Document:-

A/CN.4/275 and Add.1 & 2

Observations of Member States on the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-fourth session

Topic:

Succession of States with respect to treaties

Extract from the Yearbook of the International Law Commission:-

1974, vol. II(1)

ANNEXES

ANNEX I

Observations of Member States on the draft articles on succession of States in respect of treaties adopted by the Commission at its twenty-fourth session *

CONTENTS

NOTE

For the text of the draft articles on succession of States in respect of treaties, see *Yearbook ... 1972*, vol. II, p. 230, document A/8710/Rev.1, chap. II, sect. C.

Austria

TRANSMITTED BY A LETTER DATED 11 OCTOBER 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original: English*]

The Austrian Federal Government concurs with the opinion expressed by the International Law Commission that the preparation of draft articles has been the most appropriate and effective method of studying and identifying the rules of international law relating to succession of States in respect of treaties. As divergent views on this matter have in the past been expounded by eminent scholars of international law it is an important task to arrive at a solution of the problems arising in connexion with the sucession of States in respect of treaties which will gain as widespread an acceptance as possible by the international community.

The present provisional draft articles adopted by the International Law Commission represent basically a system which has, *inter alia*, already been propounded by American jurists. Austria therefore entirely agrees with the general outline as well as the basic content of these draft articles. A specific comment on *article* 15, paragraph 2, stipulating that a newly independent State may, under certain conditions, formulate a new reservation when establishing its status as a party or a contracting State to a multilateral treaty under *article 12* or *13* has, however, to be made. The idea embodied in this provision seems to arise from a misunderstanding of the concept of succession. A new State inherits conventions in precisely the same state in which they apply to its territorial predecessor and therefore inherits the latter's reservations. It may waive these reservations because that is also the right of its predecessor, but it may not make new ones since its predecessor cannot do so. If a newly independent State wishes to make reservations it ought to, in the view of Austria, use the process of ratification or accession to become a party to the multilateral treaty.

Czechoslovakia

TRANSMITTED BY A *note verbale* OF 11 OCTOBER 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original: English*]

1. It can be stated that the submitted draft of the articles on succession of States in respect of treaties, prepared by the International Law Commission, reflects in its subject the current international practice, proceeds from the requirements of newly established States and is in harmony with the fundamental principles of current international law, particularly the principles of sovereign equality of States and self-determination of nations. Therefore the draft can, in substance, be regarded as a good foundation for a future codification of the questions involved. In this connexion the Czechoslovak authorities would wish to note that, quite naturally, there is a close connexion with the problems involved in the succession of States in respect of treaties and the other questions of succession of States, and that, therefore, in elaborating on individual problems of the succession of States, it is necessary to proceed consistently from the same principles and to respect the necessity for a balanced relationship between individual cases of succession.

2. In giving consideration to the articles on succession of States in respect of treaties, the Czechoslovak authorities have a favourable view of particularly the clean-slate principle on which the substance of the draft is based, applied to the relation of States which emerged from former dependent territories to the international treaties concluded by their former metropolitan powers, under which such a newly independent State is not committed to the treaties concluded by former metropolitan powers. In this connexion, however, the Czechoslovak authorities wish to point to the fact that new States come into existence not only in the process of decolonization, but also by other ways. In this context, the Czechoslovak authorities would like to draw attention to the States which came into being as a result of a social revolution. Proceeding from this fact, the Czechoslovak authorities note that the definition of "newly independent State" contained in *article 2*, paragraph 1 (*f*), does not cover all the possibilities and hold that the formulation in question

* The observations reproduced in this annex were circulated in documents A/CN.4/275 and Add.1-2, A/CN.4/L.205 and A/9610/Add.1 and 2.

should be supplemented in the above sense or possibly, after appropriate modification of paragraph 1 (*d*) of the same article dealing with the term "successor State," be deleted from the draft.

3. The proposed draft does not touch upon the question of the relation between recognition and succession of States. As is evident from experience, however, inasmuch as a refusal of recognition may be used for the purpose of preventing the successor State from making use of the rights ensuing in respect of that State from succession, it would be useful to specify in the draft that succession in respect of multilateral international treaties under conditions contained in the draft articles exists irrespective of whether the new State is or is not recognized by all other States parties to the treaty in question.

4. As concerns other comments and notes on individual draft articles, the Czechoslovak authorities wish to point out the following:

(a) *Article 2*, paragraph 1 (*e*) clarifies the term of time when succession of States starts. In the opinion of the Czechoslovak authorities it would be appropriate in this connexion to take into consideration the fact that a succession of States is part of a certain process which the successor State undergoes and to give thought to a formulation that would allow an undisputable determination of the moment when succession starts.

(b) *Article 27* deals with the succession in respect of treaties of those States that were newly established following a disintegration of a former State formation. In the opinion of the Czechoslovak authorities the clean-slate principle should be set in such cases as a rule. The present formulation, which refers to this principle in paragraph 2 as an exception only, is insufficient. (Czechoslovakia, which came into exitence in 1918 as an independent State upon the disintegration of Austria-Hungary proceeded from the "clean-slate" principle in its practice.)

(*c*) *Article 30* regulates the question of other territorial régimes in relation to succession. In the opinion of the Czechoslovak authorities it would be suitable to amend the formulation of the article so as to make it evident that the provision concerns such territorial régimes that serve the interests of international co-operation and are in accordance with international law and the United Nations Charter and to exclude any misuse of the application of the article in favour of régimes established by treaties based on inequality of rights.

(d) *Article 31* is evidently based on article 73 of the Vienna Convention[a] and the Czechoslovak authorities have no objections of principle to its inclusion. They cannot agree, however, with the article mentioning "occupation of territory." As a rule, occupation of a territory results from the use or threat of force prohibited by current international law. Accordingly, a formulation of the article including an occupation of territory would not be in harmony with the above principle of international law which is among the most important, not mentioning the fact that a military occupation has always been regarded as a temporary situation which does not change anything in the international status of the occupied territory. A question arises, therefore, what does occupation have in common with a succession of States? Proceeding from the above arguments, it is recommended that the reference to occupation of territory be deleted from the draft. The Czechoslovak authorities also point out in this context that there is no such reference in article 73 of the Vienna Convention.

[a] For all references to the Vienna Convention on the Law of Treaties (hereafter referred to as the Vienna Convention), see *Official Records of the United Nations Conference on the Law of Treaties, Documents of the Conference* (United Nations publication, Sales No. E.70.V.5), p. 289.

Denmark

TRANSMITTED BY A *note verbale* OF 19 NOVEMBER 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original: English*]

It is the opinion of the Danish Government that the present attempt at codification of the topic on State succession in respect of treaties is generally acceptable with respect not only to the structuring and delimitation of the draft, which underscore the relationship with the Vienna Convention on the Law of Treaties, but also to the individual articles. Particularly the implications of the "clean-slate" principle in relation to bilateral treaties should today—in the light of the practice of States and the basic principle of equal rights and self-determination of peoples—be considered accepted customary rules of international law. This view is also in keeping with the practice observed so far in Denmark when dealing with specific cases of treaty succession.

The proposed draft articles may be used in the preparation either of a convention on the topic or of a code which is not legally binding.

In the opinion of the Danish Government it seems preferable to aim at the adoption of a legally binding convention. The fact that a convention, as a result of the general rule on non-retroactivity of treaties, will normally not be binding upon a successor State in respect of its own terms of succession is hardly a sufficient argument against using the convention as an instrument, as has also been pointed out by the International Law Commission.[a] A convention rather than a non-binding code may serve more adequately to determine what shall be considered generally accepted international law regarding succession in respect of treaties and consequently be a guide to all States. A convention will moreover, in any event, be binding in the relationship which, with respect to State succession emerges between a predecessor State and third States when these States have become parties to the convention. It might finally be considered whether to insert in a prospective convention an optional clause on retroactivity relative to new States.

If the convention is chosen as the instrument of the present codification the Danish Government will be of the opinion that the draft, as has also been suggested by members of the International Law Commission,[b] ought to be supplemented with provisions on the settlement of disputes stemming from the application or interpretation of the draft rules. Such provisions may ensure uniform understanding of the adopted rules.

The Danish Government reserves the right to submit its commentary to the individual articles at a later date.

[a] *Yearbook . . . 1972*, vol. II, p. 228, document A/8710/Rev.1, para. 41.

[b] *Ibid.*, p. 229, document A/8710/Rev.1, para. 50.

Ethiopia

TRANSMITTED BY A LETTER DATED 15 MAY 1974 FROM THE PERMANENT MISSION OF ETHIOPIA TO THE UNITED NATIONS

[*Original: English*]

I have the honour to refer to the report of the International Law Commission on the work of its twenty-fourth session and, in particular, to its commentary on the text of its draft articles on the succession of States in respect of treaties relating to boundary régimes.

Referring to the grazing provisions of the 1897 Anglo-Ethiopian Agreement relating to the boundary between Ethiopia and the former British Somaliland Protectorate, the Commission, in its commentary to draft articles 29 and 30, states that Ethiopia "declined to recognize that the ancillary provisions, which constituted one of the

conditions of that settlement, would remain binding upon it."[a] In that same commentary, the Commission also mentions that Somalia has denounced the Agreement "in response to Ethiopia's unilateral withdrawal of the grazing provisions . . ."[b] The Government of Ethiopia takes exception to these passages in the Commission's commentary.

In clarifying the position of my Government, I would like to inform you that at no time has the Government of Ethiopia stated that it is not bound by the grazing arrangements of the 1897 Anglo-Ethiopian Agreement. Neither has it taken any action to withdraw those arrangements. The Government of Ethiopia has at all times been consistent in its position that the boundary clauses as well as the grazing provisions of the 1897 Anglo-Ethiopian Agreement remain valid and that they are binding upon both Ethiopia and Somalia.

Furthermore, the Commission refers to the view of the United Kingdom expressed following the termination of its responsibilities for the Protectorate that the boundary and the grazing provisions of the 1897 Anglo-Ethiopian Agreement remain in force but that only the "special arrangement" of the 1954 Anglo-Ethiopian Agreement would lapse. Such also has been and still is the position of the Government of Ethiopia.

The Government of Ethiopia, prior to the termination of the Somaliland Protectorate, had notified the Government of the United Kingdom that the "special arrangement" of the 1954 Agreement would automatically come to an end. That notification has been considered as an official expression of the position of the Government of Ethiopia that all the provisions of the 1897 Agreement together with the grazing arrangements remain valid and unimpaired. No subsequent events have taken place to warrant any suggestion to the effect that the Government of Ethiopia has terminated the grazing arrangements.

I would be grateful if you would kindly transmit the foregoing observations of my Government to the International Law Commission and I wish to express the hope that the Government will take into account those observations in preparing its commentary to articles 29 and 30 in its final report on the succession of States in respect of treaties.

[a] Para. 12 of the commentary to draft articles 29 and 30.

[b] The text of the sentence as it appears in the Committee's report reads as follows: "Somalia does not seem to have claimed that, as a successor State, it was *ipso jure* freed from any obligation to respect the boundaries established by treaties concluded by its predecessor State though it did denounce the 1897 Anglo-Ethiopian Treaty in response to Ethiopia's unilateral withdrawal of the grazing rights mentioned below."

German Democratic Republic

TRANSMITTED BY A LETTER DATED 5 DECEMBER 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original: English*]

1. The Ministry of Foreign Affairs of the German Democratic Republic welcomes the provisional draft articles on succession of States in respect of treaties presented by the International Law Commission and, in general, considers them to be a suitable basis for a future codification of the questions of succession of States. In this connexion, however, it is deemed necessary to underline the close interrelation which no doubt exists between succession in respect of treaties and succession in respect of matters other than treaties. Proceeding from the fact that succession of States is a homogeneous institution of international law, the Ministry of Foreign Affairs of the German Democratic Republic expresses itself in favour of a single convention comprising both aspects of State succession; in case separate regulations were to be adopted, at least uniform principles should be established in their texts.

2. The Ministry of Foreign Affairs of the German Democratic Republic considers with regard to State succession in general that it is a matter important for the development of international relations, both as a result of national liberation and social revolution and of the uniting, separation or dissolution of States. Future rules on succession of States should facilitate the entry into international relations of the successor State and should therefore be such as to enable the latter to enjoy its rights as a sovereign, equal State without hindrance or delay. At the same time it is in the interest of all States that cases of State succession should not disturb international treaty and other relations which were established in accordance with the principles of international law in force and that the previous state of such relations should be maintained.

3. The provisional draft articles on succession of States in respect of treaties proceed from the principle of clean slate in cases of succession resulting from decolonization. In the view of the Ministry of Foreign Affairs of the German Democratic Republic this is a basically correct point of departure in this context. In its hard core the draft covers decolonization comprehensively, but it does not sufficiently take account of the fact that the process of decolonization has come to its end, save for a few exceptions. Therefore, it appears appropriate to call attention to the fact that new States may also emerge by way of social revolution and that the same principles should be applicable to them as are applied to States emerging by way of decolonization. Bearing this in mind, it is obvious that the term "newly independent State" contained in *article 2*, paragraph 1(*f*) is inadequate in these respects. The Ministry of Foreign Affairs of the German Democratic Republic holds the view that the term in question should be replaced with a notion of successor State which would cover all successor States in so far as they are new States. That means that those successor States which have emerged from social revolution should also be covered, along with those which have emerged from the uniting of States, the dissolution of States and from the separation of States.

4. Concerning the date of succession (*article 2*, paragraph 1 (*e*)) the draft leaves the question open at which date the succession occurs and who determines such date. Since, in international practice, succession normally takes place as a process, it would be advisable, to avoid any legal uncertainty, to include in the draft a formula which would stipulate unambiguously that the successor State, exercising the right of self-determination of its people, determines the date of succession and notifies that date to other States.

5. A clearer wording would seem to be necessary for the provisions of *article 12*, paragraph 2, and *article 13*, paragraph 2, according to which a successor State cannot notify its participation in a multilateral treaty in force or not yet in force, if the object and purpose of the treaty are incompatible with the participation of the successor State in that treaty. The Ministry of Foreign Affairs of the German Democratic Republic does not hold the present version adequate to exclude arbitrary hindrance of successor States from becoming parties to treaties.

6. The Ministry of Foreign Affairs of the German Democratic Republic is for several reasons not in a position to accept the establishment of the principle of *ipso jure* continuity in the case of the dissolution of a State as envisaged in draft *article 27*. Unlike uniting (*article 26*), the dissolution of a State, as a rule, takes place without a treaty, that means against the will of the existing State. In terms of social conditions any such States are new States whose position after succession must, as a matter of principle, not be inferior to that of "newly independent States." It is therefore hard to understand why article 27 contains the same provisions as article 26. Though article 27, paragraph 2, provides for exceptions from *ipso jure* continuity, thus allowing a limited option for the successor State, this is certainly not satisfactory. As dissolutions of States can, in essence, be compared with decolonization rather than with the uniting of States, it is the opinion of the Ministry of Foreign Affairs of the German Democratic Republic that the principle of clean slate should be established here as a rule and not as an exception.

Besides, the Ministry of Foreign Affairs of the German Democratic Republic wishes to underline its position that the interest in having largely preserved the existing state of international treaty relations in so far as these have come about in conformity with the established principles of international law, should receive more attention in the draft.

7. The Ministry of Foreign Affairs of the German Democratic Republic fully supports the automatic succession into boundary treaties as provided for in *article 29*. The same holds true for the same principle in respect of other territorial régimes as contained in *article 30*. As far as *article 30* is concerned, it has to be added, however, that the present version is not satisfactory because practically it may be used to justify the existence of those territorial régimes which came into being and continue to exist on the basis of unequal treaties. In the view of the Ministry of Foreign Affairs of the German Democratic Republic that article should, therefore, be supplemented to the effect that its provisions would regulate State succession only in the case of territorial régimes which serve the interests of peaceful international co-operation in accordance with the purposes and principles of the Charter of the United Nations.

8. The present draft of the International Law Commission does not refer to the relationship between recognition and State succession. The position of the Ministry of Foreign Affairs of the German Democratic Republic on this point is that the absence of recognition of a successor State must not result in that State being prevented from or hindered in exercising the rights and obligations ensuing from succession. Apart from succession in respect of bilateral treaties, which can hardly be realized without mutual recognition, the Ministry of Foreign Affairs of the German Democratic Republic would deem it necessary to include in the draft articles a provision making it clear that succession in respect of multilateral treaties occurs independently of the recognition of a State. This would also take account of the generally recognized principle of international law that the international personality of a State exists independently of its recognition. In the opinion of the Ministry of Foreign Affairs of the German Democratic Republic a formula patterned on article 74 of the Vienna Convention could be adequate for this purpose.

Kenya

TRANSMITTED BY A *note verbale* OF 26 APRIL 1974 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[*Original: English*]

The comments of the Kenya Government were made by the Kenya representative to the Sixth Committee on 6 October 1972, during the debate on the item.[a] Nevertheless, the Kenya Government wishes to put on record its views with respect to article 29 of the International Law Commission draft on boundary régimes, which states as follows:

> "A succession of States shall not as such affect:
>
> "(*a*) a boundary established by a treaty; or
>
> "(*b*) obligations and rights established by a treaty and relating to the régime of a boundary."

It has become necessary to comment on the above article, to which the Kenya Government fully subscribes, in view of the observations made by the Somali Democratic Republic, on its specific application, *inter alia*, to the Somali-Kenya boundary.[b]

It is the opinion of the Kenya Government that the International Law Commission took the correct legal position on boundary régimes as reflected in the draft article 29 and the commentary thereon, because the purpose of a boundary treaty is to mark out with precision the limits of a particular State sovereignty. Once this is done, the relevance of the treaty, except for evidentiary purposes, disappears. When succession of a State, i.e. . . . "when the replacement of one State by another in the responsibility for the international relations of territory . . ." takes place, the successor State steps into the shoes of the predecessor State in so far as the State's boundaries are concerned, not because of the boundary treaty, but because of the very existence of the boundaries as a fact, delimiting the predecessor State's sovereignty. It is irrelevant and confusing to bring in the issue of self-determination in such a situation in this context, as the Somali Democratic Republic seeks to do.

When the report of the International Law Commission was discussed by the General Assembly during the adoption of the resolution of the Sixth Committee on the item, the Somali representative, in the explanation of his country's vote, made a statement containing arguments similar to those contained in their *note verbale*. This prompted a reply from the Permanent Representative of Kenya who stated as follows:

> "In explaining the vote of my delegation, we should like to reiterate our position in connexion with article 29 on boundary régimes. We fully subscribe to the conclusions of the International Law Commission in that article. A State can only succeed to the territory previously held by its predecessor. In our opinion, this has nothing to do with the exercise of self-determination: it is purely a matter of one State succeeding to the sovereignty formerly exercised by another State over a given territory.
>
> "The inviolability of existing treaties has been fully recognized and enshrined in the Charter of the Organization of African Unity; it is a principle which the International Law Commission has also endorsed; and it is the guiding principle of the Government of Kenya.
>
> "As far as the Kenya-Somali boundary is concerned, there is absolutely no room for dispute: the boundary was clearly demarcated by the Anglo-Italian Treaty of 1924, and we stand by that boundary—not because it was concluded by the colonialists, but because it clearly spells out the areas of sovereignty of the two States. Our full position on this subject was reiterated in the statement we made before the Sixth Committee, which we should like to incorporate by reference into the record of this meeting."[c]

The principle of the respect for the sovereignty and territorial integrity of each State and the inviolability of existing boundaries has been enshrined, not only in the Charter of the United Nations, but also in the charter of the Organization of African Unity, and the charters of various other regional bodies. In the Organization of African Unity resolution A.H.G./Res. 16 (1), the assembly of Heads of State and Government meeting in the First Ordinary Session in Cairo, restated the pledge of all the member States:

> "1. Solemnly reaffirms the strict respect by all Member States of the Organization for the principles laid down in paragraph 3 of Article III of the Charter of the Organization of African Unity;
>
> "2. Solemnly declares that all Member States pledge themselves to respect the borders existing on their achievement of national independence."

This is a pledge by which the Kenya Government will always abide with respect to its neighbours and which it expects all the other States to respect.

[a] *Official Records of the General Assembly, Twenty-seventh Session, Sixth Committee*, 1324th meeting, paras. 5-11.

[b] See below, Somalia, *note verbale* of 6 June 1973.

[c] *Officials Records of the General Assembly, Twenty-seventh Session, Plenary Meetings*, 2091st meeting

Netherlands

TRANSMITTED BY A *note verbale* OF 9 APRIL 1974 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original: English*]

General remarks

1. The Netherlands Government welcomes the present set of 31 draft articles in an important field of international law, in which up to the present time few generally accepted rules could be discerned; State practice has shown a considerable variety of conduct in this field. Therefore the present project undertaken by the International Law Commission, that is to codify and develop the law of State succession to treaties, is an important and difficult one.

2. The Commission has rightly considered the question of the effects of a State's succession to treaties as falling within the framework of the law of treaties.[a] It states that the present draft articles "presuppose the existence of the provisions, wording and terminology of the Convention on the Law of Treaties."[b] In *article 15*, paragraph 3, an express reference is made to certain articles of the Vienna Convention. However it should be noted that article 73 of the Vienna Convention may be interpreted as excluding the applicability of all provisions of that Convention to cases of State succession. Accordingly the present articles should define *completely* the impact of State succession on treaties.

3. It is apparent that the Commission has primarily paid attention to the position of *newly independent States* vis-à-vis treaties concluded by their predecessor States for their territories prior to independence. In *part III* of the draft the rights of a successor State to *complete* the signature of its predecessor (by ratification, reservations, choice of different provisions) are carefully worked out. Such provisions are equally useful in the cases of State succession mentioned in *articles 26* and *27*.

4. The Commission has opted for a moderate version of the clean slate principle in respect of newly emerging States as one of the basic rules of the present draft. The Netherlands Government has carefully considered the question of the advisability of this approach. Continuity has carefully considered the question of the advisability of this approach. Continuity of treaty relations is a goal well worth pursuing, in the interest of both the newly emerging States and the treaty-partners of predecessor States. The Commission explains in its commentary that it has attempted to strike a balance between the well-recognized principle of self-determination of peoples and the fact of the "legal nexus" between the treaty régime and the territory of the new State prior to its independence. The Netherlands Government agrees with this approach. It would stress that the fact of the legal nexus points to the desirability of continuance of such treaties as are appropriate to be continued, for the benefit of both the new State and the treaty partners of its predecessor. In this respect, the Netherlands Government would suggest consideration of the possibility that certain general multilateral conventions of world-wide applicability, embodying important rules of international law, would escape the application of the clean slate rule. In cases where such conventions already were applicable in territory of a newly independent State prior to its independence, a presumption of *continuity*, together with the possibility to opt out, might be considered. The decision whether a certain convention would be subject to such a régime could be made by the General Assembly of the United Nations or by the diplomatic conference adopting the text of the convention in question.

5. It is clear that a "Convention on state succession in respect of treaties" would have great value as a *confirmation* of the rules of law in this field. This confirmative element will have to be stressed in the preamble to the Convention. In so far as the Convention would codify already accepted rules of general international law, a newly emerging State would be bound to those rules whether it was a party or not.[c]

6. One important, basic rule of the law of State succession to treaties is not clearly mentioned *as such* in the present draft. It is the general rule of treaty law that a treaty is binding upon a State party in respect of its entire territory, unless a different intention appears from the treaty or is otherwise established.[d] This rule is mentioned in the present draft only in the *articles 10*, paragraph (*a*) and *28*, paragraph 1. As it is a basic rule for the position of the States concerned in all cases of State succession where the predecessor State continues to exist (see, for instance, part III), or the successor State is an already existing State, it should be formulated as an "umbrella-article" before parts II, III and IV of the draft.

7. The continued validity of the treaties of the predecessor State for the remainder of its territory, as well as the continued applicability of its treaties in respect of successor States laid down in *articles 25* to *28*, are subject to an exception resulting from another important rule of treaty law, codified in article 62 of the Vienna Convention: the possibility of invoking a *fundamental change of circumstances* as a ground for termination of or withdrawal from a treaty. The Netherlands Government would assume that the fact of a State succession may well be *in itself* a fundamental (radical) change of circumstances, which may be invoked by *all* States concerned (predecessor State, successor State, other States parties), as an exception to continued applicability of a treaty. In this respect the draft might be more clear. The possibility of invoking a fundamental change of circumstances is mentioned only in articles 25 to 28, but should be clearly set out before the parts II, III and IV as a second "umbrella-article," covering, for instance, the case of article 10.

8. The principle of equality of all parties to a treaty is acknowledged by the Commission in *article 4: article 12*, paragraph 3; *article 13*, paragraph 3; *article 19*, and *articles 22 to 24*. Here it is not only the newly independent State which has the right to apply for admittance as a party, but the "other States parties" (of article 2, paragraph 1 (*m*)) rightly have a "say" in the matter of the continued applicability of their treaties in respect of a successor State. The Netherlands Government would suggest that this important principle be also acknowledged in other cases of State succession to multilateral treaties; in such a way that each "other State party" would have a right to *refuse* establishing relations under the treaty in respect of a certain successor State, *unless* this refusal would be incompatible with the object and purpose of the treaty, as would, for instance, be the case if the treaty allowed for participation by "all States".

9. Lastly, there is the important aspect of the *procedure* for settling disputes between the States parties to this convention on its application and interpretation. The Netherlands Government would strongly advise the drafting of articles on settlement of such disputes, analogous to articles 65 and 66 of the Vienna Convention.

Comments on separate articles

10. *Article 7*. The Netherlands Government would welcome a more positive attitude of the Commission towards devolution agreements between a predecessor State and its former dependent territories at the time they achieve independence. Such achievement of independence is in most cases the result of a gradual process of emancipation, in close co-operation between the still-administering State and the still-being-administered territory. The negative rule formulated in article 7 is from a legal point of view of course quite correct, and even self-evident. Article 34 of the Vienna Convention embodies the same rule, but this article is followed by articles 35 and 36, in which the *positive* aspect is mentioned of treaties providing for rights or duties of third States. The Netherlands Government fails to see

[a] *Yearbook . . . 1972*, vol. II, p. 226, document A/8710/Rev.1, para. 32.

[b] *Ibid.*, para. 34.

[c] Cf. article 5; also article 43 of the Vienna Convention.

[d] See article 29 of the Vienna Convention.

why this positive aspect should be denied to devolution agreements if all the States parties concerned should agree to this. Devolution agreements can have a distinct value as an indication of the new State's awareness of which treaties were in force in respect of its territory at the time it became independent, and its willingness to continue them. Of course it is up to the "third State" to accept or decline this offer. (See the comments in paragraph 8 above in respect of the "third State's" right to object in cases of multilateral treaties.)

11. *Article 8.* The same applies to a great extent to unilateral declarations of new States, a practice much used by newly independent African States. Here too the positive aspect of such declarations, expressing the new State's awareness of the treaties which were in force in respect of its territory, and its willingness to continue them, should be more stongly emphasized.

12. *Article 12.* See the comments in paragraph 8 above on the right to object of the other States parties and in paragraph 4 above on the question of "inheritance *ipso jure*" of certain general law-making conventions, with a possibility to opt out.

13. *Article 13.* After comparing the proposal by the International Law Association[e] and the opposite proposal of the Commission on the question whether or not to count declarations or succession for the purpose of fixing the number of ratifications or accessions required for the entry into force of a treaty, the Netherlands Government accepts the choice of the Commission, as laid down in article 13, paragraph 4, as the most logical system. The *ratio* of the requirement is, after all, that a sufficient number of States declare their willingness to abide by the provisions of the treaty in question.

14. *Articles 17 and 18.* In reply to the Commission's question "whether any time-limit ought to be placed on the exercise of the option to notify succession to a multilateral treaty,"[f] the Netherlands Government would state that in *itself* a time-limit for declarations of succession would appear to be unnecessary (*cf.* the right of accession). However, if a declaration of succession is considered as having retroactive effect, as the Commission proposes in article 18, paragraph 2, this amounts to an important difference with declarations of accession. In order to avoid uncertainty as to the legal régime applying to the territory of the new State in the period between the date of succession and the date of the declaration of succession, the Netherlands Government could accept the retroactive effect of declarations of succession, *provided* they are subject to a time-limit. For this purpose the time-limit of one year (proposed by the Commission in article 24, paragraph 3 (*b*) as a "reasonable notice of termination" of provisional application) might be suitable. If the new State is not ready to state its position within that time, it still has the right to accede, with legal effect *ex nunc.*

15. *Article 19, paragraph 1* (b) recognizes the possibility of tacit continuation of bilateral treaties. The Netherlands Government, though in favour of any system that may promote continuity of legal relations between States, would point out that the desirability of a possible tacit continuation may differ according to the character of the treaty in question. From the point of view of legal security it is preferable that both the new State and the treaty-partner of the predecessor State *expressly* state their willingness to apply the treaty in the relations between them.

16. *Articles 22 to 24.* The same point is even more pressing in cases of *provisional application* of treaties. This possibility has the advantage of promoting continuity of treaty relations, but the disadvantage of promoting legal insecurity. Provisional application is seldom allowed for under the text of the treaty itself.[g] Therefore it is desirable that this exceptional way of applying a treaty is *expressly* agreed upon by the other State party and the successor State.

17. *Article 25.* In cases of union of two or more dependent territories into one newly independent State articles 12 to 21 are applicable. Treaties which are continued as a result of this application are, under article 25, considered as being in force for the *entire* territory of the new State. This means that the other States parties to treaties that were applicable in only one part of the new State prior to independence will be confronted with a much larger area of application than the area in respect of which they originally agreed to apply those treaties. They may well see objection to this in respect of certain treaties. This illustrates the point made by the Netherlands Government in paragraphs 7 and 8 above: the principle of equality of all parties to a treaty demands that in all cases of State succession mentioned in parts II, III and IV of the draft the other States parties have the right to *object* to continuation of their treaties vis-à-vis a successor State. The Netherlands Government would call attention to the possibility of *conflicting treaties* that were in force in the separate parts of the component State before the merger into one State. Such treaties cannot be applied at the same time in the entire territory of the new State. In such cases the component State will have to choose between issuing a declaration of succession to only one of the treaties, or letting both of them lapse.

18. *Articles 27 and 28.* These articles are of special interest to the Kingdom of the Netherlands. The Kingdom consists of three component countries: the Netherlands, the Netherlands Antilles and Surinam. If the Netherlands Antilles and Surinam in the near future become independent States, from a purely legal point of view article 27 of the present draft would be applicable, in view of the constitutional rules embodied in the *Statuut voor het Koninkrijk.* From a historical point of view, however, it might be more appropriate to apply article 28, paragraph 2, to the Antilles and Surinam and article 28, paragraph 1, to the Netherlands. Generally speaking, in most cases of dismemberment the personality of the original State is, from a historical point of view, continued by one of the component parts. Several treaties of the Kingdom have been concluded or denounced in respect of only one or two of the component parts; this is mentioned in the instrument of ratification or denunciation. If article 28 should be applied, it is not clear whether this case is covered by the words in paragraph 1 (*b*) "[unless] It appears from the treaty or from its object and purpose . . ." In that respect, the phrasing of article 29 of the Vienna Convention: "Unless a different intention appears from the treaty *or is otherwise established* * . . ." would seem better to serve the purpose.

19. *Articles 29 and 30.* The Netherlands Government agrees that certain treaties, fixing territorial régimes, should be inherited by the successor State. It would point out, however, that the reasons why this is desirable apply not only to *territorial* arrangements but also to certain treaties containing rules in respect of the fundamental legal position of the *population* of the territory in question, like treaties with respect to minorities, the right to opt for a particular nationality, and other treaties guaranteeing fundamental rights and freedoms to the population of the territory which is involved in a change of sovereignty.

* Italics supplied.

Pakistan

TRANSMITTED BY A *note verbale* DATED 12 SEPTEMBER 1974 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original: English*]

Article 2, paragraph 1 (e)*: Date of the succession of States*

Proposal: Some formula must be devised to determine the date of succession of States.

[e] See International Law Association, *Report of the Fifty-third Conference, Buenos Aires, 1968* (London, 1969), pp. 602-603.

[f] *Yearbook . . . 1972*, vol. II, p. 229, document A/8710/Rev.1, para. 51.

[g] One of the rare examples is the Protocol of Provisional Application of the London Fisheries Convention of 9 March 1964 (United Nations, *Treaty Series*, vol. 581, p. 76).

Comments: The definition, it seems, covers only the situation where the predecessor State has been replaced by the successor State peacefully on a definite date. In the case of succession of States after a protracted civil war, the time when the successor State becomes responsible for the international relations of territory is always open to varying interpretations. As the date of succession of States is an important factor so far as the rights, obligations, and responsibilities of the successor State are concerned, it is advisable that some formula for determination of the date of succession of States should be devised.

Article 2, paragraph 1 (h)*: Full powers*

Proposal: The words "a State" should be substituted by the words "the successor State", occurring after the words "competent authority of"—"Full powers means in relation to a notification of succession a document emanating from the competent authority of the successor State designating a person or persons to represent the State for making the notification."

Comments: The definition is in identity, as mentioned in the commentary, with the definition given in article 2, paragraph 1 (*c*), of the Vienna Convention. However, that provision is meant for the States in general, while the present provision speaks only of the successor State. Thus, it is preferable that the words "a State" after the words "competent authority of" be substituted by the words "the successor State" to avoid any ambiguity.

Article 6: Cases of succession of States covered by the present articles

Proposals: Delete the words "international law and, in particular" and add the word "as" between the words "law" and "embodied".

Comments: In draft article 6 it is stipulated that the transfer of territory brought about "in conformity with international law" and also in accordance with the "principles of international law embodied in the Charter of the United Nations," shall be covered by the present articles.

In these articles the succession of States can be brought about in two different ways:

(*a*) in accordance with generally accepted principles of international customary law; and

(*b*) in accordance with the principles laid down in the Charter of the United Nations.

However, it is a well-known fact that the principles of international law are not only uncertain but may also come into conflict with some of the provisions of the Charter. For instance, customary international law recognizes the principles of *debellatio*. This principle lays down that if, as a result of legal, as distinct from illegal, war, the international personality of one of the belligerents is totally destroyed, victorious powers may do one of three things:

(*a*) they may annex the territories of the defeated State or hand over portions of it to another State or States;

(*b*) they may leave it untouched as *territorium nullius* to be occupied by any other subject of international law;

(*c*) they may recognize one or several new subjects of international law in the area by creating such entities. In such cases they may recognize that entity or entities and then leave it to other subjects of international law who may be prepared to recognize this situation and treat one or all of them as successors of the defunct entity.

It may be noted that the Charter does not recognize any type of war as legal. The very purpose of the Charter was to abolish war and this is evident from the Preamble which reads, *inter alia:*

"... to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind,

"...

"*And for these ends*

"to practice tolerance and live together in peace with one another as good neighbours, and

"to unite our strength to maintain international peace and security, and

"to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest,

"..."

According to article 31, paragraph 2, of the Vienna Convention a preamble is always taken as an integral part of the text of the convention.

Apart from the Preamble to the Charter of the United Nations, Article 1 of the Charter further states that:

"The Purposes of the United Nations are:

"1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;

"..."

Further, according to Article 2, paragraphs 2, 3 and 4, of the Charter:

"2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter.

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

"4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

From the above-mentioned Article it becomes clear that the Charter recognizes the principles of sovereign equality of all States and prevents the use of force by one State against the territorial integrity of another sovereign State. The only case where the use of force is permitted under Charter is referred to in Article 51 which states, *inter alia*, that:

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations..."

As is clear from the language of Article 51, this right of use of force can only be exercised if there has actually been an aggression against the Member State.

It may further become apparent from Article 51 that this right of "individual or collective self-defence" is not an unlimited one. There are certain qualifications to it. For instance when "measures [are] taken by Members in exercise of this right of self-defence" the Member State is under an obligation to "immediately" report "to the Security Council" that such a situation has arisen and it is then left to the Security Council to take "such action as it deems necessary in order to maintain or restore international peace and security".

The Charter enumerates certain cases where States come into existence through peaceful means. These are embodied in Article 76, sub-paragraph *b* which states:

"to promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each

territory and its peoples and the freely expressed wishes of the peoples concerned, and as may be provided by the terms of each trusteeship agreement."

This Article envisages many situations, namely:

(*a*) where there is a duty on the trust State to prepare the Trust Territory for independence and grant independence when it feels that the time has come to do so;

(*b*) where the people of a certain Trust Territory express their desire for independence;

(*c*) where by special agreement it is provided that the Territory shall be granted independence under certain circumstances.

The twentieth century has witnessed another phenomenon—that of intervention. The powerful neighbouring States in their desire to extend their sphere of influence, instead of resorting to aggression usually take advantage of internal unrest in another neighbouring State and resort to inciting and aiding and abetting the insurgents with the aim of separating a part of that State and establishing a separate international personality. Sometimes such intervention even leads to a war thereby endangering peace and security in the world. This is also against the spirit of the Charter which guarantees sovereign equality of all States irrespective of their size or population. To prevent this sort of intervention it is proposed that while drafting further articles it must be made incumbent on the community of nations not to recognize a State that has come into existence as a result of intervention and which therefore should not take benefits that accrue under the draft articles on succession of States.

Article 7: Devolution agreements

Proposal: The following paragraph 3 should be added:

"3. This rule is without prejudice to the provisions of articles 29 and 30."

Comments: It is true that the devolution agreement does not create any legal nexus between the successor State and the other State parties to the treaties. However, this rule has conspicuous exceptions which have been embodied in articles 29 and 30.

Paragraph 2 of article 7 by using the words "... governed by the present articles," may give an impression that the above-mentioned exceptions as laid down in articles 29 and 30 are covered. However, the Commission's commentary is silent on the point. Thus, it becomes advisable, to avert any difference of opinion, to add paragraph 3 as proposed.

Article 15: Reservations

Proposal: Renumber sub-paragraphs (*a*) and (*b*) of paragraph 3 as follows:

Sub-paragraph (*a*) should be paragraph 3, and

Sub-paragraph (*b*) should be paragraph 4.

Comments: The form of paragraph 3 is improper. Sub-paragraph (*a*) deals with the formulation of a new reservation by a newly independent State, while sub-paragraph (*b*) talks of the objection by the newly independent State to a reservation made by another State party. As both sub-paragraphs deal with different aspects of reservations, it will be more proper to divide the provisions into two paragraphs.

Article 19: Conditions under which a treaty is considered as being in force

Comments: The applicability of paragraph 2 of this article: The clean slate principle in the case of a newly independent State is quite understandable. However, it is questionable to allow the other State party to absolve itself of its treaty obligations by the mere fact that a succession of States has taken place. The other State party will remain obliged to fulfil its treaty obligations if the successor State desires to continue such treaty in force.

Part V: Boundary régimes or other territorial régimes established by a treaty—articles 29 and 30.

The Pakistan Government, being aware of the catastrophic results of making the boundaries established under a treaty challengeable by the mere fact that a succession of States has taken place, fully supports the existence of article 29. It has proposed certain amendments to the previous articles and also the addition of paragraphs to give added strength to the provisions of article 29, and also to avoid any contrary interpretations.

To challenge territorial régimes established under treaties, as mentioned in article 30, would mean creating a chaos in international relations which can never be the object of a convention like the present one. Thus the Pakistan Government also supports the inclusion of such an article in the draft articles.

Poland

TRANSMITTED BY A *note verbale* OF 12 FEBRUARY 1974 FROM THE PERMANENT MISSION TO THE UNITED NATIONS

[*Original: English*]

With reference to the United Nations Secretary-General's note No. LE 113 (2-2), the Government of the Polish People's Republic has the honour to inform him that it welcomes with great satisfaction the transmitted text of the draft articles on succession of States in respect of treaties, produced by the International Law Commission. The draft constitutes a further step towards codification of the international law.

In the opinion of the Government of the Polish People's Republic the draft correctly takes into account the specific characteristics of the various types of succession of States; in particular, the International Law Commission rightly applied the clean slate principle in the case of the newly independent States—as required by the principle of self-determination of nations and sovereignty of States, while for the question of inheritance of treaties, the only just approach has been adopted by the Commission—namely the principle of "continuity" in the cases of the different types of succession such as "uniting" or "dissolution" of States.

Simultaneously, the Government of the Polish People's Republic considers that treaties relating to certain territorial problems and, in particular, those establishing State boundaries are a category apart, not affected by cases of succession. These treaties constitute a specific category in international law—also in respect of succession of States. The principle of absolute continuity in respect of the boundary treaties—in the field of succession—is a consequence of the existence in the international law of the *jus cogens* rule which makes it mandatory to respect the territorial integrity of States. It is the view of the Government of the Polish People's Republic that this principle, expressed in *article 29* of the draft, also corresponds with the best interests of the newly independent States. At the same time this principle, duly safeguarding the most vital interests of third States, thereby serves the international community as a whole. The Government of the Polish People's Republic firmly supports the inclusion of this principle in the future convention on the succession of States in respect of treaties.

The Government of the Polish People's Republic considers that the provisions of the draft articles can be applied solely to such cases of State succession as arises while the principles of the international law, and in particular the principles enshrined in the Charter of the United Nations, are being respected. The provisions of *articles 6* and *31* expressing this proposition dispel any doubts concerning both the scope of the term of succession of States and the scope of certain other provisions of the draft. It is useful, therefore, to retain these provisions in their present form.

The Government of the Polish People's Republic deems that the question of succession of States in respect of treaties should be considered with due regard to the provisions of the Vienna Convention and that the codification of norms regulating succession of States in respect of treaties should also have the form of a convention, as the provisions of the codification being drafted should enjoy a legal standing equal to the Vienna Convention.

While presenting the foregoing general remarks on the draft elaborated by the International Law Commission, the Government of the Polish People's Republic wishes to offer the following comments of a more specific nature meant to improve and supplement the provisions of the draft itself:

(1) It is highly desirable to establish a time-limit, be it even remote (seven or even ten years) during which a newly independent State could use its right to notify its succession in respect of a multilateral treaty. Then it would be clear, at least from a certain point in time, what is the legal position—e.g., other States parties would know the date wherefrom they should take into account an eventuality of the retroactive application of a treaty in relation to newly independent States. On the other hand in the event of expiry of the term, a newly independent State would always have the right to accede to the treaty.

(2) There are no provisions in the draft seeking to regulate the legal status of the other States parties to the multilateral treaty vis-à-vis newly independent States during the period between succession of States and notification of succession in respect to the treaty (*inter alia*, in the light of the fact that notification of succession has retroactive effects). This question raises some doubts, e.g., whether the fact that the legal nexus existing between the other States parties and territory which became the territory of a newly independent State has been broken on the day of assumption of independence by that State results in the termination of all treaty obligations of other States parties in respect of this territory, or whether they have at least the same obligations as States in the period of suspension of the treaty (i.e., the obligation to restrain themselves from acts tending to obstruct the resumption of the operation of the treaty). It is also unclear whether because of retroactive effects of the notification of succession, other States parties can be held responsible for acts inconsistent with the treaty and committed after the assumption of independence by a newly independent State and before the date of succession of such State in respect of the treaty. Poland, as well as certain other parties to various multilateral treaties, is interested in the proper regulation of these questions.

(3) In the occasionally very long lapse between the date of a State's succession and notification of succession, different situations may occur, e.g., termination or suspension of the treaty in relation to the predecessor State, complete termination of the treaty or its amendment either in relation to all parties or to some of them only (including, for instance, the predecessor State.) The draft, in *article 21, paragraphs 2 and 3*, covers similar problems in respect of bilateral treaties. Explicit regulation of these problems also in relation to multilateral treaties would seem desirable.

(4) Another question breeding a number of reflections is that of the relation between the succession of States in respect of treaties and the institution of reservations to multilateral treaties. In the draft, this question has been solved in respect of one type of succession only, namely in respect to the newly independent States (*article 15*), whereas the problem of reservations and objections to multilateral treaties relates to all types of succession. It would be desirable, therefore, to fill this gap by adding both an appropriate supplementary paragraph to *article 10* and a comprehensive article to *part IV* of the draft covering these types of succession in respect of which the principle of continuity is applied.

(5) As far as the question of reservations and objections in the context of succession of the newly independent State is concerned, the Government of the Polish People's Republic feels that the clean slate principle should be applicable also to the succession in respect to reservations of the predecessor States. Since the act of succession in respect of a treaty itself is of a constitutive—and not declaratory—nature, it seems logical that is should be so treated in every respect— also in respect of the scope of the treaty covered by that act. Besides, in the case of the newly independent States formed of two or more territories (*article 25*), the present presumption in favour of automatic inheritance of the reservations could cause some difficulties; for instance, if the reservations applied to the different territories are not mutually reconcilable. Therefore, the presumption formulated in *article 15*, paragraph 1 of the draft should be reversed.

(6) The question of inheritance of objections has been completely omitted in the draft. In practice, however, a newly independent State on three occasions took clear positions with regard to objections of the predecessor States. Thus Barbados added a declaration to its notification of succession in respect of the 1949 Geneva Conventions on the Protection of War Victims, in which it submitted objections identical to those previously formulated by the United Kingdom.[a] Two other cases concern the Geneva Conventions on the Law of the Sea of 1958. Fiji and Tonga, while withdrawing an objection of the United Kingdom in respect of reservations of Indonesia, declared that they maintained all other objections.[b] Taking into account the acts presented above, it seems necessary to include in *article 15* a provision providing that predecessor States' objections do not devolve upon the newly independent State unless expressly maintained in the notification of succession. In the opinion of the Government of the Polish People's Republic, supported by the practice quoted above, this is a correct presumption. The International Law Commission in its commentary[c] rightly points to a universal lack of interest on the part of the newly independent States in the maintaining of objections made by metropolitan States. The practice shows that metropolitan States made their objections, primarily, in pursuit of their own interests. It seems desirable to regulate the question of reservations and objections in two separate articles. One of them could deal with the predecessor States' reservations and objections and the other with new reservations and objections.

[a] United Nations, *Treaty Series*, vol. 653, p. 454; and *ibid.*, vol. 278, pp. 266-268.

[b] See *Multilateral treaties in respect of which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1972* (United Nations publication, Sales No. E.73.V.7), pp. 398, 399, 404-406, and 412.

[c] See para. 14 of the commentary to article 15.

Somalia

TRANSMITTED BY A *note verbale* OF 6 JUNE 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original: English*]

In accordance with General Assembly resolution 2926 (XXVII) of 28 November 1972, on the report of the International Law Commission which recommends, in paragraph 3 (*b*) of section I, that the Commission should proceed with further consideration on succession of States in respect of treaties in the light of comments received from Member States, the Government of the Somali Democratic Republic submits the following observations on certain questions contained in Part V of the draft articles in chapter II, C of the report, which are of direct concern to the Somali Democratic Republic. In this part, which deals with boundary régimes and other territorial régimes established by treaty, direct reference is made to

Somalia's boundary disputes with Ethiopia and Kenya.[a] It is of course essential, since inferences of great international import are to be drawn from the examples quoted in the report, that both the historical background and the legal questions inferred should be established with the greatest care and after the fullest examination of the questions under study. However, both the accuracy of the historical record and the legal interpretations of the Somali-Ethiopian and Somali-Kenyan territorial disputes which appear in the report can be strongly challenged.

It should be stated at the outset that the main position of the Somali Democratic Republic with regard to the draft articles on treaties and boundary régimes is that it does not recognize the legal validity of treaties concluded between foreign colonial powers without the consent or knowledge and against the interests of the Somali people.

A brief account of the background leading to the division of the Somali people by imperial powers during the colonial period will serve to clarify this position. Long before the era of colonization, the Somali people constituted a single national entity. Being a homogeneous people with a common culture, language and faith, and inhabiting a recognized area of land, they were able to maintain their national identity and their traditional heritage in the Somali Peninsula.

With the opening of the Suez Canal in 1869, the horn of Africa assumed considerable strategic importance to the European powers. Between 1865 and 1892 France established a foothold around the port of Djibouti, French Somaliland; in 1887 Britain established a protectorate to the east of Djibouti and in 1908 Italy established its claim to other parts of the Somali Coast. An additional factor in this situation was that Ethiopia was also at that time seeking to expand its frontier. To avoid increasing friction over their respective spheres of influence, it became expedient for the European powers to attempt to fix the inland borders of the protectorates they had established.

The report of the International Law Commission refers to treaties that were drawn up with regard to Somali territory in the colonial period. The relevant treaties were those of 1897 and 1908[b] between Ethiopia and Italy and that of 1897 between Ethiopia and Britain[c] and the Anglo-Italian Treaty of 1924.[d]

The first two of these treaties, which dealt with the boundaries between Italian Somaliland and Ethiopia, called for a marking of the frontier on the ground, but, since this was never carried out, disagreement continued over the exact interpretation of the provisions. The continued dispute over the exact demarcation of the frontier between Ethiopia and Italian Somaliland, and in particular over the Somali territory of Ogaden, led eventually to the invasion of Ethiopia by Italy in 1935.

The Treaty of 1897 between Ehiopia and Britain was concluded through secret negotiations and its implementation involved the ceding to Ethiopia of a large area of Somali territory—the Haud—where Somali nomadic pastoralists had grazed their herds from time immemorial.

The Anglo-Italian treaty of 1924 became the basis of the *de facto* frontier between Italian Somaliland and Kenya. In 1926, the border of Kenya with Ethiopia was demarcated by the colonial Powers, and the Northern Frontier District (the NFD), an area exclusively inhabited by Somalis, was included in the territory of Kenya, although it was administered as an entirely separate province.

After the Italians had been ousted from East Africa in 1942 and sovereignty restored to Ethiopia, Britain placed Italian Somaliland under a British Military Administration and for some years retained control over the Haud and Ogaden areas. In 1946 the proposal of Mr. Ernest Bevin, then British Foreign Secretary, that all the Somali territories should be unified under the United Nations Trusteeship system was rejected by certain members of the United Nations. While the former Italian Somaliland became a United Nations Trust Territory under Italian Administration, the British Government placed the Ogaden illegally under Ethiopian administration. The boundary problem remained unsettled and persistent efforts by the United Nations Trusteeship Council and the United Nations General Assembly during the 1950s to arrive at a solution, before Somalia became independent, ended in failure.

The boundary dispute between the Protectorate of British Somaliland and Ethiopia also developed to serious proportions and led to the establishment by Britain of a provisional boundary line in 1950, for, with the transfer of the administration of the Haud to Ethiopia, the people of British Somaliland became fully aware of their dismemberment through artificial and arbitrary boundaries.

It is important to emphasize, at this point, that when Somalia achieved independence in 1960, it refused to recognize the validity of the treaties made by the colonial Powers for the partition of the Somali people and it has never changed this position.

In all international conferences in which Somalia has participated, the Somali Government has consistently maintained a firm and unequivocal position vis-à-vis the Somali territories under foreign domination. Thus, for example, Somalia rejected the Organization of African Unity resolution on the question of frontiers, passed in Cairo on 21 July 1964.[e] The Somali Government also reserved its position with regard to similar resolutions passed by other international conferences, for example, the Non-Aligned Conference held in Cairo in 1964.[f]

The Somali territorial disputes with Ethiopia and Kenya raise some fundamental issues of principles in the field of international law. The arguments put forward by some jurists which hinge primarily on the principle of territorial integrity and the corollary concept of the inviolability of frontiers are not applicable to the Somali case. For one thing, the principle of respect for another's territorial integrity presupposes that the State is in legal possession of that territory. It has always been the stand of the Government of the Somali Democratic Republic that Ethiopia and Kenya are unlawfully exercising sovereignty over Somali territories to which they are not entitled. This is because the *de facto* Somali-Ethiopian and Somali-Kenyan boundaries are based on the provisions of illegal treaties which are in conflict with prior treaties of protection signed between protecting colonial Powers and the Somali people. Furthermore, the principle of territorial integrity has no application to the Somali case because it is inconsistent with the right of self-determination—an internationally accepted principle which is enshrined in the Charters of the United Nations and the Organization of African Unity and in the Declaration of Non-Aligned Conferences.

It should be noted in this context that self-determination is not only a general concept in international relations but is also established as a legal doctrine by Article 1 of the United Nations Charter which makes it one of the purposes of the organization "to develop friendly relations among nations based on respect for the principle

[a] See para. 12 of the commentary to articles 29 and 30.

[b] G. F. de Martens, ed. *Nouveau Recueil général de traités*, 3rd series, vol. II (Leipzig, Dieterich, 1910), p. 121 (English text in *British and Foreign State Papers, 1907-1908*, vol. 101 (London, H. M. Stationery Office, 1912), p. 1000). Article 4 of the 1908 Treaty refers to "the line accepted by the Italian Government in 1897." References to that line may be found in *The Somali Peninsula* (Information Services of the Somali Government, 1962), pp. 59 *et seq.* and "Report of the Italian Government on the progress of direct negotiations between the Trust Territory of Somaliland under Italian administration and Ethiopia" *Official Records of the General Assembly, Eleventh Session, Annexes*, agenda item 40, document A/3463).

[c] G. F. de Martens, ed. *Nouveau Recueil général de traités*, 2nd series, vol. XXVIII, (Leipzig, Dieterich, 1902), p. 435.

[d] League of Nations, *Treaty Series*, vol. XXXVI, p. 379.

[e] AHG/Res.16 (1).

[f] Conference of Heads of State and Government of Non-Aligned Countries.

of equal rights and self-determination of peoples." Indeed the principle has been given practical application by the United Nations in cases like those of Togo and the Cameroon.

The doctrine of inviolability or sanctity of frontiers is only invoked in cases where the boundaries are demarcated on just and equitable grounds and where such demarcation is based on mutual agreements with the parties concerned. In this connexion, it should be clearly understood that Somalia's borders with Ethiopia are provisional administrative boundaries pending final demarcation and solution of the dispute. In a letter dated 15 March 1950, addressed to the President of the Trusteeship Council, the late Count Sforza, then Minister of Foreign Affairs of Italy, referring to the unilateral fixing of the provisional administrative line, wrote:

"2. It is clear from the letter of 1 March 1950, which is reproduced in the above-mentioned document[g] and from a similar letter transmitted direct to the Italian Government by the United Kingdom Government that as the retiring Administrative Authority, the latter has felt bound, in view of the possible difficulties entailed in tripartite negotiations, to fix the provisional administrative line itself unilaterally.

"3. The Italian Government, while stating that it has no intention of questioning the procedure adopted and noting that the decision in question is of a provisional nature and in no way prejudices the final settlement of the problem, nevertheless deems it appropriate to point out that the provisional line was fixed without its being consulted and, as protector of the rights of Somaliland, to reserve its position with regard not only to the legal aspects of the question, but also to certain practical difficulties which may arise from the line so fixed . . ."[h]

The International Law Commission appears to have based its comments on the demarcation of frontiers primarily on precedent and on customary international law as reflected by the traditional norms and principles applied by European Powers during the era of colonization. But under present-day international law, the obligations of Members of the United Nations under the Charter of the United Nations prevail over any pre-existing treaty obligations (see Article 103 of the Charter). The Charter recognition of the rights to self-determination therefore prevails over rights which Somalia's neighbours claim under earlier treaties.

The legal problems posed by the arbitrary demarcation of boundaries and territorial régimes by the former colonial Powers provide the International Law Commission with a golden opportunity to develop an important area of international law on the basis of principles which stem not from an outmoded colonialism but from the Charter itself. It must formulate institutional procedures to deal with the colonial legacy of serious territorial problems, such as Somalia's, which are a threat to the peace and stability of many independent countries.

[g] "Negotiation and adoption of a draft trusteeship agreement for Italian Somaliland: letter dated 1 March 1950 received by the President of the Trusteeship Council from the Permanent United Kingdom Representative on the Trusteeship Council" (*Official Records of the Trusteeship Council, Sixth Session, Annex*, vol. I, p. 112, document T/484).

[h] *Ibid.*, p. 114, document T/527.

Sweden

TRANSMITTED BY A *note verbale* OF 3 JANUARY 1974 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original: English*]

By letter dated 18 January 1973, the Legal Counsel of the United Nations, on behalf of the Secretary-General, drew the attention of the Swedish Government to the report of the International Law Commission on the work of its twenty-fourth session, held at Geneva from 2 May to 7 July 1972, containing a provisional draft of 31 articles on succession of States in respect of treaties. Pursuant to a decision taken by the Commission in accordance with articles 16 and 21 of its Statute to transmit the provisional draft articles to Governments of Member States for their observations, the Secretary-General invited the Swedish Government to present its views on the draft not later than 1 October 1973, in order to enable the Special Rapporteur on the topic to take them into account in preparing the report which he will submit to the Commission in 1974.

The Swedish Government wishes to submit the following observations concerning the Commission's draft.

The Government is aware of the high quality of the draft and appreciates the excellent work performed, in particular, by the Special Rapporteur, Sir Humphrey Waldock. The extensive research carried out by the Secretariat in relevant international practice also deserves praise. The draft and the commentaries pertaining thereto constitute a most valuable contribution to the study of a difficult and vital problem in international law and organization.

The present observations of the Swedish Government are of preliminary character and as they refer to provisional draft articles, their purpose is to offer comments and suggestions at a stage when the Commission is still working on its final draft. Accordingly, the remarks submitted below are without prejudice to the position the Government may feel justified in taking at later stages of the work.

Some of the observations concern the draft as a whole, others refer to individual articles.

General comments

A salient feature of the draft is that more than one half concerns State succession in the case of so-called newly independent States, while only three or four articles out of 31 deal with other categories of successor States. As will be argued later on under *article 2*, the definition offered in that article of "newly independent State" is less than complete. There is, however, no doubt that the term alludes above all to States which have achieved independence since the Second World War. The Commission in its commentaries recalls that the General Assembly, by its resolutions 1765 (XVII) of 20 November 1962 and 1902 (XVIII) of 18 November 1963 recommended that the Commission should proceed with its work on succession of States with appropriate reference to the views of those States. So it is understandable that the Commission has—in its words—"given special attention throughout the study of the topic to the practice of the newly independent States referred to in the above-mentioned resolutions of the General Assembly without, however, neglecting the relevant practice of older States".[a] On the other hand, the Commission observes that the era of decolonization is nearing its completion and that it is in connexion with other cases—such as secession, dismemberment of an existing State, the formation of unions of States and the dissolution of a union of States—that in the future problems of succession are likely to arise. In view of this forecast which is shared by the Swedish Government, it seems somewhat impractical to let rules related to a temporary and perhaps exceptional situation dominate a draft of articles intended for future application over a longer period of time. Moreover, the draft articles on newly independent States hardly solve the problem to what extent treaties concluded by predecessor States are still valid for States which have achieved independence since the Second World War. They rather tend to confirm the prevailing uncertainty in that respect. The General Assembly's wishes might better be met by seeking a separate solution to treaty problems related to succession connected with decolonization, i.e., by an *ad hoc* settlement of an *ad hoc* situation.

The relevant articles are based on a so-called clean slate doctrine. Its fundamental principle is, as expressed in article 11 of the draft,

[a] *Yearbook . . . 1972*, vol. II, p. 225, document A/8710/Rev.1, para. 25.

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

This negative aspect does not, however, exhaust the clean slate doctrine as formulated by the Commission. The newly independent State also has the right by a notification to effect its adherence to general multilateral treaties concluded by its predecessor. As regards restricted multilateral treaties the newly independent State may establish its status as a party with the consent of all the parties, and in the case of bilateral treaties, through express or tacit agreement between the newly independent State and the other State party. It is obvious that this combination of non-obligation and right to establish status as a party (in some cases without, in others with the consent of other parties) may prolong the uncertainty regarding the new State's treaty relations instead of offering workable solutions.

For the Commission the clean slate doctrine is a codification of existing international law. The Commission considers that the doctrine derives from State practice and is confirmed by the principle of self-determination. The description of practice given in the Commission's commentaries rather shows, however, that conflicting views have been expressed and followed in practice, and that consequently practice is far from being consistent.

With respect to general multilateral treaties the Commission relies to a large extent on the practice of the Secretary-General and other depositaries. It should, however, not be overlooked that, unless the parties otherwise agree, the functions of a depositary are limited and, on the whole, merely of an administrative character (article 77 of the Vienna Convention). The practice of depositaries cannot in itself bind the parties. Furthermore, silence of a party in regard to action taken by the depositary or to information received from him, does not necessarily mean consent. If a new State notifies the depositary that it will not consider itself obligated by a treaty concluded by the predecessor, and a party to the treaty, when informed by the depositary, omits any protest, this attitude does not necessarily imply that the party agrees or concedes that the new State is not bound. The party may well be of the opinion that the treaty is binding on the new State, but, in view of the fact that in international law the matter is controversial, consider that it should not intervene. The party may even wish to await the results of the work carried on by the Commission on the question before committing itself one way or the other. It is, in other words, doubtful whether it is possible to deduce an adequate *opinio juris* from the practice of depositaries and parties in this matter. As concerns the attitude of the newly independent States, it appears from the Commission's commentaries that some have declared themselves free of predecessor treaties of this kind while others, in particular with respect to the Geneva Red Cross Conventions, "have used language indicating recognition of an obligation to accept the Conventions as successors to their predecessors's ratifications".[b] Also the practice of newly independent States seems not to be wholly consistent.

Similarly, with respect to bilateral treaties, the Commission states that there is a "considerable measure of continuity found in practice"[c] in regard to certain categories of treaties, such as air transport and trade agreements, agreements for technical or economic assistance, etc. This tendency towards continuity is obviously based on strong practical needs of both old and new States and will therefore certainly not prove to be of transient nature. In these circumstances it is difficult to see how a clean slate principle can be derived from current State practice with respect to bilateral treaties.

Nor does it seems possible to base the clean slate doctrine on the principle of self-determination. This principle is admittedly vague and might be stretched in various directions, but its substance is that nations or peoples have a right to political independence. It would appear to be an overstatement of the principle to asserrt that it implies that a newly independent State enters the international community free of the predecessor's treaties (with the exception of so-called territorial treaties) and, in addition, has the right, at its convenience, to step into the predecessor's shoes in respect of general multilateral treaties. Furthermore, it is not apparent why the principle of self-determination should require clean slate for newly independent States and for States emerging by separation (*article 28*) but not for States created by uniting of States or dissolution of a State (*article 26* and *27*).

These considerations lead to the conclusion that there is a case for the view that in this field State practice is large ambiguous and undecided, and that general principles such as self-determination of peoples do not give sure guidance. Accordingly, the task to be accomplished seems to be not so much codification of existing customary law as progressive development of the law. When customary international law in the field is non-existent or controversial, practice considerations could and should be allowed to influence the preparations of written rules of international law.

From the practical point of view the clean slate doctrine is apt to cause serious inconvenience. According to the doctrine the newly independent State is presumed to make its appearance free from the predecessor's treaties but it can by notification or by agreement with the other parties adhere to these treaties as from the date of succession or, in some cases, from a later date. Even if there are nuances to the doctrine, which are omitted in this description, it is obvious that its application will, as pointed out above, result in great uncertainty and confusion as to the treaty relations of the new State. It is doubtful whether for the new State the disadvantage of unsettled treaty relations is sufficiently counterbalanced by the advantage of a certain freedom of action. In any case, confusion in international treaty relations is a distinct inconvenience to the international community as a whole. As the clean slate doctrine is apt to create or maintain such confusion, it is arguable that the doctrine is not in conformity with the general interest of States. Such general interest should, it would seem, be accorded priority as against the particular interest of an individual State or group of States. This does not necessarily mean that particular interests must be neglected. On the contrary, solutions should be sought whereby also these could be satisfied to a reasonable degree.

In view of these considerations, it might be worth while attempting to create a system or model based not on the clean slate doctrine but on the opposite principle that the new State continues to be bound by the treaties concluded by the predecessor State. The application of that principle would seem to maintain stability and clarity in treaty relations. The understandable wish of a successor State not to be bound by treaties in the conclusion of which it has not taken part and which are contrary to its interests, could be satisfied by attributing to that State an extensive right to denounce undesirable treaties. It might also be possible to provide that certain categories of treaties would not be binding on the successor State, e.g., treaties of alliance and military treaties. If so, those categories should, however, be clearly defined so as to avoid differences of interpretation. There are obviously many other features and details of such a system which would have to be studied and worked out. In particular, various problems regarding the right of denunciation would have to be solved, such as whether there should be a time-limit to the exercise of that right, whether the denunciation should be immediately effective, and whether other parties should, for the sake of equality, have a corresponding right of denunciation.

The establishment of an alternative model on these lines would in any case be a great help to Governments in deciding what attitude to take with respect to the very difficult problems related to State succession in regard to treaties. As has already been stressed, the present observations of the Swedish Government are of a preliminary character. The Government is not in a position at the present stage to express a definitive opinion on the clean slate model or on an opposite system. There are, in its opinion, disadvantages connected with clean slate. The Government would therefore welcome an

[b] Para. 10 of the commentary to article 11.

[c] Para. 4 of the commentary to article 19.

alternative draft of articles based on the opposite assumption that the new State inherits the treaties of the predecessor (possibly with the exception of certain categories) but has the right in a manner to be regulated in the draft to denounce such treaties (with the exception of "territorial" treaties). It would then be possible closely to examine the two systems and compare their respective advantages and disadvantages.

It might be objected that the alternative system would not be satisfactory to the States which have achieved independence since the Second World War. As has been repeatedly emphasized, it is doubtful whether the present draft solves the problems of their treaty relations, despite the extensive part devoted to them.

It may be asked if the problems of these States are not better served by separate solutions of concrete and practical measures. The drafting of rules for the future would thereby also be much simplified. Many of the provisions contained in the part dealing with "newly independent States" (such as, e.g., those on "provisional application") would be unnecessary, and this part and the part dealing with "separation of part of a State" could be combined, which would eliminate a distinction which seems rather artificial or in any case difficult to define.

Observations on particular articles

Article 2

The definition of the term "succession of States" in paragraph 1 (*b*) as "the replacement of one State by another in the responsibility for the international relations of territory" raises doubts. "Responsibility" in this context obviously means something else than "State responsibility" in the technical sense, and it is not evident what it does mean. In any case the term is not clear enough to form part of a definition. Equally vague and obscure is the expression "international relations of territory". Does it imply that "territory" already is a subject of international law having relations to States governed by that law, such as treaty relations? If so, what becomes of the clean slate theory? If not, what kind of international relations is meant?

It seems preferable to return to the expression earlier used by the Special Rapporteur, namely "the replacement of one State by another in the sovereignty of territory".[d] If that expression is considered too limited, because of the word "sovereignty", the term "administration" might be added, so that paragraph 1 (*b*) might read:

> "Succession of States means that the sovereignty over or administration of a territory passes from one State to another."

"Notification of succession" as defined in paragraph 1 (*g*) does not mean notification of a "succession of States" as defined in sub-paragraph 1 (*b*), but notification of the consent of a successor State to be bound by a multilateral treaty, i.e., succession to a treaty. The use of the same term "succession" for these two different events is hardly consistent with the statement in the commentaries that the Commission's approach "is based upon drawing a clear distinction between, on the one hand, the fact of the replacement of one State by another in the responsibility for the international relations of a territory and, on the other, the transmission of treaty rights and obligations from the predecessor to the successor State".[e]

The definition in paragraph 1 (*f*) of "newly independent State" is not complete. The crucial term used in the definition is "dependent territory" and that term is not defined. It is obvious that in the view of the Commission "dependent territory" is something different from "part of a State" (used in the title of *article 28*) but the difference is not clarified by definitions, as would be desirable.

Article 3

The principles contained in this article are not controversial, and it might be sufficient to refer to them in the commentary. If the article is maintained, its title should perhaps be changed. After all, the article is dealing with cases in which the provisions of the draft *are* applicable, under sub-paragraph (*a*) in substance and under sub-paragraph (*b*) also formally.

Article 5

As in the case of article 3, the content of this article might be transferred to the commentary.

Article 12

In its report, the Commission intimated that it would like to receive the views of Governments on the questions whether a time-limit ought to be placed on the exercise of the option to notify continued adherence to a general multilateral treaty.[f] As the option is apt to cause uncertainty as to the validity of these treaties for new States, it seems to be a minimum requirement that such a time-limit should be set. For similar reasons, it might be desirable to provide a time-limit also for the agreements by which restricted multilateral treaties, under *article 12*, paragraph 3, and bilateral treaties, under *article 19*, are continued.

Article 13

The intended sense of the phrase "multilateral treaty, which at the date of the succession of States was not in force in respect of the territory to which that succession of States relates . . ." is better expressed in the commentary by the wording "multilateral treaty not yet in force at the date of the succession of States, but in respect of which at that date the predecessor State had established its consent to be bound with reference to the territory in question".[g] The text of the article would accordingly be improved by replacing the first-mentioned phrase by the latter one.

Article 14

The Commission included this article in order to enable Governments to express their views on it, and thereby assist the Commission in reaching a clear conclusion as to whether it should be maintained in the draft. The article seems to be in line with the clean slate doctrine and at the same time demonstrates its tendency to lead to inequality between States. It is stated in the commentary that "even on the assumption of the adoption of this article, it would not be appropriate to regard the successor State as bound by the obligation of good faith contained in article 18 of the Vienna Convention until it had at least established its consent to be bound and become a contracting State".[h] The successor State would in other words be able to take advantage of a right established by the predecessor's signature of a treaty without assuming the obligation of good faith pertaining to that right. In these circumstances the inclusion of the article can hardly be recommended.

Article 15

Paragraph 2 of the article provides that a newly independent State, when establishing its status as a party or a contracting State to a multilateral treaty, may, subject to certain exceptions, formulate new reservations. In support of this provision the Commission states that

> "the Secretary-General is now treating a newly independent State entitled to become a party to a treaty by 'succession' to its predecessor's participation in the treaty, and yet at the same time to modify the conditions of that participation by formulating new reservations".[i]

[d] See *Yearbook . . . 1969*, vol. II, p. 50, document A/CN.4/214 and Add.1 and 2, article 1 (*a*).

[e] *Yearbook . . . 1972*, vol. II, p. 226, document A/8710/Rev.1, para. 29.

[f] *Ibid.*, p. 229, document A/8710/Rev.1, para. 51.

[g] Para. 1 of the commentary to article 13.

[h] Para. 8 of the commentary to article 14.

[i] Para. 11 of the commentary to article 15.

It hardly needs to be pointed out that it is not within the authority of a depositary to agree to reservations and that consequently his practice cannot be the basis of a rule of customary international law. Nor does the fact that parties to a treaty in individual cases have not protested against new reservations submitted by newly independent States necessarily mean that these parties recognize that there is a general right in favour of these new States to formulate their own reservations.

Paragraph 2 must therefore be considered as a proposal *de lege ferenda*. As such it is not appropriate, because in general reservations are not desirable and practical reasons why additional ones should be allowed in this case are not apparent.

In article 15, there is included by reference the contant of a number of articles, dealing with reservations of the Vienna Convention on the Law of Treaties. The Commission states in the commentary that thereby Governments will be given an opportunity "to express their views on the whole question of drafting by reference in the context of codification".[j] As far as the present article is concerned the reference method seems justified as otherwise the article would no doubt have been very long and heavy, and as the present draft, in any event, has a close connexion to the Vienna Convention. Regarding the general question of drafting by reference, it is not possible to give a positive or negative answer valid for all occasions. Reasons for and against vary both in kind and weight with circumstances and the decision will have to be based on the situation in the particular case.

Article 16

As with the right to form new reservations, it seems exaggerated to accord to a newly independent State the right to declare its own choice in respect of parts of a treaty or between alternative provisions.

Article 18

A provision that the newly independent State in its notification of succession may specify a date for its adherence later than the date of the succession of States seems hardly justified, as it would introduce another element of uncertainty in treaty relations.

Article 19

Regarding a time-limit, see comments above under *article 12*.

Articles 22 to 24

The provisions regarding "provisional application" seem to be needed in order to correct practical inconveniences of the clean slate doctrine. As formulated, they lead to additional inequality between States concerned. A newly independent State will be committed to provisional application of a multilateral treaty only after it has made a formal notification to that effect, while a State party to the treaty will be so committed also "by reason of its conduct". The justification of this difference is not apparent.

It may be added that the interpretation of the phrase "by reason of its conduct" in particular cases in regard to both multilateral and bilateral treaties is apt to cause difficulties and disputes.

As already pointed out, the complications of a provisional application would be avoided in the alternative model referred to above.

Articles 29 and 30

The phrase "a succession of State shall not as such affect" might be reconsidered. It is obvious that boundary régimes and other territorial régimes may be affected by a succession of States. By such a succession a new boundary State may emerge or the territory under a special territorial régime may become part of another (new) State. What is meant is presumably that the successor State is bound by the boundary régime or the territorial régime. If so, the negative formula used should be replaced by some wording affirming that such régimes continue in force in regard to successor States. A similar positive formula is used in *article 26* on uniting of States and in *article 27* on dissolution of a State, which are based on the same principle of continuity of treaties in relation to the succession of States.

[j] Para. 18 of the commentary to article 15.

Syrian Arab Republic

TRANSMITTED BY A LETTER DATED 26 JUNE 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original: English*]

With reference to your letter No. LE 113 (2-2) dated 18 January 1973 concerning the provisional draft articles on succession of States in respect of treaties adopted by the International Law Commission at its twenty-fourth session held in Geneva from 2 May to 7 July 1972, I have the honour to inform you that the Government of the Syrian Arab Republic is in general agreement with these provisional draft articles.

United Kingdom of Great Britain and Northern Ireland

TRANSMITTED BY A *note verbale* OF 29 OCTOBER 1973 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[*Original: English*]

General observations

1. The provisional draft articles on succession of States in respect of treaties, adopted by the International Law Commission in 1972, are a useful basis for further work on this topic. The United Kingdom Government support the decision of the Commission to take the provisions of the Vienna Convention (which the United Kingdom has ratified) as an essential framework of the law relating to succession of States in respect of treaties.

2. In paragraphs 35 and 36 of the introduction to the draft articles the Commission refers to the principles of the United Nations Charter. It is noted that these principles, and in particular that of self-determination, are considered by the Commission to have "implications" in the modern law concerning succession in respect of treaties, the main implication in their opinion being "to confirm" the clean slate principle.[a] The United Kingdom Government continue to have doubts as to whether full weight has been given to the many instances in which, without controversy, States concerned have continued to apply treaties after a succession of States. Where there have been controversies, these have usually been satisfactorily resolved without too much difficulty. Whilst a succession of States marks a time of change, it is usually in the interests of all States concerned to maintain as much of the essential fabric of international society (in which treaties play an important part) as is consistent with the change. This is especially the case with multilateral treaties of a law-abiding character or which establish international standards.

3. With regard to the form of the draft, the United Kingdom favour the drawing up by the Commission of a final set of draft articles for a convention. Whilst noting the temporal element in any codification and development of law of succession of States, a convention is considered to be the best type of instrument in the present state of international society. In this connexion, it is noted that the International Court of Justice in some of its recent judgements has cited the Vienna Convention even though it is not in force and when in force will not be retrospective.

4. Provisions for the settlement of disputes arising out of the application of interpretation of any convention on this topic will

[a] *Yearbook ... 1972*, vol. II, p. 227, document A/8710/Rev.1, paras. 35-36.

be desirable. The United Kingdom Government favour procedures which will be compulsory rather than merely optional. The topic is one where conciliation, mediation, arbitration or adjudication would be appropriate. As regards the latter, the United Kingdom Government support the principle of recourse to the International Court of Justice.

Observations on specific draft articles

Article 2, paragraph 1 (b): Whilst the phrase "in the responsibility for the international relations of territory" has been used in State practice, the present definition is not altogether satisfactory. Quite apart from the possibility of confusion with the notion of "State responsibility", the meaning of the phrase is not entirely free from doubt in all cases and it can give rise to difficulties, e.g., as regards protected States. A possible improvement to get over the latter difficulty would be to add the words "previously forming the territory or part of the territory of the first State". However, the first alternative in the commentary ("in the sovereignty in respect of territory")[b] might be preferable. A consequential amendment would then be necessary to article 2, paragraph 1 (*e*).

Article 2, paragraph 1 (f): In the light of article 28 and the observation thereon, the following is suggested:

> " 'newly independent State' means a *successor* State the territory of which immediately before the date of the succession of States was *part of the territory of the predecessor State*". (Additions in italics.)

The first change (the insertion of the word "successor") would emphasize the fact that a newly independent State is a category of successor State.

The scope and meaning in particular cases of the term "dependent territory for the international relations of which the predecessor State was responsible" is not completely clear.

Article 2, paragraph 1 (g): The words "considered as" might usefully be omitted here and elsewhere in the draft.

Article 2, paragraph 1 (i): A reference to accession could be added, in line with paragraph 1 (*f*) of the article.

Article 6: The United Kingdom Government consider that this article is superfluous for the reason given in paragraph 1 of the commentary; and that, if included, the article might be open to different interpretations in particular cases.

Article 9, paragraph 2: The Commission's proposals that express acceptance in writing is required appears to be unduly restrictive. In the sort of situation under consideration tacit consent should be permitted.

Article 10: The reference to "administration" goes too far and may lead to uncertainty. The point in the commentary[c] should be included in the terms of the draft article, e.g., by beginning "subject to the provisions of the present articles", as in draft article 11. In the final phrase of sub-paragraph (*b*) the compatibility test which exists in relation to reservations is proposed: this requires careful study. It would be preferable to make a more direct reference to the example of a treaty intended or expressed to have a restricted territorial scope which is given in the commentary.[d] The questions of impossibility of performance and fundamental change of circumstances also need to be considered in this connexion.

Article 11: Reference is made to paragraph 2 ("General observations") above.

Article 12: Although the rule proposed in paragraph 1 is subject to the exceptions in paragraphs 2 and 3, it is considered that insufficient weight is given to the intention of the parties to a particular treaty. As regards paragraph 2, whilst not opposing the proposal that a notification of succession may be made even though the accession provisions of a particular treaty do not cover a certain newly-independent State[e] the intention of the parties could appear from the wording of the treaty as well as from its object and purpose.

Article 13: The observations of article 12 apply equally to article 13.

Article 14: The United Kingdom Government favour the effectiveness of multilateral treaties.[f] However, the proposal in this article is not free from difficulty. It is the practice of the United Kingdom Government to consult the Government of each British dependent territory about its attitude to a particular treaty after signature and before ratification. Moreover, it has not been the practice of the United Kingdom Government to include treaties signed but not ratified in the list of treaties compiled for each dependent territory before its independence. On balance, it is considered that the need for the proposed new rule is not great enough to outweigh its difficulties.

Article 15: In paragraph 1 (*a*), the test of compatibility between two reservations may be difficult to apply in practice. The formulation of a new reservation on the same subject as an existing one should imply an intention to replace the latter with the former. Thus, the words "and is incompatible with the said reservation" might be omitted with advantage.

As regards paragraph 1 (*b*), a reservation which "must be considered as applicable only in relation to the predecessor State" could hardly be "applicable in respect of the territory in question at the date of the succession of States". Accordingly, paragraph 1 (*b*) is unnecessary.

In paragraph 2, a cross-reference might usefully be made to "the rules set out in article 19 of the Vienna Convention on the Law of Treaties", instead of repeating them *in extenso*.

Article 16: As regards paragraph 3, once a newly independent State has established its status as a party, it has all the rights and obligations of a party. Thus, the need for this paragraph is doubtful.

Article 18: Where a newly independent State makes a notification of succession some considerable time after independence, other States may, in good faith, have acted in the meantime on the assumption that the treaty was not applicable between them and the newly independent State. Should the newly independent State insist upon the date of independence as the effective date, the other States would presumably not be open to allegations of breach for having failed to apply the treaty in the meantime. This aspect of the question is not dealt with in the Commission's proposals. In paragraph 2 (*b*), it should be possible for all the parties to agree on a later date *in all cases* and not merely in those falling under article 12, paragraph 3.

Article 19: In the commentary reference is made to United Kingdom practice. Too much has been read into the italicized words in the quotation.[g] The qualification of the Foreign Office reply was dictated by the need not to interfere in the external affairs of the newly independent countries. The purpose of the words "in conformity with the provisions of the treaty" in paragraph 1 is not clear. Paragraph 1 (*b*) appears to be concerned with tacit agreement by conduct.

Article 21: Paragraphs 2 and 3 of this article appear to restate the rules in its paragraph 1. The drafting of the article could probably be much simplified.

Article 22: The term "successor State" appears in this article (and articles 23 and 24) although the articles appear in part III on "newly independent States". As well as to "another State party", reference should be made to the "predecessor State": in contrast to the position under article 19, a *multilateral* treaty can of course be applied provisionally between the successor State and the predecessor State. More generally, the proposals, as drafted, would appear to permit a newly independent State to pick and choose between the existing

[b] Para. 4 of the commentary.

[c] Para. 12 of the commentary.

[d] Para. 11 of the commentary.

[e] Para. 8 of the commentary.

[f] Para. 5 of the commentary.

[g] Para. 11 of the commentary.

parties to a treaty. The desirability of such discrimination is open to question, especially when it is not permitted under the general law on multilateral treaties. It could lead to different "schools" of States within a single treaty system.

The commentary indicates that a right of choice is not intended. The notifications referred to have been made, in the case of declarations, to the Secretary-General of the United Nations, rather than to individual States parties to or depositaries of particular treaties.[h]

Article 25: The rule in sub-paragraph (*a*) has two alternative tests —compatibility and "radical change of conditions". Only the former is proposed in article 10, sub-paragraph (*b*). The compatibility test is not always easy to apply, in practice, regarding reservations. The test of a radical change of conditions, which sounds similar to that of fundamental change of circumstances, is new and may also give rise to different interpretations in practice. The right proposed in sub-paragraph (*b*) would seem possibly to go beyong what is provided in article 29 of the Vienna Convention.

Article 26: The two tests in sub-paragraph 1 (*b*) are similar to those proposed in sub-paragraph (*a*) of article 25. But they are applied to different questions—in article 26 to that of the continuance in force of a treaty and in article 25 to that of the extent of a treaty's application. In article 26, the latter question is dealt with by an entirely different approach in paragraph 2. The justification for these differences is not clear.

Article 27: The drafting of paragraph 1 could be simplified by referring to treaties "in force" at the material time, rather than to treaties "concluded" beforehand.

Article 28: It is considered that paragraph 1 of this article should be included in part III which could be broadened to cover successor States which are not newly independent. As regards paragraph 2, this would become unnecessary where the definition proposed in these observations for the term "newly independent State" (article 2, paragraph 1 (*f*)) to be adopted.

Articles 29 and 30: The point in the commentary[i] might with advantage be included in the text of the draft articles. "Territory" should be defined so as to include "all or any part" of a State's territory.

The question of the *obligations of the predecessor State* is dealt with in part II of the draft articles (in article 10, sub-paragraph (*a*)) and in part IV (in article 28, paragraph 1). However, it is not dealt with in part III; the Commission may wish to consider this possible lacuna in their proposals.

[h] See paras. 3 and 5 of the commentary.

[i] Para. 39 of the commentary.

United States of America

TRANSMITTED BY A *note verbale* OF 7 FEBRUARY 1974 FROM THE PERMANENT REPRESENTATIVE TO THE UNITED NATIONS

[Original: English]

The Government of the United States considers that the articles on succession of States in respect of treaties proposed in first reading by the International Law Commission at its twenty-fourth session in 1972 constitute a sound basis for consideration of this difficult topic. The difficulties inherent in preserving a proper balance between the objectives of preserving continuity in international relationships on the one hand while on the other taking account of the necessities of an emergent State have, to a large extent, been met in the proposed articles. In commenting thereon, the United States will concentrate upon what it considers to be the major points of principle raised by the draft articles.

The decision of the Commission to maintain, particularly in part I ("General provisions") a substantial parallelism with the Vienna Convention is a sensible one. The unification of international law is prompted by the adoption of substantially indentical texts to the greatest extent that varying subject-matter permits. This procedure is all the more desirable when, as in the present case, the project under consideration lies within the general field of the law of treaties. Accordingly, the United States supports articles 1 through 5 as proposed by the Commission.

The purpose of *article 6*, to make clear that succession with regard to territory which does not take place in accordance with the requirements of international law should not be considered as the type of succession that is envisaged in the draft articles, is laudable. There is a question however, whether the formulation of the article achieves the end sought. To the extent that the articles impose obligations upon successor States that are designed to promote the principles of the Charter of the United Nations there is no reason for excluding the imposition of such obligations upon any State that claims to be a successor State in respect of territory. Thus, the provision in article 29 that a succession shall not as such affect a boundary established by a treaty should apply in the case of any territorial change. Its applicability, in fact, may be more necessary in the case of a territorial change having elements of illegitimacy than in cases where there is no question as to the legality of the succession.

It would be desirable to clarify article 6 to make it clear that the obligations in the draft articles apply in all cases. The article could be recast so as to provide that the rights conferred upon successors in the articles may be exercised only by States whose succession has taken place in conformity with international law. It would also seem advisable to revise the commentary. The position that the Commission drafts on the assumption that the rules it lays down would normally apply to facts occurring and situations established in conformity with international law appears too broad. The entire subject of State responsibility, for example, is concerned with rules applying to situations when there has been a breach of international law. In preparing the Vienna Convention on Diplomatic Relations[a] the Commission was concerned with formulating the normal rules for diplomatic intercourse among States. But in preparing the draft on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons,[b] the Commission was dealing with conduct in violation of the Vienna Diplomatic Conventions and other treaties and of basic principles of international law.

Articles 7 and 8 might be clarified in each case by combining paragraphs 1 and 2 into a single paragraph which would say, in effect, that notwithstanding the conclusion of a devolution agreement, or a unilateral declaration by the successor State regarding continuance in force of treaties, the present articles govern the effects of the succession with respect to treaties in force in the territory on the date of succession. As presently drafted article 7 leaves some doubts as to its relationship to articles 35, 36 and 37 of the Vienna Convention and article 8 raises some questions as to the law of unilateral acts. Examination of the commentaries to these articles, such as the commentary to article 7,[c] and of the commentary to article 8,[d] establishes the desirability of eliminating doubt on these points.

With regard to *article 10*, the United States considers that for purposes both of clarity and consistency it would be desirable to replace the phrase "under the sovereignty or administration of a State" with a phrase based on article 2, paragraph 1 (*b*), such as, "when territory as to which one State has responsibility for international relations . . ."

The United States supports the general approach taken in part III of the draft articles, regarding newly independent States. There are,

[a] United Nations, *Treaty Series*, vol. 500, p. 95.

[b] See *Yearbook . . . 1972*, vol. II, p. 312, document A/8710/Rev.1, chap. III, sect. B.

[c] Paras. 15 to 17.

[d] Paras. 16 and 17.

however, a number of improvements which could be made. *Article 12* permits any newly independent State to become party to a multilateral treaty that applied to its territory prior to independence subject, *inter alia*, to the requirement that the participation of the State is not incompatible with the object and purpose of the treaty. A requirement of this type is reasonable, but the question arises whether the test to be applied could be made more precise. A further question is how is a determination to be made whether succession to the treaty is or is not consistent with its object and purpose.

Regarding the first issue, it would appear that whenever a successor State may accede to a treaty there should not be any reasonable doubt as to its right to succeed to the treaty. While this would appear to be a reasonably obvious conclusion, it might be included in the article. Where the question of compatibility is unclear, however, and the treaty concerned has no provisions for dealing with the situation, a number of difficult questions arise. If a party to the treaty objects on the ground of incompatibility, is this sufficient to prevent succession? If not, does the objection result in barring treaty relationships between that party and the successor State? Questions of the same character arise also with respect to a number of other articles in which the requirement of compatibility with object and purpose is laid down—*article 13*, paragraph 2, *article 14*, paragraph 1 and *article 15*, paragraph 2 (*c*). The United States considers that the Commission should, in its second reading, attempt to reduce this area of uncertainty to the extent possible although it recognizes that a number of questions regarding interpretation and application of the articles must be left to solution on a case by case basis.

Article 18 provides that a newly independent State which submits a notification of succession is considered as a party to the treaty as of the date of receipt thereof, but that the treaty is considered as being in force between the parties from the date of succession. The commentary states that his application of the principle of continuity is supported by practice although States have deviated from the rule in relation to certain successions and treaties. The United States accepts the principle as a logical corollary to the theory of succession but considers that it may raise some difficult problems in application. For example, a new State is established. A dispute between private individuals develops which includes as a major issue whether a multilateral agreement applicable to the territory prior to independence remains in force within the new State. No notification of succession having been given by the new State the court decides the case on the basis that the treaty is inapplicable. Thereafter, the new State deposits a notice of succession to the treaty. What effect, if any, does bringing the treaty into effect retroactively have upon the judgement? Is the judgement open to collateral attack? Is the situation affected by whether the time for appeal has expired and no appeal has been taken; by whether an appeal is pending? Is it equitable to make provision in the articles for reopening a final decision in such a case? If so, what of settlements agreed between the parties, whether or not approved by a court, based on the assumption that the treaty was inapplicable?

This set of problems is further complicated by the factor that in authorizing the new State to make a declaration of succession, *article 12* does not contain any limitation as to time. A State could make such a notification five, ten, or twenty-five years after becoming independent, and the declaration would have retroactive effect for the entire period. The possible effects upon long-settled legal relationships are sufficiently extreme to require some protective measures. It would be desirable to provide a time-limit within which the right to notify succession must be expressed. The period should be long enough so that the new State has time enough to conduct a review of possibly applicable multilateral treaties while not being so long that private rights or the rights of other States party to the treaty would be seriously impaired by the retroactive effect of notification. A period of three years would seem to be sufficient for the new State to reach a determination while not being so long that private litigants or a court, for example, could not postpone a judgement pending clarification of the applicability of a treaty. In this connexion, an additional protective step would be to provide that periods of prescription or limitation would not run with respect to claims involving the applicability of a treaty during the three-year period.

An even more complicated timing problem arises in connexion with *articles 15 and 16*. Article 15 permits a new State at the time it notifies succession to withdraw reservations previously applicable to the territory concerned or, subject to certain limitations, to make new reservations. Any old reservation inconsistent with a new reservation is replaced by the new reservation. It is not clear whether the retroactive effect of article 18 applies to the varying situations dealt with in article 16. Certainly it would seem reasonable to consider that a reservation maintained in effect under the notification of succession should be considered as having remained in effect during the period between independence and notification if the treaty is considered in effect for that period. But to give a new reservation should retroactive effect would be quite another matter since it could lead to arbitrary and inequitable consequences that the other parties would be totally unable to guard against. Paragraph 3 of article 15 provides some protection in that the reference to article 20 of the Vienna Convention would presumably permit other States party to object to the reservation within 12 months from the date of notification. However, it is possible that the third State might have no objection to the reservation as such but would have objection to its being retroactive. Similar problems arise when the new reservation is inconsistent with an old reservation. The Commission should elimitate these complications by making it clear that new reservations take effect when made, that is, at the date of notification of succession.

The right of the new State under paragraph 2 of article 16 to change the predecessor State's choice in respect of parts of the treaty or between differing provisions raises the same problems of uncertainty and possible prejudice, if the choice is given retroactive effect, as are raised by new reservations. Accordingly, such choice should have effect only from the notification of succession.

The difficulties encountered with regard to articles 15 and 16 emphasize the need for establishing a time-limit within which the new State should notify succession.

Article 25 provides that, when a newly independent State is formed from two or more territories which had differing treaty régimes prior to independence, any multilateral treaty continued in force pursuant to the prior articles relating to newly independent States is applicable either to the entire territory of the new State or only to the former territory to which it applied at the option of the new State. Is this rule a reasonable one? For example, this rule could result in the application of the Vienna Convention on Consular Relations to a consular district in one section of a State while a consular district in another section could be subjected to a different set of requirements. Or the immunities of a diplomatic agent might vary according to whether he was in the part of the State covered by the Vienna Convention on Diplomatic Relations or not. It is suggested that sub-paragraph (*b*) of the article should be deleted. The new State is not required to maintain the treaty in effect and sub-paragraph (*a*) affords sufficient protection to take care of the unusual case. The only difficult point not covered by sub-paragraph (*a*) is the situation when multilateral treaty obligations applicable in one section would conflict with treaty obligations applicable in another section. In such cases, the new State, if it wished to maintain both treaties in effect, should be entitled to limit application to the original territory.

The distinction between the dissolution of a State (*article 27*) and the separation of part of a State (*article 28*) is quite nebulous. The principal criterion appears to be that in dissolution the predecessor State ceases to exist while in separation of part of a State, the remaining part continues to be the predecessor State. This differentiation seems largely nominal. If State A splits in half and the half calls itself State B and the other State C, should this produce different results than if State A splits in half and the half calls itself State B

and the other half State A, or vice versa? The practice cited in the commentaries to the two articles does not provide substantial assistance in sharpening the distinction between the two situations. It is suggested that article 28 adds an unnecessary element of complexity to the draft articles and that the concept of "newly independent State" is sufficiently broad to encompass the separation of part of a State in all those cases in which application of the rules in part III is indicated.

The question whether the application of a treaty is incompatible with its object and purpose arises in a substantial number of the draft articles. In *articles 25, 26 and 27* (as well as 28 if retained) the additional question of whether certain actions radically change the conditions for the operation of a treaty is raised. These are concepts of a general nature whose application to individual cases of succession may well result in strong differences of opinion. Other problems of interpretation and application have been pointed out in the comments of the United States, such as, for example, the difficulties in applying the rules relating to the time of succession.

It is clear, therefore, that differences between Governments will develop with regard to varying aspects of succession to treaties. Consequently, the Government of the United States urges the Commission to include provision for the settlement of disputes that may arise among the parties regarding the interpretation and execution of the articles.

Articles 29 and 30 are valuable from the point of view that they seek to avoid permitting the fact of a succession to be used as an argument for exarcerbating territorial disputes. The underlying logic is simple and incontrovertible. A successor State can only acquire as its territorial domain the territory and territorial rights of the predecessor. If the territory as held by the State had boundaries firmly fixed and settled by treaty with an established and well-working régime for keeping those boundaries delineated then the successor State inherits all this. If the territory as held by the predecessor State included obligations by an upstream riparian State established by treaty to release water from its river dams so as to aid the irrigation projects in the territory, the new State receives its territory with those benefits. On the other hand, if the territory as held by the predecessor State had a poorly-defined boundary as a consequence of a poorly-drafted treaty or was subject to an obligation to control its releases of water to assist irrigation in a downstream riparian State then the successor State acquires what the predecessor had, territory with badly defined boundaries or subject to an obligation to help the downstream State.

Failure to state the rules set forth in articles 29 and 30 would give rise to an assumption that the fact of succession could be used to support claims for territorial change or abolition of territorial rights. The result would be that an effort to codify international law would have resulted in undermining friendly relations among States. The United States, therefore, favours retention of articles 29 and 30.

Article 30, however, would benefit from simplification. The structure and drafting are complicated by a requirement in paragraph 1 that rights and obligations have to attach to a particular territory in the State obligated and a particular territory in the State benefited. This latter requirement seems both unnecessary and unduly confusing. If a land-locked State has transit rights to send certain commodities through a neighbouring State to a port, should it make any difference whether the commodities are grown or manufactured throughout the land-locked State or only in certain areas? Even if grown in a certain area the sale of the commodities benefits the State as a whole as well as the area directly concerned. Consequently, the United States would propose that this requirement be eliminated from the article.