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

Topic:

Succession of States with respect to treaties

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SUCCESSION OF STATES

(*a*) Succession in respect of treaties

[Agenda item 1(*a*)]

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

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CONTENTS

ABBREVIATIONS

BENELUX	Belgium-Netherlands-Luxembourg Treaty
EEC	European Economic Community
GATT	General Agreement on Tariffs and Trade
I.C.J.	International Court of Justice
I.C.J. Pleadings	I.C.J., *Pleadings, Oral Arguments, Documents*
I.C.J. Reports	I.C.J., *Reports of Judgments, Advisory Opinions and Orders*
P.C.I.J.	Permanent Court of International Justice
IAEA	International Atomic Energy Agency
OAU	Organization of African Unity
WHO	World Health Organization
WIPO	World Intellectual Property Organization

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EXPLANATORY NOTE: ITALICS IN QUOTATIONS

An asterisk inserted in a quotation indicates that, in the passage immediately preceding the asterisk, the italics have been supplied by the Special Rapporteur.

I. Introduction

THE BASIS OF THE PRESENT REPORT

1. The present report takes the form of a continuation of the Special Rapporteur's second,[1] third [2] and fourth [3] reports on this topic, and is designed to complete the series of draft articles presented in those reports.[4] The basis on which these reports, including the present one, are bring prepared and the scheme of the draft articles are thought to have been sufficiently explained in the "Introductions" to the previous reports and in chapter III of the Commission's report to the General Assembly on the work of its twenty-third session.[5] Accordingly, it is not thought that it would serve any purpose to repeat those explanations here, more especially when both the basis of the work and the scheme of the draft must remain entirely provisional until some of the more fundamental aspects of the topic have been considered by the Commission.

2. The Special Rapporteur therefore confines himself to mentioning a minor change in the arrangement of the draft articles from that envisaged by him at the twenty-third session.[6] He then indicated that any provisions concerning "dispositive", "localized" or "territorial" treaties would be included in the series of articles in part II dealing with the position of "new States" as defined in article 1, paragraph (*e*).[7] It is now thought more convenient to consider the problems raised by these treaties separately and after dealing with the rules applicable to particular categories of succession. The reason is that, as some members of the Commission emphasized at the twenty-second session,[8] the problem of "dispositive", "localized" or "territorial" treaties arises in connexion with cases of simple transfer of territory as well as in cases of new States, protected States, unions of States, etc. Accordingly, in the present report this problem is not treated in part II, which deals with "new States", but will be dealt with separately in a part IV, while part III is devoted to the rules applicable to the various particular categories of succession.

[1] *Yearbook of the International Law Commission, 1969*, vol. II, p. 45, document A/CN.4/214 and Add.1 and 2.

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

[3] *Ibid., 1971*, vol. II (Part One), p. 143, document A/CN.4/249.

[4] Reference may also be made to the Special Rapporteur's first report, which, however, was of a preliminary character (see *Yearbook of the International Law Commission, 1968*, vol. II, p. 87, document A/CN.4/202).

[5] *Ibid., 1971*, vol. II (Part One), p. 275, document A/8410/Rev.1.

[6] *Ibid.*, p. 339, document A/8410/Rev.1, para. 66.

[7] "'New State' means a succession where a territory which previously formed part of an existing State has become an independent State" (see *Yearbook of the International Law Commission, 1970*, vol. II, p. 28, document A/CN.4/224 and Add.1, article 1 and paragraph 2 of the commentary thereon).

[8] *Ibid.*, p. 271, document A/8010/Rev.1, para. 55.

II. Text of draft articles with commentaries[9]

PART III. PARTICULAR CATEGORIES OF SUCCESSION

3. Part II contains the general rules proposed by the Special Rapporteur concerning succession of "new States" in respect of treaties.[10] In addition, the term "new States" has for the purpose of the present articles been defined in article 1, paragraph (*e*) as covering any succession "where a territory which previously formed part of an existing State has become an independent State". Nevertheless, it is necessary for the Commission to consider what, if any, modifications or additions to the general rules in part II may be required for particular types of new States. The cases calling for examination in this connexion appear to be: (1) dependent territories, comprising (*a*) "protected States", (*b*) mandates and trusteeships, (*c*) colonies and (*d*) associated territories; (2) a union of States; and (3) a separation of a State into two or more States.

Article 18. — Former protected States, trusteeships and other dependencies

1. Where the succession has occurred in respect of a former protected State, Trusteeship, or other dependent territory, the rules set out in the present draft articles apply subject to the provisions of paragraph 2.

2. Unless terminated or suspended in conformity with its own provisions or with the general rules of international law:

(*a*) A treaty to which a State was a party prior to its becoming a protected State continues in force with respect to that State;

(*b*) A treaty to which a State, when a protected State, became a party in its own name and by its own will continues in force with respect to that State after its attainment of independence.

COMMENTARY

(1) A preliminary question may arise as to whether a codification of the law of succession of States in the 1970s should include any provisions regarding dependent territories. A treaty setting out the rules of succession in respect of treaties would not "bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".[11] In regard to any previous act, fact or situation the parties would be bound only by rules to which they would be subject under international law independently of the Convention.[12] Having regard, therefore, to the progressive disappearance of dependent territories, and to the modern law regarding self-determination enshrined in the Charter, the omission of provisions concerning dependent territories may be argued to be at once legally justifiable and politically preferable.

(2) On the other side, however, it may be urged that a number of considerations make it desirable that any codification of the present topic should deal specifically with the questions raised by particular types of dependent territories. First, the law applicable to succession with regard to dependent territories may be relevant historically for determining the status to-day of a treaty claimed still to be in force; e.g. in the case of a former "protected State" or Class A Mandate. Hence there may be advantage in attempting to provide an authoritative statement of that law, certain points in which may otherwise give rise to controversy. Secondly, in some cases, e.g. treaties of a "dispositive" or territorial character, where customary law may impose an *obligation* on a successor State to accept the treaty (or the situation established by it), it may be important to determine whether the particular status of the territory prior to independence is to be regarded as negativing the existence of such an obligation.[13] Thirdly, dependency with regard to external relations has not completely disappeared from the international scene and the emergence of some States to independence is very recent, so that the law governing succession in the case of dependent territories is still of present importance. A further consideration is that the differences between the various types of dependencies are much discussed in all the literature, including the most modern literature, concerning succession in respect of treaties; and there may, in consequence, be advantage in covering this aspect of the topic in the present draft, however briefly.

(3) In any event, the Special Rapporteur thinks incumbent upon him to provide the Commission with a study of the possible implications of a new State's former "protected", "mandate", "trusteeship", "colonial" or "associated" status for its succession in respect of treaties. Without such a study, the Commission may lack the material to enable it to decide whether or not to include in the draft articles any provisions on this aspect of the topic. As will appear in the ensuing paragraphs of this commentary, the Special Rapporteur believes that for the most part the special characteristics of the various types of dependent territories do not modify the application of the general rules governing a new State's succession in respect of treaties. Once a clear distinction is made, as it has to be made, between an *obligation* and a *right*[14]

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[9] The texts of the previous draft articles, together with the commentaries, have been published as follows:
Article 1 (para. 1 (*a*), (*b*) and (*c*)) and articles 2-4: *Yearbook of the International Law Commission, 1961*, vol. II, pp. 50 *et seq.*, document A/CN.4/214 and Add.1 and 2;
Article 1 (para. 1 (*d*), (*e*) and (*f*)) and articles 5-12: *ibid., 1970* vol. II, pp. 28 *et seq.*, document A/CN.4/224 and Add.1;
Article 1 (para. 1 (*g*)) and articles 13-17: *ibid., 1971*, vol. II (Part One), p. 143 *et seq.*, document A/CN.4/249.

[10] See *Yearbook of the International Law Commission, 1970*, vol. II, p. 25, document A/CN.4/224 and Add.1, and *ibid., 1971*, vol. II (Part One), p. 143, document A/CN.4/249.

[11] Unless a contrary intention to make the treaty retroactive were established; see Vienna Convention on the Law of Treaties, article 28 (*Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 293).

[12] Vienna Convention on the Law of Treaties, article 4 (*ibid.*, p. 290).

[13] A view advanced by Tanganyika in relation to the Belbases Agreements (see para. 33 of the commentary to article 22 *bis*).

[14] See commentary to article 6 in the Special Rapporteur's third report (*Yearbook of the International Law Commission, 1970*, vol. II, pp. 31-37, document A/CN.4/224 and Add.1).

to continue a predecessor State's treaties, those special characteristics do not appear to call for different rules, except upon the points indicated in the present article.

(a) *Protected States*

(4) This category of dependencies comprises territories which retained in some measure a separate international personality during the period of their dependency upon another State. It thus includes protected *States* but not so-called colonial protectorates, which fall into the category of colonies. Admittedly, it may not always be possible to draw a clear line between a protected State, as so defined, and a colonial protectorate. As the Permanent Court of International Justice once said:

> The extent of the powers of a protecting State in the territory of a protected State depends, first, upon the treaties between the protecting State and the protected State establishing the Protectorate, and, secondly, upon the conditions under which the Protectorate has been recognized by third Powers as against whom there is an intention to rely on the provisions of these Treaties. In spite of common features possessed by Protectorates under international law, they have individual legal charactreristics resulting from the special conditions under which they were created, and the stage of their development.[15]

Thus, there may be different shades of "protection", and the precise point at which "protection" pure and simple ends and turns into annexation may be a matter of nice appreciation. In a later case,[16] it is true, the International Court of Justice referred to the French protectorate over Morocco, established by the Treaty of Fez, in terms which might seem to imply that only a "protected" territory which remained a *sovereign* State would have the character of a protected State:

> Under this Treaty, Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco.

But the term "sovereign State" must have been there used by the Court in a qualified sense, because in several respects Morocco was clearly not a fully sovereign State under the Protectorate. Closer to the mark seems a previous observation of the Court in the same judgment:

> It is not disputed by the French Government that Morocco, even under the Protectorate, has retained its personality as a State in international law.[17]

Thus, the essence of a protected State for present purposes seems to be a territory organized as a State and retaining a distinct identity as such, though the power to conduct its external relations is vested in another State.

(5) For present purposes it must in any event suffice to consider whether, given an admitted case of a protected *State*, this constitutes a special situation governed by particular rules regarding succession in respect of treaties. The problem has two aspects: (1) Do treaties concluded by a protected State with third States prior to its entry into protection continue in force notwithstanding this change in its status? (2) Do treaties concluded by the protecting Power on behalf of or with reference to the protected State continue *ipso jure* to be binding on the latter after independence?

(6) The first question was answered by the Court with a clear affirmative in the *Case concerning rights of nationals of the United States of America in Morocco.* After observing, in the passage quoted above, that under the Treaty of Fez Morocco had "remained a sovereign State" though entrusting the exercise of all its international relations to France, the Court went on:

> France in the exercise of this function, is bound not only by the provisions of the Treaty of Fez, but also by all treaty obligations to which Morocco had been subject before the Protectorate and which have not since been terminated or suspended by arrangement with the interested States.[18]

Moreover, it then gave effect to a number of pre-protectorate treaties as being still in force with respect to Morocco. This decision accords with the opinion of Mr. Max Huber in his report on the *British Claims in the Spanish Zone of Morocco* (Rio Martin),[19] where he held that a Treaty of 1783 made between Great Britain and the Maghzen of Morocco prior to the establishment of the Spanish protectorate was binding upon Spain. Further support for this principle is to be found both in earlier State practice [20] and in the practice of Morocco since her resumption of her independence.[21] The principle appears also to have been applied by the Kingdom of Tonga on the termination of its status as a protected State in 1970. In a notification to the Secretary-General concerning its position after independence in regard to existing treaties Tonga *inter alia* declared:

> With respect to duly ratified treaties which were entered into by the Kingdom of Tonga before the United Kingdom undertook the responsibility for the foreign relations thereof, the Government of the Kingdom of Tonga acknowledges that they remain in force to the extent to which their provisions were unaffected in virtue of international law by the above recited instruments entered into between the United Kingdom and the Kingdom of Tonga or by other events.[22]

(7) In practice, no doubt, some pre-protectorate treaties will have terminated through the application of their own provisions, by consent or through the application of the general law of treaties. In principle, however, treaties concluded by a State before it accepts protection are generally regarded as continuing to bind it both during

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[15] *Nationality Decrees issued in Tunis and Morocco; P.C.I.J.*, Series B., No. 4, p. 27.

[16] Case concerning rights of nationals of the United States of America in Morocco; *I.C.J. Reports 1952*, p. 188.

[17] *Ibid.*, p. 185; see also K. Zemanek, "State succession after decolonization", *Recueil des cours de l'Académie de droit international de La Haye, 1965-III* (Leyden, Sijthoff, 1965), vol. 116, pp. 195-196.

[18] *I.C.J. Reports 1952*, p. 188.

[19] United Nations, *Reports of International Arbitral Awards*, vol. II (United Nations publication, Sales No. 1949.V.1), p. 725.

[20] A. D. McNair, *The Law of Treaties*, rev. ed., (Oxford, Clarendon Press, 1961), pp. 627-628. This writer suggests that annexation might sometimes be resorted to instead of protection for the very purpose of putting an end to inconvenient prior treaties affecting the territory (*ibid.*, p. 628).

[21] See diplomatic correspondence of Morocco with Italy, the United Kingdom and the United States (*Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 161, document A/CN.243/Add.1, paras. 62-64).

[22] Document A/CN.4/263, United Kingdom of Great Britain and Northern Ireland, Treaties, Tonga.

the protectorate and after its resumption of independence. The reason is that these treaties were from the outset treaties of the protected State itself, whose separate international personality remained in being notwithstanding its temporary "protection" by the other State.

(8) Logically, it may be urged, the same reasoning should be applied to treaties concluded with reference to a protected territory *during the period of protection*. In other words, if a treaty had been concluded by the protecting Power *on behalf of* or *in the name of* the protected State, the treaty should be considered as a treaty of the protected State itself and be binding upon it after independence. But if a treaty had been concluded by the protecting Power simply in its own name, and merely "extended" to the protected State, the treaty should not be considered as a treaty of the protected State itself, and the question of succession should be governed by the same rules as in the case of a treaty "extended" to a colonial territory. Such an approach to succession in respect of treaties concluded during a protectorate, if logical enough, is not without its difficulties.[23]

(9) One difficulty is the somewhat formal nature of the distinction between a treaty concluded on behalf or in the name of a protected State and one extended to it. Thus, there are many examples of treaties concluded by the United Kingdom and France which were accompanied by declarations that ratification or accession did not include any of their dependent territories, of whatever category. Then at later dates, under an authorization contained or implied in the treaty and after consultation with the local authorities, they notified the extension of the treaty to particular named dependencies. Moreover, in these cases the dependencies in question are recorded in *Multilateral treaties in respect of which the Secretary-General performs depositary functions*[24] as having acceded to the treaty on the respective dates of their notifications. True, the names of dependencies are printed in italics and subsumed under Great Britain or, as the case may be, France in order to show that they are not separate *parties* to the treaty. But the treaty was in each instance extended to the dependency by an act of consent specifically related to that dependency.[25] A good example is the Geneva Convention of 12 September 1923 for the Suppression of the Circulation of and Traffic in Obscene Publications: specific acts of consent were notified by Great Britain for numerous dependencies of various categories, while France did so for Morocco.[26]

(10) Another difficulty is that, *ex hypothesi*, a "protected State" is one that has entrusted its treaty-making power to the protecting State, so that the subsequent conclusion by the latter of any treaty having application to the protected State may be said to be a treaty made on its behalf. This is not to deny that some treaties may have been concluded specifically in the name and for the purposes of the protected State,[27] while others may have been concluded by the protecting State primarily on its own behalf, even although "extended" to the protected State. But it remains a question whether this difference in the form of the protecting State's exercise of the treaty-making power with reference to the protected State leads to different results in regard to "succession". In this connexion it may be recalled that Cambodia contended in the *Temple* case[28] that France had "represented" her in concluding with Siam a Treaty of Friendship, Commerce and Navigation in 1937; and claimed to invoke that treaty on the basis not of any principle of succession but of her "representation" by France in its conclusion. Thailand disputed the validity of this theory of the continuity of treaties concluded on behalf of a protected State.[29] The Court, however, did not find it necessary to decide the issue.

(11) A further point to take into account is that the inheritance of a treaty may in any event occur (by notification of succession in the case of multilateral treaties and "novation" in the case of bilateral treaties) although the treaty had been merely "extended" to the protected State. Whether the new State was formerly a protected State or a colony, all that is required to open up the possiblity of succession under articles 7 and 13 of the present draft is that the treaty should have been applicable in respect of the territory at the date of the succession. The only question, therefore, is whether, in the case of a treaty concluded "in the name of" a protected State, the treaty automatically continues in force as a treaty already binding on the new State or whether its continuance in force is a matter of "succession" governed by the general rules set out in the present draft.

(12) Morocco, in her "devolution agreement"[30] with France, appears to have distinguished between treaties concluded specifically in her name and treaties merely "extended" to her. She there agreed to "assume the obligations arising out of international treaties concluded by France on behalf of Morocco and out of such international instruments relating to Morocco as have not given rise to observations on its part". Similarly, in clarifying her position with respect to general multilateral treaties of which the Secretary-General is the depositary, Morocco seems to have made notifications of "succession" for treaties which had merely been "extended" to her by France but not to have done so for treaties in regard to which, prior to independence, her separate "accession"

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[23] The case for this approach is cogently argued by K. Zemanek, *loc. cit.*, pp. 196-202.

[24] United Nations, *Multilateral treaties in respect of which the Secretary-General performs depositary functions: List of signatures, ratifications, accessions, etc., as at 31 December 1968* (United Nations publication, Sales, No. E.69.V.5) (referred to hereafter as *Multilateral treaties ... 1968*).

[25] Cf. J. E. S. Fawcett, "Treaty relations of British overseas Territories" *British Year Book of International Law* (1949), (London), vol. 26, 1950, p. 102.

[26] United Nations, *Multilateral treaties ... 1968*, p. 158.

[27] e.g., the Arbitration Agreement of 1954 concluded between "the Government of the United Kingdom (acting on behalf of the Ruler of Abu Dhabi)" and the Government of Saudi Arabia (United Kingdom *Treaty Series*, No. 65 Cmnd. 9272, (London, H.M. Stationery Office, 1954).

[28] I.J.C. *Pleadings, Temple of Preah Vihear*, vol. I, pp. 165-166.

[29] *Ibid.*, vol. II, p. 38.

[30] See *Yearbook of the International Law Commission. 1962*, vol. II, p. 127, document A/CN.4/150, annex, section No. 6.

had been communicated by France.[31] Again, no notification or other act was considered necessary either by Morocco herself or by Switzerland, as depositary of the relevant treaties, to bring about the continuance of Morocco's membership of the International Union for the Protection of Literary and Artistic Works [32] or of the International Union for the Protection of Industrial Property.[33] In both these cases France had separately notified Morocco's accession to the treaties in question during the period of protection and, on independence, Morocco was simply regarded as having been a party to the treaties in her own name and as remaining so after the termination of her protected status. In the case of the 1929 Geneva Humanitarian Conventions, on the other hand, which had merely been "extended" to Morocco, she became a party after independence by a notification of accession in July 1956, which came into effect only six months later in accordance with the provisions of the 1929 treaties.[34] (It seems that the Moroccan Government used the procedure of accession rather than "succession" in the case of these treaties by inadvertence and considered itself bound by all treaties validly contracted with respect to the Moroccan protectorate by France.) [35] Evidence of Morocco's practice in regard to bilateral treaties is less readily available, but her attitude towards her succession in respect of bilateral treaties is thought to be the same as in the case of multilateral treaties. This is borne out by the fact that in her devolution agreement with France she made no distinction between bilateral and multilateral treaties; and she seems to have considered herself as in principle bound by all protectorate treaties concluded prior to independence, since she expressly excepted from the devolution agreement only one treaty, the treaty granting military bases to the United States.

(13) Tunisia's attitude after independence appears to have been less favourable to the continuity of treaties concluded during her period of protection.[36] She did not conclude any devolution agreement with France; and she made no reply to the Secretary-General's inquiry as to whether she considered herself bound by five general multilateral treaties of which he was the depositary and which had been extended to Tunisia by France. It is true that, like Morocco, Tunisia was considered as having been a member of the International Unions for the Protection of Literary and Artistic Works and for the Protection of Industrial Property prior to independence, and as automatically remaining such upon independence.[37] It is also true that prior to independence Tunisia was considered as a party to the Agreement for the Establishment of a General Fisheries Council for the Mediterranean and as remaining a party to that Agreement upon independence, without any fresh act of acceptance.[38] Again, she is listed by the Secretary-General as a party to the Convention and Protocol of 3 November 1923 relating to the Simplification of Customs Formalities simply in virtue of her ratification of that Convention during her period of protection.[39] In the case of the GATT, however, she did not maintain the commitments entered into by France on her behalf but, after a period of *de facto* application, negotiated her own accession to GATT.[40] Similarly, she notified her *accession*, not succession, to the Geneva Humanitarian Conventions of 1949 and there is no indication that she did this by mere inadvertence. Indeed, whereas Morocco notified her "succession" to the Convention on Road Traffic of 19 September 1949, Tunisia proceeded to become a party to it by way of "accession"; [41] and she deposited a new "acceptance" of the International Air Services Transit Agreement of 7 December 1944 on her own account, without regard to France's acceptance of the Agreement during the period of protection.[42] She seems, moreover, to have taken the same position in regard to bilateral treaties. In 1959 the United Kingdom Government informed Tunisia that it considered a Franco-British Treaty of 1889 which extended an earlier extradition treaty specifically to Tunisia to be still in force on the express ground that Tunis had formerly been a protectorate with a separate international personality. Tunisia replied that she did not consider herself as bound by the treaty.[43] The United Kingdom, it is true, insisted upon treating the Tunisian reply merely as a notice of termination; but it remains clear that Tunisia herself rejected the thesis of her automatic succession to the protectorate treaties. In the case of trade agreements Tunisia accepted a measure of continuity; but the treaties in question were short-term and renewable, and the continuity appears to be referable to Tunisia's assent to their remaining in force, rather than to any theory of a protectorate's succession to its predecessor's treaties.[44]

(14) Cambodia, Laos and the Republic of Viet-Nam, formerly three separate parts of French Indo-China, are commonly referred to as examples of "protected States"; [45] and, as already recalled, Cambodia in the *Temple* Case specifically invoked her prior "representation" in international relations by France as the basis of her claim to

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[31] *Ibid.*, pp. 111-112, paras. 38-39; cf. United Nations, *Multilateral Treaties ... 1968*, pp. 125, 126, 158 and 399.

[32] *Yearbook of the International Law Commission, 1968*, vol. II, p. 17, document A/CN.4/200 and Add.1 and 2, paras. 42-44.

[33] *Ibid.*, pp. 66-67, paras. 293-295.

[34] *Ibid.*, p. 44, para. 183.

[35] See D. P. O'Connell, *State Succession in Municipal Law and International Law* (Cambridge, University Press, 1967), vol. II, *International Relations* (referred to hereafter as "D.P. O'Connell, *State Sucession* ..., vol. II"), p. 142.

[36] See generally P. Louis-Ducas, *Journal du droit international* (Paris), 88th year, No. 1 (January-March 1961), pp. 86-119.

[37] *Yearbook of the International Law Commission, 1968*, vol. II, p. 17, document A/CN.4/200 and Add.1 and 2, paras. 42-44.

[38] *Ibid., 1969*, vol. II, p. 43, document A/CN.4/210, para. 77.

[39] United Nations, *Multilateral Treaties ... 1968*, p. 399.

[40] *Yearbook of the International Law Commission, 1968*, vol. II, p. 81, document A/CN.4/200 and Add.1 and 2, paras. 353-355.

[41] United Nations, *Multilateral Treaties ... 31 December 1968*, p. 230.

[42] United Nations, *Materials on Succession of States* (United Nations publication, Sales No. E/F.68.V.5), p. 226.

[43] *Ibid.*, p. 184.

[44] *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), pp. 162-163, document A/CN.4/243 Add.1, paras. 66-71.

[45] For the view of the Legal Committee of the French Union, see International Law Association, *The Effect of Independence on Treaties: A Handbook* (London, Stevens, 1965), pp. 168-169.

be entitled to invoke a 1937 Franco-Siamese Treaty of Friendship, Commerce and Navigation. The practice of these three States after independence does not, however, appear to differ materially from that of other dependent territories. Two of them, Laos and Viet-Nam, entered into devolution agreements with France which stated that they were substituted for France in all the rights and obligations resulting from all international treaties and particular conventions contracted by France in their name.[46] These agreements do not, however, appear to be based on any doctrine of the continuity of protectorate treaties. When the United Kingdom denied that there could be any *automatic* succession by Laos to a civil procedure convention or to bilateral treaties of a similar nature, Laos accepted this view of her legal position.[47] In the case of certain narcotic conventions of which the Secretary-General is the depositary, joint notifications were made by France and each of the three States, informing him of the transfer from France to the new State of the duties and obligations arising from the application of those Conventions to their country.[48] These notifications relate to only a very small number of the multilateral treaties of which the Secretary-General is the Depositary and speak not of the continuity of protectorate treaties but of the *transfer* of obligations from France to the new States. With respect to many of the multilateral treaties of which the Secretary-General is the depositary, Cambodia, Laos and the Republic of Viet-Nam have taken no action vis-à-vis the depositary and are not listed as parties. At the same time, it may be noted that in one instance, where France had made separate acceptances of the treaty specifically for Viet-Nam and Laos, these two States did not rely on the acceptance given on their behalf during the protectorate but deposited their own acceptances of the treaty after independence.[49] In another instance, where France had made a separate accession to a League of Nations Treaty specifically on behalf of French Colonies, Protectorates and Territories under French Mandate, Laos again deposited her own instrument of accession,[50] and did not rely on any doctrine of continuity or succession.

(15) Cambodia, Laos and Viet-Nam, unlike Morocco and Tunisia, were not considered as separate parties to the Conventions for the Protection of Literary and Artistic Works prior to independence or to the Conventions for the Protection of Industrial Property. These Conventions had merely been extended separately to France's overseas departments and territories.[51] After independence Cambodia and Viet-Nam informed the depositary that they no longer considered themselves as bound by the Conventions concerning literary and artistic works;[52] Laos did not notify her decision to the depositary, and was equally not considered a party.[53] In the case of the Conventions concerning industrial property, Cambodia did not notify the depositary of her decision and was not considered as having become a party.[54] Laos, on the other hand, notified her *succession* to the London text of the Paris Convention, while Viet-Nam's "accession" to the Conventions was treated by the depositary as a declaration of continuity without apparent objection from the Republic.[55] As to the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes, the Administrative Council of the Permanent Court of Arbitration invited States, formerly dependent territories of a contracting party, to consider themselves as parties to the Conventions. Cambodia and Laos then notified the depositary that they wished to be considered as parties; but the Republic of Viet-Nam did not accept succession to these Conventions.[56] Accession, not succession, was the procedure adopted by all these States when becoming parties to the Geneva Humanitarian Conventions of 1949.[57] In the case of GATT, none of these States elected to consider itself a party by succession to France.[58]

(16) Accordingly, so far as multilateral treaties are concerned, the evidence does not indicate that the question of the succession of Cambodia, Laos and Viet-Nam to treaties concluded by France during the period of their protection has been dealt with on any different basis from that of the succession of other dependent territories in respect of pre-independence treaties. Nor does there seem to be any substancial body of evidence indicating the application of a special principle, derived from their former status as protected States, with respect to their succession to bilateral treaties concluded prior to their independence. If Cambodia invoked such a principle in the *Temple* case, Thailand, objected that there was no difference between the legal position of an ex-protectorate and other dependent territories with regard to succession to treaties.[59] Laos, as already noted,[60] agreed with the United Kingdom that there was no automatic succession to civil procedure and similar bilateral treaties. In general, and leaving aside the question of treaties of a "territorial" or "dispositive" character, these three ex-protectorates appear to have considered themselves as having the same freedom either to discontinue or to "novate" bilateral treaties as other dependent territories. This is borne out

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[46] United Nations, *Materials on Succession of States (op. cit.)*, pp. 188 and 189.

[47] *Ibid.*

[48] *Yearbook of the International Law Commission, 1962*, vol. II, p. 111, document A/CN.4/150, paras. 34 and 35.

[49] United Nations, *Multilateral Treaties . . . 1968*, pp. 125-126.

[50] *Ibid.*, pp. 361 and 362.

[51] *Yearbook of the International Law Commission, 1968*, vol. II, p. 10, document A/CN.4/200 and Add.1 and 2, para. 10, foot-note 28.

[52] *Ibid.*, p. 21, para. 69.

[53] *Ibid.*, p. 26, para. 98 and foot-note 196. Laos was not included in the list of members of the Berne Union published by WIPO in January 1972 (*Copyright* (Geneva), 8th year, No. 1, January 1972, pp. 8-9).

[54] *Yearbook of the International Law Commission, 1968*, vol. II, p. 71, document A/CN.4/200 and Add.1 and 2, para. 310.

[55] *Ibid.*, pp. 61-62, para. 269.

[56] *Ibid.*, pp. 29-30, paras. 115-117 and 127, foot-notes 242 and 243.

[57] *Ibid.*, pp. 44-45, paras. 183 and 185.

[58] *Ibid.*, pp. 81-82, paras. 353, 354, 357 and 358.

[59] I.C.J. *Pleadings, Temple of Preah Vihear*, vol. II, p. 38.

[60] See paragraph 14 above.

by the fact that the official United States publication, *Treaties in Force*,[61] does not list any bilateral treaty earlier in date than 1951 as still being in force with respect to any of these three States; and by 1951 they had already recovered their autonomy in treaty-making and were on the verge of full independence.[62] It is true that, in 1950, the Legal Committee of the French Union expressed the view that "treaties regularly concluded under the previous régime and which were hitherto applicable to these States continued to bind them as a matter of law despite subsequent changes".[63] But, as indicated in the preceding paragraphs, the subsequent treaty practice with respect to these States does not appear to be compatible with that view of the law.

(17) As to former British protected States, Kuwait did not enter into any devolution agreement with the United Kingdom or make any unilateral declaration. Nor does she seem to have based her treaty practice on any special theory regarding treaties concluded by a protecting Power during the period of protection. The evidence is comparatively sparse, probably because the number of treaties concluded by the United Kingdom specifically on behalf of Kuwait or "extended" to her was not very large. In general, however, Kuwait seems to have preferred to become a party to pre-independence treaties by "accession" in her own name. Thus, she deposited her own instrument of accession to the Supplementary Convention of 7 September 1956 on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, although in 1957 the United Kingdom had transmitted to the depositary a separate notification of its application to Kuwait in a note referring specifically and exclusively to Kuwait.[64] Again, she became a party by accession to the Geneva Humanitarian Conventions of 1949 which the United Kingdom had undertaken to apply to Kuwait to the extent of its powers in relation to that territory.[65] As for bilateral treaties, the United States publication *Treaties in Force* lists a British-United States Consular Convention of 1951 and a Visa Convention of 1960 as still in force. But there is no indication that this has been done on any different basis from that applicable to other forms of dependent territories. The emergence of the other British-protected Persian Gulf States to independence is too recent for their position in regard to treaties to be apparent. But, like Kuwait, they have not entered into any devolution agreement, or made any declaration.

(18) Tonga, on the other hand, whose emergence as an independent State is also very recent, transmitted to the Secretary-General a unilateral declaration setting out in some detail her position in regard to treaties in force with respect to Tonga at the date of independence; and she asked that this declaration should be circulated to all Members of the United Nations so that they might "be effected with notice of the Government's attitude". Earlier in this commentary reference has been made to the clause in the declaration recognizing the continued validity of treaties concluded by Tonga *prior* to the protectorate to the extent that they were unaffected by subsequent acts or events. As to treaties concluded during the period of protection, paragraphs 9 to 12 of the declaration stated:

> The Government of the Kingdom of Tonga, conscious of the desirability of maintaining existing legal relationships, and conscious of its obligations under international law to honour its treaty commitments, acknowledges that treaties validly made on behalf of the Kingdom of Tonga by the Government of the United Kingdom pursuant to and within the powers of the United Kingdom derived from the above recited instruments and subject to the conditions thereof bound the Kingdom of Tonga as a Protected State and in principle continue to bind it in virtue of customary international law after 4 June 1970 and until validly terminated.
>
> However, until the treaties which the United Kingdom purported to make on behalf of the Kingdom of Tonga have been examined by it, the Government of the Kingdom of Tonga cannot state with finality its conclusions respecting which, if any, such treaties were not validly made by the United Kingdom within the powers derived from and the conditions agreed to in the above recited instruments, and respecting which, if any, such treaties are so affected by this termination of the arrangements whereby the United Kingdom exercised responsibility, for the international relations of the Kingdom of Tonga, or by other events, as no longer to be in force in virtue of international law.
>
> It therefore 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 the United Kingdom purported to make on behalf of the Kingdom of Tonga in the view of the Government thereof do not create rights and obligations for the Kingdom of Tonga by virtue of the above mentioned circumstances and in virtue of international law.
>
> It is desired that it be presumed that each treaty continues to create rights and obligations and that action be based on this presumption until a decision is reached that the treaty should be regarded as not having been validly made for the Kingdom of Tonga or as having lapsed. Should the Government of the Kingdom of Tonga be of the opinion that it continues to be legally bound by the treaty, and wishes to terminate the operation of the treaty, it will in due course give notice of termination in the terms thereof.[66]

In these paragraphs Tonga appears to have taken the position that under customary law *all* treaties validly made by the United Kingdom on behalf of Tonga in principle continue to be binding upon her; and for this purpose she does not seem to distinguish between treaties made "in the name of" Tonga and those "extended" to Tonga. Admittedly, the declaration reserves to Tonga a considerable power of appreciation with regard both to the validity of the United Kingdom's exercise of its treaty-making powers and to the effect on any particular treaty of the termination of the protectorate or of other subsequent events. But in principle Tonga appears to consider herself as *ipso jure* bound by all treaties concluded by the United Kingdom with reference to Tonga.

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[61] United States, Department of State, *Treaties in Force—A List of Treaties and other International Agreements of the United States in Force* (Washington, D.C., U.S. Government Printing Office).

[62] D. P. O'Connell, *State Succession* . . . , vol. II, pp. 144-145.

[63] International Law Association, *The Effect* . . . *(op. cit.)*, p. 168.

[64] United Nations, *Multilateral Treaties* . . . *1968*, pp. 315-317.

[65] *Yearbook of the International Law Commission, 1968*, vol. II, pp. 34 and 44, document A/CN.4/200 and Add.1 and 2, para. 137, foot-note 261, and para. 182.

[66] Document A/CN.4/263, United Kingdom of Great Britain and Northern Ireland, Tonga.

(19) The modern treaty practice examined in the present commentary is not thought to bear out the proposition that all treaties validly concluded by a protecting State within the scope of the powers conferred upon it continue *ipso jure* to bind the protected State after independence. Nor does Tonga appear to regard herself as simply taking over the treaty relations established on her behalf by the United Kingdom. When she notified the Secretary-General that she considered herself bound by the four Geneva Conventions on the Law of the Sea, which had been extended to her prior to independence, she withdrew certain United Kingdom observations concerning an Indonesian reservation and substituted for them a new observation of her own. It seems, moreover, from the correspondence [67] that both Tonga and the Secretary-General regarded the Tongan notification as a "notification of succession" similar in character to the notifications of succession made by ex-colonial new States; and this appears also from correspondence relating to other general multilateral treaties. The Tongan declaration does not differentiate between multilateral and bilateral treaties, so that the position taken by Tonga in paragraphs 9 to 12 presumably applies equally to bilateral treaties. In this connection it may be noted that the United States publication *Treaties in Force* lists six treaties as still in force, one of which dates from before Tonga's acceptance of British protection.[68] It does not, however, specify whether Tonga herself has been consulted as to the continuance in force of these particular treaties [69] merely stating that a further study is to be made of other agreements in order to determine which would continue in effect under the Tongan declaration.

(20) Tanzania, formed from the union of Tanganyika and Zanzibar, seems to have taken the view that British treaties applicable to Zanzibar when a Britsih protectorate would, in principle, have continued to bind Zanzibar after independence, on the hypothesis that such was the rule of customary law with respect to protectorates.[70] Whether or not customary law should be considered as laying down such a rule for "protected States", the view that Zanzibar succeeded *ipso jure* to treaties extended to her by the United Kingdom seems open to question. Zanzibar had in practice [71] been treated as a colonial protectorate rather than a "protected State"; for example, the United Kingdom had extended numerous multilateral treaties to the Zanzibar protectorate apparantly on the same basis as for colonial protectorates.[72] Again, Switzerland in correspondence with Tanzania concerning the status of a British extradition treaty does not appear to have placed reliance on any special rule applicable to protected States. She merely suggested that it would be possible, by an exchange of notes, mutually to confirm the maintenance in force of the treaty, seeing that in 1937 it had been extended by the United Kingdom to the then protectorate of Zanzibar.[73]

(21) Although some other possible cases of protected States might be investigated, the practice examined in the preceding paragraphs is thought sufficient for the Commission's consideration of the present problem. This practice is somewhat inconsistent, except on one point: namely, that a treaty entered into by a protected State prior to the establishment of the protectorate in principle remains binding upon it both during the period of protection and on reversion to independence.[74] The divergence is as to whether treaties concluded by the protecting Power and applicable to the protected State during the protectorate are to be considered as binding the latter *ipso jure* after its resumption of its independence. Two newly independent States, Morocco and Tonga, appear to have recognized that, as former protected States, it is incumbent upon them to take over their protecting Power's treaties or, at least, those made specifically in their name or on their behalf. Tunisia and other former protected States do not, however, appear to have regarded themselves as in any different position from other new States; i.e. they do not appear to have considered themselves as bound automatically to accept the continued application of the treaties concluded by the protecting State. The question then is as to what should be the rule adopted by the Commission.

(22) The Special Rapporteur doubts whether either practice or principle demands that, for the purpose of succession in respect of treaties, a basic distinction should be made between the case of an ex-protected State and that of an ex-colonial territory. The practice, as already indicated, is divergent. If in some instances ex-protected States seem to have been regarded as bound automatically to take over treaties concluded by their protecting Power, in many other instances this has not been so and the practice followed has been the same as that in the case of ex-colonial States. As to principle, while there may be a difference in the fact that prior to independence the protected State was regarded as having a measure of separate personality, the conditions under which the treaties in question were concluded or made applicable in respect of the protected State appear to be a more crucial factor. It is true that in some instances —comparatively few— the protecting Power did indeed act purely as the representative of the protected State which was then considered to be a party to the treaty on its own

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[67] Information supplied by the Secretariat.

[68] Treaty of Friendship, Commerce and Navigation of 2 October 1886.

[69] The Treaty of 1886, for example, appears to have been terminated in 1919 by a British notice of termination given under article 14 on behalf of Tonga, except for article 6 (see *British and Foreign State Papers, 1919*), vol. 112 (London, H.M. Stationery Office, 1922), p. 580 and *ibid., 1920*, vol.113 (London, H.M. Stationery Office, 1923), p. 192; and G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1940), vol. I, p. 83.

[70] E. E. Seaton and S. T. M. Maliti, "Treaties and Succession of States and Governments in Tanzania", in *African Conference on International Law and African Problems* (Lagos, Nigerian National Press, 1967).

[71] See J. E. S. Fawcett, *The British Commonwealth in International Law* (London, Stevens, 1963), p. 117.

[72] See United Nations, *Multilateral Treaties . . . 1968*, pp. 141 102, 114, 117, 127, 140, etc.

[73] *Yearbook of the International Law Commission, 1970*, vol. II, p. 115, document A/CN.4/229, para. 65; see also E. E. Seaton and S. T. M. Maliti, *loc. cit.*, paras. 71-73.

[74] Such a treaty may have otherwise expired under its own provisions or been terminated under the general law of treaties.

behalf; [75] and that in other more numerous instances the protecting Power in varying measure consulted the protected State regarding the treaty. But not infrequently the protecting Power concluded or applied the treaty in respect of the protected State with no, or only token, consultation with the latter.[76] Accordingly, the question how far it might be legitimate to consider treaties concluded by a protecting Power as actually treaties of the protected State itself is one that could be answered only by a separate examination of the circumstances in which the treaties were concluded or applied in respect of the latter. Having regard to the difficulty which such an examination would present and to the fact that in practice ex-protected States not infrequently seem to have been dealt with on the same basis as ex-colonial States, the Special Rapporteur suggests that the general rules regarding new States should be regarded as applying to ex-protected States, subject to one point. This concerns treaties to which the protected State had become a party in its own name during the period of protection. In the case of these treaties, as the instances cited [77] indicate, the practice appears to have been to regard the protected State as automatically remaining a party to such treaties.

(23) In the light of the various considerations set out in the foregoing paragraphs, it is suggested that the general rules proposed in parts I and II of the present draft should apply to ex-protected States with the addition of two particular rules: one to provide for the continuance in force of pre-protectorate treaties, and the second to provide for the continuance in force of treaties made during the period of protection but to which the protected State was a party in its own name and by its own will. In both cases the rule would, of course, be subject to the proviso that the treaty had not been terminated in accordance with its own provisions or under general international law. Paragraph 1 of the present article is, therefore, so formulated.

(b) *Mandates and trusteeships*

(24) In the present connexion the essence of both a mandate and a trusteeship may be taken to be a territory the external relations of which are temporarily administered by a sovereign State on behalf of the international community and under a trust for the people of the territory. Neither a mandate (according to the preponderant view) nor a trusteeship agreement vested the sovereignty of the territory in the administering Power. Under both forms of international trusteeship, however, responsibility for the international (including treaty) relations of the territory did vest in the administering Power subject to the trust. Moreover, several mandate and trusteeship agreements included specific provisions regarding the treaty relations of the territories concerned. It is therefore necessary to examine these provisions together with the treaty practice concerning mandated and trusteeship territories.

(25) *Mandates.* The four Pacific Ocean mandates and the South West Africa mandate were in a short form and contained no provision regarding treaties.[78] Article 8 of *the British mandates for Togoland and the Cameroons* and of the French mandates for Togoland and the Cameroons, and article 9 of the Belgian East African Mandate provided:

> The Mandatory shall apply to the territory any general international conventions applicable to his contiguous territories.[79]

but were otherwise silent upon the question of treaties. The British East African Mandate had a provision regarding general international conventions, but in a different, and more elaborate, form:

> The Mandatory shall apply to the territory any general international conventions already existing, or which may be concluded hereafter with the approval of the League of Nations, respecting the slave trade, the traffic in arms and ammunition, the liquor traffic and the traffic in drugs, or relating to commercial equality, freedom of transit and navigation, aerial navigation, railways, postal, telegraphic and wireless communication, and industrial, literary and artistic property.[80]

A similar article appeared in the British mandates for Palestine and Transjordan [81] and in the French mandate for Syria and the Lebanon.[82] In all these cases, however, as the mandates were "Class A" mandates, the opening words of the article were phrased: "The Mandatory shall adhere, on behalf of Palestine (or Transjordan or Syria and the Lebenon) to any general international conventions already existing . . . etc.". The mandate for Syria and the Lebanon and for Palestine and Transjordan, also contained a separate article on extradition agreements:

> Pending the conclusion of special extradition agreements, the extradition treaties at present in force between foreign Powers and the Mandatory shall apply within the territory of Syria and the Lebanon (Palestine).[83]

Finally, these mandates had a further provision concerning capitulations:

> The privileges and immunities of foreigners, including the benefits of consular jurisdiction and protection as formerly enjoyed by capitulation or usage in the Ottoman Empire, shall not be applicable in Palestine.
>
> Unless the Powers whose nationals enjoyed the afore-mentioned privileges and immunities on August 1, 1914 shall have previously renounced the right to their re-establishment, or shall have agreed to their non-application for a specified period, these privileges and immunities shall, at the expiration of the mandate, be immediately re-established in their entirety or with such modifications as may have been agreed upon between the Powers concerned.[84]

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[75] e.g. some of the treaties mentioned in paragraphs 12 and 13 of the present commentary.

[76] See K. Zemanek, *loc. cit.*, pp. 197-198; and the observations of Mr. Bartoš (*Yearbook of the International Law Commission, 1963*, vol. II, pp. 293-294, document A/5509, annex II, appendix II).

[77] See paragraphs 13 and 14 above.

[78] See A. Wright, *Mandates under the League of Nations* (Chicago, University of Chicago Press, 1930), appendix II, pp. 618-621.

[79] *Ibid.*, pp. 615-618.

[80] Article 9 (*ibid.*, pp. 614-615).

[81] *Ibid.*, pp. 600-607.

[82] *Ibid.*, pp. 607-611.

[83] Article 7 (Syria and Lebanon); article 10 (Palestine and Transjordan).

[84] Article 8 (Palestine and Transjordan); article 5 (Syria and the Lebanon).

The other Class A mandate, the British mandate for Iraq,[85] was in a somewhat special form, as it was linked to the 1922 Anglo-Iraq Treaty of Alliance. The League Council in its resolution "decided" that any capitulations should be suspended while the Treaty of Alliance was in force. Otherwise, the only relevant provision was in article 10 of the Treaty, under which the parties bound themselves to conclude separate agreements to secure the execution of any treaties, agreements or undertakings which Great Britain was under obligation to see carried out in respect to Iraq. Such agreements, it was said, were to be communicated to the League Council.

(26) Despite the heterogeneous character of the various provisions in the mandates, the broad principles acted on with regard to the treaty relations of the mandated territories seem reasonably clear. First, treaties previously applied in respect of the territory were, in general, considered as no longer applicable. It seems, however, to have been recognized that "dispositive" treaties were an exception to this general rule and would continue to be binding with respect to a mandated territory. The United States insisted that treaty "capitulations" previously granted by Turkey in principle continued in force with respect to the territories of the Class A mandates unless renounced by the interested parties; and this seems to have been on the theory that the treaty obligations attached permanently to the territories concerned.[86] Moreover, this claim seems to have been recognized in the above-mentioned provisions of the Class A mandates, which merely *suspended* the operation of capitulations during the mandatory régime. The same theory would seem to be the explanation also of the continued application of the Congo Basin "open door" conventions with respect to the territories of certain of the Class B mandates.[87] It may be that an opinion given by the British Law Officers in 1924 regarding the application of a Convention of 1899 to the Class C mandate of Western Samoa reflects the same theory.[88] But the circumstances were somewhat special, as the Mandatory Power was one of the parties to the Convention in question. Be that as it may, the evidence of the League of Nations period seems to indicate a recognition that certain types of dispositive or localized treaties continued to apply after the establishment of the mandate.

(27) Secondly, although the territory did not pass into the sovereignty of the Mandatory, the treaty-power in relation to the territory was exercisable by the Mandatory. The power both to conclude new treaties on behalf of the territory and to extend the Mandatory's treaties to the territory was thus vested in the Mandatory. The exercise of this power was, however, subject to the terms of the mandate and to supervision by the Permanent Mandates Commission. The latter was active in promoting the extension of general international conventions to mandates both in fulfilment of the specific provisions of particular mandates and on general grounds; and many general conventions were so extended. It further made a recommendation, which was endorsed by the Council and Assembly of the League, that bilateral treaties should also be applied for the benefit of mandated territories so far as was consistent with the terms of their mandates. Extension of bilateral treaties to mandates required the consent of the other party, but in many cases relevant bilateral treaties were extended to mandated territories on the same basis as for other dependent territories of the Mandatory.[89]

(28) The Class B and Class C mandates, apart from the special case of South West Africa,[90] underwent a further period of tutelage as trusteeship territories and the effect of independence on their treaty relations will therefore be examined later in connexion with termination of trusteeships. The Class A mandates, on the other hand, all terminated without passing through trusteeship, so that the effect of independence on their treaty relations requires separate consideration. In 1931, in view of the coming independence of Iraq, the Permanent Mandates Commission drew up a memorandum, which was approved by the League Council, setting out "general conditions which must be fulfilled before the mandates régime can be brought to an end". This memorandum, *inter alia*, suggested that the undertaking to be obtained from the new State should ensure and guarantee:

...

(*g*) The maintenance in force for their respective duration and subject to the right of denunciation by the parties concerned of the international conventions, both general and special, to which during the mandate, the Mandatory Power acceded on behalf of the mandated territory.[91]

(29) This formula was reproduced, with minor differences of language, in the Declaration made by Iraq in 1932 in connexion with the termination of the mandatory régime and her admission as a member of the League.[92] In addition, Iraq had concluded a fresh Treaty of Alliance with Great Britain in 1930 in which there appeared a "devolution agreement" (indeed the first example of such an agreement):

It is also recognised that all responsibilities devolving upon His Britannic Majesty in respect of Iraq under any other interna-

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[85] Q. Wright, *op. cit.*, pp. 593-600.

[86] Q. Wright, *op. cit.*, pp. 482-484. A more recent writer says that the United States argued in favour of a total succession in respect of *all* prior treaties; but seems to go beyond the view of Quincy Wright and the position taken by the United States in the diplomatic correspondence. See *Foreign Relations of the United States (1920)* (Washington, D.C., U.S. Government Printing Office, 1936), vol. II, see also A. D. McNair, *op. cit.*, p. 662.

[87] Q. Wright, *op. cit.*, p. 206.

[88] *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), pp. 174-175, document A/CN.4/243/Add.1, para. 127.

[89] Q. Wright, *op. cit.*, pp. 467-469; See also League of Nations, Permanent Mandates Commission, *Annexes to the Minutes of the Third Session*, (A.19. (Annexes) 1923.VI), pp. 309 and 310 and *ibid., Minutes of the Sixth Session* (C.386.M.132,1925.VI), pp. 169 and 170.

[90] See para. 41 below.

[91] League of Nations, *Official Journal*, 12th year, No. 10 (October 1931), p. 2055; see also L. H. Evans, "The general principles governing the termination of a mandate", *American Journal of International Law* (Washington, D.C.), vol. 26, No. 4 (October 1932), pp. 735-758.

[92] M. Hudson, *International Legislation* (Washington, D.C., Carnegie Endowment for International Peace, 1937), vol. VI, p. 39.

tional instrument, in so far as they continue at all, should similarly devolve upon His Majesty the King of Iraq alone and the high contracting parties shall immediately take such steps as may be necessary to secure the tansference to His Majesty the King of Iraq of these responsibilities.[93]

Jordan did not become independent until 1946, when the League of Nations had ceased all normal functioning and was about to arrange for its own demise. It is true that in its resolution of 18 April 1946 the final Assembly of the League formally took note of the termination of the mandate and of Jordan's new status as an independent State.[94] But, unlike Iraq, Jordan was not required to sign a declaration regarding the maintenance in force of treaties. On the other hand, at the time of becoming independent Jordan did conclude a Treaty of Alliance with Great Britain which, *inter alia*, contained a devolution agreement limited to general treaties, in the following form:

> Any general international treaty, convention or agreement which has been made applicable to Trans-Jordan by His Majesty the King (or by his Government in the United Kingdom) as mandatory shall continue to be observed by His Highness the Amir until His Highness the Amir (or his Government) becomes a separate contracting party thereto or the instrument in question is legally terminated in respect of Trans-Jordan.[95]

The emergence of Syria and Lebanon to independence began with a proclamation by General Catroux on behalf of the Free French authorities in 1941 and was an accomplished fact before the final meeting of the League Assembly in 1946, the two countries having already become original members of the United Nations.[96] Nor was any treaty concluded between either of them and France, the administering Power, in connexion with their attainment of independence. There was, it is true, a statement in the 1941 Free French proclamation "En accédant à la vie internationale indépendante, la Syrie succède naturellement aux droits et obligations souscrits jusqu'ici en son nom" [97] But this was a purely unilateral expression of the legal views of the Free French authorities which, however, may have been a reflection of the position taken on this question earlier by the Permanent Mandates Commission and the Council of the League.

(30) The circumstances of the termination of the mandate for Palestine were very special. After the Second World War Great Britain continued as Mandatory for a period while the United Nations attempted to work out a settlement of the problem of Palestine. In 1947 the General Assembly adopted resolution 181 (II) recommending the partition of the territory into two States containing the following provision concerning treaties, which would be applicable to each State:

> The State shall be bound by all the international agreements and conventions, both general and special, to which Palestine has become a party. Subject to any right of denunciation provided for therein, such agreements and conventions shall be respected by the State throughout the period for which they were concluded.[98]

Elsewhere in the resolution there was also a provision which recommended States enjoying capitulation privileges in Palestine to renounce any right pertaining to them to re-establish them—a provision which seemed to imply the continuance of capitulation treaties, unless such a renunciation took place. The partition plan, however, was never implemented, the Mandatory withdrew from the mandate, one or the proposed States never came into existence, and the other, Israel, attained independence unilaterally in 1948. A year later she was admitted as a Member of the United Nations. When her application for admission was before the Security Council she offered to make a declaration regarding the maintenance of treaties but was not required to do so, and she was admitted without having made any such declaration.[99] The Israel Government has since taken the position that the State of Israel arose in 1948 as an entirely new international personality, which neither in fact nor in law was to be considered a successor State to the mandated territory of Palestine.[100]

(31) In practice Israel's disclaimer of the character of a successor State has meant that in the case of multilateral treaties she has consistently refrained from any claim to consider herself a party to a treaty by reason of its previous application in respect of Palestine. Instead, she has in each case become a party by accession.[101] In four instances, where continuity was particularly desirable, Israel sought to achieve it by specifying that her accession was to be retroactive to the date of the proclamation of her independence; and in doing so, she made a point of the fact that Palestine had formerly been a party to the treaties in question.[102] Her attempt to give retroactive operation to her accession was, however, objected to by some of the existing parties, and the depositary accepted Israel as a party only from the date of her accession. Similarly, in the case of bilateral treaties Israel has consistently denied that treaties previously applicable to

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[93] *British and Foreign State Papers, 1930* Part I (London, H.M. Stationery Office, 1935), vol. 132, p. 208, article 8.

[94] League of Nations, *Official Journal, Special Supplement No. 194*, p. 278.

[95] United Nations, *Treaty Series*, vol. 6, p. 146.

[96] The League resolution of 18 April 1946 therefore merely welcomes their achievement of independence (*Official Journal, Special Supplement No. 194*, p. 278).

[97] R. W. G. de Muralt, *The Problem of State Succession with regard to Treaties* (The Hague, van Stockum, 1954), p. 122.

[98] There was a further clause providing that any dispute concerning the continued application and validity of treaties should be referred to the International Court.

[99] See the reply of the Israel Government to a questionnaire from the International Law Commission concerning topics for codification in *Yearbook of the International Law Commission, 1950*, vol. II, p. 215, document A/CN.4/19, part I, sect. A, 5, para. 23.

[100] See United Nations, *Materials on Succession of States (op. cit.)*, pp. 38-42.

[101] *Yearbook of the International Law Commission, 1950*, vol. II, p 216. document A/CN.4/19, Part I, sect. A,5, para. 26.

[102] The Berne Convention of 1928 for the Protection of Literary and Artistic Works, the Paris Convention for the Protection of Industrial Property, the Madrid Agreement for the prevention of false indications of origin on goods, and the Neuchâtel Agreement for the maintenance or restoration of industrial property rights affected by the Second World War (see *Yearbook of the International Law Commission, 1968*, vol. II, pp. 15-16 and 63-64, document A/CN.4/200 and Add.1 and 2, paras. 34-37 and 276-279).

Palestine are binding upon her.[103] This she has done equally in the case of the Anglo-French Agreement of 1923 concerning the use of the waters of the river Jordan, which, would seem to rank as a treaty of a dispositive or territorial character. At any rate, when this treaty was invoked by Syria in the Security Council as an obstacle to a hydroelectric project of Israel, the latter's representative replied: "The fact that the United Kingdom signed a treaty with France in 1923 does not constitute a mandatory legal obligation on my Government, which has not signed such a treaty" [104] Whether this reply was or was not legally correct would seem to depend on the view to be taken of the law governing treaties of a dispositive or territorial character, a matter which is examined in the commentary to article 22 *bis*. In general, however, Israel's claim to be a wholly new State, not legally a "successor" to the Mandatory Power, seems not to have met with serious challenge in treaty practice.

(32) Iraq, Lebanon, Syria and Jordan, on the other hand, already existed as embryo States during the period of their mandates and, on attaining independence, were clearly "successors" to the Mandatory Power concerned. Exactly what were the implications of this for their treaty relations is not quite so clear. As regards multilateral treaties, the Secretary-General inquired of these four States in 1946 whether they considered themselves to be parties to six successive League of Nations Conventions on Narcotics.[105] This it was necessary for him to ascertain in connexion with the United Nations Protocol of 1946 amending those treaties. The actual position was that during the League period France had extended these treaties to Syria and Lebanon, and Great Britain to Jordan (Trans-Jordan); one convention had been "extended" to Iraq, which had also become a party to others in her own name. The Secretary-General is stated to have satisfied himself that all four States "considered themselves bound by the treaties which had formerly been made applicable to their territories", and to have treated them as parties to the League of Nations Conventions by sending them copies of the amending Protocol.[106] Three of them—Syria, Lebanon and Iraq— duly became parties to the Protocol, thereby confirming their recognition of their character as parties to the earlier conventions. Jordan, however, elected to *accede* directly to individual conventions (as amended by the Protocol), thereby disclaiming the rights of a successor State in relation to those conventions. Consequently, the practice in regard to the narcotics conventions is unclear as to whether, in the case of an ex-Class A mandate, the character of a successor State was regarded as placing an obligation or merely conferring a right on the new State to consider itself a party to treaties concluded by the Mandatory Power with reference to the mandated territory.

(33) Again, Jordan notified the Swiss Government in 1949 of her "accession" to the two Geneva Red Cross Conventions of 1929, at the same time stating that these Conventions had been made applicable to Jordan in 1932.[107] The Swiss Government in circulating these notifications to the contracting parties referred to them as "in the nature of a declaration of continuity". Moreover, it treated the notifications as effective on the date of their receipt and not as subject to the six months' time-lag prescribed by the Conventions in cases of "accession". Even so, the Swiss Government does not seem to have regarded Jordan as *bound* to consider itself a party to the two Conventions, or it would surely have treated the notifications as merely confirmatory and retroactive to the date of Jordan's independence. Syria and Lebanon, it may be added, both became parties to one of the 1929 Conventions by the process of accession pure and simple.[108]

(34) As to bilateral treaties, the practice is unclear.[109] According to one writer "Jordanian authorities have privately expressed the opinion that the thirty-five conventions extended to Transjordan by the United Kingdom are, except where subsequent action has been taken, still in force; and it is reported that no question of their not being implemented has ever arisen."[110] Speaking of the practice of Syria and Lebanon, on the other hand, another writer has said: "As far as the present writer could ascertain from this practice of present day Governments, the Syrian and Lebanese States do not generally speaking continue the obligations of the treaties concluded by the Mandatory." [111] The 1971 edition of the United States publication *Treaties in Force* does not list any treaties of the mandate periods against the names of either Iraq or Jordan. Against the names of Lebanon and Syria it lists only two treaties from the mandate period, and the continuance of the rights conferred by those treaties after independence was the subject of express confirmation, in notes exchanged with each country in 1944.[112] Apart from the foregoing, the three Secretariat studies on Succession of States in respect of bilateral treaties (extradition, air transport and trade agreements) mention only four further treaties from the mandate period.[113] Two of these were made, in 1921 and 1923 respectively, by represent-

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[103] *Ibid.*, *1970* vol. II, p. 111, document A/CN.4/229, paras. 40-44 (extradition treaties); *ibid.*, *1971*, vol. II (Part Two), p. 123, document A/CN.4/243 paras. 21-24 (air transport agreements); United Nations, *Materials on Succession of States (op. cit.)* pp. 41-42.

[104] *Official Records of the Security Council, Eighth Year*, 639th meeting, para. 83.

[105] *Yearbook of the International Law Commission, 1962*, vol. II, p. 108, document A/CN.4/150, para. 11.

[106] Syria and Lebanon made declarations of the same kind in connexion with certain other conventions (*ibid.*, paras. 12 and 13).

[107] *Yearbook of the International Law Commission, 1968*, vol. II, p. 40, document A/CN.4/200 and Add.1 and 2, para. 161.

[108] *Ibid.*, para. 168.

[109] United Nations, *Materials on Succession of States (op. cit.)* does not contain any information supplied by the ex-Class A Mandate States.

[110] D. P. O'Connell, *State Succession . . .*, vol. II, p. 155.

[111] R. W. G. de Muralt, *op. cit.*, p. 124.

[112] See United Nations, *Materials on Succession of States (op. cit.)* pp. 204-6; see also *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 160, document A/CN.4/243/Add.1, paras. 57-59.

[113] *Ibid.*, *1970*, vol. II, p. 120, document A/CN.4/229, para. 98; and *ibid.*, *1971* vol. II (Part Two), p. 134, document A/CN.4/243/Add.1, para. 22.

atives acting expressly for "Palestine", on the one hand, and "Syria and Lebanon", on the other; and these treaties appear after independence to have been regarded by the States concerned as remaining in force.[114] The other two treaties are the Anglo-French San Remo Oil Agreement of 25 April 1920[115] and the Anglo-French Convention of 23 December 1920 concerning the Mandates for Syria and the Lebanon, Palestine and Mesopotamia,[116] as to which the Secretariat study simply notes that in 1932 a protocol was signed between Iraq, the United Kingdom and France recognizing the transfer to Iraq of the United Kingdom's obligations to France under those treaties.

(35) As the institution of Class A Mandates came to an end over a quarter of a century ago, any specific provision regarding this category of succession in the present draft would seem superfluous. In general, as others have pointed out,[117] there was a certain analogy between the institution of Class A Mandates and that of protected States, the main difference being that in the case of Class A Mandates the Administering Power's right of representation was derived from the international community. Writers tend to take the view that treaties concluded by the Mandatory on behalf of a Class A Mandate were to be considered as automatically binding on the latter after independence.[118] But it is not clear how far this view finds expression in the actual practice with regard to ex-Class A Mandates after independence. Accordingly, if rules were to be stated for ex-Class A Mandates, it would seem safer to frame them along the lines proposed for ex-protected States.

(36) *Trusteeships.* The trusteeship territories, with the exception of the "strategic" Territory of the Pacific Islands, were all territories previously held under a mandate by the same administering Power as was afterwards to be invested with the trusteeship. The territory of the Pacific Islands, formerly a mandate under Japan, was transferred to the United States as a "strategic area" trusteeship. All the Trusteeship Agreements contained a provision regarding treaties, though in varying terms. The most specific was the form of provision found in the French Agreements for Togoland (article 6) and the Cameroons (article 6)[119] and in the Italian Agreement for Somaliland (article 12):

> The Administering Authority undertakes to maintain the application to the Territory of the international agreements and conventions which are at present, in force there, and to apply therein any conventions and recommendations made by the United Nations or the specialized agencies referred to in Article 57 of the Charter, the application of which would be in the interests of the population and consistent with the basic objectives of the trusteeship system and the terms of the present Agreement.

The corresponding articles in the British Agreements for Tanganyika, Togoland and the Cameroons, if less clearly drafted, seem to have been intended to have the same general effect.[120] The provision in the Belgian Agreement for Ruanda-Urundi (article 7)[121] apart from omitting any reference to "recommendations", is in very general terms:

> The Administering Authority undertakes to apply to Ruanda-Urundi the provisions of all present or future international conventions and recommendations which may be appropriate to the particular conditions of the Territory and which would be conducive to the achievement of the bacic objectives of the International Trusteeship System.

The articles in the Agreements for the Pacific trusteeships of Western Samoa (article 7)[122] (New Zealand), New Guinea (article 6)[123] (Australia) and Nauru (article 6)[124] (United Kingdom, Australia and New Zealand) did not refer explicitly to *existing* or future conventions and recommendations, but were otherwise similar to the articles found in the British Agreements for Tanganyika, Togoland and the Cameroons. Article 14 of the United States Agreement for the "strategic" Territory of the Pacific Islands[125] also made no reference to *existing* conventions, and in this case the omission of that reference was more deliberate; for the United States was not willing to recognize the continued application to the territory of treaties applied to it by Japan during the latter's mandate. Instead, the United States applied its own treaty régime to the territory.[126]

(37) Apart from the last-mentioned case of the ex-Japanese mandate, treaties in force with respect to a territory prior to the trusteeship have been considered as applicable during the trusteeship, whether or not the Agreement contained a provision to that effect. This can hardly, however, be taken as any indication of a general principle that treaties made by an administering Power with respect to a territory remain binding upon the latter after the termination of a mandate (or trusteeship). All these cases concerned a simple transition from mandate to trusteeship, the territory remaining under the same

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[114] *Ibid.*, see also *Shehadeh et al.* v. *Commissioner of Prisons, Jerusalem, International Law Reports 1947*, vol. 14, p. 42.

[115] United Kingdom, *British and Foreign State Papers, 1920*, vol. 113 (London, H.M. Stationery Office, 1923), p. 350.

[116] *Ibid.*, p. 355.

[117] e.g., K. Zemanek, *loc. cit.*, pp. 202-206.

[118] D. P. O'Connell, *State Succession* . . . , vol. II, p. 151.

[119] For the full text of these agreements, see H. Duncan Hall, *Mandates, Dependencies and Trusteeships* (Washington, D.C., Carnegie Endowment for International Peace, 1948), pp. 347-352.

[120] Article 7, in each case; (*ibid.*, pp. 340-347). After the opening words these articles read: "any international conventions and recommendations already existing or hereafter drawn up by the United Nations or by the specialized agencies referred to in Article 57 of the Charter, which may be appropriate to the particular circumstances of the Territory and which would conduce to the achievement of the basic objectives of the International Trusteeship System".

[121] *Ibid.*, pp. 353-358.

[122] *Ibid.*, pp. 358-362.

[123] *Ibid.*, pp. 362-364.

[124] *Ibid.*, pp. 364-366.

[125] *Ibid.*, pp. 367-370.

[126] See, for example, a communication made by the United States to the International Labour Office in 1961: "When the Trust Territory of the Pacific Islands came under the jurisdiction of the United States in 1947, the treaties and agreements applicable generally to territories under the jurisdiction of the United States were considered by this Government to become applicable to the Trust Territory without necessity of a declaration to that effect in any given case"; M. M. Whiteman, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, vol. 1, p. 831).

administering Power as before. Accordingly, the "succession", if such it may be called, was of a somewhat special kind, from which it would be unsafe to draw any general conclusion. Equally, it would be unsafe to draw any general conclusion in the opposite sense from the United States refusal to consider any treaties made by Japan as continuing in force with respect to the Territory of the Pacific Islands. Although in that instance there was a change in the administering Power as well as in the character of the trust, there was also the special factor of the termination of the Japanese mandate in consequence of her part in the Second World War.

(38) Nine out of the eleven trusteeships have already been terminated, the territories in question having either emerged as independent States or opted to join with a neighbouring State. None of the General Assembly resolutions terminating these trusteeships contains any provision regarding the treaty relations of the territory concerned. It is true that in some instances "devolution agreements" have been concluded with reference to a trust territory, as in the cases of Western Samoa,[127] Somalia [128] and British Togoland.[129] But these agreements were bilateral acts between the Administering Authority and the territory rather than an expression of United Nations policy with respect to trusteeships; and they do not seem to differ in their legal character and effects from the "devolution agreements" concluded with reference to colonial territories.[130] Furthermore, Tanganyika declined to enter into any devolution agreement with her Administering Power, the United Kingdom, and instead made a unilateral declaration by which, *inter alia*, she reserved the right to decide within a stated period whether existing treaties applicable to the territory should be continued or terminated. Burundi made a unilateral declaration on similar lines, and Rwanda a shorter declaration also reserving to herself a right of decision.[131] As to France, she did not conclude any devolution agreements with reference to her trusteeships.

(39) Nor does any difference seem to have been made between a trust territory and other dependent territories in treaty practice after termination of the trusteeship. In 1961, when the Southern and Northern Cameroons opted to join respectively the Republic of Cameroon and the Federation of Nigeria, the moving treaty frontier principle was applied automatically, and each Trust Territory was simply absorbed into the treaty régime of the State of which it had become part. As to the trust territories which have themselves become new States, neither in regard to multilateral treaties nor in regard to bilateral treaties has any distinction been drawn in treaty practice between ex-colonial and ex-trust territories. The Secretary-General of the United Nations and other depositaries of multilateral treaties in dealing with questions of succession have applied precisely the same principles to both categories of new State.[132] Similarly, States appear to have dealt with ex-trusteeship and ex-colonial States on the same footing for purposes of succession in respect of bilateral treaties.[133]

(40) The broad conclusion which emerges from the foregoing, therefore, is that the general rules governing the succession of a new State in respect of treaties do not require modification in the case of a new State whose territory, or part of whose territory, was previously administered as a trusteeship territory. The previous trusteeship may in certain instances be historically relevant in determining whether a particular treaty was or was not applicable in respect of the territory at the date of independence; and this may affect succession in respect of that treaty.[134] But that is its only significance, subject to one qualification. This is that, when the question of treaties of a "territorial", "dispositive" or "localized" character comes to be examined, it may be necessary to consider whether the limited nature of the Administering Power's tenure of a trusteeship modifies, in the case of an ex-trust territory, the general rules governing such treaties.

(41) *South West Africa (Namibia)*. There remains the case of South West Africa (Namibia) the one Class C Mandate that was not converted into a trusteeship under Article 77 of the Charter of the United Nations. Other things being equal, the position of an ex-Class C Mandate concerning succession would seem analogous to that of an ex-trust territory. But the situation regarding this particular Class C Mandate is so abnormal that, for the time being at any rate, ordinary rules can hardly apply. Considering the Mandatory, South Africa, to be in breach of the conditions of the Mandate, the United Nations has terminated the latter and assumed "direct responsibility" for Namibia. The International Court in its advisory opinion of 21 June 1971 and the Security Council in its

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[127] See United Nations, *Materials on Succession of States (op. cit.)*, pp. 115-116.

[128] *Ibid.*, pp. 169-170.

[129] Covered by the agreement for Ghana, of which the Trust Territory formed a constituent part (*ibid.*, p. 30).

[130] True, the Ghana devolution agreement makes a curious distinction between succession to obligations and responsibilities under international instruments previously applicable to Ghana (which would include British Togoland) and rights and benefits enjoyed under international instruments previously applicable to the Gold Coast (which would not include the trust territory). But such a distinction between rights and obligations seems irrational and has no place in the Western Samoa devolution agreement.

[131] See the Special Rapporteur's second report (*Yearbook of the International Law Commission, 1969*, vol. II, pp. 62 and 65, document A/CN.4/214 and Add.1 and 2), paras. (1), (10) and (11) of the commentary on article 4.

[132] See the Secretariat memorandum "Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary" (*ibid., 1962*, vol. II, p. 106, document A/CN.4/150); and the series of Secretariat studies on "Succession of States to multilateral treaties" (*ibid., 1968*, vol. II, p. 1, document A/CN.4/200 and Add.1 and 2; *ibid., 1969*, vol. II, p. 23, document A/CN.4/210 and *ibid. 1970*, vol. II, p. 61, document A/CN.4/225).

[133] See the series of Secretariat studies on "Succession of States in respect of bilateral treaties" covering extradition, air transport and trade treaties (*ibid., 1970*, vol. II, p. 102, document A/CN.4/229; and *ibid., 1971*, vol. II (Part Two), p. 111, document A/CN.4/243 and Add.1).

[134] e.g., the distinction drawn by Somalia, in her notification to the Secretary-General, between treaties previously applicable to British Somaliland and those formerly applicable to the Trust Territory (*ibid., 1962*, vol. II, pp. 118-119, document A/CN.4/150, paras. 102-106).

resolution 301 (1971) of 20 October 1971 have stated that amongst the legal consequences for other States are obligations:

(*a*) To abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia;

(*b*) To abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation.[135]

In the case of multilateral treaties, however, the Court made the qualification that "the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia".[136] It may perhaps be of interest in this connexion to recall the United States refusal to consider any treaties made by Japan as continuing in force with respect to the Pacific Islands Territory.[137] But the circumstances of the former South West Africa Mandate appear to be altogether too special to be taken into a count in the present draft.

(c) *Colonies*

(42) In recent years the typical example of "new State" has been one arising from decolonization, and it may therefore be wondered why any special mention of colonies should be thought necessary. The reason is that some writers make a point of the fact that in the United Nations era decolonization has in most cases been an evolutionary process of emergence to independence, in the latter stages of which the territory had already begun to acquire the lineaments of a State and a measure of separate personality prior to independence.[138] The suggestion is made that the position of these new States, which have reached independence by evolution and consensus, is analogous to that of the older British Dominions, in regard to which the continued application of British treaties has, in general, been accepted. On this basis, it is further suggested that in the case of such ex-colonial new States the modern law of State succession may recognize some form of legal "hypothesis" or presumption of the continuance of their predecessors' treaties (except incompatible treaties).[139]

(43) It is certainly the fact that in the past quarter of a century many new States have emerged to independence through a process of evolution rather than secession. It is also the fact that in a number of cases a colonial territory has even entered into an intergovernmental agreement with a foreign government prior to independence or become a separate or associate member of an international organization.[140] These facts have no doubt played an important part in favouring the adoption by new States of a *policy* of continuing in force treaties applicable in respect of their territories prior to independence. But it does not follow that they at the same time gave rise to a *legal* "hypothesis" or presumption of continuity. As already pointed out in the commentary to article 6, the general conclusion to be drawn from modern treaty practice is to the contrary.[141] Indeed, even in the case of the older British Dominions, it is not clear whether the continuance of the predecessor's treaties occurred *ipso jure* under principles of State succession or as a matter of the will of the interested States. At any rate, in a memorandum in 1963 one member of the Commission[142] seems to have regarded the practice in question as susceptible of interpretation in terms of tacit consent. Be that as it may, the relevance of the evolutionary character of decolonization in the case of many new States appears to the Special Rapporteur to be its effect on the will of new States to continue their predecessor's treaties rather than on their legal position in this regard.

(44) The older British Dominions had advanced far in the recognition of their separate statehood and personality by the international community and had really lost their character as colonies prior to their emergence as wholly independent States. In the more recent era of decolonization the new States, however well advanced their development, were not internationally in a position comparable to that of the older British Dominions and had not attained to the same measure of separate international personality. Accordingly, whatever view may be taken of the question of succession in regard to the older British Dominions, the fact that in some instances and in greater or lesser degree the territories of new States may have enjoyed self-government prior to independence, hardly suffices to deprive them for purposes of succession of their essential character as colonies. Nor does any general distinction appear to have been drawn in practice, for purposes of succession, between a colony in a well-advanced and less well-advanced condition of self-government prior to independence.

(45) The broad conclusion, therefore, is that colonial territories do not call for any special provision and should be regarded as subject to the general rules contained in the draft articles, and notably those dealing with "new States".[143] To state this conclusion is not to overlook that in some instances treaties, such as technical assistance agreements, may be concluded on behalf of colonial territories only shortly before independence, when the

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[135] *I.C.J. Reports 1971*, p. 55.

[136] *Ibid.*

[137] See paragraphs 36 and 37 above.

[138] D. P. O'Connell, *State Succession* . . . , vol. II, pp. 131-134; cf. R. Hone, "International Legal Problems of Emergent Territories", *Report of International Law Conference* (London, The David Davies Memorial Institute of International Studies, 1960), p. 16.

[139] D. P. O'Connell, *State Succession* . . . , vol. II, p. 140; G. V. La Forest, "Towards a Reformulation of the Law of State Succession", *Proceedings of the American Society of International Law at its Sixtieth Annual Meeting* (Washington, D.C., 1966), pp. 103-107.

[140] For the practice, see J. O. Lissitzyn, "Territorial Entities other than Independent States in the Law of Treaties", *Recueil des cours de l'Académie de droit international de La Haye, 1968-III* (Leyden, Sijthoff, 1970), vol. 125, pp. 64-82.

[141] *Yearbook of the International Law Commission, 1970*, vol. II, p. 31, document A/CN.4/224 and Add.1.

[142] Mr. T. O. Elias (*ibid., 1963*, vol. II, p. 283, document A/5509, annex II, appendix II).

[143] While the majority of ex-colonial territories would fall under the rules for "new States", the possibility exists of an ex-colony's having joined itself to an existing State, in which case the moving treaty frontier principle would apply.

territory is already an embryo State and is concerned in the negotiations. Moreover, the terms of the treaty may be such as to indicate the existence and separate role of the local government. Even so, the local government's lack of separate international personality and treaty-making competence presents an obstacle to regarding the treaty as one to which the new State was a party prior to independence. In practice, it is usual for fresh agreements to be concluded as soon as possible after independence and, if not, for an acknowledgment of the continued application of the treaty to be made by the new State in an exchange of notes or otherwise.[144] This practice in itself seems to indicate that, in principle, some form of novation of the pre-independence treaty is necessary. This is probably so, even in a case like that of the United Kingdom-Venezuela Agreement of 17 February 1966. This was signed at Geneva on the eve of independence by the then Prime Minister of British Guiana and expressly provided in article VIII that on the attainment of independence by British Guiana the Government of Guyana should thereafter be a party to the Agreement in addition to the United Kingdom.[145] In all these cases, the fact that the treaty was concluded not long before independence with the participation of representatives of the embryo new State may well be an important element to be considered in determining whether a novation is to be implied from the circumstances. But it hardly seems possible to insert a special rule to cover such cases: one difficulty at least would be to specify the precise conditions under which participation of the representatives of the embryo State could be held to affect the binding force of the treaty after independence. It therefore seems preferable to leave the question of succession in these cases also to be governed by the general rules contained in the draft articles.

(d) *Associated States*

(46) Constitutional relationships between a State and a dependent territory vary almost infinitely and in some cases their precise categorization may be a matter of appreciation.[146] Among the latter are cases of dependent States "freely associated" with a sovereign State. One example is the "Commonwealth" of Puerto Rico, which began as a mere "possession" of the United States, but under its modern constitution is an autonomous political entity, voluntarily associated with the United States.[147] Under this constitution the conduct of Puerto Rico's foreign relations, including treaty-making and defence, is vested in the Federal Government of the United States. Another is the Caribbean territories (Antigua, St. Kitts-Nevis-Anguilla, Dominica, St. Lucia, Grenada and St. Vincent), which are designated States in Association with the United Kingdom.[148] These have a large measure of autonomy in internal affairs and the right, in accordance with specified procedures, to secede; on the other hand, responsibility for external affairs and defence for the time being remains vested in the United Kingdom.[149] A somewhat different type of case is the Kingdom of the Netherlands which, in addition to the Netherlands itself, embraces Surinam and the Netherlands Antilles.[150] The Queen of the Netherlands is Head of all three countries, each of which has its own separate local Government. But the Netherlands Government is at the same time Government of the Kingdom and, as such, is responsible for the conduct of the foreign relations, including treaty-making, of the Kingdom as a whole.

(47) The above examples have been cited purely as illustrations of the variety of constitutional relationships in which States may be associated, short of a full federation or union of States; and more might be given. Clearly no issue of succession arises unless and until one of the entities in question opts to become independent or to join another State. But the Commission may still think it desirable to consider whether specific mention should be made in the draft of such forms of associated States. In this connexion it is to be noted that such dependent entities have not infrequently, under a power delegated to them, entered into local agreements with other States or become members of certain international organizations.[151] But this, as pointed out earlier, is also true in some cases of protected States and colonial dependencies.[152]

(48) As the constitutional relationships in such associations of States vary considerably and are a matter of appreciation from complex facts, it may be doubted whether they can be treated as falling within a single category. In some cases, they may appear to be analogous to a protected State, in some to a colonial territory and in others, perhaps, to a Union of States. Consequently, and in the absence of any directly relevant practice, the appropriate course seems to be to omit any specific reference to associated States and leave any future question of succession to be determined by analogy in accordance with the general rules contained in the draft articles and by reference to the particular circumstances of each association of States.

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[144] K. J. Keith, "Succession to bilateral treaties by seceding States", *American Journal of International Law* (Washington, D.C.), vol. 61, No. 2 (April 1967), pp. 528-531. See also United Nations, *Materials on Succession of States (op. cit.)*, p. 217.

[145] United Kingdom, *Treaty Series*, No. 13, Cmd 2925 (London, H.M. Stationery Office, 1966).

[146] See generally O. J. Lissitzyn, *loc. cit.*, pp. 5-87.

[147] M. M. Whiteman, *op. cit.*, vol. 1, pp. 392-406.

[148] M. Broderick, "Associated Statehood—a new form of decolonization", *The International and Comparative Law Quarterly* (London) vol. 17 (April, 1968), pp. 368-369.

[149] The constitutional relationship between the Cook Islands and New Zealand is similar; indeed, it served as a model from which the Caribbean associated States were drawn (M. Broderick, *loc. cit.*, pp. 369 and 390-392).

[150] H. F. van Panhuys, "The international aspects of the reconstruction of the Kingdom of the Netherlands in 1954" *Nederlands Tijdschrift voor International Recht* (1958), vol. V, p. 1; M. Broderick, *loc. cit.*, pp. 399-400.

[151] See O.J. Lissitzyn, *loc. cit.*, pp. 20, 50, 59-60 and 82.

[152] See para. 43 above.

Article 19. — Formation of unions of States

ALTERNATIVE A

1. When two or more States form a union of States, treaties in force between any of these States and other States parties prior to the formation of the union continue in force between the union of States and such other States parties unless:

(*a*) The object and purpose of the particular treaty are incompatible with the constituent instrument of the union; or

(*b*) The union of States and the other States parties to the treaty otherwise agree.

2. Treaties which continue in force in accordance with paragraph 1 are binding only in relation to that part of the union of States in respect of which the particular treaty was in force prior to the formation of the union, unless the union of States and the other States parties otherwise agree.

3. The rules in paragraphs 1 and 2 apply also when a State joins an already existing union of States.

ALTERNATIVE B

1. When two or more States form a union of States, treaties in force between any of these States and other States parties prior to the formation of the union continue in force between the union of States and such other States parties if

(*a*) In the case of multilateral treaties other than those referred to in article 7 (*a*), (*b*) and (*c*), the union of States notifies the other States parties that it considers itself a party to the treaty;

(*b*) In the case of other treaties, the union of States and the other States parties

(i) Expressly so agree; or

(ii) Must by reason of their conduct be considered as having agreed to or acquiesced in the treaty's being in force in their relations with each other.

2. Treaties which continue in force in accordance with paragraph 1 are binding only in relation to that part of the union of States in respect of which the particular treaty was in force prior to the formation of the union, unless the union of States and the other States parties otherwise agree.

3. The rules in paragraphs 1 and 2 apply also when a State joins an already existing union of States.

Definition of the term "Union of States"

PART I. — GENERAL PROVISIONS

Article 1. Use of terms

ADDITIONAL PROVISION

...

(*h*) "Union of States" means a federal or other union formed by the uniting of two or more States which thereafter constitute separate political divisions of the united State so formed, exercising within their respective territories the governmental powers prescribed by the constitution.

COMMENTARY

(1) The present article is concerned only with successions arising from the *creation* of a union of States; questions of succession arising from the *dissolution* of a union of States will be considered in the next article, dealing with the separation of a State into two or more States. Unions of States have been created in numerous forms in the past, and political and economic pressures seem certain to result in the emergence of further unions of States in both familiar and new forms. The very variety of constitutional relationships which might be considered as falling within the concept of a union of States makes it necessary at the outset to identify what is meant by this concept for the purposes of succession of States in respect of treaties.

(2) A sharp distinction has to be made between unions of States which create a new political entity only on the plane of international law and organization, and unions which also create a new political entity on the plane of internal constitutional law. Examples of the former category are the United Nations itself, the specialized agencies, the Organization of American States, the Council of Europe, the Council for Mutual Economic Assistance and similar intergovernmental organizations which fall completely outside the concept of a union of States for the purposes of succession of States. Examples of the latter category are federations of States, such as the United States of America and Switzerland, and other constitutional unions of States, such as the former union of Egypt and Syria in the United Arab Republic, the United Republic of Tanzania, and the former unions of Iceland and Denmark and of Norway and Sweden. Constitutional unions of this category fall clearly within the scope of the Commission's study of succession of States.

(3) In addition, there are some hybrid unions which may appear to have some analogy with a union of States but which do not, in the opinion of the Special Rapporteur, form part of the present topic. One such hybrid is EEC, the precise legal character of which is a matter of discussion amongst jurists. For present purposes, it must suffice to say that, while EEC is not commonly viewed as a union of States, it is at the same time not generally regarded as being simply a regional international organization. The direct effects in the national law of the member States of regulatory and judicial powers vested in Community organs gives to EEC, it is said, a semblance of a quasi-federal association of States. Be that as it may, from the point of view of succession, EEC appears without any doubt to remain on the plane of intergovernmental organization. Thus, article 234 of the Treaty of Rome [153] unmistakably approaches the question of the pre-Community treaties of member States with third countries from the angle, not of succession or of the moving treaty frontier rule, but of the rules governing the application of successive treaties relating to the same subject-matter (article 30 of the 1969 Convention on the Law of Treaties).[154] In other words, pre-Community

[153] United Nations, *Treaty Series*, vol. 298, p. 91.

[154] *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publications, Sales No. E.70.V.5), p. 293.

treaties are dealt with in the Rome Treaty in the context of compatibility of treaty obligations and not of succession or moving treaty frontiers. The same is true of the instruments which established the other two European Communities.[155] Furthermore, the Treaty of Accession of 22 January 1972, which sets out the conditions under which four additional States may join the EEC and Euratum, deals with the pre-Accession treaties of the candidate States on the basis of compatibility of treaty obligations—of requiring them to bring their existing treaty obligations into line with the obligations arising from their accession to the Communities.[156] Similarly, the Treaty of Accession expressly provides for the new Member States to become bound by various categories of pre-Accession treaties concluded by the Communities or by their original members and does not rely on the operation of any principle of succession or of moving treaty frontiers.

(4) Numerous other economic unions have been created in various forms and with varying degrees of "community" machinery; e.g. the European, Latin American and other Free Trade Areas and the Benelux Economic Union.[157] In general, the constitutions of these economic unions leave in no doubt their essential character as "intergovernmental organizations" rather than internal "unions" of States. In the case of the Belgo-Luxembourg Economic Union, if Belgium may be expressly empowered to conclude treaties on behalf of the Union, the relationship between the two countries within the Union appears to remain definitively on the international plane.[158] Sometimes, as in the Liechtenstein-Swiss Customs Union, the relationship may seem to come to the very verge of what can be considered a relationship between two sovereign States. [159] But in practice all these economic unions have been treated as unions on the plane of international organization alone, and not as creating political unions on the plane of internal constitutional law.

(5) The topic entrusted to the present Special Rapporteur is "Succession of States in respect of treaties"; and it is his understanding that, whatever may be the problems of succession which arise in connexion with international organizations, they fall outside that topic. In consequence, it is only unions of States on the plane of internal constitutional law with which the present report is concerned.

(6) A second distinction has to be made between a union of mere territories, or of a mere territory with a State, and a union of two States, although all three cases may fall within the topic of succession of States. The reason is that, whereas the third case—a union of two States—attracts the principles which are the subject of the present article, it is other principles in the draft articles which apply to the first two cases.

(7) Thus, a new State which results from the union of two or more territories, *not already States*, raises the issue whether it begins life with a completely clean slate in regard to treaties or whether it has any rights or obligations with respect to the continuance of the treaties formerly applicable to any of the territories of which it is composed. An example is Ghana, which was formed in 1957 from the amalgamation of two colonies, a colonial protectorate and a trust territory, previously under the same administering Power, into a single independent State. In these cases, whether the new State is given a unitary or a federal constitution, there is no question of the continuity of the international personality of the individual component territories; for the territories had none prior to the creation of the new State. The problem in these cases is to determine how far and with what effect such a composite new State may notify its "succession" to a multilateral treaty or claim "novation" of a bilateral treaty under the provisions of part II of the draft articles on the basis of the treaty's previous application to one or more of the territories of which it is composed. This is a matter which is thought by the Special Rapporteur properly to fall under part II of the draft where it is not at present covered. At the same time there is a certain convenience in examining it in parallel with the question of unions of States. Accordingly, the problem raised by a new State composed of two or more formerly dependent territories will be taken up immediately after the present article in an "excursus" and any special provisions there found necessary for such composite new States can in due course be introduced into part II.

(8) The second type of case—the uniting of a mere *territory* with an existing State—also falls under an earlier provision of the draft articles, namely, the moving treaty-frontier rule set out in article 2; and this is so whether the existing State is a unitary or a federal State. A modern instance is Newfoundland's entry into the Dominion of Canada as a new Province in 1949. Newfoundland, though a fully self-governing territory prior to its merger with Canada, was not considered as a State, and the case was dealt with as one covered by the moving treaty-frontier rule; in other words, the new Canadian Province of Newfoundland simply passed out of its previous treaty régime into the treaty régime of Canada.[160] Another modern instance is the uniting of the former Italian colony of Eritrea with Ethiopia as an "autonomous unit" in a constitutional relationship designated as federal; and in this instance too the territory seems to have been

[155] Treaty instituting the European Coal and Steel Community, section 17 of the Convention containing the Transitional Provisions (United Nations, *Treaty Series*, vol. 261, p. 297); Treaty establishing the European Atomic Energy Community (Euratom), articles 105 and 106 (*ibid.*, vol. 298, p. 205).

[156] Treaty concerning the Accession of the Kingdom of Denmark, Ireland, the Kingdom of Norway and the United Kingdom of Great Britain and Northern Ireland to the European Economic Community and to the European Atomic Energy Community and Act concerning the Conditions of Accession and the Adjustments to the Treaties, article 4 (*United Kingdom Treaty Series No. 1 (1973)*—Part I, Cmnd. 5179-I (London, H.M. Stationery Office, 1973), p. 8.

[157] See generally D. W. Bowett, *The Law of International Institutions*, 2nd ed. (London, Stevens, 1970), pp. 150-227.

[158] See the Special Rapporteur's fourth report on the law of treaties (*Yearbook of the International Law Commission, 1965*, vol. II, p. 22, document A/CN.4/177 and Add.1 and 2.)

[159] P. Raton, *Liechtenstein: History and Institutions of the Principality* (Vaduz, Liechtenstein-Verlag, 1970), pp. 91-101.

[160] *Yearbook of the International Law Commission, 1969*, vol. II, p. 53, document A/CN.4/214 and Add.1, para. 6 of the Commentary to article 2.

regarded as simply absorbed into the treaty régime of Ethiopia.[161]

(9) The present article, therefore, is concerned only with a union where the individual units were themselves *States* having separate international personality at the date of their entry into the union. So confined, unions of States divide themselves into two main categories: (*a*) unions not essentially federal, and (*b*) federal unions. This classification is necessarily a broad one because in certain cases the question whether a union of States is to be considered a federation may be a matter of appreciation. If a modern textbook may be correct in saying that "a union of States is ordinarily distinguished from a federation in the extent to which functions of government are concentrated in the central authorities",[162] there is some room for argument as to precisely how far that concentration of functions must go to constitute a federal State. The same textbook indeed takes the view that for purposes of analysing the effect on treaties "the formal distinction between union and federation is of slight relevance". Nevertheless, the majority of jurists, including the writer of the textbook in question, examine the cases of non-federal and federal unions separately. The Special Rapporteur will do likewise, beginning with non-federal unions.

(a) *Non-federal unions*

(10) The "personal unions" referred to by many writers may be left out of account, because they do not raise any question of succession. They entail no more than the possession, sometimes almost accidental, by two States of the same person as Head of State (e.g. Great Britain and Hanover between 1714 and 1837), and they in no way affect the treaty relations of the States concerned with other States. In any event, they appear to be obsolete.[163] So-called "real unions", on the other hand, entail the creation of a composite international person the particular character of which differentiates it from other types of new State for the purpose of succession. Such a union exists when two or more States, each having a separate international personality, are united under a common constitution with a common Head of State and a common organ competent to represent them in their relations with other States. A union may have some other common organs without losing its character as a "real" rather than a federal union; but the essence of the matter for present purposes is the separate identities of the individual States and the common organs competent to represent them internationally in at least some fields of activity.[164]

(11) Amongst the older cases of real unions that are usually mentioned are the Norwegian-Swedish union under the Swedish Crown from 1814 to 1905 and the Danish-Icelandic union under the Danish Crown from 1918 to 1944. In each of these cases, however, one of the two union States (Norway and Iceland respectively) had not been independent States prior to the union, and it is only in connexion with the *dissolution* of unions that these precedents are cited.[165] Even so, the practice concerning the effect of their dissolution on treaties has a certain interest in the present connexion; for it underlines the significance of the separate personalities of the individual States in the context of succession. The chief precedents regarding the effect of the *creation* of a union on treaties are the modern ones of the unions of Egypt and Syria in 1958 and of Tanganyika and Zanzibar in 1964.

(12) Egypt and Syria, each an independent State and a Member of the United Nations, proclaimed themselves in 1958 one State, to be named "The United Arab Republic".[166] At the same time the Provisional Constitution of the Republic laid down that the executive authority should be vested in the Head of State and the legislative authority in *one* legislative house. True, article 58 of the Constitution also provided that the Republic should consist of two regions, Egypt and Syria, in each of which there should be an executive council competent to examine and study matters pertaining to the execution of the general policy of the region. But under the Constitution the legislative power and the treaty-making power (article 56) were both entrusted to the central organs of the united State, without any mention of the regions' retaining any separate legislative or treaty-making powers of their own.[167] *Prima facie*, therefore, the Proclamation and Provisional Constitution designed the United Arab Republic to be a new unitary State rather than a "union", either real or federal. This is, indeed, underlined by a comparison between the language of the United Arab Republic Constitution and that of the "Charter of the United Arab States" concluded by the new Republic and by the Yemen only three days after the Constitution of the United Arab Republic had been adopted.[168] That Charter expressly provided that the "United Arab States" should be created as a "union" and that each member State of the Union should "preserve its international personality and its system of government". In practice, however, Egypt and Syria were generally recognized as in some measure retaining their separate identity as distinct units of the United Arab Republic.

(13) This view of the matter was, no doubt, encouraged by the terms of article 69 of the Provisional Constitution which read:

> The coming into effect of the present Constitution shall not infringe upon the provisions and clauses of the international treaties and agreements concluded between each of Syria and Egypt and foreign Powers.
>
> These treaties and agreements shall remain valid in the regional spheres for which they were intended at the time of their conclusion, according to the rules and regulations of international law.

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[161] *Ibid.*

[162] D. P. O'Connell, *State Succession . . .*, vol. II, p. 71.

[163] See generally J. H. W. Verzijl, *International Law in Historical Perspective* (Leyden, Sijthoff, 1969), pp. 132-140.

[164] For a historical account of real unions, see J. H. W. Verzijl, *op. cit.*, pp. 140-159.

[165] The union of Austria and Hungary in the Dual Monarchy is another case sometimes cited, but again only in regard to the effect of dissolution of a union on treaties.

[166] E. Cotran, "Some legal aspects of the formation of the United Arab Republic and the United Arab States", *International and Comparative Law Quarterly* (London), vol. 8 (April, 1959), pp. 346-390.

[167] For a translation of the Provisional Constitution, see *International and Comparative Law Quarterly (op. cit.)*, pp. 374-380.

[168] *Ibid.*, pp. 387-390.

Article 69 thus in terms provided for the continuance in force of all the pre-union treaties of both Egypt and Syria within the limits of the particular region in regard to which each treaty had been concluded. Vis-à-vis third States, that provision had the character of a unilateral declaration which was not, as such, binding upon them. Third States were thus under an obligation to recognize the continuance in force of their pre-union treaties with Egypt and Syria only if (*a*) they were bound to do so under some rule of general international law or (*b*) they assented, expressly of by their conduct, to the continuance in force of those treaties under the conditions specified in article 69 of the Constitution of the United Arab Republic.

(14) As to *multilateral treaties*,[169] the Foreign Minister of the United Arab Republic made a communication to the Secretary-General of the United Nations in the following terms:

> It is to be noted that the Government of the United Arab Republic declares that the Union is a single Member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law.

The response of the Secretary-General to this communication was, during the existence of the Union, to list the United Arab Republic as a party to all the treaties to which Egypt or Syria had been parties before the Union was formed; and under the name of the United Arab Republic he indicated whether Egypt or Syria or both had taken action in respect of the treaty in question. Upon the basis of what legal principle the United Arab Republic was to be considered a party to the treaties respectively of Egypt and Syria the Secretary-General did not explain: i.e. whether he considered the United Arab Republic as having a right to notify its succession to multilateral treaties (cf. the rule proposed in article 7 of the present articles), or whether he considered the united State of Egypt-Syria as *ipso jure* bound to continue in force the pre-union treaties of Egypt and Syria in accordance with their terms. Some further light on the matter may, however, be obtained from the treatment accorded to the United Arab Republic in regard to *membership in the United Nations*.[170] The notification addressed by the United Arab Republic to the Secretary-General had requested him to communicate the information concerning the formation of the united Republic to all Member States and principal organs of the United Nations and to all subsidiary organs, particularly those on which Egypt or Syria, or both, had been represented. The Secretary-General, in his capacity as such, accepted credentials issued by the Foreign Minister of the United Arab Republic for its permanent representative, informing Member States and all principal and subsidiary organs of his action in the following terms:

> . . . In accepting this letter of credentials the Secretary-General has noted that this is an action within the limits of his authority undertaken without prejudice to and pending such action as other Organs of the United Nations may take on the basis of notification of the consitution of the United Arab Republic and the Note of 1 March 1958 [the Foreign Minister's note informing the Secretary-General of the formation of the United Republic].

The upshot was that the representatives of the United Arab Republic "without objection took their seats in all the organs of the United Nations of which Egypt or Syria, or both, had been members"; and this occurred without the United Arab Republic's undergoing "admission" as a Member State. It seems therefore that the Secretary-General and the other organs of the United Nations, acted on the basis that the United Arab Republic united and continued in itself the international personalities of Egypt and Syria. The specialized agencies, *mutatis mutandis*, dealt with the case of the United Arab Republic in a similar way.[171] In the case of the International Telecommunication Union it seems that the United Arab Republic was considered as a party to the constituent treaty, subject to different reservations in respect of Egypt and Syria which corresponded to those previously contained in the ratifications of those two States.[172]

(15) The practice regarding bilateral treaties proceeded on similar lines, in accord with the principles stated in article 69 of the Provisional Constitution; i.e. the pre-Union bilateral treaties of Egypt and Syria were considered as continuing in force within the regional limits in respect of which they had originally been concluded. Thus, in the Secretariat's study of succession in respect of extradition treaties it is said that "in accordance with the position explicitly taken by the United Arab Republic, treaties applicable to Egypt or Syria were generally considered to have remained in force unaffected by the changes in 1958 [and 1961]".[173] Again, in the Secretariat's study of air transport agreements the conclusion is reached that "notwithstanding the formation of a unitary State with no relevant power reserved for constituent parts, the air transport agreements of Egypt and Syria continued to have effect".[174] And the practice examined in its study of trade agreements shows that in this case also the commercial treaties of Egypt and Syria were considered as continuing in force within their regional limits notwithstanding the formation of the United Arab Republic.[175] The same view of the position in regard to the pre-union treaties of Egypt and Syria was reflected in the lists of "treaties in force" published by other States.[176] The United States, for example, listed against the United Arab Repub-

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[169] See *Yearbook of the International Law Commission, 1962*, vol. II, p. 113, document A/CN.4/150, para. 48.

[170] *Ibid.*, p. 104, document A/CN.4/149 and Add.1, paras. 17-21.

[171] See M. M. Whiteman, *op. cit.*, vol. 2, pp. 987-990 and 1018-1025; and D. P. O'Connell, *State Succession . . .*, vol. II, pp. 193-196.

[172] *Yearbook of the International Law Commission, 1970*, vol. II, p. 89, document A/CN.4/225, para. 108.

[173] *Ibid.*, p. 130, document A/CN.4/229, para. 147; see also p. 127, paras. 130-131.

[174] *Ibid., 1971*, vol. II (Part Two), p. 148, document A/CN.4/243, para. 190; see also pp. 142-146, paras. 152-175.

[175] *Ibid.*, pp. 179-181 and 184, document A/CN.4/243/Add.1, paras. 149-166 and 181.

[176] D. P. O'Connell, *State Succession . . .*, vol. II, pp. 72-73.

lic twenty-one pre-union bilateral treaties with Egypt and six with Syria.

(16) A modern writer considers the case of the United Arab Republic to be somewhat anomalous:

> It is difficult to place the United Arab Republic within any of the traditional categories of composite States. It was not a real union because the Republic was a State; nor was it a personal union, because whatever international personality of the constituent States survived was of very limited character. At the same time it was not a federation since there was no classical distribution of legislative powers. In short, the arrangement was *sui generis*. This however, does not necessarily invalidate analogies with other types of association.[177]

While agreeing in substance with this comment, the Special Rapporteur doubts whether it is necessary to differentiate the United Arab Republic from a real union because the United Arab Republic was constituted as a "State". True, one well-known authority took the position that "a Real Union is not itself a State, but merely a union of two full sovereign States which together make one single but composite International Person".[178] That somewhat mystical view of real unions was not, however, universally shared, another well-known authority saying bluntly: "A real union is indistinguishable for international purposes from a federal union. It occurs when States are indissolubly combined under the same monarch, *their identity being merged in that of a common State for external purposes*, though each may retain distinct internal laws and institutions.[179] Certainly, in the context of treaty relations, the latter view seems to express the substance of the matter. The anomaly, if there was one, in the case of the United Arab Republic lay rather in the greater degree of the fusion of the identities of the two States in the central organs provided for in the Constitution. The separate identities of Egypt and Syria, which remained a political fact, found only very limited expression in the Provisional Constitution. For present purposes, however, and in the light of the treaty practice during the existence of the united Republic, the view generally taken of the case of the United Arab Republic as one of a union of States seems reasonable and in accord with the facts.

(17) The question remains, however, as to the legal basis on which the pre-union treaties of Egypt and Syria were considered as continuing in force within their respective regional limits. Was this viewed as resulting from the consent of the other parties to the treaties concerned or as occurring *ipso jure* by reason of the particular nature of the "succession" as a union of independence? The practice appears to be susceptible of either interpretation. But the uniformity of the recognition of the continuity of the pre-union treaties, together with the uniform recognition accorded by international organizations to the continuity of the membership of Egypt and Syria in the United Arab Republic, may perhaps indicate conduct based on the hypothesis of an actual rule of continuity in the case of such a union of independent States.

(18) The uniting of Tanganyika and Zanzibar in the Republic of Tanzania in 1964 was also a union of independent States under constituent instruments which provided for a common Head of State and a common organ responsible for the external, and therefore treaty relations of the Union.[180] The constituent instruments indeed provided for a Union Parliament and Executive to which various major matters were reserved. Unlike the Provisional Constitution of the United Arab Republic, however, they also provided for a separate Zanzibar legislature and executive having competence in all internal matters not reserved to the central organs of the united Republic. Although, therefore, the constituent instruments *prima facie* contain federal elements, the case is commonly classified simply as a union of States and appears to have been so regarded by Tanzania herself.[181] On the other hand, the particular circumstances in which the union was formed complicate this case as a precedent from which to deduce principles governing the effect of the formation of a union of States upon treaties.

(19) Though both Tanganyika and Zanzibar were independent States in 1964 when they united in the Republic of Tanzania, their independence was of very recent date. Tanganyika, previously a trust territory, had become independent in 1961; Zanzibar, previously a colonial protectorate, had attained independence and become a Member of the United Nations only towards the end of 1963. In consequence, the formation of the union of Tanzania occurred in two stages, the second of which followed very rapidly after the first: (*a*) the emergence of each of the two individual territories to independence, and (*b*) the uniting of the two, now independent, States in the Republic of Tanzania. This fact has to be kept in mind in interpreting the treaty-practice after the formation of the Union for the following reasons. Tanganyika, on beginning life as a new State, had made the Nyerere declaration by which, in effect, she gave notice that pre-independence treaties would be considered by her as continuing in force only on a provisional basis during an interim period, pending a decision as to their continuance, termination or renegotiation.[182] She recognized the possibility that some treaties might survive "by the application of the rules of customary international law" apparently meaning thereby boundary and other localized treaties. Otherwise, she clearly considered herself free to accept or reject pre-independence treaties. The consequence was that, when not long afterwards Tanganyika united with Zanzibar, many pre-union treaties applicable in respect of her territory had terminated or were in force only provisionally. Except for possible "localized treaties", she was bound only by such treaties as she had taken steps to continue in force. As to Zanzibar, there seems to be little doubt that, leaving aside the question

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[177] *Ibid.*, p. 74.

[178] L. Oppenheim, *International Law: A Treatise* 8th ed. [*Lauterpacht*] (London, Longmans, Green, 1955), vol. I, p. 171.

[179] W. E. Hall, *A Treatise on International Law*, 8th ed., (Oxford, Clarendon Press, 1924), p. 26. Cf. P. Fauchille, *Traité de droit international public*, 8th ed. (Paris, Rousseau, 1922), vol. I, part I, pp.233-234.

[180] E. E. Seaton and S. T. M. Maliti, *loc. cit.*, paras. 26-28.

[181] *Ibid.*

[182] See paragraph 1 of the commentary to article 4 of the present draft: (*Yearbook of the International Law Commission, 1969*, vol. II, pp.62-63, document A/CN.4/214 and Add.1 and 2).

of localized treaties, she was not bound to consider any pre-independence treaties as in force at the moment when she joined with Tanganyika in forming the Republic of Tanzania. The Republic itself seems to have thought that treaties previously applicable to Zanzibar had survived the latter's independence by reason of a rule of customary law governing "protectorates"; but that the Zanzibar revolution at the beginning of 1964 had necessarily put an end to them.[183] The thesis that a revolutionary change of government may produce a clean slate in regard to treaties is, however, very controversial, and is therefore a doubtful basis for regarding Zanzibar as relieved of pre-independence treaties. On the other hand, Zanzibar appears in fact to have been a colonial protectorate rather than a protected State, and on this basis she was not in any event bound to consider treaties previously applicable to the protectorate as continuing in force after independence. Accordingly, as neither the original nor the revolutionary government of Zanzibar had notified her succession to multilateral treaties of indicated her acceptance of the novation of bilateral treaties, Tanzania was justified, if for different reasons, in thinking that Zanzibar had joined the Union free of any *obligation* to continue in force her pre-independence treaties.

(20) In a note of 6 May 1964, addressed to the Secretary-General, the new united Republic informed him of the uniting of the two countries as one sovereign State under the name of the United Republic of Tanganyika and Zanzibar (the subsequent change of name of Tanzania was notified on 2 November 1964). It further asked the Secretary-General:

> to note that the United Republic of Tanganyika and Zanzibar declares that it is now a single Member of the United Nations bound by the provisions of the Charter, and that all international treaties and agreements in force between the Republic of Tanganyika or the People's Republic of Zanzibar and other States or international organizations will, to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union, remain in force within the regional limits prescribed on their conclusion and in accordance with the principles of international law.[184]

This declaration, except for the proviso "to the extent that their implementation is consistent with the constitutional position established by the Articles of the Union", follows the same lines as that of the United Arab Republic.[185] Furthermore, the position taken by the Secretary-General in communicating the declarations to other United Nations organs and to the specialized agencies was almost identical with that adopted by him in the case of the United Arab Republic[186] and, *mutatis mutandis*, the specialized agencies seem to have followed the precedent of the United Arab Republic in dealing with the merger of Tanganyika and Zanzibar in the United Republic of Tanzania. At any rate, the resulting union was treated as simply continuing the membership of Tanganyika (and also of Zanzibar in those cases where the latter had become a member prior to the Union) without any need to undergo the relevant admission procedure. The treaty practice of Tanzania after the formation of the union necessarily reflected the special circumstances which have been mentioned;[187] even so, when closely examined, it seems to have parallels with the treaty practice in the case of the United Arab Republic.

(21) As to multilateral treaties, Tanzania confirmed to the Secretary-General that the United Republic would continue to be bound by those in respect of which the Secretary-General acts as depositary and which had been signed, ratified or acceded to *on behalf of Tanganyika*.[188] No doubt the United Republic's communication was expressed in those terms for the simple reason that there were no such treaties which had been signed, ratified or acceded to *on behalf of Zanzibar* during the latter's very brief period of existence as a separate independent State prior to the Union. In the light of that communication, the Secretary-General listed the United Republic as a party to a number of multilateral treaties on the basis of an act of acceptance, ratification or accession by Tanganyika prior to the Union. Moroever, he listed the date of *Tanganyika's* act of acceptance, ratification or accession as the commencing date of the United Republic's participation in the treaties in question.[189] Only in the cases of the Charter of the United Nations and the Constitution of the World Health Organization, to which Zanzibar had become a party by admission prior to the Union, was any mention made of Zanzibar; and in these cases under the entry for Tanzania he also gave the names of Tanganyika and Zanzibar together with the separate dates of their respective admissions to the United Nations.[190] In the other cases, the entry for Tanzania did not contain any indication that Tanzania's participation in the treaty was to be considered as restricted to the regional limits of Tanganyika.

(22) Tanganyika, after attaining independence, notified her succession to the four Humanitarian Geneva Conventions of 1949 and was therefore a party to them at the time of the formation of the United Republic of Tanzania.[191] Zanzibar, on the other hand, had taken no action with respect to these treaties prior to the Union. Tanzania is now listed as a party, but it seems

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[183] E. E. Seaton and S. T. M. Maliti, *loc. cit.*, paras. 22-24.

[184] See United Nations, *Multilateral treaties... 1968*, p. 7, foot-note 6.

[185] See paragraph 14 of the present commentary.

[186] *Ibid.*; see also United Nations, *Multilateral treaties... 1968*, p. 7, foot-note 6.

[187] See paragraph 19 above.

[188] See United Nations, *Multilateral Treaties... 1968*, p. 7, foot-note 6.

[189] e.g., the 1946 Convention on the Privileges and Immunities of the United Nations; the 1947 Convention on the Privileges and Immunities of the Specialized Agencies; the 1961 Vienna Convention on Diplomatic Relations and its Optional Protocol; the Paris Agreement of 1904 and the Paris Convention of 1910 for the Suppression of the White Slave Traffic, amended by the New York Protocol of 1949; the Conventions for the Suppression of the Circulation of Obscene Publications; the 1963 Agreement establishing the African Development Bank, etc. (See United Nations, *Multilateral Treaties... 31 December 1968*, pp. 32, 40, 45, 51, 146, 149, 157, 162, 187, 205, 215, 303, 312, 316, 323).

[190] *Ibid.*, pp. 7 and 167.

[191] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 41, document A/CN.4/200 and Add.1 and 2, para. 171.

that the question whether Tanzania's participation embraces Zanzibar as well as Tanganyika is regarded as still undetermined.[192] Similarly, the Republic of Tanganyika but not Zanzibar had become a party to the Paris Convention for the Protection of Industrial Property (Lisbon text) prior to the formation of the United Republic. After the formation of the Union the Bureau listed Tanzania as having acceded to the Paris Convention on the basis of the Lisbon text; but in this case also it was stated that the question of the application of the Convention to Zanzibar was still undetermined.[193] The situation at the moment of union differed in the case of GATT, in that Zanzibar, although she had not taken steps to become a party prior to the formation of the Union, had been an associate member of GATT before attaining independence. Otherwise it was similar, as Tanganyika had notified the Secretary-General of her succession not only to GATT but to 42 unternational instruments relating to GATT. After the union the United Republic of Tanzania informed GATT of its assumption of responsibility for the external trade relations of both Tanganyika and Zanzibar, and the United Republic was then regarded as a single contracting party to GATT.[194] In the case of FAO also, Tanganyika, before the Union, had taken steps to become a member while Zanzibar, a former associate member, had not. On being notified of the union of the two countries in a single State, the FAO Conference formally, recognized that the United Republic of Tanzania ("replaced the former member Nation, Tanganyika, and the former associate member, Zanzibar".[195] At the same time, the membership of the United Republic is treated by FAO as dating from the commencement of *Tanganyika's* membership; and it appears that Zanzibar is considered to have had the status of a non-member State during the brief interval between her attainment of independence and the formation of the United Republic of Tanzania.[196] In ITU, the effect of the Union seems to have been determined on similar lines. Again, Tanganyika had become a party to the ITU Convention before the Union, while Zanzibar, which had formerly been one unit in a "group member" of British territories, had not done so. One being notified of the Union, the General Secretariat of ITU communicated the notification to member States with the comment: "Accordingly, with effect from 26 April 1964 [the date of the formation of the Union] the Republic of Tanganyika has been succeeded in respect of its membership of the ITU by the United Republic of Tanganyika and Zanzibar". The United Republic is listed in the Annual Report as a party to the Geneva Convention of 1959 as from the date of Tanganyika's accession, and there is nothing in the entry for Tanzania to indicate that her participation is restricted within the regional limits of Tanganyika.[197]

(23) Bilateral treaties—leaving aside the question of localized treaties—in the case of Tanganyika were due under the terms of the Nyerere declaration to terminate two years after independence, that is on 9 December 1963 and some months before the formation of Tanzania.[198] The position at the date of the Union therefore was that the great majority of the bilateral treaties applicable to Tanganyika prior to her independence had terminated. In some instances, however, a pre-independence treaty had been continued in force by mutual agreement before the Union took place. This was so, for example, in the case of a number of commercial treaties, legal procedure agreements and consular treaties, the maintenance in force of which had been agreed in exchanges of notes with the interested States.[199] In other instances, negotiations for the maintenance in force of a pre-independence treaty which had been begun by Tanganyika prior to the date of the Union were completed by Tanzania after that date.[200] In addition, a certain number of new treaties had been concluded by Tanganyika between the date of her independence and that of the formation of the union.[201] Zanzibar, as previously explained, was entitled to regard herself as not bound by bilateral treaties applicable in respect of her territory prior to independence, unless they had been "novated", i.e. continued by mutual agreement.[202] In case of visa abolition agreements, commercial treaties, extradition and legal procedure agreements, it seems that prior to the union Zanzibar had either indicated a wish to terminate the pre-independence treaties or given no indication of a wish to maintain any of them in force.[203] In the case of consular treaties, seven of which treaties had been applicable in respect of Zanzibar prior to her independence, it seems that the

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[192] See 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, 1972* (Department of State publication 8628, Washington, D.C., U.S. Government Printing Office), (referred to hereafter as "United States, *Treaties in Force ... 1972*") p. 364, foot-note 3.

[193] See *Yearbook of the International Law Commission, 1968*, vol. II, p. 59, document A/CN.4/200 and Add.1 and 2, para. 258 and foot-note 466.

[194] *Ibid.*, pp. 84 and 86, document A/CN.4/200 and Add.1 and 2, paras. 373 and 382.

[195] FAO, *Report of the Thirteenth Session of the Conference (20 Nov.-9 Dec. 1965)* (Rome, 1966), para. 524.

[196] *Yearbook of the International Law Commission, 1969*, vol. II, pp. 38 and 42, document A/CN.4/210, paras. 52 and 70.

[197] *Ibid., 1970*, vol. II, p. 90, document A/CN.225, paras. 111-112.

[198] E. E. Seaton and S. T. M. Maliti, *loc. cit.*, paras. 36-41.

[199] *Ibid.*, paras. 56, 77 and 84.

[200] *Ibid.*, paras. 70-73 and 89-90.

[201] *Ibid.*, paras. 47 and 56.

[202] See para. 19 of the present commentary. Tanzania, as mentioned in that paragraph, appears to have put the termination of the treaties rather on the controversial ground of the effects of the revolution in Zanzibar.

[203] The suggestion has been made that the legal procedure agreements "being so non-political" would not necessarily have failed to survive the revolution "so that, presumably, they were to be considered as in force at the date of the union" (E. E. Seaton and S. T. M. Maliti, *loc. cit.*, para. 81). However, leaving aside the controversial point as to the effects of the revolution, it would be difficult to distinguish legal procedure agreements from visa abolition, commercial and extradition treaties on the ground of "non-political character". Moreover, the word "survive" is equivocal; the treaties might well have "survived" in the sense of being capable of being "novated" without yet having been kept in force.

consuls continued at their posts up to the date of the Union, so that the treaties appear to that extent to have remained in force, at any rate provisionally.

(24) After the formation of the United Republic, Tanganyika's new Visa Abolition Agreements with Israel and the Federal Republic of Germany were, it appears, accepted as *ipso jure* continuing in force.[204] In addition arrangements concluded by Tanganyika for continuing in force pre-independence Agreements with five countries were regarded as still in force after the union. In all those cases the treaties, having been concluded only in respect of Tanganyika, were accepted as continuing to apply only in respect of the region of Tanganyika and as not extending to Zanzibar.[205] As to commercial treaties, the only ones in force on the eve of the Union were the three new treaties concluded by Tanganyika after her independence with Czechoslovakia, the Soviet Union and Yugoslavia. These treaties again appear to have been regarded as *ispo jure* remaining in force after the formation of the United Republic, but in only respect of the region of Tanganyika.[206] In the case of extradition agreements, understandings were reached between Tanganyika and some countries for the maintenance in force provisionally of these agreements. It seems that after the union these understandings were continued in force and, in some cases, made the subject of express agreements by exchanges of notes.[207] It further seems that it was accepted that, where the treaty had been applicable in respect of Zanzibar prior to her independence, the agreement for its "novation" should be considred as relating to Zanzibar as well as Tanganyika, even although it was not in force for Zanzibar at the date of the Union of the two Republics. And since these were cases of "novation" by mutual agreement, it was clearly open to the States in question so to agree. It may be added that after the union consular treaties applicable previously in relation to Tanganyika or to Zanzibar also appear to have continued in force as between the United Republic and the other contracting parties in relation to the region to which they had applied prior to the union.[208]

(25) The constitutional arrangements setting up the United Arab Republic and the United Republic of Tanzania did not in either case leave any part of the treaty-making power in the States composing the Union. On the contrary, the whole treaty-making power was in each case placed in the hands of the Government of the Union, which was also invested with a general power of legislation with respect to the territory of the union. In each case the central organs of government of the Union were established at the capital of one of the two former States. In the case of the United Arab Republic a separate executive council was provided for the other region, Syria; in the case of Tanzania a separate local legislature was provided for the other region, Zanzibar. These arrangements would not in themselves be sufficient to distinguish these cases from other cases of the creation of a new State or of the incorporation of one State within another. The distinguishing elements of the present cases appear to be: (1) the fact that prior to each union both its component regions were internationally recognized as fully independent sovereign States; (2) the fact that in each case the process of union was regarded not as the creation of a wholly new sovereign State or as the incorporation of one State into the other but as the merging of two existing sovereign States into one; and (3) the explicit recognition in each case of the continuance in force of the pre-union treaties of both component States in relation to, and in relation *only* to, their respective regions. As already pointed out in the present commentary,[209] a question arises as to whether the third of these elements is merely an automatic consequence of the existence of the first two or whether it is itself an essential part of the legal basis for the continuance in force of the pre-union treaties of the component States. If the latter view is taken, these cases are simply a particular application of the process of "novation". If the former view is accepted, then these cases constitute a specific category of succession where the pre-union treaties of the component States *ipso jure* bind the union government within the regions in regard to which they were applicable prior to the union. The practice of the United Nations, the specialized agencies and other international organizations in regards to the continuity of membership in these cases, as noted above, appears to favour the existence of a rule of *ipso jure* continuity of treaties in this category of unions of States.

(26) Finally, attention is drawn to two points. The first is that in neither of the two cases did the constitutional arrangements leave any treaty-making power in the component States after the formation of the Union. It follows that the continuance of the pre-union treaties within the respective regions was wholly unrelated to the possession of treaty-making powers by the individual regions after the formation of the Union.

(27) The second is that in her declaration of 6 May 1964 [210] Tanzania qualified her statement of the continuance of the pre-union treaties of Tanganyika and Zanzibar by the proviso "to the extent that their implementation is consistent with the constitutional position established by the Articles of Union". This proviso was reproduced almost word for word in the first paragraph of the second resolution adopted by the International Law Association adopted in 1968 at its Buenos Aires Conference.[211] It there appears as part of a general rule covering both unions and federations of States and providing for the continuity of pre-union or pre-federa-

[204] E. E. Seaton and S. T. M. Maliti, *loc. cit.*, para. 48.

[205] *Ibid.*

[206] *Ibid.*, paras. 64-65.

[207] *Ibid.*, paras. 62-72.

[208] *Ibid.*, para. 88.

[209] See para. 17 above.

[210] For the relevant passages, see para. 20 above.

[211] International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 632; the text of the resolutions is also reproduced in the introduction to the Special Rapporteur's second report (*Yearbook of the International Law Commission, 1969*, vol. II, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15).

tion treaties "within the regional limits prescribed at the time of their conclusion". Since the proviso comes into question also in connexion with federal unions, its consideration will be deferred until after the practice in regard to federal unions has been examined. It suffices here to observe that such a proviso is consistent with a rule of continuity of pre-union treaties *ipso jure* only if it does no more than express a limitation on continuity arising from the objective incompatibility of the treaty with the union of the two States as one State; and this appears to be the sense in which the proviso was intended in Tanzania's declaration. Otherwise, such a proviso would amount to a unilateral modification of the terms of the pre-union treaties not opposable to the other contracting parties without their agreement.

(b) *Federal unions*

(28) The International Law Association, as mentioned in the preceding paragraph, proposed in its second resolution one general rule covering both "unions" and "federations of States". Furthermore, the commentary on the resolution made it clear that the term "federations of States" was intented to embrace not merely federations formed by existing *States* but all composite States created in federal form. Two questions therefore arise: (1) whether unions of States and federations of States are governed by the same rule; and (2) whether federations formed by two or more States and federations formed from two or more territories fall under the same principles. If the answers to these questions must be sought primarily in the treaty practice, it seems desirable first to give a fuller indication of the nature of the proposals of the International Law Association in regard to unions and federations.

(29) The relevant paragraphs of the International Law Association's resolution read: [212]

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 consitutional 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.

The report of the Committee responsible for drafting the resolution contained an explanatory note which ran as follows:

When a composite State is formed out of several previously separate States *or territories*,* the problem of continuity of treaties of those States *or territories* * arises. The Committee rejects the view that this continuity depends upon the form of the composition, *i.e.* federation or union, because at the present time there is a wide variation in the forms of composition, yet despite this variation there is an almost universal practice in favour of maintenance of treaties (for example the union between Egypt and Syria). It also rejects the view that continuity depends on whether or not the constituent entities retain some faculties of international intercourse (as in the case of Bavaria between 1871 and 1918) because, in fact, continuity has occurred even in the absence of such faculties. The Committee has not taken a position on the question whether treaty continuity depends upon consistency of a treaty with the constitutional position established by the instrument of union or federation, or whether treaties continue in force irrespective of the constitutional competence to give effect to them after the formation of the new entity. On the one hand, it may be argued that a State, if it may be exonerated from treaty obligations by being annexed to another State, may also be exonerated if its relationship with that other State is less than total absorption. On the other hand, it may equally cogently be argued that, since a State may not plead constitutional incapacity as an excuse for non-compliance with a treaty, escape from treaties is not achieved by a new constitutional relationship with another State. Even if continuity of treaties depends upon the consistency of a treaty with the constitutional position established by the instrument of union or federation, the question then arises whether a treaty lapses at the moment of union or federation because the subject-matter has fallen within the exclusive legislative competence of the central government, or lapses only when the central government in fact legislates inconsistently with the treaty.

The Committee has taken the position that treaties which remain in force affect only the territorial extent of the formerly separate State *or territories*.* It should be pointed out that the union may be so complete that the territorial identity of the formerly separate States *or territories* * is substantially lost. How a treaty can separately affect a territory which has little separate administrative identity is controversial, yet this is what has occurred in the case of Somalia. The problem also arises in Ghana, Kenya and elsewhere where the new State is composed of both former Crown colonies and protectorates which were differently affected by treaties. Although no conscious decision seems to have been taken in any of these countries, the solution of the problem seems to have been to presume that the treaties applied to the Crown colony have extended to the former protectorate. It is not known if there are any British treaties which affected the protectorates and not the Crown colonies though there were many which affected the Crown colonies and not the protectorates.[213]

Respecting responsibility for treaty-performance, the Committee acknowledges that it is controversial whether the central or local government is responsible. However, it believes that, considering the machinery of international negotiation, the central government remains responsible unless the local government remains competent to negotiate internationally within the treaty field. Any other solution is likely, in the Committee's opinion, to be administratively abortive and to frustrate the implications of treaty continuity through the process of administrative change.[214]

(30) The International Law Association's rapporteur for the subject of succession is also the author of a modern textbook on succession of States which states the effect of entry into a federation on treaties in similar broad terms:

The sole test of the effect of federation on treaties is the compatibility of a treaty with the federal structure, and this incompa-

[212] The resolution has a third paragraph dealing with the dissolution of unions or federations.

[213] Here there is a parenthesis calling attention to a statement of Nigeria mentioned in annex E to the Committee's report.

[214] Note 2 in the Interim Report of the Committee on the Succession of New States to the Treaties and Certain Other, Obligations of their Predecessors (International Law Association *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. 600-601).

tibility may not arise until the federal instrumentalities bring it about. A federal society involves a dovetailing rather than a supersession of legal orders. The competence to transact and the competence to perform exist conjunctively in the total legal order at the international level, but exist disjunctively in the instrumentalities of government at the constitutional level. A lapse of treaties consequent upon federation is only to be presumed when a direct and constitutionally valid exercise of federal powers renders impossible the performance of the treaty obligations of the constituent States. Only in this case is there a proper analogy with the incorporation of territory in a unitary State through annexation or cession. If the federal legislature is constitutionally incompetent within the area of power affected by the treaty, no inconsistency with the treaty can occur, and therefore, there can be no question about its survival. [215]

(31) The heterogeneous character of the practice in regard to federations admittedly renders difficult its analysis of legal rules. Even so, and after giving every weight to the arguments and opinions set out in the two preceding paragraphs, the Special Rapporteur doubts whether the global treatment of unions of States, federations of States and federations of territories adopted in the resolution of the International Law Association is really in accord with the practice or consistent with principle. As pointed out in the Special Rapporteur's second report,[216] the resolutions of the International Law Association on succession in respect of treaties hinge upon a presumption of continuity, and this seems to be the case with its second resolution concerning unions and federations as well as with its first resolution regarding newly independent States. Indeed, the second resolution is formulated more in terms of a *rule* of continuity. The term "continuity" tends to blur the fundamental issue of whether the maintenance in force of the treaty is a matter of right and obligation on the part of (*a*) the successor State and (*b*) the other party or parties to the treaty concerned. If the second resolution seeks to lay down an absolute of *ipso jure* continuity for all federations it is thought to go beyond State practice.

(32) As already emphasized above,[217] the commentary upon the International Law Association's second resolution indicates that the term "federations of States", as used in that resolution, covers all composite States created in federal form: i.e. it covers both federations of States, like Switzerland and federations of *territories* like Nigeria. But the basic treaty situation is not the same in both cases at the date of the formation of the federation. A sovereign State, when it joins a federation or union of States, has an existing treaty régime of its own—an existing complex of treaties to which it is a party in its own name. A mere territory may have an existing complex of treaties formerly made applicable to it by its administering Power; but in general these treaties are not treaties to which it is itself a party at the moment when it joins the federation. On the contrary, they are treaties to which the territory, if it were becoming a sovereign State instead of a unit of a federation, would be considered a party only after notification of succession in the case of a multilateral treaty or a novation in the case of a bilateral treaty. In other words, the underlying legal situations at the moment of federation are not the same in federations of States and federations of mere territories. Consequently, the proposition that succession in respect of treaties is governed by the same rule in both cases, is something which needs to be demonstrated from the evidence of State practice; and it is not clear that such is indeed the position revealed by State practice. Accordingly, it seems desirable to examine the cases of federations of States and federations of territories separately.

(33) Cases of federations of *States* are not numerous and the treaty practice is not easy to interpret. One precedent is the formation of the German federation in 1871 the treaty practice as to which is summarized in a modern textbook as follows:

> The commercial treaties of the United States with the German States survived the formation of the Empire but not the annexation of Hanover by Prussia. However, the explanation of this is unclear since they were at times regarded as affecting the whole Empire. Most of the relevant provisions concerned shipping, and since the treaties were uniform, and the German navies and merchant marine were unified, there was no need to be specific whether the treaties survived as treaties of the States or as treaties succeeded to by the Empire. Two successive United States Secretaries of State doubted the theory that the surviving treaties bound the whole of the Empire.
>
> Treaties of commerce and navigation between the States or the Zollverein and the Netherlands, China, Chile, Siam and Turkey were regarded as in force after 1871, as were consular treaties with the United States, the Netherlands and Turkey. Extradition treaties also survived, and were given effect to in United States courts. The Bancroft treaties, which concerned the treatment to be accorded in the German States to persons who had emigrated thence to the United States and returned, and which resolved conflicts of nationality, were the subject of diplomatic and judicial action up to the outbreak of war in 1917. Private law and judicial assistance treaties were also applied in the courts. In particular, the treaty of mutual relationship of 1856 between Baden and Switzerland has been the subject of revision and aministration action, culminating in a decision in 1955 of the Swiss Federal Court that its relevant provision was still in force.* Numerous frontier relations treaties have also been considered at various times to have survived the events of 1871. The impression is that those events had no effect upon any treaties of any of the German States.[218]

* Bertschinger *v.* Bertschinger, I.L.R., vol. XXII, p. 141.[219]

Various interpretations of this practice have been advanced but the prevailing view seems to be that the treaties of the individual German States continued either to bind the Federal State as a successor to the States within their respective regional limits or to bind the individual States through the federal State until terminated by an inconsistent exercise of federal legislative power.[220] It is true that certain treaties of individual

[215] D. P. O'Connell, *State Succession* . . . , vol. II, p. 54.

[216] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 50, document A/CN.4/214 and Add.1 and 2, para. 23.

[217] See paras. 28-29 of the present commentary.

[218] D. P. O'Connell, *State Succession* . . . , vol. II, pp. 58-60.

[219] See *Yearbook of the International Law Commission, 1963*, vol. III, p. 113, document A/CN.4/157, paras. 152-156.

[220] See D. P. O'Connell, *State Succession* . . ., vol. II, p. 57; E. Castrén, "On State Succession in Practice and Theory", *Nordisk Tidsskrift for International Ret* (Copenhagen), vol. 24 (1954), p. 67; A. D. McNair, *op. cit.*, p. 629.

States were regarded as applicable in respect of the federations as a whole. But these cases appear to have concerned only particular categories of treaties and in general any continuity of the treaties of the States was confined to their respective regional limits.[221] A further point is that under the federal constitution the individual States retained both their legislative and their treaty-making competences except in so far as the federal Government might exercise its over-riding powers in the same field.

(34) The Swiss Federal Constitution of 1848 vested the treaty-making and treaty-enforcing powers in the Federal Government. At the same time, it left in the hands of the cantons a concurrent, if subordinate, power to make treaties with foreign-States concerning "l'économie publique, les rapports de voisinage et de police".[222] The pre-federation treaties of individual cantons, it seems clear, were considered as continuing in force within their respective regional limits after the formation of the federation.[223] At the same time, the principle of continuity does not appear to have been limited to treaties falling within the treaty-making competence still possessed by the cantons after the federation. It further appears that treaties formerly concluded by the cantons are not considered under Swiss law as abrogated by reason only of incompatibility with a subsequent federal law, but are terminated only through a subsequent exercise of the federal treaty-making power.[224]

(35) Another precedent, though the federation was very short-lived, is the foundation of the Greater Republic of Central America in 1895. In that instance El Salvador, Nicaragua and Honduras signed a Treaty of Federation constituting the Greater Republic, and in 1897 the Greater Republic itself concluded a further treaty of federation with Costa Rica and Guatemala, extending the federation to these two Republics. The second treaty, like the first, invested the Federation with the treaty-making power; but it also expressly provided "Former treaties entered into by the States shall still remain in force in so far as they are not opposed to the present treaty".[225]

(36) The notification made by the Soviet Union on 23 July 1923 concerning the existing treaties of the Russian, White Russian, Ukrainian and Transcaucasian Republics may perhaps be regarded as a precedent of a similar kind. The notification stated that "the People's Commissariat for Foreign Affairs of the USSR is charged with the execution in the name of the Union of all its international relations, including the execution of all treaties and conventions entered into by the above-mentioned Republics with foreign States *which shall remain in force in the territories of the respective Republics*".*[226]

(37) The admission of Texas, then an independent State, into the United States in 1845 also calls for consideration in the present context. Under the United States Constitution the whole treaty-making power is vested in the federal Government, and it is expressly forbidden to the individual States to conclude treaties. They may enter into agreements with foreign Powers only with the consent of Congress—which has always been taken to mean that they may not make treaties on their own behalf. The United States took the position that Texas's pre-federation treaties lapsed and that Texas fell within the treaty-régime of the United States: in other words, that it was a case for the application of the moving treaty frontier principle.[227] At first, both France and Great Britain objected, the latter arguing that Texas could not, by *voluntarily* joining the United States federation, exonerate herself from her own existing treaties. Later, in 1857 Great Britain came round to the United States view that Texas's pre-federation treaties had lapsed. The reasoning of the British Law Officers seems, however, to have differed slightly from that of the United States Government:

> By the Federal constitution of the United States, treaties of commerce and navigation with foreign countries belong entirely to the Federal Government; and the entering into a separate treaty of commerce and navigation by any one of the United States with a foreign Power would be incompatible with the national constitution.
>
> It follows that if an independent American State having a separate, commercial treaty with a foreign Power is annexed to the United States, as a member of the Union, and such annexation is recognized by such foreign Power, the separate treaty merges in the general treaty of commerce (if any) subsisting between such foreign country and the Federal Union.
>
> A General Treaty of Commerce and Navigation between Great Britain and the United States was concluded in 1815, and is still subsisting.
>
> Since that year, several States have been added to the American Union and each has been justly considered and treated as having acceded to, and being bound by, that General Treaty.[228]

On this reasoning they concluded that a Texas-Great Britain Treaty of Commerce and Navigation no longer subsisted. Leaving aside the somewhat untechnical reference to the States' having "acceded" to the federal Treaty, it seems that the British Law Officers regarded the continuance of the Texas Treaty as incompatible with a constitution which reserved the treaty-making power to the federal Government. The second paragraph cited above does not, it is thought, imply that in their

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[221] R. W. G. de Muralt, *op. cit.*, p. 78; D. P. O'Connell, "State succession and the effect upon treaties of entry into a composite relationship", *The British Year Book of International Law 1963* (London), vol. 39 (1963), pp. 68-77.

[222] See J.-F. Aubert, *Traité de droit constitutionnel suisse* (Neuchâtel, Ides et Calendes, 1967), vol. 1, pp. 256-261.

[223] D. P. O'Connell, *State Succession* . . ., vol. II, pp. 60-61.

[224] P. Guggenheim, *Traité de droit international public* (Geneva, Georg, 1953), vol. I, p. 310.

[225] See R. W. G. de Muralt, *op. cit.*, pp. 83-84.

[226] D. P. O'Connell, *State Succession* . . ., vol. II, p. 60, footnote 7.

[227] D. P. O'Connell, "State succession . . ." *The British Year Book (loc. cit.)*, pp. 79-82; A. D. McNair, *op. cit.*, pp. 629-632; see also a United States Note of 25 June 1897 to Japan concerning the United States annexation of Hawaii cited in J. B. Moore, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1906), vol. V, p. 349.

[228] For the text of the Opinion, see A. D. McNair, *op. cit.*, pp. 630-632.

view this incompatibility would operate only when there was a federal treaty in force covering the same matter as the State treaty.

(38) The formation of the Commonwealth of Australia as a federal State in 1901, on the other hand, is not thought to come into account in the present context.[229] Apart from the questions of the statehood of the Colonies and of the Dominion, the very special role of the British Crown at that date in the treaty-making of the British Empire appears to preclude the use of this precedent as a basis from which to deduce rules applicable to federal unions generally.

(c) *Conclusions regarding unions of States*

(39) The precedents concerning unions of States other than federal, if few, are comparatively recent. They appear to indicate a rule prescribing the continuance in force *ipso jure* of the pre-union treaties of the individual States within their respective regional limits and subject to their compatibility with the constitution of the Union. In the case of these precedents the continuity of the pre-union treaties was recognized although the union constitution did not envisage the possession of any treaty-making powers by the States after the union. In other words, the continuance in force of the pre-union treaties was not regarded as incompatible with the union merely by reason of the non-possession by the States after the union of any treaty-making powers under the constitution. The precedents concerning federal unions, if rather more numerous, are older and less uniform. Taken as a whole, however, and disregarding minor discrepancies, they also appear to indicate a rule prescribing the continuance in force *ipso jure* of the pre-federation treaties of the individual States within their respective regional limits. Precisely how far the principle of continuity was linked to the continued possession by the individual States of some measure of treaty-making power or international personality is not clear. That element was present in the cases of the German and Swiss federations and its absence in the case of the United States seems to have been at any rate one ground on which continuity was denied. Many authors were thus led to conclude that the continuance in force of pre-federation treaties was dependent on the possession of treaty-making powers by the individual States after joining the federation; and they tended to link the continuity of the treaties to the continued possession of treaty-making powers within the same fields as the treaties in question.[230] A former member of the Commission, for example, wrote in 1951:

> Treaties concluded with third States by States members of a federal State before the constitution of that federal State are terminated in so as the member States lose the right to negotiate in respect of the matter concerned. Such treaties are not *ipso jure* transferred to the federal State because as has been shown, that State constitutes a new subject of international law. [*Translation by the United Nations Secretariat.*][231]

On the other hand, to the extent that they considered the principle of continuity to apply in these cases, writers seem to have regarded the treaties as remaining in force *ipso jure* rather than through any process of agreement.

(40) Thus, the practice as a whole does not give clear guidance as to the rules to be adopted, so that the Commission's task may have in it some elements or progressive development. The first question is whether the same rules should apply to both federal and non-federal unions of States. On this point the Special Rapporteur agrees with the Committee of the International Law Association that the variety of constitutional forms on which unions rest, with their different gradations of federation, do not make it easy to draw neat distinctions between federal and other unions. Accordingly, if possible, a single solution for unions of *States* may be preferable.

(41) The second question is whether, subject to certain qualifications, the basic rule should be the continuance in force of pre-union treaties *ipso jure* or through a process of agreement express or implied. This agreement would presumably derive either from a declaration of continuity made in connexion with the foundation of the union or from a constitutional provision concerning continuity, plus the assent of the other parties to the treaties in question. This is a conceivable solution and one which would, perhaps, involve the least departure from the general rules formulated in part II of the present draft (the differences would primarily be in regard to multilateral treaties). But both the treaty practice and jurists, as previously noted, appear to treat unions of *States* as a case of *ipso jure* continuity in so far as any continuance in force of pre-union treaties occurs. The question is delicate because it is one where the rules of international law and of the constitution of the union intersect; and the international rule is itself concerned with the effect on treaties of the constitutional change resulting from the formation of the union. The argument for treating unions of States as a special case is that, as sovereign States, they created a complex of treaty relations with other States and ought not to be able completely at will to terminate all those treaties by joining a federal or other union. In other words, the argument is that the principle of continuity should displace the "clean slate" principle in the case of the formation of a union and the moving treaty frontier principle in the case of the addition of a state to a union. Today, this argument may, perhaps, be thought to have added force in view of the growing tendency of States to group themselves in new forms of association where the line

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[229] See generally D. P. O'Connell, "State succession . . ." *The British Year Book . . .* (*loc. cit.*), pp. 82-91.

[230] e.g., A. D. McNair, *op. cit.*, p. 629.

[231] *Les traités conclus avec des Etats tiers par les Etats membres avant la constitution de l'Etat fédéral s'éteignent pour autant que les Etats membres sont privés du droit de traiter dans le domaine en question. Ces traités ne sont pas transférés* ipso jure *au nom de l'Etat fédéral, celui-ci, ainis qu'il a été indiqué, constituant un nouveau sujet du droit international.* (E. Castrén, "Aspects récents de la succession d'Etats", *Recueil des cours de l'Académie de droit international de La Haye 1951-I* (Paris, Sirey, 1952), vol. 78, p. 443.)

between international organizations and unions of States becomes somewhat blurred.

(42) The problem is to find a satisfactory formula for reconciling the principle of continuity with the new constitutional situation resulting from the formation of the union. The formula suggested by the International Law Association would allow the continuity of pre-union treaties "to the extent to which their implementation is consistent with the constitutional position established by the instrument of union or federation".[232] This formula does not make it clear whether the limitation relates to "implementation" on the part of *regional government* under powers allowed to it by the new constitution or whether it relates more generally to implementation under the constitution as a whole. Nor is the uncertainty removed by the note which the Committee of the International Law Association appended to the resolution.[233] According to this note, the Committee had not "taken a position on the question whether treaty continuity depends upon consistency of a treaty with the constitutional position established by the instrument of union or federation, or whether treaties continue in force irrespective of the constitutional competence to give effect to them after the formation of the new entity". It may be that there was some difference of opinion in the Committee on this point, because the Rapporteur of that Committee is himself on record as considering the constituent Government's competence to perform the treaty as a crucial test of continuity. Indeed, he maintains that an exercise of federal powers by the central government *subsequent* to the federation may bring about a lapse of a pre-union treaty if its effect is to "render impossible the performance of the treaty obligations of the constituent States".[234]

(43) It hardly seems acceptable that the continuity of a pre-union treaty should depend upon the mere distribution of the power to *perform* the treaty as between the regional government and the federal government, if the treaty is otherwise compatible with the constitution of the union; and still less that after the Union it should remain dependent on the federal government's not rendering *performance* of the treaty by the regional government impossible through an exercise of its federal powers. Such an approach to the question is thought to go too far in introducing internal constitutional provisions into a rule of international law, and in a manner which takes insufficient account of the rights of the other States parties to the treaty. The distribution of the power to implement treaties between central and regional governments is a matter which acquired some prominence in connexion with so-called "federal State clauses". But recourse to such clauses has always been a question of special agreement and federal clauses find no place in the general law of treaties as codified in the Vienna Convention. On principle, therefore, it is not thought appropriate to make the particular location in the constitution of the power to perform a treaty the criterion for determining its continuance in force after the formation of a union or federation.[235]

(44) Linked to the point just considered is another: if a pre-union treaty of a constituent region continues in force, is it thereafter to be considered as a treaty of the Union State or merely of the region? On this point the resolution of the International Law Association pronounced that "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*".* The Committee in its note acknowledged the question to be controversial but believed that "considering the machinery of international negotiation, the central government remains responsible unless the local government remains competent to negotiate internationally within the treaty field". This conclusion of the Committee has also to be read in the light of its rejection [236] of the view that continuity itself depends on "whether or not the constituent entities retain some faculties of international intercourse (as in the case of Bavaria between 1871 and 1918) because in fact continuity has occurred even in the absence of such faculties". (Presumably this last references was to Egypt and Syria, Tanganyika and Zanzibar in whose cases continuity was recognized despite their lack of any treaty-making powers after the formation respectively of the United Arab Republic and Tanzania.) In short, the retention by the constituent region of some negotiating powers vis-à-vis foreign States, which formerly was advanced by writers as the criterion of the continuity of the treaties themselves, is now adopted by the International Law Association as the criterion for determining whether the treaty continues as a union treaty or merely a treaty of the constituent region.

(45) The question of the capacity of constituent units of a federation in treaty relations with foreign States is one of considerable delicacy, as is emphasized by the difficulties experienced in this connexion in attempting to include a rule in the 1969 Convention on the Law of Treaties concerning the treaty-making capacity of federal States. Many federal States then showed a marked opposition to any recognition of any separate treaty-capacity for the constituent units of a federation.[237] Moreover, it seems that in federations where some faculty of entering into certain types of agreements with outside States is allowed to constituent units there is a strong tendency today to consider the agreements as made under powers delegated by the federal Govern-

[232] The formula may have been inspired by the terms of Tanzania's notification to the Secretary-General which used almost the same phraseology (see paragraph 23 of the present commentary).

[233] See para. 29 above.

[234] See para. 30 above.

[235] Nor does this criterion appear in practice to have been applied by the United Arab Republic or Tanzania in determining the continuity of pre-union treaties.

[236] See the Committee's note reproduced in paragraph 29 of the present commentary.

[237] At the United Nations Conference on the Law of Treaties all special reference to *federal* States was removed from what is now article 6 of the Convention which simply proclaims that "Every State possesses capacity to conclude treaties".

ment. In other words, to the extent that such agreements are international agreements they are regarded as agreements made by the constituent units as organs of the federation itself. Accordingly, the Special Rapporteur does not think that the solution proposed by the International Law Association is one that can be adopted by the Commission with any hope of its being accepted by States. Almost any rule formulated on this point may attract criticism from some quarter. But the rule most likely to meet with acceptance and most consistent with modern practice is thought to be one which considers treaties that continue in force after the formation of a union as treaties of the union State, although binding only in respect of the territory of one of its constituent units.

(46) Even so, there remains the fundamental problem of formulating the condition under which continuity of pre-union treaties in fact occurs. The incompatibility of a treaty with the constitution of a union of States may be of different kinds and degrees. It may be purely technical, as where the executive organs of the union differ from those specified in the treaty for the implementation of its provisions; or it may be fundamental as where a trade treaty cuts across the unified economic régime envisaged for the union. Another aspect of the problem is whether the principle of continuity can be considered applicable to all treaties or whether certain categories such as so-called "political" treaties have to be excepted. The difficulty here is to define the categories to be excepted. "Political" treaties, often referred to by writers as an exception are susceptible of very varying definitions; and in drafting the text which became the 1969 Vienna Convention on the Law of Treaties the Commission ultimately eschewed any division of treaties into categories on the basis of their subject-matter. In general the Special Rapporteur feels that compatibility of the object and purpose of the treaty with the constitution of the new State may be as near the Commission can get to a legal criterion for determining the limits of the principle of continuity. In dealing with questions of compatibility of treaties in general contexts the 1969 Convention refers to the "object and purpose" of the treaty. This criterion, although a broad one, is intended in the 1969 Convention to lay down an *objective* legal test of compatibility which, if applied in good faith, should provide a reasonable and practical rule. Great difficulties are likely to be encountered if an attempt is made to define in detail the conditions under which a pre-union treaty is to be considered as compatible with the constitution of the union; and it therefore seems better to use the broad formula found in the 1969 Convention.

(47) There is a further aspect of the problem. The constitution of a union may take the form of, or be based upon, a treaty; and in this case the provisions of article 30 of the 1969 Convention, which concerns the application of successive treaties relating to the same subject matter, require to be considered. Under paragraph 4 of that article, when the parties to a later treaty do not include all the parties to an earlier one, priority is given to the earlier treaty *as between the parties to that treaty*. In other words, if article 30 is applied to a treaty establishing a union, the pre-union treaties of each of the constituent States with other States parties necessarily have priority over the constituent instrument of the union. Thus, under article 30 they would continue in force even if they were incompatible with the constitution of the union. This, as pointed out above,[238] is the position in the case of unions like EEC which are intergovernmental rather than constitutional unions. The member States in these intergovernmental unions may be under an obligation *inter se* to use the best endeavours to bring their pre-union treaties into accord with their obligations as members of the union; but their pre-union treaties undoubtedly remain in force as between themselves and the other parties. Should the same principle, it may be asked, apply in the case of a constitutional "union of States" established by treaty?

(48) The question here posed is whether the formation of a "constitutional" union of States attracts a principle derived from the law of succession of States which displaces the ordinary principle in the law of treaties protecting the priority of an earlier treaty. The evidence it is thought, indicates that it is a point at which principles of succession have an impact upon the principles of the law of treaties. In the first place, the continuance in force of pre-union treaties never seems to have been approached either by States or writers simply from the point of view of the priority to be given to an earlier instrument. Although there may have been some differences as to the criterion which should determine continuity, compatibility in one form or another with the new situation resulting from the formation of the union has been advanced as the relevant criterion. Nor does any distinction ever seem to have been made in this context between a union of States established by treaty and one constituted by other instruments. Indeed, to make such a formal distinction the basis for applying different rules of succession in the two cases could hardly be justified; for a constituent instrument not in treaty form may still embody agreements negotiated between the States concerned. Accordingly, it is believed that, whether the union is established by a treaty or by other instruments, the continuance in force of pre-union treaties must depend on principles of successions; and that the problem is to determine exactly what are those principles.

(49) In the light of all the foregoing considerations the Special Rapporteur has prepared: first, a new provision concerning use of terms to be added to article 1 and designed to specify what is meant by a "union of States" for the purpose of the draft articles; and, secondly, two alternative texts of an article, one of which takes as its basis *ipso jure* continuity and the other tacit agreement.

(50) The meaning to be attributed to the term "union of States" is of critical importance since it will determine the scope of the case of succession here under consideration. In the opinion of the Special Rapporteur, the term should be so defined as to exclude confederations of States which do not result in the formation of a "united

[238] See para. 3 of the present commentary.

State" and intergovernmental unions such as EEC. It is also thought necessary to include the element of "separateness" as a constituent unit *after* the formation of the union, as there does not seem to be any evidence of a principle of continuity where there is a complete absorption of the constituent States in a new unitary State.

(51) As to the two texts of article 19 prepared for the Commission's consideration, alternative A starts from the standpoint that where there is a union of *States*, as above defined, the treaties of each constituent State in principle continue in force *ipso jure*, At the same time, however, this text recognizes that there is a limit to the operation of this rule where the object and purpose of a pre-union treaty are incompatible with the constituent instrument of the union.

(52) Alternative B, on the other hand, starts from the standpoint that even in the case of a union of States there is no rule of *ipso jure* continuity and that, as in the case of newly independent States, continuity is a matter of consent. In other words, under alternative B constitutional provisions or declarations proclaiming continuity, as in the cases of the United Arab Republic and Tanzania, would not be regarded as an expression of a *rule* of continuity but as unilateral statements of intention, insufficient by themselves to effect continuity. Similarly, the older precedents of continuity (the pre-union treaties of certain German States and Swiss cantons) would be regarded as explicable on the basis of the consent of the interested States. Consequently, under alternative B the same general rules would apply in the case of a union of States as in the case of "new States". The solution in alternative B has a certain attraction in that the somewhat delicate question of compatibility of pre-union treaties with the situation resulting from the formation of the union would be left to be settled by agreement of the union of States and the other States parties; and it would clearly give a more flexible rule. But this would mean removing all *obligation* of continuity (apart from the question of "territorial" treaties) in cases of unions of States.

(53) Paragraph 2 is the same in both texts and provides that a treaty which continues in force binds the *Union of States* but *in relation only to the territory in respect of which it was in force prior to the formation of the union.* The first point in this paragraph—that the treaty binds the union—has been so stated for the reasons given above.[239] The second point—that it binds only in relation to the territory in respect of which it was previously in force unless the union of States and the other States parties otherwise agree—accords with the practice discussed earlier in the present commentary.[240]

(54) Paragraph 3 also is the same in both texts and simply provides that the rules set out in the previous paragraphs for the formation of a union apply also to the case of an additional State's joining a union after its formation.

[239] Para. 45.

[240] Paras. 12-27.

Excursus A. — States, other than unions of States, which are formed from two or more territories

Additional article for inclusion at the end of part II

When a new State has been formed from two or more territories, not themselves States, treaties which are continued in force under the provisions of articles 7 to 17 are considered as applicable in respect of the entire territory of the successor State unless:

(*a*) It appears from the particular treaty or is otherwise established that such application would be incompatible with the object and purpose of the treaty;

(*b*) In the case of a multilateral treaty other than one referred to in article 7 (*c*), the notification of succession is restricted to the territory in respect of which the treaty was in force prior to the succession;

(*c*) In the case of a multilateral treaty of the kind referred to in article 7 (*c*) the successor State and the other States parties otherwise agree;

(*d*) In the case of a bilateral treaty, the successor State and the other State party otherwise agree.

COMMENTARY

(1) The International Law Association, as pointed out in the commentary to article 19,[241] grouped together all federations of States whether formed from a union of *States* or merely from two or more *territories*. This grouping, for the reasons there given, seems to assimilate two types of federation whose legal characteristics are essentially different from the point of view of succession of States. Although the Special Rapporteur has accordingly not thought it appropriate to deal with federations of mere territories under the head of unions of States, it is clearly necessary to take account of composite States, including federations, formed of two or more territories. As pointed out in the commentary to article 19,[242] the case of such composite States was not dealt with in the general articles concerning "new States" and now requires to be covered.

(2) One example of such a composite State of a federal type is Nigeria, which was created out of four former territories, namely the colony of Lagos, the two protectorates of Northern and Southern Nigeria and the northern region of the British Trust Territory of the Cameroons. The treaty situation on the eve of independence has been estimated by one writer as follows: Of the 78 multilateral treaties affecting parts of Nigeria before independence 37 applied to all territories, 31 to Lagos only, 3 to the two Protectorates only, 6 to both Lagos and the two Protectorates and 1 to the Trust Territory only. Of the 222 bilateral treaties, 151 applied equally to all four parts, 53 to Lagos only, 1 to the two Protectorates only, 13 to both Lagos and the two Protectorates, and 2 to the Trust Territory only.[243] Nigeria is a State which entered into

[241] Paras. 27-29.

[242] Para. 7.

[243] D. P. O'Connell, "State succession . . .", in *The British Year Book . . . (loc. cit)*, p. 93. The figures given by this writer for multinational and bilateral treaties add up to 300 treaties in force in respect of one or other part of Nigeria at the date of independence. Mr. Elias, in the International Law Commission, indicated a slightly larger total—334 (*Yearbook of the International Law Commission, 1962*, vol. I, p. 4, 629th meeting, para. 25).

a devolution agreement with the United Kingdom prior to independence and has since notified or acknowledged her succession to a certain number of the above-mentioned multilateral and bilateral treaties. Neither in her devolution agreement [244] nor in her notifications or acknowledgements does she seem to have distinguished between treaties previously applicable in respect of all four territories or only of some of them. Moreover, in notifying or acknowledging the continuance in force of any treaties for Nigeria, she seems to have assumed that they would apply to Nigeria as a whole and not merely within the respective regions in regard to which they had been applicable before independence. And both depositaries [245] and other contracting Parties appear to have acquiesced in this point of view; for they also refer simply to Nigeria.[246]

(3) The federation of Malaysia is a more complex case, involving two stages. The first was the formation of the Federation of Malaya as an independent State in 1957 out of two colonies, Malacca and Penang, and nine Protectorates.[247] The bringing of these territories together in a federal association had begun in 1948 so that post-1948 British treaties were applicable in respect of the whole Federation at the moment of independence; but the pre-1948 British treaties were applicable in respect only of the particular territories in regard to which they had been concluded. The devolution agreement entered into by Malaya [248] referred simply to instruments which might be held to "have application to or in respect of the Federation of Malaya". On the other hand, article 169 of the Constitution,[249] which related to the Federal Government's power to legislate for the implementation of treaties, did provide that any treaty entered into by the United Kingdom "*on behalf of the Federation or any part thereof*" should be deemed to be a treaty *between the Federation and the other country concerned.* Exactly what was intended by this provision is not clear. But in practice neither the Federation nor depositaries appear in the case of multilateral treaties to have related Malaya's participation to the particular regions of Malaya in regard to which the treaty was previously applicable.[250] In the case of bilateral treaties the practice available to the Special Rapporteur does not indicate clearly how far continuance in force of pre-independence treaties was related to the particular regions in regard to which they were applicable. The United States *Treaties in Force* has footnotes to three United Kingdom treaties listed as in force in respect of Malaysia which state that they were made applicable to parts of Malaya on certain dates; but these seem intended to justify the inclusion of the treaties rather than to indicate regional limits of application. On the other hand, in correspondence concerning the continuance in force of the Extradition Treaty of 1931, the United States recited the extension of that treaty to each several part of the Federation before stating its view that the treaty has now to be regarded as in force between the United States and the Federation.[251]

(4) The second stage of the federation occurred in 1963 when, by a new agreement, Singapore, Sabah and Sarawak joined the Federation, the necessary amendments being made of the Constitution for this purpose. Article 169 continued as part of the amended Constitution and was therefore in principle applicable in internal law with respect to the new territories; but no devolution agreement was entered into between the United Kingdom and the Federation in relation to these territories. In two opinions given in 1963 the United Nations Office of Legal Affairs regarded the entry of the three territories into the Federation as an enlargement of the Federation. The first concerned Malaysia's membership of the United Nations and, after reciting the basic facts and certain precedents, the Office of Legal Affairs of the United Nations Secretariat Stated:

> An examination of the Agreement relating to Malaysia of 9 July 1963 and of the constitutional amendments, therefore, confirms the conclusion that the international personality and identity of the Federation of Malaya was not affected by the changes which have taken place, Consequently Malaysia continues the membership of the Federation of Malaya in the United Nations.
>
> Even if an examination of the constitutional changes had led to an opposite conclusion that what has taken place was not an enlargement of the existing Federation but a merger in a union or a new federation, the result would not necessarily be different as illustrated by the cases of the United Arab Republic and the the Federal Republic of Cameroon . . .[252]

If that opinion concerned succession in relation to membership, the second concerned succession in relation to a treaty—a Special Fund Agreement. The substance of the advice given by the Office of Legal Affairs is in paragraphs 3 and 4 of the opinion:

> As you know, the Agreement between the United Kingdom and the Special Fund was intended to apply to Special Fund projects in territories for the international relations of which the United Kingdom is responsible (see, e.g., the first paragraph of the preamble to the Agreement). In view of the recent changes in the international representation of Sabah (North Borneo) and Singapore, *the United Kingdom Agreement may be deemed to have ceased to apply with respect to those territories in accordance with general principles of international law,*[15] and this would be true notwithstanding that the Plans of Operation for the projects technically constitute part of the Agreement with the United Kingdom under article I, paragraph 2, of that Agreement. Although the Special Fund could take the position that the United Kingdom Agreement has devolved upon Malaysia and that it continues to apply to Singapore and Sabah (North Borneo), this could well result in two separate agreements becom-

[244] For the text, see *Yearbook of the International Law Commission, 1962*, vol. II, p. 127, document A/CN.4/150, annex, sect. 10.

[245] e.g., the Secretary-General's letter of inquiry of 28 February 1961 (*ibid.*, p. 117, document A/CN.4/150, para. 96).

[246] e.g., United States, *Treaties in Force . . . 1971*, pp. 179-180.

[247] See generally D. P. O'Connell, *State Succession . . .*, vol. II, pp. 78-70.

[248] United Nations, *Materials on Succession of States (op. cit.)*, p. 76.

[249] *Ibid.*, pp. 87-88.

[250] See the Secretary-General's letter of inquiry of 9 December 1957 (*Yearbook of the International Law Commission, 1962*, vol. II, p. 112, document A/CN.4/150, para. 44); and United Nations, *Multilateral Treaties . . . 1968*, where reference is made simply to Malaysia as a party to certain of those treaties.

[15] McNair, *Law of Treaties*, Oxford, 1961, p. *638*.

[251] United Nations, *Materials on Succession of States (op. cit.)*, pp. 229-230.

[252] United Nations, *Juridical Yearbook, 1963* (United Nations publication, Sales No. 65.V.3), chap. VI, A, paras. 12-13.

ing applicable within those territories (i.e., the United Kingdom Agreement for projects already in existence and, as explained below, the Agreement with Malaya with respect to future projects), a situation which could give rise to confusion and should be avoided if possible.

As regards the Agreements between the Special Fund and Malaya, it continues in force with respect to the State now known as Malaysia since the previous international personality of the Federation of Malaya continues and has no effect on its membership in the United Nations. Similarly, the Agreement between the Special Fund and the Federation of Malaya should be deemed unaffected by the change in the name of the State in question. *Moreover, we are of the opinion that the Malayan Agreement applies of its own force and without need for any exchange of letters to the territory newly acquired by that State*, and to Plans of Operation for future projects therein,[16] in the absence of any indication to the contrary from Malaysia.[253]

[16] *Ibid.*, p. 633.

The Office of Legal Affairs thus advised that "Malaysia" constituted an enlarged "Malaya" and that "Malaya's" Special Fund Agreement, by operation of the moving treaty frontier principle, had become applicable in respect of Singapore and Sabah. This advice was certainly in accordance with the principle generally applied in cases of enlargement of territory, as is illustrated by the cases of the accession of Newfoundland to the Canadian Federation, and the "federation" of Eritrea with Ethiopia.[254] Moreover, the same principle, that Malaya's treaties would apply automatically to the additional territories of Singapore, Sabah and Sarawak, appears to have been acted on by the Secretary-General in his capacity as depositary of multilateral treaties. Thus, in none of the many entries for "Malaysia" in *Multilateral Treaties* . . . 1968 is there any indication that any of the treaties apply only in certain regions of Malaysia.

(5) Similarly, in the case of other multilateral treaties Malaysia appears to have been treated simply as an enlargement of Malaya and the treaties as automatically applicable in respect of Malaysia as a whole.[255] An exception is the case of GATT where Malaysia notified the Director-General that certain pre-federation agreements of Singapore, Sarawak and Sabah would continue to be considered as binding in respect of those States, but would not be extended to the States of the former federation of Malaya; and that certain other agreements in respect of the latter States would for the time being not be extended to the three new States.[256]

(6) The circumstances of the federation of Rhodesia and Nyasaland in 1953, which was composed of the colony of Southern Rhodesia and the protectorates of Northern Rhodesia and Nyasaland, were somewhat special so that it is not thought to be a useful precedent from which to draw any general conclusions in regard to the *formation* of composite States. The reason is that the British Crown retained certain vestigial powers with respect to the external relations of the federation and this prevents the case from being considered as a "succession" in the normal sense.[257]

(7) States composed from two or more territories may equally be created in the form of unitary States, modern instances of which are Ghana and the Republic of Somalia. Ghana consists of the former colony of the Gold Coast, Ashanti, the Northern Territories protectorate and the Trust Territory of Togoland. According to a modern writer [258] there were no treaties, multilateral or bilateral, which were applied before independence to Ashanti, the Northern Territories or Togoland which were not also applied to the Gold Coast; on the other hand, there were some treaties which applied to the Gold Coast but not to the other parts of what is now Ghana. The latter point is confirmed by the evidence in *Multilateral Treaties* . . . 1968 and in regard to bilateral treaties the above-mentioned writer states that of the nine United Kingdom treaties listed under Ghana in the United States *Treaties in Force*, three had previously applied to the Gold Coast alone, one to the Gold Coast and Ashanti alone and only five to all four parts of Ghana.[259]

(8) After independence Ghana notified her succession in respect of a number of multilateral treaties of which the Secretary-General is the depositary, some being treaties previously applicable only in respect of parts of what is now her territory. There is no indication in the Secretary-General's practice that Ghana's notifications of succession are limited to particular regions of the State; and, similarly, there is no indication in the United States *Treaties in Force* that any of the nine United Kingdom bilateral treaties specified as in force vis-à-vis Ghana are limited in their application to the particular regions in respect of which they were in force prior to independence. Nor has the Special Rapporteur found any practice to the contrary in the Secretariat studies of succession in respect of multilateral or of bilateral treaties or in *Materials on Succession*. In other words the presumption seems to have been made that Ghana's acceptance of succession was intended to apply to the whole of her territory, even although the treaty might previously have been applicable only in respect of some part the new State.

(9) The Republic of Somalia is a unitary State composed of Somalia and Somaliland. Both these Territories had become independent States before their uniting as the Somali Democratic Republic so that, technically, the case may be said to be one of a union of *States*. But their separate existences as independent States were very short-lived and designed merely as steps towards the creation of a unitary Republic. In consequence, from the point of succession in respect of treaties the case has some simi-

[253] *Ibid.*, sect. A, 14, paras. 3 and 4.

[254] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 53, document A/CN.4/214 and Add.1 and 2, para. 6 of the commentary to article 2.

[255] Cf. *Yearbook of the International Law Commission, 1969*, vol. II, pp. 38 and 41, document A/CN.4/210, paras. 53 and 63 and *ibid., 1970*, vol. II, pp. 90-91, document A/CN.4/225, paras. 114-115.

[256] *Ibid., 1968*, vol. II, p. 84, document A/CN.4/200 and Add.1 and 2, para. 371.

[257] See generally D. P. O'Connell, "State succession . . ", *The British Year Book . . . (loc. cit.)*, p. 95.

[258] *Ibid.*, p. 101.

[259] *Ibid.*, p. 102.

larities with that of Ghana, provided that allowance is made for the double succession which the creation of (Somalia) involved. "The general attitude of the Somalia Government" it has been said, "is that treaties, when continued at all, apply only to the areas to which they territorially applied before independence." [260] This is certainly borne out by the position taken by Somalia in regard to ILO conventions previously applicable to either or both of the Territories of which she was composed.[261] There were two such conventions previously applicable both to the Trust Territory and to British Somaliland and these Somalia recognized as continuing in force in respect of the whole Republic. Seven more conventions had previously been applicable to the Trust Territory but not to British Somaliland and a further six applicable to British Somaliland but not to the Trust Territory. These conventions also she recognized as continuing in force but only in respect of the part of her territory to which they had been applicable. It is said that Somalia adopts the same attitude in regard to extradition treaties; [262] and that she accordingly would refuse extradition of a person in the Trust Territory if extradition were sought under a former British extradition treaty applicable in respect of British Somaliland.

(10) In general, Somalia has been very sparing in her recognition of succession in respect of treaties, as may be seen from the extreme paucity of references to Somalia in the Secretariat studies. It is also reflected in the fact that she has not recognized her succession to any of the multilateral treaties of which the Secretary-General is the depositary. [263] As to those treaties, the position taken by the Secretary-General in 1961 in his letter of enquiry to Somalia is of interest. He listed nine multilateral treaties previously applicable in respect of both the Trust Territory and British Somaliland and said that, upon being notified that Somalia recognized herself as bound by them, she would be considered as having become a party to them in her own name as from the date of independence. He then added:

> The same procedure could be applied in respect of those instruments which either were made applicable only to the former Trust Territory of Somaliland by the Government of Italy or only to the Former British Somaliland by the Government of the United Kingdom, *provided that your Government would recognize that their application now extends to the entire territory of the Republic of Somalia.** [264]

This passage seems to deny to Somalia the possiblity of notifying her succession to the treaties in question only in respect of the territory to which they were previously applicable. If so, it may be doubted whether in the light of later practice, it any longer expresses the position of the Secretary-General in regard to the possibility of a succession restricted to the particular territory to which the treaty was previously applicable.

(11) The composite States discussed in the present Excursus are States which, although they may have made devolution agreements, have recognized or not recognized their succession to particular treaties as they deemed fit. Thus, the practice in regard to these composite States does not support any rule of *ipso jure* continuity such as, on one view of the matter, may be suggested by the practice in regard to the formation of unions of *States*. The practice rather indicates that the formation of a composite State of the present kind falls generally within the principles which govern newly independent States, and that the only special question which they raise is the territorial scope to be attributed to a treaty when it is recognized as remaining in force.

(12) As is apparent from the preceding paragraphs, the question of territorial scope has been dealt with in one way in some cases and in a different way in others. Once, however, it is accepted that in this category of composite States succession is a matter of consent, the differences in the practice are reconcilable on the basis that they merely reflect differences in the intentions—in the consents—of the States concerned. The question then is whether in the case of a composite new State of this kind a treaty should be presumed to apply to its entire territory unless a contrary intention appears, or whether a treaty should be presumed to apply only in respect of the territory or territories in respect of which it was previously in force unless an intention to apply it to the entire territory of the new State appears. On balance, the Special Rapporteur thinks the former to be the more appropriate rule and the article which begins this Excursus has been drafted on that basis. At the same time, it seems necessary to except from the "entire territory" rule treaties the application of which to the new States' entire territory would be incompatible with their object and purpose.

Article 20. — Dissolution of a union of States

ALTERNATIVE A

1. When a union of States is dissolved and one or more of its constituent political divisions become separate States:

(*a*) Any treaty concluded by the union with reference to the union as a whole continues in force in respect of each such States;

(*b*) Any treaty concluded by the union with reference to any particular political division of the union which has since become a separate State continues in force in respect only of that State;

(*c*) Any treaty binding upon the union under article 19 in relation to any particular political division of the union which has since become a separate State continues in force only in respect of that State.

2. Sub-paragraphs (*a*) and (*b*) of paragraph 1 do not apply if the object and purpose of the treaty are compatible only with the continued existence of the union of States.

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[260] *Ibid.*, p. 101.

[261] *Yearbook of the International Law Commission, 1962*, vol. II, p. 119, document A/CN.4/150, para. 106.

[262] D. P. O'Connell, in *British Year Book of International Law*, vol. 39 (1963), p. 102. The Secretariat study of succession in respect of extradition treaties (*Yearbook of the International Law Commission, 1970*, vol. II, pp. 102-129, document A/CN.4/229), does not contain any evidence regarding Somalia's recognition of the continuance of extradition treaties.

[263] See *Yearbook of the International Law Commission, 1962*, vol. II, p. 119, document A/CN.4/150, para. 106.

[264] *Ibid.*, p. 118, document A/CN.4/150, para. 103.

3. When a union of States is dissolved only in respect of one of its constituent political divisions which becomes a separate State, the rules in paragraphs 1 and 2 apply also in relation to this State.

ALTERNATIVE B

1. When a union of States is dissolved and one or more of its constituent political divisions become separate States, treaties binding upon the union at the date of its dissolution continue in force between any such successor State and other States parties thereto if:

(*a*) In the case of multilateral treaties other than those referred to in article 7 (*a*), (*b*) and (*c*), the successor State notifies the other States parties that it considers itself a party to the treaty;

(*b*) In the case of other treaties, the successor State and the other States parties

(i) Expressly so agree; or

(ii) Must by reason of their conduct be considered as having agreed to or acquiesced in the treaty's being in force in their relations with each other.

2. When a union of States is dissolved only in respect of one of its constituent political divisions which becomes a separate State, the rules in paragraph 1 apply also in relation to this State.

COMMENTARY

(1) The resolution of the International Law Association on this question reads:

> 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.[265]

and the note of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors of the Association appended to this resolution comments:

> The Committee finds that the practice of States supports the devolution of treaties of a composite State upon the constituent members in the event of the composite State dissolving.[266]

Thus, in the context of dissolution as in the context of formation, the Association groups together unions of States and States composed merely of two or more constituent territories. But it again seems desirable to examine these two categories separately and the present article and commentary are therefore concerned primarily with the dissolution of unions of States.

(2) The resolution also speaks without distinction of "treaties of the composite State" and it therefore presumably covers both treaties concluded by the union during its existence and any pre-union treaties of a constituent territory which continued in force after the formation of the union as treaties binding upon the union in relation to the particular territory concerned. Moreover, the rule laid down in the resolution appears to be a rule of *ipso jure* continuity.

(3) One of the older precedents usually referred to in this connexion is the dissolution of the Union of Colombia in 1829-31. This union had been formed some ten years earlier by the three States of New Granada, Venezuela and Quito (Ecuador) and during its existence the Union had concluded certain treaties with foreign powers. Among these were treaties of amity, navigation and commerce concluded with the United States in 1824 and with Great Britain in 1825.[267] After the dissolution, it appears that the United States and New Granada considered the Union Treaty of 1824 to continue in force as between those two countries. It further appears that Great Britain and Venezuela and Great Britain and Ecuador, if with some hesitation on the part of Great Britain, acted on the basis that the Union Treaty of 1825 continued in force in their mutual relations. In advising on the position in regard to Venezuela the British Law Officers, it is true, seem at one moment to have thought the continuance of the treaty required the confirmation of both Great Britain and Venezuela; but they also seem to have felt that Venezuela was entitled to claim the continuance of the rights under the treaty.

(4) Another of the older precedents usually referred to is the dissolution of the Union of Norway and Sweden in 1905.[268] During the union these States had been recognized as having separate international personalities, as is illustrated by the fact that the United States had concluded separate extradition treaties with the Governments of Norway and Sweden. The King of Norway and Sweden had, moreover, concluded some treaties on behalf of the Union as a whole and others specifically on behalf of only one of them. On the dissolution of the Union, each State addressed identical notifications to foreign Powers in which they stated their view of the effect of the dissolution. The relevant passage of the Swedish Note to Great Britain ran as follows:

> . . .The Swedish Government accordingly considers itself released from all responsibility in respect of obligations relating to Norway laid down in the said joint conventions and arrangements. With regard to treaties or other arrangements concluded separately for Norway in the name of H.M. the King of Sweden and Norway, it is clear that now that the two States are separate, H.M. Government is in no way responsible for the obligations incumbent upon Norway under such instruments.
>
> On the other hand, the Swedish Government is of the opinion that the above-mentioned acts concluded jointly by Sweden and Norway continue to have effect in regard to relations between Sweden and the other contracting party or parties, and that the dissolution of the Union between Sweden and Norway does not

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[265] See *Yearbook of the International Law Commission, 1969*, vol. II, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15, resolution 2, third paragraph.

[266] International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), p. 601.

[267] See A. D. McNair, *op. cit.*, pp. 606-611; and D. P. O'Connell, "State succession . . .", *The British Year Book . . . (op. cit.)*, pp. 117-121.

[268] See generally D. P. O'Connell in *British Year Book of International Law*, vol. 39 (1963), pp. 122-123; R. W. G. de Muralt, *op. cit.*, pp. 87-88.

in any way modify the provisions which have hitherto governed those relations. [*Translation by the United Nations Secretariat.*] [269]

These notifications, analogous to some more recent notifications, thus informed other Powers of the position which the two States took in regard to the continuance of the Union's treaties: those made specifically with reference to one State would continue in force only as between that State and the other States parties; those made for the Union as a whole would continue in force for each State, but only in relation to itself.

(5) Great Britain accepted the continuance in force of the Union treaties vis-à-vis Sweden only "pending a further study of the subject", declaring that the dissolution of the union "undoubtedly affords his Majesty's Government the right to examine, *de novo*, the Treaty engagements by which Great Britain was bound to the Dual Monarchy".[270] Both France and the United States, on the other hand, appear to have shared the view taken by Norway and Sweden that the treaties of the former union continued in force on the basis set out in their Notes.[271]

(6) The termination of the Austro-Hungarian Empire in 1919 appears to be a case of dissolution of a union in so far as it concerns Austria and Hungary and a dismemberment in so far as it concerns the other territories of the Empire. The dissolution of the Dual Monarchy is complicated as a precedent for present purposes by the fact that it took place after the 1914-1918 war in which Austria-Hungary had been a belligerent and that the question of the fate of the Dual Monarchy's treaties was regulated by the peace treaties.[272] The position was summed up by one writer as follows:

> It appears to be the view of the parties to the peace treaties (including Austria and Hungary themselves) that, apart from any provision to the contrary in them or in other treaties, those two countries are respectively the direct successors, of the Austro-Hungarian Empire and are entitled to the rights, and subject to obligations, of the treaties to which it was a party, and both Austria and Hungary have made declarations to this effect. This matter is, however, not free from controversy and there has been much litigation involving the question whether or not the personality of Austria and Hungary was destroyed in 1918, with the result that they started as new States free from earlier obligations except in so far as they might accept them by treaty . . .[273]

Austria in her relations with States outside the peace treaties appears to have adopted a more reserved attitude towards the question of her obligation to accept the continuance in force of Dual Monarchy treaties. According to a Netherlands writer, although in practice agreeing to the continuance of Dual Monarchy treaties in her relations with the Netherlands, Austria persisted in the view that she was a new State not *ipso jure* bound by those treaties.[274] Hungary, on the other hand, appears generally to have accepted that she should be considered as remaining bound by the treaties *ipso jure*.

(7) The same difference of approach in the attitudes of Austria and Hungary is reflected in the Secretariat's study of succession in respect of extradition treaties. Thus in 1922 Hungary made the following statement to the Swedish Government:

> Hungary from the point of view of Hungarian constitutional law, is identical with the former Kingdom of Hungary, which during the period of dualism formed, with Austria, the other constituent part of the former Austro-Hungarian monarchy. Consequently, the dissolution of the monarchy, that is, the termination of the constitutional link as such between Austria and Hungary *has not altered the force of the treaties and conventions which were in force in the Kingdom of Hungary during the period of dualism.** [275]

Austria, on the other hand, appears to have regarded the continuity of a Dual Monarchy extradition treaty with Switzerland as dependent on the conclusion of an agreement with that country.[276] Similarly, in the case of trade agreements the Secretariat study observes: "In so far as the question was not regulated by specific provisions in the Peace Settlement, Austria took a generally negative view of treaty continuity, and Hungary a positive one".[277] And this observation is supported by references to the practice of the two countries in relation to the Scandinavian States, the Netherlands and Switzerland, which were not parties to the Peace Settlement. Furthermore, those differing attitudes of the two countries appear also in their practice in regard to multilateral treaties, as is shown by the Secretariat study of succession in respect of the Hague Conventions of 1899 and 1907 for the Pacific Settlement of International Disputes.[278]

(8) Between 1918 and 1944 Iceland was associated with Denmark in a union of States under which treaties made by Denmark for the union were not to be binding upon Iceland without the latter's consent.[279] During the union Iceland's separate identity was recognized internationally; indeed, in some cases treaties were made separately with both Denmark and Iceland. At the date of dissolution

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[269] . . . *Le Gouvernement suédois se tient donc pour dégagé de toute responsabilité du chef des obligations stipulées dans les dites Conventions et Arrangements communs, et qui concernent la Norvège. Pour ce qui est des traités ou autres arrangements conclus au nom de Sa Majesté le Roi de Suède et de Norvège séparément pour la Norvège, il est évident que le Gouvernement de Sa Majesté n'est aucunement responsable, après la séparation des deux États, des obligations qui en résultent pour la Norvège.*

De l'autre côté, le Gouvernement suédois est d'avis que les actes susmentionnés conclus en commun par la Suède et la Norvège continuent à sortir leurs effets pour ce qui concerne les rapports entre la Suède et la ou les autres Parties Contractantes sans que la dissolution entre la Suède et la Norvège modifie en aucune manière les dispositions qui ont réglé jusqu'à présent ces rapports. (*British and Foreign State Papers*, vol. 98 (London, H.M. Stationery Office, 1909), pp. 833-934; reproduced in A. D. McNair, *op. cit.*, p. 614.

[270] A. D. McNair, *op. cit.*, p. 615.

[271] See G. H. Hackworth, *Digest of International Law* (Washington, D.C., U.S. Government Printing Office, 1943), vol. V, p. 362 and R. W. G. de Muralt, *op. cit.*, p. 88.

[272] R. W. G. de Muralt, *op. cit.*, pp. 88-91.

[273] A. D. McNair, *op. cit.*, p. 616.

[274] R. W. G. de Muralt, *op. cit.*, pp. 89-91.

[275] *Yearbook of the International Law Commission, 1970*, vol. II, p. 123, document A/CN.4/229, para. 115.

[276] *Ibid.* para. 116.

[277] *Ibid. 1971*, vol. II (Part Two), p. 172, document A/CN.4/243/Add.1, para. 110.

[278] *Ibid., 1968*, vol. II, pp. 28-29, document A/CN.4/200, paras. 110-112.

[279] See A. D. McNair, *op. cit.*, p. 620.

there existed some pre-union treaties which had continued in force for the union with respect to Iceland as well as further treaties concluded during the union and in force with respect to Iceland. Subsequently, as a separate independent State, Iceland considered both categories of union treaties as continuing in force with respect to herself and the same view of her case appears to have been taken by the other States parties to those treaties.[280] Thus, according to the Secretariat study of the extradition treaties:

> . . . a list published by the Icelandic Foreign Ministry of its treaties in force as at 31 December 1964 includes extradition treaties which were concluded by Denmark before 1914 with Belgium, France, Germany (listed under "Federal Republic of Germany"), Italy, Luxembourg, Netherlands, Norway, Spain, the United Kingdom (also listed under Australia, Canada, Ceylon, India and New Zealand) and the United States. In each case it is also indicated that the other listed countries consider that the treaty is in force.[281]

Again, according to the Secretariat study of trade agreements the same Icelandic list

> . . . Includes treaties and agreements concerning trade concluded before 1914 by Denmark with Belgium, Chile, France, Hungary, Italy, Liberia, Netherlands, Norway, Sweden, Switzerland and the United Kingdom (also listed under Canada, Ceylon, India and South Africa), and trade treaties and agreements concluded between 1918 and 1944 with Austria, Bolivia, Brazil, Czechoslovakia, Finland, Greece, Haiti, Poland, Romania, Spain, the USSR and the United States. Seventeen of the twenty-seven listed States have also confirmed that the treaties in question remain in effect. The remainder appear to have taken no position.[282]

As to multilateral treaties, it is understood that, after the dissolution, Iceland considered herself a party to any multilateral treaty which had been applicable to her during the union. But the provision in the constitution of the union that treaties made for the union were not to be binding upon Iceland without her consent was strictly applied; and a good many multilateral treaties made by Denmark during the union, including treaties concluded under the auspices of the League of Nations, were not in fact subscribed to by Iceland. This seems to be the explanation of why Denmark is in a number of cases listed today by the United Nations Secretariat as a party to a League of Nations treaty, but not Iceland.[283] In some cases, moreover, Denmark and Iceland are given separate entries indicating either that Denmark and Iceland are both bound by the treaty or that Denmark is bound and the treaty is open to accession by Iceland.[284] The practice in regard to multilateral treaties thus only serves to confirm the separate international personality of Iceland during the union.

(9) The effect of the formation of the United Arab Republic on the pre-union treaties of Syria and Egypt has been considered above.[285] Some two and a half years after its formation the union was dissolved through the withdrawal of Syria. The Syrian Government then passed a decree providing that, in regard to both bilateral and multilateral treaties, any treaty concluded during the period of union with Egypt was to be considered in force with respect to the Syrian Arab Republic.[286] It communicated the text of this decree to the Secretary-General, stating that in consequence "obligations contracted by the Syrian Arab Republic under multilateral agreements and conventions during the period of the union with Egypt remain in force in Syria". In face of this notification the Secretary-General adopted the following practice:

> Accordingly, in so far as concerns any action taken by *Egypt* * or subsequently by the United Arab Republic in respect of any instrument concluded under the auspices of the United Nations, the date of such action is shown in the list of States opposite the name of the *United Arab Republic.** The dates of actions taken by *Syria* * prior to the formation of the United Arab Republic, are shown opposite to the name of Syria, as also are the dates of receipt of instruments of accession or notification of application to the Syrian Province deposited on behalf of the United Arab Republic during the time when Syria formed part of the United Arab Republic.[287]

In other words, each State was recorded as remaining bound in relation to its own territory by treaties of the United Arab Republic concluded during the period of the union as well as by treaties to which it had itself become a party prior to the union and which had continued in force in relation to its own territory during the union.

(10) It will be observed that, prior to the formation of the United Arab Republic, Syria, as shown opposite the name of Syria, made a unilateral declaration as to the effect of the dissolution on treaties concluded by the union during its existence. At the same time, she clearly assumed that the pre-union treaties to which the former State of Syria had been a party would automatically be binding upon her and this seems also to have been the understanding of the Secretary-General. Egypt, the other half of the union, made no declaration. Retaining the name of the United Arab Republic, she apparently regarded Syria as having in effect seceded, and the continuation of her own status as a party to multilateral treaties concluded by the union as being self-evident. And she also clearly assumed that the pre-union treaties to which Egypt had been a party would automatically continue to be binding upon the United Arab Republic. This treaty practice in regard to Syria and the United Arab Republic has to be appreciated against the background of the treatment of their membership of international organizations.[288] Syria, in a cable to the President of the General Assembly, simply requested the United Nations

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[280] D. P. O'Connell, *State Succession . . .*, vol. II, pp. 111-112.

[281] *Yearbook of the International Law Commission, 1970*, vol. II, pp. 122-123, document A/CN.4/229, para. 111.

[282] *Ibid., 1971*, vol. II (Part Two), pp. 171-172, document A/CN.4/243/Add.1, para. 109.

[283] e.g. Protocol of 1930 relating to Military Obligations in Certain Cases of Double Nationality, Protocol of 1923 on Arbitration Clauses, Convention of 1927 for the Execution of Foreign Arbitral Awards, etc. (*Multilateral Treaties . . . 1968*, part II, Nos. 5, 6, 7, etc.)

[284] Signatures, ratifications and accessions in respect of agreements and conventions concluded under the auspices of the League of Nations *(League of Nations, Official Journal, Special Supplement No. 193)*.

[285] See paras. 12-17 of the commentary to article 19.

[286] See M. M. Whiteman, *op. cit.*, vol. 2, p. 987.

[287] *Multilateral Treaties . . . 1968*, p. 4, foot-note 3.

[288] See above, paras. 12-17 of the commentary to article 19.

to "take note of the resumed membership in the United Nations of the Syrian Arab Republic." [289] The President, after consulting many delegations and after ascertaining that no objection had been made, authorized Syria to take her seat again in the Assembly. Syria, perhaps because of her earlier existence as a separate Member State, was therefore accorded treatment different from that accorded in 1947 to Pakistan, which was required to undergo admission as a new State. No question was ever raised as to the United Arab Republic's right to continue her membership after the dissolution of the union. Broadly speaking, the same solution was adopted in other international organizations.

(11) Other practice in regard to multilateral treaties is in line with that followed by the Secretary-General, as can be seen from the Secretariat studies of the Conventions relative to the Protection of Literary and Artistic Works,[290] the Conventions for the Protection of Industrial Property [291] and the Geneva Humanitarian Conventions.[292] This is true also of the position taken by the United States, as depositary of the Statute of IAEA, in correspondence with Syria concerning the latter's status as a member of that Agency.[293] As to bilateral treaties, the Secretariat studies of air transport [294] and trade [295] agreements confirm that the practice was similar.

(12) The dissolution of the Mali Federation in 1960 is sometimes cited in the present connexion. But the facts concerning the dissolution of that extremely ephemeral federation are thought to be too special for it to constitute a precedent from which to derive any general rule. In 1959 representatives of four autonomous territories of the French Community adopted the text of a constitution for the "Federation of Mali," but only two of them —Soudan and Senegal—ratified the constitution.[296] In June 1960 France, Soudan and Senegal reached agreement on the conditions of the transfer of competence from the Community to the Federation and the attainment of independence. Subsequently, seven agreements of co-operation with France were concluded in the name of the Federation of Mali. But in August Senegal annulled her ratification of the constitution and was afterwards recognized as an independent State by France; and in consequence the new-born federation was, almost with its first breath, reduced to Soudan alone. Senegal, the State which had in effect dissolved or seceded from the Federation, entered into an exchange of notes with France in which she stated her view that:

> ... by virtue of the principles of international law relating to the succession of States, the Republic of Senegal is subrogated, in so far as it is concerned, to the rights and obligations deriving from the co-operation agreements of 22 June 1960 between the French Republic and the Federation of Mali, without prejudice to any adjustments which may be deemed necessary by mutual agreement.[297]

To which the French Government replied that it shared this view. Mali, on the other hand, who had contested the legality of the dissolution of the federation by Senegal and retained the name of Mali, declined to accept any succession to obligations under the co-operation agreements. Thus succession was accepted by the State which might have been expected to deny it and denied by the State which might have been expected to assume it. But in all the circumstances, as already observed, it does not seem that any useful conclusions can be drawn from the practice in regard to the dissolution of this federation.

(13) Although there are some inconsistencies in the practice (e.g. Austria and Mali), it is thought to give general support to the thesis that, on the dissolution of a union, a former constituent State remains bound by: (*a*) treaties concluded by the union government which have reference to that State; (*b*) treaties which were in force for that State when it entered the union and continued in force for it during the union. At least some of the practice, on the other land, seems explicable on the basis of the consents of the interested States. Accordingly, as in the case of the previous article, the Special Rapporteur has prepared alternative texts for the Commission's consideration: alternative A formulated in terms of a rule of *ipso jure* continuity; and alternative B formulated in terms of continuity by consent.

Article 21. — Other dismemberments of a State into two or more States

1. When part of a State, which is not a union of States, becomes another State either by separating from it or as a result of the division of that State, the rules in paragraphs 2 and 3 govern the effects of that succession of States on treaties which at the date of the separation or division were in force in respect of that part.

2. The obligations and rights of the successor State and of other States parties under any such treaty shall be determined by application of the relevant provisions of articles 7 to 17 of the present articles.

3. In the case of a separation, any such treaty remains in force as between the predecessor State and other States parties in relation to the remaining territory of the predecessor State unless it appears from the provisions or from the object and purpose of the treaty that:

(*a*) It was intended to relate only to the part which has separated from the predecessor State;

(*b*) The effect of the separation is radically to transform the obligations and rights provided for in the treaty; or

(*c*) It is otherwise agreed.

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[289] *Multilateral Treaties ... 1968*, p. 4, foot-note 3.

[290] *Yearbook of the International Law Commission, 1968*, vol. II, p. 18, document A/CN.4/200 and Add.1 and 2, paras. 50-51.

[291] *Ibid.*, pp. 67-68, paras. 296-297.

[292] *Ibid.*, pp. 49-50, para. 211.

[293] M. M. Whiteman, *op. cit.*, vol. 2, pp. 987-990.

[294] *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), pp. 142-146, document A/CN.4/243, paras. 152-175.

[295] *Ibid.*, pp. 180-181, document A/CN.4/243/Add.1, paras. 161-165.

[296] D. P. O'Connell, *State Succession...*, vol. II, pp. 170-172.

[297] *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 146, document A/CN.4/243, para. 176.

COMMENTARY

(1) Article 2 covers the case of the separation from a State of an area of territory which joins with another State (the moving treaty frontier principle), and article 20 deals with the dissolution of a union of States. The present article is concerned with other dismemberments of States resulting in two or more States.

(2) The commonest case is where part of a State separates from it, becoming itself an independent State and leaving the State from which it has sprung to continue its existence unchanged except for its diminished territory. In this type of case the effect of the dismemberment is the emergence of a "newly independent State" by secession and the position of this newly independent State in regard to treaties previously applicable in respect of the seceded territory is governed by the articles contained in part II of the present draft.[298] The basic rule governing the case of a newly independent State is the so-called clean slate rule formulated in article 6. Although in recent years this rule has found its application mainly in regard to the emergence of dependent territories into independent States it has its origin in practice relating to seceded States. Some references to the practice evidencing the application of this rule to seceding States will therefore be found in the Special Rapporteur's commentary to article 6.[299] But it is necessary to recall that practice here in order to place the problem of dismembered States in its true perspective.

(3) Before the era of the United Nations, colonies were considered as being in the fullest sense territories of the colonial Power. Consequently some of the earlier precedents usually cited for the application of the "clean slate" rule in cases of secession concerned the secession of colonies; e.g. the secessions from Great Britain and Spain of their American colonies. In these cases the new States are commonly regarded as having started their existence freed from any obligation in respect of the treaties of their parent State.[300] Another early precedent is the secession of Belgium from the Netherlands in 1830, as to which one writer has said: "Little authority is available, but it is believed to be the accepted opinion that in the matter of treaties Belgium was regarded as starting with a clean slate, except for treaties of a local or dispositive character."[301] If a somewhat different line seems to have been adopted by the Belgian courts in some cases, another writer points out that, while the Netherlands pre-1830 treaties continued in force, it was Belgium who had to conclude new ones or formalize the continuance of the old ones with a number of States.[302]

(4) As to more modern precedents, when Cuba seceded from Spain in 1898, Spanish treaties were not considered as binding upon her after independence. Similarly, when Panama seceded from Colombia in 1903, both Great Britain and the United States regarded Panama as having a clean slate with respect to Colombia's treaties.[303] Panama herself took the same stand, though she was not apparently able to convince France that she was not bound by Franco-Colombian treaties. Colombia, for her part, continued her existence as a State after the separation of Panama, and that she remained bound by treaties concluded before the separation was never questioned. Again, when Finland seceded from Russia after the First World War, both Great Britain and the United States concluded that Russian treaties previously in force with respect to Finland would not be binding on the latter after independence.[304] In this connexion reference may be made to a statement by the United Kingdom, where the position was firmly taken by that State that the clean slate principle applied to Finland except with respect to treaty obligations which were "in the nature of servitudes".[305] The United Kingdom adopted the same position in regard to Estonia, Latvia and Lithuania on their recognition after the First World War as independent States.[306]

(5) The termination of the Austro-Hungarian Empire has already been discussed [307] in the context of the dissolution of a union of States. The opinion was there expressed that it seemed to be a dissolution of a union in so far as it concerned the Dual Monarchy itself and a dismemberment in so far as it concerned other territories of the Empire. It was there noted that, even viewing the case as one of dissolution of a union, Austria had contested her obligation to assume the treaties of the Dual Monarchy, though Hungary had accepted that obligation. The other territories, which seem rather to fall into the category of dismemberment, were Czechoslovakia and Poland.[308] Both these States were required in the Peace Settlements to undertake to accede to certain multilateral treaties as a condition of their recognition. But outside these special undertakings they were both considered as new States which started with a clean slate in respect of the treaties of the former Austro-Hungarian Empire.[309]

(6) Another precedent from the pre- United Nations era is the secession of the Irish Free State from the United Kingdom in 1922. Interpretation of the practice in this case is slightly obscured by the fact that for a period after her secession from the United Kingdom the Irish Free

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[298] To become part III in the final text of the draft articles.

[299] *Yearbook of the International Law Commission, 1970*, vol. II, pp. 31-37, document A/CN.4/224 and Add.1, chap. II.

[300] A. D. McNair, *op. cit.*, pp. 601-603; D. P. O'Connell, *State Succession* . . . , vol. II, pp. 90-95, who points out that the United States attitude with respect to the secession of the Spanish colonies was not consistently negative as to their succession to obligations under Spanish treaties.

[301] A. D. McNair, *op. cit.*, p. 603.

[302] R. W. G. de Muralt, *op. cit.*, p. 101.

[303] D. P. O'Connell, *State Succession* . . . , vol. II, pp. 97-98; G. H. Hackworth, *op. cit.*, vol. V, pp. 362-363.

[304] D. P. O'Connell, *State Succession* . . . , vol. II, pp. 99-100; A. D. McNair, *op. cit.*, p. 605.

[305] *Yearbook of the International Law Commission, 1970*, vol. II, p. 32, document A/CN.4/224 and Add.1, paragraph 3 of the Commentary to article 6.

[306] See also A. D. McNair, *op. cit.*, p. 605; and D. P. O'Connell, *State Succession* . . . , vol. II, pp. 99-100.

[307] See paragraphs 6 and 7 of the commentary to article 20.

[308] Poland was formed out of territories previously under the sovereignty of three different States—Austro-Hungarian Empire, Russia and Germany.

[309] A. D. McNair, *op. cit.*, pp. 603-605; D. P. O'Connell, *State Succession* . . . , vol. II, pp. 178-182.

State remained within the British Commanwealth as a "Dominion". This being so, the United Kingdom Government took the position that the Irish Free State had not seceded and that, as in the case of Australia, New Zealand, and Canada, British treaties previously applicable in respect of the Irish Free State remained binding upon the new Dominion. The Irish Free State, on the other hand, considered itself to have seceded from the United Kingdom and to be a new State for the purposes of succession in respect of treaties. In 1933 the Prime Minister (Mr. De Valera) made the following statement in the Irish Parliament:

> The present position of the Irish Free State with regard to treaties and conventions concluded between the late United Kingdom and other countries is based upon the general international practice in the matter when a new State is established. When a new State comes into existence, which formerly formed part of an older State, its acceptance or otherwise of the treaty relationships of the older State is a matter for the new State to determine by express declaration or by conduct (in the case of each individual treaty) as considerations of policy may require. The practice here has been to accept the position created by the commercial and administrative treaties and conventions of the late United Kingdom until such time as individual treaties or conventions themselves are terminated or amended. Occasion has then been taken where desirable, to conclude separate engagements with the States concerned [310]

The Irish Government, as its practice shows, did not claim that a new State had a right *unilaterally* to determine its acceptance or otherwise of its predecessor's treaties. This being so, the Irish Prime Minister in 1933 was attributing to a seceded State a position not very unlike that found in the practice of the post-war period concerning newly independent States.

(7) Illustrations of the treaty practice in regard to the Irish Free State may be seen in the Secretariat studies of succession on States in respect of extradition treaties and trade agreements. The study of extradition treaties, *inter alia*, recalls:

> Forty-three extradition treaties applied to Ireland immediately before it became independent. One author in 1957-1958 addressed inquiries to all forty-three States. Of the eleven States which expressed a view on the continued force of the treaties in relation to Ireland, three (Ecuador, Luxembourg and Hungary) seemed to consider that the treaties were in force, one (Sweden) had expressly denounced its treaty with regard to Ireland, two (Austria and Switzerland) seemed to be favourable to the treaties being in force but made this dependent on a declaration by Ireland that it was willing to consider itself bound by the treaties, and five States (Cuba, Denmark, Guatemala, Italy and the Netherlands) considered that Ireland was not bound by these treaties. Of these five, two (Italy and the Netherlands) seemed to take the view that, if Ireland wished it could continue the treaties' operation by a declaration to that effect.[311]

The study also mentions three instances in which the continuance in force of the treaty was evidenced by conduct, in that either Ireland or the other State party invoked the treaty without encountering the objection that it was not in force.[312] That the policy of the Irish Free State was to accept the position created by its predecessor's commercial and administrative treaties is equally shown in the study of trade agreements which sets out a number of instances of the termination or replacement of pre-independence treaties in respect of the Free State.[313]

(8) As to multilateral treaties, the Irish Free State seems in general to have established itself as a party by means of accession, not succession. It is true that in the case of the 1906 Red Cross Convention the Irish Free State appears to have acknowledged its status as a party on the basis of the United Kingdom's ratification of the Convention on 16 April 1907.[314] Although the *Handbook of the International Red Cross* lists the Irish Free State as a party to that Convention from 1926, without specifying the exact date or method of its participation, a communication to the International Committee from the British Consul-General in Geneva in 1956 explained the matter as follows:

> ... In the list of ratification of the 1906 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, it would be preferable for the date of ratification by the Commonwealth countries and the Irish Republic to be 16 April 1907, *because not having repudiated them, the Commonwealth countries are bound by the international obligations deriving from the ratification of the Convention by the United Kingdom.** ...[315]

To this the Secretariat study adds the comment that according to the above communication, "the United Kingdom considers that *Australia, Canada, India, the Irish Republic* and *South Africa* become parties to the 1906 Convention by succession." [316] As the Irish Free State had a radically different view of its own position from that of the United Kingdom, this is not really conclusive. But at least the Free State seems to have acquiesced in its being considered as party to this Convention on the basis of its predecessor's ratification. In the case of the Berne Union for the Protection of Literary and Artistic Works, however, it *acceded* to the Convention, although using the United Kingdom's diplomatic services to make the notification. [317] The Swiss Government as depositary, then informed the parties to the Union of this accession and, in doing so, added the observation that the Office considered the Irish Free State's accession to the Convention as "proof that, on becoming an independent territory, it had left the Union". In other words, the Office recognized that the Free State had acted on the basis of the "clean slate" principle and had not "succeeded" to the Berne Convention. Moreover, the Republic of Ireland is listed by the United Nations Secretariat as a party to two conventions ratified by Great Britain before the former's independence and in both these cases the Republic became a party by accession.[318]

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[310] *Ibid.*, p. 123.

[311] *Yearbook of the International Law Commission, 1970*, vol. II, p. 108, document A/CN.4/229, para. 17.

[312] *Ibid.*, paras. 19-21.

[313] *Ibid., 1971*, vol. II (Part Two), p. 153, document A/CN.4/243/Add.1, paras. 19-20.

[314] *Ibid., 1968*, vol. II, pp. 38-39, document A/CN.4/200 and Add.1 and 2, paras. 154-158.

[315] *Ibid.*, p. 39, para. 157.

[316] *Ibid.*, para. 158.

[317] *Ibid.*, p. 13. para. 25.

[318] The conventions are the International Convention of 1910 for the Suppression of the White Slave Traffic and the Agreement of 1910 for the Suppression of the Circulation of Obscene Publications (see *Multilateral Treaties ... 1968*, pp. 150 and 163).

(9) Thus the practice prior to the United Nations era, if there may be one or two inconsistencies, provides strong support for the "clean slate" rule in cases of "secession" in the form in which it is expressed in article 6 of the present draft: i.e. that a seceding State, as a newly independent State, is not bound to maintain in force, or to become a party to, its predecessor's treaties. Prior to the United Nations era depositary practice in regard to cases of succession of States was much less developed than it has become in the past twenty-five years owing to the very large number of cases of succession of States with which depositaries have been confronted. Consequently, it is not surprising that the earlier practice in regard to seceding States does not show any clear concept of notifying succession to multilateral treaties, such as is now familiar. With this exception, however, the position of a seceding State with respect to its predecessor's treaties seems in the League of Nations era to have been much the same as that in modern practice of a State which has emerged to independence from a previous colonial, trusteeship or protected status.

(10) During the United Nations period cases of secession resulting in the creation of a new State, as distinct from a dependent territory emerging as a sovereign State, have been comparatively few. The first such case was the somewhat special one of Pakistan which, for purposes of membership of international organizations and participation in multilateral treaties, was in general treated as having seceded from India, and, therefore, neither bound nor entitled *ipso jure* to the continuance of pre-independence treaties.[319] This is also to a large extent true in regard to bilateral treaties,[320] though in some instances it seems, on the basis of the devolution arrangements embodied in the Indian Independence (International Arrangements) Order 1947, to have been assumed that Pakistan was to be considered as a party to the treaty in question. Thus, the case of Pakistan has analogies with that of the Irish Free State and, as already indicated in the commentary to article 6, appears to be an application of the principle that a seceded State has a clean slate in the sense that it is not under any *obligation* to accept the continuance in force of its predecessor's treaties. However, it will be necessary to revert later in this commentary to a particular aspect of the Pakistan case, namely whether any special considerations apply to the splitting of a State into two more or less comparable States.[321] But, first, two further cases of secession must be mentioned.

(11) The first is the dismemberment of the Federation of Rhodesia and Nyasaland in 1963. Reference has already been made to the formation of this Federation in 1953 [322] and it was there pointed out that, owing to the vestigial powers retained by the British Crown, the case was too special to be a useful basis from which to draw general conclusions. This is in large measure true also of the Federation in the context of the present article. After the dismemberment of the Federation in 1963, the United Kingdom retained these powers in respect of Southern Rhodesia and responsibility for the external relations of Nyasaland and Northern Rhodesia until these two territories became independent as Malawi and Zambia. Despite this complication, however, the case was dealt with somewhat on the lines of the dismemberment of a federal State. A detailed account of the practice followed in regard to the continuity of the treaties of the Federation is given in a modern textbook.[323] This indicates some uncertainty owing to doubts as to the implications of the United Kingdom's powers and the status in international law of the Federation itself. Although in many instances treaties were continued in force, the basis upon which this occurred is not clear and frequently recourse was had to exchanges of notes to confirm their maintenance in force. The Secretariat studies of succession of States in respect of bilateral treaties [324] present much the same general picture of practice and the same unclearness as to its precise basis. As to multilateral treaties, the practice hardly seems reconcilable with *ipso jure* continuity. The United Kingdom, it is true, notified the Secretary-General that the treaties would continue in force with respect to the three territories; but this merely evidences the United Kingdom's continuing responsibility for the international relations of the territories at that date. More significant is the fact that, when they became independent, neither Malawi nor Zambia considered themselves as continuing *ipso jure* to be bound by multilateral treaties. Thus in *Multilateral Treaties . . . 1968*, Malawi, when shown as a party, is listed as having become one by accession, while Zambia in the majority of cases is not shown as a party to the treaty at all. In the case of the Geneva Red Cross Conventions, Zambia became a party, but in the Secretariat studies of succession of States to multilateral treaties is included amongst the newly independent States which acceded to those Conventions; and Malawi is not shown as having become a party at all.[325] Again, while both Malawi and Zambia are recorded in those studies as having become parties to the Paris Union for the Protection of Industrial Property, the former did so by transmitting a declaration of continuity and the latter by acceding.[326] Both States acceded to ITU.[327] Accord-

[319] See *Yearbook of the International Law Commission, 1970*, vol. II, pp. 32-33, document A/CN.224 and Add.1, paras. 3-5 of the commentary to article 6. See also the Secretariat studies on succession of States to multilateral treaties (*ibid., 1968*, vol. II, pp. 16, 29 and 40, document A/CN.4/200 and Add.1 and 2, paras. 38, 115-117 and 166-167; *ibid., 1969*, vol. II, pp. 37-38, document A/CN.4/210, para. 49; and *ibid., 1970*, vol. II, p. 71, document A/CN.4/225, paras. 24-33).

[320] See the Secretariat studies on succession of States to bilateral treaties (*ibid., 1970*, vol. II, pp. 109-110, document A/CN.4/229, paras. 28-34; and *ibid., 1971*, vol. II (Part Two), pp. 121-122 and 155-156, documents A/CN.4/243, paras. 11-19 and A/CN.4/243/Add.1, paras. 30-36; and United Nations, *Materials on Succession of States (op. cit.)*, pp. 1-8, 190-191 and 223).

[321] See para. 14 below.

[322] See above paragraph 6 of the commentary to the article contained in Excursus A.

[323] D. P. O'Connell, *State Succession . . .*, vol. II, pp. 172-178.

[324] *Yearbook of the International Law Commission, 1970*, vol. II, p. 127, document A/CN.4/229, paras. 132-133; and *ibid., 1971*, vol. II (Part Two), pp. 178-179, document A/CN.4/243/Add.1, paras. 144-148.

[325] *Ibid., 1968*, vol. II, p. 44, document A/CN.4/200 and Add.1 and 2, para. 182.

[326] *Ibid.*, p. 70-71, paras. 306-309.

[327] *Ibid., 1970*, vol. II, p. 93, document A/CN.4/225, para. 125

ingly, whether or not the dismemberment of the Federation of Rhodesia and Nyasaland be regarded as a case of the dismemberment of a State, it seems impossible to find in it any support for a rule of *ipso jure* continuity.

(12) The adherence of Singapore to the Federation of Malaysia in 1963 is referred to in paragraphs (4) and (5) of the commentary to the article contained in Excursus A. In 1965, by agreement, Singapore separated from Malaysia, becoming an independent State. The Agreement between Malaysia and Singapore, in effect, provided that any treaties in force between Malaysia and other States at the date of Singapore's independence should, in so far as they had application to Singapore, be deemed to be a treaty between the latter and the other State or States concerned.[328] Despite this "devolution agreement" Singapore subsequently adopted a posture similar to that of other newly independent States. While ready to continue Federation treaties in force, Singapore regarded that continuance as a matter of mutual consent. Even if in one or two instances other States contended that she was under an obligation to accept the continuance of a treaty, this contention was rejected by Singapore.[329] Similarly, as the entries in *Multilateral Treaties . . . 1968*, show, she has notified or not notified her succession to multilateral treaties, as she has thought fit, in the same way as other newly independent States.

(13) The available evidence of practice does not therefore support the thesis that in the case of a dismemberment of a State, as distinct from the dissolution of a union of States, treaties continue in force *ipso jure* in respect of the separated territory. On the contrary, the evidence strongly indicates that any such territory which becomes a sovereign State is to be regarded as newly independent State to which in principle the rules set out in articles 7 to 17 of the present draft should apply. That this is the practice in the case of an ordinary secession of part of a State, leaving that State to continue its international existence with truncated territory hardly seems open to question. There remains, however, the point whether the position is different when there is such a radical dismemberment that it may be agreed that the original State has really disappeared and been replaced by two or more new States.

(14) Such a total disappearance of the original State is clearly a theoretical possibility. But practice does not warrant the proposition that the mere magnitude of a dismemberment will suffice to prevent the case from being considered as one of secession. Thus, the separation of East and West Pakistan from India was regarded as analogous to a secession resulting in the emergence of the newly independent State of Pakistan. Similarly, if the recent decision of WHO to admit Bangla Desh as a new member together with its acceptance of West Pakistan as continuing the personality and membership of Pakistan are any guide, the virtual splitting of a State in two does not suffice to constitute the disappearance of the original State. Treaty practice in regard to Bangla Desh is not yet available to the Special Rapporteur. But it would seem a little anomalous if a dismembered part of a State were to be refused recognition of its share of the personality and membership of international organizations but required to accept, *ipso jure*, the treaty obligations of the dismembered State. At any rate, the Special Rapporteur knows of no practice which would justify the view that a territory, considered as having seceded from an existing State, should be treated otherwise than as a newly independent State.

(15) In practice, in most cases of dismemberment one or other part is recognized as, or claims to be, the continuation of the State which has suffered the dismemberment; and if any part is treated as still representing the former State, the other part or parts are correspondingly treated as having become independent States by secession. In such cases, therefore, what has been said in the preceding paragraphs applies. Ought the draft articles, however, to envisage the case of the total disappearance of the previous State and its replacement by two or more States? In other words, do the categories of succession include, as a special case, the mere division of a State into two or more States? And in that event is the international personality of the former State to be considered as extinguished and the State replaced by two or more *new* States, or as continuing in a divided form in the international personalities of the States resulting from the division?

(16) Practice does not throw much useful light on this question, despite the fact that among the major political problems of the post-war world have been what are sometimes called the two Germanies, the two Koreas and the two Viet-Nams. The circumstances of each of these so-called divided States are, however, altogether too special for them to provide guidance in regard to questions of succession. In all three cases the problem of succession is complicated by the fact that one of the two Governments is not recognized by a large number of States, and in all three cases one or both of the two Governments claims to represent the whole State. Further complications are the effect of the Second World War on the treaties previously affecting the territories in question, and in the cases of Korea and Viet-Nam their very recent emergence to independence when the division of their territories occurred. These various complications are, no doubt, responsible for the extreme paucity of information regarding succession by one part of these States to the treaties of the previously undivided State or territory. The German Democratic Republic, it appears, maintains the theory that it is entitled to "reactivate" treaties formerly concluded by the German Reich; but its attempts to put this theory into operation have had very limited effects owing to the non-recognition policies applied by a large number of States. In any event, the claim to "reactivation", as described in a recent book,[330] seems not to be based on

[328] See S. Tabata, *Japanese Annual of International Law* (Tokyo, 1968), No. 12, pp. 36-44.

[329] See *Yearbook of the International Law Commission, 1971*, vol. II (Part One), p. 148, document A/CN.4/249, paras. 11 and 12 of the commentary to article 13; and *ibid., 1970*, vol. II, p. 118, document A/CN.4/229, para. 89.

[330] B. R. Bot, *Non-recognition and Treaty Relations* (Leyden, Sijthoff, 1968), pp. 198-208.

any principle of *ipso jure* continuity but on a right of "option" analogous to that of newly independent States.

(17) If the question is viewed simply from the standpoint of principle, there does not seem to be any sufficient reason to differentiate between a part of a State which becomes an independent State by secession and one which does so by division. Indeed, a division of a State extinguishing altogether the predecessor State is an even more radical transformation of the situation than a secession, so that it seems to follow *a fortiori* that the parts resulting from the division, assuming their recognition as States, should be considered as in the same position as a seceded State for the purposes of the law of succession of States.

(18) The present article has therefore been drafted on the basis that no distinction should be made between cases of "separation" and "division"; and that in both cases the rules contained in articles 7 to 17 of the draft should govern the position of the new States resulting from the separation or division and of the other States parties to the treaties concerned. In the case of a separation, when the predecessor State continues in existence, the treaties previously in force in respect of its territory in principle remain in force in respect of its remaining territory. But it seems necessary to provide some safeguards because of the possible effects on the treaties of the dismemberment; and these safeguards are formulated in paragraph 3 of the article.

Article 22. — Succession of States in respect of boundary settlements

ALTERNATIVE A

1. The continuance in force of a treaty which establishes a boundary is not affected by reason only of the occurrence of a succession of States in respect of a party.

2. In such a case the treaty is considered as in force in respect of the successor State from the date of the succession of States, with the exception of any provisions which by reason of their object and purpose are to be considered as relating only to the predecessor State.

ALTERNATIVE B

1. A succession of States shall not by reason only of its occurrence affect the continuance in force of a boundary settlement which has been established by a treaty.

2. In such a case the boundary settlement is to be considered as comprising any provisions of the treaty relating to the boundary.

Article 22 (bis). — *Succession in respect of certain treaties of a territorial character*

ALTERNATIVE A

1. The continuance in force of a treaty is not affected by reason only of the occurrence of a succession of States in respect of a party if the treaty creates obligations and rights relating to the user or enjoyment of territory of a party and it appears from the treaty or is otherwise established that the parties intended such obligations to attach indefinitely or for a specified period to the particular territory in question and such rights either:

(*a*) Correspondingly to attach indefinitely or, as the case may be, for a specified period, to the territory of the other party as a particular locality;

(*b*) To be accorded to a group of States or to States generally.

2. In such a case the treaty is considered as in force in respect of the succession State from the date of the succession of States.

3. "Territory" for the purposes of the present articles means all or any part of the land, internal waters, territorial sea, contiguous zone, sea-bed or air space of the party in question.

ALTERNATIVE B

1. A succession of States shall not by reason only of its occurrence affect the continuance in force of obligations and rights arising from a treaty and relating to the user or enjoyment of territory of a party if it appears from the treaty or is otherwise established that the parties intended such obligations to attach indefinitely or for a specified period to the particular territory in question and such rights either:

(*a*) Correspondingly to attach indefinitely or, as the case may be, for a specified period, to the territory of the other party as a particular locality;

(*b*) To be accorded to a group of States or to States generally.

2. In such a case the obligations and rights in question are to be considered as subject to any provisions of the treaty relating to such obligations or rights.

3. "Territory" for the purposes of the present article means all or any part of the land, internal waters, territorial sea, contiguous zone, sea-bed or air space of the party in question.

COMMENTARY *(Article)*

(1) The Special Rapporteur drew attention in his third report to certain categories of treaties often described as being of a territorial character and traditionally spoken of as possible exceptions to the general rule in article 6 that a successor State is not bound to take over treaties in force in respect of its territory at the date of the succession.[331] *Inter alia*, he there noted that the devolution agreements and, still more, the unilateral declarations which have featured in so many modern cases of succession, appear to assume that some of the treaties of the predecessor State would be binding upon the successor State. He further noted that, at any rate in the case of former British territories, the States in question appear to have had in mind categories of treaties variously referred to by writers as "treaties of a territorial character" or as "dispositive", "real" or "localised" treaties,

[331] *Yearbook of the International Law Commission, 1970*, vol. II, pp. 35-36, document A/CN.4/224 and Add.1, paras. 16-18 of the commentary to article 6; also *ibid., 1968*, vol. II, pp. 92-93, document A/CN.4/202, commentary to article 4.

as treaties creating "servitudes". During the general debate on that report at the twenty-second session of the Commission, the majority of speakers commented upon the importance of treaties of a territorial character as an exception to the general rule that a new State is not *ipso jure* bound by the treaties concluded by its predecessor.[332] At the same time some members underlined that these categories of treaties might also constitute an exception to the "moving treaty frontiers" rule dealt with in article 2 of the draft articles contained in the Special Rapporteur's second report.[333] The Special Rapporteur pointed out that the whole question of these special categories of treaties had been reserved by him for study in a separate article in his next report; and that the Commission's earlier discussion in its work on the law of treaties of the problem of objective treaty-régimes would then need to be borne in mind. The present article and commentary are intended to provide a basis for the Commission's study of this question, the complexity of which is shown by the diversity of opinion among jurists.

(2) The author of a well-known textbook on the law of treaties endorses the concept of "certain kinds of treaty obligations which by common consent must survive changes of sovereignty" [334] and appears to regard it as covering a broad range of "treaties creating purely local obligations":

It is not easy to state the legal doctrine which attaches to this kind of treaty obligation its peculiar effect. For most of them it would suffice to say that the instrument from which they originate created rights *in rem*, against the whole world, whoever the sovereign of the territory affected might be, but this would not cover capitulations or semi-legislative provisions made as part of an international settlement... In many cases it suffices to invoke such principles as *nemo dat quod non habet*, *nemo plus juris transferre quam ipse habet*, and *res transit cum suo onere*, for when a State cedes a piece of territory over which it has granted to another State a right of transit or a right of navigation on a river, or a right of fishery in territorial or national waters, it cannot cede that territory unencumbered by that obligation.[335]

(3) Sir Gerald Fitzmaurice, on the other hand, a former Special Rapporteur on the law of treaties, seems to take a narrower view of the treaties covered by this concept. Writing on questions of succession arising out of the territorial clauses of the Peace Treaty with Italy, he expressed the view that as a general rule treaties of the predecessor State do not pass with ceded territory, and then observed with regard to multilateral treaties:

There may however be cases where, although the receiving State is not a party to a multilateral Convention affecting the ceded territory it may nevertheless be bound to apply its provisions to the territory on the same basis as before the territory was ceded, because the convention concerned has created a sort of servitude regarding, or a sort of status attaching, to the territory, which whoever is sovereign of the territory becomes automatically bound internationally to respect and give effect to. But in order to determine whether this is so or not, it is necessary to look very carefully at the convention concerned in order to see whether it is one affecting the international *status* of the ceded territory or of any river, canal, etc., within it, or whether it is merely one creating *personal* obligations for a given country in *respect* of that territory or things in it. Suppose there is a treaty to which a number of States are parties which provides that a certain locality in the territory of one of them—perhaps an island—is to be and remain demilitarised. Now it may be quite plain that the true effect of this is not that the island is to acquire the permanent *status* of demilitarised territory, but merely that *State A*, in whose territory it now is, is not to fortify it—in other words it is a personal obligation on A rather than a question of the international status of the island. On the other hand there are cases where it is clear that although only a limited number of countries are actual parties to the relevant convention, it was nevertheless the intention to create a permanent régime in the nature of a status for the locality in question. In the field of demilitarisation the conventions respecting the Aaland Islands in the Baltic afford a good illustration. There are also conventions providing for the free navigation of international waterways such as the Panama, Suez and Kiel Canals, and the Dardanelles and Bosphorus—there are conventions providing for free access, to liberty of commerce and navigation, user, and non-discrimination with respect to international rivers, such as the Rhine and Danube, or the Congo in Africa, which pass through the territories of several States. There may be conventions providing for free transit or carriage on certain railways and so forth. In this type of case it is clear that although the matter originally arose out of a convention, it has become one of *status* and has ceased to depend purely on contract. Any State which takes territory thus situated, takes it as it is and subject to the régime it is impressed with, whether that State is actually a party to the convention which originally created that régime or not.[336]

A little later, turning to bilateral treaties, he added:

It is desirable to revert to the question of servitudes impressing a given territory or something in it with a status of a permanent character which it is incumbent on any one taking the territory to respect and give effect to. This question has been discussed above in relation to multilateral conventions. It does not often occur in the form of a bilateral treaty, but it can do so and can then give rise to very difficult questions. For instance statements of a general character are sometimes made by writers to the effect that *all* obligations locally connected with given territory pass to the receiving State if that territory is transferred, whereas in fact this is not always the case. Suppose that country A voluntarily cedes certain islands to country B, and there is attached to the cession a clause providing that the fishermen of country A shall continue to enjoy in the islands and its waters the same fishing rights as they enjoyed when the islands belonged to A. Such clauses are of common occurrence. There is one in the Italian Peace Treaty in reference to the Adriatic island of Pelagosa, ceded to Yugoslavia. Now suppose that a century or so later, country B in its turn cedes the islands to country C. In the absence of any express treaty provision does the obligation to grant fishing rights to the fishermen of A automatically pass from B to C, or would it come to an end on the ground that this obligation is personal to country B and does not devolve on C unless this is provided for in the treaty of cession between B and C? Some might answer that this is an obligation locally connected with the ceded territory and in the nature of a servitude on it. Subject, however, to the exact wording of the original treaty between A and B creating these rights, the better view

[332] *Ibid.*, *1970*, vol. I, pp. 132-138, 139-140 and 149 *et seq.*, 1067th meeting, 1068th meeting, paras. 10-44, 1070th to 1072nd meetings.

[333] *Ibid. 1969*, vol. II, p. 52, document A/CN.4/214 and Add.1 and 3.

[334] A. D. McNair, *op. cit.*, p. 655.

[335] *Ibid.*, p. 656.

[336] Sir G. Fitzmaurice, "The juridical clauses of the peace treaties", *Recueil des cours de l'Académie de droit international de La Haye, 1948-II* (Paris, Sirey, 1949), vol. 73, pp. 293-295.

seems to be that in a case of this kind the parties were not intending to create for the islands the character of territory permanently available for the exercise of free fishing rights in general. They really only intended to create rights for a certain category of persons, though in respect of certain territory. But the essence of the matter was an obligation *on country B* to *permit* the fishermen of A to fish in certain localities, and not, so to speak, to alter or affect the status of those localities as such. If this is so, it follows, that as this is essentially a personal obligation though its *exercise* may relate to certain territory it does not pass to C unless this is specifically provided for in the treaty between B and C, or unless it is provided generally that C shall assume in respect of the islands all the obligations previously uncumbent on B. Of course, it may well be that by virtue of its original obligations to A, B ought not to cede the islands at all, or ought only to do so subject to an express condition reserving the rights of A; and it may well be that A has a right to call on B to act accordingly and would have a good claim for damages against B if B did not so act; but that is quite a different question. What has to be considered in all such cases is not merely whether certain obligations relate to or are locally connected with the ceded territory, but whether they are of such nature, intended to be effective universally or quasi-universally as to impress the territory or something in it with a character henceforth inherent in the territory and irrespective of whether any personal obligation in the matter has been assumed by the local sovereign. There are often to be found in the authoritics statements that, on the principles of *pacta tertiis nec nocent nec prosunt* and of *res inter alios acta*, one country's right cannot be affected by what two other countries do, and that accordingly, in the type of case under discussion, the territory can only be transferred subject to that country's rights; and similarly there are the statements that, on the principles of *res transit cum onere suo* and *nemo plus juris transferre potest quam habet*, cessions of territory made in disregard of the rights of third countries cannot be effected or are illegal and invalid. Now these statements are often perfectly true, but a great deal depends on the particular facts they are applied to. Thus the statement that *res transit cum onere suo* may well beg the question, because the very issue may be whether the *onus* does in fact burden the actual *res* itself, or whether it is merely in the nature of a personal obligation incumbent on a particular State. Again, when it is said that cessions in disregard of third countries' rights are illegal or that the territory can be transferred subject to those rights, it is often not clear whether the writer means that the cession is actually null and void or whether he means that it must be read as subject to an implied condition reserving the third country's rights and binding the receiving State to go on giving effect to them; or again whether it is merely meant that the ceding State has acted wrongfully and is liable in damages to the third country. It would seem that the cession itself cannot be null and void, while the question whether it operates subject to an implied term in favour of the third country's rights does not arise since if the transfer *is* subject to this limitation, it will be precisely because the obligations is sufficiently bound up with the territory to have ceased to have a purely personal character, and consequently automatically to pass with it. If on the other hand the true nature of the obligation is *personal*, there is no juridical basis for reading into the transfer agreement an *implied* condition passing this obligation to the receiving State—rather the reverse because, strictly speaking, personal obligations incumbent on A in favour B cannot or ought not to be transferred to C without B's consent. The real situation in such a case is either that A ought not to effect the cession at all, or that he ought not to do so without B's consent, or alternatively that the cession does not affect his obligation i.e. he still remains bound in spite of it—which makes it incumbent on him to make the necessary arrangements with C to ensure that the obligation goes on being honoured. If he cannot or does not do this, either in the agreement of cession or by subsequent arrangement, he has got himself into a position where he can no longer carry out his obligations, and he is therefore in breach of them and liable to make reparation.[337]

(4) Criticizing the term "localized treaty" as too imprecise a description of the kinds of treaty involved, the writer of a modern textbook on succession of States expresses a preference for the term "dispositive" treaty; and his analysis of dispositive treaties then seems to have affinities with the position adopted by Sir Gerald Fitzmaurice:

In the effort to cast the net more widely than the servitude conception permits, therefore, the term "dispositive" has come to be employed to designate a wide spectrum of treaties which create real rights. The criterion of dispositive character, once the argument is disengaged from the servitude conception, is admittedly elusive, but at least it can be agreed that the fundamental notion underlying the expression is that a territory is impressed with a status which is intended to be permanent (or relatively so), which is independent of the personality of the State exercising the faculties of sovereignty. The Swiss Government asserted in its counter-memorial in the case of the *Free Zones of Upper Savoy* that dispositive treaties transfer or create a real right. And real rights in international law are those which are attached to territory, and which are in essence valid *erga omnes*. The restrictions imposed by the treaty are less of contractual character than equities in favour of the beneficiary, States. A dispositive treaty is thus more of a conveyance than an agreement and as such is an instrument for the delimitation of sovereign competence within the impressed territory. The State accepting the dispositive obligations possesses for the future no more than the conveyance assigned, to it and a Power which subsequently succeeds in sovereignty to the territory can take over only what its predecessor possessed. The basis of the restrictions imposed on the territory is therefore not destroyed by the change of sovereignty.[338]

(5) A member of the Commission, writing in 1951, voiced doubts as to how far treaties of a territorial nature constitute a true case of succession by operation of law and how far their continued observance by the successor State is a matter of political expediency:

Most authors make the point that legal succession occurs in respect of *territorial treaties*. This quality is attributed to treaties referring to rights and obligations directly connected with the territory itself, the person of the sovereign being immaterial and the population being considered as a secondary factor. These descriptions, however, appear unsatisfactory. Are there any treaties in which the sovereign of a territory or its population can be ignored? The transfer of rights and obligations under territorial treaties is based either on reasons of equity and expediency, or is invoked by virtue of the maxim *res transit cum suo onere*. These reasons cannot be considered as convincing. The point at issue, is how far can a State legally bind possible successor States and establish territorial and other obligations to their disadvantage? If the successor State is allowed full freedom of action with regard to other treaties concluded by the predecessor State, it may be wondered on what grounds so-called territorial treaties are to be considered as different, since they also are personal in character, their origin and nature being linked to a particular State, and the difference between them and other Treaties being doubtful.

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[337] *Ibid.*, pp. 296-299.

[338] D. P. O'Connell, *State Succession* . . . , vol. II, pp. 14-15; and *International Law* (London, Stevens, 1965), vol. I, pp. 432-433. See also I. A. Shearer, "La succession d'Etats et les traités non localisés", *Revue générale de droit international public* (Paris), 3rd series, vol. XXXV, No. 1, January-March 1964, p. 6.

It is difficult to draw definite conclusions from *international practice* in this matter, as instances are infrequent and varied, the favourable attitude of States being attributable rather to expediency than to any legal obligation. [Translation by the Secretariat.] [339]

After referring to treaties providing for the military occupation of territory as a pledge for the territorial State's performance of obligations, he went on:

Treaties delimiting frontiers are often cited as an example of territorial treaties. Doctrine is unanimous in considering that treaties of this kind are binding upon the new sovereign of a territory. This does not, however, constitute an exception to the general rule. Treaties relating to frontiers having been executed and having established a given legal situation, that situation must be respected by the new sovereign of the territory just as much as by any foreign territorial Power.

Many writers consider that the various treaties relating to *transport, fisheries* and *hunting* should also be regarded as territorial in character. Such treaties are appreciably different from those relating to frontiers in that they provide for continuing action, i.e., the application of rights and the performance of obligations. Most legal authorities consider that such treaties are also binding upon successor States. International practice does in fact confirm that opinion. The continued application of such treaties by successor States is, however, most generally due to reasons of expediency.

One of the most widely discussed questions of international law is that of the existence of *international servitudes.* Such servitudes are usually understood to mean restrictions of a territorial nature which continue even if the sovercignty over the territory changes. It is generally considered that international servitudes are not constituted for reasons of general interest. They must also be considered as unilateral, as the other contracting party does not enjoy any corresponding territorial rights, and they are not to apply to the entire territory of the State in question. Servitudes may be negative or positive, according to whether a restriction is laid upon the authority of a State over a certain part of its territory, or rights in that territory are accorded to some foreign State. Servitudes relate to certain activities or to the obligation to refrain from such, activities. They are generally divided into two classes—military or economic.

It is certain that territorial restrictions of the type mentioned above exist as between the States concerned, but it may be questioned whether they are binding upon third States in their capacity as successors. Wehberg raises the question of what reasons should prevent two States from reaching agreement on servitudes which would be binding upon the future sovereigns of the territory. The freedom to negotiate conferred by international law is certainly very extensive, but the matter under discussion involves third party rights. It accordingly seems difficult to accept international servitudes. In fact, all territorial restrictions laid down in treaties concluded between States are simply in the nature of legal obligations and their binding force limits the effects of the treaty to the domain of the contracting parties.

International practice may obviously admit purely territorial restrictions on the exercise of power over a territory. It is, however, hardly possible to adduce convincing instances of such practice in a generally recognized and binding form. Juridical cases of this nature are moreover rare and are in some instances debateable and in others clearly negative. In most of these cases, changes in the sovereignty over a territory occur as between the contracting parties themselves, and in some instances the successor State has then accepted the responsibility in question.[340] [Translation by the Secretariat.]

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[339] *La plupart des auteurs font valoir que la succession juridique apparaît à l'occasion de* traités d'ordre territorial. *Ce caractère est attribué aux traités portant sur des droits et des obligations rattachés directement au territoire lui-même, la personne du souverain du territoire n'ayant pas d'importance et la population qui y habite étant considérée comme un facteur secondaire. Ces qualifications semblent cependant défectueuses. Existe-t-il des traités permettant de faire abstraction du souverain du territoire et de la population? Le transfert des droits et des obligations prévus par les traités d'ordre territorial est, ou bien basé uniquement sur des raisons d'équité et d'opportunité, ou bien se trouve invoquée derechef la devise* res transit cum suo onere. *Ces motifs ne sauraient être considérés comme convaincants. Il s'agit en effet de savoir dans quelle mesure un Etat peut engager légalement des Etats successeurs éventuels et établir des charges territoriales et autres à leur détriment. Du moment où l'on accorde à l'Etat successeur une pleine liberté d'action en ce qui concerne les autres traités conclus par l'Etat prédécesseur, on peut se demander pour quelles raisons les traités dits d'ordre territorial seraient considérés autrement, puisqu'ils sont également de caractère personnel, leur origine et nature étant rattachés à un Etat déterminé et la différence entre eux et d'autres traités demeurant ainsi ambiguë.*

De la pratique internationale *en cette matière, il est difficile de tirer des conclusions certaines, ses manifestations étant rares et variées, et l'attitude favorable des Etats devant être attribuée à des raisons d'opportunité et non à une obligation juridique.* (E. Castrén, "Aspects récent..." *Hague Recueil (loc. cit.)* pp. 436-437; see also, by the same author, "On state succession . . ." *Nordisk Tidsskrift . . . (loc. cit.)*, pp. 68-69.) (Cf. M. ¡Udina, "La succession des Etats quant aux obligations internationales autres que les dettes publiques", *Recueil des cours de l'Académie de droit international de La Haye, 1933-II* (Paris, Sirey, 1933), vol. 44, pp. 704-750.)

[340] *Parmi les traités d'ordre territorial, on cite souvent, à titre d'exemple, les* traités réglant les frontières. *La doctrine est unanime à considérer que de pareils traités engagent le nouveau souverain du territoire. Il ne s'agit cependant pas d'une exception à la règle générale. Les traités concernant les frontières ayant été mis en exécution en établissant une situation juridique déterminée, celle-ci doit être respectée par le nouveau souverain du territoire au même titre que tout pouvoir territorial étranger.*

De nombreux auteurs estiment que le catactère de traité d'ordre territorial doit être attribué également aux divers traités portant sur les transports, *la* pêche *et la* chasse. *Ceux-ci diffèrent sensiblement des traités concernant les frontières du fait qu'ils prévoient une action continue c'est-à-dire l'application des droits et l'exécution des obligations. La plupart des jurisconsultes estiment que ces traités engagent également les Etats successeurs. La pratique internationale confirme en effet cet avis. L'application continue de pareils traités par les Etats successeurs est cependant due le plus souvent à des raisons d'opportunité.*

Une des questions de droit international les plus discutées est celle de savoir s'il existe des servitudes internationales. *Par ces servitudes on entend habituellement les restrictions d'ordre territorial qui sont maintenues même si la souveraineté sur le territoire vient à changer. On estime généralement que des servitudes internationales ne sont pas constituées pour des raisons d'intérêt général. Il faut, en plus, leur attribuer un caractère unilatéral, l'autre partie contractante ne bénéficiant pas de droits territoriaux correspondants, et elles ne doivent pas s'appliquer au territoire entier de l'Etat en question. Les servitudes peuvent être négatives ou positives selon qu'une restriction est apportée au pouvoir exercé par un Etat sur une partie de son territoire ou que des droits y sont accordés à un Etat étranger quelconque. Les servitudes portent sur diverses activités ou sur l'obligation de s'abstenir de certaines activités. On les divise habituellement en deux catégories principales selon leur caractère militaire ou économique.*

Il est certain qu'entre les Etats existent des restrictions d'ordre territorial du genre susmentionné dont bénéficie l'une des parties, mais on peut se demander si elles engagent les Etats tiers en tant qu'Etats successeurs. Wehberg se demande pour quelles raisons deux Etats seraient empêchés de convenir entre eux de servitudes qui engagent également les futurs souverains du territoire. La liberté de traiter qu'accorde le droit international est, il est vrai, fort large, mais dans le cas présent il s'agit des droits des tiers. Il semble donc difficile d'admettre des servitudes internationales. En réalité, toutes les restrictions d'ordre territorial stipulées par les traités conclus entre les Etats ont seulement le caractère d'une

(Continued on next page.)

(6) Some other writers express hesitations in varying forms concerning a new State's automatic inheritance of this category of treaties. The author of a recent book on independence and succession in respect of treaties, for example, considers that the transmissibility of these treaties is subordinated to the principles of equality of States and self-determination and concludes: "The element of localization simply indicates a stronger probability of succession, inherent in the 'real' treaty. But it does not guarantee that the instrument is necessarily or obligatorily transferable in all cases." [341] The author of another recent book on succession in respect of treaties, while referring to "localized" treaties as "instruments which are binding most specifically upon newly-independent States", emphasizes that there have been some cases of their rejection and that the new State succeeds to possible "*claims*" by other States as well as to the treaties. In the case of boundary treaties, he observes that the dispute often concerns the maintenance or otherwise of rights guaranteed in connexion with and as a condition of, the settlement of the boundary and that the dispute over these rights tends to provoke the reopening of the boundary itself.[342] In regard to boundaries another writer indeed expresses the view that succession occurs only through the tacit agreement of the neighbouring State.[343] The weight of opinion amongst modern writers, however, seems still to support the traditional doctrine that treaties of a territorial character constitute a special category which, in principle, are inherited by a new State.[344] Thus, after reviewing some of the recent practice alleged to be inconsistent with that doctrine, a jurist lecturing at the Hague Academy in 1965 said:

> ". . . it appears that the material tends to support the traditional theory in this respect rather than to disprove it. Deviations from the rule of automatic succession to dispositive treaties seem to be due more to political considerations or to the operation of the *clausula rebus sic stantibus* than to a rejection of the rule of automatic succession. In fact many of the arguments which have been used to question the continued validity of specific treaties imply that automatic succession is not denied in principle.
>
> The real difficulty lies, however, in the exact determination of treaties coming under this rule . . .".[345]

(7) Another recent writer, on the other hand, while recognizing that a new State inherits the frontiers of its predecessor and also certain kinds of "real" obligations and rights, does not see in these cases an application of any principle of succession in respect of treaties. Boundary treaties, he says are executed treaties and, as far as the executed provisions are concerned, it is not a case of succession in respect of treaties. As to the other kinds of "real" treaties, State succession in his view only one of the possible explanations, and he prefers to regard them as cases of the "grafting of an international custom upon a treaty" or of a local custom or of a "good neighbour" rule. And he concludes that there is no genuine case of "succession" forming an exception to the "clean slate" rule.[346]

(8) The International Law Association, in its 1968 resolutions on succession of new States to the treaties of their predecessors,[347] has adopted yet another approach to this question. As already pointed out in the commentary to article 7,[348] the Association takes as its starting point a presumption of the continuity of all the predecessor State's treaties which were in force with respect to the territory at the date of the succession; and under its resolutions both bilateral and multilateral treaties are to become binding on a new State unless, within a reasonable time, the latter contracts out by declaring that the particular treaty is not regarded by it as any longer in force. For this purpose the Association makes no distinction between treaties of a territorial character and other treaties; and thus does not endorse the doctrine that treaties of a territorial character form a special class which are automatically binding *ipso jure* upon a successor State. This is underlined by its manner of dealing with the question of boundaries.[349] When a boundary treaty has been executed in the sense that the

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(Foot-note 340 continued.)

obligation juridique *et d'une force obligatoire qui limitent les effets juridiques des traités aux domaines des parties contractantes. La* pratique internationale *peut évidemment admettre des restrictions purement territoriales apportées à l'exercice du pouvoir sur un territoire. Il n'est cependant guère possible de citer des cas convaincants d'une pareille pratique sous une forme généralement reconnue et obligatoire. Ces cas juridiques sont d'ailleurs rares et ils sont, d'une part, contestables, de l'autre, nettement négatifs. Dans la plupart de ces cas, les changements de souveraineté d'un territoire se sont produits entre les parties contractantes elles-mêmes et parfois, l'Etat successeur a accepté librement, par la suite, la charge en question.* (E. Castrén, "Aspects récents . . .", *Hague Recueil (loc. cit.)*, pp. 437-439.)

[341] M. G. Marcoff, *Accession à l'indépendance et succession d'Etats aux traités internationaux (Arbeiten aus dem juristischen Seminar der Universität Freiburg;* Fribourg, Editions universitaires, 1969), pp. 205-206.

[342] "*Instruments qui engagent le plus spécifiquement les nouveaux Etats indépendants*" (see A. G. Mochi Onory, *La succession d'Etats aux traités* (Milan, Giuffrè, 1968), pp. 128-131).

[343] C. Rousseau, "Chronique des faits internationaux", *Revue générale de droit international public* (Paris), 3rd series, vol. 64 (1960), p. 616, citing M. Udina, *loc. cit.*, pp. 748-749.

[344] See, in addition to Lord McNair, Sir G. Fitzmaurice and D. P. O'Connell, already cited in paragraphs 2, 3 and 4 of the present commentary: F. A. Váli, *Servitudes of International Law: A study of rights in foreign territories* (London, Stevens, 1958), pp. 319-322; K. Zemanek, *loc. cit.*, pp. 239-243; A. Ross, *A Textbook of International Law* (London, Longmans, Green, 1947), p. 127; P. Guggenheim, *op. cit.*, vol. I, p. 226; J. Mervyn Jones, "State succession in the matter of treaties", *The British Year Book of International Law*, vol. 24 (1948), p. 262; R. Hone, *op. cit.*, p. 18.

[345] K. Zemanek, *loc. cit.*, pp. 242-243.

[346] See T. Treves, "La continuità dei trattati ed i nuovi Stati independenti" Istituto di Diritto internazionale e straniero della Università di Milano *Communicazioni e Studi*, vol. XIII (Milan, Giuffrè, 1969), pp. 333-454.

[347] For the text of the resolutions, see *Yearbook of the International Law Commission, 1969*, vol. II, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15.

[348] *Ibid., 1970*, vol. II, p. 38, document A/CN.4/224 and Add.1, para. 4 of the commentary to article 7.

[349] See the eighth resolution and note eight in the report of the Committee on the Succession of New States to the Treaties and Certain Other Obligations of their Predecessors (see International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968 (op. cit.)*, pp. 603 and 605 respectively. The text of the resolutions is also reproduced in the introduction to the Special Rapporteur's second report (*Yearbook of the International Law Commission, 1969*, vol. II, p. 48, document A/CN.4/214 and Add.1 and 2, para. 15).

boundary has been delimited, the Association recognizes that a new State succeeds to the delimitation, which therefore determines the extent of its territory. But, like the writer mentioned in the preceding paragraph, it regards the treaty itself as having spent its force, so that the case is one of succession in respect of the boundary, as such, not of the treaty. On the other hand, where a boundary treaty provides for future action to delimit it, or provides for future reciprocal rights in relation to the boundary, the Association considers that the question whether the treaty is or is not succeeded to should be governed by the general presumptions of continuity envisaged by it for all treaties of the predecessor State.

(9) The diversity of opinion amongst writers makes it difficult to discern whether and, if so, to what extent and upon what basis, international law today recognizes any special category or categories of treaties of a territorial character which are inherited automatically by a successor State. It may therefore be useful to recall three other cases in the law of treaties where the question whether treaties of a "territorial" character form a special category is posed. Two of these cases came under the Commission's notice during its work on the Vienna Convention, namely treaties said to create "objective régimes" and treaties excepted from the rule in article 62 regarding a fundamental change of circumstances; the third case, the effect of war on treaties, has not been considered by the Commission.

(10) The question of treaties which provide for objective régimes was examined by the Special Rapporteur in his third report on the law of treaties with reference to the subject of treaties and third States,[350] and subsequently by the Commission at its sixteenth session.[351] The outcome of the proceedings in the Commission on this question was summarized in its final report on the law of treaties to the General Assembly as follows:

> The Commission considered whether treaties creating so-called "objective régimes", that is, obligations and rights valid *erga omnes*, should be dealt with separately as a special case. Some members of the Commission favoured this course, expressing the view that the concept of treaties creating objective régimes existed in international law and merited special treatment in the draft articles. In their view, treaties which fall within this concept are treaties for the neutralization or demilitarization of particular territories, or areas, and treaties providing for freedom of navigation in international rivers or maritime waterways; and they cited the Antarctic Treaty as a recent example of such a treaty. Other members, however, while recognizing that in certain cases treaty rights and obligations may come to be valid *erga omnes*, did not regard these cases as resulting from any special concept or institution of the law of treaties. They considered that these cases resulted either from the application of the principle in article 32 or from the grafting of an international custom upon a treaty under the process which is the subject of the reservation in the present article.[352]

Having regard to the difference of opinion, the Commission concluded that a provision recognizing, under certain conditions, the direct creation of an objective régime by a treaty of its own force would be unlikely to obtain general acceptance, and decided not to propose any special provision of that nature. Instead, it left the question of objective régimes to be resolved by the rules in what is now article 36 of the Vienna Convention on the Law of Treaties regarding treaties which provide for rights for third States and also by the process through which a treaty may become binding on a third State as the result of the grafting of an international custom upon the treaty. This way of dealing with the problem was accepted at the United Nations Conference on the Law of Treaties, with the result that the concept of a special category of treaties which of their own force create objective régimes does not find any place in the Vienna Convention.

(11) The treaties in question, as the above-cited passage of the Commission's report indicates, are treaties of a territorial character: treaties for the neutralization or demilitarization of particular territories or areas, treaties providing for freedom of navigation in particular international rivers or waterways and the like. And it is clear that the general law of treaties, as now formulated in the Vienna Convention, does not attribute to these treaties any special effects in relation to third States by reason merely of their territorial character. But it by no means follows that the same must be true in relation to a successor State. The very question to be resolved in cases of succession is whether a new State is to be considered as wholly a stranger—as a third State—in relation to its predecessor's treaty or whether the fact that the treaty was previously in force in respect of the State's territory creates some form of legal nexus between the new State and the predecessor's treaty.

(12) In another context, the effect of a fundamental change of circumstances, the Commission and the United Nations Conference on the Law of Treaties concluded that treaties establishing a boundary do form a special category which constitutes an exception to the general rule that such a fundamental change of circumstances may be invoked as a ground for terminating, withdrawing from or suspending the operation of a treaty.[353] In consequences article 62, paragraph 2 (*a*), of the Convention expressly provides that the general rule does not apply in the case of a treaty which "establishes a boundary". This provision, it will be noted, confines the category of treaties falling under this exception to boundary treaties, and is not therefore expressed to cover other forms of treaties of a territorial character.[354]

(13) As to the effect of war on treaties, which has not been examined by the Commission, the modern law is uncertain, and the Special Rapporteur has no wish

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[350] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 27-34, document A/CN.4/167 and Add.1-3, commentary to article 63.

[351] *Ibid.*, vol. I, pp. 96-109, 738th meeting, paras. 29-51, 739th meeting, 740th meeting, paras. 3-38.

[352] *Ibid., 1966*, vol. II, p. 231, document A/6309/Rev.1, part II, chap. II, para. 4 of the commentary to article 34.

[353] *Ibid.*, p. 259, para. 11 of commentary to article 59.

[354] In his second report on the law of treaties, Sir Humphrey Waldock, as Special Rapporteur, has proposed that the exception should cover treaties effecting a "grant of territorial rights" (*ibid.*, 1963, vol. II, p. 85, document A/CN.4/156 and Add.1-3, para. 17 of the commentary to article 22).

to be thought to express any opinion of his own on that topic without a thorough examination of it. He therefore confines himself to noting that a number of modern writers appear to regard the territorial, or perhaps more often the dispositive, character of certain kinds of treaties as a reason for rejecting the thesis that they are brought to an end by the outbreak of war.[355] These writers also appear to refer to this category in fairly broad terms, no limiting it to boundary treaties or other particular kinds of treaties of a territorial character.

(14) The proceedings of international tribunals throw some, if not an entirely clear, light on the question of territorial treaties. In its second Order in the case concerning the *Free Zones of Upper Savoy and the District of Gex*[356] the Permanent Court of International Justice made a pronouncement which is perhaps the most weighty endorsement of the existence of a rule requiring a successor State to respect a territorial treaty affecting the territory to which a succession of States relates. The Treaty of Turin of 1816, in fixing the frontier between Switzerland and Sardinia, imposed restrictions ont the levying of customs duties in the Zone of St. Gingolph. Switzerland claimed that under the Treaty the customs line should be withdrawn from St. Gingolph. Sardinia, although at first contesting this view of the Treaty, eventually agreed and gave effect to its agreement by a "Manifesto" withdrawing the customs line. In this context, the Court said:

> ... As this assent given by His Majesty the King of Sardinia, without any reservation, terminated an international dispute relating to the Treaty of Turin; as, accordingly, the effect of the Manifesto of the Royal Sardinian Court of Accounts, published in execution of the Sovereign's orders, laid down in a manner binding on the Kingdom of Sardinia, what the law was to be between the Parties; as the agreement thus interpreted by the Manifesto confers on the creation of the zone of St. Gingolph the character of a treaty stipulation *which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory.** [357]

This pronouncement was reflected in much the same terms in the Court's final judgement in the second stage of the case.[358] Although the territorial character of the Treaty is not particularly emphazised in the passage cited above, it is clear from other passages that the Court recognized that it was here dealing with an arrangement of a territorial character. Indeed, the Swiss Government in its pleadings had strongly emphasized the "real" character of the agreement,[359] involving the concept of servitudes in connexion with the Free Zones.[360] The case has, therefore, rightly been accepted as a precedent in favour of the principle that certain treaties of a territorial character are binding *ipso jure* upon a successor State.

(15) What is not, perhaps, clear is the precise nature of the principle applied by the Court. The Free Zones, including the Sardinian Zone, were created as part of the international arrangements made at the conclusion of the Napoleonic Wars; and elsewhere in its judgments[361] the Court emphasized this aspect of the agreements concerning the Free Zones. The question, therefore, is whether the Court's pronouncement applies generally to treaties having such a territorial character or whether it is limited to treaties forming part of a territorial settlement and establishing an objective treaty régime. On this question it can only be said that the actual terms of that pronouncement were quite general. A further point frequently raised in connexion with the problem of succession in respect of territorial treaties is whether, if it occurs, the succession is in respect of the Treaty or in respect of the situation resulting from the execution of the Treaty. The Court does not seem to have addressed itself specifically to this point. But its language in the passage from its Order cited above and in the similar passage in its final judgment, whether intentionally or not refers in terms to "a *treaty stipulation** which France is bound to respect, as she succeeded Sardinia in the sovereignty over that territory".

(16) In the early days of the League, before the Permanent Court had been established, the question of succession in respect of a territorial treaty had come before the Council of the League of Nations with reference to Finland's obligation to maintain the demilitarization of the Aaland Islands. The point arose in connexion with a dispute between Sweden and Finland concerning the allocation of the Islands after Finland's detachment from Russia at the end of the First World War. The Council referred the legal aspects of the dispute to a committee of three jurists, amongst whom was Max Huber, later to be Judge and President of the Permanent Court. The treaty in question was the Aaland Islands Convention, concluded between France, Great Britain and Russia as part of the Peace Settlement of 1856, under which the three Powers declared that "the Aaland Islands shall not be fortified, and that no military or naval base shall be maintained or created there". Two major points of treaty law were involved. The first, Sweden's right to invoke the Convention although not a party to it, was discussed by the Special Rapporteur in his third report on the law of treaties in connexion with draft articles on the effect of treaties on third States and objective régimes.[362] The second was the question of Finland's obligation to maintain the demilitarization of the islands. In its opinion the

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[355] e.g., Sir G. Fitzmaurice, *loc. cit.*, p. 312; McNair, *op. cit.*, p. 705; C. Rousseau, *Droit international public* (Paris, Sirey, 1953), p. 59.

[356] Order of 6 December 1930 (*P.C.I.J.*, Series A, No. 24). The *Free Zones* Case was discussed at length by the Special Rapporteur in his third report on the law of treaties with reference to the effect of treaties on third States (see *Yearbook of the International Law Commission, 1964*, vol. II, pp. 20-24, document A/CN.4/167 and Add.1-3, paras. 1-17 of the commentary to article 62.

[357] P.C.I.J., Series A, No. 24, p. 17.

[358] P.C.I.J., Series A/B, No. 46, p. 145.

[359] P.C.I.J., Series C, No. 17-I, *Case of the Free Zones of Upper Savoy and the District of Gex*, vol. III, p. 1654.

[360] *Ibid.*, vol. I, pp. 254 and 415.

[361] e.g., P.C.I.J., Series A/B, No. 46, p. 148.

[362] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 22-23 and 30, document A/CN.4/167 and Add.1-3, para. 12 of the commentary to article 62 and para. 11 of the commentary to article 63.

Committee of Jurists, having observed that "the existence of international servitudes, in the true technical sense of the term, is not generally admitted,"[363] nevertheless found reasons for attributing special effects to the demilitarization Convention of 1856:

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

The recognition of any State must always be subject to the reservation that the State recognized will respect the obligations imposed upon it either by general international law or *by definite international settlements relating to territory.** [364]

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

(17) The case concerning the *Temple of Preah Vihear*,[365] cited by some writers in this connexion, is of a certain interest in regard to boundary treaties, although the question of succession was not dealt with by the International Court of Justice in its judgment. The boundary between Thailand and Cambodia had been fixed in 1904 by a treaty concluded between Thailand (Siam) and France as the then protecting Power of Cambodia. The case concerned the effects of an alleged error in the application of the treaty by the Mixed Franco-Siamese Commission which demarcated the boundary. Cambodia had in the meanwhile become independent and was therefore in the position of a newly independent successor State in relation to the boundary treaty (assuming that the emergence of a protected State to independence is a case of succession). Neither Thailand nor Cambodia disputed the continuance in force of the 1904 Treaty after Cambodia's attainment of independence, and the Court decided the case on the basis of a map resulting from the demarcation and of Thailand's acquiescence in the boundary depicted on that map. The Court was not therefore called upon to address itself to the question of Cambodia's succession to the boundary treaty. On the other hand, it is to be observed that the Court never seems to have doubted that the boundary settlement established by the 1094 Treaty and the demarcation, if not vitiated by error, would be binding as between Thailand and Cambodia.

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

Under the customary international law of State succession, if Cambodia is successor to France in regard to the tracing of frontiers, she is equally bound by treaties of a local nature which determine the methods of marking these frontiers on the spot. However, the general rules of customary law regarding State succession do not provide that, in case of succession by separation of a part of a State's territory, as in the case of Cambodia's separation from France, the new State succeeds to political provisions in treaties of the former State... The question whether Thailand is bound to Cambodia by peaceful settlement provisions in a treaty which Thailand concluded with France is very different from such problems as those of the obligations of a successor State to assume certain burdens which can be identified as connected with the territory which the successor acquires after attaining its independence. *It is equally different from the question of the applicability of the provisions of the treaty of 1904 for the identification and demarcation on the spot of the boundary which was fixed along the watershed.** [366]

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

Thailand recognises Cambodia as the successor to France in respect of treaties relating to the definition and elimination of frontiers. It cannot arbitrarily exclude from the operation of such treaties any provisions which they contain relating to the compulsory jurisdiction rule *in so far as this rule is ancillary to the definition and delimitation of frontiers.** [367] [Translation by the Secretariat.]

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

(19) The case concerning *Right of Passage over Indian Territory* [368] is also of a certain interest, though it did not involve any pronouncement by the Court on succession

[363] League of Nations, *Official Journal, Special Supplement No. 3* (October 1920), p. 16.

[364] *Ibid.*, p. 18.

[365] *I.C.J. Reports 1962*, pp. 6-146.

[366] *I.C.J., Pleadings, Temple of Preah Vihear*, 1959, vol. I, pp. 145-146.

[367] "*La Thailande reconnaît que le Cambodge est successeur de la France en ce qui concerne les traités à la définition et à la délimitation des frontières. Elle ne peut exclure arbitrairement du jeu de tels traités les dispositions qu'ils renferment quant au règlement juridictionnel obligatoire*, dans la mesure où ce règlement est accessoire à la définition et à la délimitation des frontières."* (*Ibid.*, p. 165.)

[368] *I.C.J. Reports 1960*, p. 6.

in respect of *treaty* obligations. True, it was under a treaty of 1779 concluded with the Marathas that Portugal first obtained a foothold in the two enclaves which gave rise to the question of a right of passage in that case. But the majority of the Court specifically held that it was not in virtue of this treaty that Portugal was enjoying certain rights of passage for civilian personnel on the eve of India's attainment of independence; it was in virtue rather of a local custom that had afterwards become established as between Great Britain and Portugal. The right of passage derived from the consent of each State, but it was a customary right, not a treaty right, with which the Court considered itself to be confronted. The Court found that India had succeeded to the legal situation created by that bilateral custom "unaffected by the change of régime in respect of the intervening territory which occurred when India became independent".[369]

(20) State practice, and more especially modern State practice, now remains to be examined; and it is proposed to deal first with succession in respect of boundary treaties and then with the practice concerning other forms of territorial treaties.

(21) *Boundary treaties.* Attention has already been drawn earlier in this commentary to article 62, paragraph 2 (*a*) of the Vienna Convention on the Law of Treaties which provides that a fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty "if the treaty establishes a boundary".[370] This provision was proposed by the Commission as a result of its study of the general law of treaties. After pointing out that this exception to the fundamental change of circumstances rule appeared to be recognized by most jurists, the Commission commented:

> *Paragraph 2* excepts from the operation of the article two cases. The first concerns treaties establishing a boundary, a case which both States concerned in the *Free Zones* case appear to have recognized as being outside the rule, as do most jurists. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties establishing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter was an independent principle and that it might lead to confusion if, in the context of the law of treaties it were presented as an application of the rule contained in the present article. By excepting treaties establishing a boundary from its scope the present article would not exclude the operations of the principle of self-determination in any case where the conditions for its legitimate operation existed. The expression "treaty *establishing* a boundary" was substituted for "treaty fixing a boundary" by the Commission, in response to comments of Governments, as being a broader expression which would embrace treaties of cession as well as delimitation treaties.[371]

The exception of treaties establishing a boundary "from the fundamental change of circumstances rule", though opposed by a few States, was endorsed by a very large majority of the States at the United Nations Conference on the Law of Treaties. The considerations which led the Commission and the Conference to make this exception to the fundamental change of circumstances appear to apply with the same force to a succession of States, even though the question of the continuance of the treaty may then present itself in a different context. Accordingly, the attitude of States towards boundary treaties at the Conference on the Law of Treaties is believed to be an extremely pertinent element of State practice equally in the present connexion.

(22) Attention has also been drawn earlier to the assumption apparently made by both Thailand and Cambodia in the *Temple* case of the latter's succession to the boundary established by the Franco-Siamese Treaty of 1904.[372] That this assumption reflects the general understanding concerning the position of a successor State in regard to an extablished boundary settlement seems clear. Tanzania, although in her unilateral declaration she strongly insisted on her freedom to maintain or terminate her predecessor's treaties, has been no less insistent that boundaries previously established by treaty remain in force. Furthemore, despite their initial feelings of reaction against the maintenance of "colonial" frontiers, the newly independent States of Africa have come to endorse the principle of respect for established boundaries. Article III, paragraph 3 of the Charter of the Organization of African Unity, it is true, merely proclaimed the principle of "respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.[373] But in 1964, with reservations only from Somalia and Morocco, the Assembly of Heads of State and Government adopted a resolution which after reaffirming the principle in article III, paragraph 3, solemnly declared that "all Member States pledge themselves to respect the borders existing on their achievement of national independence".[374] A similar resolution was adopted by the Conference of Heads of State and Government of Non-Aligned Countries held in Cairo in October 1964. This does not, of course, mean that boundary disputes have not arisen or may not arise between African States. But the legal grounds invoked must be other than the mere effect of the occurrence of a succession of States on a boundary treaty.

(23) Somalia has two boundary disputes with Ethiopia, one in respect of the former British Somaliland boundary and the other in respect of the former Italian Somaliland boundary; and a third dispute with Kenya in respect of her boundary with Kenya's Northern Frontier District.[375] Somalia's claims in these disputes are based

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[369] *Ibid.*, p. 40.

[370] See para. 12 of the present commentary.

[371] *Yearbook of the International Law Commission, 1966*, vol. II, p. 259, document A/6309/Rev.1, part II, chap. II, paragraph II of the commentary to article 59. (Article 59 became article 62 of the Vienna Convention on the Law of Treaties.)

[372] See paras. 17 and 18 of the present commentary.

[373] United Nations, *Treaty Series*, vol. 479, p. 74.

[374] OAU document AHG/Res.16 (1); see also S. Touval, "Africa's frontiers: reactions to a colonial legacy", *International Affairs* (London), vol. 42, No. 4 (October 1966), p. 643.

[375] See D. P. O'Connell, *State Succession* . . . , vol. II, pp. 283-285; and S. Touval, *loc. cit.*, pp. 645-647.

essentially on ethnic and self-determination considerations and on alleged grounds for impeaching the validity of certain of the relevant treaties. She does not seems to have claimed that, as a successor State, she was *ipso jure* freed from any obligation to respect the boundaries established by treaties concluded by her predecessor State though she did denounce the 1897 Treaty with Ethiopia in response to the latter's unilateral withdrawal of the grazing rights mentioned below. Ethiopia and Kenya, who is herself also a successor State, take the position that the treaties in question are valid and that, being boundary settlements, they must be respected by a successor State. The Somali-Ethiopian dispute regarding the 1897 Treaty calls for more detailed comment. The boundary agreed between Ethiopia and Great Britain in 1897 separated some Somali tribes from their traditional grazing grounds and an exchange of letters annexed to the treaty provided that these tribes, from either side of the boundary, would be free to cross it to their grazing grounds. The 1897 Treaty was reaffirmed in an agreement concluded between the United Kingdom and Ethiopia in 1954, article I of this agreement reaffirming the boundary and article II the grazing rights. Article III then created a "special arrangement" for administering the use of the grazing rights by the Somali tribes. In 1960, shortly before independence, a question had been put to the British Prime Minister in Parliament concerning the continuance of the Somali grazing rights along the Ethiopian frontier to which he replied:

"Following the termination of the responsibilities of H.M. Government for the Government of the Protectorate, and in the absence of any fresh instruments, the provisions of the 1897 Anglo-Ethiopian Treaty should, in our view, be regarded as remaining in force as between Ethiopa and the successor State. On the other hand, Article III of the 1954 Agreement which comprises most of what was additional to the 1897 Treaty, would, in our opinion, lapse." [376]

The United Kingdom thus was of the view that the provisions concerning both the boundary and the Somali grazing rights would remain in force and that only the "special arrangement", which pre-supposed British administration of the adjoining Somali territory would cease. In this instance, it will be observed, the United Kingdom took the position that ancillary provisions which constituted an integral element in a boundary settlement would continue in force upon a succession of States, while accepting that particular arrangements made by the predecessor State for the carrying out of those provisions would not survive the succession of States. Ethiopia, on the other hand, while upholding the boundary settlement, declined to recognize that the ancillary provisions, though they constituted one of the conditions of that settlement, would remain binding upon her.[377]

(24) There are a number of other instances in which the United Kingdom has recognized that rights and obligations under a boundary treaty would remain in force after a succession of States. One is the Convention of 1930 concluded between the United States and Great Britain for the delimitation of the boundary between the Philippine Archipelago and the State of North Borneo. On the Philippines becoming independent in 1946, the British Government in a diplomatic Note acknowledged that as a result "the Government of the Republic of the Philippines has succeeded to the rights and obligations of the United States under the Notes of 1930".[378]

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

The Foreign Office were advised that the splitting of the former India into two States—India and Pakistan—and the withdrawal of British rule from India had not caused the Afghan Treaty to lapse and it was hence still in force. It was nevertheless suggested that an examination of the Treaty might show that some of its provisions, being political in nature or relating to continuous exchange of diplomatic missions, were in the category of those which did not devolve where a State succession took place. *However, any executed clauses such as those providing for the establishment of an international boundary or, rather, what had been done already under executed clauses of the Treaty, could not be affected whatever the position about the treaty itself might be.** [379]

Here therefore the United Kingdom again distinguishes between provisions establishing a boundary and ancillary provisions of a political character. But it also appears here to have distinguished between the treaty provisions *as such* and the boundary resulting from their execution—a distinction made by a number of jurists. Afghanistan, on the other hand, contests altogether Pakistan's right to invoke the boundary provisions of the 1921 Treaty. She does so on various grounds, such as the alleged "unequal" character of the Treaty itself and the termination of the Treaty by Afghanistan by a notice given under the Treaty in 1953. But she also maintains that Pakistan, as a newly independent State, had a "clean slate" in 1947 and could not claim automatically to be a successor to British rights under the 1921 Treaty.[380] In other words, she specifically denies that boundary treaties constitute an exception to the "clean slate" principle when the successor State is a "new" State.

(26) There are a number of other modern instances in which a successor State has become involved in a boundary dispute. But these appear mostly to be instances where either the boundary treaty in question

[376] United Nations, *Materials on Succession of States (op. cit.)*, p. 185.

[377] D. P. O'Connell, *State Succession . . .*, vol. II, pp. 302-304.

[378] See United Nations, *Materials on Succession of States (op. cit.)*, p. 190.

[379] *Ibid.*, p. 187.

[380] *Ibid.*, pp. 1-5.

left the course of the boundary in doubt or its validity is challenged on one ground or another; and in those instances the succession of States merely provided the opportunity for reopening or raising grounds for revising the boundary which are independent of the law of succession. Such appears to have been the case. for example with the Moroccan-Algeria,[381] Surinam-Guyana,[382] and Venezuela-Guyana [383] boundary disputes and, it is thought, also with the various Chinese claims in respect of Burma, India and Pakistan.[384] True, China may have shown a disposition to reject the former "British" treaties as such; but she seems rather to challenge the treaties themselves than to invoke any general concept of a newly independent State's clean slate with respect to the treaties, including boundary treaties.[385]

(27) The weight of the evidence of State practice and of legal opinion in favour of the view that in principle a boundary settlement is unaffected by the occurrence of a succession of States is strong and powerfully reinforced by the decision of the United Nations Conference on the Law of Treaties to except from the fundamental change of circumstances rule a treaty which establishes a boundary. Consequently, it is thought that the present draft must also except boundary settlements both from the moving treaty-frontier rule and from the clean slate principle contained in article 6. Such an exception would relate exclusively to the effect of the succession of States on the boundary settlement. It would leave untouched any other ground of claiming the revision or setting aside of the boundary settlement, whether self-determination or the invalidity or termination of the treaty. Equally, of course, it would leave untouched any legal ground of defence to such a claim that may exist. In short, the mere occurrence of a succession of States would be considered neither to consecrate the existing boundary if it is open to challenge nor to deprive it of its character as a legally established boundary, if such it was at the date of the succession of States.

(28) If the view expressed in the previous paragraph is endorsed by the Commission, the question still remains as to how any rule to be adopted in regard to boundary treaties should be formulated. The analogous provision in the Vienna Convention appears in article 62 as an exception to the fundamental change of circumstances rule. Moreover, it is so framed as to relate to the treaty rather than to the boundary resulting from the treaty. For the provision reads:

> A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty, (a) if the treaty establishes a boundary.

However, in the present draft the question is not the continuance in force or otherwise of a treaty between the parties; it is what obligations and rights, if any, devolve upon a successor State. Accordingly, it does not necessarily follow that here also the rule should be framed in terms relating to the boundary treaty rather than to the legal situation established by the treaty; and the opinion of jurists, as reflected in the resolution of the International Law Association, tends to favour the latter formulation of the rule. If the rule is regarded as relating to the situation resulting from the dispositive effect of a boundary treaty, then it would not seem properly to be an exception to article 6 of the present draft. It would seem rather to be a general reservation that a succession of States is not to be considered as in itself affecting a boundary settlement established by treaty prior to that succession of States. Such a general reservation was indeed included in the draft articles in the Special Rapporteur's first report in the following form:

> Nothing in the present articles shall be understood as affecting the continuance in force of a boundary established by or in conformity with a treaty prior to the occurrence of a succesion.[386]

(29) Arguments can be adduced in favour of either form of provision. On the one hand, it may be said that to detach succession in respect of the boundary from succession in respect of the boundary treaty is somewhat artificial. Very often a boundary in thinly populated territory has not been fully demarcated so that its precise course in a particular area may be brought into question. In that event recourse must be had to the interpretation of the treaty as the basic criterion for ascertaining the boundary, even if other elements, such as occupation and recognition, may also come into play. Moreover, a boundary treaty may contain ancillary provisions which were intended to form a continuing part of the boundary régime created by the treaty and the suppression of which on a succession of States would materially change the boundary settlement established by the treaty. Again, if the validity of the treaty or of a demarcation under the treaty was in dispute prior to the succession of States, it may seem anomalous to separate succession in respect of the boundary from succession in respect of the treaty. On the other hand, it may be argued that a boundary treaty has constitutive effects and establishes a legal and factual situation which therafter has its own separate existence; and that it is this situation, rather than the treaty, which passes to a successor State, In this connexion, it may also be argued that a boundary treaty may contain provisions unconnected with the boundary settlement itself, and that it is only this settlement which should form an exception to the "clean slate" principle. It may at the same time be urged that some at least of the suggested objections may be overcome if it is recognized that the legal situation constituted by the treaty comprises not only the boundary delimitation but also such ancillary provisions as were intended to form an integral part of the régime of the boundary.

(30) Having regard to the division of opinion on this point, the Special Rapporteur has prepared two alter-

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[381] D. P. O'Connell, *State Succession* . . . , vol. II, pp. 289-291.

[382] *Ibid.*, pp. 274-275.

[383] *Yearbook of the International Law Commission, 1970*, vol. II, p. 31, document A/CN.4/224 and Add.1, para. 10 of the commentary to article 5.

[384] D. P. O'Connell, *State Succession* . . . , vol. II, pp. 277-282.

[385] *Ibid.*

[386] *Yearbook of the International Law Commission, 1968*, vol. II, p. 92, document A/CN.4/202, II, article 4.

native texts of article 22 on the question of the effect of a succession of States on boundaries. One is framed in terms of succession in respect of the treaty and the other in terms of succession in respect of the boundary situation. At the same time, for the sake of simplicity, he has thought it advisable to separate the question of boundary treaties from other forms of territorial treaties which, therefore, he has assigned to a separate article—article 22 (*bis*).

(31) *Other territorial treaties.* In the commentary to article 6, attention has been drawn to the assumption which appears to be made by many States, including newly independent States, that certain treaties of a territorial character are an exception to the "clean slate" principle.[387] In British practice there are numerous statements evidencing the United Kingdom's belief that customary law recognizes the existence of such an exception to the "clean slate" principle and also to the moving treaty frontier rule. One such is a statement with reference to Finland.[388] Another is the reply of the Commonwealth Office to the International Law Association cited in that commentary which runs as follows :

"Under customary international law certain treaty rights and obligations of an existing State are inherited automatically by a new State formerly part of the territories for which the existing State was internationally responsible. Such rights and obligations are generally described as those which relate directly to territory within the new State (for example, those relating to frontiers and navigation on rivers); but international law on the subject is not well settled and it is impossible to state with precision which rights and obligations would be inherited automatically and which would not be.[389]

A further statement of a similar kind may be found in *Materials on Succession of States* [390] the occasion being discussions with the Cyprus Government regarding article 8 of the treaty concerning the establishment of the Republic of Cyprus.

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

This rule is subject to an important exception in the case of conventions of a strictly non-political character, i.e., those which are not concluded in consideration of the personality of the State but which have territorial and local effect and are based on geographical situation : the successor State, whatever the reasons for its succession, is bound to perform the obligations arising from treaties of this kind in so far as it enjoys the advantages stipulated therein. [Translation by the Secretariat] [391]

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

... The view of the Government on the question of Newfoundland treaty succession has in the past been that Newfoundland became part of Canada by a form of cession and that consequently, in accordance with the appropriate rules of international law, agreements binding upon Newfoundland prior to union lapsed, *except for those obligations arising from agreements locally connected which had established proprietary or quasi-proprietary rights** ...[392]

Some further light is thrown on the position taken by Canada on this question by the fact that Canada did not recognize air transit rights though Gander airport in Newfoundland granted in pre-union agreements as binding after Newfoundland became part of Canada.[393] On the other hand, Canada did recognize as binding upon her a condition precluding the operation of commercial aircraft from certain bases in Newfoundland leased to the United States before Newfoundland became a part of Canada. Furthermore, she does not seem to have questioned the continuance in force of the fishery rights in Newfoundland waters which were accorded by Great Britain to the United States in the Treaty of Ghent in 1818 and were the subject of the North Atlantic Fisheries Arbitration in 1910, or of the fishery rights first accorded to France in the Treaty of Utrecht and dealt with in a number of further treaties.

(33) An instructive precedent involving the succession of newly independant States is the so-called Belbases Agreements of 1921 and 1951, which concern Tanzania, on the one hand and Zaire, (formerly Congo (Léopoldville)), Rwanda and Burundi, on the other.[394] After the First World War the mandates entrusted to Great Britain and Belgium respectively had the effect of cutting off the central African territories administered by Belgium from their natural sea-port, Dar-es-Salaam. Great Britain accordingly entered into an agreement with Belgium in 1921, under which Belgium, at a rent of 1 franc per annum, was granted a lease in perpetuity of port sites at Dar-es-Salaam and Kigoma in Tanganyika. This agreement also provided for certain Customs exemptions at the leased sites and for transit facilities from the territories under Belgian mandate to those sites. In 1951, by which date the mandates had been converted into trusteeships, a further agreement between the two administering powers provided for a change in the site at Dar-es-Salaam but otherwise left the 1921 arrangements in force. The Belgian Government, it should be added, expended considerable sums in developing the port facilities at the leased sites. On the eve of independence, the Tanganyika Government informed the United

[387] *Ibid., 1970*, vol. II, pp. 36-37, document A/CN.4/224 and Add.1, para. 17 of the commentary to article 6.

[388] *Ibid.*, p. 32, para. 3 of the commentary.

[389] *Ibid.*, p. 36, para. 17 of the commentary.

[390] United Nations, *Materials on Succession of States (op. cit.)*, p. 183.

[391] "*Cette règle souffre une exception importante dans le cas de conventions qui n'ont aucun caractère politique, c'est-à-dire qui n'ont pas été conclues en considération de la personne même de l'Etat, mais qui sont d'application territoriale et locale, qui sont fondées sur une situation géographique: l'Etat successeur, quelle que soit la cause pour laquelle il succède, est tenu de remplir les charges qui découlent de traités de cet ordre comme il jouit des avantages qui s'y trouvent stipulés.*" (See D. P. O'Connell, *State Succession* ..., vol. II, p. 233).

[392] *Yearbook of the International Law Commission, 1971*, vol. II (Part Two), p. 133, document A/CN.4/243, para. 85.

[393] *Ibid.*, pp. 133-135, paras. 86-100.

[394] See D. P. O'Connell, *State Succession* ..., vol. II, pp. 241-243; and E. E. Seaton and S. T. M. Maliti, *loc. cit.*, paras. 118-121.

Kingdom that it intended to treat both agreements as void and to resume possession of the sites. The British Government replied that it did not subscribe to the view that the agreements were void but that, after independence, the international consequences of Tanganyika's views would not be its concern. It further informed Belgium, the Government of the Congo (Léopoldville), and, through the Belgian Government, the Governments of Rwanda and Burundi, both of Tanganyika's statement and its own reply.[395] In the National Assembly Prime Minister Nyerere explained that in Tanganyika's view: "A lease in perpetuity of land in the territory of Tanganyika is not something which is compatible with the sovereignty of Tanganyika when made by an authority whose own rights in Tanganyika were for a limited duration."[396] After underlining the limited character of a mandate or trusteeship, he added: "It is clear therefore, that in appearing to bind the territory of Tanganyika for all time, the United Kingdom was trying to do something which it did not have the power to do". When in 1962 Tanganyika gave notice of her request for the evacuation of the sites, Congo (Léopoldville), Rwanda and Burundi, which had all now attained independence, countered by claiming to have succeeded to Belgium's rights under the Agreements. Tanganyika then proposed that new arrangements should be negotiated for the use of the port facilities, to which the other three successor States assented; but it seems that no new arrangement has yet been concluded and that *de facto* the port facilities are being operated as before.[397]

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

(35) In the context, at any rate, of military bases, the relevance of the limited character of an administering Power's competence seems to have been conceded by the United States in connexion with the bases in the West Indies granted to it by the United Kingdom in 1941; and this in relation to the limited competence of a *colonial* administering Power. In the agreement the bases were expressed to be leased to the United States for 99 years. But on the approach of the West Indies territories to independence the United States took the view that it could not, without exposing itself to criticism, insist that restrictions imposed upon the territory of the West Indies while it was in a colonial status would continue to bind it after independence.[398] The West Indies for its part maintained that "on its independence it should have the right to form its own alliances generally and to determine for itself what military bases should be allowed on its soil and under whose control such bases should come".[399] In short, it was accepted on both sides that the future of the bases must be a matter of agreement between the United States and the newly independent West Indies. In the instant case it will be observed that there were two elements: (*a*) the grant while in a colonial status and (*b*) the personal and political character of military agreements. An analogous case is the Franco-American Treaty of 1950 granting a military base to the United States in Morocco before the termination of the protectorate. In that case, quite apart from the military character of the agreement, Morocco objected that the agreement had been concluded by the protecting Power without any consultations with the protected State and could not be binding on the latter on its resumption of independence.[400]

(36) Treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties. Among early precedents cited is the right of navigation on the Mississippi granted to Great Britain by France in the Treaty of Paris, 1763 which on the transfer of Louisiana to Spain, the latter acknowledged to remain in force.[401] The provisions concerning the Shatt-el-Arab in the Treaty of Erzerum, concluded in 1847 between Turkey and Persia are also cited. Persia, it is true, disputed the validity of the treaty. But on the point of Iraq's succession to Turkey's right under the treaty no question seems to have been raised.[402] A modern precedent is Thailand's rights of navigation on the River Mekong, granted by earlier treaties and confirmed in a Franco-Siamese treaty of 1926. In connexion with the arrangements for the independence of Cambodia, Laos and Viet-Nam, it was recognized by these countries and by France that Thailand's navigational rights would remain in force.[403]

(38) As to water rights, a major modern precedent is the Nile Waters Agreement of 1929 concluded between Great Britain and Egypt which *inter alia* provided:

Save with the previous agreement of the Egyptian Government no irrigation or power works or measures are to be constructed

[395] United Nations, *Materials on Succession of States (op. cit.)*, pp. 187-188.

[396] E. T. Seaton and S. T. M. Maliti, *loc. cit.*, para. 119.

[397] D. P. O'Connell, *State Succession . . .*, vol. II, p. 243.

[398] A. J. Esgain, "Military servitudes and the new nations", in W. V. O'Brien, ed., *The New Nations in International Law and Diplomacy* (*The Yearbook of World Polity*, vol. III) (New York, Praeger, 1965), p. 78.

[399] *Ibid.*, p. 79.

[400] *Ibid.*, pp. 72-76.

[401] D. P. O'Connell, *State Succession . . .*, vol. II, p. 234. Another early precedent cited is the grant of navigation rights to Great Britain by Russia in the Treaty of 1825 relating to the Canadian-Alaska boundary, but it is hardly a very clear precedent (*ibid.*, pp. 235-237).

[402] *Ibid.*, pp. 247-248.

[403] *Ibid.*, pp. 251-252.

or taken on the River Nile or its branches, or on the lakes from which it flows, *so far as all these are in the Sudan or in countries under British administration** which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.[404]

The effect of this provision was to accord priority to Egypt's uses of the Nile waters in the measure that they already existed at the date of the agreement. Moreover, at that date not only the Sudan but Tanganyika, Kenya and Uganda, all riparian territories in respect of the Nile river basin, were under British administration. On attaining independence the Sudan, while not challenging Egypt's established rights of user, declined to be bound by the 1929 agreement in regard to future developments in the use of Nile waters.[405] Tanganyika, on becoming independent, declined to consider herself as in any way bound by the Nile Waters Agreement. She took the view that an agreement that purported to bind Tanganyika for all time to secure the prior consent of the Egyptian Government before it undertook irrigation or power works or other similar measures on Lake Victoria or in its catchment area was incompatible with her status as an independent sovereign State. At the same time, she indicated her willingness to enter into discussions with the other interested Governments for equitable regulation and division of the use of the Nile waters. In reply to Tanganyika's Note the United Arab Republic, for its part, maintained that "pending further agreement, the 1929 Nile Waters Agreement, which has so far regulated the use of the Nile waters, remains valid and applicable." In this instance, again, there is the complication of the treaty's having been concluded by an administering Power, whose competence to bind a dependent territory in respect of territorial obligations is afterwards disputed on the territory's becoming independent.

(38) Analogous complications obscure another modern precedent, Syria's water rights with regard to the River Jordan. On the establishment of the mandates for Palestine and Syria after the First World War, Great Britain and France entered into a series of agreements dealing with the boundary régime between the mandated territories, including the use of the waters of the River Jordan. An agreement of 1923 provided for equal rights of navigation and fishing,[406] while a further agreement of 1926 stated that

All rights derived from local laws or customs concerning the use of the waters, streams, canals and lakes for the purposes of irrigation or supply of water for the inhabitants shall remain as at present. [407]

These arrangements were confirmed in a subsequent agreement. After independence, Israel embarked on a hydro-electric project which Syria considered incompatible with the régime established by the above-mentioned treaties. In debates in the Security Council Syria claimed that she had established rights to waters of the Jordan in virtue of the Franco-British treaties, while Israel denied that she was in any way affected by treaties concluded by the United Kingdom. Israel, indeed, denies that she is either in fact or in law a successor State at all.[408]

(39) Some other examples of bilateral treaties of a territorial character are cited in the writings of jurists, but they do not seem to throw any clearer light on the law governing succession in respect of such treaties.[409] Mention has, however, to be made of another category of bilateral treaties which are sometimes classified as "dispositive" or "real" treaties. These are treaties which confer specific rights of a private law character on nationals of a particular foreign State; e.g. rights to hold land. The United States, for example, has in the past regarded such treaties as dispositive in character for the purposes of the rules governing the effect of war on treaties.[410] Without entering into the question whether such a categorization of these treaties is valid in that context, the Special Rapporteur doubts whether there is any sufficient evidence that they are to be regarded as treaties of a dispositive or territorial character under the law governing succession of States in respect of treaties. Whatever dispositive effects such treaties may have in international law, they do not seem to have been regarded as territorial treaties for the purposes of succession.

(40) There remain, however, those treaties of a territorial character which were discussed by the Commission in 1964 at its sixteenth session under the broad designation of "treaties providing for objective régimes" in the course of its work on the general law of treaties. The Special Rapporteur's examination of those treaties from the point of view of their effects upon third States may be found in his third report on the law of treaties.[411] It is now, however, necessary to consider how they may affect a successor State the position of which, by reason of its special link with the territory that is the subject of the treaty, is somewhat different from that of a third State. Reference has already been made to two of the principal precedents [412] above in discussing the evidence on this question to be found in the proceedings of international tribunals. These are the *Free Zones Case* and the *Aaland Islands question* in both of which the tribunal considered the successor State to be bound by a treaty régime of a territorial character established as part of a "European settlement".

(41) An earlier case involving the same element of a treaty made in the general interest concerned Belgium's position, after her separation from the Netherlands, con-

[404] United Nations, *Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for other Purposes than Navigation* (United Nations publication, Sales No. 63.V.4), p. 101.

[405] D. P. O'Connell, *State Succession* . . . , vol. II, pp. 245-246.

[406] See United Nations, *Legislative Texts and Treaty Provisions... (op. cit.)*, p 287.

[407] *Ibid.*, p. 288.

[408] D. P. O'Connell, *State Succession* . . . , vol. II, p. 249.

[409] e.g., certain Finnish frontier arrangements, the demilitarization of Hüningen, the Congo leases, etc. (*ibid.*, pp. 234-262).

[410] See Harvard Law School, *Research in International Law: III. Law of Treaties.* Supplement to *American Journal of International Law* (Washington, D.C.), vol. 29, No. 4, October 1935.

[411] *Yearbook of the International Law Commission, 1964*, vol. II, pp. 26-34, document A/CN.4/167 and Add.1-3, commentary to article 63.

[412] See paras. 14-16 above.

cerning the obligations of the latter provided for by the Peace Settlements concluded at the Congress of Vienna with respect to frontier fortresses on the Franco-Netherlands boundary.[413] The Four Powers (Great Britain, Austria, Prussia and Russia) apparently took the position that they could not "admit that any change with respect to the interests by which these arrangements were regulated, has resulted from the separation of Belgium and Holland; and the King of the Belgians is considered by them as standing with respect to these Fortresses and in relation to the Four Powers, in the same situation, and bound by the same obligations, as the King of the Netherlands previous to the Revolution".[414] Although Belgium questioned whether she could be considered bound by a treaty to which she was a stranger, she seems in a treaty of 1831 to have acknowledged that she was in the same position as the Netherlands with respect to certain of the frontier fortresses. Another such case is article XCII of the Act of the Congress of Vienna,[415] which provided for the neutralization of Chablais and Faucigny, then under the sovereignty of Sardinia. These provisions were connected with the neutralization of Switzerland effected by the Congress and Switzerland had accepted them by a Declaration made in 1815. In 1860, when Sardinia ceded Nice and Savoy to France, both France and Sardinia recognized that the latter could only transfer to France what she herself possessed and that France would take the territory subject to the obligation to respect the neutralization provisions. France, on her side, emphasized that these provisions had formed part of a settlement made by the Powers in the general interests of Europe.[416] The provisions were maintained in force until abrogated by agreement between Switzerland and France after the First World War with the concurrence of the Allied and Associated Powers recorded in article 435 of the Treaty of Versailles.[417] France, it should be mentioned, had herself been a party to the settlements concluded at the Congress of Vienna, so that it could be argued that she was not in the position of a purely successor State. Even so, her obligation to respect the neutralization provisions seems to have been discussed simply on the basis that, as a successor to Sardinia, she could only receive the territory burdened with those provisions.

(42) The concept of international settlements is also invoked in connexion with the régimes of international rivers and canals. Thus, the Berlin Act of 1885 established régimes of free navigation on both the Rivers Congo and Niger; and in the former case the régime was regarded as binding upon Belgium after the Congo had passed to her by cession. In the Treaty of St. Germain-en-Laye of 1919 some only of the signatories of the 1885 Act abrogated it as between themselves, substituting for it a preferential régime; and this came into question before the Permanent Court of International Justice in the *Oscar Chinn* case. As pointed out in a textbook, Belgium's succession to the obligations of the 1885 Act appears to have been taken for granted by the Court in that case.[418] The various riparian territories of the two rivers have meanwhile become independent States, giving rise to the problem of their position in relation to the Berlin Act and the Treaty of St. Germain. In regard to the Congo the problem has manifested itself in GATT and also in connexion with association agreements with EEC. Although the States concerned may have varied in the policies which they have adopted concerning the continuance of the previous régime, they seem to have taken the general position that their emergence to independence has caused the Treaty of St. Germain and the General Act of Berlin to lapse. In regard to the Niger, the newly independent riparian States in 1963 replaced the Berlin Act and the Treaty of St.Germain with a new convention. The parties to this convention "abrogated" the previous instruments as between themselves. In the negotiations preceding its conclusion there seems to have been some difference of opinion as to whether abrogation was necessary; but it was on the basis of a fundamental change of circumstances rather than of non-succession that these doubts were expressed.[419]

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

(44) The question of succession of States has also been raised in connexion with the Suez Canal Convention of 1888. Egypt herself fully accepted that, as successor to the Ottoman Empire in the sovereignty of the territory, she was under an obligation to respect the régime established by the Convention and in 1957 expressly reaffirmed that obligation. The Convention created a right of free passage through the Canal and, whether by virtue of the treaty or of the customary régime which developed from it, this right was recognized as attaching to non-signatories as well as signatories. Accordingly, although many new States have hived off from the parties to the Convention, their right to be considered successor States was not of importance in regard to the use of the Canal. In 1956, however, it did come briefly into prominence in connexion with the Suez Canal Users Conference convened in London. Complaint was there made that a number of States, who were not present, ought to have been invited to the Conference; and, *inter alia*, it was said that some of those States had the right to be present in the capacity of successor States of one or other party

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[413] D. P. O'Connell, *State Succession* . . . , vol. II, pp. 263-264.

[414] *Ibid.*, p. 263.

[415] *British and Foreign State Papers, 1814-1815* (London, Foreign Office, 1839), pp. 45-46.

[416] D. P. O'Connell, *State Succession* . . . , vol. II, p. 239.

[417] *British and Foreign State Papers, 1919*, vol. 112 (London, H. M. Stationery Office, 1922), p. 206.

[418] D. P. O'Connell, *State Succession* . . . , vol. II, p. 308.

[419] T. O. Elias, "The Berlin Treaty and the River Niger Commission", *American Journal of International Law* (Washington), vol. 57, No. 4 (October 1963), pp. 879-880.

to the Convention.[420] The matter was not pushed to any conclusion, and the incident can at most be said to provide an indication in favour of succession in the case of an international settlement of this kind.

(45) Some further precedents of one kind or another might be examined, but it is doubtful whether they would throw any clearer light on the difficult question of territorial treaties. Running through the precedents and the opinions of writers are strong indications of a belief that certain treaties attach a régime to territory which continues to bind it in the hands of any successor States. Not infrequently other elements enter into the picture, such as an allegation of fundamental change of circumstances or the alleged limited competence of the predecessor State, and the successor State in fact claims to be free of the obligation to respect the régime. Nevertheless, the indication of the general acceptance of such a principle remain. At the same time, neither the precedents nor the opinions of writers give clear guidance as to the criteria for determining when this principle operates. The evidence does not, however, suggest that this exception to the "clean slate" and moving treaty frontier principles, assuming that it is recognized by the Commission, should embrace a very wide range of so-called territorial treaties. On the contrary, this exception seems to be limited to cases where one State by treaty grants, in respect of its territory or a particular part, rights of user or enjoyment, or rights to restrict its own user or enjoyment, which are intended for an indefinite or for a specified period to attach to the territory or particular parts of the territory of another State rather than to the other State as such, or, alternatively, to be for the benefit of a group of States or of States generally. There must, in short, be something in the nature of a territorial settlement.

(46) In any event, the question arises here, as in the case of boundary settlements, whether, if succession seems *ipso jure*, it is succession in respect of the treaty as such or succession in respect of the factual and legal situation —the régime—established by the dispositive effects of the treaty. The evidence would, it is thought, justify either approach; but it seems preferable that whichever approach is adopted by the Commission in regard to boundary settlements should also be adopted in regard to other forms of territorial settlements. Accordingly, the Special Rapporteur has prepared alternative texts also for article 22 *(bis)*.

[420] United Nations, *Materials on Succession of States (op. cit.)*, pp. 157-158; D. P. O'Connell, *State Succession* . . . , vol. II, pp. 271-272.