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Second report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur

Topic:
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Second report on succession in respect of treaties, by Sir Humphrey Waldock, Special Rapporteur

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I. Introduction

A. The basis of the present report

1. The Special Rapporteur's first report on this topic, which was entitled "Succession of States and Governments in respect of treaties",[1] was submitted to the Commission at its twentieth session. Owing to the heavy calls upon his time made by the first session of the United Nations Conference on the Law of Treaties, the Special Rapporteur found himself obliged to confine that report to a review of certain aspects of the topic and to the submission of four articles of a primarily introductory character.

2. At that session the Commission also had before it a first report of a preliminary character on "Succession of States in respect of rights and duties resulting from sources other than treaties",[2] submitted by Mr. Mohammed Bedjaoui, Special Rapporteur on that aspect of the topic of succession of States.

3. The two reports were considered successively by the Commission, beginning with the report of Mr. Bedjaoui on succession in respect of rights and duties resulting from sources other than treaties and continuing with the report of the present Special Rapporteur on succession in respect of treaties. A full summary of the Commission's discussion of the two reports, together with its conclusions, is included in chapter III, section C of the Commission's report for 1968.[3]

Dividing lines between the two topics of succession

4. In the course of the discussion in the Commission general agreement was expressed with the view that the criterion for demarcation between the topics entrusted to the two separate Special Rapporteurs should be "the subject-matter of succession, i.e. the content of succession and not its modalities".[4] Accordingly, considering that the reference to "rights and duties resulting from *sources* other than treaties" in the title to the topic entrusted to Mr. Bedjaoui might imply a different line of demarcation, the Commission amended that title to read more simply: "Succession in respect of matters other than treaties". Consequent upon this amendment, the Commission also endorsed the present Special Rapporteur's suggestion that in the interests of uniformity the title to the topic dealt with in his report should be modified to read: "Succession in respect of treaties".[5]

5. In the same general connexion, the Commission noted[6] the present Special Rapporteur's interpretation of his task as "strictly limited to succession with respect to treaties, i.e. to the question how far treaties previously concluded and applicable with respect to a given territory might still be applicable after a change in the sovereignty over that territory"; and his proposal to proceed on the basis that the present topic is "essentially concerned only with the question of succession in respect of the treaty as such".

Nature and form of the work

6. The Commission was agreed that its work on succession of States in respect of treaties, as also on the topics of succession of States entrusted to Mr. Bedjaoui, should combine the technique of codification with that of progressive development of international law.[7]

7. The Commission, while postponing its decision on the final form to be given to its work, noted[8] the statements of the present Special Rapporteur that he intended:

(*a*) To cast his study of succession in respect of treaties in the form of draft articles on the model of a convention in order to provide the Commission with specific texts on which to focus the discussion and in order to clarify the issues; and

(*b*) To prepare the draft in the form of an autonomous group of articles on the specific topic of succession in respect of treaties.

The Special Rapporteur has accordingly proceeded upon that basis in drawing up his second report.

Origins and types of succession

8. On the substantive aspects of its work on succession of States, the Commission was unanimous in thinking that it would not be advisable to deal separately with the origins and types of succession. Members considered that it would be "sufficient for the Commission and the Special Rapporteurs on the topic to bear in mind the various situations, with a view to formulating, when necessary, a special rule for the case of a succession due to a particular cause".[9]

Specific problems of new States

9. During the discussion members of the Commission commented upon the possible implications of "decolonization" in regard to its study of succession of States. Varying views were expressed, particular reference being made to General Assembly resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963, which recommended that the Commission should proceed with its work on the succession of States "with appropriate reference to the views of States which have achieved independence since the Second World War". In the light of the discussion and the resolutions in question, the Commission concluded that "the problem of new States should be given special attention throughout the study of the topic without, however, neglecting other causes of succession on that account".[10] This conclusion

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

[2] *Ibid.*, document A/CN.4/204, p. 94.

[3] *Ibid.*, document A/7209/Rev.1, pp. 216-223, paras. 44-91.

[4] *Ibid.*, p. 216, para. 46.

[5] *Ibid.*, p. 222, para. 91.

[6] *Ibid.*, p. 221, para. 82.

[7] *Ibid.*, p. 217, para. 51, and p. 221, para. 83.

[8] *Ibid.*, pp. 221 and 222, paras. 84-89.

[9] *Ibid.*, p. 218, para. 59.

[10] *Ibid.*, p. 218, paras. 60 and 61.

the Special Rapporteur has taken as a guideline in preparing the present report. As he observed in his first report: "The Commission cannot fail to give particular importance to the case of 'new' States because it is both the commonest and the most perplexing form in which the issue of succession arises. But there is a risk that the perspective of the effort at codification might become distorted if succession in respect of treaties were to be approached too much from the viewpoint of the 'new' State alone".[11]

10. Various particular aspects of succession in respect of treaties were touched upon by members in the course of the discussion but were not pursued having regard to its preliminary character. One point made by some members was that the Sub-Committee in 1963 had recommended that the Special Rapporteur should "initially concentrate on the topic of State succession, and should study succession of Governments in so far as necessary to complement the study of State succession".[12] In the light of that recommendation these members suggested the omission of any reference to "Governments" in the title of the present topic; and this suggestion has been followed by the Special Rapporteur in the present report.

B. Proceedings in the General Assembly

11. During the twenty-third session of the General Assembly the report of the International Law Commission on the work of its twentieth session was considered by the Sixth Committee at its 1029th to 1039th meetings. The topic of succession of States gave rise to comments from a number of representatives whose observations were in the main directed to the same aspects of the topic as had been the subject of discussion within the Commission. As in the Commission, differing views were expressed on some of the points; and, the debate being of a preliminary character, no conclusions were recorded by the Sixth Committee. A summary of the debate is contained in paragraphs 38 to 58 of the Committee's report to the General Assembly.[13] In resolution 2400 (XXIII) of 11 December 1968 the General Assembly confined itself to recalling its previous resolutions on succession of States and Governments and to recommending that the Commission should continue its work on this topic, "taking into account the views and considerations referred to in General Assembly resolutions 1765 (XVII) and 1902 (XVIII)".

C. Secretariat studies relating to the topic of succession of States

12. The Secretariat, it may be useful to recall, has prepared and distributed to members of the Commission the following documents relevant to the Commission's study of succession in respect of treaties:

(*a*) A memorandum on the succession of States in relation to membership in the United Nations;[14]

(*b*) A memorandum on the succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary;[15]

(*c*) A study entitled "Digest of the decisions of international tribunals relating to State succession";[16]

(*d*) A study entitled "Digest of decisions of national courts relating to succession of States and Governments";[17]

(*e*) Five studies on the succession of States to multilateral treaties;[18]

(*f*) A volume of the United Nations Legislative Series entitled *Materials on Succession of States*,[19] containing the information provided or indicated by Governments of Member States in response to the Secretary-General's circular note inviting them to submit the text of any treaties, laws, decrees, regulations, diplomatic correspondence etc., concerning the procedure of succession relating to the States which have achieved independence since the Second World War.

D. Recent study by the International Law Association

13. The legal literature on the subject of the succession of States and Governments is extensive[20] and, so far as was possible and appropriate, has been consulted by the Special Rapporteur. Special mention must, however, be made of a recent study by the International Law Association because of its convenient collection and exposition of a large volume of State practice relating to succession in respect of treaties. In 1961, the International Law Association established a Committee of fourteen members to study the subject of "the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors", the Chairman of the Committee being Professor Charles Rousseau and the Rapporteur Professor D. P. O'Connell. The Committee presented an interim report which was discussed at the Fifty-Second Conference of the Association held at Helsinki in 1966.[21] On the basis of this interim report the Association adopted four recommendations of a policy character

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[11] *Ibid.*, document A/CN.4/202, p. 90, para. 14.

[12] *Ibid.*, document A/7209/Rev.1, p. 222, para. 90.

[13] *Official Records of the General Assembly, Twenty-third Session, Annexes*, agenda item 84, document A/7370.

[14] See *Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/149 and Add.1, p. 101.

[15] *Ibid.*, document A/CN.4/150, p. 106.

[16] *Ibid.*, document A/CN.4/151, p. 131.

[17] See *Yearbook of the International Law Commission, 1963*, vol. II, document A/CN.4/157, p. 95.

[18] See *Yearbook of the International Law Commission, 1968*, vol. II, documents A/CN.4/200/Rev.2 and A/CN.4/200/Add.1 and 2, p. 1.

[19] ST/LEG/SER.B/14.

[20] The most recent work is a comprehensive study of the subject in two volumes by Professor D. P. O'Connell entitled *State Succession in Municipal Law and International Law* (University Press, Cambridge, 1967). A valuable bibliography of the law of State succession is to be found at the end of vol. I (pp. 543-562) and vol. II (pp. 387-406).

[21] The International Law Association, *Report of the Fifty-Second Conference, Helsinki, 1966*, p. xiii and pp. 557-595.

designed to achieve the maximum degree of continuity in the treaty relations of newly independent States. In 1965 the Association published a volume entitled *The Effect of Independence on Treaties* and comprising sixteen chapters, which contain a series of studies on particular aspects of succession in respect of treaties accompanied by extracts from State practice set out in appendices to the various chapters. Meanwhile, the Committee continued its examination of the law of succession in relation to newly independent States and presented to the Fifty-Third Conference of the Association, held at Buenos Aires in September 1968, a second interim report in which it submitted a draft of nine resolutions for adoption by the Association.[22]

14. Eight of the nine resolutions drawn up by the Committee relate to succession in respect of treaties, and all these were adopted by the Association without amendment.[23] The resolutions are to a large extent cast in the form of draft articles and, as the product of a very recent study by a learned society having a wide membership, they are clearly of direct interest to the Commission. The report of the Committee stated that the resolutions were "presented as a carefully considered compromise"; and that, although there might be some basic differences of view among its members, the Committee was unanimous in believing that its proposals would "constitute a satisfactory working system for the solution of most problems which will arise internationally, between States of differing viewpoints".

15. The texts of the eight resolutions proposed by the Committee and adopted by the International Law Association are as follows:

1. Unless the treaty otherwise provides, a State, on attaining independence may invoke and may have invoked against it a treaty which was internationally in force with respect to the entity or territory corresponding with it prior to independence if:

(*a*) The newly independent State has been notified or otherwise knows that the treaty has been internationally in force with respect to the entity or territory corresponding with it prior to independence, and

(*b*) (i) The newly independent State and the other party or parties have expressly agreed to be bound by the terms of the treaty; or

(ii) The newly independent State and the other party or parties have applied the terms of the treaty *inter se*; or

(iii) In the case of a bilateral treaty, neither the newly independent State nor the other party has declared, within a reasonable time after the attaining of independence, that the treaty is regarded as no longer in force between them; or

(iv) In the case of a multilateral treaty, the newly independent State has not declared, within a reasonable time after the attaining of independence, that the treaty is not in force with respect to it.

2. In cases of unions or federations of States, treaties, unless they otherwise provide, remain in force within the regional limits prescribed at the time of their conclusion to the extent to which their implementation is consistent with the constitutional position established by the instrument of union or federation.

In such a case where the treaty remains in force, the question whether the union or federation becomes responsible for performance of the treaty is dependent on the extent to which the constituent governments remain competent to negotiate directly with foreign States and to become parties to arbitration proceedings therewith.

In cases of dissolution of unions or federations, the separate components of the composite State may invoke or have invoked against them treaties of the composite State to the extent to which these are consistent with the changed circumstances resulting from the dissolution.

3. Termination of a treaty by notice or otherwise between two original parties does not in itself have the effect of terminating the application of the treaty vis-à-vis the successor States or as between the successor States.

4. In view of the circumstances that some successor States of two or more parties to a treaty may remain parties thereto, it is recommended that when a successor State takes action either to affirm the treaty or to terminate it, it should consider the question whether the treaty is in force with respect to other States, and it should, where it wishes to terminate a treaty as against such successor States, address notes to this effect to those successor States who have not clearly stated their intention to continue the treaty, as well as to those who have.

5. Unless a multilateral treaty otherwise provides, a newly independent State which succeeds to it becomes a beneficiary of the rights and becomes affected by the obligations thereof vis-à-vis all parties thereto, including its own predecessor and other succeeding States, whether they are successors to the same predecessor State or to other parties.

6. The question whether successor States which indicate their wish and intention to regard themselves as successor States to treaties which are not in force at the time of their independence can be counted for the purpose of aggregating the number of States parties to the convention for the purpose of bringing it into force is a question which requires further study.

7. A newly independent State is not bound by any of the rights or obligations resulting from the ratification by its predecessor State of a convention which is not in force at the date of independence.

8. When a treaty which provides for the delimitation of a national boundary between two States has been executed in the sense that the boundary has been delimited and no further action needs to be taken, the treaty has spent its force and what is succeeded to is not the treaty but the extent of national territory so delimited; but where a boundary treaty provides for future action to delimit it, or provides for future reciprocal rights in relation to the boundary, the question whether the treaty is succeeded to or not is a question to be answered by reference to the principles in section 1 above where these are applicable, and where they are not applicable it is to be answered by reference to such other legal principles as may prove to be relevant.

16. In its report the Committee attached to its draft resolutions a number of explanatory "notes" together with the "separate comments" of the Rapporteur and five other members of the Committee. Included also in the report were the texts of five "additional points" proposed by the Rapporteur and concerned with the implications of "reservations" and "interpretative declarations" in cases of succession in respect of treaties. As the Committee had been unwilling to take a position on the question of reservations to treaties pending its consideration by the United Nations Conference on the

[22] International Law Association, Buenos Aires Conference (1968), *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, pp. 1-3.

[23] Information supplied by the secretariat of the International Law Association; the ninth resolution, which concerns liability for the debts of the previous administration, was deferred for further consideration.

Law of Treaties, these "additional points" were referred to as merely "offered for consideration" and were not the subject of any pronouncement by the Committee or by the plenary conference of the International Law Association.

17. The texts of the "additional points" proposed by the Rapporteur of the International Law Association were as follows:

10. A successor State can continue only the legal situation brought about as a result of its predecessor's signature or ratification. Since a reservation delimits that legal situation it follows that the treaty is succeeded to (if at all) with the reservation.

11. A new State which does not wish to continue the reservations of its predecessor is free to withdraw these, or delimit them so as to enter more fully into the undertakings of the convention.

12. A new State may not append new reservations to its declaration of continuity without the consent of the other parties to the convention. However, under the existing rules of international law, this consent may be tacit, and if no other party objects within a reasonable time to the reservation it may be deemed to be effective in virtue of tacit consent. However, tacit consent may not be presumed when in virtue of the terms of the convention reservations are excluded or are permitted only in respect of some articles and the successor State has reserved other than these articles.

13. Since a new State take over the legal situation of its predecessor, it takes over the consequences of its predecessor's objections to an incompatible reservation made to a multilateral convention by another party. Therefore the reservation would not be effective against the new State unless the latter formally waives the objection.

14. A new State also takes over the effects of any interpretative declaration of its predecessor until it makes an alternative declaration which it can do in its declaration of continuity.

18. Appended to the texts of the "resolutions" and "additional points" are a number of "notes" on particular aspects of the topic and of "comments" by individual members of the Committee. The report also has five annexes containing recent State practice and other material relating to succession of new States.

E. The question of decolonization as an element in the topic of succession of States

19. The International Law Association resolutions, although limited to the succession of "new" States, cover much of the ground which falls within the subject entrusted to the present Special Rapporteur. They do not touch the case of the simple passing of an area of territory from the sovereignty of one existing State to that of another; nor do they have any special provision for "protected States" or territories under "mandate" or "trusteeship". On the other hand, they do deal generally with cases of "unions" and "federations" of States. Furthermore, although the main emphasis of the resolutions is on "newly independent" States, they formulate general rules for application to "new" States and do not differentiate between "new" States resulting from decolonization and other "new" States.

20. Both in the International Law Commission and in the Sixth Committee of the United Nations General Assembly, varying views were expressed regarding the significance of the process of "decolonization" as an element in the law of succession.[24] Some members considered that succession resulting from decolonization should be the subject of a special study by the Commission, envisaging as a possibility the need to include a separate chapter on decolonization in the Commission's draft. These members urged that decolonization is one of the aims of the international community and is proceeding under its supervision; that succession resulting from decolonization, as a result, presents specific aspects peculiar to it; and that decolonization has given rise to rules which affect the rules of traditional succession. It was not, they said, a question of minimizing the other aspects of succession, but of emphasizing the aspects resulting from decolonization. Other members, however, stressed the need to avoid confusing succession with decolonization, which they considered as merely one of the processes of transferring sovereignty from one State to another that create succession problems. In the view of these other members elements of continuity and rupture appear both in decolonization and traditional succession; decolonization is approaching completion, and the adoption of rules governing it will not satisfy future needs; attention should therefore be devoted mainly to the cases of succession most likely to occur in the future, e.g. dissolution, merger, economic integration, and not only to the important but transitory problems of decolonization. Certain other members took the view that, since the Commission was to study the problems of succession affecting all new States, the question of studying decolonization was ultimately only a question of priorities.

21. The principal new factor which has appeared in the practice regarding succession of States during the period of decolonization under the United Nations has been the use of the agreements commonly referred to as "devolution" or inheritance agreements. Otherwise, the State practice which has so far been published—and this is now quite extensive—contains comparatively little evidence suggesting, so far as concerns the present topic, a need to treat decolonization as a specific category of succession. Equally, it contains little evidence to suggest that decolonization, as such, calls for recognition as a specific element in the legal rules applicable to the succession of new States. The points mentioned in the Commission or in the Sixth Committee as possibly calling for a special treatment of decolonization appear for the most part to be points which, if valid, will be valid also in the case of a new State arising from a dismemberment outside the process of decolonization. As to "devolution" agreements, these may, in principle, occur in any instance of the creation of a new State by agreement with the predecessor State. On the other hand, they have been specially connected with the creation of new States within the process of "decolonization"; and the context in which these agreements were concluded may clearly, under the general law of treaties, affect their interpretation or even their validity. Accordingly, the State practice in regard to these agreements must, in the view of the Special Rapporteur, be closely examined by the Commission and due account be taken of

[24] See *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, pp. 218-220, paras. 57-70.

their special context. But when this has been done, it is not believed that the State practice will be found to call for a general study of decolonization as a separate category of succession.

22. In general, the question with which the Commission has to concern itself is believed to be not so much whether decolonization may constitute a special new form of succession as what may be the implications of the principles of the Charter, including "self-determination", in the modern law concerning succession in respect of treaties. The point may be illustrated by reference to resolution 1 adopted by the International Law Association. Sub-paragraphs (*b*) (iii) and (*b*) (vi) of that resolution clearly proceed upon the basis that the modern law does, or ought to, presume that a "newly independent State" consents to be bound by any treaties previously in force internationally with respect to its territory, unless within a reasonable time it declares a contrary intention. In formulating that presumption the International Law Association was no doubt influenced by the ever-increasing interdependence of States, the consequential advantages of promoting the continuity of treaty relations in cases of succession and the considerable extent to which in the era of decolonization newly independent States have accepted the continuance of the treaties of the predecessor sovereigns. It is, however, one thing to admit as a matter of policy the general desirability of a certain continuity in treaty relations upon the occurrence of a succession and another thing to express that policy in terms of a legal presumption. On this point, quite independently of the question whether such a presumption is compatible with the modern State practice, the Commission may have to consider the possible relevance in this regard of the principle of self-determination.

23. Attention has been drawn in this introduction to the above-mentioned presumption in the first resolution of the text of the International Law Association because it touches a fundamental point of principle affecting the Commission's general approach to the formulation of the law relating to the succession of newly independent States. The point will be further, and more closely, examined in the commentaries to articles 3 and 4 of the present draft. The traditional law on this point—the principle that a new State begins its treaty relations with a clean slate—was certainly consistent with the principle of self-determination, even if in certain respects it may have been inadequate. The question for the Commission will be whether to retain this principle of the traditional law as the underlying norm or to follow the International Law Association and admit a certain presumption in favour of the transmission of the treaties of the predecessor sovereign to a new State.

II. Text of draft articles with commentary

Article 1. Use of terms

For the purposes of the present articles:

1. (*a*) "Succession" means the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory;

(*b*) "Successor State" means the State which has replaced another State on the occurrence of a "succession";

(*c*) "Predecessor State" means the State which has been replaced on the occurrence of a "succession".

Commentary

(1) *Paragraph 1* (a) specifies the sense in which the term "succession" is used in the draft articles and is of cardinal importance for the whole structure of the draft. In many systems of municipal law, "succession" is a legal term and a legal institution which connotes the devolution from one person to another of rights or obligations automatically *by operation of law* on the happening of an event, as, for example, upon a death. The "successor" may or may not, in any particular system of law, have an option to disclaim the "succession". But in principle the event in question and the relationship of the "successor" to the person affected by the event cause the successor as a matter of law to "succeed" to certain rights or obligations of that person. The term "succession" therefore tends in municipal law to carry the meaning of a legal institution which, given the relevant event, by itself brings about the transfer of legal rights and obligations. In international law analogies drawn from municipal law concepts of succession are frequent in the writings of jurists and are sometimes also to be found in State practice. A natural enough tendency also manifests itself both among writers and in State practice to use the word "succession" as a convenient term to describe any assumption by a State of rights or obligations previously applicable with respect to territory which has passed under its sovereignty without any nice consideration of whether this is truly succession by operation of law or merely a voluntary arrangement of the States concerned. This looseness in the use of the expression "State succession" in international law is reflected in the definition given to the term "*Succession d'Etats*" in the *Dictionnaire de la terminologie du droit international* [25] which translated *reads as follows:

> A term frequently use · by writes to denote:
>
> (*a*) The situation which occurs when one State permanently replaces another State in a territory and with respect to the population of that territory as a result of total incorporation or partial annexation, of division or of the creation of a new State, whether the State to which the territory in question previously pertained continues or ceases to exist;
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> (*b*) The substitution of one State in the rights and obligations of the other State which results from that situation "Succession of States means both the territorial change itself—in other words, the fact that within a given territory one State replaces another—and the succession of one of those States to the rights and obligations of the other (i.e., of the State whose territory has passed to the successor State)." Kelsen, *Académie de Droit International*, vol. 42, p. 314.

(2) Municipal law analogies, however suggetsive and valuable in some connexions, have always to be viewed

[25] Paris, Sirey, 1960, p. 587.

* *Editorial note.* Translation supplied by Sir Humphrey Waldock.

with caution in international law; for an assimilation of States to individuals as legal persons neglects fundamental differences and may lead to unjustifiable conclusions derived from municipal law. In international law and more especially in the field of treaties, the crucial question is to determine whether and how far the law recognizes any cases of "succession" in the strict, municipal law sense of the transfer of rights or obligations by operation of law. The answer to be given to this question will only become clear for the purposes of the present articles when the Commission has undertaken a full examination of the subject of succession in respect of treaties. Meanwhile, for working purposes and without in any way prejudging the outcome of that examination, the Special Rapporteur considers it advisable to use the term "succession" exclusively as referring to the *fact* of the replacement of one State by another in the sovereignty of territory or in the competence to conclude treaties with respect to territory. Indeed, purely for drafting reasons it will probably be found convenient, whatever the Commission's conclusions on the questions of substance, to use the term "succession" exclusively as referring to the fact of a change in the sovereignty or treaty-making competence and to state separately and specifically any possible transfer of rights or obligations occurring upon such a "succession".

(3) The Special Rapporteur emphasizes that the meaning attributed to the term "succession" in paragraph 1 (*a*) is not intended as a general or exclusive definition of "succession" as a legal term in international law. On the contrary, as the title and opening words of the article imply, paragraph 1 (*a*) simply states the meaning with which the word "succession" is used in the present draft. If heavy circumlocutions are to be avoided, some convenient expression is needed to denote the fact of change of sovereignty, or of change of treaty competence, which raises the question of the continuance or otherwise of the application of treaties. The expressions "State succession" or "succession of States" are in general use and so convenient in this connexion that the temptation to employ the word "succession" for this purpose is almost inescapable, despite a certain ambiguity as to its legal implications. On the other hand, the word is certainly ambiguous since it may denote either the mere fact of a change of sovereignty or both a change of sovereignty and a transmission of rights and obligations as a legal incident of that change. Accordingly, if the word "succession" is to be used—provisionally at any rate—in its narrower, purely factual, sense of the replacement of one State by another in the sovereignty or treaty competence of a territory, it is necessary that this should be clearly stated in order to avoid any misunderstanding of the rules formulated in the draft. The Special Rapporteur, as already indicated in the previous paragraph, believes that to abopt this meaning for the word "succession" at this stage may be helpful also in regard to the Commission's study of the substantive law. The extent to which, and the conditions under which, any form of transmission of treaty rights or obligations is recognized in international law are complex and delicate questions; and it may be better that in the first instance they should be studied individually on the merits of each particular case unadulterated by concepts deriving from notions of succession in municipal law. When the relevant rules have been identified and stated for the various cases of "succession of States", the Commission will be in a better position to decide upon the appropriate terminology.

(4) These further explanations of the meaning attributed to "succession" in paragraph 1 (*a*) are prompted by the Commission's discussion of this point at the twentieth session.[26] In the course of that discussion members commented upon the formulation of article 1, paragraph 2 (*a*) in the Special Rapporteur's first report, in which it read: "'Succession' means the replacement of one State by another...in the possession of the competence to conclude treaties with respect to a given territory".[27] It was explained by the Special Rapporteur that the phrase "competence to conclude treaties" had been used in the formulation, instead of "sovereignty", because it was capable of covering such special cases as "mandates", trusteeships and protected States. Some members supported this formulation, pointing out that it might also embrace maritime zones of limited jurisdiction in respect of which treaties might have been concluded by the predecessor State. Certain other members, however, preferred a formulation in terms of a change of "sovereignty" on the ground that this would exclude certain situations such as a military occupation. The Special Rapporteur doubts whether the formulation of the meaning of the term "succession" in the draft ought to be in any way influenced by such a special case as a military occupation. The appropriate procedure would seem rather a general article reserving the question of military occupations altogether from the draft, just as such special cases as "aggression" and the "outbreak of hostilities" have been reserved from the draft Convention on the Law of Treaties.[28] Equally, to formulate "succession" only in terms of change of sovereignty may be too narrow, having regard to the special categories of cases mentioned in the debate. In view, however, of the feeling of some members that change of "sovereignty" should find mention in the formulation, the Special Rapporteur suggests that the difficulty might be met by referring to both cases, change of sovereignty and change of treaty competence.

(5) The meanings attributed in paragraphs 1 (*b*) and 1 (*c*) to the terms "Successor State" and "Predecessor State" are merely consequential upon the meaning given to "succession" in paragraph 1 (*a*).

(6) As the work progresses, it may be found desirable in the present article to add the meanings of further terms in order to give precision to the sense in which they are used in the draft. But the Commission has usually found it convenient to leave the general question

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[26] See *Yearbook of the International Law Commission, 1968*, vol. II, document A/7209/Rev.1, p. 217, paras. 47-50.

[27] *Ibid.*, document A/CN.4/202, p. 90.

[28] See *Yearbook of the International Law Commission*, 1963, vol. II, document A/5509, p. 189, para. 14, and *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, part II, p. 176, para. 29.

of the use of terms until a later stage of its work. In this connexion, as indicated in the first report of the Special Rapporteur, certain questions may arise as to the relation between terms used in the present draft and also used in the draft convention on the law of treaties. For example, in the draft Convention on the Law of Treaties the term "treaty" is given a specific meaning [29] which has the effect of limiting the categories of international agreements to which the draft convention applies. Similarly, in the present draft, as in the draft Convention on the Law of Treaties, the question will arise as to whether any general reservation should be made in regard to the relevant rules of international organizations where the "succession" has reference to a constituent instrument or a treaty adopted within the organization concerned. These questions were ventilated in the Special Rapporteur's first report in articles 2 and 3 of a chapter entitled "General provisions".[30] The interpretation placed by the Special Rapporteur, however, on the preliminary discussion of succession of States at the twentieth session is that the Commission would, on the whole, prefer to leave aside questions of this kind until a later stage of its work on "succession". For this reason, they have been omitted from the present report in which, therefore, articles 2 and 3 of the previous draft do not again appear.

Article 2. Area of territory passing from one State to another

When an area of territory, which is not itself organized as a State possessing treaty-making competence, passes under the sovereignty of an already existing State:

(*a*) Treaties of the successor State, concluded before the succession, become applicable in respect of that area from the date of the succession, unless it appears from a particular treaty or is otherwise established that such application would be incompatible with the object and purpose of that treaty.

(*b*) Treaties of the predecessor State cease to be applicable in respect of that area from the same date.

Commentary

(1) This article concerns the application of a rule, which is often referred to by writers as the "moving treaty frontiers" rule, in cases where an area of territory not itself a State undergoes a change of sovereignty and the successor State is an already existing State. The article is thus confined to cases which do not involve a union or federation of States and equally do not involve the emergence of a new State. Admittedly, the moving treaty frontiers rule has a wider application than the present article, since it also operates in varying degrees both in the case of a union or federation of States and in the case of the emergence of a new State. But in these other cases the question of the continued application of the treaties of the predecessor State is much more prominent, so that the operation of the moving treaty frontiers rule requires considerable qualification. In the cases covered by the present article—the mere addition of a piece of territory to an existing State by transfer or otherwise—the moving treaty frontiers rule appears in its simplest form. As that rule is a basic element underlying the whole law regarding succession in respect of treaties, it seems desirable to state it in the clearest possible form before entering upon the various cases in which its operation may require to be qualified by other rules.

(2) It is, of course, true that the moving treaty frontiers rule is a rule which by its terms excludes any succession in respect of treaties. Shortly stated, the rule provides that, on a territory's undergoing a change of sovereignty, it passes automatically out of the treaty régime of the predecessor sovereign into the treaty régime of the successor sovereign. It thus has two aspects, one positive and the other negative. The positive aspect is that the treaties of the successor State begin automatically to apply in respect of the territory as from the date of the succession. The negative aspect is that the treaties of the predecessor State, in turn, cease automatically to apply in respect of the territory. The rule thus assumes a simple substitution of one treaty régime for another, and denies altogether any succession in respect of treaties. No doubt, it was because the cases covered by the present article do not normally raise any question of succession in respect of treaties that they find no place in the recommendations of the International Law Association. Nevertheless, these cases do involve a "succession" in the sense of a replacement of one State by another in the sovereignty of the territory, so that their inclusion in the present draft articles seems in itself logical. Furthermore, as already indicated, the whole law of succession in respect of treaties is really concerned with the questions in what cases and under what conditions are there exceptions to the moving treaty frontiers rule, which is, therefore, a basic provision of that law. Accordingly, it seems not merely desirable but necessary for the Commission to include the present article in its draft.

(3) Sub-paragraph (*a*) of the article sets out the positive part of the moving treaty frontiers rule in its application to cases where territory is added to an already existing State. This aspect of the rule derives directly from the general provision of the law of treaties contained in article 25 of the draft Vienna Convention, which reads as follows:

> Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.[31]

Implicit in that provision is the rule that when an existing State acquires the sovereignty of an additional piece of territory, its treaties automatically become applicable in respect of the newly acquired territory to the same extent as would have been the case if the territory had been

[29] See article 2, para.1 (*a*) of the draft articles on the law of treaties, *Yearbook of the International Law Commission, 1966*, vol. II, document A/6309/Rev.1, p. 187.

[30] See *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/202, pp. 91 and 92.

[31] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF.39/14, para. 256.

under its sovereignty when each treaty was concluded. Under the law of treaties the Parties are presumed to intend that a treaty shall be applicable in respect of all the territory of each of them unless it is established that they intended the treaty to apply in respect only of a particular territory or territories or of a particular region. Except, therefore, in the case of a treaty's having a restricted territorial scope which does not embrace the newly acquired territory, a treaty must be understood as applicable automatically *and of its own force in respect of any territory newly acquired by one if its Parties.* That this is indeed the rule where an existing State acquires an additional piece of territory is confirmed by State practice.

(4) Among the earlier precedents one of the clearest statements of the rule is to be found in an Opinion given to the British Government in 1856 concerning the application of a Franco-British Treaty of 1826 to Algiers after the latter's annexation by France. The Queen's Advocate there said:

> ... it may be pointed out to the French Government that Treaty obligations are permanent and indefeasible, whilst the actual Geographical and Political boundaries of the Dominions of the contracting parties are necessarily subject to frequent changes, and that the object and spirit, no less than the text of this Convention, requires that its application and operation shall be co-extensive with the actual limits of the Dominions of both Nations, whatsoever may be the changes in such limits, or the date or circumstances of the acquisition of any particular place to which it may be sought to apply the provisions of the Convention, or the Administrative or fiscal system which may be there permitted or enforced by the Sovereign Power.[32]

Other older precedents include the extension of French treaties to Madagascar in 1896,[33] the extension of United States treaties to the Hawaiian Islands in 1898 by Joint Resolution of Congress,[34] and the application of British treaties to Cyprus after its annexation in 1915.[35]

(5) Similarly, on the formation of Yugoslavia after the First World War, the former treaties of Serbia were regarded as having become applicable to the whole territory of Yugoslavia. If some have questioned whether it was correct to treat Yugoslavia as an enlarged Serbia rather than as a new State, in State practice the situation was treated as one where the treaties of Serbia should be regarded as applicable *ipso facto* in respect of the whole of Yugoslavia. This seems to have been the implication of article 12 of the Treaty of St. Germain so far as concerns all treaties concluded between Serbia and the several Principal Allied and Associated Powers.[36] The United States afterwards took the position that Serbian treaties with the United States both continued to be applicable and extended to the whole of Yugoslavia,[37] while a number of neutral Powers, including Denmark, Holland, Spain, Sweden and Switzerland, also recognized the continued application of Serbian treaties and their extension to Yugoslavia.[38] The United States position was made particularly clear in a State Department memorandum filed as *amicus curiae* in the case of *Ivancevic* v. *Artukovic*, where the Department said:

> The weight of authority among writers on international law, as well as customary international practice, supports the rule that territorial changes of a State, whether by addition or loss of territory, do not in general deprive that State of its rights or relieve it of its obligations under a treaty, unless the changes are such as to render execution of the treaty impossible. In the case of the enlargement of a State by addition of new territory, the weight of authority supports the principle that the territory annexed becomes impressed with the treaty obligations of the acquiring State.[39]

(6) Among more recent examples of the application of this rule may be mentioned the extension of Canadian treaties to Newfoundland upon the latter's becoming part of Canada,[40] the extension of Ethiopian treaties to Eritrea in 1952, when Eritrea became an autonomous unit federated with Ethiopia,[41] the extension of Indian treaties to the former French and Portuguese possessions on their absorption into India, and the extension of Indonesian treaties to West Irian after the transfer of that territory from the Netherlands to Indonesia.

(7) In most cases, as in the case of the French[42] and Portuguese possessions in India or of the recent realignment of the United States-Mexican boundary in the Chamizal tract, the moving of the treaty frontier is an automatic process and is not made the subject of any special agreement or notification. It is rather assumed to be the natural consequence of the passing of the territory under the sovereignty of the State now responsible for its foreign relations.

(8) Sub-paragraph (*b*) provides that the treaty obligations of the former sovereign in principle cease to be applicable in respect of territory which has passed into the sovereignty of another State. It states a rule which is the corollary of the rule in sub-paragraph (*a*). If the general rule in the law of treaties is that the obligations of a treaty are intended to attach to each Party in respect

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[32] A. D. McNair, *The Law of Treaties*, rev. ed. (Oxford, Clarendon Press, 1961), pp. 634-635.

[33] See D. P. O'Connell, *op. cit.*, vol. II, p. 34.

[34] See J. B. Moore, *A Digest of International Law* (Washington D.C., Government Printing Office, 1906), vol. V, pp. 348-351.

[35] See A. D. McNair, *op. cit.*, p. 637. For other older precedents, see A. D. McNair, *op. cit.*, 633-638, R. W. G. de Muralt, *The Problem of State Succession with regard to Treaties* (The Hague, W. P. van Stockum and Son, 1954), chap. II, and D. P. O'Connell, *op. cit.*, vol. II, chap. 21.

[36] See A. D. McNair, *op. cit.*, pp. 637-638. A contrary view was expressed by J. Péritch in *Recueil des cours de l'Académie de droit international* (1929-III), Paris, Librairie Hachette, 1930, vol. 28, pp. 390-391.

[37] See G. H. Hackworth, *Digest of International Law* (Washington D.C., Government Printing Office, 1940-44), vol. V, pp. 374-375; *Foreign Relations of the United States (1927)* (Washington D.C., Government Printing Office, 1942), vol. III, pp. 842-843.

[38] See J. Péritch, *op. cit.*, pp. 402-403.

[39] See M. M. Whiteman, *Digest of International Law* (Washington D.C., Government Printing Office, 1963), vol. 2, pp. 940-945, and especially at pp. 944-945.

[40] R. W. G. de Muralt, *op. cit.*, pp. 118-119.

[41] See *Summary of the practice of the Secretary-General as depositary of multilateral agreements* (ST/LEG/7), p. 63; R. W. G. de Muralt, *op. cit.*, pp. 84-86.

[42] The "acts done by France for public purposes" dealt with in article 7 of the Treaty of Cession appear to relate only to internal public acts; see United Nations, *Treaty Series*, vol. 203, p. 155; A. Coret, *Revue juridique et politique de l'Union française* (Paris, Librairie générale de droit et de jurisprudence, 1957), vol. XI, No. 3, p. 588.

of its entire territory, this intention necessarily has reference only to the territory possessed at any given time by a Party; for a State is not normally responsible internationally for territory which is not within its sovereignty. Accordingly, its rights and obligations under a treaty necessarily cease in respect of territory which is no longer within its sovereignty. The rule recognizing the cessation of the obligations of the former sovereign in these cases is probably best explained in the above manner as following simply from the intention of the Parties to the treaties in question. But the same result would equally be arrived at by recourse to other principles of the law of treaties such as impossibility of performance and fundamental change of circumstances.

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

(10) Sub-paragraph (*b*) does not, of course, touch the treaties of the predecessor State otherwise than in respect of their application to the territory which passes out of its sovereignty. Apart from the contraction in their territorial scope, its treaties are not normally affected by the loss of the territory. Only if the piece of territory concerned had been the object, or very largely the object of a particular treaty might the continuance of the treaty in respect of the predecessor's own remaining territory be brought into question on the ground of impossibility of performance or fundamental change of circumstances.

Article 3. Agreements for the devolution of treaty obligations or rights upon a succession

1. A predecessor State's obligations and rights under treaties in force in respect of a territory which is the subject of a succession do not become applicable as between the successor State and third States, parties to those treaties, in consequence of the fact that the predecessor and the successor States have concluded an agreement providing that such obligations or rights shall devolve upon the successor State.

2. When a predecessor and a successor State conclude such a devolution agreement, the obligations and rights of the successor State in relation to third States under any treaty in force in respect of its territory prior to the succession are governed by the provisions of the present articles.

Commentary

(1) Article 3 deals with the legal effect of agreements by which, upon a succession, the predecessor and successor States have sought to make general provision for the devolution to the successor of the obligations and rights of the predecessor under treaties formerly applicable in respect of the territory concerned. A quite recent phenomenon has been the insertion of clauses in some particular treaties which purport to regulate in advance the legal position in regard to the application of the treaty in the event of part of the territory of one of the parties undergoing a succession. This type of agreement is, however, legally quite distinct from the first type and will be dealt with separately in article 5.

(2) Agreements of the first type, conveniently referred to as "devolution agreements", have been quite common. This seems to be due primarily to the fact that it has been the settled practice of the United Kingdom to propose a devolution agreement to all its overseas territories on their emergence as independent States and to the fact that the great majority of the ex-British territories have accepted the proposal and entered into such an agreement. New Zealand also concluded a devolution agreement with Western Samoa [43] on the same model as that of the United Kingdom agreements with its overseas territories, as did also Malaysia with Singapore on the latter's separation from Malaysia. Analogous agreements were concluded between Italy and Somalia [44] and between the Netherlands and Indonesia.[45] As to France, it has concluded devolution agreements in a comprehensive form with, respectively, Cambodia,[46] Laos [47] and Viet-Nam,[48] and an agreement in more particular terms with Morocco,[49] but devolution agreements do not seem to have been usual between France and her African territories.[50] Starting with the United Kingdom-Iraq agreement of 1931,[51] some twenty devolution agreements have now been concluded in connexion with the emergence of a territory to independent Statehood. Their terms vary to some extent, more especially when the

[43] Exchange of letters of 30 November 1962, see United Nations, *Treaty Series*, vol. 470, pp. 4 and 6.

[44] Treaty of Friendship (with Exchange of Notes) concluded between Italy and Somalia, Mogadiscio, 1 July 1960; for the original Italian text see *Diritto Internazionale*, vol. XVI, 1962, pp. 440-442 and *Bollettino Ufficiale della Repubblica Somala*, Anno II, 31 Dicembre 1961, Suppl. N. 9 al N. 12, pp. 5-9; English text provided by the United Kingdom Government appears in *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 169 and 170.

[45] Draft Agreement on Transitional Measures included in the Round-Table Conference Agreement between the Government of the Kingdom of the Netherlands and the Government of the Republic of Indonesia of 27 December 1949: see United Nations, *Treaty Series*, vol. 69, p. 266.

[46] D. P. O'Connell, *op. cit.*, vol. II, pp. 363 and 364.

[47] Traité d'amitié et d'association entre le Royaume du Laos et la République française du 22 octobre 1953, art. premier; see *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), p. 72.

[48] Treaty of Independence, signed 4 June 1954, between Viet-Nam and the French Republic, article 2: see *British and Foreign State Papers, 1954*, vol. 161, p. 649.

[49] Convention diplomatique franco-marocain du 20 mai, 1956: see *Annuaire français de droit international, 1956*, Paris, C.N.R.S., vol. II, p. 126.

[50] One such Agreement seems to have been made between France and the Ivory Coast; see M. M. Whiteman, *op cit.*, p. 983.

[51] League of Nations, *Treaty Series*, vol. CXXXII, p. 366, art. 8.

agreement deals with a particular situation, as in the case of the France-Morocco and Italy-Somalia Agreements. But, with the exception of the Indian Independence (International Arrangements) Order, 1947,[52] providing for the special cases of India and Pakistan, the agreements are in the form of treaties; and, with some exceptions, notably the French agreements, they have been registered as such with the Secretariat of the United Nations.

(3) Some of the newly emerged States, which have not concluded devolution agreements, have taken no formal step to indicate their general standpoint regarding succession in respect of treaties; such is the case, for example, with the ex-French African territories. Quite a number, however, have made unilateral declarations of a general character, in varying terms, by which they have taken a certain position—negative or otherwise—in regard to the devolution of treaties concluded by the predecessor State with reference to their territory. These declarations, although they have affinities with devolution agreements, are clearly distinct types of legal act, and will therefore be considered separately in the next article. The present article is concerned only with *agreements* between the predecessor and successor States purporting to provide for the devolution of treaties.

(4) Devolution agreements are of interest from two quite separate aspects. The first is the extent to which, if any, they are effective in bringing about a succession to or continuance of the predecessor State's treaties; and the second is the evidence which they may contain of the views of States concerning the customary law governing succession in respect of treaties. The second aspect will be considered in the commentary to article 6 in discussing what should be regarded as the existing law concerning succession to or continuance of treaties upon the emergence of a new State. The present article thus deals only with the legal effects of a devolution agreement as an instrument purporting to make provision concerning the treaty obligations and rights of a newly emerged State.

(5) If there are some variations in the terms of devolution agreements, their general character is the same: they provide for the transmission from the predecessor to the successor State of all the obligations and rights of the predecessor State in respect of the territory under treaties concluded by the predecessor and applying to the territory. Clealry, the present article cannot concern itself with the interpretation of particular formulations of devolution agreements and must be confined to stating the effects of devolution agreements in general terms. Accordingly, it is thought sufficient for the purposes of the present article to set out here a typical example of a devolution agreement and to refer members of the Commission to an appendix to this article for other formulations of these agreements. The Agreement concluded in 1957 between the Federation of Malaya and the United Kingdom by an Exchange of Letters [53] may serve as such a typical example of a devolution agreement. The operative provisions, contained in the United Kingdom's letter, read as follows:

> I have the honour to refer to the Federation of Malaya Independence Act, 1957, under which Malaya has assumed independent status within the British Commonwealth of Nations, and to state that it is the understanding of the Government of the United Kingdom that the Government of the Federation of Malaya agree to the following provisions:
>
> (i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument are, from 31st August, 1957, assumed by the Government of the Federation of Malaya in so far as such instruments may be held to have application to or in respect of the Federation of Malaya.
>
> (ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to or in respect of the Federation of Malaya are from 31st August, 1957, enjoyed by the Government of the Federation of Malaya.
>
> I shall be grateful for your confirmation that the Government of the Federation of Malaya are in agreement with the provisions aforesaid and that this letter and your reply shall constitute an agreement between the two Governments.

(6) Devolution agreements have to be considered, first, from the point of view of their effect as between their own parties and, secondly, from the point of view of their effect in regard to third States. However, before considering them from either of these points of view, it is necessary to comment briefly upon their intrinsic validity as treaties.

(7) The validity of devolution agreements was discussed in one of the memoranda submitted in 1963 to the Sub-Committee on States and Governments, where it was said that "the question seriously arises whether these treaties have any binding force for the newly created States".[54] Devolution agreements, it was said in that memorandum, are in part the price of freedom paid to the former sovereign and in part also provisions benefiting third parties, i.e. provisions relating to the obligations of the new State towards the treaty partners of the former sovereign; and both kinds of provisions are designed to safeguard established rights or their continued existence under the future régime of independence of the emancipated territory. There is a difficulty, it was further said, in that memorandum, in considering devolution agreements as representing freely accepted international treaty obligations or their signatories as the genuine representatives of the new sovereign State and its people. The conclusion was finally reached in the memorandum that the fate of these treaties should not be decided in an absolutely uniform manner, nor should they be declared invalid *a priori*: they should rather be regarded as belonging to a special class and as voidable either in whole or in part.

(8) The question of the validity of devolution agreements would seem to be one which now has to be determined by reference to the general law of treaties as set out in

[52] *British and Foreign State Papers, 1947*, Part I, vol. 147, London, 1955, pp. 158-176.

[53] United Nations, *Treaty Series*, vol. 279, p. 287.

[54] See Working Paper submitted by Mr. M. Bartos, *Yearbook of the International Law Commission, 1963*, vol. II, p. 297.

the Vienna Convention on the Law of Treaties[55] and in particular in articles 42-53. The Special Rapporteur therefore doubts the need to state a special rule for the validity of these agreements in the context of succession of States; and this doubt is reinforced by the way in which State practice in regard to these agreements has developed. In practice they have generally been treated as valid but, as will appear in the paragraphs which follow, they have been interpreted and applied in a manner which appears to leave the newly emerged State a free hand. Moreover, although the earlier devolution agreements, such as those of Iraq and Jordan, may in some degree have been regarded as part of the "price of independence", later devolution agreements seem to have been entered into more as an incident of the emergence of the new State than as a condition of independence. At any rate, the major part of their purpose seems to have been simply to obviate the risk of a total gap in the treaty relations of the newly emerged State and at the same time to record the former sovereign's disclaimer of any future liability under its treaties in respect of the territory concerned. That devolution agreements have certain deficiencies even from this limited point of view was underlined in another memorandum[56] submitted to the Sub-Committee on Succession of States and Governments in 1963; and these deficiencies it will be necessary to discuss below. But they relate to the utility and implications, rather than to the validity, of devolution agreements.

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

(10) A devolution agreement has then to be viewed, in conformity with the apparent intention of its parties, as a purported assignment by the predecessor to the successor State of the former's obligations and rights under treaties previously having application to the territory. It is, however, extremely doubtful whether such a purported assignment *by itself* changes the legal position of any of the interested States. The Vienna Convention on the Law of Treaties contains no provisions regarding the assignment either of treaty rights or of treaty obligations. The reason is that the institution of "assignment" found in some national systems of law by which, under certain conditions, contract rights may be transferred without the consent of the other party to the contract does not appear to be an institution recognized in international law. An assignment is by its very nature a transaction which purports to impose an obligation on a third party—an obligation on the third party to accept a different form of performance of its contract than that to which it is entitled; and in international law the rule seems clear that an agreement by a party to a treaty to assign either its obligations or its rights under the treaty cannot bind any other party to the treaty without the latter's consent.[57] Accordingly, a devolution agreement is in principle ineffective by itself to pass either treaty obligations or treaty rights of the predecessor to the successor State. It is an instrument which, *as a treaty*, is binding only as between the predecessor and successor States and the direct legal effects of which are necessarily confined to them.

(11) What then are the direct legal effects which devolution agreements may have as between the predecessor and successor States? The answer would seem to be very little more than a formal and public declaration of the transfer of responsibility for the treaty relations of the territory from the predecessor to the successor State. This answer really follows from the general principles of the law of treaties, and appears to be confirmed by State practice.

(12) Taking the assignment of obligations first, it seems clear that, from the date of independence, the treaty obligations of the predecessor State cease automatically to be binding upon itself in respect of the territory now independent. This follows necessarily from the principle of moving treaty frontiers which is as much applicable to a predecessor State in the case of independence as in the case of the mere transfer of territory to another existing State dealt with in article 2. The territory of the newly emerged State having ceased to be part of the "entire territory" of the predecessor State, the latter's treaties cannot and do not *in relation to itself* apply any longer in respect of the territory now independent; the

[55] See *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference*, document A/CONF.39/27.

[56] See Supplement to item 5 of the note on succession of States and Governments submitted by Mr. T. O. Elias, *Yearbook of the International Law Commission, 1963*, vol. II, p. 283; see also summary record of the 629th meeting of the Commission, *Yearbook of the International Law Commission, 1962*, vol. I, pp. 4 and 5, paras. 25-27.

[57] See A. D. McNair, *op. cit.*, pp. 340-341; E. Lauterpacht, *The International and Comparative Law Quarterly* (London, The Society of Comparative Legislation), vol. 7 (1958), pp. 567-568; D. P. O'Connell, *op. cit.*, vol. II, p. 352. Cf. F. A. Mann, *The British Yearbook of International Law, 1953* (London, Oxford University Press, 1954), vol. 30, pp. 475-478.

territory has passed outside the scope of the obligations of the predecessor State under its treaties. Accordingly, so far as concerns the release of the predecessor State from its obligations, a devolution agreement does not seem to do any more than provide for something which is brought about in any event by operation of the general rules of international law independently of the agreement. Conversely, on the date of the succession, the territory passes into the treaty régime of the newly emerged State; and, since the devolution agreement is incapable by itself of effecting an assignment of the predecessor's treaty obligations to the successor State, the agreement does not *of itself* establish any treaty nexus between the successor State and third States parties to the treaties of the predecessor State. Thus, even if a newly emerged State has concluded a devolution agreement, the only treaty obligations of the predecessor State which can immediately become obligations also of the successor State vis-à-vis the other contracting parties are such obligations, if any, as would in any event pass to the successor State by operation of the general rules of international law independently of the devolution agreement.

(13) It has, indeed, been explained by a former Legal Adviser to the Commonwealth Relations Office that in the devolution agreements concluded by the United Kingdom the clause requiring the newly emerged State to assume the obligations and responsibilities of the United Kingdom is intended to refer only to "instruments which may *in future* be held to have application to the new State".[58] In other words, the agreement merely contemplates the assumption by the new State of any obligation which may be held to be binding upon the new State *after* the date of independence under any general rules of international law regarding succession; and, in addition, any obligation in respect of the territory which a third State might still be entitled to call upon the *predecessor* State to perform after the date of independence. He thus explains, as does also another United Kingdom Legal Adviser,[59] the clause regarding "obligations and responsibilities" in United Kingdom devolution agreements simply as a general *indemnity* given by the new State to its predecessor in respect of any treaty obligations the performance of which after independence a third State might under general international law be entitled to demand either from the new State or from the United Kingdom. Having regard to the principle of moving treaty frontiers and to the implications of independence and self-determination, a predecessor State's need for any such indemnity would seem to be doubtful. In fact, the main reason why a clause regarding the assumption of obligations was included in the United Kingdom devolution agreements seems to have been a feeling of uncertainty as to the rules of international law concerning succession to treaties.[60]

(14) As to the assignment of rights, it is crystal clear that a devolution agreement cannot bind the other parties to the predecessor's treaties (who are "third States" in relation to the devolution agreement) and cannot, therefore, operate by itself to transfer to the successor State any rights vis-à-vis those other parties. Consequently, however wide may be the language of a devolution agreement and whatever may have been the intention of the predecessor and successor States,[61] the devolution agreement cannot of itself pass to the successor State any treaty rights of the predecessor State which would not in any event pass to it under general international law.

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

(16) The general view, in fact, seems to be that devolution agreements do not by themselves materially change for any of the interested States the position which they would otherwise have under general international law and that the significance of the agreements is primarily as an indication of the intentions of the newly emerged State in regard to the predecessor's treaties. At the same time, however, it seems also to be widely thought that devolution agreements may play a not unimportant role in promoting continuity of treaty relations upon independence. One writer [62] has, for example, said:

> The absence of any clear rule of international law relating to the assignment of treaty rights and duties, coupled with the generally accepted principle *pacta tertiis nec nocent nec prosunt*, suggests that these agreements may be of no real legal force. Alternatively, if the view is taken that the *pacta tertiis* rule is not so strict as to exclude the possibility of the existence of a genuine customary international law of succession, then one is led to the conclusion that the agreements may be redundant.
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> At present, the truth appears to lie somewhere between these two positions. It is not possible to ignore the fact that frequent reference is made to these inheritance agreements as well by successor States seeking recognition as parties to existing multilateral treaties entered into by their parent States as by third States pointing to some basis on which to treat as operative between themselves and the new State treaties previously concluded with the parent State.
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> ...
>
> At the same time, it may be noted that there are many occasions on which successor States give notice that they consider themselves

[58] See K. Roberts-Wray, *Commonwealth and Colonial Law* (London, Stevens, 1966), pp. 276 and 277. Compare, however, the opinion expressed by the United Kingdom to Cyprus in regard to the Road Traffic Convention, where the interpretation given to a devolution agreement may have been broader; see *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 182 and 183.

[59] See R. Hone, "International Legal Problems of Emergent Territories", in *Report of International Law Conference* (London, The David Davies Memorial Institute of International Studies, 1960), p. 19.

[60] See K. Roberts-Wray, *op. cit.*, pp. 267-273; see also the Commonwealth Office Note on the question of treaty succession on the attainment of independence by territories formerly dependent internationally on the United Kingdom (International Law Association, Buenos Aires Conference (1968), *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, p. 24).

[61] See K. Roberts-Wray, *op. cit.*, pp. 277 and 278.

[62] E. Lauterpacht, *op. cit.*, pp. 525-530.

as bound by multilateral agreements concluded by the parent States but make no mention of any agreement relating to the inheritance of treaty rights and duties.

...

The evidence would not, therefore, really support a conclusion that the treaty inheritance conferred upon the successor State in this context any greater rights or duties than it would have enjoyed in the absence of the treaty. This is the more true when consideration is given to the fact that in a number of instances, even in the presence of an inheritance agreement, the successor State did not regard itself as bound by the treaties of the parent State and, in consequence, took steps to become a fresh contracting party to the treaty in question.

...

Nevertheless, despite the doubtful juridical basis on which these agreements rest and the difficulties which accompany their application, they are not entirely purposeless. They assist, in the early days of independence, in focusing the attention of the authorities of the new State upon the need to clarify the range and extent of their treaty commitments. They provide a basis on which third States can take the initiative in proposing the maintenance or novation of pre-existing bilateral treaties. Finally, if the practice persists, it may help to establish a true concept of succession, under which the successor State assumes the rights and duties created by every treaty which is closely linked with its territory and which cannot be regarded as of so odious a nature politically as to terminate upon the change in sovereignty. At present, however, inheritance agreements clearly do not provide a complete solution to the problem of succession to treaties, either multilateral or bilateral.

This decidedly cautious assessment of the value of devolution agreements seems fairly typical of British legal opinion [63] despite the fact that the United Kingdom is largely responsible for the introduction of the institution of devolution agreements.

(17) The general uncertainty as to the position in customary law regarding succession in respect of treaties makes it difficult to assess the precise value given to devolution agreements in State practice. But State practice seems to confirm that their primary value is simply as an expression of the successor State's willingness to continue the treaty relations of the predecessor State in respect of the territory. That devolution agreements do constitute at any rate a *general* expression of the successor State's willingness to continue the predecessor State's treaties applicable to the territory would seem to be clear. The critical question, it seems to the Special Rapporteur, is whether a devolution agreement constitutes something more; namely an *offer* to continue the predecessor State's treaties which a third State, party to one of those treaties, may accept and by that acceptance alone bind the successor State to continue the treaties. The opinion has already been expressed in paragraph 9 above that a devolution agreement cannot, according to its terms, be understood as an instrument intended to be the means of establishing rights for third States. Even so, is a devolution agreement to be considered as a declaration of consent by the successor State to the continuance of the treaties which a third State may by its mere assent, express or tacit, convert into an agreement *novating* the treaties of the predecessor State formerly having application to the territory? Or, in the case of multilateral treaties, does the conclusion and registration of a devolution agreement constitute a notification of a claim to be a party so that the successor State is forthwith to be regarded by the depositary as a party to the treaty? The answers given to these questions must be sought in State practice the precise evaluation of which is made difficult by the uncertainty concerning the general law of succession.

(18) A considerable volume of State practice regarding multilateral treaties had been made available in memoranda submitted by the Secretariat.[64] The Secretary-General's own practice as depositary of multilateral treaties seems to have begun by attributing largely automatic effects to devolution agreements but to have evolved more recently in the direction of regarding them rather as a general expression of intention. Thus in 1959, after referring generally to his practice in dealing with notifications from new States claiming to continue or accede to their predecessors' treaties, the Secretary-General described his practice in regard to devolution agreements as follows:

However, where the treaty of independence contains a devolution clause and this clause is precise, he has inserted in the relevant Secretariat publications, against the name of the new State, a reference to the agreements previously applicable to its territory, and has in such cases invited the Governments of the new States to become parties to any protocols amending such agreements. Furthermore, if a precise and explicit devolution clause concerning the rights and obligations arising out of international conventions accepted by the State then responsible for the external relations of the new State's territory is the subject of a specific agreement concluded between the two States concerned, and if that agreement is registered with the Secretariat, the Secretary-General considers the new State to be bound by such conventions without having to transmit any notification on the subject. Moreover, the publication of the devolution agreement in the United Nations *Treaty Series* and the inclusion of the new State in the Secretariat publication *Status of Multilateral Conventions* (ST/LEG/3) among the States parties to conventions previously applied in its territory gives the States concerned all the information they require.

The same view of a devolution agreement, as having automatic effects in making the new State a party to a multilateral treaty formerly applicable to its territory, would appear to underlie a legal opinion given by the United Nations Secretariat to the United Nations High Commissioner for Refugees in 1963.[65] Asked whether Jamaica could be considered a party to the 1951 Convention on the Status of Refugees, the Secretariat

[63] See K. Roberts-Wray, *op. cit.*, p. 275; R. Hone, *op. cit.*, p. 19; *The Effect of Independence on Treaties* (a handbook published under the auspices of the International Law Association), London, Stevens and Sons, 1965, chap. 9; D. P. O'Connell, *op. cit.*, pp. 358-373.

[64] See *Summary of the Practice of the Secretary-General as Depositary of Multilateral Treaties* (1959) (ST/LEG/7), paras. 108-134; "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (1962)" (*Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/150, p. 106); "Succession of States to multilateral treaties (1968)" (*Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/200 and Add.1 and 2, p. 1).

[65] See *United Nations Juridical Yearbook, 1963*, pp. 181 and 182.

drew attention to the United Kingdom-Jamaica devolution agreement and continued:

...

3. In our opinion this exchange of letters constitutes an international agreement and in accordance with the established practice of the Secretariat it should be assumed that Jamaica has succeeded to the rights and obligations of the 1951 Convention. The fact that Jamaica has not yet replied to the general inquiry sent by the Secretary-General on 18 December 1962 inquiring about its succession to multilateral treaties does not invalidate the above conclusion based on its agreement.

Then, having referred to a reservation that had been made to the Convention by the United Kingdom, the Secretariat advised:

However, we think your main inquiry at present is answered by the conclusion that Jamaica is under the obligations of the Convention subject to the reservations made by the United Kingdom.

(19) The Special Rapporteur, without taking any position in regard to particular cases, doubts the conclusion apparently drawn in the 1959 memorandum from the registration of the devolution agreement with the Secretariat and its publication in the United Nations *Treaty Series*. A devolution agreement is a bilateral agreement between the predecessor and successor States and it is registered with the Secretariat simply in pursuance of the obligation contained in Article 102 of the Charter. The Secretary-General, it is clear, does not receive a devolution agreement in his capacity as a depositary of multilateral treaties but under Article 102 of the Charter in his capacity simply as registrar and publisher of treaties. In short, it seems at least doubtful whether the registration of a devolution agreement, even after publication in the United Nations *Treaty Series*, can be equated with a notification by the new State to the Secretary-General, as depositary, of its intention to become a separate party to a specific multilateral treaty. Therefore, it seems arguable that, on general principles, some further manifestation of will on the part of the new State with reference to the particular treaty is needed to establish definitively the new State's position as a party to the treaty in its own name. Moreover, the present practice of the Secretary-General, as set out in a more recent memorandum, appears to be based on the view that, notwithstanding the conclusion of a devolution agreement, a new State ought not to be included among the parties to a multilateral treaty without first obtaining confirmation that this is in accord with its intention. Thus the Secretariat memorandum on succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary, dated 1962, explains [66] that, when a devolution agreement has been registered or has otherwise come to the knowledge of the Secretary-General, a letter is written to the new State which refers to the devolution agreement and continues on the following lines:

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

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

(20) The practice of other depositaries of multilateral treaties equally does not seem to support the idea that a devolution agreement, as such, operates to effect or perfect a succession to a multilateral treaty without any notification of the State's will specifically with reference to the treaty in question. Occasionally, some reliance seems to have been placed on a devolution agreement as a factor in establishing a State's participation in a multilateral treaty. Thus, at the instance of the Netherlands Government, the Swiss Government appears to have regarded the Netherlands-Indonesian devolution agreement as a sufficient basis for considering Indonesia as a separate party to the Berne Convention for the Protection of Literary and Artistic Works.[67] But in its general practice as depositary of this and of other Conventions, including the Geneva humanitarian conventions, the Swiss Government does not seem to have treated a devolution agreement as a sufficient basis for considering a successor State as a party to the Convention but has acted only upon a declaration or notification of the State in question.[68] It is also the fact that the particular State concerned, Indonesia, has made it plain in another connexion that it does not interpret its devolution agreement as having the effects attributed to it by the Swiss Government in the case of the above-mentioned Berne Convention. Furthermore, it appears from the practice of the United States published in *Materials on Succession of States* [69] that the United States also acts only upon a declaration or notification of the successor State, not upon its conclusion of a devolution treaty, in determining whether that State should be considered a party to a multilateral treaty for which the United States is the depositary.

(21) The practice of individual States, whether "successor" States or interested "third" States, may be less clear cut but it also appears to confirm the limited significance of devolution agreements. The United Kingdom, it is true, has sometimes appeared to take the view that a devolution agreement may suffice to constitute the successor State a party to United Kingdom treaties previously applied to the territory in question. Thus, in 1961 the United Kingdom appears to have advised the Federation of Nigeria that its devolution agreement would suffice to establish Nigeria as a separate party to

[66] See *Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/150, p. 106, para. 133.

[67] See *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/200 and Add.1 and 2, pp. 13 and 14, paras. 26-29.

[68] *Ibid.*, pp. 16-24, paras. 35-85, and pp. 39-52, paras. 158-224.

[69] See *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 224-228.

the Warsaw Convention of 1929 [70] and Nigeria appears on that occasion ultimately to have accepted that point of view. On the other hand, Nigeria declined to treat its devolution agreement as committing it to assume the United Kingdom's obligations under certain extradition treaties.[71] In any event, the United Kingdom seems previously to have advised the Government of Burma rather differently in regard to that same Warsaw Convention.[72] It had then warned Burma that, whatever view Burma and the United Kingdom might take of their devolution agreement, this agreement:

> ... could not bind third countries to accept the transfer of all treaty rights and obligations to Burma and that there was consequently always a possibility of some third country taking a different view from the United Kingdom and Burma on that matter.

And, having concluded that it would be expedient to leave most cases until a concrete instance arose, the United Kingdom suggested that Burma should accede formally to the Warsaw Convention and to other international instruments as and when the occasion arose.

(22) Moreover, when looking at the matter as a "third State", the United Kingdom has declined to attribute any automatic effects to a devolution agreement. Thus, when informed by Laos that it considered the Anglo-French Civil Procedure Convention of 1922 as continuing to apply between Laos and the United Kingdom in consequence of a devolution agreement, the United Kingdom expressed its *willingness* that this should be so but added that the United Kingdom:

> ... wished it to be understood that the Convention continued in force not by virtue of the 1953 Franco-Laotian Treaty of Friendship, but because Her Majesty's Government and the Government of Laos were agreed that the 1922 Anglo-French Civil Procedure Convention should continue in force as between the United Kingdom and Laos.[73]

The Laos Government, it seems, acquiesced in this view. Even more explicit is the United Kingdom's comment upon this episode:

> Her Majesty's Government did not consider that there was any automatic succession by newly independent territories to the rights and obligations under civil procedure conventions or treaties of a similar nature entered into by their mother country on their behalf before independence. Any agreement between the mother country and the newly independent State to the effect that the independent State should succeed to the rights and duties under treaties entered into by the mother country on their behalf was binding upon the Contracting Parties to that agreement, *but not necessarily on States which had entered into Agreements with the mother country in respect of the territory which had now become independent. Consequently, there must be some act after independence of "novation" between the newly independent State and the other Contracting Party.*[74] [Italics added by the Special Rapporteur.]

Similarly, in the case concerning the Temple of Preah Vihear [75] Thailand in the proceedings on its preliminary objections formally took the position before the International Court that in regard to "third States" devolution agreements are *res inter alios acta* and in no way binding upon them.

(23) The United States in its practice takes account of a devolution agreement as an acknowledgment in general terms by the newly independent State of its intention to continue in force treaties previously applied to the territory of which it is now the sovereign. But it does not seem to regard this general expression of intention as conclusive as to the continuity of specific treaties. The United States practice has been described by an Assistant Legal Adviser to the State Department in a letter to the Editor-in-Chief of the *American Journal of International Law* as follows:

> In practice the United States Government endeavours to negotiate new agreements, as appropriate, with a newly independent State as soon as possible. In the interim it tries, where feasible, to arrive at a mutual understanding with the new State specifying which bilateral agreements between the United States and the former parent State shall be considered as continuing to apply. In most cases the new State is not prepared in the first years of its independence to undertake a commitment in such specific terms. To date the United States-Ghana exchange is the only all-in inclusive formal understanding of this type arrived at, although notes have also been exchanged with Trinidad and Tobago and Jamaica regarding continued application of the 1946 Air Services Agreement. An exchange of Notes with Congo (Brazzaville) on continuation of treaty obligations is couched only in general terms.
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> 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 acknowledgment. These are listed under the name of the new State in "Treaties in Force".[76]

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

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[70] *Ibid.*, p. 181.

[71] *Ibid.*, pp. 193 and 194.

[72] *Ibid.*, pp. 180 and 181.

[73] *Ibid.*, pp. 188 and 189.

[74] *Ibid.* See also the United Kingdom's advice to Pakistan that the Indian Independence (International Arrangements) Order 1947 could have validity only between India and Pakistan and could not govern the position as between Pakistan and Siam.

[75] *I.C.J. Reports 1962*, Pleadings, Oral Arguments, Documents, vol. II, p. 33. The Court itself did not pronounce upon the question of succession, as it held its jurisdiction to entertain the case upon other grounds.

[76] Printed in *The Effect of Independence on Treaties* (a handbook published under the auspices of the International Law Association), London, Stevens and Sons, 1965, pp. 382-386.

in regard to the continuance in force of individual treaties.[77]

(24) As to newly independent States which have entered into devolution agreements, their practice has been uneven. In the case of multilateral conventions of which the Secretary-General is depositary many of these States have recognized themselves as bound by the conventions previously applied with respect to their territories. Some of these States, on the other hand, have not done so.[78] In the case of other general multilateral treaties the position seems to be broadly the same.[79] In the case of bilateral treaties, as already indicated, newly independent States appear not to regard a devolution agreement as committing them vis-à-vis third States to recognize the continuance in force of each and every treaty but to reserve the right to make known their intentions with respect to each particular treaty. The Government of Indonesia took this position very clearly in a Note of 18 October 1963 to the Embassy of the Federal Republic of Germany:

> ... Article 5 of the Transitional Agreement of 1949 between the Republic of Indonesia and the Kingdom of the Netherlands does not cause by itself the automatic application to the Republic of Indonesia of international agreements which were applicable to the territory of the former Netherlands Indies. For the continued application of such international agreements a further step is required on the part of the Indonesian Government; i.e. the sending of a declaration to the other contracting party(ies) or depositary, as the case may be, that the Indonesian Government wishes to be regarded as a party to the agreement concerned in the place of the former Netherlands Indies.[80]

Neither this Note nor a previous Note addressed by the Indonesian Government to the United Kingdom in similar terms in January 1961 [81] appears to have met with any objection from the other State. The Ivory Coast, which had agreed with France that it would "assume all the rights and obligations of treaties made applicable to the Ivory Coast prior to its independence", nevertheless took the position in correspondence with the United States in 1962-1963 that it did not consider itself as bound by a Franco-American extradition treaty and that such matters should be raised *de novo*.[82] Again, while referring to its devolution agreement as evidence of its willingness to continue certain United Kingdom-United States treaties in force after independence, Ghana in its correspondence with the United States reserved a certain liberty to negotiate regarding the continuance of any particular clause or clauses of any existing treaties.[83] Equally, in correspondence with the United Kingdom concerning extradition treaties Nigeria seems to have considered itself as possessing a wide liberty of appreciation in regard to the continued application of this category of treaties,[84] and in correspondence with the United States it likewise denied the existence of any extradition treaty or arrangement between itself and the United States.[85] Again, even where the successor State is in general disposed in pursuance of its devolution agreement to recognize the continuity of its predecessor's treaties, it not infrequently finds it necessary or desirable to enter into an agreement with a third State providing specifically for the continuance of a particular treaty.[86]

(25) The practice of States in regard to devolution agreements is thus too diverse to admit the conclusion that a devolution agreement should be considered as by itself creating a legal nexus between the successor State and third States, in relation to treaties applicable to the successor State's territory prior to its independence. Some successor States and some third States have undoubtedly tended to regard a devolution agreement as creating a certain presumption of the continuance in force of certain types of treaties. But neither successor States nor third States nor depositaries have as a general rule attributed automatic effects to devolution agreements. Accordingly, State practice as well as the relevant principles of the law of treaties would seem to indicate the devolution agreements, however important as general manifestations of the attitude of successor States to the treaties of their predecessors, should be considered as *res inter alios acta* for the purposes of their relations with third States.

(26) Another consideration to be taken into account is the difficulty in some cases of identifying the treaties

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[77] See United States Exchanges of Notes with Ghana, Trinidad and Tobago and Jamaica, *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 211-213 and 220-223.

[78] For example, Indonesia, Cyprus and Somalia; see *Yearbook of the International Law Commission, 1962*, vol. II, document A/CN.4/150, p. 110, para. 21; pp. 110 and 111, paras. 31-33; pp. 114 and 115, para. 67, and p. 119, para. 106.

[79] See *Yearbook of the International Law Commission, 1968*, vol. II, document A/CN.4/200 and Add.1 and 2, p. 1. The case of international labour conventions is special owing to the practice of the International Labour Organisation requiring new States to recognize the continuance of labour conventions on their admission to the organization.

[80] See K. Zemanek "State Succession after Decolonization", *Recueil des Cours de l'Académie de droit international de La Haye, 1965-III* (Leyden, Sijthoff), vol. 116, p. 236. In the *Westerling case*, Indonesia invoked the Anglo-Netherlands Extradition Treaty of 1898 and the United Kingdom Government informed the Court that it recognized Indonesia's succession to the rights and obligations of the Netherlands under the Treaty; see *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 196 and 197.

[81] See *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), p. 186. A similar note has, it appears, been sent by the Indonesian Government to other States which have inquired as to its position regarding succession to treaties formerly applicable to the Netherlands Indies; see K. Zemanek, *op. cit.*, p. 236, foot-note 100.

[82] See M. M. Whiteman, *op. cit.*, p. 983.

[83] See *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 211-213.

[84] *Ibid.*, pp. 193 and 194.

[85] See International Law Association, Buenos Aires Conference (1968), *Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, annex E, p. 35.

[86] For example, agreements between India and Belgium (*Moniteur Belge*, 26 February 1955, p. 967); Pakistan and Belgium (United Nations, *Treaty Series*, vol. 133, pp. 200-202); Pakistan and Switzerland (*Recueil officiel des lois et ordonnances de la Confédération suisse, nouvelle série*, 1955, p. 1168); Pakistan and Argentina (*United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 6 and 7); United States and Trinidad and Tobago and United States and Jamaica (*ibid.*, pp. 220-224).

covered by a devolution agreement. Attention is drawn to this difficulty in the report of the Committee of the International Law Association,[87] and also in a Note communicated to that Committee by the Commonwealth Relations Office concerning territories formerly dependent on the United Kingdom.[88] The latter Note states:

> The British Government has provided the government of territories approaching independence with a list of the treaties considered to apply to those territories. It is not, however, possible to guarantee that such a list will be fully comprehensive or accurate though every effort is made to render it so. The number of treaties involved is enormous and the position concerning the re-application to dependent territories often obscure. *Such lists cannot therefore be regarded as definitive, and they have not been appended to any of the inheritance agreements or otherwise published.* [Italics added by the Special Rapporteur.]

Moreover, even when it is reasonably certain that a treaty was considered to apply to the territory prior to independence, a question may remain as to whether its application after independence would be compatible with the nature of its provisions. Difficulties such as these equally point to the need for a considerable liberty of appreciation to be reserved to successor States in regard to the continuance in force of treaties, notwithstanding their having entered into a devolution agreement.

(27) Accordingly, *paragraph 1* of the present article states the negative rule that the obligations and rights of a predecessor State under treaties do not become applicable as between the successor State and third States in consequence *only* of the fact that the predecessor and successor States have concluded a devolution agreement. This does not deny the general relevance of a devolution agreement as an expression of the successor State's *policy* in regard to continuing its predecessor's treaties in force. But in order to remove any possible uncertainty on the point, it seems desirable to lay down explicitly that a devolution agreement does not by itself create any legal nexus between the successor State and third States.

(28) *Paragraph 2* of the article then provides simply that, when a devolution agreement has been concluded, the obligations and rights of the successor State under treaties formerly in force in respect of its territory are governed by the provisions of the present articles. In other words, they are governed by such principles of the novation of treaties or of succession in the matter of treaties as may be considered to exist in general international law.

Article 4. Unilateral declaration by a successor State

1. When a successor State communicates to a third State, a party to treaties in force in respect of the successor State's territory prior to independence, a declaration of its will with regard to the maintenance in force of such treaties, the respective obligations and rights of the successor State and the third State are governed by the subsequent articles of the present draft.

2. When a successor State communicates to the third State a declaration expressing its consent to the provisional application of such treaties pending a decision with regard to their maintenance in force, modification or termination, the treaties shall continue to apply provisionally as between the successor State and the third State unless in the case of a particular treaty:

(*a*) The treaty comes into force automatically as between the States concerned under general international law independently of the declaration; or

(*b*) It appears from the treaty or is otherwise established that the application of the treaty in relation to successor State would be incompatible with its object and purpose; or

(*c*) Within three months of receiving the notification the third State in question has informed the successor State of its objection to such provisional application of the treaty.

3. The provisional application of a treaty as between a successor State and a third State under the present article is terminated if:

(*a*) Subject to any requirement of notice that may have been agreed between them either State communicates to the other its decision to terminate the provisional application of the treaty; or

(*b*) The declaration specified a period for the duration of the provisional application of the treaty and this period has expired; or

(*c*) At any time they mutually agree that the treaty shall thenceforth be considered as terminated or, as the case may be, brought into force between them, whether in full or in modified form, or

(*d*) It appears from the conduct of the States concerned that they must be considered as having agreed to terminate the treaty, or as the case may be, to bring it into force; or

(*e*) The termination of the treaty itself shall have taken place in conformity with its own provisions.

Commentary

(1) In March 1961 the United Kingdom Government suggested to the Government of Tanganyika that, on independence, it should enter into a devolution agreement by exchange of letters, as had been done by other British territories on their becoming independent States. Tanganyika replied that, according to the advice which it had received, the effect of such an agreement might be that it (1) would enable third States to call upon it Tanganyika to perform treaty obligations from which it would otherwise have been released on its emergence into statehood; but (2) would not, by itself, suffice to entitle it to call upon third States to perform towards Tanganyika treaties which they had concluded with the United Kingdom. Accordingly, it did not enter into a devolution agreement, but wrote instead to the Secre-

[87] See International Law Association, *Buenos Aires Conference (1968), Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors*, p. 4, note 1 (*a*).

[88] *Ibid.*, annex B, pp. 28 and 29, para. 6.

tary-General of the United Nations in December 1961 making the following declaration:

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

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

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

The Government of Tanganyika is conscious that the above declaration applicable to bilateral treaties cannot with equal facility be applied to multilateral treaties. As regards these, therefore, the Government of Tanganyika proposes to review each of them individually and to indicate to the depositary in each case what steps it wishes to take in relation to each such instrument—whether by way of confirmation of termination, confirmation of succession or accession. During such interim period of review any party to a multilateral treaty which has prior to independence been applied or extended to Tanganyika may, on a basis of reciprocity, rely as against Tanganyika on the terms of such treaty.[89]

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

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

I have the honour ... to refer to the Note dated 9 December 1961 addressed to your Excellency by the then Prime Minister of Tanganyika, setting out his Government's position in relation to international instruments concluded by the United Kingdom, whose provisions applied to Tanganyika prior to independence. Her Majesty's Government in the United Kingdom hereby declare that, upon Tanganyika becoming an independent Sovereign on 9th of December 1961, they ceased to have the obligations or rights, which they formerly had, as the authority responsible for the administration of Tanganyika, as a result of the application of such international instruments to Tanganyika.[90]

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

(2) The precedent set by Tanganyika [91] has been followed by a number of other newly independent States whose unilateral declarations have, however, taken varying forms.

(3) Botswana in 1966 and Lesotho in 1967 made declarations in the same terms as Tanganyika.[92] In 1969 Lesotho requested the Secretary-General to circulate to all Members of the United Nations another declaration extending the two-year period of review for bilateral treaties specified in its 1967 declaration for a further period of two years. At the same time, it pointed out that its review of its position under multilateral treaties was still in progress and that, under the terms of its previous declaration, no formal extension of the period was necessary. The new declaration concluded with the following *caveat*:

The Government of the Kingdom of Lesotho wishes it to be understood that this is merely a transitional arrangement. Under no circumstances should it be implied that by this Declaration Lesotho has either acceded to any particular treaty or indicated continuity of any particular treaty by way of succession." [93]

(4) In 1968 Nauru also made a declaration which with some minor differences of wording, follows the Tanganyika model closely. But the Nauru declaration does differ on one point of substance to which attention is drawn because of its possible interest in the general question of the existence of rules of customary law regarding succession in the matter of treaties with respect to bilateral treaties. The Tanganyika declaration provides that on the expiry of the provisional period of review Tanganyika will regard such of them as "*could not by the application of the rules of customary international law be regarded as otherwise surviving*, as having terminated". The Nauru declaration, on the other hand, provides that Nauru will regard "each such treaty as having terminated *unless it has earlier agreed with the other contracting party to continue that treaty in existence*" without any reference to customary law. In addition, Nauru requested the circulation of its declaration to members of the specialized agencies as well as to States Members of the United Nations.

(5) Uganda, in a Note to the Secretary-General of 12 February 1963, [94] made a declaration applying a single procedure of provisional application to both bilateral and multilateral treaties. The declaration stated that in respect of all treaties validly concluded by the United Kingdom on behalf of the Uganda Protectorate or validly extended to it before 9 October 1962 (the date of independence) Uganda would continue to apply them, on the basis of reciprocity, until the end of 1963, unless they

[89] *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 177 and 178.

[90] *Ibid.*, p. 178.

[91] For the subsequent declaration made by the United Republic of Tanzania on the Union of Tanganyika with Zanzibar, see para. (7) below.

[92] See International Law Association, *op. cit.*, annex A, sect. III, pp. 17 and 18, and sect. V, pp. 20 and 21.

[93] Text supplied by the Secretariat.

[94] See *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), pp. 179 and 180. See also the explanatory statement of the Government of Uganda in Sessional Paper No. 2 of 1963 in *The Effect of Independence on Treaties* (a handbook published under the auspices of the International Law Association), London, Stevens and Sons, 1965, p. 386.

should be abrogated, or modified by agreement with the other parties concerned. The declaration added that at the end of that period, or of any subsequent extension of it notified in a similar manner, Uganda would regard the treaties as terminated except such as "must by the application of the rules of customary international law be regarded as otherwise surviving". The declaration also expressed Uganda's hope that before the end of the period prescribed the normal processes of diplomatic negotiations would have enabled it to reach satisfactory accords with the States concerned upon the possibility of the continuance or modification of the treaties; and, in the case of multilateral treaties, it expressed its intention within that same period to notify the depositary of the steps it wished to take in regard to each treaty. Like Tanganyika, Uganda expressly stated that, during the period of review, the other parties to the treaties might, on the basis of reciprocity, rely on their terms as against Uganda.[95]

Kenya[96] and Malawi[97] subsequently requested the Secretary-General to notify Members of the United Nations of declarations made by them in the same form as Uganda. Kenya's declaration contained an additional paragraph which is of some interest in connexion with so-called dispositive treaties and which reads:

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

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

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

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

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

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

5. The Government of Zambia desires that this letter be circulated to all States members of the United Nations and the United Nations specialized agencies, so that they will be effected with notice of the Government's attitude.[98]

Subsequently, declarations in the same form were made by Guyana, Barbados and Mauritius. The declarations of Barbados and Mauritius did not contain anything equivalent to paragraph 3 of the Zambian declaration. The Guyanese declaration, on the other hand, did contain a paragraph similar to paragraph 3 dealing with Guyana's special circumstances, and reading as follows:

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

(7) In all the above instances the United Kingdom requested the Secretary-General to circulate to States Members of the United Nations a formal disclaimer of any continuing obligations or rights of the United Kingdom in the same terms as in the case of Tanganyika (see paragraph (1) above).

(8) Swaziland, the most recent of the ex-British dependencies to make a declaration, has framed it in terms which are at once simple and comprehensive:

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

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

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

The Secretary-General is asked to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single Member of the United Nations bound by the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People's Republic of Zanzibar and other States or international organizations will, to the extent that their imple-

[95] In Uganda's declaration the statement in terms refers only to multilateral treaties; but Uganda's intention seems clearly to be that parties to any of the treaties should be able, on the basis of reciprocity, to rely on their terms as against it self during the period of review.

[96] See *The Effect of Independence on Treaties* (a handbook published under the auspices of the International Law Association), London, Stevens and Sons, 1965, p. 387.

[97] *Ibid.*, p. 389.

[98] Text supplied by the Secretariat.

mentation is consistent with the constitutional position established by the Articles of Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law.[99]

The Note concluded by requesting the Secretary-General to communicate its contents to all Member States of the United Nations, to all organs, principal and subsidiary of the United Nations, and to the specialized agencies. The Note did not in terms continue in force, or refer to in any way, the previous declaration made by Tanganyika in 1961 (see paragraph (1) of this Commentary). But equally it did not annul the previous declaration which seems to have been intended to continue to have effects according to its terms with regard to treaties formerly in force in respect of the territory of Tanganyika.

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

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

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

These treaties and agreements have been and will continue to be the subject of detailed and continuous investigation. [*Translation from the French by the United Nations Secretariat.*] [100]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Ministry requests the Secretary-General to be so good as to issue this Declaration as a United Nations document for circulation among Member States and takes this opportunity to renew to the Secretary-General the assurances of its highest consideration. [*Translation from the French by the United Nations Secretariat.*][101]

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

(12) Thus, the number of newly formed States which have made unilateral declarations proclaiming their attitude towards treaties previously having application in

[99] See *The Effects of Independence on Treaties* (a handbook published under the auspices of the International Law Association), London, Stevens and Sons, 1965, pp. 381-382; and United States, Department of State, *Treaties in Force—A List of Treaties and other International Agreements of the United States in Force on January 1, 1968* (Washington D.C., Government Printing Office, 1968), p. 200.

[100] See *United Nations Legislative Series, Materials on Succession of States* (ST/LEG/SER.B/14), p. 146. This declaration was transmitted to the Secretary-General by the Belgian Government in 1967 "*à titre d'information*".

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

[101] See International Law Association, *op. cit.*, annex A, VI, pp. 21-24.

respect of their territory, is now quite substantial. Those declarations will be examined in a later commentary, together with devolution agreements, for such indications as they may contain of rules of customary law governing succession in the matter of treaties. The present article is concerned rather with the specific legal effects of the declarations, as such, in the relations between the declarant State and other States parties to treaties having application in respect of its territory prior to independence.

(13) The declarations here in question do not fall neatly into any of the established treaty procedures. They are not sent to the Secretary-General in his capacity as registrar and publisher of treaties under Article 102 of the Charter. The communications under cover of which they have been sent to the Secretary-General have not asked for their registration or for their filing and recording under the relevant General Assembly resolutions. In consequence, the declarations have not been registered or filed and recorded; nor have they been published in any manner in the United Nations *Treaty Series*.

(14) Equally, the declarations are not sent to the Secretary-General in his capacity as a depositary of multilateral treaties. A sizable number of the multilateral treaties which these declarations cover may, no doubt, be treaties of which the Secretary-General is the depositary. But the declarations also cover numerous bilateral treaties for which there is no depositary, as well as multilateral treaties which have depositaries other than the Secretary-General.

(15) The declarations seem to be sent to the Secretary-General on a more general basis as the international organ specifically entrusted by the United Nations with functions concerning the publication of acts relating to treaties or even merely as the convenient diplomatic channel for circulating to all States Members of the United Nations and members of the specialized agencies notifications of such acts. At any rate, the Secretary-General has in each case accepted the function entrusted to him by the State concerned and has communicated the text of the declaration to all States Members of the United Nations and, in addition, when so requested, to any other States members of the specialized agencies.

(16) Unlike devolution agreements, the declarations are addressed directly to the other interested States, that is, to the States parties to the treaties applied to the new State's territory prior to its independence. Moreover, they appear to contain, in one form or another, an engagement by the declarant State, on the basis of reciprocity, to continue the application of those treaties after independence provisionally pending its determination of its position with respect to each individual treaty. The Uganda-type declarations (paragraph (5) above) fix both for bilateral and multilateral treaties a specific period—usually of two years from independence—during which the new State accepts the provisional application of its predecessor's treaties; and they expressly state that at the end of this period (or of any extension of it subsequently notified) the predecessor's treaties will be regarded as terminated except such as must be considered under customary international law as still surviving. The Swaziland declaration (paragraph (8) above), although it is formulated somewhat differently and does not contain the express statement concerning determination, also fixes a specific period of two years for all treaties and would seem, by implication, to have the same effect as the Uganda-type declarations. The Tanganyika-type declarations (paragraphs (1) to (4) and (11) above) deal with bilateral treaties in the same manner as the Uganda-type declarations, prescribing a specific period of provisional application after which the predecessor's treaties are to be regarded as terminated. But in the case of multilateral treaties they appear to envisage provisional application of each treaty for an indeterminate period pending the review by the new State of its position with respect to that treaty.

(17) The Zambia-type declarations, as commentators have pointed out,[102] are more affirmative in their attitude towards succession to the predecessor State's treaties. These declarations assume that the declarant State will have succeeded, by virtue of customary international law to "many treaty rights and obligations" of its predecessor. And their technique is to express the wish that the other parties to the treaties should presume that each treaty has been succeeded to by the declarant State and base their action on this presumption until a decision is reached that it should be regarded as having lapsed. Even so, it may be doubted whether the Zambia-type declarations constitute anything more than a particular form of engagement by a new State for the provisional application of its predecessor's treaties. They expressly recognize that in virtue of customary law certain treaties may have lapsed at the date of independence; they furnish no indications which might serve to identify either the treaties which are to be considered as succeeded to by the declarant State or those which are to be considered as likely to have lapsed; and they expressly state it to be essential that *each* treaty should be subjected to legal examination with a view to determining whether or not it has lapsed. No doubt, the affirmative form of the presumption contained in these declarations may have some significance in appreciating whether a "novation" has afterwards occurred with regard to a particular treaty. But the declarations, according to their express terms, envisage the continued application of the predecessor State's treaties until a decision has been reached by the declarant State with respect to each particular treaty whether or not it has lapsed; and this would seem clearly to be an engagement for the provisional application of each treaty for an indeterminate period pending a decision whether the treaty has been succeeded to or has lapsed.

(18) The declarations, as previously mentioned, are addressed to a large number of States among which are, for the most part, to be found the other parties to the treaties applied to the declarant State's territory prior to its independence. On the other hand, they are unilateral acts the legal effects of which for the other parties to the treaties cannot depend on the will of the declarant State alone. This could be so only if a newly independent

[102] See D. P. O'Connell, *op. cit.*, vol. II, pp. 121-122; see also the Commonwealth Office Note, in International Law Association, *op. cit.*, annex B, p. 26.

State might be considered as possessing under international law a right to the provisional application of the treaties of its predecessor for a certain period after independence. The notion of such a right is not without its attractions. But that notion does not seem to have any basis in State practice; indeed, many of the declarations themselves clearly assume that the other parties to the treaties are free to accept or reject the declarant State's proposal to apply its predecessor's treaties provisionally. Equally, the treaties themselves do not contemplate the possibility either of "provisional parties" or of a "provisional application". Accordingly, the legal effect of the declarations seems to be that they furnish the basis for a *collateral* agreement in simplified form between the new State and the individual parties to its predecessor's treaties for the provisional application of the treaties after independence. The agreement may, of course, be express but may equally arise from the conduct of any individual State party to any treaty covered by the declaration in particular from acts showing that it regards the treaty as still having application with respect to the territory.

(19) The declarations now under discussion thus appear to have as their first object the creation, in a different context, of a treaty relation analogous to that which is the subject of article 25 of the Vienna Convention on the Law of Treaties. This is the article which deals with agreements for the provisional application of treaties pending their entry into force. Here the declarations in effect invite an agreement for provisional application pending determination of the question whether each individual treaty is to be considered as in force with respect to the new State either by virtue of a "succession" or "novation". As previously explained, they do not purport to deal with the question of the *definitive participation* of the new State in the treaties; this they leave as a matter to be determined with respect to each individual treaty during a period of review, the situation being covered meanwhile by the application of the treaty provisionally on the basis of reciprocity.

(20) There is, of course, nothing to prevent a new State from making a unilateral declaration in which it announces definitively that it considers itself, or desires to have itself considered, as a party to treaties, or certain treaties, of its predecessor applied to its territory prior to independence. In that event, since the declaration would not, as such, be binding on other States, its legal effect would be governed simply by the provisions of the present articles relating to succession to or "novation" of treaties in force in respect of a territory prior to independence. In other words, in relation to the third States parties to the predecessor State's treaties the legal effect of such a unilateral declaration would be analogous to that of a devolution agreement and would depend on the general law set out in the subsequent articles of the present draft.

(21) *Paragraph 1* of article 4 lays down for unilateral declarations a general provision similar to that stated in paragraph 2 of article 3 for devolution agreements. It seems necessary to include such a general provision in the article even although up till now the declarations of successor States have for the most part been directed to the provisional application of the treaties rather than to determining definitively their position with regard to their predecessor's treaties. The possibility of a successor State's making a declaration of its understanding or its will regarding the actual question of succession cannot be excluded. Indeed, the Zambia-type declaration in some respects goes near to being such a declaration. Since a unilateral declaration of the kind here in question cannot of its own force create obligations or rights for third States, its effects like those of a devolution agreement would seem necessarily to be governed by such principles of the novation of treaties or of succession as may be found to apply in general international law.

(22) *Paragraph 2* seeks to determine under what conditions a declaration by a successor State inviting the provisional application of its predecessor's treaties becomes binding upon third States parties to those treaties. Its first two sub-paragraphs deal with cases in which, for quite opposite reasons, provisional application would appear to be excluded by the nature of the treaty.

Sub-paragraph (a) excludes such treaties, if any, as the Commission may consider to be automatically binding upon a successor State; for any such treaties would be maintained in force in accordance with their terms definitively and not merely provisionally. The insertion of this sub-paragraph is purely precautionary, pending the Commission's conclusions whether any, and if so which, treaties are succeeded to automatically by a newly independent State.

Sub-paragraph (b), on the other hand, excludes treaties which by reason of their particular object and purpose are not susceptible of any application in relation to the successor State. A typical example is where participation in the treaty presupposes membership of an international organization and the successor State is not a member of the organization; e.g. the European Convention on Human Rights, concluded by the United Kingdom as a member of the Council of Europe but extended by it to non-European territories which afterwards became independent.

(23) It is *sub-paragraph 2* (c) which contains the main provision and this requires separate consideration. The critical point is whether, in the event of a declaration inviting the provisional application of the predecessor State's treaties, the acceptance of third States should be presumed unless they notify the successor State to the contrary or whether the presumption should be against provisional application unless the third State in question has manifested in some way its acceptance of the invitation. If State practice may not be very clear on the point, general considerations of convenience and of the orderly conduct of international relations would seem to favour the institution of "provisional application" as a transitional procedure for smoothing the solution of the treaty problems which arise on the emergence of a new State. Accordingly, the rule proposed in sub-paragraph (*c*) contemplates that, in the event of such a declaration, the predecessor State's treaties shall be applied provisionally unless within three months the third State in question has notified its objection to the

successor State. A period of three months seems long enough to enable a third State to decide whether or not to accept what is, after all, only the *provisional* application of the existing treaties, whereas to allow a longer period might unduly diminish the value of the "provisional application" procedure. Moreover, it would in any case still be open to the third State to terminate the provisional application of the treaties at any time under the rule proposed in paragraph 3 (*b*) of the article.

(24) *Paragraph 3* deals with the duration of a provisional application of a treaty under the present articles and does so in terms of the several events which may put an end to it.

Sub-paragraph (a) admits the right of either State, subject to any agreement that they may have made regarding the need for notice, to terminate the provisional application of any of the predecessor State's treaties at any time. This right seems inherent in the provisional character of the arrangement as well as being indicated by the circumstances existing between the States concerned in cases of succession.

Sub-paragraph (b) covers cases, such as those which arise under the Tanganyika and Uganda types of declaration, where the declaration itself specifies the period during which the "provisional application" arrangement is to operate. Unless the declaration is renewed—as has happened sometimes—it would seem clear that, on the expiry of the period specified, provisional application of the predecessor State's treaties will automatically come to an end.

Sub-paragraph (c) merely states the obvious rule that, if and when a successor State and a third State reach a definitive decision in regard to a particular treaty—to terminate it or to bring it into force, whether in full or in a modified form—the provisional régime comes to an end.

Sub-paragraph (d) states the same rule for cases where there is no express agreement but an agreement to terminate the treaty or bring it into force, whether in full or in modified form, is to be inferred from the conduct of the States concerned. This rule appears necessary, because to regard a regular and long-lasting application of a treaty as "provisional application" over a considerable period of time would seem undesirable. Equally, if the conduct of both States clearly implied that they regarded the treaty as having become a dead-letter, it would be unjustifiable to consider it as still subject to a régime of provisional application merely by reason of the declaration.

Sub-paragraph (e) states, *ex abundanti cautela*, that the régime of provisional application ceases automatically if the treaty itself comes to an end, through the operation of its own provision (article 54 of the Vienna Convention on the Law of Treaties). A successor State and a third State, if they so desired, might no doubt agree for special reasons to continue the provisional application of a treaty despite its expiry. But third States could not, in general, be considered as accepting anything more than the provisional application of the predecessor State's treaties according to their terms.