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**Question of extended participation in general multilateral Treaties concluded under the  
auspices of the League of Nations (General Assembly resolution 1766(XVII)) - Report  
Sir Humphrey Waldock, Special Rapporteur on the Law of Treaties**

Topic:  
**Extended participation in general multilateral treaties concluded under the  
auspices of the League of Nations**

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plicated. The hypothesis is that a treaty or part of it becomes void and terminates by reason of its conflict with a new overriding rule of *jus cogens*, after having been valid and applied during some, perhaps quite long, period of time. Clearly, the invalidity which subsequently attaches to the treaty is not a nullity *ab initio*, but is one that dates from the emergence of the new rule of *jus cogens*. Accordingly, equity requires that, in principle, the rules laid down in paragraph 1 concerning the legal consequences of termination should apply. However, the rule of *jus cogens* being an overriding rule of international law, it seemed to the Commission that any situation resulting from the previous application of the treaty could only retain its validity after the emergence of the rule of *jus cogens* to the extent that it was not in conflict with that rule. Paragraph 2 accordingly so provides.

(4) Paragraph 3 merely adopts the provisions of paragraph 1 to the case of the withdrawal of an individual State from a multilateral treaty. It also takes account of the fact that some multilateral treaties do contain express provision regarding the legal consequences of withdrawal from the treaty. Article XIX of the Convention on the Liability of Operators of Nuclear Ships,<sup>89</sup> for example, expressly provides that even after the termination of the Convention liability for a nuclear incident is to continue for a certain period with respect to ships the operation of which was licensed during the currency of the Convention. Again some treaties, for example, the European Convention on Human Rights and Fundamental Freedoms,<sup>90</sup> expressly provide that the denunciation of the treaty shall not release the State from its obligations with respect to acts done during the currency of the Convention.

(5) Paragraph 4 provides — *ex abundantia cautela* — that release from the further application of the provisions of a treaty does not in any way impair the duty of the parties to fulfil obligations embodied in the treaty to which they are also subjected under general international law or under another treaty. The point, although self-evident, was considered worth emphasizing in this article, seeing that a number of major Conventions embodying rules of general international law, and even rules of *jus cogens*, contain denunciation clauses. A few Conventions, such as the Geneva Conventions of 1949 for the humanizing of warfare, expressly lay down that denunciation does not impair the obligations of the parties under general international law. But the majority of treaties provide for their own denunciation without prescribing that the denouncing State will remain bound by its obligations under general international law with respect to the matters dealt with in the treaty.<sup>91</sup>

#### **Article 54. — Legal consequences of the suspension of the operation of a treaty**

**1. Subject to the provisions of the treaty, the suspension of the operation of a treaty:**

**(a) Shall relieve the parties from the obligation to apply the treaty during the period of the suspension;**

**(b) Shall not otherwise affect the legal relations between the parties established by the treaty;**

**(c) In particular, shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.**

**2. During the period of the suspension, the parties shall refrain from acts calculated to render the resumption of the operation of the treaty impossible.**

#### *Commentary*

(1) This article, like the two previous articles, does not touch the question of responsibility, but concerns only the direct legal consequences of the suspension of the operation of the treaty.

(2) Paragraph 1 adapts to the case of suspension the rules laid down in article 53, paragraph 1, for the case of termination. The parties are relieved from the obligation to apply the treaty during the period of the suspension. But the relations established between them by the treaty are not otherwise affected by the suspension, while the legality of acts previously done under the treaty and of situations resulting from the application of the treaty are not affected.

(3) The very purpose of suspending the operation of the treaty rather than terminating it is to keep the treaty relationship in being. The parties are therefore bound in good faith to refrain from acts calculated to frustrate the treaty altogether and to render its resumption impossible.

### CHAPTER III

#### **Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations \***

18. On the recommendation of the Sixth Committee, the General Assembly, at its 1171st meeting, held on 20 November 1962, adopted the following resolution<sup>92</sup>:

“ *The General Assembly,*

“ *Taking note* of paragraph (10) of the commentary to articles 8 and 9 of the draft articles on the law of treaties contained in the report of the International Law Commission covering the work of its fourteenth session,

“ *Desiring* to give further consideration to this question,

“ 1. *Requests* the International Law Commission to study further the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations, giving due consideration to the views expressed during the discussions at the seventeenth session of the General Assembly, and to include the results of the study in the report of the Commission covering the work of its fifteenth session;

\* This chapter reproduces substantially, except for the conclusions in paragraph 50, a report submitted by Sir Humphrey Waldock and circulated in mimeographed form as document A/CN.4/162.

<sup>92</sup> Resolution 1766 (XVII).

<sup>89</sup> Signed at Brussels on 25 May 1962.

<sup>90</sup> Article 65, *United Nations Treaty Series*, vol. 213, p. 252.

<sup>91</sup> E.g., Genocide Convention.

" 2. *Decides* to place on the provisional agenda of its eighteenth session an item entitled 'Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations.'"

19. In addition to the records of the discussions in the Sixth Committee, the Commission had before it a note by the Secretariat which contained a summary of those discussions (A/CN.4/159 and Add. 1) and a report entitled "Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII)", submitted by the Special Rapporteur on the Law of Treaties (A/CN.4/162). The Commission examined the question at its 712th and 713th meetings.

20. As indicated by the terms of the resolution, the further study requested of the Commission relates to a question raised in paragraph (10) of the commentary to articles 8 and 9 of the Commission's draft articles on the law of treaties. In that paragraph, the Commission drew attention to "the problem of the accession of new States to general multilateral treaties, concluded in the past, whose participation clauses were limited to specific categories of States". It pointed out that certain technical difficulties stand in the way of finding a speedy and satisfactory solution to this problem through the medium of the draft articles on the law of treaties which are now in course of preparation. Suggesting that consideration should therefore be given to having recourse to other more expeditious procedures, it observed:

"It seems to be established that the opening of a treaty to accession by additional States, while it requires the consent of the States entitled to a voice in the matter, does not necessitate the negotiation of a fresh treaty amending or supplementing the earlier one. One possibility would be for administrative action to be taken through the depositaries of the individual treaties to obtain the necessary consents of the States concerned in each treaty; indeed, it is known that action of this kind has been taken in some cases. Another expedient that might be considered is whether action to obtain the necessary consents might be taken in the form of a resolution of the General Assembly by which each Member State agreed that a specified list of multilateral treaties of a universal character should be opened to accession by new States. It is true that there might be a few non-Member States whose consent might also be necessary, but it should not be impossible to devise a means of obtaining the assent of these States to the terms of the resolution." <sup>93</sup>

21. During the discussion of the Commission's report, members of the Sixth Committee had asked for particulars of the treaties in question. The Secretariat had accordingly submitted a working paper <sup>94</sup> setting out the multilateral agreements concluded under the auspices of the League of Nations in respect of which the Secretary-General acts as depositary and which are not open to new States. Part A of this list gave twenty-

six agreements which have entered into force, while part B gave five agreements which have not yet done so. As over a quarter of a century has now elapsed without the treaties mentioned in part B receiving the necessary support to bring them into force, the Commission decided to confine its present study to the treaties mentioned in part A.

22. The Commission interprets the request addressed to it by the General Assembly as relating only to the technical aspects of the question of extended participation in League of Nations treaties. In the present study, therefore, it will examine this question generally with reference to the twenty-six treaties given in part A of the Secretariat's list, without considering how far any particular treaty may or may not still retain its usefulness. However, in the course of the discussion it was stressed that quite a number of the treaties given in part A may have been overtaken by modern treaties concluded during the period of the United Nations, while some others may have lost much of their interest for States with the lapse of time. It was also pointed out that no re-examination of the treaties appears to have been undertaken with a view to ascertaining whether, quite apart from their participation clauses they may require any changes of substance in order to adapt them to contemporary conditions. The Commission accordingly decided to bring this aspect of the matter to the attention of the General Assembly, and to suggest that in due course a process of review should be initiated.

23. Five of the twenty-six treaties have rigid participation clauses, being confined to the States which were represented at or invited to the conference which drew up the treaty. <sup>95</sup> These treaties, in short, appear to have been designed to be closed treaties. The remaining twenty-one treaties were clearly intended to be open ended, the participation clause being so worded as to allow the participation of any State not represented at the conference to which a copy of the treaty might be communicated for that purpose by the Council of the League. It is only the fact of the dissolution of the League and its Council and the absence of any organ of the United Nations exercising the powers previously exercised by the Council under the treaties which has had the effect of turning them into closed treaties.

24. The arrangements made between the League of Nations and the United Nations for the transfer of certain functions, activities and assets of the League to the United Nations covered, *inter alia*, functions and powers belonging to the League of Nations under international agreements. At its final session the League Assembly passed a resolution whereby it recommended that the Members of the League should facilitate in every way the assumption without interruption by the United Nations of functions and powers entrusted to the League under international agreements of a technical and non-political character, which the United Nations was willing to maintain. <sup>96</sup> The General Assembly, for

<sup>93</sup> *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209 and Corr. 1).*

<sup>94</sup> *Ibid.*, *Seventeenth Session, Annexes*, agenda item 76, document A/C.6/L.498.

<sup>95</sup> In one case, the Convention Regarding the Measurement of Vessels Employed in Inland Navigation, Paris, 1925 (*League of Nations Treaty Series*, vol. 67, p. 63), the treaty was also open to States having a common frontier with one of the States invited to the Conference.

<sup>96</sup> *League of Nations, Official Journal, Special Supplement No. 194*, p. 57 (Resolution of 18 April 1946).

its part, in section I of resolution 24 (I) of 12 February 1946, reserved "the right to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialized agency brought into relationship with the United Nations should exercise each particular function or power assumed". However, having placed on record that by this resolution those Members of the United Nations which were parties to the instruments in question were assenting to the action contemplated and would use their good offices to secure the co-operation of the other parties to those instruments so far as was necessary, the General Assembly declared its willingness in principle to assume the exercise of certain functions and powers previously entrusted to the League; in the light of this declaration it adopted three decisions, A, B and C, which are contained in resolution 24 (I).<sup>97</sup>

25. Decision A recalled that under certain treaties the League had, for the general convenience of the parties, undertaken to act as a custodian of the original signed texts and to "perform certain functions, pertaining to a secretariat, which do not affect the operation of the instruments and do not relate to the substantive rights and obligations of the parties". Having then set out some of the main functions of a depositary, the General Assembly declared the willingness of the United Nations to "accept the custody of the instruments and to charge the Secretariat of the United Nations with the task of performing for the parties the functions, pertaining to a secretariat, formerly entrusted to the League of Nations". It may here be remarked that, purely secretarial though the functions of the Secretariat of the League may have been as depositary of the treaties, it was invested with these functions by the parties to each treaty, not by the League of Nations, for the appointment of the League Secretariat as depositary was effected by a provision of the "final clauses" of each treaty. The transfer of the depositary functions from the Secretariat of the League to that of the United Nations was therefore a modification of the final clauses of the treaties in question. The League Assembly, it is true, had directed its Secretary-General to transfer to the Secretariat of the United Nations for safe custody and performance of the functions previously performed by the League Secretariat all the texts of the League treaties. But although the General Assembly, as already mentioned, emphasized the assent given to this transfer by those Members of the United Nations which were also parties to the particular treaties, it did not seek to obtain the agreement of all the parties to the various treaties. It simply assumed the functions of the depositary of these treaties by resolution 24 (I) and charged the Secretariat with the task of carrying them out. No objection was raised by any party and the Secretary-General has acted as the depositary for all these treaties ever since the passing of the resolution.<sup>98</sup>

26. On the other hand, decision A contained in resolution 24 (I) underlined the purely secretarial character of the depositary functions transferred to the Secre-

tariat, pointing out that they did not affect "the operation of the instruments" or relate to the "substantive rights and obligations of the parties". Accordingly, in the case of closed treaties, including those where the closure has resulted solely from the disappearance of the Council of the League the Secretary General has not considered it within his powers under the terms of the resolution to accept signatures, ratifications or accessions from States not covered by the participation clause.

27. Decision B of the resolution dealt with instruments of a "technical and non-political character" containing provisions "relating to the substance of the instruments" whose due execution was dependent on the continued exercise of functions and powers which those instruments conferred upon organs of the League. The General Assembly expressed its willingness "to take the necessary measures to ensure the continued exercise of these functions and powers" and referred the matter to the Economic and Social Council for examination. Decision C dealt with functions and powers entrusted to the League by instruments having a political character. With regard to these instruments the General Assembly decided that it would either itself examine, or would submit to the appropriate organ of the United Nations, any request from the parties to an instrument that the United Nations should assume the exercise of the functions or powers entrusted to the League.

28. In pursuance of decisions B and C, the General Assembly between 1946 and 1953 approved seven protocols which amended earlier multilateral treaties and transferred the functions or powers formerly exercised by the League to organs of the United Nations. These protocols dealt with various treaties relating to: (1) opium and dangerous drugs (United Nations Treaty Series, vol. 12, p. 179); (2) economic statistics (United Nations Treaty Series, vol. 20, p. 229); (3) circulation of obscene publications (United Nations Treaty Series, vol. 30, p. 3); (4) the white slave traffic (United Nations Treaty Series, vol. 30, p. 23); (5) circulation of and traffic in obscene publications (United Nations Treaty Series, vol. 46, p. 169); (6) traffic in women and children (United Nations Treaty Series, vol. 53, p. 13); and (7) slavery (United Nations Treaty Series, vol. 182, p. 51). In all of these protocols, in addition to making any necessary amendments of substance, the opportunity was taken of replacing the participation clause of the earlier treaties with a clause opening them to accession by any Member of the United Nations and by any non-member State to which the Economic and Social Council decides officially to communicate a copy of the amended treaty. It is for this reason that the League of Nations treaties covered by the protocols are not included in part A of the Secretariat's list of multilateral agreements which are not open to new States.

29. When the problem of extending the right to participate in closed League of Nations treaties was taken up in the Sixth Committee, certain delegations — Australia, Ghana and Israel<sup>99</sup> — joined together in introducing a draft resolution designed to achieve this ob-

<sup>97</sup> See "Resolutions of the General Assembly concerning the Law of Treaties" (A/CN.4/154), para. 18.

<sup>98</sup> See *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* (ST/LEG/7), pp. 65-68.

<sup>99</sup> *Official Records of the General Assembly, Seventeenth Session, Annexes, agenda item 76, document A/C.6/L.504/Rev.2.*

jective. This draft resolution in its final form, after recalling the previously quoted passage from the Commission's report for 1962 and resolution 24 (I), proposed that the General Assembly should: (1) request the Secretary-General to ask the parties to the conventions listed in an annex to the resolution (i.e., the conventions listed in part A of the Secretariat's working paper) to state, within a period of twelve months from the date of the inquiry, whether they objected to the opening of those of the conventions to which they were parties for acceptance by any State Member of the United Nations or member of any specialized agency; (2) authorize the Secretary-General, if the majority of the parties to a convention had not within the period referred to in paragraph 1 objected to opening that convention to acceptance, to receive in deposit instruments of acceptance thereto which are submitted by any State Member of the United Nations or member of any specialized agency; (3) recommend that all States parties to the conventions listed in the annex of the resolution should recognize the legal effect of instruments of acceptance deposited in accordance with paragraph 2, and communicate to the Secretary-General as depositary their consent to participation in the conventions of States so depositing instruments of acceptance; (4) request the Secretary-General to inform Members of communications received by him under the resolution.

30. The sponsors of the draft resolution explained that the scheme proposed in their draft contemplated three stages: first, an inquiry to the parties whether they objected to opening a convention; second, an authorization to the Secretary-General to receive new instruments of acceptance; and third, a recommendation that the legal effect of new instruments deposited should be recognized. The first two stages were, they considered, purely administrative in character and did not affect legal relationships. The third stage, that of recognition of the legal effect of newly deposited instruments, would be only a recommendation and each State would be left to determine the method of such recognition in the light of the requirements of its own internal law.

31. During the debate in the Sixth Committee certain reservations were expressed as to the procedure proposed in the joint resolution. Some representatives felt that what was really involved in the first stage was the agreement of the parties to change a rule on participation which had been laid down in the conventions, and that for reasons of international and constitutional law consent to such a change could not be given informally, or tacitly by a mere failure to object. Some representatives stated that the course which was legally preferable in order to avoid uncertainty and constitutional difficulties was to prepare a protocol of amendment of the conventions, as had already been done in other cases by the General Assembly.<sup>100</sup> The sponsors of the draft resolution and some other delegations, however, expressed the view that a requirement of express consent might mean a delay of some years in the participation of new States, and that such a requirement was unnecessary.

32. Some representatives considered that the fact

that some new States might have become bound by the League treaties through succession to parties made it difficult to determine the list of the present-day parties to the treaties, as would need to be done under the draft resolution. Another representative thought that inviting new States to accede to the conventions ignored the possibility that they might have become parties by succession and that such an invitation might prejudice the work of the International Law Commission on State succession. The sponsors, on the other hand, took the view that the question of opening the treaties for new accessions was quite distinct from the succession of States, and could not prejudice the Commission's work on the latter question.

33. A number of representatives also expressed the view that, if participation in the treaties was to be opened to additional States, it should not be restricted to States Members of the United Nations or of a specialized agency, as was provided in the draft resolution.

34. Certain other points were made with respect to the draft resolution. One representative observed that its provision for a simple majority as sufficient to open the treaties to additional States appeared to be inconsistent with the requirement of a two-thirds majority in article 9, paragraph 1 (a), of the draft articles on the law of treaties provisionally adopted by the Commission in 1962. Another representative thought that it should have been made clear that it would not be permissible for acceding States to formulate reservations since he doubted whether the recent practice concerning reservations could be applied to the older treaties.

35. The Commission, as requested, has given due consideration to the views expressed during the discussions of this question at the seventeenth session of the General Assembly. It does not, however, understand its task to be to comment in detail upon these views, but to study the technical aspects of the question generally and to report.

36. The first point to be examined is the relation between the present question and that of the succession of States to League of Nations treaties, since it has a definite bearing also on the technical aspects of opening these treaties to participation by additional States. Thus, the joint draft resolution would require the Secretary-General to "ask the parties to the conventions listed in the annex" to state within a period of twelve months whether they objected to the "opening of those conventions to which they are parties" etc.; and his authority to receive instruments of acceptance in deposit from additional States would only arise if a "majority of the parties to a convention" had raised no objection to the opening of the convention. In other words, the identification of the parties to the treaties would be necessary both for the purposes of the inquiry and for determining when the authority of the Secretary-General to receive instruments from additional States came into force. Similarly, if the procedure of an amending protocol were to be used, it would be necessary for a stated number or proportion of the parties to each League treaty to become parties to the amending protocol in order to bring the latter into force. Again, therefore, there would be a need to identify the parties to the League treaties.

<sup>100</sup> See protocols mentioned in paragraph 28 above.

37. The present practice of the Secretary-General, as appears from the Secretariat memorandum on the succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150, paragraphs 10 to 13), is to inquire from each new State whether it recognizes that it is bound by United Nations treaties, and by League treaties amended by United Nations protocols, when any of these treaties had been made applicable to its territory by its predecessor State. In consequence of these inquiries a number of new States have signified their attitudes towards certain of the League treaties. But that practice has not previously extended to the League treaties now under consideration. According to the information contained in the Secretariat memorandum, the position with regard to these treaties is that Pakistan has of its own accord made communications to the Secretary-General stating that it considers itself a party to three of the treaties, while Laos has done the same with regard to one treaty. These communications have been notified to the Governments concerned.

38. The precise legal position of a new State whose territory was formerly under the sovereignty of a State party or signatory to a League treaty is a question which involves an examination of such principles of international law as may govern the succession of States to treaty rights or obligations. Clearly, if a certain view is taken of these principles, participation in the League treaties may be open to a considerable number of the new States without any special action being taken through the United Nations to open the treaties to them. But a number of points of some difficulty may have to be decided before it can be seen how far the problem is capable of being solved through principles of succession. In many of the League treaties, for example, a substantial proportion of the signatories have not proceeded to ratification and the point arises as to what may be the position of a new State whose predecessor in the territory was a signatory but not a party to the treaty. The Commission has only recently begun its study of this branch of international law and nothing in the preceding observations is to be understood as in any way prejudging its views on any aspects of the question of succession to treaties. The Commission is here concerned only to point out that, owing to some of the difficulties, the principles governing the succession of States to treaty rights or obligations can scarcely be expected to provide either a speedy or a complete solution of the problem now under consideration.

#### PROTOCOL OF AMENDMENT

39. This procedure, if it has the merit of avoiding any possible constitutional difficulty, also has certain disadvantages. In the first place, the procedure adopted in the seven protocols mentioned in paragraph 28 above is somewhat complicated. A protocol is drawn up under which the parties to the protocol undertake that as between themselves they will apply the amendments to the League treaty which are set out in an annex to the protocol. The protocol is open to signature or acceptance only by the States parties to the League treaty and is expressed to come into force when any two such States have become parties to the protocol. On the other hand, the amendments to the League

treaty contained in the annex to the protocol do not come into force until a majority of the parties to the League treaty have become parties to the protocol. Amongst the amendments are provisions making the League treaty, as amended by the protocol, open to accession by any Member of the United Nations and by any non-member State to which a designated organ of the United Nations shall decide officially to communicate a copy of the amended treaty. Thus, under the procedure of the United Nations protocols there are different dates for the entry into force of the protocol itself and of the amendments to the League treaty. Moreover, the parties to the original treaty become parties to the amended treaty by subscribing to the protocol, whilst other States do so by acceding to the amended treaty.

40. In the second place, the protocol operates only *inter se* the parties to it. This is unavoidable, since under the existing law, unless the treaty expressly provides otherwise, a limited number of the parties, even if they constitute a majority, cannot amend the treaty so as to effect its application to the remaining parties without the latter's consent. But it means that a protocol of amendment provides an incomplete solution to the problem of extending participation in League of Nations treaties to additional States, for accession to the amended treaty will not establish any treaty relations between the acceding State and parties to the original treaty which have failed to subscribe to the protocol. There is also a possibility that there may be some delay before the number of signatures or acceptances necessary to bring the required amending provision into force are obtained. Consequently, even if the use of a simplified form of protocol were to be found possible, this procedure would still have certain drawbacks.

#### THE THREE-POWER DRAFT RESOLUTION

41. When the Commission suggested that consideration might be given to the possibility of solving the present problem by administrative action taken through the depositary of the treaties, it had in mind that today international agreements are concluded in a great variety of forms, and that in multilateral treaties communications through the depositary are a normal means of obtaining the views of the interested States in matters touching the operation of the final clauses. From the point of view of international law, the only essential requirement for the opening of a treaty to participation by additional States is, it is believed, the consent of the parties and, for a certain period of time, of the States which drew up the treaty. Constitutional or political considerations may affect the decision of the interested States as to the particular form in which that consent should be expressed in any given case. But in principle the agreement of the interested States may be expressed in any form which they themselves may determine.

42. The three-power draft resolution, evidently starting from this standpoint, seeks to obtain the necessary consents by means of inquiries addressed to the parties to the various treaties by the Secretary-General in his capacity as depositary of the treaties. These inquiries would be in a negative form asking the parties to each treaty whether they have any objection to its being opened for acceptance by any State Member of the

United Nations or of any specialized agency. In order to obviate delay, the draft resolution contemplates that the parties should be invited to reply within twelve months and that a failure to reply within that period should be treated as equivalent to an absence of objection for the purpose only of determining whether the Secretary-General should be authorized to receive in deposit instruments of acceptance from Members of the United Nations or of a specialized agency. The authority of the Secretary-General to receive instruments in deposit is to arise at the end of the twelve month's period if a majority of the parties have not up to then made any objection. But such "tacit consent" of the majority would not, it appears, suffice to give legal effect to the instruments of acceptance deposited with the Secretary-General even vis-à-vis those parties whose consent is thus presumed. For paragraph 3 of the draft resolution recommends all the parties also to recognize the legal effect of the instruments and to communicate to the Secretary-General their consent to the participation of the States concerned in the treaties.

43. The various points made in the Sixth Committee with regard to the three-power draft resolution have been noted in paragraphs 30-34 above, and the question of the bearing of State succession upon the identification of the parties to the League treaties has already been discussed in paragraphs 36-37. It is for the Sixth Committee finally to appraise the legal merits or demerits of that draft resolution as a means of solving the present problem. The Commission will therefore limit itself to certain observations of a general nature with a view to assisting the Sixth Committee in arriving at its decision as to the best procedure to adopt in all the circumstances of the case.

44. The procedure proposed in the three-power draft resolution, though it offers the prospect of somewhat speedier action than might be obtainable through an amending protocol, does not avoid some of the latter's other defects. Its entry into effect is made dependent on the tacit consent of a "majority of the parties", thereby appearing to require an exhaustive determination of the States ranking as parties in order to ascertain the date when the procedure begins to become effective. In this connexion, it may be noted that the later United Nations protocols seek to minimize the difficulty arising from the need to identify the parties to League treaties by making the entry into force of the amendments dependent upon the acceptances of a specified number, rather than of a majority of the parties.

45. At the same time, it may be pointed out that the requirement of a simple majority laid down in the draft resolution, as in the United Nations protocols, is not in conflict with the rule formulated in article 9, paragraph 1 (a), of the Commission's draft articles, which contemplates a two-thirds majority for the opening of multi-lateral treaties to additional participation. That rule was proposed by the Commission *de lege ferenda* and under it the consent of a two-thirds majority would operate with binding effect for all the parties. But under the three-power draft resolution and the United Nations protocols the consent of a simple majority of the parties modifies the treaty only with effect *inter se* the parties which give their consent.

46. Finally, it is necessary to examine the point made in the Sixth Committee as to possible constitutional

objections to the procedure of tacit consent. Under the draft resolution, as its sponsors pointed out, tacit consent would operate only to establish the authority of the Secretary-General to receive instruments in deposit and it would be open to each party to follow whatever procedure it wished for the purpose of "recognizing" the legal force and effect of the instruments deposited with the Secretary-General. If this feature of the resolution may diminish the force of the constitutional objections, it also involves a certain risk of delaying the completion of the procedure and of obtaining only incomplete results. The Legal Counsel, at the 748th meeting of the Sixth Committee, put the matter on somewhat broader grounds. "A number of the protocols", he said, "made more extensive amendments than merely opening the old treaties to new parties, and hence a formal procedure for consent was suitable; but where the only object is to widen the possibilities for accession the Committee may find that no such formality is necessary" (A/C.6/L.506).

47. A participation clause, as already pointed out, is one of the "final clauses" of a treaty and is, in principle, on the same footing as a clause appointing a depositary. It differs, it is true, from a depositary clause in that it affects the scope of the operation of the treaty and therefore the substantive obligations of the parties. But it is a final clause and it is one which furnishes the basis upon which the constitutional processes of ratification, acceptance and approval by individual States take place. In the present instance the relation between the participation clauses of the League treaties and the constitutional processes of the individual parties may, it is thought, be significant. In twenty-one out of the twenty-six treaties, as already mentioned, the participation clauses were so formulated as to make the treaty open to participation by any Member of the League and any additional States to which the Council of the League should communicate a copy of the treaty for that purpose. Thus, not only did the negotiating representatives intend, when they drew up the treaty, to authorize the Council of the League to admit any further State to participation in the treaty, but each party when it gave its definitive consent to the treaty expressly conferred that authority upon the Council. In short, in the case of these twenty-one treaties, any State organ which ratified, consented to or approved the treaty in order to enable the State to become a party by so doing gave its express consent to the admission to the treaty not only of any Member of the League but of any further State at the decision of an external organ, the Council of the League. This being so, any possible constitutional objection to the use of a less formal procedure for modifying the participation clause would seem to be of much less force in the case of these treaties. Further, the very fact that the remaining five treaties were originally designed as closed treaties suggests that they may not be of great interest to new States today, and it may be found, on examination, that the problem in fact concerns only the twenty-one treaties and, perhaps, only a very limited number of these treaties.

48. The special form of the participation clauses of the twenty-one treaties further suggests that it may be worth examining the possibility of dealing with the problem on the basis that what is involved is a simple adaptation of the participation clauses to the change-over from the League to the United Nations. The case

may not be identical with that of the transfer of the depositary functions from the League to the United Nations, in that the participation clauses touch the scope of the operation of the treaties. But consideration should, it is thought, be given to the possibility of devising some procedure analogous to that used in the case of the depositary functions.

#### ALTERNATIVE SOLUTION

49. The special form of the participation clauses of the twenty-one treaties suggested to the Commission that it might be worth examining the possibility of dealing with the problem along the lines adopted in 1946 with regard to the transfer of the depositary functions of the League Secretariat to the Secretariat of the United Nations. The case might not be identical in that the participation clauses touch the scope of the operation of the treaty and that the functions of the Council of the League under those clauses were not purely administrative. But the Commission felt that in essence what was involved was an adaptation of the participation clauses of the League treaties to the change-over from the League to the United Nations. On this basis the General Assembly, by virtue of all the arrangements made in 1946 for the transfer of powers and functions from the League to the United Nations, would be entitled to designate an organ of the United Nations to act in the place of the Council of the League, and to authorize the organ so designated to exercise the powers of the Council of the League in regard to participation in the treaties in question. If this course were to be adopted, it would seem appropriate that the resolution of the General Assembly designating an organ of the United Nations to fulfil the League Council's functions under the treaties should: (a) recall the recommendation of the League Assembly that Members of the League should facilitate in every way the assumption by the United Nations of functions and powers entrusted to the League under international agreements of a technical and non-political character; (b) recite that by the resolution those Members of the United Nations which are parties to the League treaties in question give their assent to the assumption by the designated organ of the functions hitherto exercised by the League Council under the treaties in question; and (c) request the Secretary-General, as depositary of the treaties, to communicate the terms of the resolution to any party to the treaties not a Member of the United Nations.

#### CONCLUSIONS

50. The conclusion resulting from the Commission's study of the question referred to it by the General Assembly may, therefore, be summarized as follows:<sup>101</sup>

(a) The method of an amending protocol and the method of the three-power draft resolution both have their advantages and disadvantages. But both methods take account of the applicable rule of international law that the modification of the participation clauses requires the assent of the parties to the treaties, and the Commission does not feel called upon to express a pre-

ference between them from the point of view of the constitutional issues under internal law. At the same time, it has pointed out that the special form of the participation clauses of the treaties under consideration appears to diminish the force of the possible constitutional difficulties which were referred to in the Sixth Committee.

(b) While the topic of State succession has a certain relevance in the present connexion and is a complicating element in the procedures of amending protocol and three-power draft resolution, the adoption of these procedures need not prejudice the work of the Commission on this topic or preclude the use of either of those procedures, if so desired.

(c) However, in the light of the arrangements which were made on the occasion of the dissolution of the League of Nations and the assumption by the United Nations of some of its functions and powers in relation to treaties concluded under the auspices of the League, the General Assembly appears to be entitled, if it so desires, to designate an organ of the United Nations to assume and fulfil the powers which, under the participation clauses of the treaties in question, were formerly exercisable by the Council of the League. This would provide, as an alternative to the other two methods, a simplified and expeditious procedure for achieving the object of extending the participation in general multilateral treaties concluded under the auspices of the League. It would, indeed, be administrative action such as was envisaged by the Commission in 1962, and would avoid some of the difficulties attendant upon the use of the other methods.

(d) Even a superficial survey of the twenty-six treaties listed in the Secretariat memorandum indicates that today a number of them may hold no interest for States. The Commission suggests that this aspect of the matter should be further examined by the competent authorities. Subject to the outcome of this examination, the Commission reiterates its opinion that the extension of participation in treaties concluded under the auspices of the League is desirable.

(e) The Commission also suggests that the General Assembly should take the necessary steps to initiate an examination of the general multilateral treaties in question with a view to determining what action may be necessary to adapt them to contemporary conditions.

#### CHAPTER IV

##### Progress of work on other questions under study by the Commission

##### A. STATE RESPONSIBILITY: REPORT OF THE SUB-COMMITTEE

51. The Commission considered this question at its 686th meeting. Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility, introducing the Sub-Committee's report (A/CN.4/152),<sup>102</sup> drew special attention to the conclusions set out and the programme of work proposed in the report.

<sup>101</sup> For the various views expressed by the members of the Commission during the discussion, see the summary records of its 712th and 713th meetings.

<sup>102</sup> See annex I to the present report.