the application of the principle contained in the future set of articles under international law.

Article 5: The article deserves a thorough study, with a view to developing it into a definition of the treaty-making power of international organizations depends on specific or tacit rules endowing the organization with the faculty to conclude treaties, it is very important that the legal régime of treaties which are the constituent instruments of international organizations should be examined.

PART II. CONCLUSION AND ENTRY INTO FORCE OF TREATIES

Section 1: Conclusion of treaties

[articles 6-18]

Article 6: It seems necessary that a formula that will establish the conditions under which international organizations possess the capacity to conclude treaties should be drafted.

Article 7: The problem of full powers must also be re-formulated so as to cover the practice concerning those persons who are invested with the representation of international organizations for the purpose of concluding treaties, either by the issuance of some special kind of documents, or by virtue of their own functions.

Article 8: Problems of confirmation or denial of validity of treaties concluded *ultra vires* should also be tackled in a special article.

Article 9: The adoption of the text at international conferences becomes very important in treaties to which international organizations are parties, because the approval of the plenary conference replaces to some degree the parliamentary approval of treaties between States as a procedural step towards ratification.

Article 10: *Mutatis mutandis*, the rules governing authentication of texts will apply also to treaties in which international organizations are parties.

Article 11: The means of expressing consent are also the same with the exception of ratification, which in international organizations cannot take place according to the formal model of previous parliamentary authorization.

Article 12: Signature is likely to become the normal means of expressing the consent to be bound by a treaty on the part of international organizations, since ratification in its classical form cannot take place. Article 12 should be examined and reformulated in the light of its importance in the treaty-making procedure of international organizations.

Article 14: Ratification, the most important stage of the treaty-making procedure of States, does not appear, at least in its traditional form, in treaties made by international organizations. If it is to be kept, it will be within the sense of pure

confirmation, under the form of a *posteriori* approval by the competent organ. Anyway, the matter requires careful study.

Articles 16 and 17: These provisions, duly amended, could be retained in the future series of rules.

Article 18: International organizations could hardly perpetrate acts capable of defeating the object and purpose of a treaty, prior to its entering into force, since member States, which might be the other parties, would take care to control their activities.

Section 2: Reservations

[articles 19-23]

Articles 19 to 23 should apply in the pertinent provisions to treaties in which international organizations participate.

Article 20: Paragraph 3: This provision, dealing with reservations to a treaty which is a constituent instrument of an international organization, should deserve close consideration, with a view to clarifying what is meant by "the acceptance of the competent organ of that organization".

Section 3: Entry into force and provisional application of treaties

[articles 24-25]

These provisions, dealing with entry into force and provisional application of treaties, should also be explored for adaptation to the new articles in the pertinent provisions.

PART III. OBSERVANCE, APPLICATION AND INTERPRETATION OF TREATIES

[articles 26-38]

Part III as a whole, and in particular articles 31-33: To the extent that these provisions are concerned with the codified general principles of the law of treaties, they should apply to future rules governing treaties to which international organizations are parties, either by their repetition in the body of the future series of articles, or by reference to the Vienna Convention texts.

PART IV. AMENDMENT AND MODIFICATION OF TREATIES

[articles 39-41]

These provisions, concerning amendment and modification of treaties, should be discussed so that they may be adapted to the mode complex means of expressing the will of international organizations.

PART V. INVALIDITY, TERMINATION AND SUSPENSION OF THE OPERATION OF TREATIES

[articles 42-72]

Articles 42 to 72 also contain rules governing all kinds of treaties. These rules should be carefully studied in order to be incorporated into the future set of articles or be established as a subsidiary body of norms governing treaties concluded by international organizations with States or between two or more international organizations.

Articles like 48, 49, 50, 51, and 52, concerning error, fraud and corruption of a representative, which could hardly apply to the wide-open procedure of treaty-making of international organizations, are to be disregarded.

PART VI. MISCELLANEOUS PROVISIONS

[articles 73-75]

These provisions deserved close reading.

Article 74: Could be replaced by a rule concerning the capacity of States claiming to be members of certain international organizations to conclude treaties with the latter. That would be the corresponding formulation in the field of international organizations.

PART VII. DEPOSITARIES, NOTIFICATIONS, CORRECTIONS AND REGISTRATION

[articles 76-80]

These provisions, dealing with depositaries, notifications, corrections and registration, should be scrutinized for minor changes so as to be adapted to the practice of international organizations.

PART VIII. FINAL PROVISIONS

[articles 81-85 and annex]

These provisions concern only the Vienna Convention, and therefore are not relevant to the scope of our studies.

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

36. The work leading up to the United Nations Conference on the Law of Treaties, namely the twenty years of thorough research in the International Law Commission, was so fruitful that one could hardly speak of points of law which were neglected by the Vienna Convention, even if some points were deliberately disregarded.

37. The fact is that some theoretical discussions were put aside as sterile and perhaps obsolete, and some other points were not tackled because their drafting by the Commission depended on the progress of its programme of work. That was the case with problems dealing with the international legal personality of international organizations, discussed in the 639th meeting of the Commission,^o and the ensuing debate on the capacity to become a party to a treaty.

38. Now, without reopening the discussion of the problem of the international legal personality of international organizations, we should investigate carefully the question of their capacity to make treaties, the so called *jus contrahendi* of international organizations. The important thing is to establish on which grounds international organizations can conclude treaties, since it is beyond doubt that there are limitations to their treaty-making power and that they cannot contract by treaty generally.

39. It would be appropriate to study the clauses in international organization constitutions, from which treaty-making power derives, trying to establish their nature and the circumstances in which they occur, so as to arrive at a theory of the sources of the capacity of international organizations to conclude treaties. Another important point is to investigate whether such capacity may spring from tacit authorization or if it will always call for express provisions.

^o See *Yearbook of the International Law Commission, 1962*, vol I, pp. 57 *et seq.*

40. As with other points deliberately not dealt with by the Vienna Convention, like international responsibility, State succession and the outbreak of hostilities, we must recognize that the Conference on the Law of Treaties was not at the time in a position to settle problems which were not yet solved by the Commission concerning such matters. As the work of the Commission progresses we will have before us texts that should be taken up with a view to being incorporated in the future set of articles. That will probably be so with State responsibility and succession of States in respect of treaties.

41. Problems of succession of international organizations should be dealt with likewise. In this matter we have an early and important example in the agreements with the League of Nations for the general succession by the United Nations. These are a clear-cut instance of succession between international organizations and deserve an attentive study.

42. Some thought should also be given to the question of the effect of hostilities on a headquarters agreement. The problem is by no means a theoretical one, and may occur at any time. It offers much more interest for our task than the general problem of coercion on treaties between States in the case of armed coercion or international sanctions, cited by Professor Reuter.⁹ Coercion could hardly occur in respect of international organizations and treaties to which they are parties. The impact of hostilities on a headquarters agreement is something that has to be considered as offering immediate interest, since it may indeed happen at any time.

43. One point which should deserve detailed study is the one concerned with the organs through which the treaty-making power of international organizations is exercisable. Some writers have rightly contended that "the law of international organizations does not as yet contain any clear rules for determining where the treaty-making power of organizations resides".¹⁰ In fact the authorization to conclude treaties, emanating from clauses of the organization's constitution or from a general resolution, might in practice devolve upon different organs of the same organization. It would be of paramount importance to trace what Detter calls the "whereabouts of the treaty-making power within the organization".¹¹

B. Participation of the international organizations in the work

44. In my reply to question I, B, it was contended that we should favour the idea of extending the future set of articles to be prepared by the Commission to the maximum possible range of international organizations, regardless of their universal or regional character. Of course the participation of various international organ-

izations in the studies to be conducted by the Sub-Committee, and subsequently by the International Law Commission, is another problem. It will hardly be possible to invite a large number of organizations without jeopardizing the good conduct of the work. One solution could be to invite only the organizations and specialized and related agencies that were represented in the United Nations Conference on the Law of Treaties. But considering the high degree of interest that the work will certainly create among international organizations, it would perhaps be advisable that the participation of other organizations should be considered and in certain cases accepted.

45. A compromise solution could be to accept the direct participation, as observers, of those organizations which were present at the Conference on the Law of Treaties and which are listed in the Final Act.¹² At the same time the Commission, through its Chairman, could circulate invitations to all intergovernmental organizations and agencies of a certain importance asking for observations and suggestions based on their current practice. These contributions could be, in the course of the future work, organized into a working paper, which will provide important reference for the use of those actually engaged in the conduct of the studies.

4. Mr. Rosenne (14 January 1971)

[Original text: English]

I

1. At the outset we wish to express deep appreciation to the Chairman, Professor Paul Reuter, for the remarkably acute questionnaire which he has prepared in order to guide our deliberations in the present exploratory stage. We shall follow the Chairman in one respect in that before proceeding to formulate replies to his precisely enunciated questions we find it necessary to include some words of introduction.

2. We also wish to record our appreciation for the work accomplished by the Secretary-General in preparing the working paper A/CN.4/L.161 and Add.1 and 2. This document shows that despite the reticence of the Vienna Convention on the Law of Treaties itself, the topic has been the cause of considerable preoccupation to the International Law Commission since it began discussing the law of treaties in 1950. Having regard for its comprehensive survey of what is undoubtedly a complicated and prolonged discussion, it is suggested that our sub-committee may wish to recommend that after due editing, the working paper in its final form should be included in the Commission's *Yearbook*.

3. It is clear from the working paper that at no stage did the Commission ever investigate the question whether the rules relating to the treaties concluded between

⁹ See above, annex I, Questionnaire, para. 23.

¹⁰ T. I. H. Detter, "The organs of international organizations exercising their treaty-making power", in *The British Year Book of International Law*, 1962 (London, 1964), p. 421.

¹¹ *Ibid.*, p. 444.

¹² See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 283, document A/CONF.39/26, para. 4.

States and international organizations or between two or more international organizations are the same as those relating to treaties concluded between States alone. The most that can be said is that in the very early stages it was contemplated, without investigation, that the Commission might be able to formulate its rules as governing indifferently treaties concluded between States and treaties concluded between States and other subjects of international law. However, the basis upon which such a conclusion might be feasible does not appear in any of the published records of the Commission. Rather to the contrary. Running through the Commission's work on the law of treaties is a serious—and apparently unanswered—questioning of the correctness of that assumption. This questioning was crystallized in a series of formal decisions by the Commission recorded, for instance, in the Secretary-General's working paper (A/CN.4/L.161, para. 23, 49, 65 and 66) and ultimately consolidated in the Commission's report on the first part of its seventeenth session^a and repeated in its report on its eighteenth session.^b

4. Significance must be attached to this analysis of the history of the matter. The suggestion is sometimes heard—for instance in paragraph 112 of the working paper—that certain of the draft articles adopted by the Commission in first reading in the period 1962-1964, because they were drafted in general terms, could, if interpreted literally, be applied to treaties concluded by any subject of international law having treaty-making capacity, and in particular by an international organization. Be that as it may, one may doubt that the matter is really one of interpretation, literal or otherwise, of the text of the articles, whether in one or other of the drafts of the Commission or as adopted in the Vienna Convention. The real point surely is that all the preliminary work and research, primarily by the special rapporteurs on the law of treaties and also by individual members of the Commission, was limited to treaties concluded between States. The problem of treaties concluded between States and international organizations was simply dropped from the intellectual horizons of the Commission and its members, who contented themselves with the very proper reservations which now appear in article 3 of the Vienna Convention.

5. There are two reasons in particular why it is probably necessary to stress these aspects, and the prudence which they engender, at this stage—and obviously this does not imply taking a position on the question whether or to what extent or how any of the rules formulated in the Vienna Convention could be applied in the case of treaties concluded between States and international organizations. The first reason relates to the inherent difference, which is a matter of kind and not merely of degree, between the will of a State to be a party to an international treaty and the formation of that will, and the will of an international organization to be a

party to an international treaty and the formation of that will. The second reason relates to the question: What is the purpose which led the Conference on the Law of Treaties to recommend—and the General Assembly of the United Nations to endorse by resolution 2501 (XXIV)—the recommendation that the Commission should undertake the present study,^c notwithstanding the fact that the Commission itself had made no similar suggestion?

6. There is a preliminary question of terminology to be noted, for which reference may be made to the report of the Sixth Committee which states:

It was further said that it would be advisable, if only from the point of view of terminology, to reserve the term "treaty" for agreements between States and to use another expression for instruments to which a subject of international law other than a State was or might become a party. The establishment of a specific terminology for international agreements between States and international organizations or between two or more international organizations would have the added advantage of being more consonant with the provisions of articles 1 and 3 of the Vienna Convention on the Law of Treaties.^d

7. Let us turn now to the first reason. Even if it is correct, as we believe to be the case, that the Vienna Convention is above all concerned not with the law of international obligations in general but with the law governing the instrument by which the consent of States to be bound by the obligations deriving from treaties is expressed, the preoccupation of the draftsmen of the Convention was with an elusive object, the will of the State. As is well known, this is a matter which has implications no less on the domestic level than on the international level, a fact which accounts for the particular delicacy and caution with which it has to be approached. If the formation of the will of the State is a domestic matter in which the domestic law is controlling (as indeed is recognized ultimately in articles 46 and perhaps 47 of the Vienna Convention), the expression of that will on the international level and its various incidences is a matter of international law. The suggestion sometimes made that articles such as 54 or 56 of the Convention could be applied to agreements concluded between States and international organizations simply because those articles are framed in general terms may be a *petitio principii*. In the Vienna Convention those articles are concerned with an international incidence of the will of a State formed domestically and controlled by domestic law, something which is impossible in respect to an international organization. The conclusion therefore is that if the study of treaties concluded between States and international organizations or between two or more international organizations is

^a *Yearbook of the International Law Commission, 1965*, vol. II, p. 158, document A/6009, paras. 19-21.

^b *Ibid.*, 1966, vol. II, p. 176, document A/6309/Rev.1, part II, para. 28.

^c See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 285, Resolution relating to article 1 of the Vienna Convention on the Law of Treaties.

^d *Official Records of the General Assembly, Twenty-fourth Session, Annexes*, agenda items 86 and 94 (b), document A/7746, para. 113.

to proceed, the focus must be shifted onto the systematics of the initiation, formulation and expression of the will of an international organization in all its various incidences.

8. The existence of a question as to the purpose for which this study is being undertaken is provoked, in our mind, by the short title given for the sake of brevity to the topic in paragraph 1 of document A/CN.4/L.161. However, the title of the topic, from which the terms of reference and the relevant conclusions as to the ultimate purpose of the study have to be deduced, cannot be divorced from the text of articles 1 and 3 of the Vienna Convention. In this respect it is our view that more weight has to be given to the discussion during the first part of the Commission's seventeenth session.^a It will be recalled that in the draft submitted by the Drafting Committee at the 810th meeting, what is now the opening phrase of article 3 of the Vienna Convention (but which was then sub-paragraph (a) of article 2) referred to "treaties concluded between subjects of international law other than States or between such subjects or international law and States".^b Objection was taken to wording it that way round: it was suggested that really States should be mentioned first, an arrangement which would be "more consistent with the Commission's decision to limit the scope of the articles to treaties between States".^c Behind that formal reason there were no doubt reasons of a more substantive character, which have become accentuated since 1965. At all events, even if the Special Rapporteur subsequently introduced the final text on the basis that only "drafting changes" had been made,^d it nevertheless seems that one should not proceed as though the changes had not been made. Furthermore, it is difficult to avoid an impression that some of those who call for a study of this topic are prompted by an emotional hankering after an idealistic concept of "international organizations" antipodal to the "State" as the subject not merely of international law, but of the whole international order. This cannot form the basis for useful work by the Commission which is motivated by the actual requirements of the international community as presently constituted, and not by a mere attempt to achieve abstract perfection in a given area of legal regulation.

9. One final introductory remark. It must not be thought that the topic is to be approached solely as a juridical-technical one. No doubt in very many cases, as in the case of treaties concluded between States, problems of the law of treaties are essentially juridical problems, or at all events the juridical aspects can be identified and separated from the political aspects. It is also no doubt true that for the most part the experience which has been gained of treaties concluded between

States and international organizations is confined to what might be termed general juridical experience with a minimum of political additives. However, at least one instance can be given in which fundamental lack of clarity over a whole series of basic elements of an agreement said to exist between the United Nations (acting through its Secretary-General) on the one hand and a Member State on the other has given rise to major political controversy and in the view of some may have even been a contributory factor in the breakdown of international peace. The reference is to the agreement between the United Nations and the United Arab Republic regarding the United Nations Emergency Force and the controversy over the status of the so-called Dag Hammarskjöld *aide-mémoire* of 5 August 1957.¹

II

The following more specific answers are submitted to the questions.

I. DELIMITATION OF THE SCOPE OF THE COMMISSION'S WORK

A. What treaties should the studies cover?

10. The Commission's work should concentrate first and foremost on international agreements concluded between States and international organizations. Secondly it should deal with the type of treaty to which paragraph (c) of article 3 of the Vienna Convention relates, as far as concerns the relations of the States parties to those treaties and international organizations. The question of the agreements to which all the parties are international organizations can probably wait until the work is further advanced. In general, the Vienna Convention should be regarded as determining the broad scope of the present study. On that basis it is also suggested that the position regarding unwritten agreements should be left completely reserved, as was done in the Vienna Convention.

11. It is agreed that in so far as applicable and relevant, the rules which have been included in the Vienna Convention should not now be called into question. However, it is not to be assumed without further investigation by the Special Rapporteur that the treaties to which article 5 of the Vienna Convention relates (and this includes the treaties to which paragraph 3 of article 20 refers), which are certainly treaties concluded between States, come within the scope of the new study.

12. The question of possible distinctions between the categories of treaties to be considered probably does

^a See *Yearbook of the International Law Commission, 1965*, vol. I, pp. 244-245, 810th meeting, paras. 12-27; *ibid.*, p. 280, 816th meeting, para. 2. These discussions are summarized in paragraphs 146-147 of document A/CN.4/L.161.

^b *Yearbook of the International Law Commission, 1965*, vol. I, p. 244, 810th meeting, para. 12.

^c *Ibid.*, para. 14.

^d *Ibid.*, p. 280, 816th meeting, para. 2.

¹ See *The New York Times*, 19 June 1967, p. 12. See also the letter of Mr. (formerly Ambassador) Ernest Gross in *ibid.*, 26 May 1967, p. 44. For the views of Secretary-General U Thant, see *Official Records of the General Assembly, Fifth Emergency Special Session, Annexes*, agenda item 5, in particular document A/6730/Add.3, paras 71-73; Press Release EMF/449 of 3 June 1967, p. 19; and statement by the Secretary-General in *The New York Times*, 20 June 1967, p. 19. All this material is reproduced in *International Legal Materials* (Washington D.C., The American Society of International Law, 1967), vol. VI, No. 3 (May-June 1967), pp. 581 *et seq.*

not have to be raised in a form which is different from that in which it was treated by the Commission and in the Vienna Convention, with perhaps one addition. The questions which have arisen about the relationship of an international organization with treaties (a) concluded under its auspices, (b) concluded between it and one of its members, and (c) concluded between it and another international organization, as far as concerns the *pacta tertiis* rule, are extremely complex. As regards the first type of treaty, we have already in our Hague lectures of 1954¹ hesitatingly drawn attention to the possibility that United Nations practice was moving in the direction of producing quite a fundamental restructuring of the law on this matter. As far as the second and third categories of treaties are concerned, the fundamental question which is posed is not really that of the treaty law aspect itself but the quite different one of the real nature and practical consequences of the international personality of an international organization. On this, some preliminary observations must be made.

13. Does the international personality of an international organization resemble the concept of the juridical personality of an incorporated body in domestic law, as being something quite distinct from the personality of its individual members (a concept which we understand is not so rigidly held in contemporary law as it might have been in an earlier period), or is it something else? In one case the *pacta tertiis* rules would be applicable in all the particularity of their exposition in articles 34 to 37 of the Vienna Convention. In other cases this would not be so, for reasons at which the questionnaire hints. Consequently it seems to us that it would not be profitable to plunge too early into this type of issue which, incidentally, it might be noted, has been little touched upon by the publicists, at all events to judge from a quick perusal of the literature listed in the Secretary-General's working paper (A/CN.4/L.161 and Add.1-2).

14. In addition to the categories of treaty mentioned in paragraph 13, there is also the problem of treaties concluded by an international organization not in its own right and interest, so to speak, but more directly in a representative capacity on behalf of the States which are members of that international organization. That issue was raised at the Commission's sixteenth session (1964) in article 60 of the draft articles on the law of treaties submitted in Sir Humphrey Waldock's third report² and a year later in "Question A" in his fourth report.³ The debates in the Commission are described in the Secretary-General's working paper (A/CN.4/L.161, paras. 101-110, 124-125, and 129). In practice, a closely related question has arisen with regard to the participation in commodity conferences convened under United Nations auspices of certain international econ-

omic organizations.⁴ The problem may arise both for multilateral and for bilateral treaties. This aspect, which does not have to be limited to the participation of international economic organizations in commodity conferences leading possibly to their participation in the commodity agreements issuing therefrom, whether participating in their own right and interest or in a representative capacity, is believed to be growing in importance. From the practical point of view it may well turn out to be the case that study of this relatively novel development may become the most signal contribution which the International Law Commission could make to the legal regulation of the international relations of States in this sphere.

15. The general conclusion therefore would be that the first stage of the examination might well be limited to the issues of the rules relating to the formation and the expression of the consent of the international organizations to be a party to a treaty with a State, and the concomitant question of whether, as far as the consent of the State is concerned, the rules of the Vienna Convention can be applied as they are. In the words of the questionnaire, the first aspect to be studied should be limited to the conclusion of the agreement itself, including the participation of an international organization in an already existing international treaty where such participation is possible under the terms of that treaty itself or by virtue of ancillary instruments.

B. To what international organization with the Commission's proposals apply?

16. Here again, and with the reservation occasioned by the particular problem raised in paragraph 14 above, it is believed that in the initial phase of the examination the question ought primarily to be answered by reference to the Vienna Convention itself. This should occasion no real difficulty when the broad scope of the invitations to international organizations to send observers to the Conference on the Law of Treaties is recalled, and contrasted with the actual participation of the international organizations, whether by writing⁵ or physically.⁶ At the same time, since the Commission, through its examination of the topic of the relations between States and international organizations, is now better informed of the difficulties of this aspect, it seems that it might well base itself in due course on the final conclusions to be reached as regards that aspect of that topic. However, under no circumstances should the Commission adopt the extremely limitative approach which is suggested in the initial part of paragraph 15 of the Secretary-General's working paper (A/CN.4/L.161).

⁴ An illustration of this problem can be seen in the legal opinion of the United Nations Secretariat of 24 May 1968, published in United Nations, *Juridical Yearbook*, 1968 (United Nations publication, Sales No. E.70.V.2), pp. 201-202.

⁵ See A/CONF.39/7 and Add. 1-2 and Add.1/Corr.1.

⁶ See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 283, document A/CONF.39/26 para. 4.

¹ *Recueil des cours de l'Académie de droit international de La Haye*, 1954-II (Leyden, Sijthoff, 1955), t. 86, pp. 330-346.

² *Yearbook of the International Law Commission*, 1965, vol. II, pp. 22-23, document A/CN.4/L.177 and Add.1-2.

³ *Ibid.*, 1964, vol. II, pp. 16-17, document A/CN.4/L.167 and Add.1-3.

II. HOW TO DEAL WITH THE SUBJECT

A. How to determine the subject-matter

17. While of course a very careful reading of the articles of the Vienna Convention would be required in order to determine their applicability to the agreements now under consideration, it hardly seems appropriate to take the articles of the Convention as the starting point, for that would imply a mechanical approach and overlook the nature of things. As a formal matter, to take the Convention as the starting point has its attractions. However, as has been indicated in the introductory part of this paper, it is precisely because of the material difference in the nature of the consent of an international organization in comparison with the consent of a State to be bound by a treaty that it becomes essential to proceed much more analytically. The Vienna Convention, when the matter is worked out this way, may be seen more as a point of arrival than as the point of departure.

18. For this reason it is not possible at this stage to give any firm answer to the question what are the points of the Vienna Convention which call for modifications or major additions. The Chairman of the Sub-Committee has indicated a whole series of questions which will have to be studied in depth by the Special Rapporteur and any further examination will have to await the proposals of the Special Rapporteur.

19. One exception to the generality of this argument can be made. The Commission has in several different contexts since 1950 been faced with the problem of determining rules on the subject of the capacity of international organizations to conclude treaties or to perform other acts having relevance on the plane of international law, and this in turn cannot be separated from the question of a definition of "international organization". The experience of the Commission seems to suggest that these are doctrinal matters on which agreement is well-nigh impossible. Personally we have always had doubts as to the real relevance of the capacity issue in the law of treaties, for in practice "capacity" will depend on the position taken by the parties to the agreement in question, subjectively. The reference in the questionnaire to article 46 of the Vienna Convention really seems to us decisive. Similar considerations apply in regard to the definition of "international organization", and in this connexion, and generally, we permit ourselves to refer to our statement at the fifteenth session of the Commission (1963)^p and more generally to the Commission's debate during its twentieth session (1968).^q

20. With regard to the reservations flowing from articles 73, 74 and 75 of the Vienna Convention, it seems that the same reservations should be made in the present case. However, in view of the illustration which is given in the questionnaire regarding the effect of

hostilities on a headquarters agreement, it is to be hoped that, as forecast in its report on its twenty-first session,^r the Commission will reach practical conclusions in the course of its examination of the topic of relations between States and international organizations, and that this will make it unnecessary to take the matter further in connexion with the further study of the present topic.

B. Participation of international organizations in the work

21. It is believed that for the time being the Commission may rest on the measures which it proposed at its twenty-second session which, it is understood, have since been endorsed in principle by the General Assembly in its resolution 2634 (XXV) of 12 November 1970. The report which this Sub-Committee is to submit to the International Law Commission may furnish indications of the type of information which, subject to the guidance of the Special Rapporteur, the interested international organizations may be asked to supply. If we recall the hesitations expressed at the United Nations Conference on the Law of Treaties by the representatives of the States called upon to express themselves on the matter,^s it seems that much more must be known about the realities of this problem before further progress can be made, and that it behoves the international organizations concerned to participate in assembling the factual data on the basis of which viable decisions can later be made.

^r *Ibid.*, 1969, vol. II, p. 206, document A/7610/Rev.1, para. 18.

^s See *Official Records of the United Nations Conference on the Law of Treaties, Second Session, Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole* (United Nations publication, Sales No. E.70.V.6), p. 168, 30th plenary meeting, paras. 32-35; pp. 178-179, 32nd plenary meeting, paras. 37-52.

5. Mr. Ustor (29 January 1971)

[Original text: English]

1. In his introduction to the questionnaire, Professor Reuter rightly points out that the field which the Commission is about to enter is fraught with difficulties. Indeed, the subject to be dealt with is one in regard to which, to use the words of article 15 of the Statute of the Commission, "the law has not yet been sufficiently developed in the practice of States"^a and in that of their organizations. Hence the hesitation apparent in the questions submitted in the questionnaire, many of which are said to be premature. Hence a similar hesitation and uncertainty in the following answers and the desire to stress their tentative character.

^p *Yearbook of the International Law Commission, 1963*, vol. I, pp. 300-301, 718th meeting, paras. 3-7.

^q *Ibid.*, 1968, vol. I, pp. 13 *et seq.*, 945th and 946th meetings.

^a *Statute of the International Law Commission* (United Nations publication, Sales No. 62.V.2).

I. DELIMITATION OF THE SCOPE OF THE COMMISSION'S WORK

A. *What treaties should the studies cover?*(1) *Should unwritten agreements be excluded?*(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

2. I agree with the view—for the reasons given in the questionnaire—that the study to be undertaken should deal—in harmony with the Vienna Convention on the Law of Treaties—only with treaties concluded in written form and I agree also that the substantive rules of the Vienna Convention should as far as possible not be called into question. It is of course desirable that the emerging questions should be studied in full breadth and depth and that the Commission should not in any way curtail the complete freedom of the Special Rapporteur to explore all aspects of the problem. This applies to problems such as those connected with the formula “any relevant rules of the organization”, used in article 5 of the Vienna Convention. If, however, a study of the term “written agreement” led to the temptation to modify the meaning of the term “treaty” as defined in the Vienna Convention, I would have—for practical reasons—very serious doubts concerning the advisability of such action, even if on theoretical grounds a change could be substantiated.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

3. I do not think that the making of a distinction between categories of treaties could be precluded in advance. Besides the instances mentioned in the questionnaire, the category of multilateral treaties in general comes to mind, in which field international organizations have very little experience. The Commission, bearing in mind the old wisdom that the life of the law is not logic but experience, may wish to maintain its customary prudence in adopting provisions on matters not supported by extensive practice. This caution will in my view particularly apply to the problems mentioned in paragraph 7 of the questionnaire, problems which I am inclined to prefer to set aside for the time being.

B. *To what international organizations will the Commission's proposals apply?*

4. The ideal solution of the problem raised in this section of the questionnaire would obviously be to adopt draft rules governing treaties of all governmental international organizations, all the more so as practically all intergovernmental organizations have a certain practice in concluding treaties. It may be asked, however, whether for practical reasons it would not be advisable to begin with a more cautious approach to the problem similar to the one the Commission has chosen in regard to the topic representatives of States to international organizations. Subject to further studies on the matter I would—for the time being—opt for the second

solution. This would also simplify the question of consultations with the interested organizations.

II. HOW TO DEAL WITH THE SUBJECT

5. The appointment of a Special Rapporteur and his instruction as usual would obviously be necessary.

A. *How to determine the subject-matter*(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

6. I agree with the view that the only possible answer to that question is in the affirmative, i.e. the natural point of departure for the study of the topic is the Vienna Convention. In the course of the careful reading of the Convention some of its provisions will possibly have to be tested in four ways:

Are they applicable to a State which has treaty relations not with one or more States (as in the hypothesis of the Vienna Convention) but with international organizations?

Are they applicable to an international organization which has treaty relations with one or more: (a) member States, (b) non-member States, (c) international organizations?

(2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

7. There is an obvious necessity to draft an article on the capacity of international organizations to conclude treaties. For this purpose a particularly thorough examination of practice and theory will be needed. While rejecting the extremes of the theories which would endow international organizations with unreasonably large competences, the Commission will have to proceed with great caution to ascertain the cases where the existence of treaty-making power of an organization may be established in the absence of an explicit authorization of its constitution.

8. Article 46 of the Vienna Convention is one of the rules which will have to be tested in the four ways suggested above. While it will stand the first test, a close examination of the practice, if any, will be necessary to judge the other ones. My feeling is, however, that the rule in regard to international organizations corresponding to article 46 should be stricter than the original because of the obvious difference in the nature of a constitution of a State and that of an international organization.

9. I would not challenge the view that on the methods of dealing with articles 7-17 it is too early to pronounce.

10. The question of the effect on international organizations of treaties concluded between States does not belong to the field of the present study; indeed, it belongs rather to the realm of the Vienna Convention. However, I believe that the Commission may give some thought to this problem. To the question definitely put in this connexion my tentative answer would be as follows: The effects of a treaty concluded by an inter-

national organization (with another organization or one or more non-member States) on the member States not parties to the treaty are a matter to be governed by the constitution of the organization and its other internal law. The question of such effect does not properly belong to the law of treaties but to the law of the particular organization or to that of international organizations in general.

11. I do not think that article 47 of the Vienna Convention can remain unchanged in the context of treaties of international organizations, while articles 48 and 50 will have to stand in their essence.

12. Concerning article 54, I do not feel any hesitation in accepting its general validity. The effects of the termination of a constituent treaty on the member States is in my view again a question beyond treaty law.

13. The effect of the termination of membership on the application of a treaty concluded between the organization and a member State is certainly worth a thorough examination. In this respect my feeling is that the provisions of article 62 of the Vienna Convention rather than article 63 will be relevant.

14. As to the question of the settlement of disputes, my view is that its exclusion from the study to be undertaken is preferable. The procedure of disputes settlement is a general question of international law, and it would not be advisable to deal with it piecemeal in connexion with each individual chapter of substance and adopt possibly different solutions. Moreover, a highly practical reason militates for the separation of these matters. The experience of the Conference on the Law of Treaties shows that, while it was relatively easy to reach a fairly broad agreement on matters of substance, the idea of including in the Convention rules on the settlement of disputes met with strong opposition. It seems to me that the victory of the view that such rules have to be adopted together with the substantive ones would be a Pyrrhic one which would not bring closer the entry into force of the Convention. I think that the Commission would be well advised if it gave these points a thorough consideration.

15. I would leave it to the judgment of the Special Rapporteur whether he wishes to put forward proposals on depositaries, notifications, etc., in respect of the kind of treaties to be dealt with.

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

16. As to article 73 of the Vienna Convention, I also think that a similar course should be followed here and the study should be kept within the same limits as those of the Vienna Convention.

B. Participation of the international organizations in the work

17. I agree with the conclusions of this paragraph.

6. Mr. Tabibi (6 April 1971)

[Original text: English]

I. DELIMITATION OF THE SCOPE OF THE COMMISSION'S WORK

A. What treaties should the study cover?

(1) *Should unwritten agreements be excluded?*

1. As in the case of unwritten treaties between States which was excluded by the Commission and the Conference on the Law of Treaties, here too the question of unwritten treaties should be excluded regardless of its importance in the practice of various international organizations. Therefore, the Commission should deal with written agreements only and at the same time make an attempt to define precisely what constitutes a written agreement.

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

2. The rules of the Vienna Convention, although validated now by so many signatures of State representatives, in no way shut the door to a broader study particularly on the competence of organizations to conclude treaties.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

3. To explore certain distinctions between various categories of treaties based on the actual purpose and object of the treaty and in accordance with the practices and statute of the organizations of universal character seems useful.

B. To what international organizations will the Commission's proposals apply?

4. The Commission's proposals should apply mainly to governmental organizations of a universal character, and in this regard the views of organizations concerned should be ascertained by the Commission.

II. HOW TO DEAL WITH THE SUBJECT

5. This topic should be studied by the future rapporteur thoroughly in advance, as was done by previous rapporteurs on other topics assigned by the Commission to them, and only then will the Commission be able to take a final position on the subject.

A. How to determine the subject-matter

(1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

6. Yes, it is, provided that the rapporteur makes a careful survey of the articles of the Vienna Convention.

(2) *As we read the articles of the Vienna Convention, which are the points which call for modifications or major additions?*

(3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

7. On these two questions the future rapporteur should concentrate and make a thorough study for the final decision of the Commission next session.

B. Participation of the international organizations in the work

8. The explanation given in this respect by the Chairman of the Sub-Committee in paragraph 24 of his questionnaire is wise and correct. We should wait until the future rapporteur on the subject is appointed and begins his work, and only once the progress of his work has reached a certain stage should additional briefing and information be obtained.

7. Dr. Nagendra Singh (18 June 1971)

[Original text: English]

1. Before answering the questionnaire, may I place on record my sincere appreciation of the efforts of the Chairman of the Sub-Committee, Professor Paul Reuter, who has commenced his exploratory work in a scientific and comprehensive manner. Again, the task accomplished by the Secretary-General in preparing the working paper contained in document A/CN.4/L.161 and Add.1 and 2 deserves all praise. My answers to the various questions are as follows.

I. DELIMITATION OF THE SCOPE OF THE COMMISSION'S WORK

A. What treaties should the studies cover?

(1) *Should unwritten agreements be excluded?*

2. The Vienna Convention on the Law of Treaties has excluded unwritten agreements from its purview. Again, in regard to the definition of what constitutes a written agreement it is submitted that the stand taken in article 2, paragraph 1 (a), of the Vienna Convention should be considered as acceptable. We may at least work on that basis in any exercise that the Commission undertakes now. The unwritten agreements should therefore be excluded.

(2) *Is it possible and desirable to avoid reverting to questions which were the subject of articles of the Vienna Convention on the Law of Treaties?*

3. As the Vienna Convention represents settled law on the subject, it would be dangerous to call in question the rules of the Vienna Convention in any exercise. What is possible, however, is to elucidate some of these rules and expressions which have special significance in the context of international organizations, but in no circumstances should any attempt be made to modify the settled principles of the Convention.

4. In fact, our objective will be fully served if all those aspects which are not covered by the Vienna Convention and are of importance from the viewpoint of international organizations when they are parties to a treaty are now fully dealt with. Again, we should examine the articles of the Vienna Convention with a view to further development of the law on the subject in so far as it affects international organizations. Thus apart from uncovered, developmental and elucidatory aspects vital to our subject, the basic fundamentals of the Convention should not be called in question.

(3) *Is there a likelihood that distinctions will have to be made between the categories of treaties to be considered?*

5. The usual distinction between bilateral and multilateral treaties could be considered in the context of international organizations being a party. This problem will perhaps arise when the study reaches an advanced stage. It could perhaps be stated that treaties cannot be classified in categories and divided into water-tight compartments. However, it is true that, based on the competence of international organizations, some classification may seem to be possible when the problem is studied in greater detail. For example, some organizations may have limited competence to conclude agreements of the "traité-loi" type. There may also be some organizations that could be parties to a treaty of the "traité-contrat" type only.

6. Again, on the basis of who are parties to a treaty, further distinction could be made on the following lines:

(a) Treaties having exclusively international organizations as parties;

(b) Treaties having exclusively member States as parties, the international organization furnishing its auspices only;

(c) Treaties having an international organization as a party and a member State as the other party;

(d) Treaties having an international organization as one party and several member States as other parties.

7. Apart from these bilateral and multilateral distinctions between treaties, there may be a distinction to be made on the nature and type of international organizations. For example, international organizations, depending on their nature and functions, may be parties to a treaty which may possibly be different from treaties concluded by international organizations which do not have similar functions to perform. This aspect will have to await a more detailed study, as has already been stated.

B. To what international organizations will the Commission's proposals apply?

8. I would be prepared to stretch the scope of the study to include all intergovernmental international organizations which would have the necessary competence to enter into treaties. It would be wrong to limit the scope of the subject to international organizations of the universal or global type only. The reason is simple and straightforward. If an international organization is

competent to conclude treaties, we cannot allow such treaties to escape our attention when we are codifying the law relating to those treaties which are concluded between States and international organizations or between two or more international organizations. Our study must be exhaustive and complete and not, therefore, be restricted to a limited study of international organizations of the universal type alone. There should also be no limitation imposed such as to include important international organizations, and exclude the less important ones. Such a study would be faulty in as much as it is impossible to distinguish between what is important and not important. A distinction could be made on the basis of universal international organizations and those which are not universal. However, such a distinction would be unnecessary for our purpose if we have to codify the law relating to treaties concluded between international organizations or by international organizations. As long as they are treaties to which an international organization is a party, it would be imperative for us to legislate or regulate in respect of them and not to exclude them from our purview.

II. HOW TO DEAL WITH THE SUBJECT

A. How to determine the subject-matter

- (1) *Would not the best way of tackling the subject be to take the articles of the Vienna Convention as the starting point?*

9. I agree with Professor Reuter and feel that the Commission should tackle the subject by accepting the provisions of the Vienna Convention as the basis. It would then be easy to apply the problems of international organizations to the codified articles of the Convention, in order to locate what changes are necessary or what additions are required to meet the special problems of international organizations.

- (2) *As we read the articles on the Vienna Convention, which are the points which call for modifications or major additions?*

10. The main factor demanding modification or major addition would be the competence of international organizations to conclude treaties. For example, it will depend upon the constituent instrument of the international organization whether or not treaties may be concluded by the organization. If the instrument so permits, does it in any way circumscribe or limit the power of the organization to enter into treaties? The existence of the constituent instrument as against the inherent right of the sovereign State to conclude treaties is the most important differential factor which will have to be examined by the special rapporteur in drafting the articles for the purpose of codifying this particular subject.

11. Another point of importance would be the *modus operandi* for conclusion of treaties by international organizations. This may require careful study.

12. Another important factor relates to the position of an international organization where it may often find itself assimilated to that of a third party. The basic question also arises as to how an international organization is to be bound by a treaty and how it is to

express its consent? A very careful research of the constituent instrument will have to be made to codify the law pertaining to problems like giving of consent, ratification, etc.

13. It may not be necessary here to list the articles of the Vienna Convention which would be *ipso facto* applicable to international organizations and those that would have to be expanded and developed to meet the special viewpoint of the treaties concluded by international organizations.

- (3) *Should a study be made of other points of treaty law which were deliberately neglected by the Vienna Convention?*

14. I am in entire agreement with the proposal that in the early stage of our examination we exclude those aspects of treaty law which were intentionally omitted by the Vienna Convention. For example, questions relating to State succession, international responsibility, outbreak of hostilities, etc., are separate subjects which require separate examination. It would make our codification cumbersome. However, if the scope of the addition to be made was very much limited and could be comprehensively dealt with in a few articles, the study could perhaps include all those excluded subjects if possible and a decision could then be taken which could be incorporated in our codification without disturbing the balance. I would agree *prima facie* with the view that the subjects omitted by the Vienna Convention would not lend themselves to codification in our exercise unless it was intended to complete the entire subject of international organizations and there were not many articles which were needed to complete the entire study in all its aspects.

B. Participation of the international organizations in the work

15. I am in entire agreement with the view expressed by Professor Reuter that we take those measures which the Commission adopted at its twenty-second session. However, we must not close the door to any international organization expressing special keenness to attend. In that event there may be a danger of a large number of international organizations jeopardizing the promptness and efficiency with which this work could be completed. However, we should have an open door policy on the subject and not shut out any particular international organization which shows special keenness to help and assist. Subject to this observation, I would endorse the adoption of the measures approved by the Commission at its twenty-second session.

CONCLUSION

16. This subject is of vital importance today owing to the ever-increasing role of international organizations in the life of the world community, and the Commission should lose no time in making further progress with its codification. A special rapporteur should, therefore, be appointed as soon as possible to endeavour to fill the gap which at present exists in the codified law on the subject.

GENERAL ASSEMBLY RESOLUTION 2669 (XXV) ON PROGRESSIVE DEVELOPMENT AND CODIFICATION OF THE RULES OF INTERNATIONAL LAW RELATING TO INTERNATIONAL WATERCOURSES

[Agenda item 6]

DOCUMENT A/CN.4/244/REV.1

Note by the Secretariat

[Original text: English]
[21 July 1971]

1. By a *note verbale* dated 24 April 1970, the Government of Finland requested the inclusion in the agenda of the twenty-fifth session of the General Assembly of an item entitled "Progressive development and codification of the rules of international law relating to international watercourses".¹ At its 1843rd plenary meeting, on 18 September 1970, the General Assembly placed the item requested by Finland on the agenda of its twenty-fifth session and referred it to the Sixth Committee.

2. In an explanatory memorandum attached to the note verbale, the Government of Finland stated that the United Nations should further the progressive development and codification of the rules of international law relating to international watercourses, including international drainage basins, and that the General Assembly should take the preliminary action necessary for the attainment of that goal. The explanatory memorandum also made a certain number of specific suggestions concerning the course of action which should be followed.²

3. The Sixth Committee considered the item at its 1225th, 1228th and 1230th to 1236th meetings, held between 13 and 25 November 1970.³ The proposals and amendments thereto, submitted during the consideration of the item, are recorded in the report of the Sixth Committee.⁴

4. During the discussion of the item in the Sixth Committee, the question arose whether the draft resolution to be recommended to the General Assembly should single out studies of a recent date undertaken by inter-governmental⁵ or non-governmental bodies. Some rep-

resentatives were in favour of making a specific reference to the "Helsinki Rules on the Uses of the Waters of International Rivers" adopted by the International Law Association at its 52nd Conference held at Helsinki on 20 August 1966.⁶ Others suggested that mention should likewise be made of the resolution entitled "Utilization of non-maritime international waters (except for navigation)" adopted at Salzburg, on 11 September 1961, by the Institute of International Law.⁷ Different views having been expressed on the question, it was finally decided to include the following passage in the report of the Sixth Committee to the General Assembly.

It was agreed in the Sixth Committee that intergovernmental and non-governmental studies on the subject, especially those which are of a recent date, should be taken into account by the International Law Commission in its consideration of the topic.⁸

5. At its 1920th plenary meeting, held on 8 December 1970, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 2669 (XXV). In paragraph 1 of the resolution the Assembly recommends

that the International Law Commission should, as a first step, take up the study of the law of the non-navigational uses of

use of international rivers and lakes", and the Asian-African Legal Consultative Committee adopted in 1969 a resolution establishing an inter-sessional sub-committee for a detailed consideration of the "law of international rivers". For the Declaration of Montevideo concerning the Industrial and Agricultural Use of International Rivers, approved by the Seventh Inter-American Conference at its fifth plenary session on 24 December 1933, see annex I, section 1 of the report prepared by the Secretary-General pursuant to General Assembly resolution 1401 (XIV) (A/5409, vol. III).

⁶ International Law Association, *Report of the Fifty-second Conference, held at Helsinki, 1966* (London, International Law Association, 1967), pp. 484-532.

⁷ See *Annuaire de l'Institut de droit international, Salzburg Session, September 1961* (Basle, 1961), vol. 49, t. II, pp. 381-384. The text of the resolution is reproduced in paragraph 1083 of the Secretary-General's report (A/5409, vol. III).

⁸ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 91, document A/8202, para. 17.*

¹ *Official Records of the General Assembly, Twenty-fifth Session, Annexes, agenda item 91, document A/7991.*

² These suggestions are summarized in the report of the Sixth Committee to the General Assembly (*ibid.*, document A/8202, para. 2).

³ *Ibid.*, *Twenty-fifth Session, Sixth Committee.*

⁴ *Ibid.*, *Twenty-fifth Session, Annexes, agenda item 91, document A/8202, paras. 4-12.*

⁵ In 1967, the Inter-American Juridical Committee adopted a "draft convention concerning the industrial and agricultural

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 deem it appropriate.

6. In paragraph 2 (a) of that resolution, the General Assembly requests the Secretary-General

to continue the study initiated by the General Assembly in resolution 1401 (XIV) in order to prepare a supplementary report on the legal problems relating to the utilization and use of international watercourses, 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.

The "supplementary report" so requested will be published as a document of the International Law Commission.⁹ The report on legal problems relating to the utilization and use of international rivers (A/5409), prepared by the Secretary-General pursuant to General Assembly resolution 1401 (XIV) of 21 November 1959, was published in 1963 and, in accordance with that

resolution, circulated to Member States. The full text of national laws and legislation and of treaties referred to in the Secretary-General's report were compiled and published by the Secretariat in a volume of the *United Nations Legislative Series*.¹⁰

7. In accordance with paragraph 2 (b) of resolution 2669 (XXV), the Secretariat has made the necessary arrangements to distribute to the members of the Commission the text of that resolution the report on the item submitted by the Sixth Committee to the General Assembly at its twenty-fifth session, and the summary records of the meetings of the Sixth Committee at which the item was considered, as well as the report on legal problems relating to the utilization and use of international rivers prepared by the Secretary-General.¹¹

¹⁰ 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).

¹¹ The Secretary-General's report being out of stock, the copies for distribution to the members of the Commission are photo-offset, reproductions of the original text. The report was published in 1963 in English, French, and Spanish only.

⁹ *Ibid.*, agenda item 73, document A/8207, para. 3.

CO-OPERATION WITH OTHER BODIES

[Agenda item 9]

DOCUMENT A/CN.4/248

**Report on the twelfth session of the Asian-African Legal Consultative Committee,
by Mr. Taslim O. Elias, Observer for the Commission**

[Original text: English]
[6 May 1971]

ABBREVIATIONS

ECE	Economic Commission for Europe
UNCITRAL	United Nations Commission on International Trade Law

1. In accordance with the decision reached at the twenty-second session of the Commission,¹ I attended the twelfth session of the Asian-African Legal Consultative Committee held in Colombo, Ceylon, from 18 to 28 January 1971.

2. At the opening meeting of the session, the following agenda was adopted:

- I. Administrative and organizational matters
 1. Adoption of the agenda
 2. Election of the President and Vice-President
 3. Admission of observers
 4. Consideration of the Secretary's report on policy and administrative matters and the Committee's programme of work
 5. Date and place for the thirteenth session
- II. Matters referred to the Committee by the Governments of the participating countries under article 3 (b) of the Statutes
 1. Law of the sea including questions relating to sea-bed and ocean-floor (referred by the Government of Indonesia) (priority item).
 2. Law of international river (referred by the Governments of Iraq and Pakistan)
- III. Matters taken up by the Committee under article 3 (c) of the Statutes

International sale of goods (taken up by the Committee at the suggestion of the Governments of India and Ghana).

3. On 18 January 1971, following the election of the President and the Vice-President as well as the admission of observers, the President invited me to make a state-

ment on the work of the International Law Commission at its twenty-second session. I gave a summary account of the contents of the Commission's report, highlighting those features which were of special interest to the Committee. This was well received. The first day's session concluded with this event.

A. THE LAW OF THE SEA

4. From the morning of 19 January till noon on 22 January, there was a general discussion in the Committee on the law of the sea and the law of international rivers. Statements on the law of the sea by non-members were made by observers from the United States of America, Ecuador, Brazil, Argentina, Peru and the German Branch of the International Law Association. The United States and the Latin American countries argued their cases with cogency, the former explaining in detail its memorandum on the subject which had been in circulation since its presentation in New York and elsewhere, while the latter strongly advocated the adoption of the 200-mile limit for the territorial sea.

5. The work of the session was thereafter carried on in two Sub-Committees, one on the law of the sea and one on the law of international rivers. I was elected Chairman of the first Sub-Committee, which turned out to be a committee of the whole. This meant that the Sub-Committee on the Law of International Rivers only functioned whenever the Committee of the Whole on the Law of the Sea was not sitting. The third subject, international sale of goods, was discussed at the meeting of the Committee on 25 January, and later considered briefly in a sub-committee before the Committee resumed its deliberations on the first two topics.

¹ See *Yearbook of the International Law Commission, 1970*, vol. II, p. 311, document A/8010/Rev.1, para. 95.

6. The emphasis throughout was on the law of the sea. This was because the United Nations had decided to hold a conference on the subject in 1973² to deal, *inter alia*, with the new legal régime governing the exploration of the sea-bed resources beyond the continental shelf, the breadth of the territorial sea, the régime of the international straits, the definition of the limit of the continental shelf, special rights of the coastal States in the fisheries resources of the sea and the anti-pollution measures of the high sea. It was felt in the Committee that the problem would be to attempt to reconcile the two dominant principles underlying the law of the sea: the principle of the freedom of the sea and the principle of the sovereignty of coastal States over areas off their coast. The 1958 Conventions on the Law of the Sea do not resolve the question of the breadth of the territorial sea and the outer limit of the continental shelf. They recognize, however certain rights of coastal States in a contiguous zone adjacent to its territorial sea which is not more than 12 miles from the coast or the baseline from which the territorial sea is measured. Many States exercise fisheries jurisdiction within 12 miles of their coast, either in the territorial sea or in the contiguous zone.

7. Views were divided as to whether to accept (a) the Latin American idea of a 200-mile limit, (b) the United States-espoused theory that the sea-bed and its resources are a common heritage of mankind as a whole, and that there should be established an international organization or régime to administer and govern all activities on the ocean floor, having full international personality and being independent and impartial, (c) the United States trust concept, implying the difficult problem of having to define the boundary of the area between the continental shelf and the sea-bed area which would be placed under the international régime, or (d) the fact that most States today have accepted only the twelve-mile limit, so that (b) and (c) should be practicable if there could be general agreement. The representatives of the Philippines and of Indonesia strenuously advocated an archipelago principle which guarantees the unity of their groups of islands while recognizing the right of innocent passage for foreign ships. The principle must be regarded as an exception to any general rule that might emerge.

8. There were available to the Sub-Committee these documents, *inter alia*: (a) the United Nations Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (resolution 2749 (XXV) adopted by the General Assembly on 17 December 1970); (b) the draft statute for an international sea-bed authority, submitted by the Mission of the United Republic of Tanzania to the United Nations (document NY/CSB 2/3, dated 8 January 1971);³ and (c) the statement by Bernard H. Oxman, Assistant Legal Adviser for

Ocean Affairs, Department of State, United States of America, regarding the statement by President Nixon of 23 May 1970 and the draft United Nations Convention on the International Sea-Bed Area submitted by the United States as a working paper on 3 August 1970.⁴ These were all discussed at considerable length. In the end, the representative of Ceylon, acting as Rapporteur on the subject, was requested to formulate proposals based on the various views expressed in the Sub-Committee, which would be used at the pre-conference meeting of members of the Asian-African Legal Consultative Committee to be held in Geneva on 15 July 1971, just before the session of the United Nations Committee on the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the Limits of National Jurisdiction to consider the working papers prepared by a working group of nine member States as well as comments by Governments thereon.

9. It was the view of the Committee that all the detailed discussion in Colombo and Geneva should be regarded as tentative only and that a more definitive position would be taken in Lagos, Nigeria, at the thirteenth session of the Committee to be held in January 1972, when the law of the sea should be the main business.

B. THE LAW OF INTERNATIONAL RIVERS

10. As already explained in paragraph 5 above, this topic was given a subordinate role by the Committee, as it had been discussed at the eleventh session. The Sub-Committee of Ten (Ceylon, Ghana, Iran, Iraq, Japan, Jordan, Nigeria, Pakistan and the United Arab Republic) met a number of times to consider the question of international rivers. Two sets of draft proposals were tabled, one by India based on a section of the draft articles of the International Law Association containing the Helsinki Rules⁵ and the other by Pakistan containing general provisions on the utilization of international rivers. The Sub-Committee soon saw the futility of any attempt to study the subject in depth on the basis of the two parallel approaches, and invited the Ceylonese Rapporteur to aim at achieving a synthesis on which meaningful discussion could take place. Both India and Pakistan would appear to be so preoccupied with their immediate dispute over the sharing of the waters of the Ganges River that neither said it was ready to accept any objective approach to the problem of international rivers. The Secretary-General of the International Institute for the Unification of Private Law suggested that it would be wise to establish a commission for each international river, citing those of the Rhine and the Danube as examples. The examples of the Nile River, the Senegal River and the River Niger régimes⁶ did not seem to appeal to them as useful

² General Assembly resolution 2750 C (XXV), of 17 December 1970.

³ Reproduced in *Official Records of the General Assembly, Twenty-sixth Session, Supplement No. 21 (A/8421)*, annex I, sect. 1.

⁴ *Ibid.*, *Twenty-fifth Session, Supplement No. 21 (A/8021)*, annex V.

⁵ International Law Association, *Report of the Fifty-second Conference, held at Helsinki, 1966* (London, International Law Association, 1967), pp. 484-532.

⁶ The particular attention of the Committee was drawn to my article entitled "The Berlin Treaty and the River Niger

precedents. A permanent commission of even a purely administrative character was unacceptable to both. The best that the Committee could do was to decide to keep the subject under further study at an inter-sessional meeting of the Sub-Committee to be held during 1971.

C. INTERNATIONAL SALE OF GOODS

11. The leader of the Pakistan delegation, as the Chairman of the standing Sub-Committee on this subject, gave an account of the work of the Sub-Committee and of the progress made so far on the subject in UNCITRAL. The subjects considered were international payments, shipping, bills of lading and international commercial arbitration. Also considered was the question of model contracts for commodities such as rubber and cocoa products prepared by the Trade Association of Overseas Buyers. Suitable commodities that could be used as a beginning for such contracts could be rubber, timber, rice, textile, machinery, oil and coconut products. Mr. Hannold, Chief of the International Trade Law Branch of the United Nations Office of Legal Affairs, agreed to make available all contracts prepared by ECE. He explained a number of changes made to articles 1-17 of the Uniform Law on International Sale of Goods, and described briefly the work done by UNCITRAL on the subjects of prescription, negotiable instruments, international shipping legislation and international arbitration. It was decided that more information should be obtained by the secretariat of the Committee on the research already carried out in Africa and Asia, and that a questionnaire should thereafter be sent to all member States with a view to determining the line of future work on this subject.

D. ENLARGEMENT OF MEMBERSHIP

12. In pursuance of the Committee's consideration of the question of increased membership at its eleventh

session (Accra, 1970), the twelfth session gave some thought to the subject at Colombo. It was decided:

(a) That a summary of the proceedings of that session, especially in relation to the law of the sea, be made available in both English and French in order to draw the attention of non-member African States to the important subjects being studied and thereby induce them to join;

(b) That the francophone African States be invited to consider becoming members before the thirteenth session of the Committee to be held in Lagos in January 1972, at which there would be provision for simultaneous translation in English and French if an encouraging number (say four or five) should indicate a desire to do so within a reasonable time;

(c) That the basic documents of the Committee (i.e., the background papers, including the constitution) should be translated into French and forwarded to such States under cover of a circular letter from the Secretary; and

(d) That, as part of the effort to acquaint them with the Committee's work, the Governments of member States be requested to use their good offices to persuade non-members to join, and that the leaders of the delegations present at the session should undertake to take up the matter at the personal level with their counterparts in non-member African States on all appropriate occasions.

E. CONCLUSION

13. The Committee decided: (a) that the present practice of supplying a copy of the printed report to each member of the International Law Commission as well as six sets of the Committee's brief of documents and the reports of the sessions to the Commission's secretariat be continued; and (b) that the Committee's representative should attend the Commission's sessions for at least one week, although attendance for a period of two weeks would be preferable.

14. Finally, the Committee wished to convey its appreciation to the Commission for sending to its twelfth session an observer to give it an account of the work of the Commission's twenty-second session.

Commission", which appeared in the *American Journal of International Law* (Washington D.C.), vol. 57, No. 4 (October, 1963), p. 873. The article gave an account of the régime set up by the nine riparian States of the Niger River Basin.

CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

Note. This list includes all United Nations documents identified in the text by their symbols for which no reference is given in a foot-note.

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/5409	Legal problems relating to the utilization and use of international rivers: report of the Secretary-General (summary of legislative texts and treaty provisions)	Mimeographed. For the full text of the legislative texts and treaty provisions, see United Nations publication, Sales No. 63.V.4.
	Question of methods of fact-finding—Register of experts in legal and other fields, prepared in pursuance of General Assembly resolution 2329 (XXII): note by the Secretary-General	Mimeographed.
A/7720	Respect of human rights in armed conflicts: report of the Secretary-General	Published separately (offset).
A/7751	Question of methods of fact-finding—Revised register of experts in legal and other fields, prepared in pursuance of General Assembly resolution 2329 (XXII): note by the Secretary-General	<i>Idem.</i>
A/7925 and Add.1-3	Views of Member States on the desirability of convening at an early date a conference on the law of the sea: report of the Secretary-General	Mimeographed.
A/8052	Respect of human rights in armed conflict: report of the Secretary-General	Published separately (offset).
A/8058	Permanent sovereignty over natural resources—The exercise of permanent sovereignty over natural resources and the use of foreign capital and technology for their exploitation: report of the Secretary-General	Mimeographed.
A/8108	Question of methods of fact-finding—Register of experts in legal and other fields, prepared in pursuance of General Assembly resolution 2329 (XXII): note by the Secretary-General	Published separately (offset).
A/AC.138/32	Committee on the Peaceful Uses of the Sea-bed and the Ocean Floor Beyond the Limits of National Jurisdiction—FAO statement on its possible contribution to preparation for the conference on the law of the sea	Mimeographed.
A/C.1/212	Admission of new members to the United Nations—Letter, dated 8 October 1947, addressed by the Chairman of the Sixth Committee to the Chairman of the First Committee	<i>Idem.</i>
A/C.6/156	Question of the admission of Pakistan to membership in the United Nations—Statement made by the representative of Argentina at the 59th meeting of the First Committee on 24 September 1947	<i>Idem.</i>
A/CN.4/L.151	Relations between States and international organizations: Temporary observer delegations and conferences not convened by international organizations: working paper prepared by Abdullah El-Erian, Special Rapporteur	<i>Idem.</i>
A/CN.4/L.161	Question of treaties concluded between States and international organizations or between two or more international organizations: Working paper submitted by the Secretary-General, containing a short bibliography and a historical survey of the question	<i>Idem.</i> The document contains only chapter I of the historical survey, the remainder appearing in an addendum.
A/CONF.32/5 and Add.1	International Conference on Human Rights (1968)—Measures taken within the United Nations in the field of human rights: study prepared by the Secretary-General	Mimeographed.
A/CONF.32/6 and Add.1	<i>Idem</i> —Methods used by the United Nations in the field of human rights: study prepared by the Secretary-General	<i>Idem.</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CONF.39/7 and Add.1 and Add.1/Corr.1 and Add.2	United Nations Conference on the Law of Treaties (1968 and 1969)—Written statements submitted by specialized agencies and intergovernmental bodies invited to send observers to the Conference	<i>Mimeographed</i>
E/C.7/2/Add.6	Natural resources development and policies, including environmental considerations: report of the Secretary-General—Addendum: issues of international waters resources development	<i>Idem.</i>
E/CN.14/STC/24 E/CN.14/STC/24/ Rev.1	Bilateral trade and payments agreements in Africa	<i>Idem.</i>

**CHECK LIST OF DOCUMENTS OF THE TWENTY-THIRD SESSION
NOT REPRODUCED IN VOLUME II**

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/238 and Add.1-2	Observations of Member States on the draft articles on representatives of States to international organizations, adopted by the International Law Commission at its twenty-first session	Reproduced in A/8410/Rev.1, annex I.
A/CN.4/239 and Add.1-3	Observations of Member States, Switzerland and the secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency on the draft articles on representatives of States to international organizations, adopted by the International Law Commission at its twentieth and twenty-first sessions	<i>Idem.</i>
A/CN.4/240 and Add.1-7	Observations of Member States, Switzerland and the secretariats of the United Nations, the specialized agencies and the International Atomic Energy Agency on the draft articles on representatives of States to international organizations, adopted by the International Law Commission at its twenty-second session	<i>Idem.</i>
A/CN.4/242	Provisional agenda	Mimeographed. For the agenda as adopted, see p. 2 above (A/8410/Rev.1, para. 7).
A/CN.4/251	Letter dated 10 May 1971 from Mr. Shabtai Rosenne to the Chairman of the International Law Commission	Mimeographed.
A/CN.4/L.161 and Add.1-2	Question of treaties concluded between States and international organizations or between two or more international organizations: Working paper submitted by the Secretary-General, containing a short bibliography, a historical survey of the question and a preliminary list of the relevant treaties published in the United Nations <i>Treaty Series</i>	<i>Idem.</i>
A/CN.4/L.162/Rev.1 and Corr.1 [English only]	Observations and suggestions concerning the (English) text of the draft articles on representatives of States to international organizations: Working paper submitted by the Secretariat	<i>Idem.</i>
A/CN.4/L.163 [French only]	<i>Idem</i> (French text)	<i>Idem.</i>
A/CN.4/L.164 [Spanish only]	<i>Idem</i> (Spanish text)	<i>Idem.</i>
A/CN.4/L.165 [Russian only]	<i>Idem</i> (Russian text)	<i>Idem.</i>
A/CN.4/L.167	Draft articles on representatives of States to international organizations—Differences in form between part II and part IV of the draft: note by the Secretariat	<i>Idem.</i> Largely reproduced in A/CN.4/241/Add.3, para. 5 (see vol. II, Part One, p. 38.
A/CN.4/L.168 and Corr.2 and 3	<i>Idem</i> —Text of articles adopted by the Drafting Committee: articles 6–27, 27bis, 28–33, 35–44 and 46–49	Text of the articles reproduced in the summary records of the 110th–1116th meetings (see volume I).
A/CN.4/L.168/Add.1	<i>Idem</i> : Article 45	Reproduced in the summary record of the 1114th meeting (vol. I).
A/CN.4/L.168/Add.2 and Corr.1 and 2	<i>Idem</i> : Articles 52–57, 57bis, 58–62, 62bis, 63 and 64	<i>Idem</i> , 1116th, 1118th and 1119th meetings (vol. I).
A/CN.4/L.168/Add.3	<i>Idem</i> : Articles 49bis and 77bis	<i>Idem</i> , 1119th meeting (vol. I).
A/CN.4/L.168/Add.4	<i>Idem</i> : Articles 65, 66, 66bis, 67, 67bis and 68–77	<i>Idem</i> , 1122nd and 1123rd meetings (vol. I).

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.168/Add.5	<i>Idem</i> : Articles 81–86	<i>Idem</i> , 1123rd and 1124th meetings (vol. I).
A/CN.4/L.168/Add.6	<i>Idem</i> : Articles 87 and 89–101	The text of articles 87, 89–91 and 93–101 is reproduced in the summary records of the 1124th–1126th meetings (vol. I).
A/CN.4/L.168/Add.7	<i>Idem</i> : Articles 102–108, 110–116 and 116 <i>bis</i>	The text of articles 102, 103, 105, 106, 108, 110, 112, 114, 116 and 116 <i>bis</i> is reproduced in the summary records of the 1126th and 1127th meetings (vol. I).
A/CN.4/L.169	<i>Idem</i> —Amendments proposed by Mr. Kearney to articles 50, 50 <i>bis</i> , and 50 <i>ter</i>	The text of the amendments is reproduced in the summary record of the 1119th meeting (vol. I).
A/CN.4/L.170	<i>Idem</i> —Text of article 12 adopted on second reading by the Drafting Committee	Reproduced in the summary record of the 1114th meeting (vol. I).
A/CN.4/L.170/Add.1	<i>Idem</i> —Texts of articles 25, 32 and 52 adopted on second reading by the Drafting Committee and recommendation concerning article 6	The texts of article 52 and of the recommendation concerning article 6 are reproduced in the summary record of the 1118th meeting (vol. I).
A/CN.4/L.170/Add.2	<i>Idem</i> —Articles 49 <i>bis</i> and 77 <i>bis</i> adopted on second reading by the Drafting Committee	The text of the articles is reproduced in the summary record of the 1121st meeting (vol. I).
A/CN.4/L.170/Add.3	<i>Idem</i> —Text of article 81 adopted on second reading by the Drafting Committee and recommendation concerning article 83	<i>Idem</i> , 1124th meeting (vol. I).
A/CN.4/L.172	<i>Idem</i> —Report of the Drafting Committee on article 34	<i>Idem</i> , 1117th meeting (vol. I).
A/CN.4/L.175	<i>Idem</i> —Amendment proposed by Mr. Kearney to alternative A of article 100 as submitted by the Drafting Committee (A/CN.4/L.168/Add.6)	<i>Idem</i> , 1125th meeting (vol. I).
A/CN.4/L.176	Draft report of the International Law Commission on the work of its twenty-third session (chap. I)	Mimeographed. See below, note concerning A/CN.4/L.178 <i>et seq.</i>
A/CN.4/L.177	Working Group on relations between States and international organizations—Consolidated draft articles: Text submitted by the Working Group on second reading: paragraph 2 of article 1	Reproduced in the summary record of the 1132nd meeting (vol. I).
A/CN.4/L.177/Add.1	<i>Idem</i> : Articles 2, 4 and 11	<i>Idem</i> , 1134th and 1135th meetings (vol. I).
A/CN.4/L.177/Add.2	<i>Idem</i> : Article 88 <i>bis</i> (formerly article 75)	<i>Idem</i> , 1138th meeting (vol. I).
A/CN.4/L.177/Add.3	<i>Idem</i> : Articles 81 and 82	<i>Idem</i> .
A/CN.4/L.178 and Add.1–15, A/CN.4/L.179 and Add.1–4	Draft report of the International Law Commission on the work of its twenty-third session (chap. II–V)	Mimeographed. For the final text, see A/8410/Rev.1 (see vol. II, part one, p. 275).
A/CN.4/L.180 and Add.1–5		
A/CN.4/L.181 and Add.1	Draft articles on the representation of States in their relations with international organizations, with annex	Mimeographed.
A/CN.4/SR.1087–SR.1148	Provisional summary records of the 1087th to the 1148th meetings of the Commission	Mimeographed. For the final text, see vol. I.

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