

Document:-
A/CN.4/163

**Report of the International Law Commission on the work of its Fifteenth Session, 6
July 1963, Official Records of the General Assembly, Eighteenth Session, Supplement
(A/5509)**

Topic:
<**multiple topics**>

Extract from the Yearbook of the International Law Commission:-
1963 , vol. II

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REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/5509 *

Report of the International Law Commission covering the work of its fifteenth session, 6 May — 12 July 1963

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* Also issued as *Official Records of the General Assembly, Eighteenth Session, Supplement No. 9.*

CHAPTER I

Organization of the Session

1. The International Law Commission, established in pursuance of General Assembly resolution 174 (II) of 21 November 1947, and in accordance with its Statute annexed thereto, as subsequently amended, held its fifteenth session at the European Office of the United Nations, Geneva, from 6 May to 12 July 1963. The work of the Commission during the session is described in this report. Chapter II of the report contains twenty-five articles on the invalidity and termination of treaties.

Chapter III concerns the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations. Chapter IV relates to progress of work on other subjects under study by the Commission. Chapter V deals with a number of administrative and other questions.

A. MEMBERSHIP AND ATTENDANCE

- The Commission consists of the following members:
Mr. Roberto AGO (Italy)
Mr. Gilberto AMADO (Brazil)
Mr. Milan BARTOS (Yugoslavia)

Mr. Herbert W. BRIGGS (United States of America)
 Mr. Marcel CADIEUX (Canada)
 Mr. Erik CASTRÉN (Finland)
 Mr. Abdullah EL-ERIAN (United Arab Republic)
 Mr. Taslim O. ELIAS (Nigeria)
 Mr. André GROS (France)
 Mr. Eduardo JIMÉNEZ DE ARÉCHAGA (Uruguay)
 Mr. Victor KANGA (Cameroon)
 Mr. Manfred LACHS (Poland)
 Mr. LIU Chieh (China)
 Mr. Antonio DE LUNA (Spain)
 Mr. Luis PADILLA NERVO (Mexico)
 Mr. Radhabinod PAL (India)
 Mr. Angel M. PAREDES (Ecuador)
 Mr. OBED PESSOU (Dahomey)
 Mr. Shabtai ROSENNE (Israel)
 Mr. Abdul Hakim TABIBI (Afghanistan)
 Mr. Senjin TSURUOKA (Japan)
 Mr. Grigory I. TUNKIN (Union of Soviet Socialist Republics)
 Mr. Alfred VERDROSS (Austria)
 Sir Humphrey WALDOCK (United Kingdom of Great Britain and Northern Ireland)
 Mr. Mustafa Kamil YASSEN (Iraq)

3. All the members, with the exception of M. Victor Kanga, attended the session of the Commission.

B. OFFICERS

4. At its 673rd meeting, held on 6 May 1963, the Commission elected the following officers:

Chairman: Mr. Eduardo Jiménez de Aréchaga

First Vice-Chairman: Mr. Milan Bartos

Second Vice-Chairman: Mr. Senjin Tsuruoka

Rapporteur: Sir Humphrey Waldock

5. At its 677th meeting, held on 10 May 1963, the Commission appointed a Drafting Committee under the chairmanship of the first Vice-Chairman of the Commission. The composition of the Committee was as follows: Mr. Milan Bartos, Chairman, Mr. Roberto Ago, Mr. Herbert W. Briggs, Mr. Abdullah El-Erian, Mr. André Gros, Mr. Luis Padilla Nervo, Mr. Shabtai Rosenne, Mr. Grigory Tunkin, Sir Humphrey Waldock. The Drafting Committee held twelve meetings during the session.

6. The Legal Counsel, Mr. Constantin Stavropoulos, was present at the 710th meeting, held on 28 June 1963. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, represented the Secretary-General and acted as Secretary to the Commission.

C. AGENDA

7. The Commission adopted an agenda for the fifteenth session consisting of the following items:

1. Law of treaties.
2. Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII)).
3. State responsibility: report of the Sub-Committee.
4. Succession of States and Governments: report of the Sub-Committee.
5. Special missions.

6. Relations between States and inter-governmental organizations.
7. Co-operation with other bodies.
8. Date and place of the sixteenth session.
9. Other business.

8. In the course of the session, the Commission held forty-nine meetings. It considered all the items of its agenda.

CHAPTER II

Law of Treaties

A. INTRODUCTION

Summary of the Commission's proceedings

9. At its fourteenth session the Commission provisionally adopted part I of its draft articles on the law of treaties, consisting of twenty-nine articles on the conclusion, entry into force and registration of treaties (A/5209 and Corr. I, chapter II). At the same time the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit this draft, through the Secretary-General, to Governments for their observations. The Commission further decided to continue its study of the law of treaties at its next session, to give the topic priority and to take up at that session the questions of the validity and duration of treaties.

10. Both the "validity" and the "duration" of treaties have been the subject of reports by previous Special Rapporteurs. "Validity" was dealt with by Sir Hersch Lauterpacht in articles 10-16 of his first report on the law of treaties (A/CN.4/63)¹ and in his revision of article 16 in his second report (A/CN.4/87)², and by Sir Gerald Fitzmaurice in his third report (A/CN.4/115)³ "Duration" was not covered by Sir Hersch Lauterpacht in either of his two reports, but was dealt with at length in Sir Gerald Fitzmaurice's second report (A/CN.4/107)⁴. Owing to the pressure of other work, none of these reports had been examined by the Commission; but the Commission has naturally given them full consideration.

11. At the present session of the Commission, the Special Rapporteur submitted a report (A/CN.4/156 and Add.1-3) on the essential validity, duration and termination of treaties. The Commission also had before it a memorandum prepared by the Secretariat containing the provisions of the resolutions of the General Assembly concerning the law of treaties (A/CN.4/154). It considered the report of the Special Rapporteur at its 673rd-685th, 687th-711th, 714th, 716th-718th and 720th meetings and adopted a provisional draft of articles upon the topics mentioned, which is reproduced in the present chapter together with commentaries upon the articles. In studying these topics the Commission came to the conclusion that it was more convenient to formulate the articles upon the "essential validity" of

¹ *Yearbook of the International Law Commission, 1953*, vol. II, pp. 137-159.

² *Yearbook of the International Law Commission, 1954*, vol. II, pp. 133-139.

³ *Yearbook of the International Law Commission, 1958*, vol. II, pp. 20-46.

⁴ *Yearbook of the International Law Commission, 1957*, II, pp. 16-70.

treaties in terms of the various grounds upon which treaties may be affected with invalidity and the articles on "duration and termination" in terms of the various grounds upon which the termination of a treaty may be brought about. Accordingly, the Commission decided to change the title of this part of its work on the law of treaties to "Invalidity and Termination of Treaties"; this is, therefore, the title given to the draft articles reproduced in the present chapter.

12. As stated in paragraph 18 of its report for 1962⁵, the Commission's plan is to prepare a draft of a further group of articles at its session in 1964 covering the application and effects of treaties. After all its three drafts on the law of treaties have been completed, the Commission will consider whether they should be amalgamated to form a single draft convention or whether the codification of the law of treaties should take the form of a series of related conventions. In accordance with its decision at its previous session, the Commission has provisionally prepared the present draft in the form of a second self-contained group of articles closely related to the articles in part I which have already been transmitted to Governments for their observations. The present draft has therefore been designated "The Law of Treaties — Part II." At the same time the Commission decided, without thereby prejudging in any way its decision concerning the form in which its work on the law of treaties should ultimately be presented, that it would be more convenient not to number the present group of articles in a new series, but to number them consecutively after the last article of the previous draft. Accordingly, the first article of the present group is numbered 30.

13. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit its draft concerning the invalidity and termination of treaties, through the Secretary-General, to Governments for their observations.

The scope of the present group of draft articles

14. The present group of draft articles covers the broad topics of the invalidity and termination of treaties, while the topic of the suspension of the operation of treaties has been dealt with in close association with that of termination. The draft articles do not, however, contain any provisions concerning the effect of the outbreak of hostilities upon treaties, although this topic raises problems both of the termination of treaties and of the suspension of their operation. The Commission considered that the study of this topic would inevitably involve a consideration of the effect of the provisions of the Charter concerning the threat or use of force upon the legality of the recourse to the particular hostilities in question; and it did not feel that this question could conveniently be dealt with in the context of its present work upon the law of treaties. Another question not dealt with in these draft articles is the effect of the extinction of the international personality of a State upon the termination of treaties. The Commission, as further explained in paragraph (3) of its commentary to article 43, did not think that any useful provisions could

be formulated on this question without taking into account the problem of the succession of States to treaty rights and obligations. Having regard to its decision to undertake a separate study of the topic of succession of States and Governments and to deal with succession in the matter of treaties in connexion with that topic, the Commission excluded for the time being the question of the extinction of the international personality of a State altogether from the draft articles regarding the termination of treaties. It decided to review this question at a later session when its work on the succession of States was further advanced.

15. In discussing the invalidity of treaties, the Commission considered the case of a treaty the provisions of which conflict with those of a prior treaty; and in discussing the termination of treaties it considered the analogous case of the implied termination of a treaty by reason of entering into another treaty the provisions of which are incompatible with those of the earlier treaty. Some members of the Commission considered that in both instances these cases raised questions of the interpretation and of the priority of the application of treaties, rather than of validity or determination. Other members expressed doubts as to whether these cases could be considered as exclusively questions of interpretation and application. The commission decided to leave both these cases aside for examination at its next session when it would have before it a further report from its Special Rapporteur dealing with the application of treaties, and to determine their ultimate place in the draft articles on the law of treaties in the light of that examination.

16. The draft articles have provisionally been arranged in six sections covering: (i) a general provision, (ii) invalidity of treaties, (iii) termination of treaties, (iv) particular rules relating to the application of sections (ii) and (iii), (v) procedure, and (vi) legal consequences of the nullity, termination or suspension of the operation of a treaty. The definitions contained in article 1 of part I are applicable also to part II and it was not found necessary to add any further definitions for the purposes of this part. The articles formulated by the Commission in this part, as in part I, contain elements of progressive development as well as of codification of the law.

17. The text of draft articles 30-54 and the commentaries as adopted by the Commission on the proposal of the Special Rapporteur are reproduced below:

B. DRAFT ARTICLES ON THE LAW OF TREATIES

Part II. — Invalidity and termination of treaties

Section I: General provision

Article 30. — Presumption as to the validity, continuance in force and operation of a treaty

Every treaty concluded and brought into force in accordance with the provisions of part I shall be considered as being in force and in operation with regard to any State that has become a party to the treaty, unless the nullity, termination or suspension of the operation of the treaty or the withdrawal of the particular party from the treaty results from the application of the present articles.

⁵ Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209 and Corr.1); see also Yearbook of the International Law Commission, 1962, vol. II.

Commentary

The substantive provisions of the present part of the draft articles on the law of treaties relate exclusively to cases where for one reason or another the treaty is to be considered vitiated by nullity or terminated or its operation suspended. The Commission accordingly thought it desirable to underline in a general provision at the beginning of this part that any treaty concluded and brought into force in accordance with the provisions of the previous part is to be considered as being in force and in operation, unless its nullity or termination or the suspension of its operation results from the provisions of the present part.

*Section II: Invalidity of treaties***Article 31. — Provisions of internal law regarding competence to enter into treaties**

When the consent of a State to be bound by a treaty has been expressed by a representative considered under the provisions of article 4 to be furnished with the necessary authority, the fact that a provision of the internal law of the State regarding competence to enter into treaties has not been complied with shall not invalidate the consent expressed by its representative, unless the violation of its internal law was manifest. Except in the latter case, a State may not withdraw the consent expressed by its representative unless the other parties to the treaty so agree.

Commentary

(1) Constitutional limitations affecting the exercise of the treaty-making power take various forms.⁶ Some constitutions seek to preclude the executive from entering into treaties, or particular kinds of treaties, except with the previous consent of a legislative organ; some provide that treaties shall not be effective as law within the State unless "approved" or confirmed in some manner by a legislative organ; others contain fundamental laws which are not susceptible of alteration except by a special procedure of constitutional amendment and which in that way indirectly impose restrictions upon the power of the executive to conclude treaties. Legally, a distinction can be drawn under internal law between those types of provision which place constitutional limits upon the power of a Government to enter into treaties and those which merely limit the power of a Government to enforce a treaty within the State's internal law without some form of endorsement of the treaty by the legislature. The former can be said to affect the actual power of the executive to conclude a treaty, the latter merely the power to implement a treaty when concluded. The question which arises under this article is how far any of these constitutional limitations may affect the validity under international law of a consent to a treaty given by a State agent ostensibly authorized to declare that consent; and on this question opinion has been divided.

⁶ See *United Nations Legislative Series, Laws and Practices concerning the Conclusion of Treaties (ST/LEG/SER. B/3)*.

⁷ E.g., P. Chailley, *La nature juridique des traités internationaux selon le droit contemporain*, pp. 175 and 215; S. B. Crandall, *Treaties, their Making and Enforcement*, pp. 13-14; C. De Visscher, *Bibliotheca Visseriana*, vol. 2 (1924), p. 98.

(2) One group of writers⁷ maintains that international law leaves it to the internal law of each State to determine the organs and procedures by which the will of a State to be bound by a treaty shall be formed and expressed; and that constitutional laws governing the formation and expression of a State's consent to a treaty have always to be taken into account in considering whether an international act of signature, ratification, acceptance, approval or accession is effective to bind the State. On this view, internal laws limiting the power of State organs to enter into treaties are to be considered part of international law so as to avoid, or at least render voidable, any consent to a treaty given on the international plane in disregard of a constitutional limitation; the agent purporting to bind the State in breach of the constitution is totally incompetent in international as well as national law to express its consent to the treaty. If this view were to be accepted, it would follow that other States would not be entitled to rely on the authority to commit the State ostensibly possessed by a Head of State, Prime Minister, Foreign Minister, etc., under article 4; they would have to satisfy themselves in each case that the provisions of the State's constitution are not infringed or take the risk of subsequently finding the treaty void. The weakening of the security of treaties which this doctrine entails is claimed by those who advocate it to be outweighed by the need to give the support of international law to democratic principles in treaty-making.

(3) In 1951, at its third session, the Commission itself adopted an article based upon this view (A/CN.4/L.28).⁸ Some members, however, were strongly critical of the thesis that constitutional limitations are incorporated into international law, while the Assistant Secretary-General for Legal Affairs expressed misgivings as to the difficulties with which it might confront depositaries. During the discussion at that session it was said that the Commission's decision had been based more on a belief that States would not accept any other rule than on legal principles.

(4) A second group of writers,⁹ while basing themselves on the incorporation of constitutional limitations into international law, recognize that some qualification of that doctrine is essential if it is not to undermine the security of treaties. According to this group, good faith requires that only notorious constitutional limitations with which other States can reasonably be expected to acquaint themselves should be taken into account. On this view, a State contesting the validity of a treaty on constitutional grounds can only invoke those provisions of the constitution which are notorious or could easily have been ascertained by inquiry. Some writers in this group further maintain that a State which invokes the provisions of its constitution to annul its signature, ratification, etc., of a treaty, is liable to compensate the

⁸ Article 2: "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose." (*Yearbook of the International Law Commission 1951*, vol. II, p. 73).

⁹ E.g., McNair, *Law of Treaties* (1961), chapter III; Paul De Visscher, *De la conclusion des traités internationaux* (1943), p. 275; P. Guggenheim, *Recueil des cours de l'Académie de droit international*, vol. 74 (1949), p. 236; Sir Hersch Lauterpacht, *First Report on the Law of Treaties, Yearbook of the International Law Commission, 1953*, vol. II, pp. 141-146.

other party which "relied in good faith and without any fault of its own on the ostensible authority of the regular constitutional organs of the State".¹⁰

(5) A compromise solution based upon the initial hypothesis of the invalidity in international law of an unconstitutional signature, ratification, etc., of a treaty presents certain difficulties. If a limitation laid down in the internal of a State is to be regarded as effective in international law to curtail the authority of a Head of State or other State agent to declare the State's consent to a treaty, it is not clear upon what principle a "notorious" limitation is effective for that purpose but "non-notorious" one is not. Under the State's internal law both kinds of limitation are legally effective to curtail the agent's authority to enter into the treaty. Similarly, if the internal limitation is effective in international law to deprive the State agent of any authority to commit the State, it does not seem that the State can be held internationally responsible in damages in respect of its agent's unauthorized signature, ratification, etc., of the treaty. If the initial signature, ratification, etc., of the treaty is not imputable to the State by reason of the lack of authority, all subsequent acts of the State agents with respect to the same treaty would also logically seem not to be imputable to the State.

(6) The practical difficulties are even more formidable, because in many cases it is quite impossible to make a clear-cut distinction between notorious and non-notorious limitations. Admittedly, there now exist collections of the texts of State constitutions and the United Nations has issued a volume of "Laws and Practices concerning the Conclusion of Treaties" based on information supplied by a considerable number of States. Unfortunately, however, neither the texts of constitutions nor the information made available by the United Nations are by any means sufficient to enable foreign States to appreciate with any degree of certainty whether or not a particular treaty falls within a constitutional provision. Some provisions are capable of subjective interpretation, such as a requirement that "political" treaties or treaties of "special importance" should be submitted to the legislature; some laws do not make it clear on their face whether the limitation refers to the power to conclude the treaty or to its effectiveness within domestic law. But even when the provisions are apparently uncomplicated and precise, the superficial clarity and notoriety of the limitations may be quite deceptive. In the majority of cases where the constitution itself contains apparently strict and precise limitations, it has nevertheless been found necessary to admit a wide freedom for the executive to conclude treaties in simplified form without following the strict procedures prescribed in internal law; and this use of the treaty-making power is reconciled with the letter of the law either by a process of interpretation or by the development of political understandings. Furthermore, the constitutional practice in regard to treaties in simplified form tends to be somewhat flexible, and the question whether or not to deal with a particular treaty under the procedures laid down in the constitution then becomes to some extent a matter of the political judge-

ment of the executive, whose decision may afterwards be challenged in the legislature or in the courts. Accordingly, while it is certainly true that in a number of cases it will be possible to say that a particular provision is notorious and that a given treaty falls within it, in many cases neither a foreign State nor the national Government itself will be able to judge in advance with any certainty whether, if contested, a given treaty would be held under national law to fall within an internal limitation, or whether an international tribunal would hold the internal provision to be one that is "notorious" and "clear" for the purposes of international law.

(7) A third group of writers¹¹ considers that international law leaves to each State the determination of the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane. According to this view, international law determines the procedures and conditions under which States express their consent to treaties on the international plane; and it also regulates the conditions under which the various categories of State organs and agents will be recognized as competent to carry out such procedures on behalf of their State. In consequence, if an agent, competent under international law to commit the State, expresses the consent of the State to a treaty through one of the established procedures, the State is held bound by the treaty in international law. Under this view, failure to comply with internal requirements may entail the invalidity of the treaty as domestic law, and may also render the agent liable to legal consequences under domestic law; but it does not affect the validity of the treaty in international law so long as the agent acted within the scope of his authority under international law. Some of these writers¹² modify the stringency of the rule in cases where the other State is actually aware of the failure to comply with internal law or where the lack of constitutional authority is so manifest that the other State must be deemed to have been aware of it. This compromise solution, which takes as its starting point the supremacy of the international rules concerning the conclusion of treaties, does not present the same logical difficulties as the compromise put forward by the other group. As the basic principle, according to the third group, is that a State is entitled to assume the regularity of what is done within the authority possessed by an agent under international law, it is logical enough that the State should not be able to do so when it knows, or must in law be assumed to know, that in the particular case the authority does not exist.

(8) The decisions of international tribunals and State practice, if they are not conclusive, appear to

¹¹ E.g., Anzilotti, *Cours de droit international* (French translation by Gidel), vol. 1 (1929), pp. 366-367; Sir Gerald Fitzmaurice, *British Yearbook of International Law*, vol. 15 (1934), pp. 129-137; Blix, *Treaty-Making Power* (1960), chapter 24; and see UNESCO, *Survey of the Ways in which States interpret their International Obligations* (P. Guggenheim), pp. 7-8.

¹² J. Basdevant, for example, while holding that States must in general be able to reply on the ostensible authority of a State agent and to disregard constitutional limitations upon his authority, considered that this should not be so in the case of a "Violation manifeste de la constitution d'un Etat"; *Recueil des cours de l'Académie de droit international*, vol. XV (1926), p. 581; see also UNESCO, *Survey of the Ways in which States interpret their International Obligations*, p. 8.

¹⁰ Sir Hersch Lauterpacht, *Yearbook of the International Law Commission, 1953*, vol. II, p. 143; see also Lord McNair, *op. cit.*, p. 77; *Harvard Law School, Research in International Law*, part. III, Law of Treaties, art. 21.

support a solution based upon the position taken by the third group. The international jurisprudence is admittedly not very extensive. The *Cleveland* award¹³ (1888) and the *George Pinson* case¹⁴ (1928), although not involving actual decisions on the point, contain observations favouring the relevance of constitutional provisions to the international validity of treaties. On the other hand the *Franco-Swiss Custom* case¹⁵ (1912) and the *Rio Martin* case¹⁶ (1924) contain definite decisions by arbitrators declining to take account of alleged breaches of constitutional limitations when upholding the validity respectively of a protocol and an exchange of notes, while the *Metzger* case¹⁷ contains an observation in the same sense. Furthermore, pronouncements in the *Eastern Greenland*¹⁸ and *Free Zones*¹⁹ cases, while not directly in point, seem to indicate that the International Court will not readily go behind the ostensible authority under international law of a State agent — a Foreign Minister and an Agent in international proceedings in the cases mentioned — to commit his State.

(9) As to State practice, a substantial number of diplomatic incidents have been closely examined in a recent work.²⁰ These incidents certainly contain examples of claims that treaties were invalid on constitutional grounds, but in none of them was that claim admitted by the other party to the dispute. Moreover, in three instances — the admission of Luxembourg to the League, the Politis incident and the membership of Argentina — the League of Nations seems to have acted upon the principle that a consent given on the international plane by an ostensibly competent State agent is not invalidated by the subsequent disclosure that the agent lacked constitutional authority to commit his State. Again, in one case a depositary, the United States Government, seems to have assumed that an ostensibly regular notice of adherence to an agreement could not be withdrawn on a plea of lack of constitutional authority except with the consent of the other parties.²¹ Nor is it the practice of State agents, when concluding treaties, to cross-examine each other as to their constitutional authority to affix their signatures to a treaty or to deposit an instrument of ratification, acceptance, etc. It is true that in the *Eastern Greenland* case Denmark conceded the relevance in principle of Norway's constitutional provisions in appreciating the effect of the Ihlen declaration, while contesting their relevance in the particular circumstances of the case. It is also true that at the seventeenth session of the General Assembly one delegate in the Sixth Committee expressed concern that certain passages in the Commission's report seemed to imply a view unfavourable to the relevance of constitutional provisions in determining the question of a State's consent in international law. But the weight of State practice seems to be very much the other way.

(10) The view that a failure to comply with constitutional provisions should not normally be regarded as vitiating a consent given in due form by an organ or agent ostensibly competent to give it appears to derive support from two further considerations. The first is that international law has devised a number of treaty-making procedures — ratification, acceptance and approval — specifically for the purpose of enabling Governments to reflect fully upon the treaty before deciding whether or not the State should become a party to it, and also of enabling them to take account of any domestic constitutional requirements. When a treaty has been made subject to ratification, acceptance or approval, the negotiating States would seem to have done all that can reasonably be demanded of them in the way of giving effect to democratic principles of treaty-making. It would scarcely be reasonable to expect each Government subsequently to follow the internal handling of the treaty by each of the other Governments, while any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs. The same considerations apply in cases of accession where the Government has the fullest opportunity to study the treaty and give effect to constitutional requirements before taking any action on the international plane to declare the State's accession to the treaty. Again, in the case of a treaty binding upon signature it is the Government which authorizes the use of this procedure; the Government is aware of the object of the treaty before the negotiations begin and, with modern methods of communication, it normally has knowledge of the exact contents of the treaty before its representative proceeds to the act of signature; moreover, if necessary, its representative can be instructed to sign "*ad referendum*." Admittedly, in the case of treaties binding upon signature, and more especially those in simplified form, there may be a slightly greater risk of a constitutional provision being overlooked; but even in these cases the Government had the necessary means of controlling the acts of its representative and of giving effect to any constitutional requirements. In other words, in every case any failure to comply with constitutional provisions in entering into a treaty will be the clear responsibility of the Government of the State concerned.

(11) The second consideration is that the majority of the diplomatic incidents in which States have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. Furthermore, in most of these cases the other party to the dispute has contested the view that non-compliance with constitutional provisions could afterwards be made a ground for invalidating a treaty which had been concluded by representatives ostensibly possessing the authority of the State to conclude it. Where a Government has genuinely found itself in constitutional difficulties after concluding a treaty and has raised the matter promptly, it appears normally to be able to get the constitutional obstacle removed by internal action and to obtain any necessary indulgence in the meanwhile from the other parties. In such cases the difficulty seems often to show itself not from the matter being raised in the legislative body whose consent was by-passed, but rather in the courts

¹³ Moore, *International Arbitrations*, vol. 2, p. 1946.

¹⁴ *United Nations Reports of International Arbitral Awards*, vol. V, p. 327.

¹⁵ *Ibid.*, vol. XI, p. 411.

¹⁶ *Ibid.*, vol. II, p. 724.

¹⁷ *Foreign Relations of the United States* (1901), p. 262.

¹⁸ P.C.I.J., Series A/B, No. 53, pp. 56-71 and p. 91.

¹⁹ P.C.I.J., Series A/B, No. 46, p. 170.

²⁰ H. Blix, *op cit.*, chapter 20.

²¹ H. Blix, *op. cit.*, p. 267.

when the validity of the treaty as internal law is challenged on constitutional grounds.²² Confronted with a decision in the courts impugning the constitutional validity of a treaty, a Government will normally seek to regularize its position under the treaty by taking appropriate action in the domestic or international sphere.

(12) Some members of the Commission were of the opinion that international law had to take account of internal law to the extent of recognizing that internal law determines the organ or organs competent in the State to exercise the treaty-making power. On this view, any treaty concluded by an organ or representative not competent to do so under internal law by reason of any failure to comply with its provisions would be invalidated by reason of the defective character of the consent resulting from the application of the internal law. The majority of the Commission, however, considered that under such a rule the complexity and uncertain application of provisions of internal law regarding the conclusion of treaties would create too large a risk to the security of treaties. In the light of this consideration and of the jurisprudence of international tribunals and the evidence of State practice, they considered that the basic principle of the present article had to be that non-observance of a provision of internal law regarding competence to enter into treaties does not affect the validity of a consent given in due form by a State organ or agent competent under international law to give that consent. Some members, indeed, took the view that it was undesirable to weaken this basic principle in any way by admitting any exceptions to it and would have preferred to see the State held bound by the consent of its organ or representative in every case where it appeared to have been given in due form. Other members forming part of the majority, while endorsing whole-heartedly the view that non-observance of internal law regarding competence to enter into treaties does not, in principle, affect a consent regularly given under the rules of international law, considered that it would be admissible to allow an exception in cases where the violation of the internal law regarding competence to enter into treaties was absolutely manifest. They had in mind cases, such as have occurred in the past, where a Head of State enters into a treaty on his own responsibility in contravention of an unequivocal provision of the constitution. They did not feel that to allow this exception would compromise the basic principle, since the other State could not legitimately claim to have relied upon a consent given in such circumstances. This view is incorporated in article 31.

(13) The article therefore provides that, when the consent of a State to be bound has been expressed by an organ or representative furnished with the necessary authority to do so under international law, the efficacy

²² E.g. *Prosecution for Misdemeanours (Germany) case*, (*International Law Reports 1955*, pp. 560-561); *Belgian State v. Leroy (ibid.*, pp. 614-616). National courts have sometimes appeared to assume that a treaty, constitutionally invalid as domestic law, will also be automatically invalid on the international plane. More often, however, they have either treated the international aspects of the matter as outside their province or have recognized that to hold the treaty constitutionally invalid may leave the State in default in its international obligations.

of that consent to bind the State cannot normally be impeached merely on the ground of a non-observance of internal law. Only in the case of a violation of the law which is "manifest" may the invalidity of the consent be claimed. Article 4, to which reference is made in the text of the paragraph, is an article which sets out the conditions under which certain State organs or agents are not required to furnish any evidence of their authority to negotiate or conclude treaties and the conditions under which they are required to do so. From this article it follows that an organ or agent is to be considered as possessing authority under international law either when no evidence of authority is required under article or when specific evidence of authority has been produced.

(14) The second sentence of the article merely draws the logical consequence from the rule laid down in the first sentence. This is that, except in the case of a manifest violation, a consent regularly given under the provisions of international law but in breach of a provision of internal law may only be withdrawn with the agreement of the other party or parties.

Article 32. — Lack of authority to bind the State

1. If the representative of a State, who cannot be considered under the provisions of article 4 as being furnished with the necessary authority to express the consent of his State to be bound by a treaty, nevertheless executes an act purporting to express its consent, the act of such representative shall be without any legal effect, unless it is afterwards confirmed, either expressly or impliedly, by his State.

2. In cases where the power conferred upon a representative to express the consent of his State to be bound by a treaty has been made subject to particular restrictions, his omission to observe those restrictions shall not invalidate the consent to the treaty expressed by him in the name of his State, unless the restrictions upon his authority had been brought to the notice of the other contracting States.

Commentary

(1) Article 32 covers cases where a representative may purport by his act to bind the State but in fact lacks authority to do so. This may happen in two ways. First, a representative who cannot be considered as possessing authority under international law to bind the State in accordance with the provisions of article 4 and lacks any specific authority from his Government may, through error or excess of zeal, purport to enter into a treaty on its behalf. Secondly, while possessing the necessary authority under international law, a representative may be subject to express instructions from his Government which limit his authority in the particular instance. Neither type of case is common but both types have occasionally occurred in practice.²³

(2) Where a treaty is not to become binding without subsequent ratification, acceptance or approval, any excess of authority committed by a representative in establishing the text of the treaty will automatically be dealt with at the subsequent stage of ratification, acceptance

²³ See generally H. Blix, *op. cit.*, pp. 5-12 and 76-82.

or approval. The State in question will then have the clear choice either of repudiating the text established by its representative or of ratifying, accepting or approving the treaty; and if it does the latter, it will necessarily be held to have endorsed the unauthorized act of its representative and, by doing so, to have cured the original defect of authority. Accordingly, the present article is confined to cases in which the defect of authority relates to the execution of an act by which a representative purports finally to establish his State's consent to be bound. In other words, it is confined to cases where there is an unauthorized signing of a treaty which is to become binding upon signature, or where a representative, authorized to exchange or deposit a binding instrument under certain conditions or subject to certain reservations, exceeds his authority by failing to comply with the conditions or to specify the reservations, when exchanging or depositing the instrument.

(3) Paragraph 1 of the article deals with cases where the representative lacks any authority to enter into the treaty. In 1908, for example, the United States Minister to Romania signed two conventions without having any authority to do so.²⁴ With regard to one of these conventions, his Government had given him no authority at all, while he had obtained full powers for the other by leading his Government to understand that he was to sign a quite different treaty. Again, in 1951 a convention concerning the naming of cheeses concluded at Stresa was signed by a delegate on behalf both of Norway and Sweden, whereas it appears that he had authority to do so only from the former country. In both these instances the treaty was, in fact, subject to ratification, but they serve to illustrate the kind of cases that may arise. A further case, in which the same question may arise, and one more likely to occur in practice, is where an agent has authority to enter into a particular treaty, but goes beyond his full powers by accepting unauthorized extensions or modifications of it. An instance of such a case was Persia's attempt, in discussions in the Council of the League, to disavow the Treaty of Erzerum of 1847 on the ground that the Persian representative had gone beyond his authority in accepting a certain explanatory note when exchanging ratification.²⁵

(4) Where there is no authority to enter into a treaty, it seems clear, on principle, that the State must be entitled to disavow the act of its representative, and paragraph 1 so provides. On the other hand, it seems equally clear that, notwithstanding the representative's original lack of authority, the State may afterwards endorse his act and thereby establish its consent to be bound by the treaty. It will also be held to have done so by implication if it invokes the provisions of the treaty or otherwise acts in such a way as to appear to treat the act of its representative as effective.

(5) Paragraph 2 of the article deals with the other type of case where the representative has authority to

enter into the treaty but his authority is curtailed by specific instructions. The Commission considers that in order to safeguard the security of international transactions, the rule must be that specific instructions given by a State to its representative are only effective to limit his authority vis-à-vis other States, if they are made known to the other States in some appropriate manner before the State in question enters into the treaty. That this is the rule acted on by States is suggested by the rarity of cases in which a State has sought to disavow the act of its representative by reference to secret limitations upon his authority. Thus in the incident in 1923 of the Hungarian representative's signature of a resolution of the Council of the League, the Hungarian Government sought to disavow his act by interpreting the scope of his full powers, rather than by contending that he had specific instructions limiting their exercise. Furthermore, the Council of the League seems clearly to have held the view that a State may not disavow the act of an agent done within the scope of the authority apparently conferred upon him by his full powers. Paragraph 2 accordingly provides that specific instructions are not to affect a consent to a treaty signified by a representative unless they had been brought to the notice of the other contracting State or States.

Article 33. — Fraud

1. If a State has been induced to enter into a treaty by the fraudulent conduct of another contracting State, it may invoke the fraud as invalidating its consent to be bound by the treaty.

2. Under the conditions specified in article 46, the State in question may invoke the fraud as invalidating its consent only with respect to the particular clauses of the treaty to which the fraud relates.

Commentary

(1) There does not appear to be any recorded instance of a State claiming to annul or denounce a treaty on the ground that it had been induced to enter into the treaty by the fraud of the other party. The only instance mentioned by writers as one where the matter was discussed at all is the Webster-Ashburton Treaty of 1842 relating to the north-eastern boundary between the United States and Canada.²⁶ That, however, was a case of non-disclosure of a material map by the United States in circumstances in which it was difficult to say that there was any legal duty to disclose it, and Great Britain did not assert that the non-disclosure amounted to fraud.

(2) Clearly, cases in which Governments resort to deliberate fraud in order to procure the conclusion of a treaty are likely to be rare, while any fraudulent misrepresentation of a material fact inducing an essential error would in any event fall under the provisions of the next article dealing with error. Some members of the Commission therefore felt that it was not really necessary to have a separate article dealing specially with fraud and they would have preferred to amalgamate fraud and error in a single article. On balance, however, the Commission considered that it was advisable to keep fraud and error distinct in separate articles.

²⁴ Hackworth, *Digest of International Law*, vol. IV, p. 467. Cf. also the well-known historical incident of the British Government's disavowal of an agreement between a British political agent in the Persian Gulf and a Persian minister which the British Government afterwards said had been concluded without any authority whatever; Adamyiat, *Bahrein Islands*, p. 106.

²⁵ For further cases, see H. Blix, *op. cit.*, pp. 77-81.

²⁶ See Moore, *Digest of International Law*, vol. 5, p. 719.

Fraud, when it occurs, strikes at the root of an agreement in a somewhat different way from innocent misrepresentation and error. It does not merely nullify the consent of the other party to the terms of the agreement; it destroys the whole basis of mutual confidence between the parties.

(3) The Commission encountered some difficulty in formulating the article. Fraud is a concept found in most systems of law, but the scope of the concept is not the same in all systems. Thus, it is doubtful whether the French term *dol* corresponds exactly with the English term "fraud"; and in any event it is not always appropriate to transplant private law concepts into international law without certain modifications. Moreover, the absence of any precedents means that there is no guidance to be found either in State practice or in the jurisprudence of international tribunals as to the scope to be given to the concept of fraud in international law. In these circumstances, some members of the Commission thought it desirable that an attempt should be made to define with precision the conditions necessary to establish fraud in the law of treaties. The view which prevailed, however, was that it would be better to formulate the general concept of fraud applicable in the law of treaties in as clear terms as possible and to leave its precise scope to be worked out in practice and in the decisions of international tribunals.

(4) The article, as drafted, uses the English word "fraud" and the French word *dol* as the nearest terms available in those languages for identifying the principle with which the article is concerned; and the same applies to the word *dolo* in the Spanish text of the article. In using these terms the Commission does not intend to convey that all the detailed connotations given to these terms in internal law are necessarily applicable in international law. It is the broad principle comprised in each of these terms, rather than the detailed applications of the principle in internal law, that is covered by the present article. The term used in each of the three texts is accordingly intended to have the same meaning and scope in international law. Accordingly, in indicating the matters which will operate to nullify consent under this article, the Commission has sought to find a non-technical expression of as nearly equivalent meaning as possible: fraudulent conduct, *conduite frauduleuse* and *conducta fraudulenta*. This expression is designed to include any false statements, misrepresentations or other deceitful proceedings by which a State is induced to give a consent to a treaty which it would not otherwise have given.

(5) The effect of fraud, it seems to be generally agreed, is not to render the treaty *ipso facto* void but to entitle the injured party, if it wishes, to invoke the fraud as invalidating its consent; the article accordingly so provides.

(6) Paragraph 2 makes applicable to cases of fraud the principle of the separability of treaty provisions, the general scope of which principle is defined in article 46. The Commission considered that where the fraud related to particular clauses only of the treaty, it should be at the option of the injured party to invoke the fraud as invalidating its consent to the whole treaty or to the particular clauses to which the fraud related. On the other hand, even in cases of fraud the severance of the treaty could only be admitted under the conditions specified in article 46, because it would be undesirable to set

up continuing treaty relations on the basis of a truncated treaty the provisions of which might apply in a very uneven manner as between the parties.

Article 34. — Error

1. A State may invoke an error respecting the substance of a treaty as invalidating its consent to be bound by the treaty where the error related to a fact or state of facts assumed by that State to exist at the time when the treaty was entered into and forming an essential basis of its consent to be bound by the treaty.

2. Paragraph 1 above shall not apply if the State in question contributed by its own conduct to the error or could have avoided it, or if the circumstances were such as to put that State on notice of a possible error.

3. Under the conditions specified in article 46, an error which relates only to particular clauses of a treaty may be invoked as a ground for invalidating the consent of the State in question with respect to those clauses alone.

4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and articles 26 and 27 then apply.

Commentary

(1) In municipal law, error occupies a comparatively large place as a factor which may nullify the reality of consent to a contract. Some types of error found in municipal law, however, can hardly be imagined as operating in the field of treaties, e.g., error *in persona*. Similarly, some types of treaty, more especially law-making treaties, appear to afford little scope for error *in substantia* to affect the formation of consent, even if that may not be altogether impossible. Moreover, treaty-making processes are such as to reduce to a minimum the risk of errors on material points of substance. In consequence, the instances in which errors of substance have been invoked as affecting the essential validity of a treaty have not been frequent.

(2) Almost all the recorded instances concern geographical errors, and most of them concern errors in maps.²⁷ In some instances, the difficulty was disposed of by a further treaty; in others the error was treated more as affecting the application of the treaty than its validity and the point was settled by arbitration. These instances confirm the possible relevance of errors either in regard to the validity of treaties or their application, but they do not provide clear guidance as to the principles governing the effect of error on the essential validity of treaties.

(3) The effect of error was, however, discussed in the *Eastern Greenland* case before the Permanent Court of International Justice, and again in the *Temple* case before the present Court. In the former case²⁸ Norway contended that, when asked by the Danish Ambassador to say that Norway would not object to the Danish Gov-

²⁷ See Harvard Law School: *Research in International Law*, III, Law of Treaties, pp. 1127-1128; Hyde, *A.J.I.L.* (1933), p. 311; and Kiss, *Répertoire français de droit international public*, vol. I, pp. 55-56.

²⁸ *P.C.I.J.*, Series A/B, No. 53, pp. 71 and 91.

ernment extending its political and economic interests over the whole of Greenland, Norway's Foreign Minister had not realized that this covered the extension of the Danish monopoly régime to the whole of Greenland, and that accordingly his acquiescence in the Danish request had been vitiated by error. The Court contented itself with saying that the Foreign Minister's reply had been definitive and unconditional and appears not to have considered that there was any relevant error in the case. Judge Anzilotti, while also considering that there was no error, went on to say: "But even accepting, for a moment, the supposition that M. Ihlen was mistaken as to the results which might ensue from an extension of Danish sovereignty, it must be admitted that this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a Government could be ignorant of the legitimate consequences following upon an extension of sovereignty . . ." ²⁹

(4) In the first stage of the *Temple* case ³⁰ the Court was confronted with a plea that, when making a declaration under the optional clause in 1950, Thailand had had a mistaken view of the status of its earlier declaration of 1940 and had for that reason used language which had been shown in the *Israel v. Bulgaria* case to be inadequate to effect its acceptance of the optional clause in 1950. As to this plea the Court said: "Any error of this kind would evidently have been an error of law, but in any event the Court does not consider that the issue in the present case is really one of error. Furthermore, the principal juridical relevance of error, where it exists, is that it may affect the reality of the consent supposed to have been given. The Court cannot, however, see in the present case any factor which could, as it were *ex post* and retroactively, impair the reality of the consent Thailand admits and affirms she fully intended to give." A plea of error was also raised in the second stage of the case on the merits; and the error, which was geographical, arose in somewhat special circumstances. There was no error in the conclusion of the original treaty, in which the parties were agreed that the boundary in a particular area should be the line of a certain watershed; the error concerned what the Court held to be a subsequent, implied, agreement to vary the terms of the treaty. Thailand had accepted a map prepared *bona fide* for the purpose of delimiting the boundary in the area in question, but showing a line which did not follow the watershed. Rejecting Thailand's plea that its acceptance of the map was vitiated by error, the Court said: "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error." ³¹

(5) The *Eastern Greenland* and *Temple* cases throw light on the conditions under which error will *not* nullify the reality of the consent rather than on those under which it will do so. The only further guidance which can perhaps be obtained from the Courts' decisions is in the *Mavrommatis Concessions* case ³² which, however, con-

cerned a concession, not a treaty. There the Court held that an error in regard to a matter not constituting a *condition* of the agreement would not suffice to invalidate the consent, and it seems to be generally agreed that, to vitiate consent to a treaty, an error must relate to a matter considered by the parties to form an essential basis of their consent to the treaty.

(6) The Commission recognized that some systems of law distinguish between mutual and unilateral error; but it did not consider that it would be appropriate to make this distinction in international law. Accordingly, the present article applies no less to an error made by only one party than to a mutual error made by both or all the parties.

(7) Paragraph 1 formulates the general rule that an error respecting the substance of a treaty may be invoked as vitiating consent where the error related to a fact or state of facts assumed to exist at the time that the treaty was entered into and forming an essential basis of the consent to the treaty. The Commission did not intend the requirement that the error must have related to a "fact or state of facts" to exclude any possibility that an error of law should in some circumstances serve to nullify consent. Quite apart from the fact that errors as to rights may be mixed questions of law and fact, the line between law and fact is not always an easy one to draw, and cases are conceivable in which an error of law might be held to affect consent. For example, it may be doubtful how far an error made as to a regional or local custom is to be considered as one of law or of fact for the purposes of the present article, having regard to the pronouncements of the Court as to the proof of a regional or local custom.³³ Again, it would seem clear on principle that an error as to internal law would for the purposes of international law be considered one of fact.

(8) Under paragraph 1, error only affects consent if it was a fundamental error in the sense of an error as to a matter which formed an essential basis of the consent given to the treaty. Furthermore, even such an error does not make the treaty automatically void, but gives a right to the party whose consent to the treaty was induced by the error to invoke the error as invalidating its consent. On the other hand, if the party concerned does invoke the error as invalidating its consent, the effect will be to make the treaty void *ab initio*.

(9) Paragraph 2 excepts from the rule cases where the mistaken party in some degree brought the error upon itself. The terms in which the exception is formulated are those used by the Court in the sentence from its judgment on the merits in the *Temple* case which has already been quoted in paragraph (4) above.

(10) Paragraph 3 applies to cases of error the principle of the separability of treaty provisions. The Commission considered that it was undesirable that the whole treaty should be brought to the ground in cases where the error related to particular clauses only and where these clauses were separable from the rest of the treaty under the conditions specified in article 46. If acceptance of the clauses in question was not an essential condition of the consent of the parties to the treaty as a whole, it appeared to be legitimate and desirable to allow severance of the treaty with respect to those clauses.

²⁹ *Ibid.*, p. 92.

³⁰ *I.C.J. Reports*, 1961, p. 30.

³¹ *I.C.J., Reports*, 1962 p. 26; see also the individual opinion of Sir Gerald Fitzmaurice (*ibid.*, p. 57).

³² *P.C.I.J.*, Series A, No. 11.

³³ E.g., in the *Asylum, Right of Passage and U.S. Nationals in Morocco* cases.

(11) Paragraph 4, in order to prevent any misunderstanding, takes up a point which was the subject of articles 26 and 27, namely, errors not as to the substance of a treaty but as to the wording of its text. The present paragraph merely underlines that such an error does not affect the validity of the consent and that it falls under the provisions of articles 26 and 27 relating to the correction of errors in the texts of treaties.

**Article 35. — Personal coercion
of representatives of States**

1. If individual representatives of a State are coerced, by acts or threats directed against them in their personal capacities, into expressing the consent of the State to be bound by a treaty, such expression of consent shall be without any legal effect.

2. Under the conditions specified in article 46, the State whose representative has been coerced may invoke the coercion as invalidating its consent only with respect to the particular clauses of the treaty to which the coercion relates.

Commentary

(1) There appears to be general agreement that acts of coercion or threats applied to individuals with respect to their own persons or in their personal capacity in order to procure the signature, ratification, acceptance or approval of a treaty will necessarily justify the State in invoking the nullity of the treaty.³⁴ History provides a number of instances of the alleged employment of coercion against not only negotiators but members of legislatures in order to procure the signature or ratification of a treaty. Amongst those instances the Harvard Research Draft lists:³⁵ the surrounding of the Diet of Poland in 1773 to coerce its members into accepting the treaty of partition; the coercion of the Emperor of Korea and his ministers in 1905 to obtain their acceptance of a treaty of protection; the surrounding of the national assembly of Haiti by United States forces in 1915 to coerce its members into ratifying a convention. It is true that in some instances it may not be possible to distinguish completely between coercion of a Head of State or Minister as a means of coercing the State itself and coercion of them in their personal capacities. For example something like third-degree methods of pressure were employed in 1939 for the purpose of extracting the signatures of President Hacha and the Foreign Minister of Czechoslovakia to a treaty creating a German protectorate over Bohemia and Moravia, as well as the gravest threats against their State. Nevertheless, the two forms of coercion, although they may sometimes be combined, are, from a legal point of view, somewhat different; the Commission has accordingly placed them in separate articles.

(2) The present article deals with the coercion of the individual representatives "in their personal capacities". This phrase is intended to cover any form of constraint or of threat against a representative affecting him as an individual and not as an organ of his State. It would therefore include not only a threat to his person, but a threat to ruin his career by exposing a private indiscretion, as would also a threat to injure a member

of the representative's family with a view to coercing the representative.

(3) The Commission gave consideration to the question whether coercion of a representative, as distinct from coercion of the State, should render the treaty *ipso facto* void or whether it should merely entitle it to invoke the coercion of its representative as invalidating its consent to the treaty. It concluded that the use of coercion against the representative of a State for the purpose of procuring the conclusion of a treaty would be a matter of such gravity that the article should provide for the absolute nullity of a consent to a treaty so obtained.

(4) On the other hand, if the coercion has been employed against a representative for the purpose of extracting his assent to particular clauses only of a treaty and these clauses are separable from the rest of the treaty under the conditions specified in article 46, it seems logical that the injured party should have the right, if it wishes, to treat the coercion as invalidating its consent to those clauses alone. Otherwise, the injured party might be obliged to waive the coercion of its representative with respect to part of the treaty in order not to lose the benefit of the remainder of the treaty.

**Article 36. — Coercion of a State
by the threat or use of force**

Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void.

Commentary

(1) The traditional doctrine prior to the Covenant of the League of Nations was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of force for the settlement of international disputes. With the Covenant and the Pact or Paris there began to develop a strong body of opinion which advocated that the validity of such treaties ought no longer to be recognized. The recognition of the criminality of aggressive war in the Charters of the Allied military tribunals for the trial of the Axis war criminals, the clear-cut prohibition of the threat or use of force in Article 2, paragraph 4, of the Charter of the United Nations, together with the practice of the United Nations itself, have reinforced and consolidated this opinion. The Commission considers that these developments justify the conclusion that the invalidity of a treaty procured by the illegal threat or use of force is a principle which is *lex lata* in the international law of today.

(2) Some authorities, it is true, while not disputing the moral value of the principle, have hesitated to accept it as a legal rule. The arguments are that to recognize the principle as a legal rule may open the door to the evasion of treaties by encouraging unfounded assertions of coercion and that the rule will be ineffective because the same threat or compulsion that procured the conclusion of the treaty will also procure its execution, whether the law regards it as valid or invalid. Important though it may be not to overlook the existence of these difficulties, they do not appear to the Commission to be

³⁴ McNair, *op. cit.*, pp. 207-209.

³⁵ Harvard Law School, *op. cit.*, pp. 1155-1159.

of such a kind as to call for the omission from the present articles of a principle of invalidity springing from the most fundamental provisions of the Charter, the relevance of which in the law of treaties as in other branches of international law cannot today be regarded as open to question.

(3) If the notion of coercion is confined, as the Commission thinks it must be, to a threat or use of force in violation of the principles of the Charter, the possibilities of a plausible abuse of this ground of invalidity do not appear to be any greater than in cases of fraud or error or than in cases of a claim to terminate a treaty on the ground of an alleged breach or of a fundamental change in the circumstances. Some members of the Commission expressed the view that any other forms of pressure, such as a threat to strangle the economy of a country, ought to be stated in the article as falling within the concept of coercion. The Commission, however, decided to define coercion in terms of a "threat or use of force in violation of the principles of the Charter," and considered that the precise scope of the acts covered by this definition should be left to be determined in practice by interpretation of the relevant provisions of the Charter.

(4) Again, even if sometimes a State should initially be successful in achieving its objects by a threat or use of force, it cannot be assumed in the circumstances of today that a rule nullifying a treaty procured by such unlawful means would not prove meaningful and effective. The existence, universal character and effective functioning of the United Nations in themselves provide the necessary framework for the operation of the rule formulated in the present article.

(5) The Commission considered that the rule should be stated in as simple and categorical terms as possible. The article therefore provides that: "Any treaty the conclusion of which was procured by the threat or use of force in violation of the principles of the Charter of the United Nations shall be void." The principles regarding the threat or use of force laid down in the Charter are, in the opinion of the Commission, rules of general international law which are today of universal application. It was therefore considered to be both legitimate and appropriate to frame the article in terms of the principles of the Charter. At the same time, the phrase "violation of the principles of the Charter" was chosen rather than "violation of the Charter", in order that the article should not appear to be confined in its application to Members of the United Nations.

(6) The Commission further considered that a treaty procured by a threat or use of force in violation of the principles of the Charter must be characterized as void, rather than as voidable. The prohibitions on the threat or use of force contained in the Charter are rules of international law the observance of which is legally a matter of concern to every State. Even if it were conceivable that after being liberated from the influence of a threat or of a use of force a State might wish to allow a treaty procured from it by such means, the Commission considered it essential that the treaty should be regarded as in law void *ab initio*. This would enable the State concerned to take its decision in regard to the maintenance of the treaty in a position of full legal equality with the other State. If, therefore, the treaty were maintained in force, it would in effect be by the conclusion of a new

treaty and not by the recognition of the validity of a treaty procured by means contrary to the most fundamental principles of the Charter of the United Nations.

**Articles 37. — Treaties conflicting
with a peremptory norm of general international
law (*jus cogens*)**

A treaty is void if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Commentary

(1) The opinion of writers has been divided upon the question whether international law recognizes the existence within its legal order of rules having the character of *jus cogens*, that is, rules from which the law does not permit any derogation. Some writers, considering that the operation even of the most general rules of international law still falls short of being universal, deny that any rule can properly be regarded as a *jus cogens* from which individual States are not competent to derogate by agreement between themselves.³⁶ But whatever imperfections international law may still have, the view that in the last analysis there is no rule from which States cannot at their own free will contract out has become increasingly difficult to sustain. The law of the Charter concerning the prohibition of the use of force in reality presupposes the existence in international law of rules having the character of *jus cogens*.³⁷ This being so, the Commission concluded that in codifying the law of treaties it must take the position that today there are certain rules and principles from which States are not competent to derogate by a treaty arrangement.

(2) The formulation of the rule, however, is not free from difficulty, since there is not as yet any generally recognized criterion by which to identify a general rule of international law as having the character of *jus cogens*. Moreover, it is undeniable that the majority of the general rules of international law do not have that character and that States may contract out of them by treaty. The general law of diplomatic intercourse, for example, requires that certain treatment be accorded to diplomatic representatives and forbids the doing of certain acts with respect to diplomats; but these rules of general international law do not preclude individual States from agreeing between themselves to modify the treatment to be accorded reciprocally to each other's representatives. It would therefore be going much too far to state that a treaty is void if its provisions conflict with a rule of general international law.

(3) The emergence of rules having the character of *jus cogens* is comparatively recent, while international law is in process of rapid development. The Commission considered the right course to be to provide in general terms that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals. Some members of

³⁶ See for example G. Schwarzenberger, *International Law* (3rd edition), vol. I, pp. 426-427.

³⁷ See McNair, *op cit.*, pp. 213-214.

the Commission felt that there might be advantage in specifying, by way of illustration, some of the most obvious and best settled rules of *jus cogens* in order to indicate by these examples the general nature and scope of the rule contained in the article. Examples suggested of treaties conflicting with such rules included: (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter; (b) a treaty contemplating the performance of any other act criminal under international law; and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate. Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the article to cases involving acts which constitute crimes under international law; treaties violating human rights or the principle of self-determination were mentioned as other possible examples. The Commission, however, decided against including any examples of rules of *jus cogens* in the article for two reasons. First, the mention of some cases of treaties void for conflict with a rule of *jus cogens* might, even with the most careful drafting, lead to misunderstanding as to the position concerning other cases not mentioned in the article. Secondly, if the Commission were to attempt to draw up, even on a selective basis, a list of the rules of international law which are to be regarded as having the character of *jus cogens*, it might find itself engaged in a prolonged study of matters which fall outside the scope of the present articles.

(4) Accordingly, the article simply provides that a treaty is void "if it conflicts with a peremptory norm of general international law from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character". This provision makes it plain that nullity attaches to a treaty under the article only if the rule with which it conflicts is a peremptory norm of general international law from which no derogation is permitted, even by agreement between particular States. On the other hand, it would clearly be wrong to regard even rules of *jus cogens* as immutable and incapable of modification in the light of future developments. As any modification of a rule of *jus cogens* would today most probably be effected by the conclusion of a general multilateral treaty, the Commission thought it desirable to make it plain by the wording of the article that a general multilateral treaty establishing a new rule of *jus cogens* would fall outside the scope of the article. In order to safeguard this point, the article defines rules of *jus cogens* as peremptory norms of general international law from which no derogation is permitted "and which can be modified only by a subsequent norm of general international law having the same character".

(5) The Commission considered the question whether the nullity resulting from the application of the article should in all cases attach to the whole treaty or whether severance of the offending provisions from the rest of the treaty might be admissible under the conditions laid down in article 46. Some members were of the opinion that it was undesirable to prescribe that the whole treaty should be brought to the ground in cases where only one part — and that a small part — of the treaty was in conflict with a rule of *jus cogens*. Other members, however, took the view that rules of *jus cogens*

are of so fundamental a character that, when parties conclude a treaty which conflicts in any of its clauses with an already existing rule of *jus cogens*, the treaty must be considered totally invalid. In such a case it was open to the parties themselves to revise the treaty so as to bring it into conformity with the law; and if they did not do so, the law must attach the sanction of nullity to the whole transaction. This was the view which prevailed in the Commission and the article does not, therefore, admit any severance of the offending clauses from the rest of the treaty in cases falling under its provisions.

Section III: Termination of treaties

Article 38. — Termination of treaties through the operation of their own provisions

1. A treaty terminates through the operation of one of its provisions:

(a) On such date or on the expiry of such period as may be fixed in the treaty;

(b) On the taking effect of a resolutive condition laid down in the treaty;

(c) On the occurrence of any other event specified in the treaty as bringing it to an end.

2. When a party has denounced a bilateral treaty in conformity with the terms of the treaty, the treaty terminates on the date when the denunciation takes effect.

3. (a) When a party has denounced or withdrawn from a multilateral treaty in conformity with the terms of the treaty, the treaty ceases to apply to that party as from the date upon which the denunciation or withdrawal takes effect.

(b) A multilateral treaty terminates if the number of the parties is reduced below a minimum number laid down in the treaty as necessary for its continuance in force. It does not, however, terminate by reason only of the fact that the number of the parties falls below the number specified in the treaty as necessary for its entry into force.

Commentary

(1) The majority of modern treaties contain clauses fixing their duration or the date of their termination or a condition or event which is to bring about their termination, or providing for a right to denounce or withdraw from the treaty. In these cases the termination of the treaty is brought about by the provisions of the treaty itself and how and when this is to happen is essentially a question of interpreting and applying the treaty. The present article sets out the basic rules governing the termination of a treaty through the application of its own provisions.

(2) The treaty clauses are very varied.³⁸ Many treaties provide that they are to remain in force for a specified period of years or until a particular date or event; others provide for the termination of the treaty through the operation of a resolutive condition. Specific periods fixed by individual treaties may be of very different lengths, periods between one and twelve years being usual but longer periods up to twenty, fifty and even ninety-nine years being sometimes found. More

³⁸ See *Handbook of Final Clauses* (ST/LEG.6), pp. 54-73.

common in modern practice are treaties which fix a comparatively short initial period for their duration, such as five or ten years, but at the same time provide for their continuance in force after the expiry of the period subject to a right of denunciation or withdrawal. These provisions normally take the form either of an indefinite continuance in force of the treaty subject to a right of denunciation on six or twelve months' notice or of a renewal of the treaty for successive periods of years, subject to a right of denunciation or withdrawal on giving notice to that effect six months before the expiry of each period. Some treaties fix no period for their duration and simply provide for a right to denounce or withdraw from the treaty, either with or without a period of notice. Occasionally, a treaty which fixes a single specific period, such as five or ten years, for its duration allows a right of denunciation or withdrawal even during the currency of the period.

(3) Paragraph 1 sets out the rules governing the time at which a treaty comes to an end by the operation of the various types of terminating provision found in treaties. Some members felt that these rules were self-evident and did not really need to be stated; but the Commission considered that, although they follow directly from the application of the provisions in question, the rules are the governing rules and therefore should have a place in a codifying convention. Some members suggested that the "occurrence of any other event", in sub-paragraph (c), was already covered by the "resolutive condition". As, however, a clause providing for a terminating "event" is not always expressed in the form of a term or of a condition, it was thought preferable to include sub-paragraph (c) so as to ensure that no case could be said not to have been covered.

(4) Paragraphs 2 and 3 deal with cases where the treaty comes to an end through the operation of a clause providing for a right to denounce or withdraw from it. Although this is only a particular example of termination through the operation of a resolutive condition, it has a special importance for two reasons. First, it is a condition which brings the treaty to an end at the will of the individual party; secondly, it is extremely common in multilateral treaties. Clearly, denunciation of a bilateral treaty brings the treaty itself to an end and paragraph 2 so provides. The denunciation of a multilateral treaty, on the other hand, by a single party or the withdrawal of a single party from the treaty does not normally put an end to the treaty; the effect is merely that the treaty ceases to apply to the party in question. Paragraph 3 (a) states this general rule.

(5) In some cases, a multilateral treaty which is subject to denunciation or withdrawal does provide for the termination of the treaty itself, if denunciations or withdrawals should reduce the number of parties below a certain figure. For example, the Convention on the Political Rights of Women³⁹ provides that it "shall cease to be in force as from the date when the denunciation which reduces the number of the parties to less than six becomes effective". In some cases the minimum number of surviving parties required by the treaty to keep it alive is even smaller, e.g., five in the case of the Customs Convention on the Temporary Importation of Commer-

cial Road Vehicles⁴⁰ and three in the case of the Convention Regarding the Measurement and Registration of Vessels Employed in Inland Navigation.⁴¹ In other, perhaps less frequent, cases a larger number is required to maintain the treaty in force. Clearly, provisions of this kind establish what is really a resolutive condition and, as paragraph 3 (b) states, the treaty terminates when the number of parties falls below the specified minimum.

(6) A further point arises as to whether a multilateral treaty, the entry into force of which was made dependent upon its ratification, acceptance, etc., by a given minimum number of States, automatically ceases to be in force, should the parties afterwards fall below that number as a result of denunciations or withdrawals. The better opinion,⁴² it is believed, is that this is not a necessary effect of a drop in the number of the parties below that fixed for the treaty's entry into force. The treaty provisions in question relate exclusively to the conditions for the entry into force of the treaty and, if the negotiating States had intended the minimum number of parties fixed for that purpose to be a continuing condition of the validity of the treaty, it would have been both easy and natural for them so to provide. In some cases, it is true, a treaty which fixes a low minimum number of parties for entry into force prescribes the same number for the cessation of the treaty. But there is no general practice to that effect, and the fact that this has not been a regular practice in cases where a larger minimum number, such as ten or twenty, has been fixed for entry into force seems significant. At any rate, when the number for entry into force is of that order of magnitude, it does not seem desirable that the application of the treaty should be dependent on the number of parties not falling below that number. The remaining parties, if unwilling to continue to operate the treaty with the reduced number, may themselves either join together to terminate it or separately exercise their own right of denunciation or withdrawal. Paragraph 3 (b) therefore also provides that a treaty is not terminated "by reason only of the fact" that the number of its parties falls below that prescribed for its original entry into force.

Article 39. — Treaties containing no provisions regarding their termination

A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of a denunciation or withdrawal. In the latter case, a party may denounce or withdraw from the treaty upon giving to the other parties or to the depositary not less than twelve months' notice to that effect.

Commentary

(1) Article 39 covers the termination of treaties which neither contain any provision regarding their duration or termination nor mention any right for the

⁴¹ *Ibid.*, pp. 72-73.

⁴² Cf. E. Giraud, "Modification et terminaison des traités collectifs", *Annuaire de l'Institut de droit international*, vol. 49, tome I, 1961, p. 62.

³⁹ *United Nations Treaty Series*, vol. 193, p. 135, art. 8.

⁴⁰ *Handbook of Final Clauses (ST/LEG.6)*, p. 58.

parties to denounce or withdraw from it. Such treaties are not uncommon, recent examples being the Charter of the United Nations, the four Geneva Conventions of 1958 on the Law of the Sea and the Vienna Convention on Diplomatic Relations, 1961. The question is whether they are to be regarded as terminable only by common agreement or whether individual parties are under any conditions to be considered as having an implied right to withdraw from the treaty upon giving reasonable notice to that effect.

(2) In principle, the answer to the question must depend on the intention of the parties in each case, and the very character of some treaties excludes the possibility that the contracting States could have intended them to be open to unilateral denunciation or withdrawal at the will of an individual party. Treaties of peace and treaties fixing a territorial boundary are examples of such treaties. Many treaties, however, are not of a kind with regard to which it can be said that to allow a unilateral right of denunciation or withdrawal would be inconsistent with the character of the treaty; for the normal practice today in the case of most categories of treaties is either to fix a comparatively short period for their duration or to provide for the possibility of termination or withdrawal. No doubt, one possible point of view would be that, since the parties in many cases do provide expressly for a unilateral right of denunciation or withdrawal, their silence on the point in other cases must be interpreted as excluding such a right. Some authorities,⁴³ basing themselves on the Declaration of London of 1871 and certain State practice, take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is provided for in the treaty or consented to by all the other parties. The Declaration of London and the State practice in question, however, relate to peace treaties or other treaties designed to establish enduring territorial settlements, in other words, to treaties where an intention to admit a right of unilateral denunciation or withdrawal is excluded by the character of the treaty. In many other types of treaty the widespread character of the practice making the treaty subject to denunciation or withdrawal suggests that it would be unsafe to draw the conclusion from the mere silence of the parties on the point that they necessarily intended to exclude any possibility of denunciation or withdrawal. For this reason a number of other authorities⁴⁴ take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties, and more especially in commercial treaties and in treaties of alliance.

(3) The difficulty of the problem is well illustrated by the discussions which took place at the Geneva Conference on the Law of the Sea concerning the insertion of denunciation clauses in the four conventions drawn up

at that Conference.⁴⁵ None of the Conventions contains a denunciation clause. They provide only that after five years from the date of their entry into force any party may at any time request the revision of the Convention, and that it will be for the General Assembly to decide upon the steps, if any, to be taken in respect of the request. The Drafting Committee, in putting forward this revision clause, observed that its inclusion "made unnecessary any clause on denunciation". Proposals had previously been made for the inclusion of a denunciation clause and these were renewed in the plenary meeting, notwithstanding the view of the Drafting Committee. Some delegates thought it wholly inconsistent with the nature of the codifying conventions to allow denunciation; some thought that a right of denunciation existed anyhow under customary law; others considered it desirable to provide expressly for denunciation in order to take account of possible changes of circumstances. The proposal to include the clause in the "codifying" conventions was rejected by 32 votes to 12; with 23 abstentions. A similar proposal was also made with reference to the Fishing and Conservation Convention, which formulated entirely new law. Here, opponents of the clause argued that a right of denunciation would be out of place in a Convention which created new law and was the result of negotiation. Advocates of the clause, on the other hand, regarded the very fact that the Convention created new law as justifying and indeed requiring the inclusion of a right of denunciation. Again, the proposal was rejected, by 25 votes to 6, with no less than 35 abstentions. As already mentioned, no clause of denunciation or withdrawal was inserted in these conventions and at the subsequent Vienna Conferences on Diplomatic and Consular Intercourse the omission of the clause from the conventions on those subjects was accepted without discussion. However, any temptation to generalize from these Conferences as to the intentions of the parties in regard to the denunciation of "law-making" treaties is discouraged by the fact that other conventions, such as the Convention on the Prevention and Punishment of the Crime of Genocide, 1948, and the Geneva Conventions of 1949 on prisoners of war, sick and wounded, etc. expressly provide for a right of denunciation.

(4) The contention was put forward in the Commission that, in order to safeguard the security of treaties, the absence of any provision in the treaty should be interpreted in every case as excluding any right of unilateral denunciation or withdrawal without the agreement of the other party. Some members, on the other hand, considered that in certain types of treaty, such as treaties of alliance, the presumption as to the intentions of the parties was the other way round, with the result that a right of denunciation or withdrawal after reasonable notice should be implied in the treaty unless there were indications of a contrary intention. Certain other members took the view that, while the omission of any provision for it in the treaty did not exclude the possibility of implying a right of denunciation or withdrawal, the existence of such a right was not to be implied from the character of the treaty alone. According to these members, the intention of the parties was essentially a question of fact to be determined not merely by reference to the character of the treaty but by reference to all the circumstances of the case. This view prevailed in the Commission and is embodied in article 39.

⁴³ See article 34 of the *Harvard Research Draft*, pp. 1173-1183; C. Rousseau, *Principes généraux du droit international public*, pp. 526-548.

⁴⁴ See Hall, *International Law*, 8th Edition, p. 405; Oppenheim, *International Law*, 8th Edition, vol. 1, p. 938; McNair, *Law of Treaties*, 1961, pp. 501-505; Sir Gerald Fitzmaurice, Second Report on the Law of Treaties, *Yearbook of the International Law Commission*, 1957, vol. II, p. 22.

⁴⁵ United Nations Conference on the Law of the Sea, *Official Records*, vol. II (A/CONF.13/38), *United Nations publication Sales No. 58.V.4*, vol. II, pp. 19, 56 and 58.

(5) The article states that a treaty not making any provision for its termination or for denunciation or withdrawal is not subject to denunciation or withdrawal unless "it appears from the character of the treaty and from the circumstances of its conclusion or the statements of the parties that the parties intended to admit the possibility of denunciation or withdrawal". Under this rule, the character of the treaty is only one of the elements to be taken into account and a right of denunciation or withdrawal will not be implied unless it appears from the general circumstances of the case, including the statements of the parties, that the parties intended to allow the possibility of unilateral denunciation or withdrawal. The statement of one party would not, of course, be sufficient to establish that intention, unless it appeared to meet with the express or tacit assent of the other parties. The term "statements of the parties", it should be added, was not meant by the Commission to refer only to statements forming part of the *travaux préparatoires* of the treaty, but was meant also to cover subsequent statements showing the understanding of the parties as to the possibility of denouncing or withdrawing from the treaty; in other words, it was meant to cover interpretation of the treaty by reference to "subsequent conduct" as well as by reference to the *travaux préparatoires*.

(6) The period of notice is twelve months. An alternative would be simply to say "reasonable" notice; but as the purpose of the article is to clarify the position where the parties have failed to deal with the question of the termination of the treaty, the Commission preferred to propose a specific period of notice. A period of six months' notice is sometimes found in termination clauses, but this is usually where the treaty is of the renewable type and is open to denunciation by a notice given before or at the time of renewal. Where the treaty is to continue indefinitely subject to a right of denunciation, the period of notice is more usually twelve months, though admittedly in some cases no period of notice is required. In formulating a general rule, the Commission considered it to be desirable to lay down a longer rather than a shorter period in order to give adequate protection to the interests of the other parties to the treaty.

Article 40. — Termination or suspension of the operation of treaties by agreement

1. A treaty may be terminated at any time by agreement of all the parties. Such agreement may be embodied:

(a) In an instrument drawn up in whatever form the parties shall decide;

(b) In communications made by the parties to the depositary or to each other.

2. The termination of a multilateral treaty, unless the treaty itself otherwise prescribes, shall require, in addition to the agreement of all the parties, the consent of not less than two thirds of all the States which drew up the treaty; however, after the expiry of . . . years the agreement only of the States parties to the treaty shall be necessary.

3. The foregoing paragraphs also apply to the suspension of the operation of treaties.

Commentary

(1) The termination of a treaty or the suspension of its operation by agreement is necessarily a process which involves the conclusion of a new "treaty" in some form or another. From the point of view of international law, as stated in article 1 of the Commission's draft articles, the agreement may be any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation. It is true that the view has sometimes been put forward that an agreement terminating a prior treaty must be cast in the same form as the treaty which is to be terminated or at least be a treaty form of "equal weight". However, it reflects the constitutional practice of particular States,⁴⁶ not a general rule of international law. It is always for the States concerned themselves to select the appropriate instrument or procedure for bringing a treaty to an end, and, in doing so, they will no doubt take into account their own constitutional requirements. So far as international law is concerned, all that is required is that the parties to the prior treaty should have entered into an agreement to terminate it, whether they conclude that agreement by a formal instrument or instruments or by a "treaty in simplified form".

(2) Paragraph 1 of article 40 therefore provides that a treaty may be terminated at any time by agreement of all the parties, and that the agreement may be embodied in an instrument drawn up in whatever form the parties shall decide. The paragraph further underlines that the agreement may be embodied in communications made by the parties to the depositary or to each other. In some cases, no doubt, the parties will think it desirable to use a formal instrument. In other cases, they may think it sufficient to express their consents through the diplomatic channel or, in the case of multilateral treaties, by communications made through the depositary. As to the latter procedure, in modern practice communications through the depositary are a normal means of obtaining the consents of the interested States in matters touching the operation of the "final clauses" of the treaty; it would seem to be a convenient procedure to use for effecting the termination of a treaty by an agreement in simplified form.

(3) Paragraph 1 as already noted, provides that the consent of all the parties to a treaty is necessary for its termination by agreement. Each party to a treaty has a vested right in the treaty itself of which it cannot be deprived by a subsequent treaty to which it is not a party or to which it has not given its assent. The application of this rule to multilateral treaties tends to result in somewhat complicated situations, because it is very possible that some parties to the earlier treaty may fail to become parties to the terminating agreement. In that event, the problem may arise whether the earlier treaty is to be regarded as terminated *inter se* the parties to the later treaty but still in force in other respects. Further reference to this matter is made in the commentary to the next article. Here it suffices to say that, whatever the complications, it is a strongly entrenched rule of interna-

⁴⁶ See an observation of the United States representative at the 49th meeting of the Social Committee of the Economic and Social Council (E/AC.7/SR.49, p. 8), to which Sir Gerald Fitzmaurice drew attention.

tional law that the consent of every party is, in principle, necessary to the termination of any treaty bilateral or multilateral; it is this rule which is safeguarded in the opening sentence of paragraph 1 of the present article.

(4) Paragraph 2 deals with the question whether in the case of a multilateral treaty the consent of all the parties is necessarily sufficient for its termination or whether account might also be taken of the interests of the other States still entitled to become parties under the terms of the treaty. Some members of the Commission were inclined to the opinion that, if a State had not shown enough interest in a treaty to take the necessary steps to become a party before the time arrived when its termination was under discussion, there was no case for making the termination of the treaty conditional upon its consent. However, it was pointed out that quite a number of multilateral conventions, especially those of a technical character, require only two or a very small number of ratifications or acceptances to bring them into force; and that it did not seem right that the first two or three States to deposit instruments of ratification or acceptance should have it in their power to terminate the treaty without regard to the wishes of the other States which drew up the treaty. It was also recalled that in drafting article 9 concerning the opening of a treaty to additional States the Commission had thought it necessary that all the States which had drawn up the treaty should have a voice in the matter for a certain period of time. The Commission decided that it ought to follow the same approach in the present article; paragraph 2 accordingly provides that until the expiry of . . . years the consent of the States which drew up the treaty should be required in addition to that of the actual parties. As in the case of article 9, the Commission preferred to await the comments of Governments on the question before suggesting the length of the period during which this provision should apply.

(5) Paragraph 3 provides that the rules laid down in the article apply equally to the suspension of the operation of a treaty.

Article 41. — Termination implied from entering into a subsequent treaty

1. A treaty shall be considered as having been impliedly terminated in whole or in part if all the parties to it, either with or without the addition of other States, enter into a further treaty relating to the same subject-matter and either:

(a) The parties in question have indicated their intention that the matter should thereafter be governed by the later treaty; or

(b) The provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.

2. However, the earlier treaty shall not be considered as having been terminated where it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty.

Commentary

(1) The previous article concerns cases where the parties to a treaty enter into a later agreement for the

express purpose of terminating the treaty. The present article deals with cases where the parties, without expressly terminating or modifying the first treaty, enter into another treaty which is so far incompatible with the earlier one that they must be considered to have intended to abrogate it. Where the parties to the two treaties are identical, there can be no doubt that, in concluding the second treaty, they are competent to abrogate the earlier one; for that is the very core of the rule contained in the previous article. Even where the parties to the two treaties are not identical, the position is clearly the same if the parties to the later treaty include all the parties to the earlier one; for what the parties to the earlier treaty are competent to do together, they are competent to do in conjunction with other States. The sole question therefore is whether and under what conditions the conclusion of the further incompatible treaty must be held by implication to have terminated the earlier one.

(2) This question is essentially one of the construction of the two treaties in order to determine the extent of their incompatibility and the intentions of the parties with respect to the maintenance in force of the earlier one. Some members of the Commission felt that for this reason the question ought not to be dealt with in the present report as one of termination, but should be left over for consideration at the next session at which the Special Rapporteur would be submitting draft articles on the application of treaties. However, it was pointed out that, even if it were true that a preliminary question of interpretation was involved in these cases, there was still a need to determine the conditions under which the interpretation should be held to lead to the conclusion that the treaty had been terminated. The Commission decided provisionally, and subject to reconsideration at its next session, to retain article 41 in its present place among the articles dealing with "termination" of treaties.

(3) Paragraph 1 therefore seeks to formulate the conditions under which the parties to a treaty are to be understood as having intended to terminate it by concluding a later treaty conflicting with it. The wording of the two clauses in paragraph 1 is based upon the language used by Judge Anzilotti in his separate opinion in the *Electricity Company of Sofia* case,⁴⁷ where he said:

"There was no express abrogation. But it is generally agreed that, beside express abrogation, there is also tacit abrogation resulting from the fact that the new provisions are incompatible with the previous provisions, or that the whole matter which formed the subject of these latter is henceforward governed by the new provisions."

That case, it is true, concerned a possible conflict between unilateral declarations under the optional clause and a treaty, and the Court itself did not accept Judge Anzilotti's view that there was any incompatibility between the two instruments. Nevertheless, the two tests put forward by Judge Anzilotti for determining whether a tacit abrogation had taken place appeared to the Commission to contain the essence of the matter.

(4) Paragraph 2 merely provides that the earlier treaty shall not be considered to have been terminated

⁴⁷ *P.C.I.J.*, Series A/B, No. 77, p. 92.

where it appears from the circumstances that a later treaty was intended only to suspend the operation of the earlier one. Judge Anzilotti, it is true, in the above-mentioned opinion considered that the declarations under the optional clause, although in his view incompatible with the earlier treaty, had not abrogated it because of the fact that the treaty was of indefinite duration, whereas the declarations were for limited terms. But it could not be said to be a general principle that a later treaty for a fixed term does not abrogate an earlier treaty expressed to have a longer or indefinite duration. It would depend entirely upon the intention of the States in concluding the second treaty, and it is probable that in most cases their intention would have been to cancel rather than suspend the earlier treaty.

(5) The Commission considered whether it should add a further paragraph dealing with the question of the termination of a treaty as between certain of its parties only in cases where those parties alone enter into a later treaty which conflicts with their obligations under the earlier one. In such cases, parties to the earlier treaty, as stressed in paragraph (3) of the commentary to the previous article, cannot be deprived of their rights under it without their agreement, so that in law the later treaty, even if concluded between a majority of the parties to the earlier treaty, cannot be said to have terminated the earlier one altogether. There is, however, a question whether the earlier treaty terminates *inter se* the parties who enter into the later treaty. This question is so closely connected with the problem of the application of treaties that, for the reasons given in the Introduction to the present articles, the Commission decided to defer the examination of this question until its next session when it will take up the problem of the application of treaties.

Article 42. — Termination or suspension of the operation of a treaty as a consequence of its breach

1. A material breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

2. A material breach of a multilateral treaty by one of the parties entitles:

(a) Any other party to invoke the breach as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;

(b) The other parties by common agreement either:

(i) To apply to the defaulting State the suspension provided for in subparagraph (a) above; or

(ii) To terminate the treaty or to suspend its operation in whole or in part.

3. For the purposes of the present article, a material breach of a treaty by one of the parties consists in:

(a) The unfounded repudiation of the treaty; or

(b) The violation of a provision which is essential to the effective execution of any of the objects or purposes of the treaty.

4. The right to invoke a material breach as a ground for terminating or suspending the operation of part only of a treaty, which is provided for in

paragraphs 1 and 2 above, is subject to the conditions specified in article 46.

5. The foregoing paragraphs are subject to any provisions in the treaty or in any related instrument which may regulate the rights of the parties in the event of a breach.

Commentary

(1) The great majority of writers⁴⁸ recognize that the violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty. A violation of a treaty obligation, as of any other obligation, may give rise to a right in the other party to take non-forcible reprisals and the reprisals may properly relate to the defaulting party's rights under the treaty. Opinion differs, however, as to the extent of the right to abrogate the treaty and the conditions under which it may be exercised. Some writers,⁴⁹ in the absence of effective international machinery for securing the observance of treaties, are more impressed with the innocent party's need to have this right as a sanction for the violation of the treaty. These writers tend to formulate the right in unqualified terms, giving the innocent party a general right to abrogate the treaty in the event of a breach.⁵⁰ Other writers are more impressed with the risk that a State may allege a trivial or even fictitious breach simply to furnish a pretext for denouncing a treaty which it now finds embarrassing.⁵¹ These writers tend to restrict the right of denunciation to "material" or "fundamental" breaches and also to subject the exercise of the right to procedural conditions.⁵²

(2) State practice, although not lacking⁵³ does not give great assistance in determining the true extent of this right or the proper conditions for its exercise. In many cases, the denouncing State has decided for quite other reasons to put an end to the treaty and, having alleged the violation primarily to provide a pretext for its action, has not been prepared to enter into a serious discussion of the legal principles involved. The other party has usually contested the denunciation primarily on the basis of the facts; and, if it has sometimes used language appearing to deny that unilateral denunciation is ever justified, this has usually appeared rather to be a protest against the one-sided and arbitrary pronouncements of the denouncing State than a rejection of the

⁴⁸ See Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1081-1083; McNair, *op. cit.*, p. 553. C. Rousseau seems to have doubted whether customary law recognizes a right to denounce a treaty on the ground of the other party's non-performance, because claims to do so have usually been objected to; but for the reasons given in paragraph 2 this can hardly be regarded as sufficient evidence of the non-existence of any such customary rights.

⁴⁹ E.g., Hall, *op. cit.*, p. 408; S. B. Crandall, *Treaties, their Making and Enforcement*, p. 456; A. Cavaglieri, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international* (1929-I), vol. 26, p. 535.

⁵⁰ See Oppenheim, *op. cit.* p. 947.

⁵¹ E.g., McNair, *op. cit.*, p. 571; C. C. Hyde, *International Law*, vol. 2, p. 1543; E. Giraud, *op. cit.*, p. 28.

⁵² See Harvard Law School, *Research in International Law, III, Law of Treaties* (Article 27), pp. 1077 and 1091-1092.

⁵³ Hackworth, *Digest of International Law*, vol. 5, pp. 342-348; Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1083-1090; McNair, *op. cit.*, pp. 553-569; A. Cè Kiss, *Répertoire français de droit international*, vol. 5, pp. 102-121; *Fontes Juris Gentium*, Series B, section 1, tomus I, part I (2), pp. 791-2.

right to denounce when serious violations are established. Thus, States which have on one occasion seemed to assert that denunciation of a treaty is always illegitimate in the absence of agreement have, on other occasions, themselves claimed the right to denounce a treaty on the basis of alleged breaches by the other party.

(3) Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their Government had not in point of fact elected to denounce the treaty and they have not found it necessary to examine the conditions for the application of the principle at all closely.⁵⁴

(4) International jurisprudence has contributed comparatively little on this subject. In the case of the *Diversion of Water from the River Meuse*,⁵⁵ Belgium contended that, by constructing certain works contrary to the terms of the Treaty of 1863, Holland had forfeited the right to invoke the treaty against it. Belgium did not claim to denounce the treaty, but it did assert a right, as a defence to Holland's claim, to suspend the operation of one of the provisions of the treaty on the basis of Holland's alleged breach of that provision, although it pleaded its claim rather as an application of the principle *inadimplenti non est adimplendum*. The Court, having found that Holland had not violated the treaty, did not pronounce upon the Belgian contention. In a dissenting opinion, however, Judge Anzilotti expressed the view⁵⁶ that the principle underlying the Belgian contention is "so just, so equitable, so universally recognized that it must be applied in international relations also". The only other case that seems to be of much significance is the *Tacna-Arica Arbitration*.⁵⁷ There Peru contended that by preventing the performance of article 3 of the Treaty of Ancon, which provided for the holding of a plebiscite under certain conditions in the disputed area, Chile had discharged Peru from its obligations under that article. The Arbitrator,⁵⁸ after examining the evidence, rejected the Peruvian contention, saying:

"It is manifest that if abuses of administration could have the effect of terminating such an agreement, it would be necessary to establish such serious conditions as the consequence of administrative wrongs as would operate to frustrate the purpose of the agreement, and, in the opinion of the Arbitrator, a situation of such gravity has not been shown."

This pronouncement seems to assume that only a "fundamental" breach of article 3 by Chile could have justified Peru in claiming to be released from its provisions.

(5) The Commission was agreed that a breach of a treaty, however serious, did not *ipso facto* put an end to a treaty, and also that it was not open to a State simply to allege a violation of the treaty and pronounce the treaty at an end. On the other hand, it considered that

within certain limits and subjects to certain safeguards the right of a party to invoke the breach of a treaty as a ground for terminating it or suspending its operation should be recognized. Some members considered that, in view of the risk of abuse, it would be dangerous for the Commission to endorse such a right, unless its exercise were to be made subject to control by compulsory reference to the International Court of Justice. Other members, while agreeing on the importance of providing proper safeguards against arbitrary denunciation of a treaty on the ground of an alleged breach, pointed out that the question of providing safeguards against arbitrary action was a general one which affected several articles and was taken up in article 51; at the same time, they drew attention to the difficulties standing in the way of any proposal to include a clause of compulsory jurisdiction in a general convention. The Commission decided to formulate in the present article the substantive conditions under which a treaty may be terminated or its operation suspended in consequence of a breach, and to deal with the question of the procedural safeguards in article 51. Some members, in agreeing to this decision, stressed that in their opinion the present article would only be acceptable, if the necessary procedural safeguards were provided in article 51.

(6) Paragraph 1 therefore provides that a "material" breach of a bilateral treaty by one party entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part. The formula "invoke as a ground" is intended to underline that the right arising under the article is not a right arbitrarily to pronounce the treaty terminated. If the other party contests the breach or its character as a "material" breach, there will be a "difference" between the parties with regard to which the normal obligations incumbent upon the parties under the Charter and under general international law to seek a solution of the question by pacific means will apply. The Commission considered that the action open to the other party in the case of a material breach is either the termination or the suspension of the operation of the treaty in whole or in part. The right to take this action arises under the law of treaties independently of any right of reprisal, the principle being that a party cannot be called upon to fulfil obligations which the other party fails to fulfil. This right would, of course, be without prejudice to the injured party's right to present an international claim on the basis of the other party's responsibility with respect to the breach.

(7) Paragraph 2 covers the case of a material breach of a multilateral treaty, and here the Commission considered that it was necessary to visualize two possible situations: (a) an individual party affected by the breach might react alone; or (b) the other parties to the treaty might join together in reacting to the breach. When an individual party reacts, the Commission considered that its position was similar to that in the case of a bilateral treaty, but that its right should be limited to suspending the operation of the treaty in whole or in part as between itself and the defaulting State. In the case of a multilateral treaty the interests of the other parties had to be considered, while a right of suspension provided adequate protection to the State directly affected by the breach. Moreover, the limitation of the right of the individual party to a right of suspension seemed particu-

⁵⁴ E.g., *Ware v. Hylton* (1796), 3 Dallas 261; *Charlton v. Kelly*, 229 U.S. 447; *Lepeschkin v. Gosweiler et Cie.*, *Journal du droit international* (1924), vol. 51, p. 1136; *In re Tatarko*, *Annual Digest and Reports of Public International Law Cases*, 1949, No. 110, p. 314.

⁵⁵ P.C.I.J., Series A/B, No. 70.

⁵⁶ *Ibid.*, p. 50; cf. Judge Hudson, pp. 76-77.

⁵⁷ *Reports of International Arbitral Awards*, vol II, pp. 929 and 943-944.

⁵⁸ President Coolidge.

larly necessary having regard to the nature of the obligations contained in general multilateral treaties of a law-making character. Indeed, the question was raised as to whether even suspension would be admissible in the case of law-making treaties. It was pointed out, however, that it might be inequitable to allow a defaulting State to continue to enforce the treaty against the injured party, whilst itself violating its obligations towards that State under the treaty. Moreover, it had to be borne in mind that even such treaties as the Genocide Convention and the Geneva Conventions on the treatment of prisoners of war, sick, and wounded allowed an express right of denunciation. When the other parties to a multilateral treaty react jointly to a breach by one party, they obviously have the right to do jointly what each one may do severally, and may therefore jointly suspend the operation of the treaty with regard to the defaulting State. Equally, if a breach by one State frustrates or undermines the operation of the treaty as between all the parties, the others are entitled jointly to terminate or suspend the operation of the treaty in whole or in part.

(8) Paragraph 3 defines the kind of breach which may give rise to a right to terminate or suspend the treaty. Some authorities have in the past seemed to assume that any breach or any provision would suffice to justify the denunciation of the treaty. The Commission, however, was agreed that the right to terminate or suspend must be limited to cases where the breach was of a serious character. It preferred the term "material" to "fundamental" to express the kind of breach which is required. The word "fundamental" might be understood as meaning that only the violation of a provision directly touching the central purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an ancillary character. Sub-paragraph (a) of the definition simply records that the repudiation of a treaty, which does not of itself terminate a treaty, is an act which the other party is entitled to regard as a "material" breach. The main definition is in sub-paragraph (b) under which a breach is "material" if the provision violated is one "essential to the effective execution of any of the objects or purpose of the treaty".

(9) Paragraph 4 subjects the provisions in the article concerning the partial termination of a treaty or partial suspension of its operation to the conditions governing the separability of treaty provisions specified in article 46. The Commission considered that this was necessary because even in the case of breach it would be wrong to hold the defaulting State afterwards to a truncated treaty the operation of which was grossly inequitable between the parties.

(10) Paragraph 5 merely reserves the rights of the parties under specific provisions of the treaty or of a related instrument which are applicable in the event of a breach.

Article 43. — Supervening impossibility of performance

1. A party may invoke the impossibility of performing a treaty as a ground for terminating the treaty when such impossibility results from the total

and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty.

2. If it is not clear that the impossibility of performance will be permanent, the impossibility may be invoked only as a ground for suspending the operation of the treaty.

3. Under the conditions specified in article 46, if the impossibility relates to particular clauses of the treaty, it may be invoked as a ground for terminating or suspending the operation of those clauses only.

Commentary

(1) The present article concerns the termination of a treaty or the suspension of its operation in consequence of the fact that the total disappearance or destruction of its subject-matter has rendered its performance permanently or temporarily impossible. The next article concerns the termination of a treaty in consequence of a fundamental change in the circumstances existing at the time when it was entered into. Cases of supervening impossibility of performance are *ex hypothesi* cases where there has been a fundamental change in the circumstances existing at the time when the treaty was entered into. Some members of the Commission felt that it was not easy to draw a clear distinction between the types of cases dealt with in the two articles and were in favour of amalgamating them. The Commission, however, considered that juridically "impossibility of performance" and a "fundamental change of circumstances" were distinct grounds for regarding a treaty as having been terminated, and should be kept separate. Although it was true that there might be borderline cases in which the two articles tended to overlap, the criteria to be employed in applying the articles were not the same, and to combine them might lead to misunderstanding. "Impossibility of performance" was therefore kept distinct in the present article as a specific and separate ground for invoking the termination of a treaty.

(2) Paragraph 1 provides that the total and permanent disappearance or destruction of the subject-matter of the rights and obligations contained in the treaty may be invoked as putting an end to the treaty. This may happen either through the disappearance or destruction of the physical subject-matter of the treaty or of a legal situation which was the *raison d'être* of the rights and obligations contained in the treaty. Practice furnishes few examples of impossibility relating to the physical subject-matter of the treaty; but the type of case envisaged by the article is the submergence of an island, the drying up of a river, the destruction of a railway, hydro-electric installation, etc. by an earthquake or other disaster. As to impossibility resulting from the disappearance of the legal subject-matter of the treaty rights and obligations, an example is treaty provisions connected with the operation of capitulations which necessarily fall to the ground with the disappearance of the capitulations themselves. The dissolution of a customs union might similarly render further performance of treaties relating to its operation impossible.

(3) Most authorities cite the total extinction of the international personality of one of the parties to a bilateral treaty as an instance of impossibility of performance. After discussion, however, the Commission decided against including the point in the present article, at

any rate at the present stage of its work. It considered that it would be very misleading to formulate a provision concerning the extinction of the international personality of a party without at the same time dealing with, or at least reserving, the question of the succession of States to treaty rights and obligations. But the question of succession is a complex one which is already under separate study in the Commission and it was thought to be inadvisable to prejudge in any way the outcome of that study by attempting to formulate in the present article the conditions under which the extinction of the personality of one of the parties would bring about the termination of a treaty. If, on the other hand, the question of State succession were merely to be reserved by some such phrase as "subject to the rules governing State succession in the matter of treaties", a provision stating that the "extinction of a party can be invoked as terminating the treaty" would serve little purpose. For the time being, therefore, extinction of the international personality of a party was omitted from the article, and it was noted that the point should be reconsidered when the Commission's work on State succession was further advanced.

(4) Impossibility of performance, as a ground for the termination of the treaty under this article, is something which comes about through events which occur outside the treaty; and the treaty is sometimes referred to as terminating by operation of law independently of any action of the parties. The Commission recognized that in cases under this article, unlike cases of breach, the ground of termination, when established, might be considered to have automatic effects on the validity of the treaty. But in drawing up the article it felt bound to cast the rule in the form not of a provision automatically terminating the treaty but of one entitling the parties to invoke the impossibility of performance as a ground for terminating the treaty. The difficulty is that disputes may arise as to whether a total disappearance or destruction of the subject-matter of the treaty has in fact occurred, and in the absence of compulsory jurisdiction it would be inadvisable to adopt, without any qualification, a rule bringing about the automatic abrogation of the treaty by operation of law. Otherwise, there would be a risk of arbitrary assertions of a supposed impossibility of performance as a mere pretext for repudiating a treaty. For this reason, the Commission considered it necessary to formulate the article in terms of a right to invoke the impossibility of performance as a ground for terminating the treaty and to make this right subject to the procedural requirements of article 51.

(5) Paragraph 2 provides that if it is not clear that the impossibility is to be permanent, it may be invoked only as a ground for suspending the operation of the treaty. These cases might simply be treated as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance. But where there is a continuing impossibility of performance of continuing obligations it seems better to recognize that the treaty may be suspended.

(6) Paragraph 3 applies the principle of the separability of treaty provisions to cases of impossibility of performance. Where the impossibility is only partial, the Commission considered that the separation of those parts of the treaty which had been rendered impossible of performance from the remainder of the treaty would

be entirely appropriate and desirable, if the conditions for the separability of treaty provisions set out in article 46 existed in the case.

Article 44. — Fundamental change of circumstances

1. A change in the circumstances existing at the time when the treaty was entered into may only be invoked as ground for terminating or withdrawing from a treaty under the conditions set out in the present article.

2. Where a fundamental change has occurred with regard to a fact or situation existing at the time when the treaty was entered into, it may be invoked as a ground for terminating or withdrawing from the treaty if:

(a) The existence of that fact or situation constituted an essential basis of the consent of the parties to the treaty; and

(b) The effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty.

3. Paragraph 2 above does not apply:

(a) To a treaty fixing a boundary; or

(b) To changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself.

4. Under the conditions specified in article 46, if the change of circumstances referred to in paragraph 2 above relates to particular clauses of the treaty, it may be invoked as a ground for terminating those clauses only.

Commentary

(1) Almost all modern writers,⁵⁹ however reluctantly, admit the existence in international law of the principle with which this article is concerned and which is commonly spoken of as the doctrine of *rebus sic stantibus*. Just as many systems of municipal law recognize that, quite apart from any actual impossibility of performance, contracts may become inapplicable through a fundamental change of circumstances, so also, it is held, international law recognizes that treaties may cease to be binding upon the parties for the same reason. Most writers, however, at the same time enter a strong caveat as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked; for the risks to the security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are perhaps more serious than in the case of any other ground either of invalidity or of termination. The circumstances of international life are always changing, and it is all too easy to find some basis for alleging that the changes have rendered the treaty inapplicable.

(2) The evidence of the recognition of the principle as a rule of customary law is considerable, even if it be

⁵⁹ E.g., Oppenheim, *op. cit.*, vol. I, pp. 938-944; McNair, *op. cit.*, pp. 681-691; F. I. Kozhevnikov, *International Law* (Academy of Sciences of the USSR), p. 281; C. Rousseau, *Principes généraux du droit international public*, tome I, pp. 580-615; Harvard Law School, *Research in International Law*, III, *Law of Treaties*, pp. 1096-1126; Chesney Hill, *The Doctrine of Rebus Sic Stantibus*, University of Missouri Studies (1934).

true that the Court has not yet committed itself on the point. In the *Free Zones* case,⁶⁰ having held that the facts did not in any event justify the application of the doctrine, the Permanent Court expressly reserved its position. It observed that it became unnecessary for it to consider "any of the questions of principle which arise in connexion with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the methods by which effect can be given to the theory, if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816". On the other hand, it can equally be said that the Court has never on any occasion⁶¹ rejected the principle and that in the passage just quoted it even seems to have assumed that the doctrine is to some extent admitted in international law.

(3) Municipal courts, on the other hand, have not infrequently recognized the relevance of the principle in international law, though for one reason or another they have always ended by rejecting the application of it in the particular circumstances of the case before them.⁶² These cases contain the propositions that the principle is limited to changes in circumstances the continuance of which, having regard to the evident intention of the parties at the time, was regarded as a tacit condition of the agreement;⁶³ that the treaty is not dissolved automatically by law upon the occurrence of the change but only if the doctrine is invoked by one of the parties;⁶⁴ and that the doctrine must be invoked within a reasonable time after the change in the circumstances was first perceived.⁶⁵ Moreover, in *Bremen v. Prussia*⁶⁶ the German Reichsgericht, while not disputing the general relevance of the doctrine, considered it altogether inapplicable to a case where one party was seeking to release itself not from the whole treaty but only from certain restrictive clauses which had formed an essential part of an agreement for an exchange of territory.

(4) The principle of *rebus sic stantibus* has not infrequently been invoked in State practice either *eo nomine* or in the form of a reference to a general principle claimed to justify the termination or modification of treaty obligations by reason of changed circumstances.

Detailed examination of this State practice is not possible in the present Report.⁶⁷ Broadly speaking, it shows a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground. The most significant indications as to the attitude of States regarding the principle are perhaps to be found in statements submitted to the Court in the cases where the doctrine has been invoked. In the *Nationality Decrees* case the French Government contended that "perpetual" treaties are always subject to termination in virtue of the *rebus sic stantibus* clause and claimed that the establishment of the French protectorate over Morocco had for that reason had the effect of extinguishing certain Anglo-French treaties.⁶⁸ The British Government, while contesting the French Government's view of the facts, observed that the most forceful argument advanced by France was that of *rebus sic stantibus*.⁶⁹ In the case concerning *The Denunciation of the Sino-Belgian Treaty of 1865*, China invoked, in general terms, changes of circumstances as a justification of her denunciation of a sixty-year-old treaty, and supported her contention with a reference to Article 19 of the Covenant of the League of Nations.⁷⁰ This Article, however, provided that the Assembly of the League should "from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable", and the Belgian Government replied that neither Article 19 nor the doctrine of *rebus sic stantibus* contemplated the unilateral denunciation of treaties. It further maintained that there could be no question of China's denouncing the treaty because of a change of circumstances unless she had at least tried to obtain its revision through Article 19; that where both parties were subject to the Court's jurisdiction, the natural course for China, in case of dispute, was to obtain a ruling from the Court; and that if she did not, she could not denounce the treaty without Belgium's consent.⁷¹ In the *Free Zones* case⁷² the French Government, the Government invoking the *rebus sic stantibus* principle, itself emphasized that it does not allow unilateral denunciation of a treaty claimed to be out of date. It argued that the doctrine would cause a treaty to lapse only "lorsque le changement de circonstances aura été reconnu par un acte faisant droit entre les deux Etats intéressés"; and it further said: "cet acte faisant droit entre les deux Etats intéressés peut être soit un accord, lequel accord sera une reconnaissance du changement des circonstances et de son effet sur le traité, soit une sentence du juge international compétent s'il y en a un".⁷³ Switzerland, emphasizing the differences of opinion amongst writers in regard to the principle, disputed the existence in international law of any

⁶⁰ P.C.I.J., Series A/B, No. 46, pp. 156-158.

⁶¹ E.g., in the *Nationality Decrees Opinion* (P.C.I.J., Series B, No. 4, p. 29), where it merely observed that it would be impossible to pronounce upon the point raised by France regarding the "principle known as the *clausula rebus sic stantibus*" without recourse to the principles of international law concerning the duration of treaties.

⁶² E.g., *Hooper v. United States*, Hudson, *Cases on International Law*, Second Edition, p. 930; *Lucerne v. Aargau* (1888) *Arrêts du Tribunal fédéral suisse*, vol. 8, p. 57; *In re Lepeschkin*, *Annual Digest of Public International Law Cases*, 1923-1924, Case No. 189; *Bremen v. Prussia*, *Ibid.*, 1925-1926, Case No. 266; *Rothschild and Sons v. Egyptian Government*, *Ibid.*, 1925-1926, Case No. 14; *Canton of Thurgau v. Canton of St. Gallen*, *Ibid.*, 1927-1928, Case No. 289; *Bertaco v. Bancel*, *Ibid.*, 1935-1937, Case No. 201; *Stransky v. Zivnostenska Bank*, *International Law Reports*, 1955, pp. 424-427.

⁶³ *Lucerne v. Aargau*; *Canton of Thurgau v. Canton of St. Gallen*; *Hooper v. United States*.

⁶⁴ *In re Lepeschkin*; *Stransky v. Zivnostenska Bank*.

⁶⁵ *Canton of Thurgau v. Canton of St. Gallen*.

⁶⁶ *Annual Digest of Public International Law Cases*, 1925-1926, Case No. 266.

⁶⁷ See the accounts of the State practice in Chesney Hill, *op. cit.*, pp. 27-74; C. Kiss, *op. cit.*, pp. 381-393; C. Rousseau, *op. cit.*, pp. 594-615; Harvard Law School, *Research in International Law*, III, *Law of Treaties*, pp. 1113-1124; H. W. Briggs, *A.J.I.L.* 1942, pp. 89-96, and 1949, pp. 762-769.

⁶⁸ P.C.I.J., Series C, No. 2, pp. 187-188.

⁶⁹ *Ibid.*, pp. 208-209.

⁷⁰ *Ibid.*, No. 16, I, p. 52.

⁷¹ *Ibid.*, pp. 22-23; the case was ultimately settled by the conclusion of a new treaty.

⁷² *Ibid.*, Series A/B, No. 46.

⁷³ *Ibid.*, Series C, No. 58, pp. 578-579, 109-146, and 405-415; see also Series C, No. 17, I, pp. 89, 250, 256, and 283-284.

such right to the termination of a treaty because of changed circumstances enforceable through the decision of a competent tribunal. But Switzerland rested its case primarily on three contentions: (a) the circumstances alleged to have changed were not circumstances on the basis of whose continuance the parties could be said to have entered into the treaty; (b) in any event, the doctrine did not apply to treaties creating territorial rights; and (c) France had delayed unreasonably long after the alleged changes of circumstances had manifested themselves.⁷⁴ France does not appear to have disputed that the doctrine is inapplicable to territorial rights; instead, she drew a distinction between territorial rights and "personal" rights created on the occasion of a territorial settlement.⁷⁵ The Court upheld the Swiss Government's contentions on points (a) and (c), but did not pronounce on the application of the *rebus sic stantibus* principle to treaties creating territorial rights.

(5) The principle has also sometimes been invoked in debates in political organs of the United Nations, either expressly or by implication. In 1947, for example, when Egypt referred the question of the continued validity of the Anglo-Egyptian Treaty of 1936 to the Security Council, the United Kingdom delegates interpreted the Egyptian case as being one based on the *rebus sic stantibus* principle. The existence of the principle was not disputed, though emphasis was placed on the conditions restricting its application. The Secretary-General also, in a study of the validity of the minorities treaties concluded during the League of Nations era, while fully accepting the existence of the principle in international law, emphasized the exceptional and limited character of its application.⁷⁶

(6) Some members of the Commission expressed doubts as to how far the principle could be regarded as an already accepted rule of international law; and many members emphasized the dangers which the principle involved for the security of treaties unless the conditions for its application were closely defined and adequate safeguards were provided against its arbitrary application. The Commission, however, concluded that the principle, if its application were carefully delimited and regulated, should find a place in the modern law of treaties. A treaty might remain in force for a long time and its stipulations come to place an undue burden on one of the parties. Then, if the other party were obdurate in opposing any change, the fact that international law recognized no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties might impose a serious strain on the regulations between the States concerned; and the dissatisfied State might ultimately be driven to take action outside the law. The number of such cases was likely to be comparatively small. As pointed out in the commentary to article 38, the majority of modern treaties are expressed to be of short duration, or are entered into for recurrent terms of years with a right to break the treaty at the end of each term, or are expressly or implicitly terminable upon notice. In all these cases either the treaty expires automatically or each party, having the power to terminate the treaty, has the power also to apply pressure upon the other party to revise its

provisions. Nevertheless, there remains a residue of cases in which, failing any agreement, one party might be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions. It is in these cases that the *rebus sic stantibus* doctrine could serve a purpose as a lever to induce a spirit of compromise in the other party. Moreover, despite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties.

(7) In the past the principle has almost always been presented in the guise of a tacit condition implied in every "perpetual" treaty that would dissolve it in the event of a fundamental change of circumstances. The Commission noted, however, that the tendency today was to regard the implied term as only a fiction by which it was attempted to reconcile the principle of the dissolution of treaties in consequence of a fundamental change of circumstances with the rule *pacta sunt servanda*.⁷⁷ In most cases the parties gave no thought to the possibility of a change of circumstances and, if they had done so, would probably have provided for it in a different manner. Furthermore, the Commission considered the fiction to be an undesirable one since it increased the risk of subjective interpretations and abuse. For this reason, the Commission was agreed that the theory of an implied term must be rejected and the doctrine formulated as an objective rule of law by which, on grounds of equity and justice, a fundamental change of circumstances may, under certain conditions, be invoked by a party as a ground for terminating the treaty. It further decided that, in order to emphasize the objective character of the rule, it would be better not to use the term "*rebus sic stantibus*" either in the text of the article or even in the title, and so avoid the doctrinal implication of that term.

(8) The Commission also recognized that many authorities have in the past limited the application of the principle to so-called perpetual treaties, that is, to treaties not making any provision for their termination. The reasoning by which this limitation of the principle was supported by these authorities did not, however, appear to the Commission to be convincing. When a treaty had been given a duration of ten, twenty, fifty or ninety-nine years, it could not be excluded that a fundamental change of circumstances might occur which radically affected the basis of the treaty. The cataclysmic events of the present century showed how fundamentally circumstances may change within a period of only ten or twenty years. If the doctrine were regarded as an objective rule of law founded upon the equity and justice of the matter, there did not seem to be any reason to draw a distinction between "perpetual" and "long terms" treaties. Moreover, practice does not altogether support the view that the principle is confined to "perpetual" treaties.⁷⁸ Some treaties of limited duration actually contain what were

⁷⁴ *Ibid.*, Series C, No. 58, pp. 463-476.

⁷⁵ *Ibid.*, pp. 136-143.

⁷⁶ E/CN.4/367, p. 37.

⁷⁷ C. Rousseau, *op. cit.*, p. 584; Sir John Fischer Williams, *A.J.I.L.*, 1928, pp. 93-94; C. De Visscher, *Théories et réalités en droit international public*, p. 391; J. Basdevant, "Règles générales du droit de la paix", *Recueil des Cours 1936*, vol. IV, pp. 653-654; Sir Gerald Fitzmaurice, second report, *Yearbook of the International Law Commission, 1957*, vol. II, para. 149.

⁷⁸ C. Rousseau, *op. cit.*, p. 586.

equivalent to *rebus sic stantibus* provisions.⁷⁹ The principle has also been invoked sometimes in regard to limited treaties as, for instance, in the resolution of the French Chamber of Deputies of 14 December 1932 expressly invoking the principle of *rebus sic stantibus* with reference to the Franco-American war debts agreement of 1926.⁸⁰ The Commission accordingly decided that the rule should be framed in the present article as one of general application, though for obvious reasons it would seldom or never have relevance for treaties of limited duration or for treaties which are terminable upon notice.

(9) Paragraph 1 has as its object to emphasize that it is not any change in the circumstances existing when the treaty was entered into that may be invoked as a ground for terminating a treaty, but only one which fulfils the conditions laid down in paragraph 2. Many members of the Commission regarded the rule contained in this article, even when strictly defined, as representing a danger to the security of treaties. These members considered it essential to underline the exceptional character of the application of the rule, and some of them were in favour of using an even stronger formula. Certain other members, while recognizing the need to define the conditions for the application of the article with precision, regarded it rather as expressing a principle of general application which has an important role to play in bringing about a modification of out-of-date treaty situations in a rapidly changing world.

(10) Paragraph 2 defines the changes of circumstances which may be invoked as a ground for the termination of a treaty or for withdrawing from a multilateral treaty. The change must relate to a fact or situation which existed at the time when the treaty was entered into and must be a "fundamental" one in the sense that: (a) "the existence of the fact or situation constituted an essential basis of the consent of the parties to the treaty", and (b) "the effect of the change is to transform in an essential respect the character of the obligations undertaken in the treaty". The Commission gave the closest consideration to the formulation of these conditions. It attached great importance in expressing them in objective terms, while at the same time making it clear that the change must be one affecting the essential basis of the consent of the parties to the treaty. Certain members felt that general changes of circumstances quite outside the treaty might bring the article into operation. But the Commission decided that such general changes could only be invoked as a ground for terminating the treaty if their effect was to alter a fact or situation constituting an essential basis of the parties' consent to the treaty.

(11) Certain members of the Commission favoured the insertion of a provision making it clear that a subjective change in the attitude or policy of a government could never be invoked as a ground for terminating, withdrawing from or suspending the operation of a

treaty. They represented that otherwise the security of treaties might be gravely prejudiced by the recognition of the principle in the present article. Other members, while not dissenting from the view that mere changes of policy on the part of a government cannot normally be invoked as bringing the principle into operation, felt that it would be going too far to state that a change of policy could never in any circumstances be invoked as a ground for terminating a treaty. They instanced a treaty of alliance as a possible case where a radical change of political alignment by the government of a country might make it unacceptable, from the point of view of both parties, to continue with the treaty. The Commission, considering that the definition of a "fundamental change of circumstances" in paragraph 2 should suffice to exclude abusive attempts to terminate a treaty on the basis merely of a change of policy, decided that it was unnecessary to go further into the matter in formulating the article.

(12) Paragraph 3 excepts from the operation of the article two cases which gave rise to some discussion. The first concerns treaties fixing a boundary, which both States concerned in the *Free Zones* case appear to have recognized as being outside the rule, as do most writers. Some members of the Commission suggested that the total exclusion of these treaties from the rule might go too far, and might be inconsistent with the principle of self-determination recognized in the Charter. The Commission, however, concluded that treaties fixing a boundary should be recognized to be an exception to the rule, because otherwise the rule, instead of being an instrument of peaceful change, might become a source of dangerous frictions. It also took the view that "self-determination", as envisaged in the Charter, was an independent principle and that it might lead to confusion if, in the context of the law of treaties, it were presented as an application of the rule contained in the present article. By excepting treaties fixing a boundary from its scope the present article would not exclude the operation of the principle of self-determination in any case where the conditions for its legitimate operation existed.

(13) The second exception — in sub-paragraph 3 (b) — is cases where the parties have foreseen the change of circumstances and have made provision for it in the treaty itself. In the discussion of this article some members of the Commission expressed the view that the principle contained in this article is one which, under general international law, the parties may not exclude altogether by a provision in the treaty. According to these members, the parties may make express provision for a change which they contemplate may happen, but are not entitled simply to negative the application of the present article to the treaty. Other members doubted whether the freedom of States to make their own agreement on this point could or should be limited in this way. The Commission, without taking any position on this question, excepted from the article "changes of circumstances which the parties have foreseen and for the consequences of which they have made provision in the treaty itself".

(14) Paragraph 4 makes the principle of the separability of treaty provisions applicable to this article. Where the change of circumstances relates to particular clauses only of the treaty, it seemed to the Commission appropriate, for the same reasons as in the case of super-

⁷⁹ E.g., art. 21 of the Treaty on Limitation of Naval Armament, signed at Washington, 6 February 1922 (Hudson, *International Legislation*, vol. II, p. 820); art. 26 of the Treaty for the Limitation of Naval Armament, signed at London, 25 March 1936 (*ibid.*, vol. VII, p. 280); and Convention regarding the régime of the Straits, signed at Montreux, 20 July 1936 (*L.N.T.S.*, vol. 173, p. 229).

⁸⁰ For the text of the resolution, see C. Kiss, *op. cit.*, pp. 384-385.

vening impossibility of performance, to allow the severance of those clauses from the rest of the treaty under the conditions laid down in article 46.

(15) In the discussion of this article, as in the discussion of article 42, many members of the Commission stressed the importance which they attached to the provision of adequate procedural safeguards against arbitrary action as an essential basis for the acceptance of the article.

Article 45. — Emergence of a new peremptory norm of general international law

1. A treaty becomes void and terminates when a new peremptory norm of general international law of the kind referred to in article 37 is established and the treaty conflicts with that norm.

2. Under the conditions specified in article 46, if only certain clauses of the treaty are in conflict with the new norm, those clauses alone shall become void.

Commentary

(1) The rule formulated in this article is the logical corollary of the rule in article 37 under which a treaty is void if it conflicts with a "peremptory norm of general international law from which no derogation is permitted". Article 37, as explained in the commentary to it, is based upon the hypothesis that in international law today there are a certain number of fundamental rules of international public order from which no State may derogate even by agreement with another State. Manifestly, if a new rule of that character — a new rule of *jus cogens* — is established either by general multilateral treaty or by the development of a new customary rule, its effect must be to render void not only future but existing treaties that conflict with it. This follows from the fact that it is an overriding rule of public order depriving any act or situation which is in conflict with it of legality. An example would be former treaties regulating the slave trade, the performance of which later ceased to be compatible with international law owing to the general recognition of the total illegality of all forms of slavery.

(2) The Commission discussed whether to include this rule in article 37, but decided that it should be placed among the articles concerning the termination of treaties. Although the rule operates to deprive the treaty of validity, its effect is not to render it void *ab initio*, but only from the date when the new rule of *jus cogens* is established; in other words it does not nullify the treaty, it forbids its further performance. It is for this reason that paragraph 1 provides that the treaty "becomes void when a new peremptory norm . . .".

(3) Paragraph 2 provides that, subject to the conditions for the separability of treaty provisions laid down in article 46, if only certain clauses of the treaty are in conflict with the new rule of *jus cogens*, they alone are to become void. Although the Commission did not think that the principle of separability was appropriate when a treaty was rendered void *ab initio* under article 37 by an existing rule of *jus cogens*, it felt that different considerations applied in the case of a treaty which had been entirely valid when concluded but was now found in some of its provisions to conflict with a newly established rule of *jus cogens*. If those provisions could properly be regarded as severable from the rest of the

treaty, the Commission thought that the rest of the treaty ought to be regarded as still valid.

Section IV: Particular rules relating to the application of sections II and III

Article 46. — Separability of treaty provisions for the purposes of the operation of the present articles

1. Except as provided in the treaty itself or in articles 33 to 35 and 42 to 45, the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty shall relate to the treaty as a whole.

2. The provisions of articles 33 to 35 and 42 to 45 regarding the partial nullity, termination or suspension of the operation of a treaty or withdrawal from particular clauses of a treaty shall apply only if:

(a) The clauses in question are clearly severable from the remainder of the treaty with regard to their application; and

(b) It does not appear either from the treaty or from statements made during the negotiations that acceptance of the clauses in question was an essential condition of the consent of the parties to the treaty as a whole.

Commentary

(1) A number of the articles in sections II and III provide explicitly for the possibility of limiting a claim to invoke the nullity of a treaty or a ground of termination to particular clauses only of the treaty. In each case reference is made to the conditions for the separability of treaty provisions specified in the present article. As the proposals of the Commission concerning the right to claim the partial nullity or termination of a treaty are to some extent *de lege ferenda*, the Commission considers it desirable to make certain general observations on the question before commenting upon the article.

(2) The separability of treaty provisions was until comparatively recently considered almost exclusively in connexion with the right to terminate a treaty on the ground of a breach by the other party. Certain modern authorities,⁸¹ however, have advocated recognition of the principle of separability in cases of invalidity and in determining the effect of war upon treaties. They have urged that in some cases one provision of a treaty may be struck out or suspended without necessarily disturbing the balance of the rights and obligations established by the other provisions of the treaty and without destroying one of the considerations which induced the parties to accept the treaty as a whole. These authorities cite in support of their contentions certain pronouncements of the Permanent Court of International Justice in regard to the interpretation of self-contained parts of treaties.⁸²

(3) The question of the separability of treaty provisions for the purposes of interpretation raises quite different issues from the application of the principle of

⁸¹ See Harvard Law School, *Research in International Law, III, Law of Treaties*, art. 30, pp. 1134-1139; McNair, *Law of Treaties (1961)*, chapter 28.

⁸² E.g., the *Free Zones Case*, Series A/B, No. 46, p. 140; the *Wimbledon Case*, Series A, No. 1, p. 24.

separability to the nullity or termination of treaties. However, although the jurisprudence of the two Courts does not throw much light on these latter questions, it is clear that certain judges in separate opinions in the *Norwegian Loans*⁸³ and *Interhandel*⁸⁴ cases accepted the applicability of the principle of separating treaty provisions in the case of the alleged nullity of a unilateral Declaration under the Optional Clause, by reason of a reservation the validity of which was contested.

(4) The authorities being by no means conclusive, the Commission decided that it should examine *de novo* the appropriateness and utility of recognizing the principle of the separability of treaty provisions in the context of the nullity and termination of treaties. The Commission further decided that in order to determine the appropriateness of applying the principle in these contexts it was essential to examine each article in turn, since different considerations might well apply in the various articles. The Commission concluded that, for reasons which have already been given in the commentary to each article, the application of the principle would be appropriate and serve a useful purpose in regard to articles 33 (fraud), 34 (error), 35 (personal coercion), 42 (breach), 43 (impossibility of performance), 44 (change of circumstances) and 45 (supervening rule of *jus cogens*). But it also concluded that this would only be acceptable if the conditions under which the principle might legitimately be invoked in any given case were defined with some strictness. The sole purpose of the present article is to define those conditions.

(5) Paragraph 1 of the article makes it clear that the general rule is that the nullity or termination of a treaty or the suspension of its operation relates to the treaty as a whole. This rule is subject, first, to any provisions in the treaty allowing the separation of its provisions and, secondly, to the special provisions contained in the above-mentioned articles. Treaties, more especially multilateral treaties, which admit the acceptance of part only of the treaty or which allow partial withdrawal from the treaty or suspension of the operation of only one part are not uncommon; and their provisions, so far as they are applicable, necessarily prevail.

(6) Paragraph 2 sets out the basic conditions to which the application of the principle of separability is subject in each of the articles where it is allowed, and they are two-fold. First, the clauses to be dealt with separately must be clearly severable from the rest of the treaty with regard to their operation. In other words, the severance of the treaty must not interfere with the operation of the remaining provisions. Secondly, it must not appear from the treaty or from the statements during the negotiations that acceptance of the severed clauses was an essential condition of the consent of the parties to the treaty as a whole. In other words, acceptance of the severed clauses must not have been so linked to acceptance of the other parts that, if the severed parts disappear, the basis of the consent of the parties to the treaty as a whole also disappears.

Article 47. — Loss of a right to allege the nullity of a treaty or a ground for terminating or withdrawing from a treaty

A right to allege the nullity of a treaty or a ground for terminating or withdrawing from it in cases falling under articles 32 to 35 and 42 and 44 shall no longer be exercisable if, after becoming aware of the facts giving rise to such right, the State concerned shall have:

(a) Waived the right; or

(b) So conducted itself as to be debarred from denying that it has elected in the case of articles 32 to 35 to consider itself bound by the treaty, or in the case of articles 42 and 44 to consider the treaty as unaffected by the material breach, or by the fundamental change of circumstances, which has occurred.

Commentary

(1) The foundation of the principle that a party is not permitted to benefit from its own inconsistencies is essentially good faith and fair dealing (*allegans contraria non audiendus est*). The relevance of this principle in international law is generally admitted and has been expressly recognized by the International Court of Justice itself in two recent cases.⁸⁵

(2) The principle is one of general application which is not confined to the law of treaties.⁸⁶ Nevertheless, it does have a particular importance in this branch of international law. As already mentioned in previous commentaries, the grounds upon which treaties may be invalidated under section II or terminated under section III involve certain risks of abusive claims to allege the nullity or termination of treaties. Another risk is that a State, after becoming aware of an essential error in the conclusion of the treaty, an excess of authority committed by its representative or a breach by the other party etc., may continue with the treaty as if nothing had happened and only raise the matter at a much later date when it desires for quite other reasons to put an end to its obligations under the treaty. Indeed, it may seek in this way to resuscitate an alleged ground of invalidity or of termination long after the event upon the basis of arbitrary or controversial assertions of fact. The principle now under consideration places a limit upon the cases in which such claims can be asserted with any appearance of legitimacy. Such indeed was the role played by the principle in the *Temple* case and in the case of the *Arbitral Award of the King of Spain*. Accordingly, while recognizing the general character of the principle, the Commission considered that its particular importance in the sphere of the invalidity and termination of treaties called for its mention in this part of the law of treaties.

(3) "Waiver", although not identical with the general principle of law discussed in the preceding paragraphs of this commentary, is connected with it; indeed some cases of the application of that general principle

⁸⁵ *The Arbitral Award made by the King of Spain, I.C.J. Reports, 1960*, pp. 213-214; *The Temple of Preah Vihear, I.C.J. Reports, 1962*, pp. 23-32.

⁸⁶ See generally D. W. Bowett, *British Yearbook of International Law, 1957*, pp. 176-202; Bin Cheng, *General Principles of Law*, pp. 141-149; Judges Alfaro and Fitzmaurice in *The Temple of Preah Vihear, I.C.J. Reports, 1962*, pp. 39-51, 62-65.

⁸³ *Case of Certain Norwegian Loans, I.C.J. Reports, 1957*, p. 9.

⁸⁴ *I.C.J. Reports, 1959*, p. 6.

can equally be viewed as cases of implied waiver. The Commission, therefore, considered it appropriate to include "waiver" in the present article together with the general principle of law.

(4) The article accordingly provides that the right to invoke the nullity of a treaty or a ground for terminating or withdrawing from it in cases falling under certain articles shall no longer be exercisable if the State concerned shall have either: (a) waived its right or (b) shall have so conducted itself that it is debarred from asserting the right by reason of the principle that it may not take up a legal position which is in contradiction with its own previous representations or conduct. The essence of the matter is that the State in question so conducts itself as to appear to have elected, in cases of nullity under articles 32-35, to consider itself bound by the treaty, or in cases of termination under articles 42 and 44, to consider the treaty unaffected by the breach or change of circumstances.

(5) The Commission noted that the application of the principle in any given case would necessarily turn upon the facts and that the governing consideration would be that of good faith. This being so, the principle would not operate if the State in question had not been aware of the facts giving rise to the right or had not been in a position freely to exercise its right to invoke the nullity of the treaty as the ground of termination. The Commission further noted that in municipal systems of law this general principle has its own particular manifestations reflecting technical features of the particular system. It felt that these technical features of the principle in municipal law might not necessarily be appropriate for the application of the principle in international law. For this reason, it preferred to avoid the use of such municipal law terms as "*préclusion*" or "*estoppel*" and to speak simply of the State being "debarred" from denying that it has elected to consider itself as bound by the treaty or to consider the treaty in force.

(6) The Commission did not think it appropriate that the principle should be admitted in cases of "coercion" or "*jus cogens*" or in cases of "impossibility of performance" or of "supervening *jus cogens*"; and, clearly, it would not be applicable to termination under a right conferred by the treaty or to termination by agreement. Consequently, the operation of the principle was confined to articles 32-35 and 42 and 44.

Article 48. — *Treaties which are constituent instruments of international organizations or which have been drawn up within international organizations*

Where a treaty is a constituent instrument of an international organization, or has been drawn up within an international organization, the application of the provisions of part II, section III, shall be subject to the established rules of the organization concerned.

Commentary

(1) The application of the law of treaties to the constituent instruments of international organizations and to treaties drawn up within an organization inevitably has to take account also of the law governing each organization. Thus, in formulating the rules governing the conclusion of treaties in part I, the Commission found it necessary in certain contexts to draw a distinction be-

tween these and other kinds of multilateral treaties and also in a few instances to distinguish treaties drawn up under the auspices of an international organization from treaties drawn up at a conference convened by the States concerned. In the present part the Commission did not think it necessary to make any particular provision for these special categories of treaties with regard to the articles contained in section II which deal with the grounds of the invalidity of treaties. The principles embodied in that section appeared by their very nature not to require modification for the purposes of being applied to the constituent treaties of organization or to treaties drawn up within or under the auspices of international organizations.

(2) On the other hand, it appeared to the Commission that certain of the articles in section III concerning the termination or suspension of the operation of treaties and withdrawal from multilateral treaties might encroach upon the internal law of international organizations to a certain extent, more especially in relation to withdrawal from the organization, and termination and suspension of membership. Accordingly, the present article provides that the application of the provisions of section III to constituent instruments and to treaties drawn up "within" an organization shall be subject to the "established rules" of the organization concerned. The term "established rules of the organization" is intended here, as in article 18, paragraph 1 (a), to embrace not only the provisions of the constituent instrument or instruments of the organization but also the customary rules developed in its practice.

(3) The phrase treaty "drawn up within an international organization", which also appears in certain articles of part I, covers treaties, such as the international labour conventions, the texts of which are drawn up and adopted by an organ of the organization concerned, but not treaties drawn up "under the auspices" of an organization in a diplomatic conference convened by the organization. The latter category of treaties, in the opinion of the Commission, is as fully subject to all the provisions of the present part as are general multilateral treaties drawn up in conferences convened by the States concerned. Admittedly, there are a few treaties, like the Genocide Convention⁸⁷ and the Convention on the Political Rights of Women,⁸⁸ which were drawn up "within" an organization but the application of which is not particularly affected by the law of the organization. As, however, the present article does not exclude these treaties from the application of the provisions of section III, but only makes the application of those provisions subject to the law of the organization concerned, it was not considered necessary to qualify the phrase "drawn up within an organization" for the purposes of the present article.

Section V: Procedure

Article 49. — *Authority to denounce, terminate or withdraw from a treaty or suspend its operation*

The rules contained in article 4 relating to evidence of authority to conclude a treaty also apply, *mutatis mutandis*, to evidence of authority to denounce, termi-

⁸⁷ United Nations *Treaty Series*, vol. 78, p. 277.

⁸⁸ United Nations *Treaty Series*, vol. 193, p. 135.

nate or withdraw from the treaty or to suspend its operation.

Commentary

Article 4 sets out the rules governing the cases in which organs or representatives of States may be required to furnish evidence of their authority to conclude a treaty. Competence under international law to invoke or establish the nullity of a treaty or to invoke a ground terminating, withdrawing from or suspending the operation of a treaty or to effect these acts is of the same nature as competence to conclude treaties, and it is normally exercised by corresponding State organs or representatives. Similarly, when an organ or representative of a State purports to exercise that competence, the other parties to the treaty are concerned to know that it or she possesses the necessary authority to do so. Accordingly, it seems both logical and necessary that the rules concerning the furnishing of evidence of authority contained in article 4 should also apply, *mutatis mutandis* to organs or representatives purporting to perform acts on behalf of their States with regard to the nullity, termination or suspension of the operation of a treaty or withdrawal from a treaty; and the present article so provides.

Article 50. — Procedure under a right provided for in the treaty

1. A notice to terminate, withdraw from or suspend the operation of a treaty under a right expressly or impliedly provided for in the treaty must be communicated, through the diplomatic or other official channel, to every other party to the treaty either directly or through the depositary.

2. Unless the treaty otherwise provides, the notice may be revoked at any time before the date on which it takes effect.

Commentary

(1) This article concerns the procedure for exercising a power of termination, withdrawal or suspension which is expressed or implied in the treaty. The procedural act required is a notification and this is usually given in writing. If difficulties are to be avoided, it is essential that the notice should not only emanate from an authority competent for the purpose under the previous article, but should also be the subject of an official communication to the other interested States. It goes without saying that the notification should conform to any conditions laid down in the treaty itself; e.g., the condition frequently found in treaties for recurrent periods of years that notice must be given not less than six months before the end of one of the periods.

(2) Paragraph 1 accordingly provides that a notice of termination etc. should be formally communicated to all the other parties either directly or through the depositary. It sometimes happens that in moments of tension the termination of a treaty or a threat of its termination may be made the subject of a public utterance not addressed to the State concerned. But it is clearly essential that such statements, at whatever level they are made, should not be regarded as a substitute for the formal act which diplomatic propriety and legal regularity require.

(3) Paragraph 2 deals with a small point of sub-

stance in that it provides that a notice of termination etc. may be revoked at any time before the date on which it takes effect. Thus, if a treaty is subject to termination by six months' notice, a notice given under the treaty may be revoked at any time before the expiry of the six-month period makes it effective. A query was raised in the Commission as to a possible need to protect the interests of the other parties to the treaty, should they have changed their position by taking preparatory measures in anticipation of the State's ceasing to be a party. The Commission, however, considered that the right to revoke the notice was really implicit in the provision that it was not to become effective until after the expiry of a certain period. The other parties would be aware that the notice was not to become effective until after the expiry of the period specified and would, no doubt, take that fact into account in any preparations which they might make.

Article 51. — Procedure in other cases

1. A party alleging the nullity of a treaty, or a ground for terminating, withdrawing from or suspending the operation of a treaty otherwise than under a provision of the treaty, shall be bound to notify the other party or parties of its claim. The notification must:

(a) Indicate the measure proposed to be taken with respect to the treaty and the grounds upon which the claim is based;

(b) Specify a reasonable period for the reply of the other party or parties, which period shall not be less than three months except in cases of special urgency.

2. If no party makes any objection, or if no reply is received before the expiry of the period specified, the party making the notification may take the measure proposed. In that event it shall so inform the other party or parties.

3. If, however, objection has been raised by any other party, the parties shall seek a solution of the question through the means indicated in Article 33 of the Charter of the United Nations.

4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.

5. Subject to article 47, the fact that a State may not have made any previous notification to the other party or parties shall not prevent it from invoking the nullity of or a ground for terminating a treaty in answer to a demand for the performance of the treaty or to a complaint alleging a violation of the treaty.

Commentary

(1) As already mentioned in previous commentaries, many members of the Commission regarded the present article as in some ways a key article for the application of the provisions of part II, sections II and III, of the law of treaties. They thought that some of the grounds upon which treaties may be considered invalid or terminated under those sections, if allowed to be arbitrarily asserted in face of objection from the other party, would involve real danger for the security of treaties. These dangers were, they felt, particularly serious in regard to

claims to denounce or withdraw from a treaty by reason of an alleged breach by the other party or by reason of a fundamental change of circumstances. In order to minimize these dangers the Commission has sought to define as precisely and as objectively as possible the conditions under which the various grounds may be invoked. But whenever a party to a treaty invokes one of these grounds, the question whether or not its claim is justified will nearly always turn upon facts the determination or appreciation of which may be controversial. Accordingly, the Commission considered it essential that the present articles should contain procedural safeguards against the possibility that the nullity or termination of a treaty may be arbitrarily asserted on the basis of the provisions of sections II and III as a mere pretext for getting rid of an inconvenient obligation.

(2) States in the course of disputes have not infrequently used language in which they appeared to maintain that the nullity or termination of a treaty could not be established except by consent of both parties. This presentation of the matter, however, subordinates the application of the principles governing the invalidity and termination of treaties to the will of the objecting State no less than the arbitrary assertion of the nullity or termination of a treaty subordinates their application to the will of the claimant State. The problem is, of course, the familiar one of the settlement of differences between States. In the case of treaties there is the special consideration that the parties by negotiating and concluding the treaty have brought themselves into a relationship in which there are particular obligations of good faith. Some members of the Commission were strongly in favour of recommending that the application of the present articles should be made subject to compulsory judicial settlement by the International Court of Justice, if the parties did not agree upon another means of settlement. Other members, however, pointed out that the Geneva Conventions on the Law of the Sea and the two Vienna Conventions respectively on Diplomatic and on Consular Relations did not provide for compulsory jurisdiction. While not disputing the value of recourse to the International Court of Justice as a means of settling disputes arising under the present articles, these members expressed the view that in the present state of international practice it would not be realistic for the Commission to put forward this solution of the procedural problem.

(3) After giving prolonged consideration to the question, the Commission concluded that its appropriate course was, first, to provide a procedure requiring a party which invoked the nullity of a treaty or a ground for terminating it to notify the other parties and give them a proper opportunity to state their views, and then, in the event of an objection being raised by the other party, to provide that the solution of the question should be sought through the means indicated in Article 33 of the Charter. In other words, the Commission considered that in dealing with this problem it should take as its basis the general obligation of States under international law to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered" which is enshrined in Article 2, paragraph 3, of the Charter and the means for the fulfilment of which are indicated in Article 33 of the Charter.

(4) Paragraph 1 accordingly provides that a party "alleging" the nullity of the treaty or a ground for terminating it or suspending its operation shall put in motion a regular procedure under which it must first notify the other parties of its claim. In doing so it must indicate the measure which it proposes to take with respect to the treaty and the grounds upon which the claim is based, and must give the other parties a reasonable period within which to reply. Except in cases of special urgency, the period must not be less than three months. The second stage of the procedure depends on whether or not objection is raised by any party. If there is none of there is no reply before the expiry of the period, the party may take the measure proposed. If, on the other hand, objection is raised, the parties are required to seek a solution of the question through the means indicated in Article 33 of the Charter. The Commission did not find it possible to carry the procedural provisions beyond this point without becoming involved in some measure and in one form or another in compulsory solution of the question at issue between the parties. If after recourse to the means indicated in Article 33 the parties should reach a deadlock, it would be for each government to appreciate the situation and to act as good faith demands. There would also remain the right of every State, whether or not a Member of the United Nations, under certain conditions, to refer the dispute to the competent organ of the United Nations.

(5) Even if, for the reasons previously mentioned in this commentary, the Commission felt obliged not to go beyond Article 33 of the Charter in providing for procedural checks upon arbitrary action, it considered that the establishment of the procedural provisions of the present article as an integral part of the law relating to the invalidity and termination of treaties would be a valuable step forward. The express subordination of the substantive rights arising under the provisions of Sections II and III to the procedure prescribed in the present article and the checks on unilateral action which the procedure contains would, it was thought, give a substantial measure of protection against purely arbitrary assertions of the nullity or termination of a treaty.

(6) Paragraph 4 merely provides that nothing in the article is to affect the position of the parties under any other provisions for the settlement of disputes in force between the parties, whether contained in the treaty itself or in any other instrument.

(7) Paragraph 5 reserves the right of any party to invoke the nullity or termination of a treaty by way of answer to a demand for its performance or to a complaint in regard to its violation, even although it may not previously have initiated the procedure laid down in the article for invoking the nullity or termination of the treaty. In cases of error, impossibility of performance or change of circumstances, for example, a State might well not have invoked the ground in question before being confronted with a complaint—perhaps even before a tribunal. Subject to the provisions of article 47 concerning the effect of inaction in debarring a State from invoking a ground of nullity or termination, it would seem right that a mere failure to have made a prior notification should not prevent a party from raising the question of the nullity or termination of a treaty in answer to a demand for performance.

Section VI: Legal consequences of the nullity termination or suspension of the operation of a treaty

Article 52. — Legal consequences of the nullity of a treaty

1. (a) The nullity of a treaty shall not as such affect the legality of acts performed in good faith by a party in reliance on the void instrument before the nullity of that instrument was invoked.

(b) The parties to that instrument may be required to establish as far as possible the position that would have existed if the acts had not been performed.

2. If the nullity results from fraud or coercion imputable to one party, that party may not invoke the provisions of paragraph 1 above.

3. The same principles shall apply with regard to the legal consequences of the nullity of a State's consent to a multilateral treaty.

Commentary

(1) This article deals only with the legal effects of the nullity of a treaty. It does not deal with any questions of responsibility or of redress arising from acts which are the cause of the nullity of a treaty. Fraud or coercion, for example, clearly raise questions of responsibility and redress as well as of nullity. But those questions fall outside the scope of the present part, which is concerned only with the nullity of the treaty.

(2) The Commission found that this article posed a problem of some delicacy. The nullity of the treaty in cases falling under section II is a nullity *ab initio*, and yet, for reasons which are entirely justifiable in law, it may not have been invoked until after the treaty has been applied for some time. The problem is to determine the legal position of the parties on the basis that the treaty is a nullity but the parties have acted upon it as if it were not. The Commission considered that in cases where neither party was to be regarded as a wrong-doer with respect to the cause of nullity their legal positions should be determined on the basis of the principle of good faith, taking account of the nullity of the treaty.

(3) Paragraph 1 accordingly provides that the nullity of the treaty is not, as such, to affect the legality of acts performed by either party in good faith in reliance on the void instrument before its nullity is invoked. This means that the nullity of the treaty does not, as such, convert acts done in reliance on a right conferred by the treaty into wrongful acts for which the party in question has international responsibility. It does not mean that the acts are to be regarded as validated for the future and creative of continuing rights. On the contrary, sub-paragraph (b) expressly provides that the parties may be required to "establish as far as possible the position that would have existed if the acts had not been performed". In other words, the nullity of the treaty is for all other purposes to have its full legal consequences.

(4) Paragraph 2 for obvious reasons excepts from the rule in paragraph 1 a party whose fraud or coercion has been the cause of the nullity.

(5) Paragraph 3 merely applies the previous paragraphs also to the nullity of the consent of an individual State to a multilateral treaty.

Article 53. — Legal consequences of the termination of a treaty

1. Subject to paragraph 2 below and unless the treaty otherwise provides, the lawful termination of a treaty:

(a) Shall release the parties from any further application of the treaty;

(b) Shall not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty.

2. If a treaty terminates on account of its having become void under article 45, a situation resulting from the application of the treaty shall retain its validity only to the extent that it is not in conflict with the norm of general international law whose establishment has rendered the treaty void.

3. Unless the treaty otherwise provides, when a particular State lawfully denounces or withdraws from a multilateral treaty:

(a) That State shall be released from any further application of the treaty;

(b) The remaining parties shall be released from any further application of the treaty in their relations with the State which has denounced or withdrawn from it;

(c) The legality of any act done in conformity with the provisions of the treaty prior to the denunciation or withdrawal and the validity of any situation resulting from the application of the treaty shall not be affected.

4. The fact that a State has been released from the further application of a treaty under paragraph 1 or 3 above shall in no way impair its duty to fulfil any obligations embodied in the treaty to which it is also subjected under any other rule of international law.

Commentary

(1) Article 53, like the previous article, does not deal with any question of responsibility or redress that may arise from acts which are the cause of the termination of a treaty, such as breaches of the treaty by one of the parties; it is limited to the legal consequences of a treaty's termination.

(2) Except in the case mentioned in paragraph 2 of the article, the formulation of the legal consequences of termination did not appear to the Commission to pose any particular problem. Paragraph 1 states that the termination releases the parties from any further application of the treaty, but does not affect the legality of any act done in conformity with the provisions of the treaty or that of a situation resulting from the application of the treaty. It is true that different opinions are sometimes expressed as to the exact legal basis, after a treaty has terminated, of situations resulting from executed provisions of the treaty. However, the Commission did not think it necessary to enter into this theoretical point for the purpose of formulating the provisions of the article, which appeared to it to follow logically from the legal act of the termination of the treaty.

(3) The particular case of a termination resulting from the emergence of a new rule of *jus cogens* which is contemplated in article 45, on the other hand, appeared to the Commission to be a little more com-

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

CHAPTER III

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

18. On the recommendation of the Sixth Committee, the General Assembly, at its 1171st meeting, held on 20 November 1962, adopted the following resolution⁹²:

“ *The General Assembly,*

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

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

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

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

⁹² Resolution 1766 (XVII).

⁸⁹ Signed at Brussels on 25 May 1962.

⁹⁰ Article 65, *United Nations Treaty Series*, vol. 213, p. 252.

⁹¹ E.g., Genocide Convention.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29. When the problem of extending the right to participate in closed League of Nations treaties was taken up in the Sixth Committee, certain delegations — Australia, Ghana and Israel⁹⁹ — joined together in introducing a draft resolution designed to achieve this ob-

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

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

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

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

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

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

32. Some representatives considered that the fact

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

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

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

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

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

¹⁰⁰ See protocols mentioned in paragraph 28 above.

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

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

PROTOCOL OF AMENDMENT

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

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

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

THE THREE-POWER DRAFT RESOLUTION

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

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

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

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

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

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

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

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

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

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

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

ALTERNATIVE SOLUTION

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

CONCLUSIONS

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

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

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

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

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

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

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

CHAPTER IV

Progress of work on other questions under study by the Commission

A. STATE RESPONSIBILITY: REPORT OF THE SUB-COMMITTEE

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

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

¹⁰² See annex I to the present report.

52. All the members of the Commission who took part in the discussion expressed agreement with the general conclusions of the report, *viz.*: (1) that, in an attempt to codify the topic of State responsibility, priority should be given to the definitions of the general rules governing the international responsibility of the State, and (2) that in defining these general rules the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the persons or property of aliens, should not be overlooked and that careful attention should be paid to the possible repercussions which developments in international law may have had on responsibility.

53. Some members of the Commission felt that emphasis should be placed in particular on the study of State responsibility in the maintenance of peace, in the light of the changes which have occurred in recent times in international law. Other members considered that none of the fields of responsibility should be neglected and that the precedents existing in all the fields in which the principle of State responsibility had been applied should be studied.

54. The members of the Commission also approved the programme of work proposed by the Sub-Committee, without prejudice to their position on the substance of the questions set out in that programme. Thus, during the discussion, doubts or reservations were expressed with regard to the solution to be given to certain problems arising in connexion with some of the questions listed. In this connexion, it was pointed out that these questions were intended solely to serve as an *aide-mémoire* for the Special Rapporteur when he came to study the substance of particular aspects of the definition of the general rules governing the international responsibility of States, and that the Special Rapporteur would not be obliged to pursue one solution in preference to another in that respect. The Sub-Committee's suggestion that the study of the responsibility of other subjects of international law, such as international organizations, should be left aside also met with the general approval of the members of the Commission.

55. After having unanimously approved the report of the Sub-Committee on State Responsibility, the Commission appointed Mr. Ago as Special Rapporteur for the topic of State responsibility. The Secretariat will prepare certain working papers on this question.

B. SUCCESSION OF STATES AND GOVERNMENTS: REPORT OF THE SUB-COMMITTEE

56. The report of the Sub-Committee on the Succession of States and Governments (A/CN.4/160 & Corr. 1)¹⁰³ was discussed by the Commission at its 702nd meeting. Mr. Manfred Lachs, Chairman of the Sub-Committee, introduced the report and explained the Sub-Committee's conclusions and recommendations. All the members of the Commission who took part in the discussion fully approved the delimitation of the topic and the approach thereto, the proposed objectives, and the plan of work drawn up.

57. The Commission considered that the priority given to the study of the question of State succession was fully justified. The succession of Governments will,

for the time being, be considered only to the extent necessary to supplement the study on State succession. During the discussion, several members of the Commission stressed the special importance which the problems of State succession had at the present time for the new States and for the international community, in view of the modern phenomenon of decolonization; in consequence they emphasized that, in the codification of the topic, special attention should be given to the problems of concern to the new States.

58. The Commission approved the Sub-Committee's recommendations concerning the relationship between the topic of State succession and other topics on the Commission's agenda. Succession in the matter of treaties will therefore be considered in connexion with the succession of States rather than in the context of the law of treaties. Furthermore, the Commission considered it essential to establish some degree of co-ordination between the Special Rapporteurs on, respectively, the law of treaties, State responsibility, and the succession of States, in order to avoid any overlapping in the codification of these three topics.

59. The objectives proposed by the Sub-Committee — *viz.*, a survey and evaluation of the present state of the law and practice in the matter of State succession and the preparation of draft articles on the topic in the light of new developments in international law — were approved by all the Commission's members. Some considered that the existing general rules and practice should be adapted to present day situations and aspirations, and that in consequence the codification of State succession would necessarily include, to a large extent, provisions belonging rather to the progressive development of international law. Other members of the Commission, while recognizing that account would have to be taken of the new spirit and of the new aspects which were becoming manifest in international relations, shared the view that first there should be thorough research into past practice before one could undertake the creation of such elements of new law as were necessary.

60. The broad outline, the order of priority of the headings and the detailed division of the topic were agreed to by the Commission, it being understood that its approval was without prejudice to the position of each member with regard to the substance of the questions included in the programme. The programme lays down guiding principles to be followed by the Special Rapporteur, who, however, will not be obliged to conform to them in his study in every detail.

61. The Commission, after having unanimously approved the Sub-Committee's report appointed Mr. Lachs as Special Rapporteur on the topic of the succession of States and Governments. The Commission adopted a suggestion by the Sub-Committee that Governments should be reminded of the note circulated by the Secretary-General asking them to furnish him with the text of all treaties, laws, decrees, regulations, diplomatic correspondence, etc., relating to the process of succession and affecting States which have attained independence since the Second World War (A/5209, chapter IV, para. 73). At the same time, the Commission suggested that the deadline for the communication of comments by Governments should be prolonged to 1 January 1964. The Secretariat will

¹⁰³ See annex II to the present report.

circulate the texts of the comments submitted by Governments in response to the said circular note and will prepare an analysis of these comments and a memorandum on the practice followed, in regard to the succession of States, by the specialized agencies and other international bodies.

C. SPECIAL MISSIONS

62. The Commission discussed this topic at its 711th and 712th meetings. It had before it a memorandum prepared by the Secretariat (A/CN.4/155). During the discussion it was agreed to resume consideration of the topic of special missions in conformity with resolution 1687 (XVI) adopted by the General Assembly on 18 December 1961. As the rules regarding permanent missions had been codified by the Vienna Convention on Diplomatic Relations, 1961, the Commission expressed the belief that it should now draw up the rules applicable to special missions to supplement the codification of the law relating to diplomatic relations among States.

63. With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.¹⁰⁴ At that session the Commission had also decided¹⁰⁵ not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences.

64. With regard to the approach to the codification of the topic, the Commission decided that the Special Rapporteur should prepare a draft of articles. These articles should be based on the provisions of the Vienna Convention on Diplomatic Relations, 1961, but the Special Rapporteur should keep in mind that special missions are, both by virtue of their functions and by their nature, an institution distinct from permanent missions. In addition, the Commission thought that the time was not yet ripe for deciding whether the draft articles on special missions should be in the form of an additional protocol to the Vienna Convention, 1961, or should be embodied in a separate convention or in any other appropriate form, and that the Commission should await the Special Rapporteur's recommendations on that subject.

65. Lastly, at its 712th meeting, the Commission appointed Mr. Milan Bartos as Special Rapporteur for the topic of special missions.

D. RELATIONS BETWEEN STATES AND INTER-GOVERNMENTAL ORGANIZATIONS

66. In accordance with the Commission's request at its fourteenth session, the Special Rapporteur, Mr. El-

Erian, submitted at the present session a first report (A/CN.4/161 and Add.1), consisting of a preliminary study on the scope of and approach to the topic of "Relations between States and inter-governmental Organizations". He submitted also a working paper (A/CN.4/L.103) on the scope and order of future work on the subject. At its 717th and 718th meetings, the Commission had a first general discussion of this report and asked the Special Rapporteur to continue his work and prepare a second report containing a set of draft articles, with a view to further consideration of the question at a later stage.

CHAPTER V

Other decisions and conclusions of the Commission

A. CO-OPERATION WITH OTHER BODIES

67. The Commission considered the item concerning co-operation with other bodies at the 715th meeting.

68. The Inter-American Juridical Committee was represented by Mr. José Joaquín Caicedo Castilla, and the Asian-African Legal Consultative Committee by Mr. H. W. Tambiah; they both addressed the Commission.

69. The Commission, after considering the invitation addressed to it by the Secretary of the Asian-African Legal Consultative Committee, decided to ask its Chairman, Mr. Eduardo Jiménez de Aréchaga, to attend the Committee's next session in the capacity of observer, or, if he was unable to do so, to appoint another member of the Commission or its Secretary to represent the Commission at that session. The next session of the Asian-African Legal Consultative Committee will open at Cairo on 15 February 1964, and will last for two weeks.

70. The Commission expressed the hope that the relevant regulations of the United Nations would be so adapted as to ensure a better exchange of documentation between the Commission and the bodies with which it co-operates. The Commission further recommended that the Secretariat should make whatever arrangements were needed for the purpose.

B. PROGRAMME OF WORK, DATE AND PLACE OF THE NEXT SESSION

71. The Commission adopted the following programme of work for 1964: (1) Law of treaties (application, interpretation and effects of treaties); (2) Special missions (first report with draft articles); (3) Relations between States and inter-governmental organizations (first report and general directives (A/CN.4/161 and Add.1) and another report with draft articles); (4) State responsibility (preliminary report, if ready); (5) Succession of States and Governments (preliminary report on the aspect of treaties, if ready).

72. Since it will not be possible to deal with all items at the regular session, which should be mainly devoted to the law of treaties, and, if possible, to a first discussion of the preliminary reports on State responsibility and succession of States and Governments, it was decided that a three-week winter session of the Commission should take place at Geneva from 6 to 24 January 1964.

¹⁰⁴ *Yearbook of the International Law Commission, 1960*, vol. I, 565th meeting, para. 26.

¹⁰⁵ *Ibid.*, para. 25.

73. In this winter session, the Commission should consider the draft articles to be submitted by the Special Rapporteur on special missions and consider the first report and general directives to the Special Rapporteur on the subject of relations between States and inter-governmental organizations.

74. It was suggested that measures should be taken now to arrange also for a winter session in January 1965, in order to continue the consideration of the two topics which complete the codification of diplomatic law without thereby detracting from the time required for the work of the Commission on the law of treaties.

75. In accordance with the decision taken by the Commission during its fourteenth session (A/5209, chapter V, para. 83) it was decided that the regular session of the Commission would be held at Geneva from 4 May to 10 July 1964.

C. PRODUCTION AND DISTRIBUTION OF DOCUMENTS, SUMMARY RECORDS AND TRANSLATIONS

76. The Commission expressed its satisfaction at the very considerable improvement in the facilities put at its disposal for the production of documents, summary records and translations—a matter which had been the subject of some criticism at the previous session (*ibid.*, paras 84 and 85).

77. There had still been some delay, however, in the translation of documents into Spanish, and the Commission expressed the hope that further improvements would be made in that respect.

78. The Commission also expressed the hope that its preparatory documents would be sent to members by air mail, to allow them sufficient time to study the documents before the opening of the session.

D. DELAY IN THE PUBLICATION OF THE YEARBOOK

79. The Commission has noted with concern that publication of the volumes of the *Yearbook of the International Law Commission* is being subjected to an increasing delay. The Commission expresses the hope that steps will be taken to ensure that in future the Yearbook will be published as soon as possible after the termination of each annual session.

E. REPRESENTATION AT THE EIGHTEENTH SESSION OF THE GENERAL ASSEMBLY

80. The Commission decided that it would be represented at the eighteenth session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Eduardo Jiménez de Aréchaga.

ANNEXES

ANNEX I

DOCUMENT A/CN.4/152

Report by Mr. Roberto Ago Chairman of the Sub-Committee on State Responsibility (Approved by the Sub-Committee)

[16 January 1963]
[Original: English/French]

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Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility (Approved by the Sub-Committee)

1. The Sub-Committee on State Responsibility, set up by the International Law Commission at its 637th meeting on 7 May 1962 and consisting of the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen, held its second session at Geneva from 7 to 16 January 1963. The terms of reference of the Sub-Committee, as laid down by the Commission at its 668th meeting on 26 June 1962,¹ were as follows:

“(1) The Sub-Committee will meet at Geneva between the Commission's current session and its next session from 7 to 16 January 1963;

“(2) Its work will be devoted primarily to the general aspects of State responsibility;

“(3) The members of the Sub-Committee will prepare for it specific memoranda relating to the main aspects of the subject, these memoranda to be submitted to the Secretariat not later than 1 December 1962 so that they may be reproduced and circulated before the meeting of the Sub-Committee in January 1963;

“(4) The Chairman of the Sub-Committee will prepare a report on the results of its work to be submitted to the Commission at its next session.”

2. The Sub-Committee held seven meetings ending on 16 January 1963. All its members were present with the exception of Mr. Lachs, who was absent because of illness. The Sub-Committee had before it memoranda prepared by the following members:

Mr. Jiménez de Aréchaga (ILC (XIV) SC.1/WP.1);
Mr. Paredes (ILC (XIV) SC.1/WP.2 and Add.1,
A/CN.4/WP.7);
Mr. Gros (A/CN.4/SC.1/WP.3);
Mr. Tsuruoka (A/CN.4/SC.1/WP.4);
Mr. Yasseen (A/CN.4/SC.1/WP.5);
Mr. Ago (A/CN.4/SC.1/WP.6).

3. The Sub-Committee held a general discussion of the questions to be studied in connexion with the work relating to the international responsibility of States, and with the directives to be given by the Commission to the Rapporteur on that topic.

4. Some members of the Sub-Committee expressed the view that it would be desirable to begin the study of the very vast subject of the international responsibility of the State by considering a well-defined sector such as that of responsibility for injuries to the person or property of aliens. Other members, on the other hand, argued that it was desirable to carry out a general study of the subject, taking care not to confuse the definition of the rules relating to responsibility with that of the rules of international law—and in particular those relating to the treatment of aliens—the breach of which can give rise to responsibility. Some of the members in this second group stressed in particular that, in the study of the topic of responsibility, new developments of

¹ Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209 and Corr.1), paragraph 68

international law in other fields, notably that of the maintenance of peace, ought also to be taken into account.

5. In the end, the Sub-Committee agreed unanimously to recommend that the Commission should, with a view to the codification of the topic, give priority to the definition of the general rules governing the international responsibility of the State. It was agreed, firstly that there would be no question of neglecting the experience and material gathered in certain special sectors, specially that of responsibility for injuries to the person or property of aliens; and, secondly, that careful attention should be paid to the possible repercussions which new developments in international law may have had on responsibility.

6. Having reached this general conclusion, the Sub-Committee discussed in detail an outline programme of work submitted by Mr. Ago. After this debate, it decided unanimously to recommend to the Commission the following indications on the main points to be considered as to the general aspects of the international responsibility of the State; these indications may serve as a guide to the work of a future special rapporteur to be appointed by the Commission.

*Preliminary point: Definition of the concept of the international responsibility of the State*²

First point: Origin of international responsibility.

(1) *International wrongful act*: the breach by a State of a legal obligation imposed upon it by a rule of international law whatever its origin and in whatever sphere.

(2) *Determination of the component parts of the international wrongful act*:

(a) *Objective element*: act or omission objectively conflicting with an international legal obligation of the State.³ Problem of the abuse of right. Cases where the act or omission itself suffices to constitute the objective element of the wrongful act and cases where there must also be an extraneous event caused by the conduct.

(b) *Subjective element*: imputability to a subject of international law of conduct contrary to an international obligation. Questions relating to imputation. Imputation of the wrongful act and of responsibility. Problem of indirect responsibility.

Questions relating to the requirement that the act or omission contrary to an international obligation should emanate from a State organ. System of law applicable for determining the status of organ. Legislative, administrative and judicial organs. Organs acting *ultra vires*.

State responsibility in respect of acts of private persons. Question of the real origin of international responsibility in such cases.

Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu*. Problems of the degree of fault.⁴

(3) *The various kinds of violations of international obligations*. Questions relating to the practical scope of the distinctions which can be made.

International wrongful acts arising from conduct alone and those arising from events. The causal relationship between conduct and event. Practical consequences of the distinction.

International wrongful, acts and omissions. Possible consequences of the distinction, particularly with regard to *restitutio in integrum*.

² The Sub-Committee suggested that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside.

³ The question of possible responsibility based on "risk", in cases where a State's conduct does not constitute a breach of an international obligation may be studied in this connexion.

⁴ It would be desirable to consider whether or not the study should include the very important questions which may arise in connexion with the proof of the events giving rise to responsibility.

Simple and complex, non-recurring and continuous international wrongful acts. Importance of these distinctions for the determination of the *tempus commissi delicti* and for the question of the exhaustion of local remedies.

Problems of participation in the international wrongful act.

(4) *Circumstances in which an act is not wrongful*

Consent of the injured party. Problem of presumed consent; Legitimate sanction against the author of an international wrongful act;

Self-defence;

State of necessity.

Second point: The forms of international responsibility

(1) *The duty to make reparation*, and the right to apply sanctions to a State committing a wrongful act, as consequences of responsibility. Question of the penalty in international law. Relationship between consequences giving rise to reparation and those giving rise to punitive action. Possible distinction between international wrongful acts involving merely a duty to make reparation and those involving the application of sanctions. Possible basis for such a distinction.

(2) *Reparation*. Its forms. *Restitutio in integrum* and reparation by equivalent or compensation. Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.

(3) *Sanction*. Individual sanctions provided for in general international law. Reprisals and their possible role as a sanction for an international wrongful act. Collective sanctions.

7. In accordance with the Sub-Committee's decision, the summary records giving an account of the discussion on substance, and the memoranda by its members mentioned in paragraph 2 above, are attached to this report.⁵

APPENDIX I

INTERNATIONAL LAW COMMISSION

Sub-Committee on State Responsibility

SUMMARY RECORDS OF THE 2ND, 3RD, 4TH AND 5TH MEETINGS
Summary record of the second meeting

(Monday, 7 January 1963, at 3 p.m.)

Organization of work

The CHAIRMAN welcomed the members of the Sub-Committee and expressed the hope that its deliberations would indicate the road to be followed for the codification of the subject of State responsibility.

He drew attention to the working papers submitted by the members of the Sub-Committee (A/CN.4/SC.1/WP.1-7).⁶

He invited comments on the subject of the organization of the Commission's work.

The first point to be decided was the number of meetings to be held by the Sub-Committee.

The second question was that of observers. In principle, the meetings of Sub-Committees in the United Nations were closed. However, the missions of two countries had informally inquired whether they could send observers to the meetings of the Sub-Committee.

The third question was that of the distribution of summary records. The Secretariat expected to receive requests for the summary records of the Sub-Committee from members of the International Law Commission who were not members of the Sub-Committee and also from delegations.

Mr. GROS said the Sub-Committee could hardly decide at that stage how many meetings its work would require. He suggested that a decision on that question should be deferred until all the members had had an opportunity of speaking,

⁵ These summary records and memoranda are reproduced in appendix I and appendix II below.

⁶ These working papers are reproduced in Appendix II below.

supplementing the papers submitted by them and commenting upon those submitted by their colleagues. The Sub-Committee would hold one meeting every day and decide later whether more meetings were required.

Mr. JIMENEZ DE ARECHAGA, Mr. de LUNA, Mr. PA-REDES, Mr. TSURUOKA and Mr. YASSEEN supported Mr. Gros.

Mr. TUNKIN also supported Mr. Gros, adding that members would require some time to study the papers.

The CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed to adopt, with regard to the organization of its meetings, the same pattern as the International Law Commission itself.

It was so agreed.

Mr. BRIGGS, speaking on the question of observers, said that, in view of the exploratory character of the Sub-Committee's discussions, it might not be desirable to admit outside observers.

The CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed that its meetings would not be open to observers; it would be explained, in reply to any requests in that regard, that the discussions were of a preparatory character and that the Sub-Committee regretted its inability to admit observers.

It was so agreed.

The CHAIRMAN invited comments on the question of summary records.

Mr. TUNKIN doubted the necessity of keeping records of the meetings at all.

The CHAIRMAN said that such records would be useful to the members themselves. If there were no objection, he would consider that the Sub-Committee agreed that the provisional summary records would be distributed to its members only.

It was so agreed.

State responsibility

The CHAIRMAN invited discussion on the subject of State responsibility.

Mr. de LUNA said that he fully agreed with Mr. Tsuruoka's view as expressed in his working paper that the Commission should not be over-bold in its innovations and yet should contrive to meet the new needs of the international community, whilst harmonizing the legitimate interests of all members of that community. But, for that very reason, the Commission should not confine itself to what Mr. Tsuruoka had defined as responsibility *stricto sensu*. Mr. Jiménez de Aréchaga had pointed out in his paper that even States which did not permit private ownership of the means of production accepted the principle of compensation for claims by nationals of another country applying the same economic policies, though they did not base it on vested interests or the rights of private property. That had led Mr. Jiménez de Aréchaga to attempt to find a common foundation for the obligation to compensate, based on the principle of unjust enrichment. Mr. Tunkin had said in the Commission in 1960 that the existence of two economic systems was an undoubted fact that had to be borne in mind. It was that state of affairs which had caused Mr. Yasseen in his working paper to conclude — a conclusion with which he (Mr. de Luna) could not agree — that responsibility for injuries to aliens was not a topic that could readily be codified at the present time. On the other hand, he agreed with Mr. Yasseen, Mr. Ago and Mr. Gros that the law of responsibility should not be dealt with piecemeal. The first task should be to evolve the general principles governing international responsibility.

There were certain points that had not been touched on in the papers submitted by members of the Sub-Committee. Would the Commission confine itself to States, as it had done in the case of the law of treaties, and disregard the question of the responsibility of individuals and of international organizations? If it did not would it deal solely with individuals responsible for an international wrongful act or would it

also consider the individual as an injured party, as advocated, for example, by some Spanish-American jurists? The latter seemed to him to be a doubtful proposition, although it was true that the recent draft convention of the Organization for Economic Co-operation and Development on the protection of the property of aliens provided that a national of one of the parties to the convention who considered himself injured by measures contravening the convention could bring proceedings before the arbitral tribunal against any other party responsible. Similar provision occurred in a draft convention prepared by the World Bank. His view was that the Commission should limit itself to the responsibility of States and postpone consideration of that of individuals or of international organizations.

When dealing with circumstances in which an act was not wrongful, the Commission would have to distinguish between circumstances which, in addition to removing the wrongful character of an act, also exonerated from responsibility, and those which, while removing the wrongful character of the act, were not a defence to a claim for reparation of the injury caused (e.g. state of necessity).

With regard to the consequences of international responsibility, he said the Commission should concern itself not only with reparation and restitution but also with unjust enrichment — not merely in the context in which Mr. Jiménez de Aréchaga had referred to it but also in cases where a State had obtained certain advantages to the detriment of another State.

Lastly, a distinction should be drawn between the violation of a rule and the invalidity of a rule by reason of some defect of form or absence of will. Action under a rule which was void might constitute an international delinquency giving rise to a claim. Hence, there was a connexion between the relatively novel theory of nullity in international law and the law governing international responsibility.

Mr. Tsuruoka said that he had little to add at that stage to the working paper which he had submitted; the paper referred to a number of important points concerning the subject.

With regard to the possible responsibility for acts which were not unlawful, he counselled caution, as he had done in his working paper.

The CHAIRMAN, speaking as member of the Sub-Committee, agreed with Mr. de Luna that the responsibility of international organizations should not be dealt with. It was even questionable whether such organizations had the capacity to commit international wrongful acts, and the subject in any case fell outside the scope of the International Law Commission's present preoccupations.

He also agreed that the Sub-Committee should not consider the question of the individual as a subject of international law in the context of responsibility, though naturally, the topic of State responsibility covered the question of the responsibility of the State for the acts of individuals.

For those reasons, he thought that the Commission should confine its attention to the traditional subjects of international law: States and similar subjects, like, for example, insurgents possessing international personality.

The meeting rose at 3.55 p.m.

Summary record of the third meeting
(Tuesday, 8 January 1963, at 10 a.m.)

State responsibility (continued)

The CHAIRMAN invited the Sub-Committee to continue its discussion on State responsibility.

Mr. YASSEEN said that the first question to be decided by the Sub-Committee was one of method: should the International Law Commission study first the general principles of State responsibility or should it begin with an analysis

of the application of those principles to a particular field of international relations?

He agreed with several other members that the appropriate method was to study first the general principles of responsibility. If the subject of State responsibility was approached piecemeal, the result might well be to give to certain particular rules an importance which they did not have. In addition, such an approach would involve a danger of confusion between the rules governing responsibility and the substantive rules which established international obligations.

It was not advisable to begin work by a consideration of the implementation of the principles governing international responsibility in a specific field of international relations, for example, that of claims for injuries to the person or, more particularly, the property of aliens. The ending of the era of colonialism left many privileged situations which needed revision in a number of the newly independent States.

The changed circumstances called for flexible solutions, and the whole subject of responsibility in relation to those matters did not lend itself readily to codification.

He referred to the discussions which had taken place in the Second Committee of the General Assembly at its seventeenth session on the subject of permanent sovereignty over natural wealth and resources. The many amendments which had been submitted to the draft resolution prepared by the Commission appointed to study that subject⁷ showed that views differed widely on questions which might at first sight have appeared uncontroversial.

It was the duty of the International Law Commission to prepare a draft codification. The rules formulated in such a code would require almost unanimous assent. In fact, a two-thirds majority would be required for their approval by an international conference. It was doubtful whether such a majority could be obtained on rules dealing with the treatment of aliens, particularly on the more important points of the subject.

For all those reasons, he urged the Sub-Committee not to adopt a fragmentary approach and in particular not to undertake first a study of State responsibility for injuries to the person or property of aliens.

Mr. PAREDES agreed that the general principles governing the subject of State responsibility should be studied first. However, such a study should embrace the whole field of State responsibility, and cover not only civil but also criminal responsibility.

The time had come to define the criminal responsibility of States and to determine whether States could be tried for breaches of rules of international law. There had been some instances where States had been held to have incurred criminal liability, but in the absence of a legal definition the whole subject was still in a somewhat confused state and was dominated by political rather than legal considerations. He realised that he had raised a very delicate issue but thought that the matter required consideration.

It was necessary to determine whether sanctions could be applied by such organisations as the United Nations and the Organisation of American States. Without wishing to express any view either in favour or against certain recent resolutions adopted and actions taken by those bodies, he felt bound to mention them as illustrating the need to define both the civil and the criminal responsibility of States.

The traditional rules on the subject of State responsibility had undergone a change; it was now admitted that in certain circumstances a State might be held criminally liable; international organisations considered that they had the power to take punitive action in the event of breaches of international law. Unless the legal position in that respect were clarified, the punitive action taken by international organisations could be disputed and it could be asserted that it constituted an abuse of power and a political rather than a legal act.

⁷ Report of the Commission on Permanent Sovereignty over Natural Resources (E/3511).

The Nürnberg judgement⁸ had shown that it was possible to hold a head of State criminally liable for crimes against humanity. That criminal liability had been acknowledged even in the case where a ruler had acted in the exercise of his constitutional powers. Lastly, a clear distinction should be drawn between the responsibility attaching to the State in the internal political sphere in respect of its acts and the international responsibility of that State for those same acts. The two types of responsibility were governed by different rules of law and were justiciable in different courts.

Mr. GROS said that he was prepared to accept the method suggested by Mr. Yasseen but solely as a method, without prejudice to substance.

He would be prepared to agree that the International Law Commission should study State responsibility without emphasis on the question of responsibility for injuries to the person or property of aliens. However, he could not agree with Mr. Yasseen that the problem of injuries to aliens had become obsolete. In everyday international practice cases occurred where diplomatic protection was given in connexion with injuries to the person or property of aliens. Not only was the subject still alive, but the Commission should not hesitate to draw on the vast experience gained in the matter of State responsibility for the treatment of aliens.

Nor could he agree with Mr. Yasseen that the subject of the treatment of aliens was connected with the problem of decolonization. Mr. Jiménez de Aréchaga, in his working paper (para. 25) mentioned some thirty agreements concluded after the Second World War dealing with compensation for nationalisation measures. None of those agreements concerned decolonization. He mentioned as examples the agreements between France and Czechoslovakia and between France and Canada. The agreements cited by Mr. Jiménez de Aréchaga clearly demonstrated that nationalisation was a continuing problem and one that constituted a source of State responsibility.

The Sub-Committee might do well to discuss the present legal nature and scope of diplomatic protection. The right to give diplomatic protection to nationals abroad was recognized in article 3 of the Vienna Convention on Diplomatic Relations, 1961.⁹ Similarly, the right of consular protection would no doubt be recognized by the Convention on consular relations to be prepared by the forthcoming Vienna Conference of 1963. Moreover, the protection of nationals abroad had been recognized by many recent general agreements by which the States concerned had established special machinery, including in some cases arbitration courts, for dealing with matters arising out of injuries to aliens.

Referring to the remarks by Mr. Paredes, he considered that the subject of the criminal responsibility of the State was more of theoretical than of practical importance. Many writers, such as Dumas¹⁰ and Pella, had considered the question of the possible criminal liability of the State; in fact, as early as 1895, Professor de Martens had broached the subject. He did not, however, think that a discussion of the topic would be in its place in a draft intended to be submitted to over one hundred States; the draft should contain material from which those States could immediately deduce practical consequences.

He agreed that the first step should be the study of the general aspects of State responsibility. A first report on that point might be followed by a study of the responsibility of the State in particular circumstances. Such a study would

⁸ For an analysis of the judgement, see the memorandum submitted to the International Law Commission by the Secretary-General in 1949: *The Charter and Judgment of the Nürnberg Tribunal — History and Analysis* (A/CN.4/5), United Nations publication, Sales No. 1949 V. 7.

⁹ Text in United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March — 14 April 1961, Official Records, vol. II United Nations publication, Sales No. 62.X.1.

¹⁰ See bibliography annexed to Mr. Ago's working paper, *infra*.

show that the rules in the matter were the result of more than a century of State practice and arbitral case-law.

At the same time, however, it was desirable not to engage in the preparation of a series of monographs divorced from practical experience. It was necessary to maintain a balance so that, in the study of the general aspects of State responsibility, the experience of the past in the application of the rules of State responsibility was not ignored.

Mr. YASSEEN, replying to Mr. Gros, said that he fully recognized the existence of a substantial body of State practice and case-law on the subject of the responsibility of the State for injuries to the person or property of aliens. He maintained, however, that the practice in the matter was not at all uniform; the controversies to which the Calvo Clause had given rise provided clear evidence of that lack of uniformity.

He agreed that decolonization was not the only factor which complicated the present situation; it was, however, an important factor in that respect.

Since the establishment of the United Nations, a large number of new States had become independent, and most of them suffered from the persistence of privileged situations favouring certain other States. The revision of those situations was a very important problem from the point of view of the maintenance of good relations between States.

He was fully aware that the problem of nationalisation was not confined to former colonies. However, nationalisation measures did not create difficult problems between countries which were equal. They created serious problems in connexion with the privileged situations left over from the decolonization process.

Mr. BRIGGS said that the Commission's usual practice had been to leave special rapporteurs free to define the scope of their topics. On the submission of a special rapporteur's first report, the Commission would undertake a critical analysis of the approach adopted by him.

It was only in connexion with the law of treaties that the Commission had departed from that practice and had given instructions to the Special Rapporteur.¹¹ As he understood it, it was the purpose of the present Sub-Committee to prepare such instructions for the future special rapporteur on the subject of State responsibility.

He considered that those instructions should be most general. It was the purpose of the Sub-Committee to explore various possibilities and to report to the International Law Commission on the scope of the subject. In that respect, he fully agreed with Mr. Gros, who had implied in his working paper that it was undesirable for members to take up any very definite positions on the issues involved, a course which would involve the danger of hardening those positions.

On the whole, he agreed with the approach adopted by Mr. Tsuruoka in his working paper. There was no doubt that a great deal of material existed on the subject of State responsibility for injury to aliens, but that there was very little material on other aspects of State responsibility. Accordingly, any work done on those other aspects would not constitute either a codification or a progressive development of international law; it would be more in the nature of legislation in regard to matters not previously regulated by international law. He would hesitate to suggest that the Commission should embark on the task of creating new rules of international law on matters which had not been regulated in the past.

Turning to the subject of permanent sovereignty over natural wealth and resources—an expression which he thought contained a contradiction in terms—he considered that the subject could be dealt with on the basis of traditional principles. Any problems arising in the matter would involve questions of international responsibility for the treatment of

aliens and would not require the formulation of any new rules. He did not think that there was any connexion with the question of decolonization. The subject was simply one of the determination of State responsibility. He agreed, however, that it would be desirable to reinvestigate the applicable rules in the matter.

With regard to the remarks by Mr. Paredes, he said that the whole subject of the criminal liability of the State had been disposed of by the Nürnberg judgement which had made it clear that, as far as criminal law was concerned, individuals alone could be held liable. State responsibility was in fact of a civil rather than of a criminal character. For that reason, he thought that the concluding paragraph of Mr. Ago's paper, on sanctions and reprisals, was out of place.

Mr. Ago's paper somewhat artificially stressed the distinction between the international law of State responsibility and the law relating to the treatment of aliens. He could not agree with some of the statements contained in that paper; for example, neither the draft prepared by the Institute of International Law in 1927¹² nor the Hague draft of 1930¹³ contained anything which was outside the subject of State responsibility. The same was true of the Harvard draft of 1929;¹⁴ although it was true that that draft employed the term "responsibility" in more than one sense, for the most part it correctly treated State responsibility as a secondary obligation, having its source in the non-observance of a primary obligation under international law.

On the whole, however, he thought that Mr. Ago's outline for the treatment of the subject could be used as a pattern for purposes of discussion, though it was perhaps a little too abstract to form the framework of a draft treaty to be submitted to States.

The section on reparation in Mr. Ago's paper would be adequate as a basis of discussion, though he could not approve of the inclusion of paragraph 3 dealing with sanctions, because the questions of reprisals, war, and collective sanctions mentioned therein had no place in a draft on State responsibility.

Mr. JIMENEZ de ARECHAGA said that he could not agree with the Chairman's opinion that the Commission should give priority to the attempt to codify the general and rather theoretical aspects of State responsibility rather than the responsibility of the State for injuries to the person or property of aliens. Those special aspects had been included under the heading of State responsibility in the draft prepared by the Institute of International Law in 1927 and in the Hague draft of 1930, as well as in the Harvard draft of 1929 and in the various drafts submitted by the Commission's own Special Rapporteur. Since codification meant recognition of the accepted State practice, and of the rules embodied in existing treaties, he agreed fully with Mr. Tsuruoka that in the codification of such a topic as State responsibility priority should be given to the field in which most of State practice had arisen, namely that of the responsibility of the State towards aliens. With all due respect to Mr. Yasseen, who had also advocated a general approach, those special aspects should not be postponed, since in view of their urgency and practical interest for States it was obvious that, if they were not dealt with by the Commission, they would have to be dealt with by some other United Nations body, whereas the Commission was the one most competent to do so.

¹² Draft on "International Responsibility of States for injuries on their territory to the person or property of foreigners", prepared by the Institute of International Law (1927); reprinted in annex 8 to Mr. García Amador's first report on State responsibility (A/CN.4/96) in *Yearbook of the International Law Commission, 1956*, vol. II, United Nations publication, Sales No. 1956 V. 3, vol. II.

¹³ Text of articles adopted in first reading by the Third Committee of the Conference for the Codification of International Law (The Hague, 1930), reprinted *ibid.*, annex 3.

¹⁴ Draft Convention on "Responsibility of States for damage done in their territory to the person or property of foreigners" prepared by Harvard Law School (1929), reprinted *ibid.*, annex 9.

¹¹ Report of the Commission on its 13th session (A/4843), chapter III, paragraph 35; reprinted in *Yearbook of the International Law Commission, 1961*, vol. II, United Nations publication, Sales No. 61 V. 1, vol. II.

The CHAIRMAN, speaking as a member of the Sub-Committee, said that there appeared to be two opposite views in the Sub-Committee: one, that the Commission should concentrate on the general aspects of State responsibility, the other, that it should concern itself with such special fields as the responsibility of the State for injuries to the person or property of aliens. Some of the differences which had appeared in debate might be due to the different meanings attached to the word "responsibility"; in a very general sense, the expression "the State is responsible" was sometimes used as the equivalent of "the State is obliged". In his opinion, the term "responsibility" more correctly described the situation in which a State subject to international law found itself when it violated an obligation imposed on it by a rule of customary or conventional international law. Use of the word should be restricted to that sense if the Commission was to accomplish its task successfully. Otherwise it would be necessary to extend it to all fields, including, for example, the obligation of the State to see to it that its administration of justice observed certain minimum standards with respect to aliens. That was not really a question of State responsibility, however, but rather a rule of substantive international law concerning the treatment of aliens. The questions really concerning the responsibility of the State were, on the contrary, different ones, such as: Was a State responsible for the action of one of its organs acting outside its competence? When and in what circumstances would a State be responsible for an act committed by an individual? Did the consent of the injured party excuse a State from responsibility?

With respect to Mr. Briggs's observations on the question of sanctions, he could not agree that the international responsibility of the State should be purely civil in character. He had mentioned reprisals in his working paper precisely because reprisals were a form of sanction of a penal character which existed in international law. If a warship of one State torpedoed a vessel belonging to another and the latter sent a cruiser to bombard a harbour of the first State, was that not a form of penalty or sanction? Indeed, the question of sanctions raised a whole series of practical problems. As he had pointed out before, the consequences of State responsibility might be either reparation or punishment. But if a State offered reparation for an injury committed by it, could it compel the injured State to refrain from resorting to sanctions of a penal character against it? Were there certain fields where only reparations, not sanctions, were admissible and others where the use of sanctions had to be envisaged? Could there be collective as well as individual sanctions? A series of questions of that kind might arise in that connexion.

Mr. BRIGGS agreed with Chairman's remarks concerning the meaning of the term "responsibility". The draft prepared at The Hague in 1930 said that international responsibility was incurred by a State "if there is any failure on the part of its organs to carry out the international obligations of the State which causes damage to the person or property of a foreigner" in its territory. Article 1 of the Harvard draft of 1929 said that a State was responsible "when it has a duty to make reparation to another State for the injury sustained by the latter State as a consequence of an injury to its national". In the latter sense, responsibility was limited to a duty to make reparation for an injury which had already been committed. Article 4 of the same draft spoke of a different kind of responsibility, *viz.* the duty of a State "to maintain governmental organization adequate, under normal conditions, for the performance of its obligations under international law". The meaning of "responsibility" for the purpose of the present debate was that attached to it in article 1 of the Harvard draft.

He could not agree with the Chairman's suggestion that the discussion of an international standard for the treatment of aliens would be outside the field of State responsibility. Study of the nature and content of such an international standard might clearly reveal a basis of State responsibility. On the contrary, he fully agreed with Mr. Gros, who stated in his

paper that "Agreement on the machinery for making an international claim would be useless if there was no agreement on the general rules of substance concerning such claims." Similarly, in dealing with the question of State responsibility, it was impossible to ignore the content of the situation or act which created that responsibility.

With respect to sanctions, he reserved his right to comment later, but he doubted whether that question really came under the law of State responsibility.

Mr. GROS said that the substantive rules to which he had referred in his paper were those governing responsibility and not the substantive rules of international law, violation of which constituted the source of responsibility.

Mr. Ago had fully met his point about the uselessness of agreement on the machinery for making an international claim if there were no agreement regarding the source of responsibility, since the preliminary point and the first point of Mr. Ago's proposed outline covered precisely what he (Mr. Gros) meant by the substantive rules of responsibility. In his view it would be quite inadequate if the Commission were to confine itself to indicating the practical manner in which a State could obtain redress for a violation of international law, without establishing what was the cause of international responsibility. It was necessary to establish what the illegal act was, what it consisted of and how it arose, and those points were dealt with in Mr. Ago's "preliminary point". To that extent, therefore, he was fully in agreement with him and with certain other members of the Sub-Committee. Moreover, Mr. Briggs's views apparently did not differ very substantially from those of Mr. Ago. The latter agreed with Mr. Briggs that the matter could not be discussed in the abstract and that the basic characteristics of responsibility had to be deduced from the facts of international life, including cases relating to the treatment of aliens. Mr. Ago's paper should be regarded as a kind of table of contents; when the time came to fill in the details, the sections coming under the heading of Mr. Ago's preliminary point and first point, should explain in what way the international responsibility of a State which infringed an international obligation arose. In that way, it would be possible to reconcile the views of those members of the Commission who held that the substantive rules of responsibility could be deduced from a corpus of traditional international law and those like Mr. Yasseen who thought that that was no longer the proper approach. He did not think that even Mr. Yasseen would refuse to allow a reference to an arbitration case which had dealt, for instance, with an injury to an alien, if the reference was necessary in order to define what constituted an illegal international act.

Mr. YASSEEN said that it was perfectly natural to evolve a theory from its application in differing fields of human activity. But it would be wrong to generalize from a particular rule or to give the rule a scope which in reality it did not possess.

Mr. PAREDES said that it had not been his intention to introduce any innovation but rather to draw attention to changing circumstances in the modern world and to the practical consequences which would follow the adoption of his point of view. The various papers submitted had made it clear that the principles of State responsibility were not theoretical but could be applied in practice.

With regard to criminal responsibility, he still maintained that it should be understood in the broad sense it had acquired as a result of the creation of the League of Nations. It was only in a society organized as world society now was that the legal notion of responsibility could exist; it was only then that it was possible to establish legally the meaning of the rights and duties of States, which went far beyond the quite simple obligations created by treaty or custom.

Mr. de LUNA said that, as he had argued before, the problem should be considered in general terms: the substantive rules of international law should not be confused with those of State responsibility. Practice in so important a matter as diplomatic protection and the protection of the rights of aliens should, of course, be borne in mind, but the Commission

should not confine itself merely to that subject, when there were so many others which could give rise to State responsibility. For example, nuclear test explosions could pollute the atmosphere of the territory of States which had had no part whatever in the tests.

He did not think that there was anything to be gained by pursuing Mr. Yasseen's point; when the time came to apply the rules it would be necessary merely to say that an unlawful act had taken place, that a State had violated an obligation under international law and that as a result of that violation it was bound to provide some kind of redress.

The meeting rose at 12.25 p.m.

Summary record of the fourth meeting

(Wednesday, 9 January 1963, at 10.15 a.m.)

State responsibility (continued)

The CHAIRMAN invited the Sub-Committee to continue its debate on the treatment of the topic of State responsibility.

Mr. TUNKIN said that all were agreed that the increasing role of international law in international relations and its progressive development were of primary importance for assuring peaceful coexistence and eliminating the threat of war. That thesis had been repeatedly stressed in General Assembly resolutions during the past two or three years.

The principal objectives of international law were the consolidation of international peace and the development of friendly relations among States. An important branch of that law was that concerning State responsibility, which, in turn, could be divided into a number of sectors, distinguishable one from the other, for example, the responsibility of States for acts of aggression, on the one hand, and their responsibility for injuries to the person or property of aliens on the other. The question was: What particular rules governing State responsibility were most important for the cause of peace? If the Commission was not to shrink from its task, it certainly should not disregard, in its study of the topic, responsibility for the gravest violations of international law, such as acts of aggression, the refusal to grant independence to colonial peoples, and the violation of the sovereign rights of States.

Nevertheless, the Commission would first, both for reasons of method and for reasons of substance, have to consider the general principles of State responsibility. With respect to method, the Commission's experience had shown that without the necessary study of the general principles of State responsibility it would be impossible to complete the study of any particular field of such responsibility. With respect to substance, it was necessary to take into consideration the new developments in international law in general, which had entirely transformed international law. Those developments had certainly had repercussions in the field of State responsibility, particularly with regard to the general principles governing that branch of international law. The Commission's decision to begin its work on State responsibility with a study of the general aspects of the topic was therefore a sound one, and the Sub-Committee should not deviate from it.

He agreed with those members who had suggested that the Commission should leave aside such problems as those relating to the responsibility of international organizations, as well as those relating to the responsibilities of individuals, as formulated in the so-called Nürnberg principles. Mr. Yasseen had suggested that the Commission's study should start with an inquiry into the general theory of State responsibility; but he preferred the expression "general principles", which did not sound so abstract and purely academic as "general theory". Moreover, in formulating the general principles of State responsibility, the Commission should, as Mr. Gros and Mr. de Luna had said, take into consideration the field of international law as a whole. In particular, he thought that,

in the light of the new developments in international law of which he had spoken earlier, the Commission should consider the most important new subject—that of the responsibility of States for acts of aggression—which was not covered by the old international law concerning State responsibility. In addition, consideration should be given to the legal problems arising from the disintegration of the colonial system, from the acceptance of the principle of the sovereignty of States over their natural resources, which had also been referred to by Mr. Yasseen, and other problems.

Some members had suggested that State responsibility in international law was analogous to civil responsibility in municipal law. That idea had been predominant before the First World War and at the time of the League of Nations, but had not adequately reflected the realities of international life even then. It was significant that even those who asserted that State responsibility in international law came very close to responsibility in civil law admitted by way of exception that an international wrong could give rise not only to a claim for reparations but also to sanctions. Sanctions constituted the most important part of the modern international law of State responsibility, although fortunately they were less frequently resorted to than reparations. If it was agreed that the responsibility of a State in international law was broader than civil responsibility in municipal law, it was still questionable whether that extended responsibility could be described as criminal responsibility. He did not think that the analogy between municipal and international law could be carried so far.

Turning to the more immediate problem of drafting the instructions to be given to the future special rapporteur on the subject, he said that the outline set forth in Mr. Ago's working paper constituted a good basis for discussion. With regard to Mr. Ago's "preliminary point", however, he considered that as the Commission under its terms of reference had to study the responsibility of States, reference to the responsibility of other subjects of international law should be omitted. With respect to paragraph 2 (b) of Mr. Ago's "first point", concerning the subjective element, he suggested that the words concerning the "capacity" of a State to commit on international delinquency should be omitted. With respect to paragraph 4, concerning the circumstances in which an act was not wrongful, he doubted whether that paragraph properly reflected the modern international law. If a State, for example, acted in self-defence, it was not acting wrongfully, and hence the question of its responsibility did not arise at all in that case. With respect to paragraph 3 of Mr. Ago's "second point", he would prefer the words "questions relating to war" to be deleted. He also recommended the deletion of the final reference in that paragraph to the United Nations system, since it presupposed a strict division, which was theoretically unfounded, between general international law and the so-called law of the United Nations. Reference should be made only to collective sanctions, which would certainly include those sanctions provided for in the United Nations Charter.

Mr. YASSEEN observed that, in employing the expression "general theory" of State responsibility, he had not meant to speak of abstract rules but rather to express the idea of a systematic and consolidated body of generally applicable rules.

Mr. GROS said that he was prepared to accept the outline proposed by Mr. Ago as a working basis for the Sub-Committee's discussions. It was his impression that Mr. Tunkin wanted the Commission to study only those substantive rules of international law relating to State responsibility which happened to contain new elements not previously contained in international law. In his own opinion, general international law as a whole, its old as well as its new elements, was the source of all the rules which might be the cause of State responsibility. If, as Mr. Tunkin seemed to think, the Commission was to study only certain topics from the point of view of substance, he (Mr. Gros) would prefer that it should confine itself to the general aspects of State responsibility. It

was always necessary to keep separate the principles of substantive international law in general and those which concerned specifically the field of State responsibility. With respect to Mr. Tunkin's remark that State responsibility was not analogous to liability in private law, he thought that it would be very difficult to formulate international law while ignoring the general rules of comparative private law. International law was not a totally different technique from private law and it was impossible to regard it as an island by itself.

Mr. de LUNA, agreeing with Mr. Gros, said that many of the rules formulated in the course of the development of international law had had their origin in municipal law. The question how far the general rules of comparative private law should or should not be taken into account in cases involving the responsibility of the State would always have to be decided in the light of the particular circumstances.

Mr. BRIGGS said that at the previous meeting it had been suggested that a discussion of international standards in the administration of justice with respect to aliens would be entirely outside the field of State responsibility; at the present meeting, however, it had been asserted that a refusal to grant independence to colonial peoples would constitute a grave violation of the international law governing State responsibility. He could not understand why the latter topic was more appropriate to the Sub-Committee's discussion of general principles than the former. The Sub-Committee had been told that it should not go into questions of substance, but it was difficult to see how the Commission could deal with such new problems without referring to substantive law.

Mr. TUNKIN said, in reply to Mr. Gros, that he had not suggested that the traditional subjects of international law should be ignored. He had merely stressed the need not to lose sight of new developments in international law. Matters that were well-known and well defined were unlikely to be ignored but it was quite common to disregard new developments. That was particularly true in international law, which was evolving rapidly. New principles were emerging constantly; some had by now been well defined and had become established, but others were still in the process of formation. The Commission, while of course considering old-established principles, should not lose sight of those new developments.

Mr. Gros had rightly stressed the need to keep separate the principles of substantive international law from those which belonged specifically to the field of State responsibility. In that connexion, and referring to the remarks by Mr. Briggs, he said he had not suggested that the Commission should engage in a formulation of principles of substantive law. However, although the Commission was not called upon to formulate those principles, it would come into contact with them when studying the principles of State responsibility.

Reference had been made to analogies drawn from municipal law. International law naturally had some points in common with municipal law and therefore analogies with the latter should not be excluded altogether from the debate. It was, however, dangerous to introduce into international law notions drawn from municipal law. Certain outstanding jurists had in fact been led to totally unfounded conclusions by assuming that international law developed along the same lines as municipal law.

Mr. JIMENEZ de ARECHAGA noted that the majority of the members of the Sub-Committee favoured the priority suggested by the Chairman in his paper. Mr. Briggs, Mr. Tsu-ruoka and he (the speaker) were thus in the minority, and he thought it would not serve any useful purpose to continue the discussion on method. He would co-operate in the work of the Sub-Committee in accordance with the method which the majority preferred.

However, the views of the minority should be made known to the full Commission. Accordingly, the Sub-Committee's report should contain as annexes the summary records of its meetings and the working papers submitted to it; Mr. Tsu-ruoka's working paper was particularly significant in that respect.

He agreed to the suggestion that the Sub-Committee should consider in detail the various points of the plan formulated by the Chairman in his working paper.

The CHAIRMAN noted, at the end of the general discussion, that the Sub-Committee agreed that the work on State responsibility should be devoted to the general problems of the international responsibility of States. In a commentary it would be explained that the topic also covered such subjects of international law as, for instance, insurgents, which were generally assimilated to States. The question of the possible international responsibility of international organizations would be left out, as had been done by the Commission in connexion with other topics. International organizations were too recent a phenomenon and the question of a possible international responsibility by reason of alleged wrongful acts committed by such organizations was not suited to codification.

There was also general agreement within the Sub-Committee that the problems of State responsibility would alone be considered and that no attempt would be made to discuss and define certain principles of substantive international law, whether those principles related to old-established or to new areas of the law. Of course, all those substantive rules, and in particular the new rules, would have to be borne in mind in order to see whether they had any impact on the rules governing international responsibility.

Speaking as a member of the Sub-Committee, he agreed with Mr. Tunkin that it was unnecessary for the Commission to consider the somewhat theoretical problem whether the expression "criminal responsibility" could be used in connexion with States.

While agreeing that the use of the expression "criminal responsibility of States" should be avoided, he thought that certain realities should be borne in mind. The question arose in international law whether State responsibility did not involve something different from mere reparation. The main purpose of reparation was to re-establish a situation corresponding as far as possible to that which would have existed if the breach of international law had not been committed; it normally involved such remedies as restitution and compensation. International responsibility could, however, produce other consequences, sometimes called sanctions, the purpose of which went beyond the re-establishment of the situation that would have existed if the breach had not been committed. They had the clear character of a sanction, in that they possessed, like *poena*, an afflictive purpose.

If it were admitted that international responsibility could produce consequences of that kind, the further question would arise whether that was true of breaches of all international obligations or only of some of them. Another question to be determined was whether there was to be a choice between reparations and sanctions, and if so, who would be called upon to make that choice.

With regard to the plan put forward in his working paper, he agreed that war was outside the scope of the work of the Commission. He had included a reference to it in the plan only because some writers, e.g. Kelsen, had put forward the theory that war constituted a typical form of sanction for illicit acts in international law. If the members of the Sub-Committee unanimously agreed with him in rejecting that theory, the reference to war could certainly be avoided.

The meeting rose at 12.5 p.m.

Summary record of the fifth meeting
(Thursday, 10 January 1963, at 10 a.m.)

State responsibility (continued)

The CHAIRMAN invited the Sub-Committee to consider the outline set forth in his working paper (A/CN.4/SC.1/WP.6), paragraph by paragraph.

Preliminary point

The CHAIRMAN said that he had included a reference to the responsibility of subjects of international law other than States in order to recall that a decision should be taken as to whether the question of the possible responsibility of international organizations ought to be considered. If the Sub-Committee agreed that that question should be left out, the reference in question could be deleted.

Mr. YASSEEN said that the topic which the Commission had been asked to study was that of State responsibility. The possible responsibility of other subjects of international law was therefore outside the scope of the study.

The CHAIRMAN said that, if there was no objection, he would consider that the Sub-Committee agreed to delete the reference in question.

It was so agreed.

Mr. PAREDES said that the question of imputability should be regarded as a preliminary one. In that connexion, consideration should be given to the imputability to the State of unlawful acts committed with the intention of causing injury and also of acts of negligence; in addition, attention would have to be given to State responsibility in respect of certain circumstances which placed a State in a position to cause injury to other subjects of international law unintentionally and without the performance of an act on its part, e.g. in the case of unjust enrichment to the detriment of another State. Lastly, there were cases in which injury could be caused by the lawful exercise of a right in a way prejudicing the rights of others.

The CHAIRMAN pointed out that the matters to which Mr. Paredes referred were dealt with in paragraph 2 (b) of the outline, dealing with the subjective element in the determination of the component parts of an international wrongful act.

Mr. PAREDES thought that the consideration of the subjective element should precede that of the objective element.

The CHAIRMAN said that the question of the order in which the two problems were considered was perhaps not a vital one. On the whole, however, he considered that the study of the objective element, i.e. of the act which gave rise to international responsibility, should logically precede the study of the question of imputability.

Mr. TUNKIN said that Mr. Paredes's approach would have been appropriate if the Commission's study related to international responsibility in general. However, under its terms of reference, the Commission's task was confined to the study of State responsibility. Since that topic did not embrace the whole field of international responsibility, there was therefore no need to make a preliminary study of imputability.

First point: origin of international responsibility

The CHAIRMAN said that paragraph (1) dealt with an international wrongful act. In his view, the question of reparation in respect of injury arising from lawful acts fell outside the scope of the subject of State responsibility. If the act which caused an injury was not unlawful, it did not give rise to international responsibility. There could well be injury resulting from such an act, and even a voluntary agreement to compensate for the damage, but there was no international responsibility in the true sense of the term.

He had included a reference to the problem of the abuse of rights because, if that concept were to be admitted in international law, then the abusive exercise of a right would constitute a breach of a rule of international law prohibiting the use of a right for the sole purpose of injuring another subject of international law. Responsibility arising from an abuse of right would in such a case originate in an unlawful act.

Mr. de LUNA recalled that, at the second meeting, he had raised the question of responsibility for lawful acts. In particular, he had drawn attention to acts committed in a state of necessity, which involved one of the consequences of responsibility, namely reparation.

Mr. YASSEEN said that it was hardly logical to say that

a lawful act could give rise to responsibility. With reference to acts performed under the influence of a state of necessity, he said that such an act could on occasion give rise to State responsibility.

It would be desirable to make a thorough study of the matter in order to determine whether a state of necessity in fact had the effect of removing completely the wrongful nature of an act committed under such conditions.

It was perhaps pertinent in that connexion to recall that, in municipal criminal law, many authorities maintained that a state of necessity could not be pleaded in justification of the act committed; it merely constituted grounds for exoneration from punishment or for the mitigation of the penalty.

Paragraph (1) was approved.

The CHAIRMAN, inviting debate on paragraph 2(a), drew attention to the case of certain international obligations which required a State to observe a certain conduct. He mentioned as an example the obligation, laid down in the Vienna Convention on Diplomatic Relations, 1961, to exercise police surveillance in order to prevent attacks against an embassy.

In the case of an obligation of that type, international responsibility did not arise if the State failed to carry out its obligation, unless a further event, caused by the failure of the State, was also present. It was not enough that there should have been a failure in police surveillance; it was also necessary that some persons should have taken advantage of that lack of surveillance in order, for example, to attack the embassy concerned. Among other things, the point was of interest in regard to the determination of the *tempus commissi delicti*.

Mr. de LUNA said that a somewhat similar situation could arise in the event of the enactment of a law which conflicted with international law. The international responsibility of the State would ordinarily not be involved until the law was actually applied and caused an injury to an alien; but in some cases the enactment of a law contrary to international law engendered, without its actual application, an international responsibility because its promulgation by itself caused an injury to an alien, for instance a law devaluing his property.

Mr. GROS said that the discussion showed that in international law there existed some rules which imposed upon the State the obligation to perform some positive act, and other rules which imposed a more general obligation to observe a certain conduct.

The problem to which reference had been made could also arise in regard to the actions of the judiciary. An actual denial of justice would have to occur, affecting a definite person on a certain day, for State responsibility to be involved, even if the reason for the denial had existed on many other occasions but the denial had not in fact taken place. The discussion had drawn attention to the fact that, even if a State failed to observe its obligations, cases could exist in which no injury resulted from that failure and therefore the problem of responsibility did not arise.

Paragraph 2(a) was approved.

The CHAIRMAN invited the Sub-Committee to consider section 2(b) dealing with the subjective element. The question arose, in particular, whether reference should be made to the problem of the capacity of the State. He agreed with Mr. Tunkin that it was not desirable to stress the situation of dependent States, a situation which was fast disappearing. However, there still existed certain cases of trust territories. Undoubtedly the question arose whether such subjects had the capacity to commit breaches of international law. A number of writers (e.g. Verdross)¹⁵ had drawn attention to the indirect or vicarious responsibility of the administering Power in respect of acts performed in the administered trust territory.

Another problem of a similar kind arose in connexion with military occupation. If the courts of the occupying Power

¹⁵ Alfred Verdross: "Theorie der mittelbaren Staatenhaftung" in *Zeitschrift für öffentliches Recht*, 21 (1941), pp. 283-309.

committed a denial of justice, should responsibility for that denial of justice attach to the occupying or to the occupied State? A similar problem could also arise in other cases where one State exercised certain powers in the territory of another State with the consent of the latter.

Mr. TUNKIN said that an analogous problem had been discussed in connexion with the law of treaties during the recent session of the Commission. In particular, the problem could arise with regard to the responsibility of federal States. He preferred that no explicit reference should be made to the problem of the capacity of the State, which was reminiscent of colonial situations. The formula "questions relating to imputation" would seem to cover the whole subject.

The CHAIRMAN suggested that the reference to the problem of the capacity of the State should be replaced by a reference to the problems of indirect or vicarious responsibility.

Mr. de LUNA supported that suggestion, which would have the advantage of covering the problems of both active and passive situations.

The Chairman's suggestion was adopted.

Mr. BRIGGS suggested that in the English text of the third sub-paragraph the words "State responsibility for acts of private persons" should be replaced by "State responsibility in respect of acts of private persons". That change would not affect the French original.

Mr. JIMENEZ de ARECHAGA said that it was perhaps not desirable to introduce a reference to the question of "fault" in the last sub-paragraph. The Chairman and Anzilotti had put forward two different views on the question whether, for purposes of international responsibility, there must have been fault on the part of the organ whose conduct was the subject of a complaint.

Undoubtedly the question was of great interest from a theoretical point of view, but in a codification which was intended to serve a practical purpose it was not desirable to stress it. In the *Corfu Channel*¹⁶ case the International Court of Justice had not attempted to determine whether international responsibility originated in "fault" or in "risk". The point had been referred to only in the dissenting opinion of one of the judges.

In the *Corfu Channel* case, the International Court of Justice had taken into consideration the influence which the control of a State over its territory had on the question of evidence. Accordingly, the Court had been content with circumstantial evidence.

For those reasons, he thought that the reference to "fault" should be deleted and a reference to the question of evidence of responsibility introduced.

The CHAIRMAN agreed on the desirability of including, at the appropriate place, a reference to the question of evidence of State responsibility.

However, so far as the fourth sub-paragraph of paragraph 2(b) was concerned, he thought that it should not be amended, for it left the question completely open. The passage in question did not suggest that the existence of "fault" was necessary for purposes of international responsibility. It merely indicated that the question whether or not "fault" must exist ought to be considered.

Many examples could be given demonstrating the need to consider that question. One example was that of an airplane which was forced by weather conditions to fly over the territory of a State, or even to land in that territory. The question certainly arose whether State responsibility existed in respect of such an unintentional breach of international law.

Mr. BRIGGS supported Mr. Jiménez de Aréchaga.

As long ago as 1929, Borchard had written: "On the Continent a very considerable literature has developed on the issue whether risk or fault underlies State responsibility in international law," adding, however, that those theories "apparently

play little or no part in the determinations of international tribunals or in the work of Foreign Offices . . . International Courts and Foreign Offices do not profess to make any fundamental distinction between wrongful, though perhaps innocent and unintentional, invasion of an alien's rights, and 'fault' — the degree of wilfulness or negligence in the commission of the injury affecting mainly the measure of damages."¹⁷

Mr. de LUNA urged that the question whether "fault" was necessary for the purpose of establishing responsibility should be left open. The Commission should elucidate the question whether State responsibility on the basis of the theory of risk applied in international law. He considered that if responsibility in the absence of fault were thus to be admitted, very heavy burdens would be placed upon the State.

Mr. GROS pointed out that, with industrial development, an increasing number of situations arose in which a State could be held responsible for damage not attributable to a "fault". For example, when a State constructed a dam on its territory, it engaged in a perfectly lawful activity. If the dam collapsed as a result of *force majeure*, no liability attached to that State under municipal law. However, the collapse of the dam could cause a flood, and hence damage by water, beyond the frontiers of the State concerned; in that event, the question would arise whether risk or fault underlay that State's responsibility in international law.

It was the duty of the Commission at least to consider the question.

The CHAIRMAN said that, at the time when Borchard had written the passage quoted by Mr. Briggs, the question of international responsibility had been envisaged chiefly in connexion with the responsibility of the State for the acts of private individuals.

Mr. JIMENEZ de ARECHAGA suggested that the last sub-paragraph be replaced by a passage along the following lines:

"Responsibility based on risk, responsibility connected with the objective breach of an international obligation, responsibility connected with 'fault'".

Mr. YASSEEN objected that the inclusion of a reference to "risk" would prejudice the question whether the doctrine of risk applied in international law. There was considerable divergence among authorities on that point.

Mr. TUNKIN said that the first sentence of the passage proposed by Mr. Ago set forth the issue very clearly: "Must there be fault on the part of the organ whose conduct is the subject of a complaint?" International practice in the matter was not uniform and the Commission would probably be unable to adopt a uniform rule on that point.

He took the opportunity to draw the attention of the future special rapporteur to the fact that the question of responsibility arising from the uses of nuclear energy had been the subject of a number of draft conventions prepared by the International Atomic Energy Agency.

Mr. GROS urged that the formulation proposed in Mr. Ago's working paper for the last sub-paragraph of paragraph 2(b) should be retained. That formulation did not imply a choice as between the two opposing views on the question of "fault".

Mr. JIMENEZ de ARECHAGA withdrew his suggestion. He could accept the Chairman's formulation, with the clarification resulting from the discussion.

The CHAIRMAN said that, if there was no objection, he would consider that paragraph 2(b) was approved with the changes made in the first and third sub-paragraphs.

It was so agreed.

The CHAIRMAN invited debate on paragraph 3 (the various kinds of violations). The problem there was what

¹⁶ ICJ Reports, 1949.

¹⁷ E.M. Borchard, "Theoretical aspects of the international responsibility of States", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1929), Bd. I, T. 1, pp. 224-225.

practical consequences there might be and whether differences between one kind of violation and another were reflected in the reparation and in the determination of the *tempus commissi delicti*.

Paragraph 3 was approved.

The CHAIRMAN invited debate on paragraph 4 (circumstances in which an act is not wrongful). In that connexion he fully agreed that Mr. Tunkin was right from a theoretical point of view. A general right of self-defence was accepted in international law; but it had to be remembered that, under the United Nations system for example, recourse to force was not normally permitted, and accordingly it seemed to him that a special problem of self-defence as an excuse for contravening that rule might arise.

Mr. TUNKIN agreed that the problem of self-defence existed; under Article 51 of the Charter, for example, a State might even use military force for the purpose of defending itself. His doubts related to the manner in which the problem should be treated in the field of State responsibility.

Paragraph 4 was approved.

Second point: consequences of international responsibility

The CHAIRMAN suggested, in the light of Mr. Tunkin's comments on the title of the second point, that it might be altered to read "the forms of responsibility".

It was so agreed.

The CHAIRMAN said he agreed with Mr. Tunkin that the words "The United Nations system" in paragraph 3 should be deleted. It had already been decided to delete the words "questions relating to war" in the same paragraph.

Mr. de LUNA said that armed reprisals were also forbidden under the Charter and he therefore suggested that the word "pacific" should be inserted before the word "reprisals".

The CHAIRMAN considered that it would be better not to make such a change as it raised a question of substance.

There remained for consideration the question of proof and where a reference to it should be inserted in the outline. The Sub-Committee was concerned with the problem of proof solely in connexion with a wrongful act; it was a very important problem, covering e.g. proof of conduct, proof that the act had been committed by a particular organ of the government, proof that the organ in question had acted in certain given circumstances and proof of intention.

Mr. YASSEEN thought that the question of proof arose not only in connexion with State responsibility. Surely it was a general question of public international law?

Mr. TUNKIN agreed.

Mr. de LUNA shared the doubts expressed by previous speakers and drew attention to those cases in which an uneasy balance was struck between the notions of "fault" and "objective responsibility" and in which one had to be satisfied with *prima facie* evidence.

Mr. GROS said that he was impressed with the importance of questions of proof in connexion with responsibility; the Chairman's paper would surely be incomplete if that problem were to be omitted. A good deal of time was spent in commissions of inquiry, claims commissions and arbitration tribunals on determining the facts before studying the rights and wrongs of a case, e.g. in disputes between States arising from collisions on the high seas. There was no need to devote a lengthy chapter to the subject, but something should undoubtedly be said about the theory of proof; it could perhaps be inserted appropriately between paragraphs (3) and (4). On the other hand, if it was thought preferable not to mention it in the first report, it could be referred to in connexion with procedural machinery.

The CHAIRMAN said that the question of proof arose more particularly in connexion with two problems—the question of fault, and circumstances in which an act was not wrongful. It would be found that, whereas it was almost universally recognized that there was no wrongful act if there was a genuine state of necessity, it was invariably argued in

particular cases that proof of the existence of such a state of necessity had not been produced.

Mr. YASSEEN said that he still thought that the Sub-Committee was not called upon at that stage to express any views on the question of proof. Proof was obviously required in order to set any sort of proceedings in motion, but that had nothing to do with the rules governing State responsibility.

Mr. JIMENEZ de ARECHAGA said that, when the rules of the territorial sea had been codified, many of the articles had been based on the judgements of the International Court, notably the decision in the *Anglo-Norwegian Fisheries* case.¹⁸ He thought that, so far as questions of evidence or proof were concerned, the future special rapporteur on State responsibility could draw on the Court's judgement in the *Corfu Channel* case, in which it would be found that the Court had established a close connexion between the substantive problem and the question of proof. Proof was of decisive importance in questions of responsibility since it was always difficult for the injured party to produce evidence.

In preparing a working plan such as the one the Sub-Committee was discussing, it was always better to cover the whole field. It could be left to the special rapporteur to decide whether proof should be dealt with in a later report.

Mr. TUNKIN said that there were, after all, many problems which were closely connected with those before the Sub-Committee; for example, there was the question of the sources of international law. In his view, it would be somewhat premature to refer to the problem of proof in the outline under discussion.

The CHAIRMAN suggested that the Sub-Committee might make some kind of recommendation to the future special rapporteur, in which it would draw attention to the great importance of proof in international practice and leave it to the special rapporteur to decide, when preparing his report, whether he should mention the problem of proof in connexion with one or two particular chapters or whether he should devote a separate chapter to it. It was important however that the Sub-Committee should not go beyond a simple recommendation to that effect.

It was so agreed.

The meeting rose at 12.15 p.m.

APPENDIX II

Memoranda submitted by members of the Sub-Committee on State Responsibility

THE DUTY TO COMPENSATE FOR THE NATIONALIZATION OF FOREIGN PROPERTY

*submitted by Mr. E. Jiménez de Aréchaga*¹

The purpose of the present working-paper is to examine the general rules of international law which, in the absence of specific treaties, govern the international obligations arising for a State as a consequence of measures of nationalization affecting the property owned by foreign States, foreign individuals or foreign companies.

The present paper is divided into three parts, as follows:

- (i) a critical examination of various positions advanced and taken by Governments on this question;
- (ii) a discussion of the legal foundations which may serve as the basis for the positions taken on this matter; and
- (iii) conclusions.

¹⁸ ICJ Reports 1951.

¹ Originally circulated as mimeographed document. ILC/(XIV)/SC.1WP.1.

Part I

(1) *The claim for adequate, prompt and effective compensation*

1. One position on the question under consideration is that general international law requires the State which has taken measures of nationalization affecting properties owned by foreigners to accompany such measures by adequate, prompt and effective compensation. Such was, for instance, the position firmly maintained by the United States in the diplomatic discussions which took place with Mexico concerning the measures of nationalization of land and oil properties adopted by the latter country.

2. The main criticism levelled against this requirement of prompt and adequate compensation is that, although it may be applicable to individual expropriations, it would make it impossible to adopt basic reforms or to take nationalization measures in a wide scale and of a general and impersonal character. The Government of Mexico stated in its reply to the United States that "the transformation of a country, that is to say, the future of the nation, could not be halted by the impossibility of paying immediately the value of the properties belonging to a small number of foreigners who seek only a lucrative end".²

3. In some academic circles in the United States, an alternative has been proposed to the requirement of prompt compensation. The 1961 Harvard Research draft convention on the responsibility of States for damage caused to the person or property of foreigners proposes, according to the traditional view in that country, that compensation must be prompt, adequate and effective. However, the draft admits that if property is taken by a State in furtherance of a general programme of economic and social reform, the just compensation may be paid over a reasonable period of years, in the form of bonds bearing a reasonable rate of interest.³

4. The practice of States confirms that, in the case of nationalization, the payment of deferred compensation has been offered and accepted, even by countries supporting the traditional doctrine under consideration. France and Great Britain, for instance, have paid compensation for the measures of nationalization of banks, airlines, insurance companies, transportation and steel and coal industries in the form of bonds redeemable, over a number of years, bearing a 3 per cent interest. This formula was accepted by States whose nationals were affected by such nationalization measures, such as Switzerland, United States and Belgium.⁴ In the Anglo-Iranian oil case, the United Kingdom admitted before the Court that the payment of compensation might be made over a number of years.⁵

(2) *The thesis of the equality of nationals and foreigners*

5. In the diplomatic controversy between the United States and Mexico mentioned above, Mexico took the view that, because of the complete equality between foreigners and nationals, the former could not claim compensation when it was not paid to the nationals affected.

"The foreigner who voluntarily moves to a country which is not his own, in search of a personal benefit, accepts in advance, together with the advantages which he is going to enjoy, the risks to which he may find himself exposed. It would be unjust that he should aspire to a privileged position safe from any risk, but availing himself, on the other hand, of the effort of the nationals which must be to the benefit of the collectivity".⁶

² Note from Eduardo Hay, Foreign Minister of Mexico, dated 3 August 1938, *International Conciliation*, No. 345, p. 527.

³ See text of the draft convention in *American Journal of International Law*, July 1961, p. 545. For the rule referred to in the text and the corresponding comment, see pp. 553-563.

⁴ Foighel, "Nationalization", 1957, pp. 120-123.

⁵ I.C.J. Reports, 1952, p. 106.

⁶ Publication referred to in footnote 2 above, p. 529.

6. This is the thesis which the Argentine international lawyer Podestá Costa has called the "community of fortune": "the foreigner who participates in the material and moral alternatives of the place where he finds himself enjoys its benefits and cannot escape its inconveniences".⁷ It has been observed in support of this view that in most cases the foreign capital invested in an under-developed country, while exposed to greater risks, also obtains higher profits.

7. According to this doctrine, when an expropriation or nationalization measure affects adversely the rights of foreign subjects, those foreigners would possess no specific claim to compensation, other than that which may be recognized with respect to nationals, such as the ordinary remedies conferred by municipal law before national tribunals. The responsibility of the State would only exist if there has been discrimination against the foreigners as such, because of xenophobic feelings or similar reasons.

8. In the above mentioned controversy with Mexico, the United States objected to the extent to which an extreme application of this doctrine of equality of nationals and foreigners might lead, stating: "It is contended, in a word, that it is wholly justifiable to deprive an individual of his rights if all other persons are equally deprived, and if no victim is allowed to escape".⁸ For these reasons, it sustained the view that a minimum standard of treatment for the foreigner should exist, which it would not be legitimate to affect. Where such a minimum standard is not respected, a responsibility would arise for the State which has taken the measures of expropriation or nationalization: "when aliens are admitted into a country, the country is obligated to accord them that degree of protection of life and property consistent with the standards of justice recognized by the law of nations".⁹

9. The United States jurist Borchard argued against the theory of the community of fortune, pointing out that the equality of treatment for foreigners and nationals would be justified if they possessed exactly the same rights, but in fact foreigners are as a rule deprived of political rights, and as such they cannot influence the measures adopted by the Government, whereas nationals have such means of exerting influence on their Governments.

10. This argument seems to have inspired the following statement made by the Government of the United States when it protested in 1953 against what was termed as inadequate compensation for measures of nationalization adopted by the Government of Guatemala: "International law does not authorize States to do any and every act, so long as such act is imposed on nationals and foreigners on a basis of equality or without discrimination. What a State may do with respect to its nationals or their property is a matter largely between that State and its nationals, for the reason that nationals of a State are presumed to be able to take corrective measures looking to the protection of their rights".¹⁰

11. According to the doctrine of complete equality of treatment, the foreign subjects may be totally deprived of protection if the municipal law denies any right of compensation to nationals. Now, the question under consideration is whether there is an international law obligation to compensate for the taking of foreign-owned property. If such an obligation exists, it is obvious that it cannot be disregarded by the unilateral act of a State which under its municipal law denies compensation to its nationals.

12. The Permanent Court of International Justice has stated that a measure against foreign owners which is not authorized by international law cannot become lawful by reason of the fact that the State applies it to its own nationals. In the case concerning certain German interests in Polish

⁷ Podestá Costa, *La Responsabilidad Internacional del Estado*, Havana Academy of International Law, vol. 11, p. 207.

⁸ Publication referred to in footnote 2 above, p. 541.

⁹ *Ibid.*, p. 542.

¹⁰ U.S. *Department of State Bulletin*, 1953, vol. 29, p. 358.

Upper Silesia it decided: "as regards the Polish submission, the Court . . . cannot attach to the fact that articles 2 and 5 of the law of July 14th, 1920, apply to a certain class of property, no matter what the nationality of the owners may be, the importance and effect which are attributed to that fact by Poland. Even if it were proved—a point which the Court does not think it necessary to consider—that, in actual fact, the law applies equally to Polish and German nationals, it would by no means follow that the abrogation of private rights effected by it in respect of German nationals would not be contrary to Heading III of the Geneva Convention. Expropriation without indemnity is certainly contrary to Heading III of the Convention: and a measure prohibited by the Convention cannot become lawful under this instrument by reason of the fact that the State applies it to its own nationals."¹¹ It is true that this judgement refers to an expropriation prohibited by a special treaty, but the argument of the Court would be equally applicable to any obligation arising from the exercise of the right to expropriate or nationalize, as for instance, a duty to compensate, which may result from general international law.¹²

13. The doctrine of the equality of nationals and foreigners has not been followed in the recent practice of States. Even those States which have gone further in their nationalization policies, to the extent of denying a right to full compensation to the affected nationals, have discriminated in favour of foreign-owned property, and their own nationalization laws admit the possibility of a greater protection for this foreign property. In France, which recognizes with respect to nationals affected a right to compensation, it was stated during the discussions of the 1945 nationalization laws, that the Government was prepared to grant higher compensation for the property owned by foreigners.¹³

(3) *The thesis that no compensation is due and its practical application*

14. The Government of Mexico, in the above referred diplomatic controversy with the United States also held that "there is in international law no rule universally accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation, nor even of deferred compensation, for expropriations of a general and impersonal character like those which Mexico has carried out for the purpose of redistribution of the land."¹⁴

15. A similar position had been taken by the Soviet Union at the Genoa Conference, where their representatives stated that the USSR "cannot be forced to assume any responsibility toward foreign Powers and their nationals . . . for the nationalization of private property."¹⁵

16. In a recent book on the subject of nationalizations, by Konst. Katzarov, this position is justified on the ground that "integral nationalization leads in fact to the reparation of an injustice, and to the restitution in favour of the collectivity of what belongs to it, and therefore, it is not to be expected that the former owners should be indemnified."¹⁶

17. However, this author, when examining the laws and practice followed on this matter by several communist States points out that "many recent laws relating to nationalization shows a tendency to look for a compromise . . . in the sense that they reserve the possibility of granting a freely negotiated indemnity. In acting in such a way, the conflicts which arise between the conception of the nationalizing State and the

conceptions of the States interested in such a measure and affected by it, have been taken into account. . . . This has an importance of principle in connexion with the legitimation of the nationalization in International Law and indicates the desire felt by the nationalizing States of not coming in conflict against the international 'ordre public'. It is on this juridical basis that all the international agreements concerning the settlement of indemnities have been concluded. In all these cases, the indemnity has been determined independently of the level of indemnities of municipal law, and it is habitually a higher one. The negotiation, in those international agreements, of a superior compensation is not—or does not represent only—an economic or political compromise, but is founded on the concrete provisions of the laws establishing the nationalization."¹⁷

18. This writer adds: "those special provisions in the laws try precisely to make it possible to discuss the amount of the indemnities in the framework of international relations, in order to adapt the nationalization to the international 'ordre public': the legislator seems to have understood that it could not participate in an international discussion invoking as the only argument its sovereign estimation of the indemnity and the denial of judicial control."¹⁸

19. Finally, this writer states that "the possibility of solving the questions arising from nationalizations lies in the conclusion of an agreement between the nationalizing State and the States whose subjects are affected by the nationalization. From here it results that the procedure relating to this settlement is transformed into a State-to-State question. In the majority of cases it is in this way that have been settled after the Second World War the relations established by the nationalizations with foreign subjects. A State may always claim that the rules of international law are observed with respect to its subjects, and, in particular, that the right to an appropriate indemnization be recognized in case of nationalization. The evolution of international life leads to more and more frequent use of the negotiation between States of a global compensation, and the hope is often expressed that this procedure should be improved."¹⁹

(4) *The global compensation agreements*

20. Since the Second World War it has become a widespread practice to settle the international questions arising from nationalization measures in global compensation agreements, the so-called "lump-sum" agreements, of which there had also been some examples in the past.²⁰ Through these agreements, the State which has adopted nationalization measures pays a global amount as compensation to the State of nationality of the affected owners of nationalized property. In order to determine the amount of compensation, account is taken, totally or partially, of the different individual claims arising on the same grounds, i.e. the nationalization measures, although such claims are presented jointly by the claimant State. This State, as a "quid-pro-quo" of the compensation received, declares in its own name and in that of its nationals that all claims which may arise from such nationalization measures become extinguished or cancelled.

21. These agreements do not provide in all cases for full or even adequate compensation and often they only represent a percentage of the existing claims.²¹ Very often such "en bloc" agreements allow for the indemnization being paid over

¹¹ Series A, No. 7, pp. 32-33.

¹² Schwarzenberger, *International Law*, vol. I, third ed. pp. 206-74.

¹³ Foighel, *op. cit.*, p. 60.

¹⁴ Publication cited in footnote 2, p. 527.

¹⁵ Reply of the USSR delegation to memorandum of 2 May 1922, Saxon Mills, *The Genoa Conference*, p. 409.

¹⁶ Konst Katzarov, *Théorie de la Nationalisation*, Neuchâtel, 1960, p. 421.

¹⁷ Katzarov, *op. cit.*, p. 438.

¹⁸ *Op. cit.*, p. 452.

¹⁹ *Op. cit.*, pp. 453, 455, 456.

²⁰ See Whiteman, *Damages in International Law*, vol. III, p. 2068 and Christensen in *American Journal of International Law*, 1961, pp. 617-8.

²¹ See Christensen, *op. cit.*, p. 622 and Foighel, *op. cit.*, p. 117; Asian-African Legal Consultative Committee, Report of the fourth session, pp 142-143.

a number of years.²² Finally, consideration may be taken of the financial capacity of the indemnifying State: for that purpose, they may be accompanied by the granting of credits or by commercial agreements designed to make it possible for the indemnifying State to meet the agreed payments.

22. The State receiving the global compensation may or may not distribute it among the affected individuals or companies "pro-rata" of the values received. In the first case, it is necessary for the damaged parties to submit their individual claims for consideration to organs set up under the municipal law of the State of their nationality.

23. A pre-war example of this type of direct agreements between States settling claims of their nationals for nationalization measures, was the Litvinov assignment, executed in 1933 between the President Roosevelt of the United States and the Soviet Foreign Minister Litvinov. By this agreement, the Soviet Union assigned to the United States, "the amounts admitted to be due or that may be found to be due (to the Government of the Soviet Union), as the successor of prior governments of Russia or otherwise, from American nationals, including corporations, companies, partnerships or associations, and also the claim of the Russian Volunteer Fleet", as "preparatory to a final settlement of the claims and counter-claims between the Government of USSR and the USA and the claims of their nationals".²³ It is interesting to note that before 1933, the USSR had accepted, with respect to other States, point 3 of the Cannes Declaration providing for compensation to foreign interests for loss or damage caused to them by nationalization measures.²⁴

24. Mexico also reached global compensation agreements with the United States in 1943²⁵ and with the United Kingdom and the Netherlands²⁶ in respect of the nationalization of land and of oil investments.

25. After the Second World War such global compensation agreements have been generalized, and the following examples may be indicated: United States with Yugoslavia (1948), Italy (1948), Czechoslovakia (1946), Poland (1946 and 1960) and Romania (1960); Switzerland with Yugoslavia (1948), Poland (1949), Czechoslovakia (1946, 1947 and 1949), France (1949), Hungary (1950), Romania (1951), Bulgaria (1955); France with Czechoslovakia (1950), Hungary (1950), Poland (1948), Yugoslavia (1951) and Bulgaria; Great Britain with Yugoslavia (1948 and 1949), France (1951), Poland (1948 and 1954), Czechoslovakia (1949 and 1956), Hungary (1954, 1956 and 1959), Bulgaria (1955) and Romania (1961); Sweden with Hungary (1946), Czechoslovakia (1947 and 1956), Yugoslavia (1947), Poland (1949), Hungary (1951) and Bulgaria; Belgium with Poland (1948), France (1949), Czechoslovakia (1947 and 1952) and Hungary (1955); Denmark with Poland (1947, 1949 and 1953); Norway with Bulgaria (1955) and Poland (1948 and 1955); the Netherlands with Czechoslovakia (1949); Turkey with Yugoslavia (1950); Canada with France (1951).²⁷

26. Even certain States whose economic policy is based on the national ownership of all the means of production

and which have taken wide nationalization measures, have made and accepted "inter se" claims for compensation in respect of properties belonging to their nationals which had been nationalized in other countries applying the same economic policies. Thus on 29 March 1958, an agreement was signed between Poland and Czechoslovakia in which both parties declare "settled as well as liquidated all monetary claims and other proprietary obligations of the legal subjects of one contracting party towards the ... other contracting party". Such settlement includes "all obligations of the Polish State in connexion with claims which arise out of measures taken up pursuant to Polish nationalization, expropriation or any other legal provision depriving of or restricting rights of ownership by which Czechoslovak properties, rights and interests on the present territory of the Polish People's Republic were affected". A reciprocal provision makes the same settlement for Polish properties nationalized in Czechoslovakia. A similar treaty, dated 11 February 1956, was entered into between Yugoslavia and Czechoslovakia, providing: "By this treaty are also settled and liquidated: (a) all obligations of the Czechoslovak State in connexion with claims arising out of Czechoslovak measures of nationalization, expropriation or other measures limiting or depriving of rights of ownership to which Yugoslav properties, rights and interests were subjected in Czechoslovakia up to the day of the signature of this treaty." A reciprocal provision makes the same settlement for Czechoslovak properties nationalized in Yugoslavia. And on 24 March 1961 a treaty between Czechoslovakia and Romania for the settlement of outstanding financial and property questions was ratified. This treaty liquidates and settles "monetary and all other claims of ... Czechoslovak legal and physical persons against the Romanian State", as all analogous Romanian claims against Czechoslovakia²⁸.

27. These treaties also adopt, in most other essential points, the traditional rules as to nationality of claimants and the relevant dates of the measures of dispossession and even the drafting technique is very similar to that of the lump-sum agreements. The treaties referred to in the preceding paragraph imply the recognition by the signatory States of the fact that the nationalization measures they have adopted, affecting foreign owners, give rise to a legal obligation to compensate. The obligation to pay compensation is confirmed by such treaties because they expressly speak of "claims arising out of measures of nationalization". The fact that both contracting parties waive their mutual claims for compensation only reaffirms this principle. Such mutual waiver is nothing else but another type of the global settlement which has become so customary since 1945²⁹.

28. All the above-mentioned "en bloc" compensation-agreements, taken together, constitute a recognition by the various legal systems of the civilized world that the State which nationalizes foreign-owned property has, under general international law, a duty to compensate the State of nationality of those foreign owners. The amount and appropriateness of such compensation cannot, however, be established on the basis of those treaties, for most of them constitute compromise settlements. This duty to compensate has been recognized and executed by the States involved in these questions, whatever may have been the position initially adopted with respect to the existence or non-existence of such a legal obligation.

29. The social and economic basis of this legal duty is obvious and it explains the different treatment given in practice to nationals and to foreigners. The mutual interest in the re-establishment of normal currents of international trade is a strong incentive for States to reach compensation agreements, as soon as the friction originated by the adoption of the

²² The agreement between Poland and the United States provided for the payment of \$40 millions in 20 annual instalments from 1961. Rode, in *American Journal of International Law*, 1961, p. 455.

²³ *American Journal of International Law*, 1934, Supp. p. 10.

²⁴ The USSR acceptance of point 3 of the Cannes Declaration and the text of the Declaration itself are recorded in Saxon Mills, *The Genoa Conference*, p. 409 *et seq.*

²⁵ U.S. Department of State Bulletin, 1943, p. 230.

²⁶ United Nations Treaty Series, vol. 3, p. 13 and vol. 6, p. 55.

²⁷ A list of the agreements made until 1957 appears in Foighel, *op. cit.*, pp. 132-133. For a more up-to-date list, see G. White, *Nationalization of Foreign Property*, London, 1961, p. XIX to XXV. The United States is presently negotiating agreements with Czechoslovakia and Bulgaria: *American Journal of International Law* 1961, p. 619.

²⁸ Drucker, *International and Comparative Law Quarterly*, vol. 10, April 1961, pp. 246-250 and Oct. 1961, pp. 904, 907. See also United Nations Treaty Series, vol. 112, p. 91, for a previous agreement.

²⁹ Drucker, *loc. cit.*, pp. 251 and 907.

measures is overcome and the positions of principle publicly taken by the Foreign Offices have been forgotten. Capital exporting countries have an obvious interest in favouring a rule of law which protects, at least to a certain extent, their own interests and those of its nationals abroad. And with regard to under-developed countries, although a first reaction might be to deny such an obligation, a more intelligent consideration of their long-range interests soon convinces them of the desirability to recognize and support such a rule, because there is a very strong possibility that, in its absence, the foreign investments which these countries need for their economic development would not be made, at least in the same volume or at the same rate of interest. For such reasons, the rule that the nationalization of foreign-owned property implies a duty to compensate operates in the well-understood self-interest of all States.

30. In the second part of this paper, an examination will be made of the legal foundation of this international obligation. Such an examination might provide useful indications as to the scope, measure and effectiveness of the duty to compensate.

Part II

(1) *The legal basis for the claim to adequate, prompt and effective compensation*

31. The doctrine which asserts the existence of an obligation under international law to make prompt, adequate and effective compensation, is based on the principle of respect for acquired rights, in general, and for private property, in particular. However, in asserting the legal authority of those principles, a confusion is often made. Which acquired rights of private property are referred to? Those recognized and protected by the internal law of the State? If such is the case, then this is not sufficient ground for an international law obligation, since rights granted or protected by municipal law may be modified or suppressed by it without any international responsibility being incurred.

32. In order to prove the existence of an international obligation it would be necessary to demonstrate the existence of a rule of international law which would guarantee, in every State, and against any State, the respect for the acquired right of private property. Such demonstration is intended by the British Professor Wortley, who states:

"The answer to the difficulty would seem to be that what is compensated is the right protected by international law and not that protected by national law. International law has an objective standard of valuation. It is not the right which the 'lex-situs' gives that is compensated, but, it is submitted, the right which, being lawfully acquired, was, until the nationalization, protected by the 'lex-situs'. If the right of property is created by the State, then it can be freely modified or abolished by its creator, if he has not bound himself by special treaty. But if the thesis here maintained is exact, namely, that a right of property is not so much created, as protected by the State as part of its task in securing the rule of law by the administration of justice, then the theory of acquired rights is not 'inexact' or 'erroneous'. If a function of the State, as the present writer has argued, is to protect the property of those subject to its jurisdiction, a right which is recognized in international law, then the claim to seize property for less than its value needs some explanation beyond the mere use of power".³⁰

33. This attempt of justification is clearly unsatisfactory and it does not demonstrate the existence of an international law obligation. Whatever is the political and economic doctrine which may be preferred, to assert that one of the functions of the State is "to protect the property of those subject to its jurisdiction", obviously does not correspond to present realities, since an important group of States deny the right of

ownership over the means of production to individuals and private corporations. It cannot be said either that there is an agreement or understanding among States to support such form of property. On the contrary, the Cannes declaration clearly stated as an international law rule that "Nations can claim no right to dictate to each other regarding the principles on which they are to regulate their system of ownership, internal economy and government. It is for every nation to choose for itself the system which it prefers in this respect"³¹.

34. A second attempt at justification is to assert that the right of private property for individuals and corporations is a general principle of law recognized by civilized nations and, as such, that it has validity in international law. This is the position taken by the Swiss writer Bindschedler who states: "the institution of private property is universally recognized, not only at the international level, but also in the municipal law systems. The great majority of modern Constitutions recognize it expressly. This is the case even in the Constitution of communist States. Of course, the scope of the right of private property is different in States of capitalist structure than in those of communist social structure: in the latter, the goods which are susceptible of appropriation by individuals are strictly delimited; means of production are excluded from the system of private property and the legal protection does not encompass them"³². But this is precisely the question, since the problems of compensation arise mostly with respect to the nationalization of the means of production.

35. The right of private ownership cannot be considered today as a general principle of law recognized in the domestic forum by all civilized States. A cursory glance at comparative law on the question shows that such a principle has no longer that degree of generality which is required to constitute an international law rule. It is true that some statements by judicial or arbitral organs may be invoked in support of the rule³³, but, as Foighel points out, the decisions in question were made in and belong to a period when liberal economy was the only recognized economic system in the leading States. Respect for vested rights in municipal law, and the uniformity of the economic systems of the leading countries in so far as their views of private property were concerned, were simply the pre-condition for the assumption of the existence in international law of a maximum of protection for vested rights³⁴.

36. Today it is necessary to take into account the existence of different economic systems, not in order to deny an obligation to compensate, which as pointed out previously, continues to be valid, but in respect to the legal foundation of such an obligation. In this connexion the criticism made in 1960 by the USSR jurist, Professor Tunkin, on the Harvard Draft is justified, when he observed that: "the provisions of the Draft relating to property were formulated in disregard of the fact that two fundamentally different economic systems now existed in the world. . . . For example, paragraph 2, art. 10 (taking and deprivation of use or enjoyment of property), which laid down certain standards for compensation, in effect reproduced the corresponding provisions of the Code Napoleon of 1804 in its concern for the sanctity of private property. While such provisions might still exist in the municipal law of some countries, it was absolutely inadmissible in view

³¹ Saxon Mills, *op. cit.*, p. 12.

³² Bindschedler, "La protection de la propriété privée en Droit International Public" *Recueil des Cours de l'Académie de Droit International*, vol. 90, pp. 198-9.

³³ The Permanent Court of International Justice stated "the principles of respect of acquired rights is a part of general international law" (Series A, No. 7, p. 30). See also *Reports of International Arbitral Awards* (R.I.A.A.), published by the United Nations, vol. II, p. 909, arbitral decision of 27 September 1928, *Goldenberg v. Romania*.

³⁴ Foighel, *op. cit.*, p. 53.

³⁰ Wortley, B. A. *Expropriation in Public International Law*, 1959, p. 126.

of the coexistence of two economic systems, to postulate the principle as a rule of international law."³⁵

(2) *Maintenance of the same legal basis on a more restricted geographical scope*

37. In view of the impossibility of basing the rule on a general principle of law recognized by every civilized State, the attempt has been made to circumscribe that foundation of the rule, and the rule itself, to the relations amongst sharing a similar system of respect for private property. Bindschedler says: "The principle of protection of foreign properties was born in a world in which private relations, and the flow of men and capitals, constituted an essential of international relations: such a movement is not possible except with the guarantees and good faith of the interested Governments. Autarchic States, or those which tend to autarchy, such as the Soviet Union and its satellites, as well as other States where an exacerbated nationalism is in force, may disregard those points of view; or rather, such points of view are determining their actions, since their objective is precisely to exclude foreign investments and limit relations with foreigners to official relations. Their denial of the principle of protection for private property does not originate in general consequences before which they withdrew. But the negative conception of those States which, to a certain extent, withdraw themselves from the international society cannot have effect, in those domains in which they cease to cooperate, on the development of the law which regulates the relations in the interior of that same open international society"³⁶

38. However, this attempt at segregating a particular section of the international community where the duty to compensate for the nationalization of foreign-owned property would continue to be in force, on the ground of respect for private property, does not correspond to reality and is devoid of any practical interest.

39. As previously indicated, even those States which do not admit the private ownership of the means of production, have recognized in practice a duty to compensate for the nationalization of foreign property, not only in their relations with "capitalist" States, but also in their mutual relations. This shows that it continues to be necessary to find a legal foundation for the existing rules which would apply to all States, in accordance with general international law. It does not correspond to fact to say either that communist States withdraw from the inter-State economic community or from international trade or that they refuse radically to make or accept foreign investments.

40. Furthermore, such an attempt to restrict the foundation of the rule, and thereby, the rule itself, to a limited group of States sharing the same economic system, deprives such rule of any practical interest and turns the duty under examination into a potestative one. If such a rule became inapplicable to those States denying the private ownership of the means of production, a safety-value would be open for any Government wishing to evade the obligations here examined. It would be sufficient for that purpose to state the nationalization measures are adopted in furtherance of an economic policy which rejects the private ownership of the means of production.

(3) *The principle of unjust enrichment as the legal foundation of the obligation to compensate*

41. The preceding discussion leads to the inescapable conclusion that it is necessary to find a different legal foundation for the obligation to compensate for large-scale nationalizations affecting foreign-owned property. Contemporary international practice shows also that the claiming State, when formulating its claims, when reaching global compensation

agreements and waiving rights or claims of its nationals, is in fact exercising powers of its own, and is not acting as mere representative or "diplomatic protector" of claims and interests of its nationals. States have attributed themselves large powers of disposition and settlement with respect to individual claims, relegating to a later stage, governed by municipal law, the distribution of any funds which may be obtained in the compensation agreements as "quid pro quo" for the cancellation of the individual claims. Under municipal law, it is even conceivable that no distribution is made to the affected individuals or companies, without any responsibility being incurred thereby under international law. This confirms that a substantial modification of the traditional principles concerning diplomatic protection and the international responsibility of States for the taking of foreign-owned property, has taken place in connexion with large-scale nationalization measures, and also indicates that the rules in force must be grounded on different principles.

42. The principle which may constitute the legal foundation of the conduct of States in this matter is the principle of unjust enrichment. If no compensation was granted, then the nationalizing State would be enriching itself unjustly, not so much at the expense of foreign individuals or companies, but really at the expense of a foreign State considered as a whole and as another and different political and economic unity. Through the unilateral exercise of its sovereign power to nationalize, a State would be depriving a foreign community of the wealth represented by the investments made and thereby would be taking undue advantage of the fact that economic resources proceeding from another State had penetrated its territorial sphere.

43. This legal foundation of the international duty to compensate for the nationalization of foreign-owned property may have important repercussions on the "quantum" of the compensation due. The extent and scope of compensation would be determined by the enrichment obtained by the nationalizing State rather than measured, as it is traditionally done now, by the loss or impoverishment suffered by the affected foreign individual.³⁷ It might become legitimate to take into account whether and in what measure the nationalized properties represent additional assets for the economy of the nationalizing State.

44. Considerations of such a nature seem to have been taken into account in the negotiation of global compensation agreements. The statement of the Swiss Federal Council relative to the agreement with Poland dated 25 June 1949, which provides the best account yet published of negotiations leading to this type of agreement, declares that Poland acknowledged her duty to pay compensation for the nationalized property of aliens but that she attached a limitation to this duty: compensation was to be paid only for those investments which had benefited the Polish economy. The Swiss report implies that in the end the valuation of nationalized Swiss property was based on the value which any particular asset had for the Polish State.³⁸ It may be considered that these reasons also explain why compensation is denied for "goodwill" or "business reputation", since this element normally does not constitute an enrichment for the State in a nationalized economy. There is a complete absence of any reference to goodwill or business reputation in any of the post-war compensation agreements.³⁹ By the same token, "lucrum cessans" or the loss of future profits of an enterprise is not included in the compensation.⁴⁰ Likewise, the measures which originate a duty to compensate are those which determine a transfer of rights or interests in favour of the nationalizing State or any of its agencies. As Bindschedler indicates, measures

³⁵ *Yearbook of the International Law Commission*, 1960, vol. I, 568th meeting, para. 42.

³⁶ *Op. cit.*, pp. 198-9.

³⁷ *Legal Aspects of Foreign Investment*, Friedmann and Pugh, editors, Chapter 41, by A.A. Fatouros, pp. 723 and 729.

³⁸ G. White, *Nationalization of Foreign Property*, London, 1961, pp. 223-224.

³⁹ White, *op. cit.*, p. 49.

⁴⁰ Bindschedler, *op. cit.*, p. 247 and note.

such as the suppression of slavery of the total suppression, for reasons of general policy, of a detrimental or inconvenient industrial or commercial activity, are not subject to compensation. The reason may well be that in those cases no enrichment is gained by the State, although a loss may be incurred by the foreign owner.⁴¹

45. The fact of basing the duty to compensate on the principle of unjust enrichment also explains some of the solutions adopted in the global compensation agreements concerning the effectiveness of the payment. Effectiveness refers to the possibility of the immediate utilization of the indemnity. With respect to the possibility of the free transfer of any funds abroad, most global compensation agreements deal differently with those cases in which the nationalized funds have originated in a foreign State, and those in which the foreigner acquired the funds in the country, by succession or marriage, for instance.⁴² In the Netherlands-Czechoslovakia agreement of 4 November 1949, the compensation was transferable into Netherlands currency to the extent to which the nationalized property represented a capital increment to the Czechoslovak Republic, a provision which occurs in several of these agreements.⁴³ A capital increment was taken to mean any investment made by a Netherlands subject through the transfer of gold, guilders or other foreign exchange which was freely convertible at the time of transfer, and accumulated profits arising from such investments. Movable property introduced into Czechoslovakia also constituted a capital increment. In general, payment in the currency of the claimant State was granted only where it was considered by the nationalizing State that a comparable benefit had accrued to them at the time of the original investment.⁴⁴

(4) *Unjust enrichment as a general principle of law recognized by civilized nations*

46. In an arbitral decision issued in 1931 it is stated "that the theory of unjust enrichment as such has not yet been transplanted to the field of international law as this is of a juridical order distinct from local or private law".⁴⁵

47. However, a cursory examination of comparative law shows that the principle of unjust enrichment is today generally, with differences of detail, by all municipal legal systems, whether they belong to common law or to civil law countries. It is expressly embodied in the German, Swiss, Italian, Japanese, Austrian, Turkish, Spanish and Latin-American civil codes. The French, Belgian and Dutch courts have recognized and applied the principle, despite the absence of a specific provision in the Napoleonic Code.⁴⁶ The United States Restatement on Restitution provides in article I that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other".⁴⁷ This action "in rem verso" is also recognized in Canada and is the law of the Province of Quebec.⁴⁸ In the English law, "the various actions for moneys delivered and received 'quantum meruit', constructive trust etc. constitute the elements of a principle of enrichment".⁴⁹ The Civil Code of the USSR in sections 399-401 recognizes this same principle⁵⁰ as does Polish law.⁵¹

⁴¹ *Ibid.*

⁴² Bindschedler, *op. cit.*, p. 270.

⁴³ White, *op. cit.*, p. 200.

⁴⁴ White, *op. cit.*, p. 241 and examples there indicated.

⁴⁵ Dickson Car Wheel Co. v. Mexico, General Claims Commission R.I.A.A., vol. IV, p. 676.

⁴⁶ Dalloz, 92.1.596.

⁴⁷ Restatement on Restitution, Section 1. See Dawson, "Unjust Enrichment: A Comparative Analysis", 1951.

⁴⁸ Baxter, "Unjust Enrichment in the Canadian Common Law and in Quebec Law", *The Canadian Bar Review*, Oct. 1954, p. 855.

⁴⁹ Friedmann, *Legal Theory*, p. 392 and O'Connell, "Unjust Enrichment" in *American Journal of Comparative Law*, 1956, pp. 2 *et seq.*

⁵⁰ Gsovsky, *Soviet Civil Law*, vol. II, pp. 202-207.

⁵¹ A. Ohanowicz, *l'azione d'indebito arricchimento nel diritto civile polacco*, Riv. Dir. Comm. 1961, p. 328.

48. In fact, all the main legal systems, ancient and modern, have found it necessary to provide relief, in a greater or lesser degree, in order to prevent unjust enrichment. Fundamentally, there is nothing new in the idea of unjust enrichment; it is almost as old as justice.⁵² Any civilized system, as Lord Wright has insisted,⁵³ must recognize the equities of the case and impute to the party enriched an obligation to restore the benefit or its economic equivalent.

49. This principle has also gained recognition in international law. Huber in his arbitration on the British claims against Spain, relating to the Spanish Zone in Morocco, applied this doctrine in a case which referred to the payment of rentals for the use of a property of a British subject by the Spanish authorities. In disposing of the contention that a lease cannot be presumed, and that without a lease agreement there can be no obligation to pay rent, Huber stated "it is a generally recognized principle that obligations 'quasi ex-contractu' may arise from unilateral acts. The prolonged occupation of an immovable property by the authorities, without the consent of the owner, without an expropriation procedure and without excuse of military necessity, certainly constitutes a sufficiently extraordinary fact which has all the characteristics which allow to deduce from it obligations 'quasi ex-contractu' at the charge of the authorities and in favour of the owner".⁵⁴

50. Finally, in the Lena Goldfield arbitration, the tribunal declared that "when a foreign company, at the request of a foreign government, has invested capital, work and technical capacity in the development of a mining industry, the expropriation of such property without indemnity constitutes an unjust enrichment of the expropriating government at the expense of the foreigner."⁵⁵

Part III — Conclusions

51. As the question of compensation for nationalization is surveyed, the first impression may be one of conflicting claims in the statements of various States; some of them claiming adequate, prompt and effective compensation while others deny, on various legal grounds, any obligation to compensate. But after this discussion subsides, the observer cannot fail to be impressed with the fact that States, mainly interested in maintaining or re-establishing their currents of trade and in receiving or making foreign investments, do usually reach after a time practical agreements.

52. In such agreements, those States which contend that compensation must be adequate and prompt settle for what they may consider inadequate and delayed indemnization, and those States which deny any liability to pay do compensate in fact, taking into account, to an extent compatible with their financial capacity, the interests of foreign States.

53. This long-range trend is reflected in the now prevailing practice of the global or "lump-sum" compensation agreements, which show that the classical picture of the responsibility of a State towards a foreign individual or a foreign company has been changed. The affected individual disappears from the international scene, and he only reappears, if at all, before national organs.

54. This treaty practice has become so widespread that more than fifty of such bilateral agreements have entered into force since the war. Included in this figure are agreements between States which do not accept the private ownership of the means of production, but which have found it necessary to settle all obligations of one State against the other for the measures of nationalization affecting rights and

⁵² Baxter, *op. cit.*, p. 881.

⁵³ *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* (1943) A.C. 32 at p. 61.

⁵⁴ R.I.A.A., vol. II, p. 682.

⁵⁵ See Nussbaum A., "The Arbitration between the Lena Goldfield and the Soviet Government", *Cornell Law Review*, 1950-51, pp. 31 *et seq.*

interests of nationals of one of the parties in the territory of the other.

55. It might be possible to infer certain conclusions from this established treaty practice as to the existence, foundation and scope of a duty to compensate for the nationalization of foreign-owned property.

56. The apparent disagreements in this field may be more of philosophical approach or of legal foundation than of the actual practice and conduct of States. It is evident that it is not possible to assume the existence in general international law of a rule providing for the respect of private property, when obviously this is not a general principle of law recognized now by all civilized States.

57. The possibility of finding and establishing the existence of a certain duty to make a certain compensation — as revealed by the widespread treaty practice — might be based on a different legal ground, namely, on the principle prohibiting unjust enrichment, which all civilized legal systems recognize and accept.

58. This different legal ground of the unjust enrichment of one State at the expense of another might have important repercussions on the scope and extent of the duty to compensate, as well as on the effectiveness of the payment. The compensation that the nationalizing State would have to pay would be assessed on the basis of its gain and not on the basis of the alien's loss, and the free transfer of the indemnity would depend on the extent of that State's own enrichment.

AN APPROACH TO STATE RESPONSIBILITY

*submitted by Mr. Angel Modesto Paredes*⁵⁶

The law on the international responsibility of States should be fundamentally revised in line with modern ideas regarding the conduct of States, the main novel features of which include the following:

1. The traditional legal principle which exempted collective entities from all criminal liability has been superseded; criminal liability can now be imputed not only to the public representative directly responsible for the injury but also to the entity in whose name he acted. This explains the large number of cases in which rulers have been put on trial by reason of their official acts, even where they had performed these acts in the exercise of their constitutional powers, and the cases in which sanctions have been ordered against the States concerned. It should be noted that the sanctions in question comport the idea of punishment; they do not represent the mere use of force to impose a particular conduct, as in the case of war or action short of war, such as the breach of diplomatic relations.

2. There is a tendency to hold the country which is considered guilty answerable collectively. This is demonstrated not only by the proposition accepted in the various international Charters that an unjustified armed attack against any of the member States is deemed to be an attack upon all, but also by the function entrusted to international bodies of safeguarding the peace and security of members against any conduct or action which may threaten them. This involves a risk for the nations, in that these international bodies may claim excessive powers and invade the domain reserved to the exclusive domestic jurisdiction of States. Another question may well be asked: if a country is deliberately excluded against its will from a particular organization of States, is that country bound by the decisions of that organization and can sanctions be legally applied to that country?

3. In our time, the content of international co-operation has acquired a very special significance, in contrast to the traditional isolation upheld by the former legal postulates of sovereignty and individualism. There is no need for a formal agreement between nations for these to be entitled to mutual co-operation, for that co-operation is implicit in the recognition of identical ends and means for all mankind. As a result, what were formerly considered as purely moral duties are now effectively acquiring a legal character; this happens sometimes hesitatingly and in the form of assistance given without obligation but these situations contain the seeds of future developments.

Firstly: From the foregoing it follows that there are acts and omissions for which a State is answerable both civilly (reparation) and penally, in the same manner as an individual who causes an injury to another person.

Special importance attaches, in this connexion, to matters relating to the fundamental rights of peoples enumerated in the [author's draft] agreement on "The exclusive domestic jurisdiction of States", from which the following rules can be deduced:

1. No one may supplant the government of a people in the exercise of its constitutional functions; any infringement of this rule involves the responsibility both of those who carried out the wrongful act and of those who, being able to resist, tolerated the act.

No agreement, pact or act of compliance can be pleaded in justification of such acts.

Collective assistance can be requested or offered only if the legitimate authority declares itself not competent to discharge its duties, and provided always that no other body claims that competence.

2. An international juridical person possessing full capacity may neither contract nor consent to surrender any part of its exclusive jurisdiction; any agreement entered into to this effect should be deemed to be void and inoperative.

If a government finds that its duties are beyond its means, it should apply to the international organizations of which it is a member for assistance out of the resources of those organizations.

3. Any international juridical person which obstructs the free constitutional development of another thereby commits a violation of international law and is responsible for the injury caused, both civilly (reparation), and, where applicable, criminally as well.

4. The adoption of a particular political system and the choice of the persons to apply it are domestic matters which admit of no outside interference; a country disturbed by such interference may accordingly apply to the international organization responsible for the peace and security of nations.

The object of this application is to cause the intervention to cease, and not to provoke it; accordingly, no individual or collective disturbing action will be permitted and the responsibility for any such action will be imputable to all those who contributed to it.

5. The international economic policy of every government should be conducted by that government itself; however, agreements relating to common markets, mutual benefits, systems of co-operation and preferential treatment are lawful, provided that such agreements do not imply economic warfare, unfair competition or unjust prejudice to others.

6. Prejudicial economic conduct decided upon or carried out unlawfully by a people or a group of peoples against another people, may be impugned by the latter people as punishable aggression.

7. An economic blockade may be ordered only by the competent international organization, as the sanction for an offence duly proved and declared as such by the competent court, or as a means of compelling an international juridical person to carry out duties that may be legitimately imposed upon it, likewise through the agency of the competent collective organ.

⁵⁶ Originally circulated as mimeographed document ILC/(XIV)/SC.1/WP. 2 and Add. 1.

8. Fiscal matters are within the exclusive domestic jurisdiction of the State, and no other international legal entity has any power to supplant the administrator competent to handle State funds.

9. No foreign authority may, either on its own decision or with the consent or even at the request of the government of a country, collect taxes or constitute mortgages or pledges on that country's public revenues or carry out in these matters any other act on behalf of the State. Notwithstanding any treaty provisions to the contrary, the aggrieved party has the right to lodge a complaint with the competent international organ.

10. The supervision and protection of private individuals in a country is the primary duty of its government, and that government may be neither supplanted nor assisted by any other in the fulfilment of that duty; a State may, however, give a guarantee regarding the extent and manner in which it will carry out its obligations towards private individuals.

11. Any injured person may, by virtue of such a guarantee, enter a claim with the competent foreign authorities within the limits and in the form agreed in the relevant treaty.

Rules of competence for the court will be laid down at the time of its establishment and its procedure will be set forth in its statute.

12. In the drafting of the statute of the court of private claims, the protection of private individuals will be taken primarily into account, subject to due regard for the right of governments to stability.

13. An alien living in any territory whatsoever is under the protection of the national authorities and enjoys the same rights and privileges as a national but is subject to the same burdens, both in so far as the alien's personal status permits.

No alien may enjoy a privileged position, and any claim made on his behalf must be strictly subject to the application of the rules of law.

Claims by aliens will be dealt with by the same courts as deal with claims by other inhabitants of the country.

Likewise, any complaint by an alien in the international sphere will be dealt with by the judges who deal with those of nationals.

Secondly: In this century, offensive and defensive alliances have been replaced by a more extensive and durable co-operation between States, which has led to the establishment of international organizations, whether world-wide or regional like the Organization of American States. These organizations propound the following principles in particular:

(a) Common aims for all member States, and common means to achieve those aims. Neither the diversity of races nor that of levels of culture, nor the different political systems constitute an obstacle in that respect. These principles are placed above and beyond any temporary agreements, since the United Nations is prepared to entertain claims by non-member States which are prepared to accept its procedures.

(b) Peace and joint prosperity can be achieved by means of the understanding between men. This fundamental concept utterly refutes the propaganda according to which the Western and Eastern political systems are so irreconcilable that they cannot co-exist in the world to-day.

(c) Disagreements between men give rise to alarm, insecurity and war, the results and ultimate consequences of which do not affect merely those directly and immediately concerned but reach very much further and constitute, to use the words of the San Francisco Charter, a "threat to international peace and security".

(d) It is therefore in the interest of all to avoid conflicts and to try to settle them speedily.

(e) In consequence of the foregoing, it is an established contemporary rule of conduct that an aggression against any of the member States is deemed to be an aggression against all of them.

(f) For this reason, the main organs of these organisations

are ready to protect members against such risks. However, peaceful methods and efforts to reach agreement must first be exhausted before any means of coercion are used.

(g) Accordingly, certain powers of adjudication have been established at various levels of jurisdiction.

(h) One of the consequences of the foregoing is that many risks are involved, particularly the risk that a particular conduct may be imposed upon a State which is not a member of the organization, on the pretext that there is a threat to the member States or to international peace and security. This is a delicate question which requires very thorough study, lest these prerogatives be exercised in defiance of justice and law.

These doctrines have given rise to a new system of restraint on States, which leaves behind the methods of ordeal by justice exclusively practised previously and replaces it by a judicial system for the enforcement of the rule of law. At present, in international matters, powers of adjudication have been established, with various branches and levels of jurisdiction, so that it is safe to assert that in international matters, as in national matters, no one may take the law into his own hands.

The complexity and novelty of the subject require a thorough examination of the problems which it involves, in order to discern the appropriate and direct relationship between the question to be settled and the jurisdiction of the judge competent to deal with it; it is necessary in this respect to avoid as far as possible all confusion in matters of jurisdiction and to assert the competence of the judiciary to correct where necessary any injustice which may arise from political exigencies. For these reasons, we suggest the establishment of a judicial body based on the following principles:

1. A court to deal with constitutional matters at the international level:

(a) The first duty of the court will be to determine whether a particular question is an international matter or a matter within the exclusive domestic jurisdiction of the State concerned;

(b) If the matter is recognized as being within the exclusive national jurisdiction, the court will so inform the international organization dealing with the case, so that organization should abstain;

(c) If several States are involved in the problem under discussion, the court will render a decision indicating the international organ competent to deal with it;

(d) If the case does not involve matters at the national constitutional level but at the international level, the court will likewise determine the competent organ.

2. A court or division of the court, to deal with administrative questions.

The court will, in the first place, at the request of any of the parties concerned, determine the legal nature of the dispute and, if appropriate, refer it to the national authorities.

If the case is found to involve international administrative matters, the court will, at the request of a party having a legitimate interest determine the authority having jurisdiction in the matter.

3. A division of the court will deal with fiscal matters pertaining to the functioning of the international organization concerned.

4. A fourth division of the court will consider and adjudicate upon the civil reparation which may be due in respect of an injury caused by one international juridical person to another.

If an international organ imposes a fine or some form of civil reparation, the party affected may apply to the judicial authority established under this article for a ruling on the question of the jurisdiction of the organ in question.

If the ruling is that there was no jurisdiction, there will be no obligation to pay reparations. On the other hand, if the jurisdiction is upheld, the court may not pronounce upon the amount of damages or upon other aspects of the decision which was competently rendered.

5. No international penal sanction may be applied without a decision of the international criminal court:

- (a) The court will have exclusive jurisdiction to deal with certain penal matters;
- (b) The court will have preventive jurisdiction with respect to other aspects of the offence; and
- (c) The court may and should review the more severe sanctions imposed by other international organs.

6. Claims against States submitted by private individuals to international organs will be dealt with by another judicial body and by different methods.

Thirdly: Duties relating to co-operation between States

Whereas:

the new meaning of international co-operation follows from the recognition of the inter-dependence of peoples for the purpose of the achievement of their objectives and the fulfilment of their destiny;

the equal objectives and destinies reflect the needs of the human race, which are substantially the same for all;

the said objectives are accordingly best achieved through ventures undertaken by the nations acting in common;

such action may take the form of: (a) assistance and actual support; (b) the avoidance on the part of Governments of acts capable of causing harm to other peoples; (c) the prohibition of any positive prejudice to others; and, (d) responsibility for omissions which cause prejudice;

the protection to be accorded to a nation needing it, without placing that nation in a position of dependency, can only be given through the collective action of the body representing a community;

a Government may not, even in the legitimate exercise of its powers, cause prejudice to any other international person without incurring the obligation to make reparation, unless it can be proved that the action was unavoidable for the purpose of safeguarding its own needs and that all possible precautions were taken to cause no harm or as little harm as possible to others;

if there is intent to cause prejudice, the act shall give rise to a claim for reparation, even if it is not punishable in itself; omissions may be malicious or culpable; malicious, if the injury was foreseen and the action necessary to prevent it was not taken, with intent to cause the injury; and culpable, if there is failure to take the necessary precautions, through inattention or negligence.

Now therefore the High Contracting Parties proclaim the following

DUTIES OF STATE SOLIDARITY:

Article 1. Any damage occasioned to one State concerns and affects the others.

Article 2. If the damage is a result of a natural phenomenon, such as earthquakes, floods and other great disasters, nations are under an obligation to provide relief.

Article 3. This relief shall be provided through an international commission of permanent officials appointed for the purpose, to be known as the Relief Commission.

Article 4. The Commission shall inform each State of the amount of its contribution.

Article 5. After a Government has been notified of its contribution it shall be responsible for sending the contribution to the Commission, which shall transmit it to the victim.

Article 6. Duties between States also arise out of their respective geographical positions and out of the inter-dependence resulting from the configuration of the terrain, as happens in the case of international inland waterways and proximity to a sea.

Article 7. The circumstances referred to in the preceding article imply many prohibitions and mutual responsibilities.

Article 8. International trade implies duties of mutual respect and the prohibition of unfair competition.

Article 9. No person, whether individually or jointly with

others, is free to use assets owned in common by all in ways which are prejudicial to others.

Article 10. Prejudicial use may occur in the following ways: either because the property is used for a purpose different from that for which it is, by its nature, intended; or because it is exploited inconsiderately and in a way liable to exhaust its resources; or because it is used in a way which is harmful to the user and to others. Anyone proposing to sterilize the atmosphere of a region in such a way as to prevent or impede the biological development of that region would be guilty of the first offence; the mass destruction of the resources of the sea or the use of such resources in an imprudent and unregulated manner come under the second heading; atomic explosions, with all the evils they involve, are examples of the third case.

Article 11. Any person who attempts to change the use of an asset which is *res communis omnium*, or who deprives others of the use of part of that asset, may be forbidden, either temporarily or permanently, to enjoy or use the asset in question, upon proof of the act or acts imputed to that person. In addition, the person concerned shall be liable for compensation for the damage caused.

Article 12. Natural resources which are *res communis omnium* shall be exploited under international control and regulation. The control organ shall be competent to judge violations and to impose penalties.

Article 13. No person may involve himself or others in avoidable dangers, even on the pretext of scientific research. In the latter case, the authorization of the organ to which such authority has been given shall be required, and it shall be given on the basis of a circumstantial report from competent technicians.

Article 14. Any person who performs such an act regardless of an express prohibition, or who does not apply for authorization to carry it out or does not act as he has been instructed to, shall be prosecuted for the commission of an international offence or shall be liable to any penalties resulting from it and shall be responsible for compensation for any injury caused.

Article 15. Any person who causes prejudice to another by acts permitted and carried out under the terms of the authorization shall be responsible for the value of the damage, even though the acts were authorized.

Article 16. Omissions, in the international field, may be malicious or culpable.

Article 17. An omission is malicious if there has been failure to carry out a duty positively imposed by a treaty, a convention, or any other legal instrument; an omission is culpable if it conflicts with the mutual security which States owe to one another; for instance, if one State is aware of imminent danger threatening another and does not inform that State, that is a culpable omission.

WORKING PAPER

*prepared by Mr. André Gros*⁵⁷

The International Law Commission has decided that the members of the Sub-Committee on State Responsibility should submit to the Secretariat memoranda on the main aspects of the subject.

In the light of the first general debate in the Commission and in order to facilitate the Sub-Committee's initial proceedings, it seems essential to specify rapidly the general conditions for the work to be done in the Sub-Committee.

It is now apparently accepted that the Commission considers it possible to examine the problem of State responsibility by taking into consideration judicial precedents and diplomatic practice bearing on cases of responsibility concerning the treatment of aliens, without, however, making of something which

⁵⁷ Originally circulated as mimeographed document A/CN.4/SC.1/WP.3.

is only a part of international law the sole source of State responsibility. This basic concept being established, it seems to me that the study of State responsibility might be conducted in the following manner:

I. General definition of the law of responsibility

While there can be no question of writing a theoretical treatise on responsibility, agreement must be reached on the general aspects of this problem of law. Personally, I would say that, as in any legal system, responsibility in international law has two aspects:

(1) It is a claim for redress against an act which has resulted in an injury.

(2) This claim, in order to be validly made and maintained, has to fulfil certain conditions.

While these two aspects may be distinguished for the purposes of the study, it should be borne in mind that this distinction reflects an academic definition and that these two elements are inseparably connected in constituting the law of State responsibility. Agreement on the machinery for making an international claim would be useless if there was no agreement on the general rules of substance concerning such claims. The existence of these two aspects of the law of responsibility and the connexion between them are perfectly clear in the domestic law of responsibility in every State.

Thus, in French private law, article 1382 of the Civil Code laid down a rule which has become widely known:

"Any human act resulting in injury to another person imposes, on the person whose wrongful act resulted in the injury, a duty to make reparation for it."

This article specifies the "source" of responsibility; as to the machinery for obtaining redress, it consists in the procedures established by the rules of French private law. The Sub-Committee might thus consider whether there was, in international law, an equivalent to this "source" of responsibility which is defined in the various systems of private law. There is a category of cases of State responsibility in which this analogy with private law is all the more justified in that these cases involve persons and the State protecting those persons lays claim to a certain treatment or to reparation on their behalf, even if, as the Permanent Court of International Justice says, in doing so the State acts by invoking its own right. This is the classic theory of diplomatic or consular protection on behalf of a State's nationals (see the Vienna Convention of 1961, article 3, and article 4 of the draft articles on consular relations adopted unanimously by the International Law Commission in 1961). The claim bears on the violation of an interest or the violation of a right, to use the actual words of the texts prepared by the Commission. Protection based on the violation of a right implies a theory of the Commission. Protection based on the violation of the international responsibility of the State. This may be studied and defined.

In a study of this general definition, the essential rule of State sovereignty naturally cannot be disregarded, and there is no question of recognizing a right of intervention by foreign States in the domestic affairs of a State, but it is self evident that all States engage in diplomatic and consular protection of their nationals and, as I have just noted, the two major conventions prepared by the Commission itself recognize this right of protection. That, therefore, can be regarded as a first topic of study, the outcome of which should be a definition of the general conditions, and of the limits, of the international responsibility of the State.

II. Other problems which should be examined

It seems unnecessary, with a view to beginning the general debate in the Sub-Committee, that each member should state definitively, in his memorandum, the method of discussion he envisages. Personally, I consider that the order in which the various points listed below are discussed is not of major importance. What is needed is a general outline, but any of the aspects in question may be studied first.

Given this indication of method, it seems that the problems to be examined are:

A. Subjects of law in international responsibility (who bears the international duty?);

B. Scope of the international duty (kinds of duties, procedures for disciplining);

C. The problem of the elements of guilt;

D. Machinery:

(a) the condition of nationality;

(b) exhaustion of local remedies.

These notes are intended solely to facilitate the opening of the debate in the Sub-Committee and the preparation of general directives for the Special Rapporteur who will be responsible for drafting the report.

WORKING DOCUMENT

prepared by Mr. Senjin Tsuruoka⁵⁸

I. INTRODUCTION

Working Method

1. A State which infringes a right of another State by an act or omission contrary to international law incurs responsibility for restoration of the right infringed or for reparation in respect of the injury caused. That is the principle of State responsibility as established in international law. It is easy to see that such a principle, once it is formulated in clear and comprehensive terms, in its many aspects, will be the more effective in forestalling breaches of international obligations and consequently in ensuring the rule of international law. I am glad the International Law Commission is now able to undertake the codification of this important branch of international law.

2. I think we must turn first of all to the question of the method or organization of the work of the International Law Commission, for in my view this is of greater importance in the codification of State responsibility than in the codification of other topics.

I would suggest to the International Law Commission:

(a) that it undertake first the codification of "State responsibility for injury to the person or property of aliens" (hereinafter referred to as "State responsibility *stricto sensu*") and that it then proceed to codify the general principles governing all aspects of State responsibility in the broad sense of the term;

(b) or (and this is a variation of my proposal above) that it undertake the codification of State responsibility both *stricto sensu* and *lato sensu* at the same time.

What is important, in my view, is that the International Law Commission should not omit to codify the system of State responsibility *stricto sensu* and that it should devote its efforts to that end before giving special attention to other individual branches of the law of responsibility *lato sensu*.

Some of the reasons which have led me to adopt the view I have just mentioned are set out in paragraphs 3, 4, 5 and 6 below. At the same time I shall venture to draw the attention of the International Law Commission to a number of points. I hope that it will bear them in mind when it codifies the general principles governing State responsibility *lato sensu*.

3. In considering the method of work to be adopted in the codification of State responsibility, I have been guided by two considerations: respect for the spirit of the United Nations Charter (Article 13, paragraph 1 a) and the Statute of the

⁵⁸ Originally circulated as mimeographed document A/CN.4/SC.1/WP.4.

International Law Commission, and concern to make the work of the Commission as fruitful as possible.

Let us note in passing, although everyone is aware of it, that the International Law Commission, as an organ of the United Nations General Assembly, has the task of ensuring the progressive development of international law and working on its codification. It is neither an international legislative body nor an academic institution. Its essential purpose is not to renew international law or to establish a purely theoretical legal system. On the contrary, its work should result from research into the rules of positive international law. It should establish a legal system better adapted to the new conditions of international life, but in conformity with positive international law. In other words, it must not be over-bold in its innovations yet must contrive to meet the new needs of the international community, whilst harmonizing the legitimate interests of all members of that community.

With these concerns as my point of departure, I soon found myself confronted by certain salient features which characterize the law of State responsibility. I shall mention them in the pages which follow.

4. State responsibility *lato sensu* is entailed by failure in many ways to fulfil various international obligations. Its aspects, characteristics and mechanisms vary almost infinitely according to the different kinds of failure in question and the variety of the circumstances in which the failure occurs. Furthermore, since in practice State responsibility is most often understood as the duty to make reparation for injuries caused, it cannot be denied that the presence or absence of reparation sometimes decides the question whether or not the responsibility itself can be said to exist. In short, the system of State responsibility *lato sensu* covers a vast field of international law and is highly complicated.

It will therefore be agreed that it would be an arduous undertaking to try to pick out from this vast and complex field the general principles applicable to all aspects of State responsibility *lato sensu*. Still greater difficulties would be encountered if the attempt were made, as it must be, to invest the principles thus isolated not just with theoretical but with real and practical value.

5. If this is true for the codification of the principles embracing all branches of the law of State responsibility, there is one which is well suited to codification; it is that governing the law of State responsibility in the matter of injuries caused to the person or property of aliens. What is more, the codification of the latter will help to meet the pressing needs of the world economic situation. It will have the further effect of greatly facilitating the task of codifying the law of responsibility *lato sensu*, the advantage of which will be all the greater since the difficulties in the way of such a task are considerable.

But why and how does the system of State responsibility *stricto sensu* lend itself so well to codification?

We should first of all point to the great number of precedents, above all in the practice of international tribunals, and the wealth of literature accumulated in the course of history. We should also mention the existence of important works on codification in this branch. In particular it is significant that nearly all the work done so far on the codification of State responsibility relates only to State responsibility *stricto sensu*. It is certainly neither by simple oversight nor by chance that such works have been restricted to this one area of State responsibility; on the contrary, it shows that throughout its history the notion of the law of State responsibility has grown up almost exclusively around the question of the protection of the person or property of aliens. And this subject is still such a burning issue in modern international life that State responsibility in this matter has finally come to be regarded not only as the prototype or kernel of State responsibility but also as the very synonym for it.

In the light of these facts, once we admit that the International Law Commission has no other task than to ensure the progressive development and codification of international

law, and that in the way I explained above (see paragraph 3), it will not be disputed that the system of responsibility *stricto sensu* has all the prerequisites for codification. It will also be agreed that the Commission would do well to undertake work specially devoted to this topic. Finally, it will be recognized that the Commission can hardly codify the law of State responsibility *lato sensu* without constant reference to it.

But there is more. Codification of the law concerning the protection of aliens will meet the needs of the international community, the common responsibilities and interdependence of which are becoming daily more pronounced, above all as a result of progress in communications. In particular, it will facilitate economic and technical co-operation between the developing countries and the industrialized nations by giving greater security to the men and property sent abroad for that purpose.

In addition, we cannot pass over in silence another not inconsiderable advantage, to which I referred just now, from which the Commission will be able to benefit: the fact that there are quite a few codification projects, both official and private, bearing on the law of State responsibility. And they do not date back so very far. Moreover, the Commission has its own documents: six reports on the matter submitted by its Special Rapporteur, Dr. F. V. García Amador.

Moreover, a comparison of this sector of the law of State responsibility with other sectors of the same body of law shows even more clearly how much better suited to codification it is than the others.

Of course, no one denies the importance of the questions that arise in connexion with different types of State responsibility which result from violations of principles or rights recognized under international law, such as the principles of the territorial integrity and the political independence of States, the right of peoples to self-determination, and the right of States to work their natural resources. I believe also that the general principle of State responsibility formulated at the very beginning of this report (paragraph 1 above) applies to these different aspects of the question. Leaving aside that general principle, however, legal rules governing these various aspects of State responsibility do not exist at the present stage on the development of international law, in a sufficiently concrete, specific form for suitable codification. If, therefore, in spite of these unfavourable conditions the Commission should attempt the task of codification in this sector, it would be forced to establish a great many new rules. In so doing, it might well exceed the terms of reference laid down in its Statute, since it would then no longer be dealing with the progressive development or codification of international law. That is not true, however, in the case of the codification of the law of State responsibility *stricto sensu*.

I trust that I have now sufficiently explained my main reasons for putting forward the proposal contained in paragraph 2 above.

6. Before concluding this section of my paper, however, I should like to express the hope that, if the International Law Commission should begin its work with the codification of the general principles governing all aspects of State responsibility:

- (a) it will not depart unduly from established usage and practice and will be cautious in making innovations;
- (b) it will recognize the fact that the law of State responsibility for injuries caused to the person or property of aliens is a rich source of material for the codification of the general principles governing State responsibility *lato sensu*;
- (c) it will also recognize that the codification of the aforementioned general principles should be supplemented by the codification of the law of responsibility *stricto sensu*;
- (d) the members of the Commission will not seek to gain special advantages for any given State or group of States from the work of codification but, on the contrary, will try to harmonize the legitimate interests of all States.

7. I should like to make a further point. Like Sir Humphrey Waldock, I deplore the "decline of the optional clause" (Statute of the International Court of Justice, Article 36, para-

graph 2). However excellent the work of the International Law Commission may be and however many States may accept it, the principles laid down will be ineffective and may even remain inoperative so long as guarantees for their strict application do not exist. I earnestly hope that, in order to provide the international community with such guarantees, the Commission will undertake a study, as soon as possible, of the means of strengthening the system of judicial procedure. Consideration could be given, for example, to the possibility of encouraging acceptance of the optional clause of the Statute of the International Court of Justice and to the necessity of setting up international tribunals.

II. GENERAL PRINCIPLES GOVERNING THE LAW OF STATE RESPONSIBILITY

8. In this section of my paper, I intend to deal with certain questions which, in my opinion, will call for discussion by the International Law Commission when it codifies the general principles governing State responsibility. Needless to say, I shall confine myself, at this preliminary stage of the Commission's work, to observations of a general nature leaving details on one side. The questions to which I shall address myself may be grouped as follows:

- (1) The juridical nature of State responsibility;
- (2) The constituent elements of State responsibility:
 - (a) the legal capacity of States incurring responsibility;
 - (b) the wilful act and fault (*culpa*);
 - (c) injury to legal interests;
- (3) Exoneration from responsibility;
- (4) Extinguishment of responsibility previously incurred.

9. The juridical nature of State responsibility is a subject which has been extensively discussed by the authorities. There is general agreement that the juridical nature of the responsibility resulting from breaches of international obligations is similar to that of civil responsibility under municipal law. When a State commits an act which is contrary to a rule of international law, the question which normally arises is that concerning the restoration of the right infringed or of reparation for the injury sustained. In other words, what is usually involved is a responsibility on the part of the State which has caused injury to the legal interest of another State to make reparation for that injury. Of course, it sometimes happens that a breach of an international obligation constitutes an act punishable under international law, as in the case of a crime under municipal law. In such cases, the breach goes beyond the scope of relations between the two States which, respectively, caused and sustained the injury, and the State which caused the injury incurs penal responsibility similar to that under municipal law. It should be noted in that connexion that there is an increasingly pronounced tendency to regard certain types of State responsibility as being penal in nature. This reflects a new development in the international community. Since the Second World War, the latter has tended to centralize certain types of jurisdiction, as is strikingly demonstrated by some provisions of the United Nations Charter. It is held by some, for example, that a breach of international obligations which affects the fundamental rights of the State is to be regarded as a violation of the general interest of the international community as a whole. In such cases, from the point of view of the general interest of the international community as a whole, there is considerable justification for saying that, quite apart from the question of civil responsibility arising between the States directly concerned, there are some grounds for the imposition of a sanction. It should be noted at the same time, however, that, at the present stage of its development, the structure of the international community is not yet so well organized that State responsibility can, as a general rule, be dealt with in these terms.

In my opinion, the International Law Commission should confine itself to stating that, generally speaking, State responsibility is of a juridical nature similar to that of civil responsi-

bility under municipal law and that, in certain exceptional cases, it entails the imposition of a sanction.

10. Consideration of the constituent elements of State responsibility should relate, in the first place, to the commission of an act which is unlawful under international law. The breach or non-performance of the rules of international law normally arises out of an act or omission which are contrary to the material standards of that body of law. I should be noted that such acts or omissions must, in particular, be contrary to international obligations in force between the State committing the act or omission and the State injured thereby. Consideration should next be given to the legal capacity of the State which committed the act or omission. In the case of a State of limited capacity, the imputability of the act or omission should be decided in terms of the delegated powers. In some cases of this nature, there is a form of delegated responsibility within the framework of those powers.

11. The State is a body corporate. Hence, an unlawful act by a State is in reality an act or omission by an individual which is deemed to be the unlawful act of the State whose responsibility is involved. The question of the imputability of responsibility to a State by reason of an act committed by an individual is one which needs clarification. Normally, an act committed by the agent of a State constitutes an act of that State. Thus, a State incurs responsibility for any act committed by one of its agents acting within the real or apparent limits of his competence. That is true irrespective of whether the agent in question is the Head of State, the Head of Government, the Minister for Foreign Affairs or some other person belonging to the legislative, judicial or administrative organs.

12. Does the State incur international responsibility for the action of a private person and, if so, to what degree? That is a subject of controversy among the authorities and of uncertainty in practice. But what is certain is that the State is bound to some extent to prevent any action by a private person likely to cause injury to aliens on the territory in which it exercises its sovereignty. The rule applies both in the case of an individual and in the case of a group. Consequently, the State incurs international responsibility for an injury caused by the act of an individual if it does not exercise due diligence to prevent such an action. The degree of diligence which it should exercise, I believe, is that which may be expected of a civilized State.

13. Anyone who infringes the right of another by an intentional act or negligence is required to repair the injury sustained. That is a general principle of private law recognized throughout the civilized world.

But how can it be introduced, in a modified form, into the law of State responsibility? The question is not a simple one. According to traditional notions, since the intentional act or negligence is regarded as a constituent element of international responsibility, the principle of *culpa* is the basis for international responsibility. In my opinion, however, in international law, the principle of *culpa* should be examined from a somewhat different point of view from that of municipal law. In international law, the question of due diligence is not necessarily related to the notion of negligence. International responsibility may sometimes arise from the mere fact that injury has been caused. In some cases, therefore, we would have to recognize an objective responsibility related to the injured right.

But I do not go so far as to say that the principle of responsibility without fault recognized in some national laws should be generally recognized in international law. The subject would require scrutiny by the International Law Commission.

14. It is a precondition of State responsibility that there must be an injured interest of a subject of international law and that that interest must have been injured as a result of an act committed by another subject of international law. The question of the injured legal interest arises primarily on the bilateral level, between the State committing the injury and

the State sustaining it. The injury is usually of a material nature. But, in some instances, injuries of a non-material nature may also involve State responsibility. For example, State responsibility is involved if the State offends the honour of another State. On the other hand, I find it difficult to speak of State responsibility deriving from a non-observance of general international law which does not cause any real injury.

15. Even if a State has caused injury to the legal interests of another State by an act normally regarded as unlawful, it is exonerated from responsibility for that act if the State sustaining the injury has waived the right to claim reparation or if the act in question was carried out in circumstances justifying the exercise of the right of self-defence or the right of reprisal.

16. A State discharges its responsibility resulting from its violation of an international obligation by making good the injury caused. The methods of discharging responsibility or releasing itself from such responsibility vary according to the injured interests and to the circumstances in which the illegal act was committed. As a general rule, responsibility is discharged by one of the following methods or by several of them combined: restoration of the *status quo ante*, reparation of the injury sustained, apologies and punishment of the offender. The question which of those methods is applicable in a given case is determined by the juridical nature of the injured interest; the State sustaining the injury is not entirely free in its choice of the means of asserting its right. Moreover, the amount of the reparation or compensation should be commensurate with the injury sustained.

17. The recent development in the ideas of jurists on the question of subjects of international law will necessitate some changes in the traditional theories concerning the matter. The question will arise with respect to the active and passive subjects of responsibility. But account should be taken of the fact that in positive international law, in its present state of development, private persons and international organizations are not in the same position as the State, so far as international responsibility is concerned, unless so recognized in an international agreement. I am inclined to think that, in that connexion, the International Law Commission would be well-advised to deal primarily with the State and to refer only incidentally to the other subjects of international law.

III. STATE RESPONSIBILITY WITH REGARD TO THE TREATMENT OF ALIENS

18. In part I of this paper, I explained why the International Law Commission should not fail to undertake the codification of the law of State responsibility for injury caused to aliens. I also pointed out that there are a number of draft codifications, both official and private, covering this subject matter. Moreover, I think there is general agreement on the important factors to be clarified. I shall therefore confine myself here to presenting a rapid sketch of the essential features which those various drafts have in common. I shall also draw attention to certain new developments in that branch of law.

19. In many cases that have occurred in international practice and precedents, I believe the principle of the nationality of the party bringing the claim has been recognized as an established principle of international law. But there is some uncertainty regarding the scope of its application and its tenor, and hence a thorough study should be made in order to work out adequate standards.

20. Greater difficulties are encountered in defining the notion of "nationality", which constitutes a preliminary question in diplomatic protection. The nationality of a juridical person endowed with an international structure, the applicability of the theory of the "genuine link", the protection of stateless persons — all these questions are still to be clarified.

21. The meaning to be attributed to the so-called "Calvo" clause and its scope should also be discussed in detail, because there is confusion and uncertainty on the subject both in the writings of learned authors and in the practice of international tribunals where those questions are arousing new interest owing to the recent expansion of trade and communications between States.

22. The significance of the waiver of the right to bring a claim or the meaning of the waiver of diplomatic protection is a relatively new problem. Such problems have arisen primarily in connexion with property settlements following the First and Second World Wars. But, in my view, the juridical scope of such clauses still remains to be defined.

23. In the municipal law of many States a distinction is made between two categories of responsibility: responsibility to repair or indemnify an injury caused by a wrongful act of an official of the State, that is, an act performed outside the scope of his competence, and responsibility to indemnify a loss sustained as a result of a measure of expropriation or nationalization, that is, a measure authorized by law. I feel that caution should be exercised before adopting such a distinction in international law. I think it particularly important to maintain a fair balance between the various interests involved if such a distinction should be accepted.

24. Finally, before concluding this paper, I should like to dwell for a moment on the criticism that the customary rules governing State responsibility which have been developed in connexion with matters relating to the protection of the person and property of aliens are merely a product of the capitalist and imperialist system. Consequently, they are not acceptable to States which have adopted other systems.

It is not my intention to refute that argument here. But one thing seems certain: the customary rules in question, as applied at the present time, constitute a neutral juridical system. They form a juridical machinery which functions independently of political coloration.

Furthermore, all the members of the international community are required to respect the international law in force; that law applies to old States as well as to newly-independent States.

Neither changes in the political system of a State nor the emergence of an independent State can have the legal effect of destroying the juridical value of the international law in force. To maintain the contrary is to run the risk of destroying the stability of the legal order which should prevail in the international community.

The progressive development of international law should be encouraged. But in order to ensure that development, it is important to recognize the value of the international law in force, as established by agreement and by practice, for it is the very basis for development.

WORKING PAPER

prepared by Mr. Mustafa Kamil Yasseen⁵⁹

The Sub-Committee on State Responsibility has to deal with a problem of method and planning. It has to determine the proper approach to the topic "State responsibility", the scope of the International Law Commission's task in the matter as defined in General Assembly resolution 799 (VIII) and the manner in which the Commission should proceed, and the main divisions of the topic.

The scope of the Commission's task

According to resolution 799 (VIII) the subject to be discussed is the international responsibility of States, and the

⁵⁹ Originally circulated as mimeographed document A/CN, 4/SC.1/WP. 5.

Commission's task would not seem to be limited to any particular aspect or aspects of that responsibility to the exclusion of others. In my opinion, the first step must be to define the general theory of responsibility. That theory exists. Its application in practice has yielded uneven results; it has proved more fruitful and effective in certain fields of international relations than in others. But that is no reason for denying that it exists or that certain principles have a general scope transcending the particular case of responsibility to which they are applied. State responsibility should therefore be considered as a whole.

There are some, however, who think that the law of responsibility should be dealt with piecemeal and that it is preferable to consider first the international responsibility of States for injury to the person or property of aliens. I do not find that argument convincing; the method they propose might complicate matters. The codification of the law of responsibility in a limited field of international relations might invest particular solutions with an importance which they do not really possess. Furthermore, responsibility for injury to aliens does not seem to me to be a topic that can readily be codified at the present time. While it is true that there exist numerous precedents in this field, they are far from being unanimous; the conflicting doctrines on many fundamental issues are too well known to need mentioning. The positions of States in this matter differ widely and are firmly held. In the present period of the liquidation of the colonial regime and the correction of certain privileged situations obtained under that regime, it is difficult to ensure a calm atmosphere for working out a generally accepted code of law. Our era of rapid evolution, or, rather, of revolution, is in my opinion the least favourable for the defining of general rules capable of governing these matters which are directly affected by this rapid evolution. These questions encompass an infinite number of slightly differing cases which require flexible solutions; these should be based first and foremost on the idea of justice, the principle of State sovereignty over natural resources and wealth, and the economic and social conditions prevailing in certain societies.

The interests of States are sometimes too conflicting in this field, and it would not seem an easy matter to find a compromise solution on certain points, particularly with regard to agreements which might be described as unequal, often imposed under the pressure of difficulties encountered by the community concerned and mortgaging its future even after independence.

What can be noted is a growing tendency to confirm the sovereignty of States over their national resources.

In my opinion, therefore, the best approach to the law of State responsibility is first to define the general theory. That theory may have to be adapted to some extent in its application in the different areas of international relations, and this, too, should be a task for the International Law Commission.

The main divisions of the topic

The first step must be to consider the general theory of State responsibility; for this purpose the following questions must be studied:

1. *The unlawful act.* This is the failure to carry out an international obligation, in other words a departure from a rule of international law, irrespective of its source (treaty, custom). It should be stressed here that the unlawful act may be one of commission or of omission.

Although fault seems, in principle, to constitute the basis of State responsibility, the question whether that responsibility may in exceptional cases be based to some extent on risk should also be considered.

2. *The injury.* It should be noted that moral injury is also a factor to be considered; it is desirable, however, to study the conditions in which State responsibility could result in moral injury.

3. *The cause and effect relationship.* It is an essential

condition of responsibility that the injury must be caused by the unlawful act. It is desirable here to take up the problem of indirect injury.

4. *Reparation.* Under this heading, the nature of the reparation, its forms in the international sphere and, above all, the role of moral reparation should be studied. Consideration should be given to the scope of *restitutio in integrum* and to the question whether the injured party or the party committing the unlawful act may opt freely between *restitutio in integrum* and other forms of reparation. It is especially important to decide whether reparation should also include loss of earnings.

5. *The subjects of responsibility.* The party committing the unlawful act is the active subject; the injured party is the passive subject. According to positive law the subject (active or passive) must be a State.

It is arguable, however, that in consequence of the evolution of the notion of the individual as a subject of law he should be regarded as a direct subject of responsibility and able, as such, to institute proceedings in international tribunals.

Without wishing to enter into the substance of the question, I think it hardly tenable to advance this proposition as a general rule of international law. There is no reason, however, why the notion of the individual as a passive subject of responsibility should not be accepted in certain cases, exceptionally, by virtue of a special rule of law.

6. *Excuse; ground for limitation of or exoneration from reparation of the injury.* The problem here is to define the grounds which excuse an act and deprive it of its unlawful character: self-defence, and even *force majeure* in general, and the case of necessity.

The grounds for the limitation of or exoneration from reparation have to be defined. Thus, the effect of fault on the part of the injured party, the effect of the waiver of the claim, and the possibility of laying down a time limitation extinguishing the obligation to make reparation must all be studied.

Once the general theory of responsibility has been defined, it will be possible to study its application in particular areas of international relations, but we should not confine ourselves to responsibility for injuries to aliens; that question is important, but there are others equally and even more important in our time. The priority to be given to these questions may be considered at a later stage.

WORKING PAPER

*prepared by Mr. Roberto Ago*⁶⁰

At its first meeting on 21 June 1962, the Sub-Committee on State Responsibility of the International Law Commission decided that for its second series of meetings, from 7 to 16 January 1963, which was to be devoted to the organization of the Sub-Committee's work and to determining the main points to be considered, especially in relation to the general aspects of State responsibility, the members of the Sub-Committee should if possible prepare some working papers describing what they regarded as the fundamental aspects of the subject.

Two working papers, one by Mr. Jiménez de Aréchaga and one by Mr. Paredes, were submitted to the Sub-Committee at its June meeting. Recently, another working paper, prepared according to the criteria laid down by the Sub-Committee, was sent in by Mr. Gros.

Now I venture to submit to the members of the Sub-Committee these few pages, whose sole purpose is to summarize some general considerations on the subject of the international

⁶⁰ Originally circulated as mimeographed document A/CN.4/SC.1/WP.6.

responsibility of the State, at least some of which I have previously expounded orally in the Commission, and to draw attention particularly to certain points which I think ought to receive priority in any attempt to codify the international law on the subject. I also attach to this short paper a bibliography of works from the legal literature of several countries concerning specifically State responsibility or some of its aspects, for I believe that, especially in the case of less recent works or articles in periodicals, an indication of the place and date of publication might sometimes help the members of the Sub-Committee in their research. To avoid making this bibliography unnecessarily long, I have not mentioned the numerous text books and general treatises on international law, almost all of which contain chapters, and sometimes very long ones, on State responsibility; and I also apologize in advance for the gaps and omissions which the members of the Sub-Committee will certainly notice in my list of specialized works.

I

If there is any branch of general international law the codification of which is particularly desirable, and even necessary, it is surely that dealing with the international responsibility of States. Few questions recur so frequently in disputes between States as those relating to responsibility; in few subjects are the repercussions of the development of international law in every other respect felt so automatically as in that of responsibility; few chapters of international law are regarded with so much interest, and sometimes concern, by States, and particularly by new States; and in no branch of international law; perhaps, is the fundamental requirement that the law should be clear and certain felt so greatly as in that of State responsibility.

At the same time, the codification of the international law concerning State responsibility is unquestionably a particularly difficult undertaking.

It might of course be argued that the material available in this field is exceptionally abundant. Cases of State responsibility are very frequent in international practice, most international arbitral awards or judicial decisions have touched upon problems of responsibility either directly or indirectly, and furthermore, jurists have devoted many studies to the international responsibility of the State, and some of these studies are regarded as among the most searching and famous in the whole body of learned writing on international law.

This imposing mass of material and research does not, however, always facilitate the task of clarifying the principles governing the subject, firmly tracing the main lines of the concept of international responsibility and clearly determining the circumstances and consequences of such responsibility. Furthermore, despite the exceptional quantity of the available material as a whole, the fact remains that this material is concerned chiefly with particular points and aspects, while many others, on the contrary, have been only very incompletely explored and not very fully described.

For example, a great deal has been written on the problem of the responsibility of the State for acts of private persons or for acts of organs performed outside their competence; much has been said about the aspect of the responsibility arising out of the action of judicial bodies, and particularly about the definition of denial of justice; many pages have been devoted to responsibility for damage caused during uprisings or civil wars; and scholars have discussed amply the opposition between the idea of an objective responsibility and that of responsibility by reason of fault, and have debated the determination of such concepts as indirect responsibility and the exhaustion of local remedies. Nevertheless, the research done into other no less important subjects has not been sufficient. There is a lack of balance due to the fact that while some parts of the subject have been elucidated, others have been left in obscurity. What is more, the numerous studies

on particular points are not accompanied by an equally large number of general studies of the international responsibility of the State assigning to each element its true place in a systematic whole.

One point in particular seems to me to deserve further emphasis in this connexion, even though it has been the subject of very relevant comment by several members of the International Law Commission during the preliminary discussions on the topic. Many of the best known and most penetrating individual or collective studies carried out in the field of international responsibility, and, in general, several of the tentative and draft codifications so far produced on the subject, have dealt with State responsibility only in the limited sector where this responsibility arises out of injury caused in the territory of the State to the person or property of aliens and in the related field of the diplomatic protection of injured aliens by their national State.

It was not the only consequence of this approach that some at least of the aspects stressed were held to be special features of responsibility within the sector mentioned rather than truly general characteristics of international responsibility, and that some confusion has occasionally arisen in this connexion: the most obvious, and actually the virtually inevitable consequence of this partial approach has been that people have endeavoured simultaneously—as though the principles involved were *ejusdem generis*—to determine rules which genuinely relate to responsibility and other rules which rather constitute fundamental standards and sometimes even principles of international arbitral or judicial procedure.

A very clear illustration of this will be found in the conclusions of the sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law. A first article providing that international responsibility can only arise out of the violation, by the State, of an international duty established by treaty or by a customary rule, is followed by other articles laying down the obligations of the State for the judicial protection of aliens or for their protection in case of a riot. The same approach will be found in the Lausanne draft (1927) of the Institute of International Law, in the drafts prepared by the Association of International Law of Japan in 1926, by the American Institute of International Law in 1927, by the International Commission of Jurists of the Conference of American States in 1928, and in the very well-known draft convention prepared in 1929 by the Harvard Law School for the first Conference for the Codification of International Law held in 1930. To give only one example, in the Harvard draft the rule that the State must provide the same judicial protection for aliens as for its own citizens appears side by side with the provisions defining the specific aspects of the violation of the rules of law and the consequences thereof. The same arrangement is noticeable in the six very learned, well documented and very remarkable reports submitted to the International Law Commission by Mr. F. V. García Amador, its distinguished special Rapporteur, which deal, side by side, with the typical problems of responsibility (e.g. the distinction between different categories of wrongful international acts, or the determination of the duty to make reparation and the various forms of reparation) and with the problems relating rather to the definition of the duties of States in the treatment of aliens and also, particularly in the earlier reports, with the obligations of the State regarding the protection of human rights.

For such a juxtaposition of questions belonging to intrinsically separate categories we should certainly not blame the learned jurists or the institutions which prepared the reports cited above and others. It was the more or less inevitable consequence of the fact that, when the subject matter assigned for study or placed on the agenda was defined, a division was not made "horizontally" between the rules of substance laying down the international rights and duties of States in the various fields and the aspects and consequences of the violation, by States, of the obligations deriving from these rules; instead, the division was made "vertically", the subjects being classi-

fied according to sector. This explains why even in a study which was to deal merely with the question of responsibility in relation to a particular sector it became almost inevitable to determine, in addition, the content of the rules of substance whose violation one meant to discuss; this happened particularly in the case of ill-defined and often controversial rules such as those relating precisely to the duties of States regarding the treatment of aliens.

As a result, however, the border line between two distinct fields of law tended inevitably to become somewhat blurred. A more precise definition of the duties imposed by international law on States regarding the treatment of aliens is no doubt a most important objective; but whoever wishes to attain this objective ought to proceed by a direct route, not by a circuitous one, in connexion with the determination of rules relating to international responsibility for wrongful acts. Also, as partial study, undertaken by sectors, of problems of responsibility cannot provide a true view of the whole of the subject. The international responsibility of the State is a situation resulting not only from the violation of particular international obligations, but from the infringement of any international obligation, whether established by rules covering a specific matter or by other rules. To achieve such a general view, complete and at the same time free of all extraneous matter, appears to be the indispensable condition for any useful effort of codification in this field.

I do not wish to imply that certain specific aspects of responsibility, in cases where the obligations violated by the State concern the treatment of aliens, may be neglected and should not receive due prominence. Even less do I wish to appear to be suggesting that the very valuable material and experience gathered concerning this aspect of international responsibility should not be utilized to the full. My point is merely that any discussion of international responsibility should take into account the whole of responsibility and nothing but responsibility.

Besides, this subject by itself is beset by a good many difficulties and controversial points; there is no need to add others arising out of the much debated subject of the law relating to aliens or out of any other branch of international law, however important. For example, nobody can deny the present importance of the principles concerning the maintenance of peace and the protection of the sovereignty and territorial integrity of States against any undue interference. But the determination of the rules relating to that subject is likewise a separate undertaking, which should be approached by a direct and independent route, not indirectly in conjunction with an attempted definition of rules concerning responsibility, for otherwise the difficulties peculiar to one field will be added to those of another and, above all, the disadvantages of a study of responsibility by separate sectors, as criticized by me, will recur.

Here, too, I hasten to add that I do not wish to give the impression of thinking that every distinction between the violation of certain rules and the violation of others is immaterial for the purpose of the consequent responsibility, or of believing that the consequences of the infringement of a rule essential to the life of the international community should not be much serious than those arising out of lesser infringements. I believe, on the contrary, that logically this must be so. Once again, what I wish to emphasise is merely that the consideration of the contents of the various rules of substance should not be an object in itself in the study of responsibility, and that the contents of these rules should be taken into account only to illustrate the consequences which may arise from an infringement of the rules.

It seems to me, in conclusion, that the International Law Commission acted wisely in deciding that the general and necessarily uniform aspects of State responsibility should be studied first; the Sub-Committee should therefore strictly adhere to this decision when selecting the various points to be considered. In my view, only in this way can we hope, step by step, to accomplish a difficult task, which is essential both

for the definition and clarification of existing rules and for the development to be aimed at in several respects.

II

Turning now more specifically to the main points which should be considered under the heading of the general aspects of the international responsibility of the State, I believe that the Sub-Committee should concentrate mainly on two basic points: firstly, the definition of the acts which give rise to the international responsibility of the State, that is to say international wrongful acts and the component parts and different types of such acts, etc.; and, secondly, the consequences of international responsibility. These two fundamental points might be examined in the manner outlined below, though I should add that my suggestions are tentative and provisional and by no means aspire to exhaust the subject.

Preliminary point — Definition of the concept of *international responsibility*.

Responsibility of States and responsibility of other subjects of international law.

First point — *Origin of international responsibility*

(1) *International wrongful act*: the breach by a State (more precisely, by a subject of international law) of a legal obligation imposed upon it by a rule of international law, whatever its origin and in whatever sphere.

(2) *Determination of the component parts of the international wrongful act*:

(a) *Objective element*: act or omission objectively conflicting with an international legal obligation of the State. Problem of the abuse of right. Cases where the act or omission itself suffices to constitute the objective element of the wrongful act and cases where there must also be an extraneous event caused by the conduct.

(b) *Subjective element*: imputability to a subject of international law of conduct contrary to an international obligation. Questions relating to imputation. Problem of the capacity of the State to commit an international delinquency. Relationship between this capacity and the capacity to act. Limits. Imputation of wrongful act and of responsibility.

Questions relating to the requirement that the act or omission contrary to an international obligation should emanate from a State organ. What system of law is applicable for the purpose of determining what is a State organ? Legislative, administrative and judicial organs. Organs acting *ultra vires*.

State responsibility for acts of private persons. Question of the real origin of international responsibility in such cases.

Must there be fault on the part of the organ whose conduct is the subject of a complaint? Objective responsibility and responsibility related to fault *lato sensu*. Problem of the degree of fault.

(3) *The various kinds of violations* of international obligations. Questions relating to the practical scope of the distinctions which can be made.

International wrongful acts arising from conduct alone and those arising from events. The causal relationship between conduct and event. Importance of the distinction.

International wrongful acts and omissions. Possible consequences of the distinction, particularly so far as *restitutio in integrum* is conserved.

Simple and complex, non-recurring and continuing international wrongful acts. Importance of these distinctions for the determination of the *tempus commissi delicti* and for the question of exhaustion of local remedies.

Problems of participation in the international wrongful act.

(4) *Circumstances in which act is not wrongful*

Consent of the injured party. Problem of presumed consent. Legitimate sanction against the author of an international wrongful act.

Self-defence.

A State of necessity.

Second point—Consequences of international responsibility

(1) The duty to *make reparation*, and the right to apply *sanctions* to a State committing a wrongful act, as consequences of responsibility. Question of the penalty in international law. Relationship between consequences giving rise to reparation and those giving rise to punitive action. Possible distinction between international wrongful acts involving merely a duty to make reparation and those involving the application of sanctions. Possible basis for such a distinction.

(2) *Reparation*. Its forms. *Restitutio in integrum* and reparation by equivalent or *compensation*. Extent of reparation. Reparation of indirect damage. Satisfaction and its forms.

(3) *Sanction*. Individual sanctions provided for in ordinary international law. Reprisals and their possible role as a sanction for an international wrongful act. Questions relating to war. Collective sanctions. The United Nations system.

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THE SOCIAL NATURE OF PERSONAL RESPONSIBILITIES

*Working paper prepared by Mr. Angel Modesto Paredes*⁶¹

In every process of imputing responsibility for an act to a person it is possible to consider two aspects: the psychological (that is to say, the decision attributed to the person concerned) and the sociological (that is to say, the social consequences of the act).

⁶¹ Originally circulated as mimeographed document A/CN.4/SC.1/WP. 7.

I. Psychological responsibility

The agent's psychological responsibility arises out of his clear recognition of the relations affected and out of his will to act in the way in which he in fact acted. Accordingly, the simultaneous existence of the following requirements or elements are evidence of his intention to produce the full consequence of his act: an accurate discernment of the outcome and of the objects comprised in the judgement as to the relations between the subject and the act—a judgement which may regard those relations good, indifferent or bad; and a will which, aware of those relations, translates the intent into action.

The absence or partial absence of one or more of these elements implies the absence, or the existence only in a diminished degree, of the efficacy of the decision, and hence a modification of the agent's responsibility (the consequence of the act decided upon and performed). If the plan was vague, or if judgment was impaired, or if the volition flagged, then the gravity of the offender's responsibilities will be affected in like measure. It may be asserted that the degrees of psychological imputability constitute a vast scale of differentiation, as varied, perhaps, as the personality of the agents.

The foregoing concords with the philosophical view that, if a man chooses evil he does so through an error of appreciation and not through a propensity of the will, and that the prevalence of right conduct will be the immediate result of the enlightenment of truth. This principle is erroneous, for it ignores the circumstantial attributes of each of the factors; in the first place, the social value attaching to the object may not coincide with the individual's assessment of it, with the consequence that a conflict of values arises; secondly, the agent's judgement may be at fault, in that he overestimates the worth of what is his own and in doing so underestimates the worth of what belongs to others; and thirdly, he may suffer from some innate or acquired perversity, accounted for by many social factors and in particular by the collapse of ethical standards at times of transition, when ethical standards have not yet been replaced by well-defined and firmly-rooted social precepts.

The will as the impulse behind conduct and behind the choice of means to give effect to that conduct is weakened by various circumstances of everyday occurrence; sometimes by purely organic, nervous or intellectual inner tensions; or it may crumble under the impact of external causes or of outside wills to which we submit either because duty so requires or because they overpower us; sometimes weakness and submission reach such a point that there can be no question of any freedom or spontaneity of will on the part of the person who performs the act, but rather of the replacement of one will by another.

It is thus seen that personal decisions lose a good deal of their autonomy and certainty, and only in a limited way can the act or behaviour be said to have been willed deliberately by the person to whom it is attributed. It follows that a truly voluntary act and a genuinely independent decision are the rarest things in real life.

But if our analysis has led us to this whittling away of the individual's responsibility, what can we say about collective acts and the responsibilities for such acts?

First, we should inquire: To whom can the decisions affecting the conduct of collective persons be traced?

By reason of the very nature of the extremely grave and complex decisions taken daily in every community, it is difficult to consult each of the associated individuals, and impossible in the case of a large political community like the State. Consequently, so far as knowledge and judgement are concerned, the group has to be represented, as a rule, by individuals who act for it, i.e. by authorized agents; this is the correct concept of public office. It is those who govern who have direct knowledge of a matter and form judgements concerning it. Not infrequently, moreover, they are empowered to take the relevant decisions, or the decisions are taken on behalf of the State by various public servants appointed for

the purposes. The result takes the form of public acts performed by associated persons. The process thus breaks down into the actions of many agents—sometimes individuals and sometimes groups—who intervene at different stages.

Let us take the case of a census. Specialists in ethnography have realized that the basis for any sound administration is the recognition of the country's human and economic conditions, and, they call upon the government to carry out a census. The government acknowledges the justice of the request and decides to put it into effect: it makes available the necessary human and material resources and appoints census committees to conduct the census with the aid of the population.

However, there are cases and aspects in which the intervention of the group as such at various stages of conduct is manifest. Let us assume the case of the twofold referendum—the "initiative" advocating the adoption of a law or other measure, and the subsequent consultation for its approval or rejection. In the history of the small nations there have been governments which relied on a continuous succession of referendums, and even today this practice is resorted to at times when the issue at stake is of great moment, the organized political forces being to some extent by-passed by an appeal to the public, as was done recently in France by de Gaulle, with excellent results from the point of view of his policy. Apart from this, there are the ordinary popular elections prescribed by democratic constitutions for certain purposes, such as the appointment of executives.

In this way, many decisions in the life of a State are reached by this process, and it becomes necessary to determine what person or persons bear the responsibility for what has been done; for we know that at the various stages in a particular action the executive or the public may play a part and take a decision. And the characteristics we have noted at the various stages of the decision-making process are the variables which the nature of the decision imposes on the participants. For example, a people may have a sufficient awareness of a matter when it decides in favour of it, without achieving the fullness of knowledge of a very gifted individual. The judgements which a people forms are often sensible even though the people lacks the knowledge and wisdom to be expected of a distinguished executive; the generosity of will of a nation can never equal in quality the wisdom of a just man.

It would be necessary to carry out very penetrating research to define precisely the field of influence of the persons taking part and the consequences attributable to each of their acts; we do not propose to do this here, except in a very restricted field—with a view to the application of our findings to the international responsibilities of States.

For this purpose, we must first ask ourselves: Did the agent act within his term of reference, or did he exceed them? If he acted within his terms of reference, then it is his principal who is bound by the act; if he exceeded them, the principal is not bound. In the present context we are concerned with the first of these two situations.

But if the principal is committed, does this mean that the agent is relieved entirely of his responsibility? Not in every case; both may be answerable, though as we shall see, the consequences are not the same for both.

In the case where the injury is occasioned by the decision of the agent acting within the limits of his terms of reference, the question arises whether the act was indispensable for the defence of the State's overriding interests.

(a) If the act, though not indispensable, was useful to the country, then the State has a direct responsibility, and the official who ordered the act has a subsidiary responsibility;

(b) if the act was neither necessary nor useful, then the official is answerable, the State's responsibility being only subsidiary.

If the damage was unavoidable in the safeguarding of matters of paramount importance to the people's highest aspirations, then the idea of the governing body's fault vanishes

and is replaced by the responsibility of the State, though this is subject to qualification by many circumstances (e.g. self-defence, state of necessity) which diminish the wrongfulness of the act.

If, on the other hand, the official acted *ultra vires*, usurping functions not vested in him, then, because in so doing he did not act as his people's representative and hence could not commit that people, the responsibility is his, and his alone.

II. *The requirements of equity*

From another point of view, responsibility is grounded in ethics or equity: whoever causes an injury, even unintentionally, has a duty to make good the injury. In this sense, the risk is the same for individuals and for nations.

This is in line with the traditional theory of quasi-delict, but goes further by reason of the extension of the social system of co-operation among men. It is a kind of morality evolved in the doctrine—and infrequent in practice—which nowadays blends and mingles the usefulness and the duty of assistance: the damage sustained by any one affects all others. The idea owes its origin to the recognition of the identity of needs and ends for mankind and to the competition for means in a limited market.

Mere equity would require reparations, in cases where the injury done to another is due to our negligence in the performance of an act which it was our duty to perform, or to our carelessness, lack of skill or inexperience, or where we have derived some advantage from another's prejudice. But the solidarity which modern life imposes also requires us to give assistance further afield.

III. *Social rules*

In any organized human society the association cannot subsist unless its members are mutually answerable for their acts and conduct towards each other. The complete autonomy of each is compatible only with absolute isolation. Hence there are both advantages and duties for the participants, in that the different social limitations on behaviour have their counterpart on the one hand in the greater solidarity and in common benefit and, on the other, in interdependence, which implies many responsibilities.

Perhaps the isolation in which nations lived in the past—so long as they were not impelled to action by the desire to dominate others—and the deceptive prospect of self-sufficiency pursued by some great Powers enabled them to exist without rules governing responsibility, albeit with the ever-present risk that their differences would be settled by war. But if peace is the aim and if war is to be abolished, the world needs a system of responsibilities which are legally enforceable, in other words judicial process and judicial decision. This means a system relying on courts possessing the necessary competence.

If this is what effective peace means, then the association of peoples is bound to be strengthened and to prosper if the law is recognized as the sole formula of co-existence above the transience and violence of political rivalries.

These, then, are the relationships to be considered: in the modern world, the peoples can live in plenty through a partnership for extracting the maximum yield from natural resources; partnership means the carrying on of competing activities having one or many purposes; any competition involves the danger of rivalry, disagreement about means or at least about the part which each should play; hence it becomes indispensable to regulate conduct, through rules governing action, requiring each one to do his duty, and this means in effect that each is held answerable for his acts. If his conduct conforms with what is agreed upon or just, the person is called responsible; if he departs from that conduct, he is called to order by the means available to society.

In our analysis of the various aspects of responsibility, we started with psychology, which is concerned with individual intention, in other words with the acts decided upon and

carried out by the individual—subjective reality—and finished with the actual event and its social implications—objective responsibility, which in the final analysis is nothing other than the discipline of the members of an association.

IV. *The determination of responsibility and penalties in law*

As far as those responsible are concerned, the remedy for injuries caused takes the form of financial reparation and of penalties ordered for the purpose of punishing the wrongful conduct; the object is to enforce conduct conforming to law.

But what should be the attributes of the penalties in order to be styled legal?

So long as no true society of nations had been organized, one could not speak of a stable legal system governing their reciprocal relations, except in the rare cases where parties took their disputes to the established international courts. The usual remedy for whoever considered that he had suffered prejudice or that his claims were neglected consisted of recourse to force, and more particularly to war. One metaphysical philosophy, it is true, maintained that God rewarded the just cause with victory. But a superficial reading of history shows the hollowness of such metaphysics. Often, victory was won by fortuitous circumstances, and at other times the issue was decided by the preparations for war and by the volume and quality of the forces, which reminds us of the cynical popular saying that God gives victory to the good when they are more numerous than the wicked. There remained the mere moral sanction of public opinion, which is so vacillating and uncertain, or the supposed judgement of history.

What is so novel and remarkable about international relations in our time is the *possibility* of establishing courts adjudicating according to law on the conduct of peoples and holding responsible those causing an injury, theoretically even the most powerful State.

And so we discern the idea taking shape that all Powers have a duty to abandon policies based on selfish interests and instead to apply the policy based on law which is required by justice and equity. We are still far from protecting and satisfying such needs, when questions fundamental for States are at issue, particularly among the great Powers; but there can be no doubt that important advances have been made which are bound to culminate in a better system of relationships, with full confidence, among the disputants, in the rectitude and wisdom of the judge.

It should, however, be pointed out that the effective establishment of international courts ought to be preceded by a clear conception and statement of the reciprocal rights and duties of nations, the precise definition of the character and scope of those rights and duties. This is what is meant by the theory of fundamental and derived rights and duties: delimiting the proper sphere of the exclusive jurisdiction of States; defining with certainty what the principle of non-intervention implies and adhering firmly to this definition; organizing the high courts and providing them with the strongest guarantees of independence and respect for their opinions and with the necessary means for enforcing their decisions.

V. *Subjects of international responsibility*

As explained earlier in this paper, the responsibility for governmental acts at the international level may attach to the public officials who decided upon or executed the injurious acts, or also to the people which consented to the acts.

The Nürnberg trials and other later trials, in so far as they are not to be regarded as acts of vengeance, gave prominence to two important legal concepts: firstly, officials who, acting in the name and on behalf of a people, perform acts of cruelty—even if in so doing they act within the limits of their functions—are answerable for the injury caused; and secondly, crimes which show evidence of depravity on the part of those committing them can be tried and punished without the need for a pre-existing law. Both aspects merit careful study, though in view of our present purpose, we cannot examine them at this stage.

We also know that the people itself is answerable—in some circumstances directly and as a principal, and in others, indirectly. In the first case, in order that the people may be held responsible, certain acts, apart from any referendum, must have been performed, even though the acts are initiated and carried out by the appropriate official. And as regards the second case, indirect responsibility arises from any act decided upon by a competent authority.

What is the true rationale of this responsibility?

Of the three aspects of responsibility which we have mentioned—psychological, ethical and social—it can be said that in the normal course of the exercise of public functions, the last two primarily and directly involve the State, whereas the first involves the official concerned.

Where the intent or purpose is reprehensible or the conduct depraved, one tries to correct and counteract them by exerting an influence on the person. The object is the psychological betterment of the offender, which is sought by means of personal penalties. To correct his anti-social propensities, efforts are made to discipline the subject's conduct. In this very particular and very special instance, however, the setting is international and the subjects are States, though the analogy with individual conduct is not wholly excluded, since history has known countries which in their psychological make-up have been persistently militarist, aggressive or interventionist, irrespective of the regime in power. In one of my works I spoke of international bullying, and that is what must be done away with. In these very special cases of which I am speaking, then, the personal penalties intended to amend conduct might be applied to States, even though they are really meant for individuals. But if they are to be applied to peoples, it must be borne in mind that the penalties will affect guilty and innocent alike, and everything possible should be done to protect the innocent. Furthermore, the enforcement measures applied should be of various kinds.

Where the responsibility is founded in equity, and in cases of sociological responsibility, the remedy is a claim to financial compensation, and this can be easily satisfied by the State. Besides, this compensation is in conformity with the reparation claimed; injury caused unintentionally or harm caused as a result of adverse circumstances must be compensated.

War as a means of coercion should be generally outlawed and force should be used only as a last resort, after all other methods have failed.

Lastly, no penalty of any kind should be imposed without a decision by the competent court.

General principles of international responsibility

1. Imputation is the judgement attributing an act or occurrence to a specific person.
2. Responsibility implies an imputation and the obligation to repair the damage caused.
3. International responsibility differs in nature from responsibility under municipal law.
4. There is an active subject of responsibility, who may

claim reparation, and a passive subject, who has the duty to make reparation.

5. Both the active subject and the passive subject may be collective or individual.

6. Responsibility attaches to the passive subject where any of the following circumstances exist:

- (a) if he intentionally committed the act, or if he conceived and planned it, whether or not he participated in its execution (psychological responsibility);
- (b) if he caused injury to another person, even unintentionally (responsibility in equity);
- (c) if the responsibility is the result of the risks, rivalry and conflicts inherent in life in society and of the solidarity and co-operation among associates (sociological responsibility).

7. Responsibility gives rise to punitive and civil damages.

8. Punitive damages are applicable primarily to the social disturbance caused by the event and their main object is to check the anti-social impulses of the offender.

Civil damages relate to the material damage caused.

9. Individual persons or entities may be jointly or severally responsible for a particular act, in varying forms and degrees.

10. Ordinarily, the officials who order and prepare the commission of punishable acts incur criminal liability, and the people concerned is liable for the civil damages for the act imputable to it.

11. Exceptional cases of the criminal responsibility of States are those in which their habitual—or at least their frequently repeated—conduct shows a tendency towards aggression and violence which disturbs normal international relations.

Once this tendency has been established by a long succession of events, the State in question will be held responsible for any recurrence of its unlawful acts.

12. Penalties consist of measures of constraint directed against the person or property of the offenders.

13. Where States are involved, constraint of persons should be avoided as far as possible.

14. War may be resorted to only in extreme cases, in the case of persistent refusal to submit, and only by decision of a competent court, to be carried into effect by the international executive agency established for this purpose.

15. Any judgement concerning international responsibility should answer the following questions:

- (a) who were the individuals who should be held responsible for the decision taken?
- (b) in what capacity did the individuals in question act:
 - (a) as administrative authorities or as private persons?
 - (b) in the first case, did they or did they not act within their constitutional powers?
- (c) was the international person lawfully represented for the purpose of the decision?
- (d) did the injury occur in consequence of a state of necessity?
- (e) was the injury not necessary or useful for the State?

ANNEX II

DOCUMENT A/CN.4/160 and Corr. 1

**Report by Mr. Manfred Lachs
Chairman of the Sub-Committee on Succession of
States and Governments
(Approved by the Sub-Committee)**

[7 June 1963]
[Original : English/French]

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Report by Mr. Manfred Lachs, Chairman of the Sub-Committee on the Succession of States and Governments

(Approved by the Sub-Committee)

1. The International Law Commission, at its 637th meeting on 7 May 1962, set up the Sub-Committee on the Succession of States and Governments, composed of the following ten members: Mr. Lachs (Chairman), Mr. Bartos, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The Commission, at its 668th meeting on 26 June 1962, took the following decisions with regard to the work of the Sub-Committee:¹

"(1) The Sub-Committee will meet at Geneva on 17 January 1963, immediately after the session of the Sub-Committee on State Responsibility, for as long as necessary but not beyond 25 January 1963;

"(2) The Commission took note of the Secretary's statement in the Sub-Committee regarding the following three studies to be undertaken by the Secretariat:

"(a) A memorandum on the problem of succession in relation to membership of the United Nations,

"(b) A paper on the succession of States under general

multilateral treaties of which the Secretary-General is the depositary,

"(c) A digest of the decisions of international tribunals in the matter of State succession;

"(3) The members of the Sub-Committee will submit individual memoranda dealing essentially with the scope of and approach to the subject, the reports to be submitted to the Secretariat not later than 1 December 1962 to permit reproduction and circulation before the January 1963 meeting of the¹ Sub-Committee;

"(4) Its chairman will submit to the Sub-Committee, at its next meeting or, if possible, a few days in advance, a working paper containing a summary of the views expressed in the individual reports;

"(5) The Chairman of the Sub-Committee will prepare a report on the results achieved for submission to the next session of the Commission."

2. In accordance with these decisions, the Sub-Committee met at the European Office of the United Nations on 17 January 1963. As the Chairman of the Sub-Committee, Mr. Lachs, was prevented by illness from being present, the Sub-Committee unanimously elected Mr. Erik Castrén as Acting Chairman. The Sub-Committee held nine meetings, and ended its session on 25 January 1963. It was decided that the Sub-Committee would meet again, with the participation of the Chairman, Mr. Lachs, at the beginning of the fifteenth session of the International Law Commission in order to approve its final report. The Sub-Committee approved its final

¹ Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209 and Corr 1), para. 72.

report at its 10th meeting held on 6 June 1963, during the fifteenth session of the International Law Commission, with the participation of the Chairman, Mr. Lachs, and all its members.

3. The Sub-Committee had before it memoranda submitted by the following members:

- Mr. Elias (ILC(XIV)/SC.2/WP.1 and A/CN.4/SC.2/WP.6);
- Mr. Tabibi (A/CN.4/SC.2/WP.2);
- Mr. Rosenne (A/CN.4/SC.2/WP.3);
- Mr. Castrén (A/CN.4/SC.2/WP.4);
- Mr. Bartos (A/CN.4/SC.2/WP.5).

The Chairman, Mr. Lachs, also submitted a working paper (A/CN.4/SC.2/WP.7) which summarized the views expressed in the foregoing memoranda. The Sub-Committee decided to take Mr. Lachs' working paper as the main basis of its discussion.

4. The Sub-Committee also had before it the three following studies prepared by the Secretariat:

The succession of States in relation to membership in the United Nations (A/CN.4/149 and Add. 1);

The succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150 and Corr. 1).

Digest of decisions of international tribunals relating to State succession (A/CN.4/151).

5. The Sub-Committee discussed the scope of the topic of succession of States and Governments, the approach to be taken to it and the directives which might be given by the Commission to the Special Rapporteur on that subject. Its conclusions and recommendations were as follows:

I. The scope of the subject and the approach to it

A. SPECIAL ATTENTION TO PROBLEMS IN RESPECT OF NEW STATES

6. There is a need to pay special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II. The problems concerning new States should therefore be given special attention and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter.

7. Some members wished to indicate that special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources; others thought such an indication superfluous, in view of the fact that these principles are already contained in the United Nations Charter and the resolutions of the General Assembly.

B. OBJECTIVES

8. The objectives are a survey and evaluation of the present state of the law and practice on succession, and the preparation of draft articles on the topic having regard also to new developments in international law in this field. The presentation should be precise, and must cover the essential elements which are necessary to resolve present difficulties.

C. QUESTIONS OF PRIORITY

9. The Sub-Committee recommends that the Special Rapporteur, who should be appointed at the fifteenth session of the International Law Commission, should initially concentrate on the topic of State succession, and should study succession of Governments in so far as necessary to complement the study of State succession. Within the field thus delimited, the Sub-Committee's opinion is that priority should be given to the problems of succession in relation to treaties.

D. RELATIONSHIP TO OTHER SUBJECTS ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION

(a) Law of treaties

10. The Sub-Committee is of the opinion that succession in respect of treaties should be dealt with in the context of succession of States, rather than in that of the law of treaties.

(b) Responsibility of States, and relations between States and inter-governmental organizations

11. The fact that these subjects are also on the agenda of the International Law Commission calls for special attention in order to avoid overlapping.

(c) Co-ordination of the work of the four Special Rapporteurs

12. It is recommended that the four Special Rapporteurs (on succession of States and Governments, on the law of treaties, on State responsibility and on relations between States and inter-governmental organizations) should keep in close touch and co-ordinate their work.

E. BROAD OUTLINE

13. In a broad outline the following headings are suggested:

- (i) Succession in respect of treaties
- (ii) Succession in respect of rights and duties resulting from other sources than treaties
- (iii) Succession in respect of membership of international organizations.

14. The Sub-Committee was divided on the question whether the foregoing outline should include a point on adjudicative procedures for the settlement of disputes. On the one hand, it was argued that the settlement of disputes was in itself a branch of international law, which was extraneous to the branch relating to the succession of States and Governments to which the Commission had been asked to give priority. On the other hand, other members, stressing that the outline was only a list of points to be examined by the Special Rapporteur, expressed the view that the Special Rapporteur should be asked to consider whether some particular system for the settlement of disputes should be an integral part of the regime of succession.

F. DETAILED DIVISION OF THE SUBJECT

15. The Sub-Committee was of the opinion that in a detailed study of the subject the following aspects, among others, will have to be considered:

(a) The origin of succession:

Disappearance of a State;
Birth of a new State;
Territorial changes of States.

(b) Ratione materiae:

Treaties;
Territorial rights;
Nationality;
Public property;
Concessionary rights;
Public debts;
Certain other questions of public law;
Property, rights, interests and other relations under private law;
Torts.

(c) Ratione personae:

Rights and obligations:
(i) Between the new State and the predecessor State;
(ii) Between the new State and third States;
(iii) Of the new State with respect to individuals (including legal persons).

(d) Territorial effects:

Within the territory of the new State;
Extra-territorial.

II. Studies by the Secretariat

16. The Sub-Committee decided to request the Secretariat to prepare, if possible by the sixteenth session of the Commission in 1964:

(a) An analytical restatement of the material furnished by Governments in accordance with requests already made by the Secretariat;

(b) A working paper covering the practice of specialized agencies and other international organizations in the field of succession;

(c) A revised version of the digest of the decisions of international tribunals relating to State succession (A/CN.4/151), incorporating summaries of the relevant decisions of certain tribunals other than those already included.

17. The Sub-Committee noted the statement by the Director of the Codification Division that the Secretariat would submit at the earliest opportunity the publication described under paragraph 16 (a) above, that it would publish the information requested under 16 (b) as soon as it could be gathered, and that the request under 16 (c) would be given earnest consideration, in the light of the availability of the decisions in question.

III. Annexes to the report

18. The Sub-Committee decided that the summary records giving an account of the discussion on substance, and the memoranda and working papers by its members mentioned in paragraph 3 above, should be attached to its report.²

APPENDIX I

INTERNATIONAL LAW COMMISSION

Sub-Committee on Succession of States and Governments

SUMMARY RECORDS OF THE 3RD, 4TH, 5TH, 6TH AND 7TH MEETINGS

SUMMARY RECORD OF THE THIRD MEETING

(Thursday, 17 January 1963, at 10.30 a.m.)

ORGANIZATION OF WORK

Mr. LIANG, representative of the Secretary-General, welcomed the members of the Sub-Committee on behalf of the Secretary-General and informed them that he had received two telegrams from Mr. Lachs, Chairman of the Sub-Committee, expressing regret at his inability to attend the meeting owing to a sudden serious illness.

He therefore called for nominations for the office of Acting Chairman.

Mr. BRIGGS nominated Mr. Castrén.

Mr. TUNKIN seconded the nomination.

Mr. Castrén was elected Acting Chairman and took the chair.

The ACTING CHAIRMAN thanked the members for his election and suggested that he should send, on behalf of the Sub-Committee, a telegram to Mr. Lachs wishing him a speedy recovery.

It was so agreed.

The ACTING CHAIRMAN drew attention to the working papers submitted by members of the Sub-Committee.³

He invited comments on the subject of the organization of the Sub-Committee's work.

The first point to be decided was the number and schedule of meetings.

The second question was that of observers. The missions of two countries had informally inquired whether they could send observers to the meetings of the Sub-Committee. Similar inquiries had been received in respect of the meetings of the Sub-Committee on State Responsibility but that Sub-Committee had decided, in view of the informal and preliminary nature of its proceedings, that observers would not be admitted.

The third question was that of the distribution of summary records. It was possible that the Secretariat would receive requests for the provisional or final summary records of the Sub-Committee from members of the International Law Commission who were not members of the Sub-Committee, and also from delegations. Accordingly, it was desirable to decide to what extent those requests could be met. The Sub-Committee on State Responsibility had decided that the provisional summary records of its meetings should be restricted to members only, but that the final versions of the records giving an account of the discussions on substance should be attached to its report.

Mr. TUNKIN proposed that, on all three points, the Sub-Committee should follow the same course as the Sub-Committee on State Responsibility. The situation was absolutely the same for both Sub-Committees.

Mr. ELIAS supported that proposal.

Mr. BRIGGS also supported Mr. Tunkin's proposal, with the qualification that members of the International Law Commission who were not members of the Sub-Committee should be welcomed to attend the meetings as observers.

Mr. EL-ERIAN supported Mr. Tunkin's proposal with the qualification suggested by Mr. Briggs.

The ACTING CHAIRMAN said that if there were no objection, he would consider that the proposal by Mr. Tunkin, as amended by Mr. Briggs, was unanimously approved by the Sub-Committee.

It was so agreed.

SUCCESSION OF STATES AND GOVERNMENTS

The ACTING CHAIRMAN invited debate on the procedure to be followed by the Sub-Committee.

Mr. TUNKIN said that the Sub-Committee on State Responsibility had been able to adopt a report which included an outline of the future study of the topic because it had had before it a paper from its Chairman containing a draft outline; in fact, that draft outline had been adopted by the Sub-Committee with only a few amendments and incorporated into its report.

In view of the absence of the Chairman, he suggested that the present Sub-Committee should confine its work to a discussion of the documents submitted by its members and any problems of succession of States that members might wish to raise.

He further suggested that the Sub-Committee should re-convene early during the next session of the International Law Commission. The Chairman would be asked to prepare a draft report, including an outline of the subject, which report would be considered by the Sub-Committee when it re-convened. The Sub-Committee would then be able to approve the Chairman's report (as had been done by the Sub-Committee on State Responsibility) and submit it to the full Commission early in the latter's next session.

Mr. ELIAS said that the Sub-Committee should not confine its work during the present series of meetings to a mere general discussion. It should consider the outline of the topic of the succession of States and Governments, bearing in mind that it was called upon to define the scope of that topic and report thereon to the International Law Commission.

² These summary records, memoranda and working papers are reproduced in appendix I and appendix II below.

³ Reproduced in Appendix II *infra*.

Perhaps the Sub-Committee could meet a few days before the opening of the Commission's next session.

Mr. ROSENNE said that he sympathized with the views expressed by both Mr. Tunkin and Mr. Elias. He understood, with regret, that the Chairman would be unable to participate at all in the present series of meetings. The Sub-Committee would nevertheless have to carry its deliberations to the stage of a draft report, the final adoption of which could be left until the Sub-Committee re-convened early in the session of the International Law Commission. He hoped that by then the Chairman would be able to attend.

He recalled the difficulties which had arisen regarding the holding of Sub-Committee meetings during the last session of the Commission, because some members had to combine their duties in the Commission with membership in other United Nations bodies meeting concurrently at Geneva. That situation might well arise again.

He added that, whereas the Sub-Committee on State Responsibility would be able to report to the Commission well in advance of the next session, the present Sub-Committee would only be able to report early in that session. Nevertheless, the Commission would still be able to consider the reports during its session and fulfil its mandate to report to the General Assembly on both subjects in time for the Assembly's next session.

Mr. TABIBI said that the course suggested by Mr. Tunkin would probably not delay the work of the Sub-Committee. Members could exchange views on the subject of the succession of States and Governments, and a preliminary report could be prepared which would be transmitted to the Chairman, together with the summary records of the Sub-Committee's meetings. The Chairman would then be able to report to the full Commission, in accordance with the latter's decision.

Mr. EL-ERIAN said that Mr. Tunkin's suggestion was most practical. He agreed with Mr. Elias that the Sub-Committee should not confine its work to a general discussion; it would advance the work as far as possible but it could not finalize it, in view of its terms of reference, which required that the Chairman should report to the full Commission.

Mr. LIU said it might perhaps be premature to discuss at that stage the form which the report would take. The immediate task of the Sub-Committee was to explore the topic of the succession of States and define the scope of the subject. The Sub-Committee had before it a number of valuable working papers and Secretariat documents. On the basis of the discussion on those documents, either the Acting Chairman or the Chairman, if he had by then sufficiently recovered, could prepare a report to the International Law Commission.

Mr. TUNKIN said that the Chairman's absence presented no practical difficulties. The Sub-Committee could proceed to discuss the problem of State succession as a whole and attempt to reach agreement on certain points; on that basis the Chairman could then prepare a draft report which the Sub-Committee could adopt at a meeting to be held early during the next session of the Commission.

The ACTING CHAIRMAN said that the Sub-Committee would be in a better position to take a final decision on the matter at a later stage in the discussion. In his opinion, the Sub-Committee should prepare a provisional draft report, which, as Mr. Tunkin had suggested, would serve as a basis for the final draft report to be prepared by the Chairman.

Mr. BRIGGS agreed that the Sub-Committee should wait until later in its session before taking any decision as to the type of report which it would submit. He hoped that it would try to reach at least tentative conclusions on certain questions, such as, for example, whether the study of State succession should be kept separate from that of the succession of Governments. The Chairman could then use those conclusions in preparing its own draft report, which, as Mr. Tunkin had said, should then be formally approved by the Sub-Committee.

Mr. BARTOS said he understood that the Sub-Committee would shortly have before it the working paper which the Chairman had prepared on the subject and which would be very important for its work. Under the Sub-Committee's terms of reference (A/5209, chapter IV, para. 72) its Chairman would also serve as its rapporteur. Any interim draft prepared by the Sub-Committee, therefore, would be subject to amendment by the Chairman, who would then prepare his own report. That report, after approval by the Sub-Committee, would also constitute the latter's report to the Commission.

Mr. LIANG, representative of the Secretary-General, drew attention to three studies prepared by the Secretariat: (1) The succession of States in relation to membership in the United Nations (A/CN.4/149); (2) Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150); and (3) Digest of decisions of international tribunals relating to State succession (A/CN.4/151). He explained that those studies did not call for any substantive discussion by the Sub-Committee but were intended merely for reference purposes.

Mr. ROSENNE said that he realized that the Secretariat papers in question did not relate directly to the Sub-Committee's main tasks, although they impinged upon it. He suggested that the Sub-Committee might devote some time to an exchange of views concerning the type of material which the Secretariat should in future be asked to produce.

The meeting rose at 11.30 a.m.

SUMMARY RECORD OF THE FOURTH MEETING

(Friday, 18 January 1963, at 3.15 p.m.)

SUCCESSION OF STATES AND GOVERNMENTS (*continued*)

The ACTING CHAIRMAN invited the Sub-Committee to continue its discussion.

Mr. BRIGGS said that the complexity of the task confronting the Sub-Committee was well indicated in the working paper prepared by the Chairman, Mr. Lachs. He expressed the fear that if the Sub-Committee were to embark upon a general debate, no two members would be talking about the same thing. He agreed, therefore, with Mr. Rosenne and Mr. Tabibi that in the interests of a more orderly discussion it would be better to start with specific questions, for example whether the succession of States should be dealt with separately from the succession of Governments.

Mr. TUNKIN agreed that the Sub-Committee should concentrate on practical problems in its discussion with a view to producing a useful draft report.

Mr. ELIAS shared the view that the Sub-Committee should confine itself to specific questions and should first discuss whether State succession should be taken up separately from the succession of Governments. It could then discuss the form in which its final conclusions should be expressed — whether as general rules or in an international convention.

Mr. BARTOS said that the systematic working paper prepared by the Chairman would provide a good basis for the discussion. As had been suggested by the previous speakers, the Sub-Committee should avoid any general debate and concentrate on such specific problems as the distinction between the succession of States and the succession of Governments.

The ACTING CHAIRMAN agreed that the approach suggested by the speakers offered a sound plan for the organization of the Sub-Committee's work and that the Chairman's working paper would undoubtedly provide a useful basis for the discussion.

Mr. TUNKIN said that, as the Chairman had indicated in his working paper, the problem of State succession could be

approached in various ways. Whereas the Sub-Committee on State Responsibility had considered only general principles, the present Sub-Committee might have to go further and consider specific matters. In that connexion, he agreed that the Sub-Committee should deal first with the question of the succession of States; actually, it was States and not Governments which possessed rights under international law. The Sub-Committee should not, however, close the door altogether to the possibility of discussing in that connexion also the problem of the succession of Governments, if the need should arise, for it was not entirely clear as yet how the two subjects could be separated.

With regard to the scope of the study to be undertaken, he thought that it would have to include the question of the succession of States in respect of general multilateral treaties, that being one of the most important parts of the subject. It would also be difficult to avoid the question of succession in respect of membership in international organizations. But the Commission should put specific emphasis on the problems of succession arising out of the attainment of independence by former colonies; those problems were of particular interest to the new States, and the Commission should show its awareness of their importance.

It had been indicated in the various working papers that the Sub-Committee should, in its study, be guided primarily by the existing practices of States. As Mr. Bartos had pointed out in his paper, however, those practices had to be interpreted with caution, since some of them had been imposed by metropolitan States on new and weak States and might lead the Sub-Committee astray if taken as typical examples.

He stressed the importance of being guided by those general principles which constituted the very core of contemporary international law, with due regard for the logical sequence in which they had evolved. It was necessary, however, to distinguish clearly between substantive rules of international law and the specific rules relating to State succession. The Sub-Committee would be acting correctly if it followed the example of the Sub-Committee on State Responsibility and drafted an outline programme of work which could serve as the basis for instructions to be given to the future special rapporteur on the subject.

With regard to the form which the Commission's draft should ultimately take, he said it was premature to reach a decision, but the experience of the Commission had shown that the draft articles drawn up by a special rapporteur should be as short as possible and formulated with a view to the drafting of a convention rather than a code.

Mr. BARTOS said that the general rules of international law should not be regarded as a sort of static dogma; they had developed with the evolution of the international community. They had, in particular, been modified by the Charter of the United Nations.

In his memorandum he had drawn attention to that point, which was illustrated, in regard to the topic of the succession of States, by the emergence of a large number of new States as a result of the process of decolonization. Admittedly, cases of State succession could arise otherwise than in consequence of the formation of newly independent States, but that phenomenon provided a clear example of the need to bring old principles into line with new developments.

He noted that all the working papers devoted special attention to the problems relating to the newly independent States. The same was true of the excellent Secretariat documents which were before the Sub-Committee.

Turning to the Chairman's memorandum and to the first question raised in the outline therein contained, he said that the questions of State succession and governmental succession were in fact inseparable. The issue of the continuity of the State, i.e. governmental succession, could also arise in regard to new States and remained of interest in contemporary international law.

The question of the continuity of the State—in other

words whether a State continued to be bound by the acts of a former government notwithstanding the changes which had taken place—could arise not only in regard to treaties but also in regard to actual situations (*situations de fait*), in particular as to frontiers. For example, was an event having legal implications (*un fait juridique*) (such as the drawing of the McMahon line in the Himalayas by former rulers) actually binding upon the States concerned?

Another interesting example was provided by the frontier between China and the USSR near Lake Baikal. In that case the USSR relied on a Protocol signed by the Russian and Chinese Empires in the last decade of the nineteenth century; the case was not one of succession to sovereignty but of succession to possession, itself implying the exercise of sovereignty.

He agreed that the Sub-Committee should work on the basis of the plan contained in the Chairman's paper.

Mr. EL-ERIAN agreed with Mr. Bartos that State succession and governmental succession were inseparable. The future special rapporteur on the topic would have to deal with the succession of Governments, at least in connexion with the succession of States.

The purpose of such an approach would be twofold. First, to enable the special rapporteur to delimit more precisely the scope of State succession. Second, to enable him to draw upon material which would be denied to him if he confined his attention to State succession.

However, the Sub-Committee should clearly realise that the connexion between State succession and governmental succession existed only at the preliminary stage. Sooner or later the two questions would have to be divided and studied separately. There were precedents for the division of a subject in the course of its study by the International Law Commission; for example, the study of consular relations had been severed from that of diplomatic relations, and the law of the sea had been divided into several component parts.

Turning to the question of other topics related to State succession, he agreed with Mr. Tunkin that succession to treaties should be included in the study of the topic of succession of States rather than in that of the law of treaties.

With regard to the topic of the relations between States and inter-governmental organizations (for which he had been appointed Special Rapporteur) and its connexion with that of the succession of States for the purpose of membership in such organizations, he would draw a distinction between two questions. The first was that of the succession between inter-governmental organizations—such as the succession of the United Nations to the League of Nations—which came within the scope of the topic of the relations between States and inter-governmental organizations. The second question was that of succession of States in the membership to such organizations, a question which belonged to the topic of State succession.

He thus drew attention to the fact that questions like that of succession between international organizations, which related to the legal position of such organizations, i.e. their external relations, raised problems which bore on relations between States and international organizations rather than problems of State succession.

Turning to the question of the approach to the subject of State succession, he agreed on the need to deal with the general principles, which he construed in the same manner as Mr. Bartos and, in particular, as including the principles of the United Nations Charter.

He also supported the view, put forward in the scholarly paper by Mr. Bartos and also emphasized in the Chairman's paper, that special treatment should be given to problems arising out of the emancipation of the newly independent States.

A further question arose: Should the objective be the codification or the progressive development of international law? In that connexion, he said that the General Assembly had

clearly indicated in its debates on the question of future work in the field of international law during the fifteenth and sixteenth sessions that more emphasis should be given to progressive development. That desire of the General Assembly had special force in regard to State succession, since it was admitted that the customary law on the subject was, as had been pointed out in a number of the working papers, uncertain in some of its aspects and incomplete as a whole.

He reserved the right to comment on the Chairman's paper at a later stage.

Mr. BRIGGS agreed with the view, expressed in Mr. Tabibi's working paper, that any recommendations upon which the Sub-Committee might agree should be firmly based on State practice.

He supported Mr. Tunkin's suggestion that the draft on State succession should take the form of terse and brief articles of the type usually included in a convention.

He inclined to the view that the results of the Commission's labours should be embodied in a convention, to be approved at an international conference such as that held at Vienna in 1961. More than half of the States at present Members of the United Nations had not been in existence when the rules on State succession had come into being: those States were entitled to an opportunity to consider those rules at an international conference, where they could be adapted and even supplemented by new rules as necessary.

As to whether the objective should be codification or progressive development, he thought it would be premature at that stage to take a decision.

Turning to the question whether State succession and governmental succession should be treated as one topic or as two, he pointed out that the two were already divided: they concerned two distinct legal situations. It was true that the problem sometimes arose whether a new entity was a new State or a new government. For example, when Italy had replaced Sardinia, the question had been debated whether a new State had come into being and whether the problems which arose were those of State succession and not of governmental succession. In the modern international community, he was sure that no Government of a new State of Asia or Africa would agree to be regarded as merely a new Government which had replaced the former colonial authority.

The problems of State continuity, in other words those of governmental succession, arose frequently in connexion with the international responsibility of the State, for they related to the responsibility of a State for the acts of past Governments.

For those reasons, he thought that a distinction should be drawn between State succession and governmental succession. He noted the suggestion, mentioned in the Chairman's paper, that the latter question should be studied "in connexion with" State succession. He was not at all certain of the meaning of that suggestion; he agreed with Mr. Tunkin that governmental succession should be studied as much as was needed for an understanding of State succession; care should be taken, however, not to pursue two objects at the same time. He had been interested by Mr. El-Erian's remark that State succession and governmental succession would have to be divided sooner or later, and thought that the division should be made at an early rather than a late stage.

Referring to part II, section 1 D of the Chairman's outline, he said that the principle of self-determination had been at the origin of the appearance of all the States which had emerged in the last two centuries, such as the United States of America. He agreed, naturally, that the study of State succession should take particular account of the interests and needs of the newly independent States.

On the question of succession of States in relation to treaties, he found very valuable the Secretariat document on the subject (A/CN.4/150). He had also been much impressed by the paper submitted by Mr. Bartos.

His own views in that respect had changed somewhat. Some fifteen or twenty years previously, he had considered that the matter of succession to treaties belonged to the law of treaties, but he now concurred with the view, so ably put forward by Mr. Bartos, that the matter should be studied in conjunction with State succession.

Mr. ELIAS said that, since the Sub-Committee had had an opportunity of hearing the views of those members who had not submitted papers, it should close the general discussion. At its next meeting, it should confine itself to deciding how to approach the problem of succession of States and succession of Governments; in his view, the Sub-Committee should suggest that the future special rapporteur should concentrate on the topic of the succession of States and consider the succession of Governments only to the extent to which it would help him to elucidate the subject. Once a firm decision had been reached on that point, the Sub-Committee should consider the extent to which the implications of State succession for treaties should be dealt with under the heading of State succession rather than under that of the law of treaties.

Mr. TABIBI agreed that, owing to shortage of time, the Sub-Committee should try to reach a decision on the basis of the Chairman's paper and of those points on which general agreement was likely. Nevertheless, he thought that the general discussion should not yet be closed: he for one would wish to comment further on the memoranda submitted by members and by the Secretariat.

Mr. ROSENNE thought it was premature to reach a decision. A consensus might well emerge if the discussion was continued. It was already apparent that the members of the Sub-Committee were virtually unanimous in thinking that the treaty aspects of succession should be dealt with in the context of the law of succession rather than in that of the law of treaties. Nevertheless, it would be desirable to devote some attention to considering what precisely had to be included in the law of treaties in the context of the topic of the succession of States. For example, could there be succession to the signature of a treaty as opposed to succession to a treaty that had actually come into force, in view of the decision reached by the Commission at its 14th session with regard to the legal effects of signature? And to what extent was it possible for a new State to make reservations to existing treaties in the context of the general law on reservations?

With regard to the problem whether the Sub-Committee was called upon to deal with one topic or with two, or with a combination of both, he said that a decision should be postponed for several days until some of the other problems had been considered. He noted, for example, that in document A/CN.4/150 the Secretariat had not made a distinction between instances of succession which on closer analysis might be found to be cases of succession of Governments; examples were Lebanon, Jordan and Morocco. The Secretariat had been quite right; but that demonstrated the danger of too rapid a decision on the main issue. Moreover it was significant that, in its resolution 1686 (XVI) the General Assembly had referred to "the topic" (in the singular) of succession of States and Governments.

Mr. LIU said that he was inclined to regard the succession of States and the succession of Governments as one topic; the emphasis, however, should be on the study of the former, since what rules could be formulated on the succession of Governments were vague and were certainly related to the succession of States.

Mr. ELIAS, supplementing his earlier remarks, said that it had not been his intention to suggest that the discussion should be closed at once but that, in view of the limited time at its disposal, the Sub-Committee should confine itself as from that meeting to considering whether the succession of States and the succession of Governments should be treated together or separately.

The ACTING CHAIRMAN said that a decision with regard to the closure of the general discussion would be taken at the next meeting.

The meeting rose at 5.10 p.m.

SUMMARY RECORD OF THE FIFTH MEETING

(Monday, 21 January 1963, at 3 p.m.)

SUCCESSION OF STATES AND GOVERNMENTS (*continued*)

The ACTING CHAIRMAN, speaking as a member of the Sub-Committee, said that he shared some of the views expressed in the valuable working paper submitted by Mr. Bartos. That working paper dealt exclusively and very thoroughly with the question whether, and to what extent, new States were bound by pre-existing treaties relating to their territory; it would be of great value both to the future Special Rapporteur and to the Commission itself. The two documents submitted by Mr. Elias also contained very valuable suggestions for the Special Rapporteur and for the Commission when the real work of codification began. Those documents drew attention to a number of important new problems which deserved thorough consideration.

The working paper submitted by Mr. Tabibi very appropriately stressed that the problem of State succession should be dealt with on the basis of the general practice of States. However, the difficulty of the matter lay in the fact that the practice of States was not always uniform. In that respect, he agreed with Mr. Tabibi that the Commission should not devote much attention to theoretical issues but should focus its attention on territorial re-organization accompanied by a change of sovereignty.

Like Mr. Tabibi, he believed that the main task of the Commission should be to examine the succession of States and not the succession of Governments.

Mr. Tabibi, like Mr. Bartos, thought that the Commission should first consider whether new States were bound by treaties entered into by their predecessors; he appeared to give, in principle, a negative answer to that question.

The working paper submitted by Mr. Rosenne dealt with a broad range of subjects. In the first place, Mr. Rosenne appeared to think that the succession of States and the succession of Governments should be treated as a single topic, for the reason (among others) that the attainment of independence had sometimes taken technically the form of a change of Government. Yet, even in that case a new State in fact came into being, and consequently the problem was essentially one of State succession. Actually, there was no reason why the two aspects of the question should not be studied jointly, but the problems of State succession were much more important and urgent than those of governmental succession.

With regard to the form which the codification of the subject would take, Mr. Rosenne (in paras. 5 and 6 of his paper) rejected that of a convention and favoured the formulation of a set of general principles or, alternatively, of a set of model rules. In support of that view, Mr. Rosenne had stated that many of the problems of State succession were of a bilateral character, that the number of non-successor States directly affected was small and that other States would not be sufficiently interested in concluding a general international convention on the question. There was some force in those arguments but he (Mr. Castrén) believed that third States would be interested in the formulation of general rules on so important a subject as State succession, because they might be affected in future by the problem. Naturally, any general international convention on the question should be sufficiently flexible to cover at least the majority of the various possible cases.

Mr. Rosenne further suggested (para. 8) that consideration should be given to possible differences between a successor Government and foreign individuals affected by State succession, and recommended judicial settlement in such cases. Admittedly the question was an important one, but the problem involved was vast and difficult and was, moreover, connected with State responsibility.

Mr. Rosenne had made a number of suggestions (para. 10) regarding the exclusion of certain questions which belonged to the realm of municipal law. There would no doubt be an advantage in limiting the scope of the very broad subject of State succession, and he (Mr. Castrén) had perhaps gone too far in his own working paper in suggesting the study of all questions relating to the legal status of the local population coming under the territorial and personal jurisdiction of the new State. However, it was not possible to exclude such questions as nationality; in addition, the new sovereign had a duty to respect human rights in its relations with the local population.

So far as the law of treaties was concerned and its connexion with State succession, Mr. Rosenne had drawn attention to a number of important problems which needed to be solved (paras. 12 *et seq.*). The first was whether the succession to treaties should be dealt with by the Commission in the context of its work on the law of treaties or as part of the subject of State succession. In his own paper he (Mr. Castrén) had indicated that both courses were possible, while showing a preference for the second one. Of course, it would be very difficult to draw a clear line of demarcation between the two subjects and, for that reason, the two Special Rapporteurs concerned should work in close contact.

As indicated by Mr. Rosenne, the Commission should arrive at a clear formulation on the question how new States could become parties to multilateral treaties and members of international organizations. There already existed some practice in the matter, but it was not uniform. Another question which arose was that of the legal effects of a general agreement between the new State and the former metropolitan State on the question of maintaining in force various treaties formerly rendered applicable to the territory of the new State; Mr. Bartos had dealt with that question in his working paper, and he (Mr. Castrén) believed that it was possible to find an acceptable solution to that problem.

With regard to economic rights, he agreed with Mr. Rosenne (paras. 19-22 of his paper) that it would be desirable to classify the agreements which constituted the legal basis for the exercise of economic activities by aliens before the new State's attainment of independence. There existed a very real difference between the case of an alien whose rights were based on an international convention and an alien whose rights were based on administrative action taken under municipal law. It was also necessary, when examining questions relating to concessions and to the respect due to the rights of private individuals, to bear in mind that they were connected with the topic of State responsibility.

The question of the public debt of a territory which had become independent was also a problem of State succession (Mr. Rosenne's paper, para. 23).

In his conclusions Mr. Rosenne suggested that the Sub-Committee might make recommendations to the Commission relating to the appointment of a Special Rapporteur, to his precise terms of reference and to the time schedule for the progress of the work. He agreed in principle with Mr. Rosenne but thought that those questions should be postponed and dealt with only in the final report of the Sub-Committee.

The Chairman's working paper constituted an excellent analysis of those of the other members. The suggestions it contained were generally acceptable, and he suggested that the Chairman's paper should be taken as a basis of the Sub-Committee's detailed discussion, as soon as the general discussion was concluded.

He thanked the Secretariat for the three excellent studies concerning matters connected with the topic of State succession. In particular, the Secretariat had provided information on recent practice in the matter of succession to treaties, which was very important because the study of State succession would probably begin with that question. As the work on the topic of State succession advanced, however, further documents would be needed relating to the attitude of the new States to the obligations of the predecessor States other than those arising from treaties, in such matters as public debts, concessions and nationality. Information was needed on all the problems connected with the process of the attainment of independence. Of course, the future Special Rapporteur could obtain such information directly from governments and official documents, but he suggested that the already difficult task of the Special Rapporteur would be made easier if the Secretariat could undertake that research work.

Mr. TABIBI said that, after reading the valuable working papers submitted by members, he had been confirmed in the view that the topic of State succession was a difficult and complicated one, because of the many political, economic and human factors involved. It constituted, however, a new and challenging field of study and one which was of great contemporary importance in view of the changes taking place in the world.

He had emphasized in his own working paper that the study of State succession should be based on State practice. He agreed that undue emphasis on State practice might involve some dangers because the former colonial Powers had, in past practice, imposed some of the solutions. However, the general rules of international law were inadequate to provide the answer to all the problems involved; in any event, many of those rules had also been formulated in the past by former colonial Powers. His conclusion on that point was similar to that of Mr. Bartos, namely that due attention should be paid to the principles of the United Nations Charter and to the practice and principles of the United Nations—in particular, the principle of self-determination—and the extent to which the general rules of international law had been modified by the Charter, principles and practice of the United Nations.

In the consideration of the general principles of the topic of State succession, two types of problems called for attention. The first were the problems of the newly independent nations; the second were those of third States. It was essential to bear in mind both types of problems, for the former colonial Powers had signed treaties which affected third States.

Turning to the various theories mentioned by Mr. Bartos in his paper, he said that he favoured the *tabula rasa* theory, which took into account the will of the people concerned. The other theories were not suited to present circumstances. Mr. Bartos had given, in connexion with the theory of option, the example of the Peace Treaties of 1946; however, those treaties had been imposed on the defeated Powers by the victorious Powers, which had thus been able to impose upon the vanquished the system of option in question. As to the system embodied in the theory of a period of reflection (Mr. Bartos's paper, section IV), he could not agree to any suggestion that the Secretary-General should merely fulfil the duties of a post office; the Secretary-General should be able to examine whether a declaration relating to the validity of treaties affected other Members of the United Nations.

As to the possible forms of the codification of the international law relating to State succession, he favoured a draft convention rather than a code; a convention would be more acceptable to States and would prove a more effective means of codifying the international law on the subject.

With regard to the question of the separation of the subject of governmental succession from that of State Succession, he referred to his own memorandum. On that point, he had understood Mr. Tunkin as having suggested as a compromise that the future Special Rapporteur on the topic of State succession should make passing references to governmental

succession, as necessary. But surely the question of governmental succession was an important one, and the Special Rapporteur would find it necessary to devote attention to it.

With a view to avoiding overlapping, he agreed with the suggestion contained in the Chairman's working paper that there should be close co-operation between the Special Rapporteurs on the topics of State succession, State responsibility and the law of treaties.

Mr. Rosenne had referred in his working paper (para. 14) to "dispositive treaties" or treaties creating local obligations, regarding which it was sometimes asserted that they subsisted despite changes of sovereignty; the reference was to international treaties and treaty settlements which defined and delimited international frontiers, and Mr. Rosenne had indicated that "this theory has obvious practical advantages". He could not agree with M. Rosenne on that point; the theory in question had no practical advantages, was unnecessary and was moreover contrary to the will of the people affected by such treaties. The majority of the territorial treaties which would be covered by such a theory had been imposed upon the people concerned against their will; the frontiers drawn by those treaties had been drawn under the influence of colonial Powers. The issue was an important one because the territories affected were sometimes larger in area than that of some Member States of the United Nations.

Referring to the memorandum prepared by the Secretariat (A/CN.4/149) on the subject of the succession of States in relation to membership of the United Nations, he said the memorandum reproduced the text of the legal opinion of 8 August 1947 given by the Assistant Secretary-General for Legal Affairs on the subject of the admission of Pakistan to membership of the United Nations. That legal opinion envisaged the situation of both India and Pakistan in the light of the succession to all treaty rights; the new Dominion of India was regarded as continuing to possess all the treaty rights and obligations of the pre-existing State of India; the territory which had broken off from India, i.e. Pakistan, was regarded as a new State and was considered as not taking over the treaty rights and obligations of the old State. The issue, as thus presented, was not limited to the question of membership of the United Nations. The question of membership was viewed as consequential to the broader issue of succession to treaty rights and obligations.

That was true not only of the legal opinion to which he had referred, but also of the action taken by the General Assembly and the Security Council in the matter of the admission of Pakistan.

In that connexion, he had been surprised to see that the Secretariat document to which he had referred reproduced (in para. 5) the text of an agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan. That agreement was one of the strangest in the history of international law. He failed to see how the new Dominion of India could confer upon Pakistan, i.e. a part of its territory seceding from it, rights under treaties relating to the territory of the State of India, rights which affected third parties. It was equally strange for Pakistan, i.e. the seceding portion of India, to confer upon the new Dominion of India rights which affected third parties.

Mr. ROSENNE said, with reference to the proposed separation of the subject of the succession of States and that of the succession of Governments, that there was a danger that the Commission might create inequalities and artificial distinctions if it decided to treat the practical problems arising out of the independence of new States as if they were exclusively problems of State succession. There was a distinction in law between former colonial territories which had been formally annexed by the colonial State and those which had not been so annexed. The latter included the old-fashioned kind of protectorate, as well as the two modern phenomena of the Mandated and Trust Territory. The special

legal position of such territories had been considered by the Permanent Court of International Justice and by the present International Court of Justice in a number of cases, and that jurisprudence could not be lightly discarded.⁴ The problem had been very well expressed by Mr. Bartos in his working paper when he had stated that the Sub-Committee should devote its attention mainly to the question of succession of States and Governments raised by the birth and creation of new States through the application of the principles of self-determination of peoples embodied in the United Nations Charter. In such a context, any attempt to set aside the question of the succession of Governments as not relevant would create more difficulties than it would solve. What should be excluded from a study of the succession of Governments, however, was the consideration of questions not directly relevant to the creation of new States, such as the status of Governments which had come into power by revolutionary or unconstitutional means and also some Governments, such as that of the present Republic of South Africa, which had come into power by constitutional means but which had undergone an elaborate series of changes during the past forty years, where the change of government had not led to the creation of a new State. Secondly, all questions of governmental succession relating to insurgents should be excluded, and so should, thirdly, all questions relating to matters of State responsibility arising out of a change of government. Nor should the Sub-Committee be concerned with any problems of recognition. What it should concern itself with was the problem of changes of government, whether constitutional or not, which led directly to independence accompanied by membership in the United Nations. That point could be covered by adding another heading under part II, section 3 B, sub-paragraph (a) of the Chairman's working paper, which would refer to succession originating in the termination of a protectorate, mandate or trusteeship agreement.

He was not clear about the interpretation of the heading of section 1 C of part II of the Chairman's paper, which read: "In favour of giving priority to the topic of succession of States and studying succession of Governments in connexion with it." He preferred the wording used by Mr. Tunkin, who had said that the succession of Governments should be studied "when the need arose". He noted also that Mr. Tunkin had said that it would be premature for the Sub-Committee to reach any decision at the present time concerning the final form in which its conclusions would be expressed. However, he agreed with Mr. Tunkin that the draft articles should be terse, and in a form suitable for ultimate incorporation in a convention.

So far as the form of the final text was concerned, he maintained an open view at the moment, with the understanding that, if in the final text the progressive development of the law of the succession of States and Governments predominated over its codification, the Commission, under its Statute, would have no choice but to recommend the conclusion of a convention. Lastly, he hoped that the Sub-Committee would find time to discuss the types of working paper which the Secretariat should be asked to produce.

Mr. LIANG, representative of the Secretary-General, said that the Secretariat had informed the Commission at its last session that it would furnish it and its Sub-Committees with certain working papers. Three of those documents (A/CN.4/149, 150 and 151) were already before the Sub-Committee, and a fourth study containing an analysis of national court decisions concerning State succession was in the course of preparation. He regretted that in view of the Secretariat's heavy schedule of work, including the preparation of the forth-

coming Vienna conference, it would be unable to assume any additional tasks before the Commission's next session.

Mr. ROSENNE explained that he had not expected the Secretariat to prepare any more documents before the Commission's next session but had referred only to the work to be done by it during the next twelve months.

Mr. ELIAS proposed, in the interests of a more orderly discussion, that the Sub-Committee should proceed to consider the Chairman's working paper point by point.

Mr. EL-ERIAN supported that proposal.

It was so agreed.

Mr. BRIGGS said, with reference to part I (preliminary remarks) of the Chairman's paper, that the problems concerning new States should be given "special attention" rather than "special treatment".

With reference to part II section 1 (Succession of States and Governments: one or two topics?), he proposed that paragraph C should be revised along the lines suggested by Mr. Tunkin to include the following phrase: ". . . that the Sub-Committee recommends that the Special Rapporteur should initially give priority to the topic of State succession, while considering the succession of Governments in so far as needed to throw light on State succession".

Mr. ELIAS said that he would prefer the phrase "should concentrate on" to the phrase "give priority to".

Mr. BRIGGS accepted that amendment.

Mr. ROSENNE said that he might accept the phrase "that the Special Rapporteur should initially concentrate on", but since two different topics were involved, he was afraid that the second part of Mr. Briggs's amendment, namely the phrase "to throw light on", would lead to confusion.

Mr. BRIGGS said that in formulating his amendment he had acted under the impression that Mr. Rosenne was satisfied with the wording suggested by Mr. Tunkin for paragraph C. He also noted that Mr. Rosenne, when referring to those cases of the succession of Governments which he would exclude from consideration, had excluded almost everything and had said that the Sub-Commission should concern itself with the problem of changes of Government, whether constitutional or not, which led directly to independence accompanied by membership in the United Nations. To him that seemed to be an example of State succession. In dealing with the subject, the special rapporteur would have to consider the practical implications of both kinds of succession.

Mr. ELIAS thought that Mr. Briggs's suggestion was an adequate solution, since it merely indicated to the special rapporteur the lines on which the Sub-Committee was thinking; it would be open to the rapporteur at any time to depart from the Sub-Committee's suggestions if he thought it necessary. He also criticized Mr. Rosenne's reference to the case of the Republic of South Africa as illustrating a kind of Government succession that ought to be excluded from consideration; surely, the *Robert E. Brown Case*⁵ was a significant landmark in international law.

Mr. LIU said that the wording proposed by Mr. Briggs, as amended by Mr. Elias, was acceptable to him.

Mr. ROSENNE proposed that Mr. Briggs's amendment should be revised to read ". . . recommends that the Special Rapporteur should initially concentrate on the topic of State succession and also the problem of succession of Governments".

⁴ As instances cf. the cases of the Mavrommatis Palestine Concession, Tunis and Morocco Nationality Decrees, United States Nationals in Morocco and the various South West Africa cases.

⁵ Robert E. Brown claim, American and British Claims Arbitration Tribunal, in *British Year Book of International Law*, 1924, pp. 210-221; also in *American Journal of International Law*, XIX (1925), pp. 193-206.

Mr. TUNKIN said he preferred Mr. Briggs's original text, as amended by Mr. Elias.

Mr. BARTOS supported the amendment of Mr. Briggs, but reserved the right to comment further on the matter after the presentation of subsequent arguments.

Mr. ROSENNE said that he would agree provisionally to the proposed amendment, although he was not entirely satisfied with it.

Mr. ELIAS proposed, as a compromise, that part II, section 1, of the Chairman's working paper should be left unchanged and that Mr. Briggs's amendment, together with the other suggestions made during the debate, should be included at the end of it. That would enable those who were not members of the Sub-Committee to know what other views had been expressed, while all the members themselves could feel that their points of view would be available to the future special rapporteur.

The ACTING CHAIRMAN said that, so far as the records were concerned, the Sub-Committee would follow the same procedure as the Sub-Committee on State Responsibility.

Mr. TABIBI said that to mention all the alternatives in the report might cause confusion; it would be best if the different points of view were explained in the records, although some indications should be given in the report.

Mr. TUNKIN thought that it would be preferable if the preliminary remarks were included in the section entitled "The scope of the subject"; an injunction to the Special Rapporteur to pay particular attention to the problems arising out of the accession of new States to independence would then be included in his instructions.

Mr. BARTOS, supported by Mr. BRIGGS and Mr. EL-ERIAN, suggested that the words "and of the principles of the United Nations Charter" should be added after the words "in the light of contemporary needs" in the passage entitled "preliminary remarks".

The ACTING CHAIRMAN said that, in the absence of objection, the suggestions made by Mr. Tunkin and Mr. Bartos would be adopted. Section 1 D could then be deleted.

He then invited the Sub-Committee to consider part II, section 2 (Delimitation of the topic) and noted that the subject matter of paragraph A (a), "Law of treaties" had already been discussed at some length by the Sub-Committee.

Mr. TUNKIN thought that the Commission should go further than the Chairman had done in that paragraph and should state positively that it was of the opinion that the subject of succession in respect of treaties should be dealt with in the context of State succession.

Mr. ROSENNE said that, in that case, the best course would be to delete the last two sentences of paragraph A(a).

It was so agreed.

The ACTING CHAIRMAN suggested that sub-paragraphs (b) and (c) of section 2 A should be considered together.

Mr. EL-ERIAN said that the recommendation to the three Special Rapporteurs in sub-paragraph (c) was equally applicable to the Special Rapporteur on the topic of relations between States and inter-governmental organizations, who should therefore be mentioned.

It was so agreed.

Mr. TUNKIN said that, with regard to responsibility (sub-paragraph (b)), the only problem was to avoid overlapping. That could be achieved by co-ordination between the Special Rapporteurs: but since what was being drafted was a programme of work for the future Special Rapporteur on succession of States, the wording would have to be reformulated in the draft report in clear-cut terms, on the same lines as in the report of the Sub-Committee on State responsibility.

The ACTING CHAIRMAN agreed that the same formulation as that used by the Sub-Committee on State responsibility should be employed.

He then asked the Sub-Committee to consider section 2B (Exclusion of certain issues) in the Chairman's report.

Mr. BARTOS said that, while in principle he could accept sub-paragraph (a), he had certain reservations with regard to (b) and (c). He fully agreed that all matters falling within Article 2(7) of the Charter were outside the scope of international law in the ordinary sense; but there were certain questions in connexion with the succession to sovereign rights which could not be regarded *ipso facto* as being purely domestic during the period of transition. There were some matters that had an international law aspect. Moreover, it might not merely be a question of relations between former subjects of the metropolitan Power and the Government; it might be a question of aliens in general.

Mr. BRIGGS agreed. He was not convinced that all the items in (b) and (c) should be excluded from the study. Reference had been made to matters which appeared to fall essentially within the domestic jurisdiction of States under Article 2(7) of the Charter and thus to be outside the scope of a state of international law; but some of those matters were not so clearly excluded. As Feilchenfeld had suggested in his *Public Debts and State Succession* (1931), the jural relations sought to be continued by theories of State succession were predominantly jural relations under municipal, not international, law, and the problem was therefore to determine whether international law required a succeeding State to assume or revivify the municipal law obligations of its predecessor. Before approving the suggestions made in sub-paragraphs (a), (b) and (c) the Sub-Committee should certainly devote more time to considering whether there were any rules of international law which required a succeeding State to assume the municipal law obligations of its predecessor.

With regard to (a), it had frequently been held, notably by the Permanent Court of International Justice in the *German Settlers case*⁶ and by courts in the United States that, in the case of a territorial transfer, the old law survived a change of sovereignty until it was formally changed. Though that statement might reflect practice, it concealed an ambiguity, since the laws which continued in operation derived their character as positive law from the fact that they were regarded by the new State as rules of its own law.

The ACTING CHAIRMAN suggested that the examples quoted in (a), (b) and (c) might be omitted.

Mr. ELIAS said that the examples in question were based on an assumption that had been disputed earlier in the Sub-Committee when it had endeavoured to delimit the scope of succession of States and of Governments. If it was accepted that all subjects such as changes of government, whether by revolution or by constitutional or unconstitutional means, were outside the scope of the topic, then the examples would be pertinent. But once the validity of that assumption was challenged, a reference to the examples would merely hamper the Special Rapporteur in his work. Moreover, unless he was allowed to examine those topics, he would not know to what extent they ought to be excluded from the study. Care had to be exercised in making reference to Article 2(7) of the Charter since, when it had been invoked, it had often led to difficulties: for instance, it had been cited by the Government of the Republic of South Africa in support of its policy in South West Africa and even in South Africa itself.

Mr. TUNKIN said that, regardless of any argument in favour of retaining or deleting section 2B (a), (b) and (c), the

⁶ Advisory opinion of the PCIJ in the case of the *Settlers of German Origin in Territory ceded by Germany to Poland*, Series B, No. 6.

Sub-Committee could not very well begin by saying what should be excluded from the study. What the Chairman had written was merely a recapitulation of suggestions made by members in their papers. In his view the whole of paragraph B should be omitted.

Mr. ROSENNE agreed that that would be the best course.

Mr. LIU observed that the reference to Article 2(7) of the Charter was irrelevant, since the intention of Article 2(7) was to preclude the United Nations from taking action in matters lying within domestic jurisdiction; it made no attempt to define what was in the sphere of international law and what was in the sphere of domestic jurisdiction.

Section 2B was deleted.

The ACTING CHAIRMAN invited the Sub-Committee to consider section 3 (Division of the topic). He recalled that it had already been decided to include (a) "succession in respect of treaties" and to exclude (d) "succession between international organizations".

Mr. EL-ERIAN suggested that the order of sub-paragraphs (b) and (c) should be reversed.

It was so agreed.

Mr. BARTOS proposed the deletion of the words "concerning individuals" which appeared within brackets in sub-paragraph (e). The sub-paragraph dealt with succession in respect of rights and duties resulting from sources other than treaties and applied to relations between States in general. The words in brackets would limit the scope of the Special Rapporteur's work.

It was so agreed.

Mr. ELIAS inquired what was intended by sub-paragraph (e).

Mr. ROSENNE said that it was desirable that consideration should be given to the question how far specific proposals for the settlement of disputes were an integral part of the system to be evolved by the Commission for the topic of succession. The question should be studied by the Special Rapporteur even if he were to reach a negative conclusion.

Mr. TUNKIN said that the different means of settling disputes constituted a separate subject: the introduction of such a topic would merely complicate matters.

Mr. ROSENNE said that, if the majority wished to delete sub-paragraph (e), he wished it to be placed on record that he was opposed to such a decision.

The ACTING CHAIRMAN noted that, if a sub-heading was deleted by the Sub-Committee, that did not mean that the Special Rapporteur would be precluded from studying the point covered by the sub-heading in question.

Mr. ELIAS said that it was surely not intended that a set of articles was necessarily to be regarded as incomplete if no machinery was established for the settlement of disputes. The sub-paragraph should be deleted.

Mr. BRIGGS said that, while he agreed that the subject should not be made more complicated, he thought that sub-paragraph (e) should be retained. He could visualize situations in which a recommendation with regard to special adjudicative procedures might be very appropriate. The Special Rapporteur should be left free to deal with the point.

Mr. BARTOS also thought that the sub-paragraph should be retained. There had certainly been cases in the past where special judicial machinery had been established to settle disputes arising out of territorial changes and State succession: the Charter did not exclude such methods of settling disputes, which were in conformity with United Nations practice. Under the League of Nations system too, disputes had been settled by arbitral and other special tribunals; it was not always possible for the parties to go to the expense of taking a case before the International Court of Justice.

Mr. TUNKIN said that a question of principle was involved. The Sub-Committee should be clear in its own mind about what it was trying to do. It was engaged in drafting an outline for the codification of the particular branch of international law dealing with the succession of States, and there was no point in confusing the issue by introducing a topic which formed a separate and distinct branch of international law.

The meeting rose at 6 p.m.

SUMMARY RECORD OF THE SIXTH MEETING

(Tuesday, 22 January 1963, at 10 a.m.)

MESSAGE FROM THE CHAIRMAN

The ACTING CHAIRMAN read a telegram just received from the Chairman, thanking the Sub-Committee for its wishes for a speedy recovery and stating that he would appreciate receiving the Sub-Committee's draft and recommendations.

SUCCESSION OF STATES AND GOVERNMENTS (*continued*)

The ACTING CHAIRMAN invited the Sub-Committee to continue its debate on part II, section 3A (e) of the Chairman's working paper.

Mr. ROSENNE said that the document which the Sub-Committee was preparing would, if the International Law Commission accepted it, constitute guidance for the future Special Rapporteur on the topic of State succession, without committing him, or the other members of the Commission as to substance.

If, therefore, it was agreed that the outline for the study of the topic should contain a reference to the question of adjudicative procedures for the settlement of disputes, the effect would be merely to invite the Special Rapporteur to bear mind the question of such procedures and to consider whether, in particular, procedures other than those of existing organs such as the International Court of Justice were in any way relevant to the topic of State succession.

He recalled that the International Law Commission had on many occasions drawn attention in its past drafts to the question of adjudicative procedures for the settlement of particular types of disputes. It had, for example, included a provision on the settlement of certain types of disputes in its draft on nationality including statelessness.⁷ In the draft articles on the conservation of the living resources of the sea, the Commission had embodied provisions for a special type of machinery for the settlement of disputes;⁸ a more general type of provision had also been included in the draft articles on the continental shelf⁸ and both provisions had been incorporated into the results of the work of the first Conference on the Law of the Sea (1958).⁹

He thought that the Commission would have to envisage the problem of State succession in its totality, and hence it was appropriate for it to consider the question of the settle-

⁷ Draft convention on the elimination of future statelessness, and draft convention on the reduction of future statelessness: provision for judicial settlement in article 10 of both conventions, see report of the International Law Commission on its 5th session, chapter IV (A/2456, in *Yearbook of the International Law Commission, 1953*, vol. II, United Nations publication Sales No. 59.V.4, vol. II).

⁸ See report of the International Law Commission on its 8th session, chapter II (A/3159, in *Yearbook of the International Law Commission, 1956*, vol. II, United Nations publication, Sales No. 1956.V.3, vol. II).

⁹ *United Nations Conference on the Law of the Sea, Official Records*, vol. II, annexes (A/CONF.13/38), United Nations publications Sales No. 58.V.4, vol. II.

ment of disputes. The decision whether provisions on the subject should be included in the final text to be adopted on the basis of the Commission's own proposals was perhaps a political one; indeed, it might well be that, on the basis of the material submitted by the future Special Rapporteur, the Commission itself would reach the conclusion that the question of the settlement of disputes was not an integral part of the topic of State succession.

He agreed with Mr. Bartos that the reference to the procedures for the settlement of disputes was not intended to refer to any particular existing procedure. There were in effect a variety of organs for the settlement of particular types of disputes arising out of State succession; those disputes might in some cases involve two States and in others a State and a private individual.

Mr. EL-ERIAN expressed doubts regarding the advisability of including, particularly at the preliminary stage, any reference to the question of procedures for the peaceful settlement of disputes.

The Sub-Committee's task was to delimit the topic of the succession of States and Governments. Accordingly, it should confine its deliberations to the content of that topic, i.e., the substantive law of State succession, and should not enter into the question of machinery for the implementation of those substantive rules of law.

It was as yet uncertain whether the final draft on the topic of State succession would take the form of a draft convention or that of a restatement of the law on the subject. He therefore urged the Sub-Committee not to engage at that stage in work on a question which would be normally covered in the final clauses of a draft convention.

His view was borne out by the experience of the International Law Commission itself. He seemed to recollect that, during the Commission's discussion of one of the concluding articles of the late Mr. Scelle's draft on arbitral procedure,¹⁰ Mr. François had pointed out that, if the provision then under discussion (concerning the settlement of disputes as to the meaning of the arbitral award) were to be included in the draft, it might well become a habitual clause (*clause de style*) to which governments would automatically make a reservation; the effect would be to hinder rather than to advance the cause of pacific settlement of disputes.

It was true that in the Geneva Conventions on Fishing and Conservation of the Living Resources of the High Seas and on the Continental Shelf (1958) certain provisions on the settlement of disputes had been included. The reason for their inclusion had been that those particular Conventions, as distinct from the other two 1958 Geneva Conventions, contained an element of progressive development which had been accepted by a number of countries only on condition that a particular machinery for the settlement of disputes was embodied in the appropriate Convention.

He recalled that, at its most recent (seventeenth) session the General Assembly had adopted its resolution 1815 (XVII) in which it had included among the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations the "principle that States shall settle their international disputes by peaceful means". In its operative procedural paragraph, the resolution included the principle of pacific settlement of disputes among the three topics which were to be given priority study by the Assembly at its next session. As pointed out by Mr. Tunkin, it was thus clear that the question of the pacific settlement of disputes was another important branch of international law, which should be kept distinct from the topic of State succession.

The ACTING CHAIRMAN noted that there was a fairly even division of opinion among the members of the Sub-Committee on the question whether the outline for the study of State succession should or should not include a reference to procedures for the settlement of disputes. It would be preferable not to put the question to the vote, but instead to record that division of opinion in the Sub-Committee's draft report. For his part, he saw no harm in suggesting that the future Special Rapporteur might take into consideration the question of the settlement of disputes; the Special Rapporteur would not be under any obligation to propose a rule on the subject, but if he saw fit to do so, it would be for the full Commission to decide whether a clause on the settlement of disputes should be included in the draft on State succession.

Mr. TUNKIN found the Acting Chairman's suggestion acceptable as far as the draft report was concerned; when the Sub-Committee reconvened in May, it would decide the question in connexion with its final report.

The problem under discussion was an important one; if the Sub-Committee were to decide to recommend that the Special Rapporteur should study the question of the pacific settlement of disputes, the Special Rapporteur would be under an obligation to deal with a matter which, in his (Mr. Tunkin's) view, was extraneous to the subject.

Mr. ELIAS said he would prefer the matter to be decided by a vote.

The ACTING CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed to adopt the course suggested by Mr. Tunkin.

It was so agreed.

The ACTING CHAIRMAN invited the Sub-Committee to consider part II, section 3B of the Chairman's outline, dealing with the "detailed division of the subject".

Mr. BRIGGS suggested that section 3B should be left substantially unchanged: it provided a satisfactory table of contents for the study of the topic of State succession. In that regard, he pointed out that the criteria mentioned under subparagraphs (a), (b) and (c) were not mutually exclusive.

He had no objection to the suggestion made by Mr. Rosenne at the previous meeting that a reference should be introduced to the termination of a protectorate, mandate or trusteeship, but thought that those cases were covered by the expression "birth of a new State".

Mr. ELIAS said he had no objection to the retention of sub-paragraphs (a), (b) and (c), but thought that the material contained in sub-paragraph (d) was already substantially covered by sub-paragraph (b) of paragraph A entitled "Broad outline".

Mr. BARTOS agreed that the criteria specified in subparagraphs (a), (b) and (c) were not mutually exclusive; it was impossible to carry out an analysis on that basis without inter-relating the various sets of criteria.

He stressed that the Chairman, in the outline contained in his working paper, had merely intended to catalogue the various criteria which had been put forward; it had not been the Chairman's intention to express a definite view on the choice between those criteria.

He urged that all the material contained in the Chairman's outline should be retained; he suggested that the Sub-Committee should, rather than delete anything, make it clear that the enumerations in the various sub-headings were not exhaustive and that further points could be added in future. That result could be achieved by introducing into the opening sentence an expression such as "in particular".

He found very interesting Mr. Rosenne's suggestion that sub-paragraph (a) should contain a reference to the question of the termination of a protectorate, mandate or trusteeship agreement. Such a reference would not, however, exhaust all the important cases which might arise; he was thinking, in particular, of the re-emergence of a State. For example, the

¹⁰ A/CN.4/113, in *Yearbook of the International Law Commission, 1958*, vol. II, United Nations publication Sales No. 58.V.1, vol. II.

disappearance of Ethiopia as a result of successful military action had been more or less acknowledged by the League of Nations; when Ethiopia had later regained its independence, the question had arisen what had been its status in international law during its temporary disappearance from the international scene.

As far as protectorates were concerned, he drew attention to the well established doctrine in international law, acknowledged by the practice of international courts, that a protected State was a semi-sovereign State, and as such possessed in some measure a legal personality in international law. With reference to sub-paragraph (d), he drew attention to the existence of guarantor States, which were neither "States directly concerned" nor "third States".

The ACTING CHAIRMAN said that the valuable points made by Mr. Bartos and other speakers would come to the attention of the Special Rapporteur through the summary records of the meetings.

Mr. LIANG, representative of the Secretary-General, said he was somewhat puzzled by the use of the term "criteria" in the opening sentence of paragraph B, a paragraph which in fact spelled out the details of the subject matter of the future report on the topic of the succession of States and Governments.

Furthermore, it was not quite clear what exactly was the purport of the preposition "by" (in the English text) which was used in (a), (b) and (c), apparently to connect the opening words "several criteria are offered" to "the origin of succession", "the source of rights and obligations" and "territorial effects" respectively.

The points to which he had drawn attention could be dealt with by redrafting. In addition it would perhaps be desirable to rearrange the order of the various sub-paragraphs. Sub-paragraph (a), dealing with the origin of succession, would be appropriate as the opening paragraph, and should be followed by two sub-paragraphs dealing respectively with *ratione personae* questions (sub-paragraph (d)) and *ratione materiae* questions (sub-paragraph (b)).

A final sub-paragraph along the lines of (c) would deal with "effects".

Mr. EL-ERIAN expressed misgivings about the wisdom of including in the outline any detailed references to the various ways in which new States came into being, and to the question whether certain particular States were "new" or not. He noted the suggestion by Mr. Briggs that a formerly protected State might, on the termination of the protectorate, be considered as a new State; in fact, the International Court of Justice, in its decision in the case concerning rights of nationals of the United States in Morocco, had held that Morocco was a State in protectorate relationship with France: the external aspects of its independence had been suppressed during the protectorate but Morocco had retained its personality as a State in international law.¹¹

He also reserved his position regarding the examples given in the Secretariat documents. He realized that those documents were not before the Sub-Committee at that stage; he would, therefore, have ample opportunity of discussing them in the International Law Commission before which they would be formally placed at its next session.

Mr. TUNKIN agreed with the doubts expressed by the representative of the Secretary-General. There was some overlapping between the headings in paragraphs A and B; the explanation was that the Chairman had had no intention of setting forth a programme of work but merely of recapitulating the various points raised by members in their working papers. It was for the Sub-Committee to draft a programme of work; in doing so it would inevitably have to choose from the Chairman's working paper those points which it considered

appropriate for inclusion and arrange them in proper order.

In particular, he agreed with Mr. Elias that sub-paragraph (d) of paragraph B was largely covered by the sub-headings in paragraph A.

Mr. TABIBI agreed with Mr. Tunkin's remarks and with those of the representative of the Secretary-General. The defects to which attention had been drawn could be removed by redrafting.

In the redrafting of the section, he urged that the suggestion by Mr. Bartos should be taken into account and that it should be clearly stated that the enumerations were not exhaustive. In that manner, it would be possible to add further points that might later come to the attention of the Commission in its work.

Mr. TUNKIN suggested that the Sub-Committee should at that stage confine its work to an examination of the various items in paragraph B, to see whether any should be deleted and whether any further points should be added. It should be left to the Chairman to rearrange the material for submission to the Sub-Committee when it reconvened in May.

Mr. BRIGGS, while agreeing that such terms as "criteria" and "source" had not perhaps been well chosen, said that the outline set forth in paragraph B provided a satisfactory sketch of the questions which any Special Rapporteur would have to consider. He therefore agreed with Mr. Bartos that none of the items which the Chairman had considered relevant should be deleted but that the Sub-Committee should, if it thought appropriate, add further items to the list.

He agreed that the various sub-headings of paragraph B were necessarily inter-related. It would be precisely the task of the Special Rapporteur to work out all the inter-relationships in question.

Mr. ROSENNE drew attention to the use in sub-paragraph (b) of the term "servitudes", a term which had been the subject of much criticism and which he did not find suitable at that stage of the development of international law.

With regard to sub-paragraph (d), he pointed out that it dealt with two entirely different sets of rights: firstly, rights as between two States, and secondly, rights as between a State and an individual.

The ACTING CHAIRMAN said that the term "servitude" had probably been used by the Chairman in order to refer to territorial treaties.

Mr. BARTOS said that the Chairman, in using that term, had probably been thinking of such cases as the régime established for the navigation on the Danube.

In some cases the particular status described as a "servitude" had been established by treaty; in others, it was the result of geographical circumstances. He referred in that connexion, to the efforts made at the Geneva Conference on the Law of the Sea, 1958, by the representatives of landlocked countries to establish the principle that their countries were entitled to the benefit of a servitude which would give them access to the sea through the territory of other States. That idea had a definite tendency to become part of positive international law.

Other examples could be cited, such as the respective rights of Egypt and the Sudan in the Nile waters and the respective rights of India and Pakistan with regard to the Indus.

The fact that questions of "servitudes" often created acute problems on the emergence of new States was an argument in favour of the inclusion of a reference to that point. In spite of the objections which had been made to the term, he found its use appropriate in international law, as a convenient one to describe the type of situation to which he had referred.

Mr. LIU proposed that the first sentence in paragraph B should be redrafted to read: "The following subjects are suggested ..." and that the word "by" at the beginning of each of the sub-paragraphs should be deleted.

¹¹ *Rights of United States Nationals in Morocco; I.C.J. Reports, 1952.*

Mr. BARTOS suggested that the word "criteria" might be replaced by "aspects".

Mr. ROSENNE said that he would not insist on including the termination of a protectorate, mandate or trusteeship agreement as one of the origins of succession.

The ACTING CHAIRMAN said that it had been suggested that the formation of unions of States and the dissolution of such unions might be included under sub-paragraph (a).

Mr. BRIGGS and Mr. ELIAS thought that that addition was not necessary.

The ACTING CHAIRMAN said that no further changes in sub-paragraph (a) appeared necessary.

Mr. ELIAS and Mr. TUNKIN thought that sub-paragraph (b) could be left unchanged.

Mr. ROSENNE said that sub-paragraph (b) might be included under the general heading of "*ratione materiae*" suggested by Mr. Liang.

The ACTING CHAIRMAN said that the term "property" was too general; reference should be made to both private and public property.

Mr. TUNKIN thought that a general reference to property was sufficient.

Mr. BARTOS suggested that the expression "property and interests" might be used, although he did not insist on it.

The ACTING CHAIRMAN said that the consensus appeared to be that the word "property" by itself be retained.

Mr. BRIGGS pointed out that sub-paragraph (b) contained no reference to public debts and private rights. Those matters might come under the heading "contracts in general" or even partly under the heading of "property".

The ACTING CHAIRMAN said that he would agree to the inclusion of a reference to public debts but not to a reference to private rights. He suggested that the reference to public debts might be inserted after the heading of "property".

Mr. ELIAS said that in that case the words "in general" after "contracts" should be omitted.

Mr. ROSENNE proposed that under the heading "public law", administrative and nationality problems should be treated separately, since the distinction between them was clear-cut and since nationality problems, in particular, deserved special study.

Mr. ELIAS suggested that the phrase "especially in relation to nationality problems" might meet his point.

Mr. LIU proposed the deletion of the words "administrative and" in the parenthesis after "public law".

The ACTING CHAIRMAN agreed to that proposal, since he also believed that the two topics should be treated separately. With respect to the next heading, "torts", he noted that there was no objection. With respect to sub-paragraph (c), he thought that the special rapporteur should study both effects within the territory of the State concerned and extra-territorial effects.

Mr. ROSENNE agreed that sub-paragraph (c) might be retained, but pointed out that there be three kinds of territorial effects: (1) effects in the newly independent State, (2) effects in the former metropolitan State, (3) effects in third States.

The ACTING CHAIRMAN, referring to sub-paragraph (d), said that Mr. Bartos had earlier mentioned a category of States which were neither "States directly concerned" nor "third States".

Mr. BARTOS said that it might suffice if the record referred to the existence of an intermediate category of States.

The ACTING CHAIRMAN, in reply to a question by Mr. ELIAS, explained that the nationality problems referred

to after "public law" in sub-paragraph (b) included all those concerning the status of the population of the territory, whereas the treatment of that population would be the subject of the third heading of sub-section (d).

Mr. LIANG, representative of the Secretary-General, said that one problem arising in connexion with the third and fourth headings of sub-paragraph (d) was the possession of nationality, whereas in sub-paragraph (b) it might be a question of whether nationality had or had not been retained.

Mr. ELIAS said that, without wishing to press the point, in his opinion the two sub-sections were imprecise and overlapped in that respect.

The ACTING CHAIRMAN said that the future special rapporteur would obviously have to avoid overlap with the topic of State responsibility; for that purpose all the rapporteurs should maintain contact with each other. Meanwhile, the Sub-Committee could adopt sub-paragraph (d) provisionally.

He invited debate on part III (The approach to the subject).

Mr. BRIGGS said, with reference to section 1 of part III of the Chairman's paper, that he did not understand the statement: "there are no general agreements on State succession and even the international customary law on it is defective." Did that mean that the existing law was incomplete or merely that the writer did not like it? He suggested that the statement should be replaced by the phrase in the section heading: "evaluation of the present state of the law on succession". As it stood, the statement was misleading; it was for the future rapporteur to determine the extent to which agreement had been reached.

The ACTING CHAIRMAN supported that view.

Mr. LIU suggested that section 1 might be omitted altogether.

Mr. TABIBI said that sections 1 and 2 might be combined, or, alternatively, that they might be amalgamated with the "Preliminary remarks" at the beginning of the paper.

Mr. BARTOS said that he was unwilling, as a matter of general principle, to delete any part of section 1, since the sub-Committee had a duty to indicate the various points which, in its opinion, should be covered by the study. After all, the work would involve a combination of codification and progressive development of international law. The rules of international law were subject to change according to circumstances, but the Sub-Committee should determine the existing state of affairs to the best of its ability. If it found that those rules were not universally applied, it could state that there was "uncertainty" regarding them, but it should not say that there was no general agreement on the subject.

Mr. ELIAS proposed that the words "point of departure" should be deleted in the heading of section 1, which should be revised to read "survey and evaluation of the law of State succession from the point of view of (a) customary international law (b) treaty rights and obligations (c) State practice."

It might then be added that the study of those three aspects could be divided into two parts, one relating to the period before and the other to the period after the beginning of the Second World War.

Such a solution would avoid the necessity of beginning the section with a value judgement that might be controversial.

Mr. ROSENNE agreed with Mr. TABIBI that the matters in question should be mentioned at the very beginning of the document. He would suggest that the expression "point of departure" should be retained and that the wording should be "taking as the point of departure a survey and evaluation of the present state of the law and practice on succession, the objective is the elaboration of detailed replies to the question: 'to what extent is the successor State bound by the obligations of its predecessors, and to what extent is it to benefit from its rights?' This is necessary because of the many uncertainties which have recently come to light."

Mr. ELIAS said that if his suggestion was taken into account, he would propose that the quotations in section 2 should be omitted and their content rephrased as a guide to the Special Rapporteur, who should be told that the study should be limited and precise and should cover the essential elements which were necessary for the establishment of acceptable principles on State succession.

Mr. BRIGGS said that he was prepared to accept Mr. Rosenne's proposal with the exception of the latter part. He thought that it would be better to say the the objective was a survey and evaluation of the existing state of the law and practice on succession and the preparation of draft articles on the law of State succession.

Mr. TABIBI said that in fact there was little difference between the various suggestions. The objective should be placed first, for emphasis; it should be followed by a text based on the proposals made by Mr. Rosenne and Mr. Elias. With a view to guiding the Special Rapporteur, it would be advisable to add to the end of Mr. Rosenne's text a statement that the Special Rapporteur's work should be limited and precise and should cover the essential elements necessary for the creation of rules in the field of State succession.

Mr. TUNKIN said that there were three questions to be settled in connexion with the approach to the subject. The first was, what aspect should be dealt with first. After the different problems to be studied had been listed, an indication might be given that the Special Rapporteur should first deal with a specific problem and stress certain aspects of it. The second question was that of the ultimate aim: whether a treaty, a draft convention or a code should be prepared. The Sub-Committee might suggest that the Special Rapporteur should prepare his draft article in conventional language, as was generally agreed. Thirdly, there was the question of the criteria or principles which should guide the Special Rapporteur. In that connexion the Sub-Committee should indicate that the Special Rapporteur should be guided by the fundamental principles of modern international law, especially by the principles of the Charter, and that existing practice should be taken into account.

He had an open mind on the question whether section 1 should be placed at the beginning of the document; if it was, then all matters connected with the approach to the problem should also be placed at the beginning.

Mr. ROSENNE said that the difficulty confronting the Sub-Committee arose from the fact part III dealt with two separate things: the approach to the general question of succession and the approach to specific subjects arising out of the law of succession. The term "objective" should be interpreted to mean the purpose of the study of the entire topic; the question of the approach to particular aspects of the topic should be dealt with separately elsewhere in the paper.

Mr. TUNKIN said that the approach to particular problems could not be decided at that stage. For instance, section 3(b) contained the words "the principle of respect for . . . vested rights". He would be quite unable to agree that the "principle" of vested rights should appear under "guiding criteria". It was admittedly one of the problems which the Special Rapporteur ought to study, but not as a "principle". It was in fact impossible to say in advance that the Special Rapporteur should accept a particular principle; it was necessary to study the problem first and then to formulate principles.

He thought that the formulation suggested by Mr. Rosenne might be accepted because it was phrased in more general terms, although he considered the reference to "the many uncertainties which have recently come to light" to be unnecessary.

Mr. LIU said that a general statement of the reasons why such a study had to be made should be placed at the beginning of the draft. He did not disagree with the substance of sections 1 and 2 of part III either as they stood or as it was

proposed to amend them; but they definitely belonged to the introductory part.

Mr. TUNKIN's point about "vested rights" could be met if the "principles" enumerated in section 3 (a) and (b) were merely enumerated as subjects for study and not worded in such a way as to be directives to the Special Rapporteur.

Mr. ROSENNE said that he accepted the amendment proposed by Mr. Briggs. He also agreed to the omission of the passage in his proposed text concerning "the many uncertainties which have recently come to light". He accepted Mr. Elias's proposal that section 2 should be included in an amended form. The only question remaining was the actual formulation of the single text of sections 1 and 2, where his text differed from that proposed by Mr. Elias.

Mr. ELIAS said he would no insist on his text. With regard to Mr. Briggs's suggestion (that one of the objectives should be the preparation of draft articles on the law of State succession), he thought that the reference to draft articles should come under a separate numbered heading.

Mr. BARTOS said that section 4 of part III was not in the appropriate place since its contents had nothing to do with the approach to the subject. In the instructions to the Special Rapporteur, it should be stated that he should start from the principles of positive law on the matter, as modified by existing practice and by the evolution of the international community. The heading of the section should not read "codification or progressive development" as the Chairman's paper put it, but "codification and progressive development". In Article 13 of the Charter and in the Statute of the Commission codification and progressive development were mentioned in juxtaposition and were not regarded as being separate. It was essential that the Sub-Committee should specify that the draft articles should be based on the existing state of international law and take international practice into account: they should conform to the realities of the modern age.

Mr. BRIGGS said that it had been his impression that the Sub-Committee had not yet considered whether the draft articles to be prepared by the Special Rapporteur were to be in the form of codification or were to constitute progressive development of international law. Once the Special Rapporteur had submitted the draft articles, the Commission could decide whether codification of existing law was sufficient and, if not, how far it was insufficient.

Mr. TUNKIN said that codification and progressive development could not be separated. Under its Statute the Commission was expected not only to codify but also to develop international law. There was no need to give any directives in the matter: each Special Rapporteur was necessarily guided by the Statute of the Commission.

The ACTING CHAIRMAN suggested that the authors of the various proposals in connexion with sections 1 and 2 of part III should confer with a view to working out an agreed draft in time for the next meeting of the Sub-Committee.

The meeting rose at 1 p.m.

SUMMARY RECORD OF THE SEVENTH MEETING

(Wednesday, 23 January 1963, at 10 a.m.)

SUCCESSION OF STATES AND GOVERNMENTS (*continued*)

The ACTING CHAIRMAN recalled that the Sub-Committee had agreed on the following formulation for the paragraph of its draft report which dealt with the scope of the subject:

"There is a need to pay special attention to problems of succession arising as a result of the emancipation of

many nations and the birth of so many new States after World War II. The problems concerning new States should therefore be given special treatment, and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter."

Mr. BRIGGS suggested that, in the second sentence, the words "special treatment" should be replaced by "special attention".

It was so agreed.

The ACTING CHAIRMAN invited the Sub-Committee to consider the paragraph of the draft report concerning objectives, as proposed by Mr. Elias and Mr. Rosenne. That paragraph would replace sections 1 and 2 of part III of the Chairman's working paper and would read:

"The objective is a survey and evaluation of the present state of the law and practice on succession as the point of departure for the preparation of draft articles on the topic. The presentation should be limited and precise, and must cover the essential elements which are necessary to resolve present difficulties."

Mr. ELIAS, on behalf of the sponsors of the paragraph, amended the first sentence so as to replace the words "as the point of departure is" by "with a view to".

Mr. LIANG, representative of the Secretary-General, pointed out that it was not altogether appropriate to say that the presentation of draft articles should be "limited"; it would be more appropriate to say that the presentation should be precise and, perhaps, that the scope of the study should be limited.

Mr. BRIGGS agreed with the representative of the Secretary-General. He, too, found the second sentence imprecise. As he recalled, the Sub-Committee had agreed, on the suggestion of Mr. Tunkin, that the draft articles should be drafted in precise terms, along the lines of the articles of a convention.

Mr. BARTOS also agreed with the representative of the Secretary-General and said that it had been agreed by the Sub-Committee that the draft articles should be formulated in precise terms.

Mr. ELIAS suggested, in the light of these remarks, the deletion of the words "limited and" in the second sentence.

It was so agreed.

Mr. BRIGGS said that the second sentence could be further improved by specifying that it was the "presentation of the draft articles" which should be precise.

Mr. ROSENNE objected that it was not only the draft articles, but also the commentary, which should be precise and should cover the essential elements to overcome present difficulties:

Mr. BRIGGS did not press the point.

Mr. LIU said that, as it stood, the first sentence appeared to limit the objective to "a survey and evaluation of the present state of the law and practice on succession". He was not at all certain of the necessity to lay down any objective for the Special Rapporteur, but if any such objective were to be laid down, it should certainly not be limited to a survey and evaluation of the present state of the law.

The ACTING CHAIRMAN suggested that, in order to meet that point, the first sentence should be revised to read:

"The objectives are a survey and evaluation of the present state of the law and practice on succession and the preparation of draft articles on the topic."

Mr. ELIAS supported that suggestion, on the understanding that that redraft would serve to indicate that the Special Rapporteur would not only deal with the codification of the existing law but also make suggestions for its improvement.

The Acting Chairman's suggestion was adopted.

The ACTING CHAIRMAN invited the Sub-Committee to resume its consideration of section 3 of part III (The approach

to the subject) of the Chairman's working paper. At the previous meeting doubts had been expressed about the advisability of retaining any part of sub-sections (a) and (b). He suggested that the heading "Guiding criteria", which was perhaps somewhat inappropriate, and the opening sentence, should be omitted in any case.

Mr. TUNKIN pointed out that the questions mentioned in sub-paragraphs (a) and (b) were already covered by passages of the draft report already approved by the Sub-Committee.

Sub-paragraph (a) was covered by the reference to "the principles of the United Nations Charter" in the second sentence of the opening paragraph of the draft report which dealt with the scope of the subject. And so far as sub-paragraph (b) was concerned, he said it would be altogether inappropriate to lay down as one of the "guiding criteria" for the Special Rapporteur the "principle of respect for economic rights, private or vested rights". If the Sub-Committee made such a recommendation it would in effect be touching on substance.

He urged that all points which related to substance should be left out. The Chairman had mentioned them in his paper because of his duty to make an analysis of the various points raised in the member's working papers. The Chairman had not intended to suggest that all those points should be included in the outline to be adopted by the Sub-Committee as part of its report.

Mr. BRIGGS said that he was largely in agreement with Mr. Tunkin. He suggested that the bulk of part III should not be included in the draft report. The only points which he suggested should be retained were the following:

First, a reference to "private rights" at the end of the list under the heading *ratione materiae* in part II on the "scope of the subject". No value judgment would be expressed; the inclusion of those words would merely have the effect of indicating that private rights other than property should also be considered.

Second, a reference to the question of the time factor (sub-paragraph (c)), which he felt would be useful.

Mr. ROSENNE found himself largely in agreement with Mr. Tunkin regarding the deletion of the bulk of part III. However, the whole of section 3 could well be omitted. The question of the time factor, mentioned in sub-paragraph (c), would inevitably come to the notice of the Special Rapporteur.

Some reference should be included, possibly immediately after the opening paragraphs of the material part of the draft report, to the Sub-Committee's discussion on the subject of codification or progressive development (part III, section 4 of the Chairman's working paper) and on the related question of the form which the Commission's final draft would take (section 6). It was, of course, for the full Commission to decide on those questions, but its conclusion would depend on the survey and evaluation of the present state of the law and practice in the matter of State succession. He was by no means certain that, once the survey and evaluation had been made, the existing law should be found as unsatisfactory as had on occasion been suggested.

He suggested that, at an appropriate place in the Sub-Committee's report, a passage should be introduced stating that, in the study of State succession, priority should be given to the question of succession to treaties. It was generally agreed that succession to bilateral and multilateral treaties was by far the most urgent aspect of succession at present.

Mr. ELIAS agreed that the bulk of part III should be omitted. In particular, he agreed with Mr. Rosenne that the question of the time factor mentioned in section 3(c) would as a matter of course be dealt with by the Special Rapporteur along with other matters of substance; it was therefore unnecessary to mention it in the Sub-Committee's draft report. That question had arisen mainly because of the special case of Tanganyika.

He hesitated to support the proposal of Mr. Briggs for including "private rights" under the heading of *ratione materiae*. He considered that "property", "contracts", "concessionary rights", "torts" and "public debts" covered all private rights.

The ACTING CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed not to include in the draft report any part of either (a) or (b) of section 3 of the Chairman's paper.

It was so agreed.

Mr. ROSENNE said that he had not had in mind the specific case of Tanganyika when he had originally raised the question of the time factor. The point which he had wished to stress was that, if the rules on State succession were to be regarded as transitional, the question would arise how long the transitional period should last.

Mr. BRIGGS said that, although he had not been altogether satisfied with the reply given by Mr. Elias, he would not press for the inclusion of a reference to "private rights".

With regard to section 3 (c), he said that the question of the time factor was, in fact, material, and he was not at all thinking of the specific case of Tanganyika.

In that connexion, he noted the passages from the advisory opinion of the Permanent Court of International Justice in the case of the Settlers of German Origin in territories ceded to Germany by Poland (1923), quoted in paragraphs 41 and 42 of the Digest of decisions of international tribunals relating to State succession prepared by the Secretariat (A/CN.4/151). To those quotations he wished to add the following passage from that same advisory opinion:

"The general question whether and under what circumstances a State may modify or cancel private rights by its sovereign legislative power, requires no consideration here".

In that particular case, the Permanent Court of International Justice had not needed to go into that general question, because of the existence of the Minorities Treaty of 1919¹² binding the State concerned. However, the question had arisen whether, immediately after succession, a State could cancel private rights by sovereign legislation. The question of the time factor was therefore a very real one, an deserved consideration.

Mr. TABIBI said that if the contents of sub-paragraph (c) were to be retained in any form, it was necessary to include a reference to third States; succession did not affect only the new State but also third States.

The ACTING CHAIRMAN said that it appeared to be generally agreed that sub-paragraph (c) should be dropped altogether. If there was no objection, he would consider that the Sub-Committee agreed to that course.

It was so agreed.

Mr. TABIBI said that a reference to the principle of self-determination in both its economic and political aspects, was essential. It was a fundamental principle of the United Nations and had been recognized, in particular, through the adoption of article 1 of the draft Covenants on Human Rights. Its importance was all the greater because many peoples had still to achieve self-determination.

It was essential that any Special Rapporteur on the topic of State succession should place particular emphasis not only on political self-determination but also on economic self-determination. In that connexion, he cited the example of the Congo, which had achieved political self-determination but had not attained full economic independence. In regard to economic independence, General Assembly resolution 1314 (XIII) on the subject of permanent sovereignty over natural resources was particularly relevant.

For those reasons, he suggested that a specific reference to economic and political self-determination should be introduced into the opening paragraph of the material part of the draft report.

Mr. TUNKIN supported Mr. Tabibi's proposal and suggested that in the second sentence of the relevant paragraph of the draft report, after the words "the principles of the United Nations Charter", a phrase along the following lines should be added:

"and especially the principles of self-determination and sovereignty over natural resources".

Mr. BRIGGS said that he could not support that proposal. He would, however, be prepared to accept the inclusion of a reference to self-determination in the section concerning "Origin of succession". All States had come into being through the exercise of the right of self-determination, with or without struggle, with or without the consent of the mother country.

Mr. EL-ERIAN said that he understood and shared Mr. Tabibi's concern for the inclusion of a reference to the principle of self-determination both in its economic and in its political aspects. He thought, however, that the principle would be covered by the existing reference to the principles of the United Nations Charter in general. Those principles included self-determination of peoples, sovereign equality of States and equal rights of nations.

Mr. BRIGGS and Mr. ELIAS agreed with Mr. El-Erian and said that the second sentence of the relevant paragraph of the draft report might be left as it stood.

The ACTING CHAIRMAN said that a reference to "the principles and resolutions of the United Nations" might perhaps cover the point which had been raised. However, he noted that there appeared to be general agreement not to change the text of the second sentence of the paragraph in question in the draft report. The different views expressed by members would be recorded in the summary records and, if there was no objection, he would consider that the Sub-Committee agreed not to make any change in that paragraph.

It was so agreed.

The ACTING CHAIRMAN invited comments on part III, section 4 of the Chairman's paper, entitled "Codification or progressive development". In his view, codification was not enough: there should be some new rules based on contemporary practice. The Sub-Committee might perhaps indicate that the Special Rapporteur could propose new rules if he saw fit.

Mr. TUNKIN thought that there was no need to include any reference to the matter in the draft report. Every Special Rapporteur should make concrete proposals which might be codification or progressive development, in accordance with the Commission's Statute.

Mr. LIANG, representative of the Secretary-General, said that in no task undertaken by the International Law Commission had it been decided in advance that the work to be done should constitute codification or development or even both. It was only after the work had been completed that the Commission had said that certain parts of it dealt with progressive development or codification; and even then the Commission had not always followed that course. In the case of the draft on the continental shelf,¹³ the Commission had indicated that much of it was progressive development. In the case of the draft on the conservation of the living resources of the sea,¹⁴ there were many elements of legislation in the machi-

¹³ Report of the International Law Commission on its 5th session (A/2456), in *Yearbook of the International Law Commission, 1953*, vol. II, United Nations publication, Sales No. 59V.4, vol. II.

¹⁴ Report of the International Law Commission on its 7th session (A/2934), in *Yearbook of the International Law Commission, 1955*, vol. II, United Nations publication, Sales No. 60V.3, vol. II.

¹² Hudson: *International Legislation*, vol. I, pp. 285 *et seq.*

nery devised for the conservation of the living resources of the sea.

Mr. EL-ERIAN, while agreeing with Mr. Liang that it had not been the practice of the Commission to give any indication at the preliminary stage, thought that the topic of State succession was a special case. It was generally agreed that it was one of the least developed branches of international law. Moreover, General Assembly resolution 1686 (XVI) concerning the future work of the Commission placed special emphasis on the progressive development of international law. It was true, however, that the subject was covered by the statement in the draft report that "the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter".

Mr. BARTOS said that, for the reasons he had given at the previous meeting, he considered that section 4 of part III of the Chairman's paper should be deleted.

Mr. ROSENNE said that, although he had been in favour of retaining sections 4 and 6, he was now convinced that it would be premature to include any reference to codification or progressive development.

Section 4 was deleted.

The ACTING CHAIRMAN asked the Sub-Committee to comment on section 5 (Treaties).

Mr. TUNKIN thought that the Sub-Committee should adopt Mr. Rosenne's suggestion that a definite indication should be given in the draft report that the problem of succession in relation to treaties should be given priority.

Mr. ELIAS suggested that a passage to that effect should be included under "miscellanea".

The ACTING CHAIRMAN suggested that the whole of section 5 should be omitted and a reference to the need to give priority to succession in relation to treaties should be made in the concluding paragraph.

It was so agreed.

The ACTING CHAIRMAN noted that no decision had been reached on Mr. Briggs's proposal that private rights should be included under the heading *ratione materiae* in the passage of the draft report dealing with the division of the subject. He suggested that the word "property" should be qualified by the words "public or State". Contracts, concessionary rights and other private rights could then appear together on one line.

Mr. BRIGGS said that he was far from certain that all private rights were property rights: indeed, he was convinced that they were not. His view was that private rights were one of the items that the Special Rapporteur should bear in mind.

Mr. ROSENNE said that the list under *ratione materiae* confused questions concerning relations between States and questions of relations between States and individuals. It could be left to the Acting Chairman to rearrange it; his own view was that the proper order should be, first, pure questions of States and inter-State relationships; second, nationality as such; third, the remainder.

After further discussion, Mr. BARTOS, agreeing with Mr. Rosenne, suggested that the order should be: treaties; territorial servitudes; nationality; State or public property; concessionary rights; public debts; property, rights, interests and relationships governed by private law; torts.

Mr. Rosenne said that, while agreeing with Mr. Bartos, he was not clear whether the last item referred to international or to domestic torts. If it was intended to refer to domestic torts, the word should be dropped because it was covered by Mr. Bartos's phrase regarding relations governed by private law.

The ACTING CHAIRMAN thought that it would be advisable to retain the reference to torts.

Mr. Bartos's suggestion was adopted.

The ACTING CHAIRMAN invited the Sub-Committee to consider part III, section 6 of the Chairman's paper — "The form of the final work of the Commission on the subject". It would perhaps be best, as Mr. Tunkin had suggested, not to take a final decision with regard to the form of the final work but to recommend that the Special Rapporteur should draft his rules in the form of short articles.

Mr. BRIGGS agreed. There was already a reference to the preparation of the articles in the draft report. The matter was one for the Commission to decide.

Mr. BARTOS thought that it would be inadvisable to make no reference at all to the matter. He would suggest that the existing section 6 should be replaced by a statement that the matter was one for the Commission to decide.

Mr. Bartos's suggestion was adopted.

The ACTING CHAIRMAN inquired whether the Sub-Committee had any comments to make on part IV (Miscellanea) of the Chairman's paper.

Part IV, section A was deleted.

Mr. LIANG, representative of the Secretary-General, referring to section B (a) and (b), said that a Secretariat paper analysing and collating the replies from governments would be ready in time for the next session of the Commission. A paper covering the practice of specialized agencies and international organizations in the field of succession was being prepared and would perhaps be ready in time for the Commission's next session.

Mr. ROSENNE said that, now that the Sub-Committee had concluded its consideration of the Chairman's paper, he wished to make some observations on document A/CN.4/151. It was a useful document so far as it went, but he thought that it should be revised and expanded. The sources referred to in paragraph 1 omitted a good many which might be taken into consideration in a revised version. Useful material could be culled from the *Recueil des décisions des tribunaux arbitraux mixtes*; from the reports of the several conciliation commissions established under the Peace Treaty with Italy of 1947;¹⁵ the decisions of the United Nations Tribunal for Libya established under General Assembly resolution 388 (V); the decisions of the tribunal sitting at Coblenz under the Bonn-Paris agreements relating to the Federal Republic of Germany; those of the tribunal under the London agreement with regard to German foreign debts; and possibly from the reports of the administrative tribunals of the United Nations and the International Labour Organisation.

Perhaps it would be possible for the Secretariat to prepare a revised document in time for the Commission's 1964 session.

Mr. LIANG, representative of the Secretary-General, said that careful consideration would be given to the suggestion, depending on the availability of the sources.

The Sub-Committee decided that the words "who should be appointed at the fifteenth session of the Commission" should be inserted after the words "The Sub-Committee recommends that the Special Rapporteur ..." in the relevant paragraph of its draft report.

The meeting rose at 12.45 p.m.

SUMMARY RECORD OF THE EIGHTH MEETING

(Thursday, 24 January 1963, at 10.20 a.m.)

CONSIDERATION OF DRAFT REPORT

The ACTING CHAIRMAN drew attention to the draft provisional report and invited members to consider it paragraph by paragraph.

¹⁵ United Nations Treaty Series, vol. 49.

Paragraphs 1 to 4

Mr. ELIAS asked whether the draft report, when completed, would be submitted to the Commission or to the Chairman. In the latter case, would the Chairman then submit it to the Commission or would final action by the Sub-Committee be necessary?

Mr. BRIGGS said that the draft report, when submitted to the Commission by the Chairman, would be the report of the Sub-Committee.

Mr. ROSENNE said that at the Sub-Committee's third meeting on 17 January 1963 Mr. Tunkin had suggested that the Chairman should be asked to prepare a draft report which would be considered by the Sub-Committee when it reconvened. The Sub-Committee would then be able to approve the Chairman's report and submit it to the full Commission early in the latter's next session. At the same meeting Mr. Bartos had said that any interim draft prepared by the Sub-Committee would be subject to amendment by the Chairman, who would then prepare his own report. That report, after approval by the Sub-Committee, would also constitute the latter's report to the Commission. In those circumstances, could not the heading be simply "draft report" instead of "draft provisional report" and could not that report be then issued as a mimeographed Secretariat document?

Mr. LIANG, representative of the Secretary-General, said that the present report, as had been the case with the report of the Sub-Committee on State Responsibility, would in its final form be the report of the Sub-Committee to the Commission. The only doubt that could arise would be concerning the exact manner of its presentation. It was normal United Nations practice to issue a document such as that now before the Sub-Committee as a "draft report"; upon submission to the parent body the word "draft" would be deleted. Accordingly, he suggested that the word "provisional" was unnecessary.

It was so agreed.

Paragraph 1 was approved.

Mr. ROSENNE drew attention to the last sentence in paragraph 2: "It was decided that the Sub-Committee would meet again during the fifteenth session of the International Law Commission in order to approve its final report with the participation of Mr. Lachs, the Chairman". He suggested that it be revised to read "early in the fifteenth session".

Mr. LIANG, representative of the Secretary-General, suggested that the sentence be revised to read: "It was decided that the Sub-Committee would meet again, with the participation of Mr. Lachs, its Chairman, at the beginning of the fifteenth session of the International Law Commission in order to approve its final report".

Mr. Liang's suggestion was adopted.

Paragraph 2, as amended, was approved.

Paragraph 3 was approved without comment.

Mr. ROSENNE drew attention to the first part of the first sentence in paragraph 4: "The Sub-Committee held a general discussion of the scope of the subject of succession of States and Governments. . .". He recalled that both the General Assembly, in its resolutions, and the Commission had always referred to the "topic" of succession of States and he proposed that the text be revised accordingly.

It was so agreed.

Mr. BRIGGS, supported by Mr. ELIAS, proposed that the first part of that sentence should be revised to read: "The Sub-Committee discussed the scope of the topic of succession of States . . .".

It was so agreed.

Paragraph 4, as amended, was approved.

PART I: THE SCOPE OF THE SUBJECT AND THE APPROACH TO IT

Section A: Special attention to problems in respect of new States

Mr. LIANG, representative of the Secretary-General, drew attention to the second and third sentences of paragraph 5, reading: "The problem concerning new States should therefore be given special attention, and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter. Some members wished to indicate that special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources; others thought such an indication superfluous, in view of the reference to the principles of the Charter". Since the matters referred to in the last sentence were the subject of General Assembly resolutions as well, he suggested that the sentence should be made a separate paragraph and that the final phrase should be revised to read: ". . . in view of the principles of the Charter and the resolutions of the General Assembly".

Mr. TABIBI said that the passage as drafted did not sufficiently reflect the great importance of certain other principles, besides those contained in the Charter, such as the principle expressed in General Assembly resolution 1803 (XVII) concerning permanent sovereignty over natural resources. He proposed, therefore, that the words "Some members wished to indicate that . . ." at the beginning of the sentence should be deleted, so that the sentence would begin with the words "Special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources. . .". The rest of the sentence could then be revised accordingly.

The ACTING CHAIRMAN said that not all members could agree to such a formula.

Mr. BRIGGS did not think that the future special rapporteur on State succession should be given instructions to give special emphasis to the principles of self-determination and permanent sovereignty over natural resources.

Mr. LIANG, representative of the Secretary-General, suggested that the third sentence should be included as a separate paragraph, as he had indicated before, but that the final phrase should be revised to read: ". . . in view of the fact that these principles are already contained in the Charter of the United Nations and in resolutions of the General Assembly".

Mr. Liang's suggestion was adopted.

Paragraph 5, as amended, was approved.

Section B: Objectives

Paragraph 6 was approved without comment.

Section C: Questions of priority

Mr. ROSENNE wished to comment on paragraph 7, which read: "The Sub-Committee recommends that the Special Rapporteur, who should be appointed at the fifteenth session of the International Law Commission, should initially concentrate on the topic of State succession, and should study succession of governments in so far as necessary to throw light on State succession. Within the field thus delimited, the Sub-Committee's opinion is that priority should be given to the problems of succession in relation to treaties, both multilateral and bilateral". He objected to the expression "in so far as necessary to throw light on" and proposed that it be replaced by the phrase "in so far as necessary to meet the objectives set forth above".

Mr. EL-ERIAN said it was his understanding that any study of succession of governments should be only supplementary to the study of State succession.

Mr. ELIAS proposed that the phrase should be revised to read: "in so far as necessary to complement the study of State succession".

It was so agreed.

Mr. ELIAS questioned, with respect to the final phrase of the paragraph, whether it was desirable to define the types of treaties to which priority should be given in the study of State succession; he therefore proposed the deletion of the words "both multilateral and bilateral".

It was so agreed.

Paragraph 7, as amended, was approved.

Section D: Relationship to other subjects on the agenda of the International Law Commission

Paragraphs 8 and 9 were approved without comment.

Paragraph 10 was approved with a drafting change.

Section E: Division of the topic

Paragraph 11 was approved with drafting changes.

Section F: Detailed division of the subject

The ACTING CHAIRMAN invited the Sub-Committee to consider paragraph 12, taking sub-paragraphs (a) to (d) successively.

Sub-paragraph (a) was approved without comment.

Mr. BARTOS suggested the introduction of the words "certain other questions of public law", immediately below "public debts".

Sub-paragraph (b) was approved with that amendment.

Mr. LIANG, representative of the Secretary-General, found the terminology used in sub-paragraph (c) somewhat ambiguous. In particular, the expression "States directly concerned", used in the first heading, was probably intended to refer to the new State and to the former metropolitan State.

In the second heading, the expression "other States" was used in the sense of "third States", the more apt expression used in the last heading.

Mr. BARTOS agreed with the representative of the Secretary-General. The expression "States directly concerned" could cover, for example, guarantor States. He cited the examples of the former territory of Tangier and the former Free State of Trieste to show that the expression "States directly concerned" could refer to States other than those actually affected by the transfer of territory or sovereignty.

Moreover, he found the expression "former metropolitan State" unsatisfactory. It would not cover, for example, a case such as that of the United Arab Republic and Syria. He suggested that the expression "predecessor State" should be used.

The ACTING CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed to replace, in the first heading, the expression "States directly concerned" by "the new State and the predecessor State".

It was so agreed.

Mr. ROSENNE proposed that the second heading, reading "rights and obligations towards other States" should be replaced by "rights and obligations between the new State and third States".

It was so agreed.

Mr. BRIGGS criticised the drafting of the third heading ("rights and obligations of nationals of the former metropolitan States"). The apparent intention was to refer to persons who retained the nationality of the former metropolitan State after the emergence of the new State. The drafting did not make that clear.

Mr. ROSENNE suggested that the heading in question should be redrafted along the following lines: "rights and obligations of new States towards persons who have retained the nationality of the predecessor State".

Mr. LIU drew attention to the problem existing in many new States of certain categories of residents who had been treated as part of the local population by the former metropolitan State but who, on the new State's achieving independence, had not acquired the nationality of either the new State or the former metropolitan State. They sometimes became nationals of a third State.

Mr. BRIGGS proposed that both the third heading and the fourth ("rights and obligations of nationals of third States") should be replaced by a single heading along the following lines:

"rights and obligations of the new State with respect to individuals".

That language would cover all individuals, regardless of nationality.

Mr. ROSENNE proposed the insertion at the end of the text proposed by Mr. Briggs of the words "including juridical persons", in brackets.

The proposal by Mr. Briggs, as amended by Mr. Rosenne, was approved.

Sub-paragraph (c) was approved subject to drafting changes.

Sub-paragraph (d) was approved with a drafting change.

Paragraph 12 as a whole, as amended, was approved, subject to drafting changes.

PART II: STUDIES BY THE SECRETARIAT

Paragraph 13

Mr. ELIAS proposed that paragraph 13 should be amended to read "The Sub-Committee decided to request the Secretariat to prepare ..."

It was so agreed.

Paragraph 13, as amended, was approved.

Paragraph 14

The ACTING CHAIRMAN said that the word "suggestion" in the fourth line of paragraph 14 should be replaced by the word "request" in view of the amendment of paragraph 13.

Mr. LIANG, representative of the Secretary General, suggested that the second line should be altered to read "that the Secretariat would submit at the earliest opportunity the publication described under (a) above".

It was so agreed.

Paragraph 14, as amended, was approved.

Paragraph 15

Mr. ELIAS proposed that the opening words of paragraph 15 should be redrafted to read "The Sub-Committee decided that the summary records would be attached to this report".

Paragraph 15, as amended, was approved.

Mr. ROSENNE proposed that a further paragraph should be inserted, preferably after paragraph 3, stating that the three papers (A/CN.4/149, 150 and 151) prepared by the Secretariat had been made available to the Sub-Committee.

It was so agreed.

The meeting rose at 12.30 p.m.

SUMMARY RECORD OF THE NINTH MEETING

(Friday, 25 January 1963, at 10 a.m.)

ADOPTION OF THE SUB-COMMITTEE'S DRAFT REPORT

(A/CN.4/SC.2/R.1)

The ACTING CHAIRMAN invited the Sub-Committee to consider the draft report (A/CN.4/SC.2/R.1). He drew

attention to a mistake in paragraph 15 (b): the word "certain", which was erroneously placed at the beginning of the eighth line, should be moved to the previous line and inserted before "other questions of public law".

Mr. ELIAS drew attention to two further mistakes: in the English text of paragraph 15(c) the words "with respect of individuals" should be corrected to read "with respect to individuals" and in paragraph 15(d), the word "concerned" should be deleted after "new States".

The ACTING CHAIRMAN said the appropriate corrections would be made.

Mr. ELIAS proposed that the title of paragraph 13 "E. Division of the topic (a) Broad outline" should be amended to read: "E. Broad outline".

It was so agreed.

The ACTING CHAIRMAN suggested that, in paragraph 15(a), the word "existing" should be deleted from the heading "territorial changes of existing States".

It was so agreed.

Mr. ELIAS proposed that the adjective "private" should be inserted before "property" in the penultimate line of paragraph 15(b).

Mr. BRIGGS proposed that the whole line should be amended to read:

"Private property, rights, interests and other relations under private law".

Mr. Briggs's proposal was adopted.

Mr. ROSENNE asked whether it was appropriate for the Sub-Committee to request the Secretariat to prepare certain documents as indicated in paragraph 16. Perhaps the Sub-Committee should recommend that the Commission should make that request.

Mr. LIANG, representative of the Secretary-General, said that, from the point of view of the Secretariat, paragraph 16 could remain as drafted; he was inclined to believe that the Sub-Committee was entitled to address requests to the Secretariat.

Mr. LIU noted the expression "discussion on substance" which was used in paragraph 18; perhaps a better expression could be found since the Sub-Committee had not dealt with the substance of the topic of State succession.

Mr. ROSENNE thought the reference in paragraph 18 was to the substance of the matter referred to in the Sub-Committee and not to the substance of State succession.

Mr. LIU did not press the point.

The draft report as a whole, as amended, was adopted.

The ACTING CHAIRMAN said that a copy of the draft report, as adopted, would be forwarded to the Chairman, whose absence had been regretted by all.

He thanked the members for their co-operation, which had made it possible for the Sub-Committee to do useful preparatory work. He hoped that, when the Sub-Committee reconvened at the beginning of the next session of the International Law Commission, it would be possible to complete the report in one or two meetings.

Mr. BRIGGS expressed regret at the absence of the Chairman, Mr. Lachs, and paid a tribute to the successful and impartial manner in which the Acting Chairman had conducted the work of the Sub-Committee. He also expressed appreciation for the work of the Secretariat, and in particular the representative of the Secretary-General.

Mr. TABIBI associated himself with the tributes to the Acting Chairman and to the Secretariat. In view of a certain anxiety which had in the past been expressed regarding the technical services provided by the European Office, he wished to place on record his appreciation of the high quality of the

services provided for the Sub-Committee, with special reference to the summary records.

Mr. ROSENNE, Mr. LIU, Mr. BARTOS and Mr. ELIAS associated themselves with the remarks of the previous speakers.

Mr. EL-ERIAN, also associating himself with those remarks, noted that the fruitful work of the Sub-Committee represented an encouraging new experience in the methods of work of the International Law Commission.

The ACTING CHAIRMAN thanked all the members for their kind words and said that he looked forward to meeting them when the Sub-Committee reconvened in May 1963.

The meeting rose at 11.5 a.m.

SUMMARY RECORD OF THE TENTH MEETING

(Thursday, 6 June 1963, at 3.45 p.m.)

APPROVAL OF THE SUB-COMMITTEE'S FINAL REPORT TO THE INTERNATIONAL LAW COMMISSION

The CHAIRMAN, after thanking Mr. Castrén for the able way in which he had functioned as Acting Chairman during his absence, said that the Sub-Committee's present task was to approve its final report to the Commission and at the same time to discuss the studies which it had requested the Secretariat to prepare.

Mr. BRIGGS, Mr. CASTREN and Mr. ELIAS pointed out that the Sub-Committee's draft report, adopted at its ninth meeting on 25 January 1963, had been based on the working paper submitted by the Chairman. The Sub-Committee should, therefore, hear the comments of the Chairman on its draft report before proceeding to approve its final report.

Mr. TABIBI, after associating himself with the remarks of the previous speakers, pointed out that the Sub-Committee had not yet decided whether the outline for the study of State succession should or should not include a reference to adjudicative procedures for the settlement of disputes; that was a question on which the Commission itself might take a decision. With respect to the Sub-Committee's final report, he said that for technical reasons it would be rather difficult to revise the draft report, but that the summary records containing any new views might be appended to it.

Mr. ROSENNE, supported by Mr. TUNKIN, proposed that the Sub-Committee should consider its draft report paragraph by paragraph, with a view to approving it as its final report to the Commission. In that way, the studies requested of the Secretariat could be discussed in connexion with the relevant paragraphs of the draft report.

It was so agreed.

Paragraphs 1-6

Paragraphs 1-6 were approved without comment.

Paragraph 7

Mr. TUNKIN said that there appeared to be a certain discrepancy between the French and the English texts of the first clause: the former read "*Certains membres ont voulu que le rapport souligne la nécessité de mettre l'accent sur les principes de l'autodétermination . . .*", whereas the latter read "Some members wished to indicate that special emphasis should be given to the principles of self-determination . . .". Exactly by whom was that emphasis to be given?

The CHAIRMAN suggested that since the emphasis was presumably to be given by the Special Rapporteur, the French text should be revised to read "*qu'on souligne . . .*".

It was so agreed.

Paragraph 7, as amended in the French text, was approved.

Paragraph 8

The CHAIRMAN said that he had certain doubts concerning the formulation of that paragraph, since some members thought that the objectives should include not only a survey and evaluation of the present state of the law and practice on succession but also a reference to the progressive development of the law.

Mr. ROSENNE said that it had been the general understanding that the Special Rapporteur would have the necessary discretion in that respect.

Mr. TUNKIN, supported by Mr. CASTREN, said that the paragraph should include some mention of the progressive development of international law on the subject, since otherwise it might be interpreted to mean that members of the Sub-Committee were not entirely in agreement on that point.

Mr. BRIGGS said that such an addition would be quite appropriate, although he personally was satisfied with the paragraph as it stood.

The CHAIRMAN suggested that the phrase "having regard to new developments in international law in this field" should be added to the first sentence.

It was so agreed.

Paragraph 8, as amended, was approved.

Paragraphs 9-13

Paragraphs 9-13 were approved without comment.

Paragraph 14

Mr. ROSENNE said that at the sixth meeting he had initiated the discussion of the question whether the outline should include a point on adjudicative procedures for the settlement of disputes; although opinion in the Sub-Committee had been divided, the views of members were clear from the summary records and the Special Rapporteur would undoubtedly bear them in mind.

The CHAIRMAN said he inclined to the view that the question of the settlement of disputes constituted a separate chapter in itself, but he would not wish to influence the Sub-Committee.

Mr. TUNKIN agreed that that question constituted a separate subject of international law; in his opinion, those who thought that it should be included in the outline were too much influenced by Anglo-American legal practice based on judge-made law. In order to expedite the Sub-Committee's work, however, he proposed that the paragraph should be allowed to stand as it was.

Mr. CASTREN supported that proposal.

Mr. BRIGGS also supported the proposal but wished to make it clear that those who had expressed the view that the Special Rapporteur should be asked to consider the inclusion of the question of the settlement of disputes had not been thinking of the compulsory jurisdiction of the International Court.

The CHAIRMAN suggested that paragraph 14 should be retained with the exception of the last sentence.

It was so agreed.

Paragraph 14, subject to the drafting change suggested by the Chairman, was approved.

Paragraph 15

Mr. EL-ERIAN, Mr. TUNKIN, Mr. BRIGGS and Mr. ROSENNE suggested that the reference to territorial servitudes should be deleted, since the idea of servitudes was foreign to international law.

Mr. ELIAS suggested that the phrase might be changed to read "territorial servitudes or rights"; in any case the Special Rapporteur would be free to delete the reference if he saw fit.

Mr. BARTOS thought a reference to the subject should be retained, for an important question was involved which arose in international law and which would have to be dealt with, though perhaps the terminology might be changed.

Mr. TABIBI, supported by Mr. CASTREN, proposed that the phrase should be changed to "territorial rights".

It was so decided.

Paragraph 15 as amended was approved.

Paragraph 16

The CHAIRMAN said that in addition to the three studies mentioned in paragraph 4, the Secretariat had completed a fourth study, consisting of a digest of decisions of national courts relating to succession of States and Governments (A/CN.4/157), since the Sub-Committee's last meeting.

Mr. TABIBI suggested that in view of the importance of the analytical restatement of the material furnished by Governments, the deadline for replies should be extended.

Mr. BRIGGS considered that the actual texts of the replies were even more important than the analysis and hoped that they would be included in the document.

Mr. ELIAS and Mr. ROSENNE suggested that the Secretariat should be asked to send Governments a reminder.

It was so agreed.

Paragraph 16 was approved.

Paragraph 17

Paragraph 17 was approved subject to drafting changes.

Paragraph 18

Mr. ROSENNE regretted the inclusion of paragraph 18, as it was completely at variance with what had been decided in the plenary session. Unfortunately, the decision by the Sub-Committee on State Responsibility to publish the summary records and working papers had left the Sub-Committee on Succession little choice. However, the latter Sub-Committee's work was somewhat different in that questions of substance had been discussed to the very end of its session, as in the discussion of territorial rights in the current meeting. Accordingly, annex I should include the summary records of the 8th, 9th and 10th meetings, which the Chairman and the Secretariat could be asked to make as short as possible.

Mr. BARTOS said that when the Sub-Committee had discussed the question in January it had decided to follow the same procedure as the Sub-Committee on State Responsibility. That decision could, of course, be reconsidered, but he thought it had been a wise one. He agreed with Mr. Rosenne that the summary record of the current meeting should also be annexed to the report. With regard to the memoranda and working papers, there was nothing secret about them; they had been circulated to universities and institutions and they might be of use to students. Accordingly he considered that the Sub-Committee should abide by paragraph 18, and he proposed that it should be approved.

Paragraph 18 was approved.

Mr. BRIGGS, supported by Mr. EL-ERIAN proposed that the Sub-Committee should approve the final report, as amended, as a whole and submit it with its annexes to the Commission and request the Chairman to inform the Commission accordingly.

It was so decided.

The meeting rose at 4.50 p.m.

APPENDIX II

Memoranda submitted by members of the Sub-Committee

DELIMITATION OF THE SCOPE
OF "SUCCESSION OF STATES AND GOVERNMENTS"Submitted by Mr. T. O. ELIAS¹

Synopsis of Chapters

1. (i) Analysis of the concept of "Succession of States and of Governments". Consider *Luther v. Sagor* (1921) 1KB 456; 3KB 532; *Haile Selassie v. Cable & Wireless Ltd.* (1936). No. 2, Ch. 132; The Tinoco Concessions 1923 (See AJIL, Vol. 18, 1924, p. 147) — an arbitral award by Taft, C.J., between Great Britain and Costa Rica.
 - (ii) *Universal v. partial* succession (e.g. dismemberment, cession, incorporation in a federal State, attainment of independence).
 - (iii) Inference from (i) and (ii): International rights and obligations attach to *States*, not to Governments. A State's identity is not affected by a mere change of government, whether as to form or as to personnel.
 - (iv) Where there is a union of two States, sometimes difficult to say which is the annexor or whether there has been a simple merger of their separate identities in a new State; e.g. Italy (see *Gastaldi v. Lepage Hemery*, Annual Digest, 1929-30, Case No. 43). Turkey (see *Ottoman Debt Arbitration*, Annual Digest, 1925-26, Case No. 57).
 - (v) Succession in the field of international organizations.
 2. Main headings for detailed consideration of the subject:

The legal effects of succession on —

 - (a) Treaties,
 - (b) Contracts (e.g. debts, concessions),
 - (c) Torts (i.e. civil wrongs or delicts), and
 - (d) State property.
 3. (a) *Treaties*:
 - (i) Distinction sometimes drawn in international practice between *political* treaties (e.g. treaties of alliance) and *dispositive* treaties (e.g. treaties of neutralisation)? Both do not pass on succession.
 - (ii) *Quaere*: whether treaties of commerce, extradition, etc. continue to be binding after the extinction of the predecessor State. The majority view is that there is no succession in such cases (Oppenheim, *International Law*, vol. I, 8th edn., p. 159).
 - (iii) The principle of *Res transit cum suo onere* applies to render valid treaties relating to boundary lines, river navigation, etc.

(b) *Contracts*:

 - (i) Whether succession occurs as a result of cession, annexation or dismemberment, there is *prima facie* a duty on States to respect the acquired *proprietary, contractual or concessionary* rights of private individuals? (See, e.g. Oppenheim, *op. cit.*, pp. 161-2). *Per contra*: *West Rand Central Gold Mining Co. v. The King* (1905) 2KB 391, "... The conquering sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them." This is a highly controversial proposition.
 - (ii) *The Permanent Court of International Justice* on the matter: *The German Settlers in Poland*, Advisory Opinions, No. 6, Series B; Hudson World Court Rep. 207: *Mavrommatis Palestine Concessions*, Judgment No. 5, Series A, Hudson *op. cit.*, p. 297.
 - (iii) *The Peter Pazmany University* (1933), Series A/B, No. 6; Hudson *op. cit.*, p. 311. Effect of annexation upon the public debt of the State annexed: e.g. *Italy*, in respect of the annexation of Lombardy from Austria in 1860; *Prussia*, in respect of the annexation of Schleswig-Holstein from Denmark in 1866.
 - (iv) *Quaere*: Is an annexing State bound to assume the public debt of the annexed State incurred by the latter in the course of waging war against its conqueror?
 - (v) In regard to concessionary contracts, no general rule of succession can be laid down. Each case must be considered on its merits (Oppenheim, *op. cit.*, p. 162).
- (c) *Torts*:
- (i) Apart from issues as to denial of justice, exhaustion of local remedies, etc., there is no general liability for the delicts or civil wrongs of an annexed or extinguished State but there may be for *liquidated* damages.
 - (ii) The Anglo-American Pecuniary Claims Tribunal's decision in *The Robert E. Brown Claim Case* (See BYIL, 1924, pp. 210-221), on the annexation by Great Britain of the South African Republic, which resulted in certain gold-mining losses to an American citizen.
 - (iii) This case was followed by the same tribunal in *No. 84 of The Hawaiian Claims* (see AJIL, 1926, Vol. 20, pp. 381-2).
- (d) *State property*:
- (i) Annexation entails the passing of the property in such things as the former government's bank balance, public buildings and undertakings (e.g. transport, public utilities) to the annexing or successor State.
 - (ii) e.g., Britain handed over the Confederate cruiser *Shenandoah* to the U.S. Government after the Civil War. Also *U.S. of America v. Prioleau* (1865) 35LJ Ch. 7.
 - (iii) But the Mixed Commission appointed by The Treaty of Washington, 1871, held that the United States of America was "not internationally liable for the debts of the Confederacy, or for the acts of the Confederate forces". (Moore, *Digest*, i, §, 22, p. 60).
4. *Succession in the field of international organizations*:
 - (i) When an international organ is dissolved and another is established to perform similar or even identical functions — e.g. the United Nations replacement of the League, ICJ of PCIJ, WHO of International Sanitary Bureau. Mandates Commission replaced by the Trusteeship Council: *Status of South West Africa* (1950) (Advisory Opinion of ICJ) Reports; p. 136? But see *Anglo-Iranian Oil Company* (1951) for the ruling of the Vice-President of the Court that certain functions of the PCIJ did not devolve upon the ICJ.
 - (ii) Consider (a) Yearbook of the International Court of Justice 1952-3, p. 45; (b) Fitzmaurice in BYIL, Vol. 29, 1952, p. 8.
5. *Succession on the attainment of political independence by former dependencies*
 - (i) Regarding certain members of the British Commonwealth, see O'Connell in BYIL, Vol. 26, 1949, pp. 454-463.
 - (ii) A. B. Keith: *The Theory of State Succession with Special Reference to English and Colonial Law*, 1907.

¹ Originally circulated as mimeographed document ILC/(XIV)/SC.2/WP.1.

- (iii) E. H. Feilchenfeld: Public Debts and State Succession, 1931.
- (iv) Sir Cecil Hurst: State Succession in Matters of Tort: 5 BYIL, 1924.
- (v) F. B. Sayre: Change of Sovereignty and Concessions: 12 AJIL, 1918, p. 182.
- (vi) A. S. Hershey: The Succession of States: 5 AJIL, 1911.
- (vii) J. W. Garner: De Facto Government and State Succession: 9 BYIL, 1928.
- (viii) Wilkinson: The American Doctrine of State Succession (1934).

A SUPPLEMENT TO ITEM 5 OF THE NOTE
ON SUCCESSION OF STATES AND GOVERNMENTS

Submitted by Mr. T. O. ELIAS²

1. Is the traditional law governing State succession in general adequate to cover State succession in consequence of colonial independence?

Existing rules and past State practice are not necessarily inapplicable, but a different if deeper kind of legal analysis and adaptation is called for. A *juristic*, rather than a *political*, solution to the contemporary problem of State succession must be provided without avoidable delay.

2. (a) The older Dominions of the British Commonwealth (particularly Canada, Australia and New Zealand) share with the newer the one characteristic that they all became, at independence, parties to a large number of United Kingdom treaties by devolution; but, whereas inter-governmental treaties were gradually extended to them, over the years, by the tacit consent of the other contracting parties, there can be no presumption of any tacit consent in the case of the newly independent Dominions in Africa and Asia, precisely because there has been little or no time for this to be tested.

(b) In this respect, Latin American experience may be likened to that of the older British Dominions, and there has been time for practice to crystallise.

3. (i) The theory of *universal succession* cannot fit the case of the newly independent States because

- (a) some at least of the treaties supposedly taken over are of the "personal", rather than the "territorial" type, and therefore pertain solely to the metropolitan Powers concerned;
- (b) there have been criticisms, in the ex-colonial countries, of the attempted devolution of treaty rights and obligations through the more or less informal exchange of notes or letters between a plenipotentiary of the metropolitan Power and the head of government of the colony at independence. Thus the treaties have frequently not been studied and publicly discussed by the colonial legislatures before their automatic "inheritance". Indeed, it has been said that "these agreements are models of evasive draftsmanship".

N. B.: The earlier practice of attempting to devolve treaty rights and obligations upon States members of the British Commonwealth by means of United Kingdom statutes has also been criticized.

- (c) sometimes, as in the ex-Belgian Republic of the Congo, there may have been no formal settlement of the issues of State succession, which is thus left to be implied from the mere fact of independence.

Consider Katanga and the Union Minière. Has Katanga an international personality? Has it acquired rights and

obligations of State succession separate and distinct from any which the Republic of the Congo might be deemed to have "inherited" direct from Belgium?

- (d) in the case of French ex-colonies in Africa and Asia, the situation at independence was rendered extremely fluid by the concept of the new French Community which at first had control of the external relations of these territories.

Of course, a series of subsequent agreements have placed the legal situation on probably the same footing as with the British ex-colonies.

Note: The Treaty of Rome contained provisions for the continued associate membership of the European Economic Community of the former colonies of France and Belgium. There is attached to it a list of such territories. The whole exercise is not strictly one of State succession as such.

- (a) some of the treaties may devolve upon the new States at independence, while others clearly do not. An empirical approach to each treaty is the surest guide. Ordinary canons of statutory interpretation cannot be applied without reference to the surrounding circumstances both at the time of the making of the treaty by or with the metropolitan Power and at the moment when it is sought to enforce it against a newly independent State e.g.:

- (i) the House of Lords has held that the expression "High Contracting Parties" in the Warsaw Convention refers only to the actual signatories to it. How, then, can a newly independent State of Great Britain be said to have inherited such a convention under a theory of universal succession?

- (ii) when the United Kingdom Government ratified the Counterfeiting Convention, which was expressly limited to the States that participated in the preceding Conference, some of her colonies had become independent, while others became so only afterwards. The first category might accede or succeed to this Convention, but the second category of new States could not.

3. (ii) A study of the *Status of Multilateral Conventions* of the United Nations shows that many newly independent Members States accept the principle of "automatic" succession to such conventions, especially if they are of a humanitarian character.

4. Former Trust (or Mandated) Territories furnish yet another illustration of the inadequacy of the existing rules governing State succession.

Problems arising generally similar to those of the ex-colonies, but dissimilar because of the legal implications of the withdrawal of "the protective umbrella" not only of the mandatories but also of the United Nations on their attainment of independence.

Consider Palestine (so far as relevant, now Israel), Togo, Camerouns, and Tanganyika; also the peculiar position of South West Africa and the South African Government's claim that it is already an integral part of its territory. Any possibility of State succession in respect of South West Africa? If finally integrated with South African Republic, the old rules should cover the case. If not, then the new rules, about to be formulated ought to apply to it, as to the other trust territories.

5. The practice (or lack of it) of certain ex-Protectorates like Morocco, Tunis and Syria must be examined to see what lessons it may hold for the modern principles of State succession now under study. e.g.

- (a) Morocco, but not Tunis, accepted the Road Traffic Convention in virtue of France's signature as the protector State.

- (b) Morocco and Tunis were held by the P.C.I.J., in the *Nationality Decrees in Tunis and Morocco Case*, to be

² Originally circulated as mimeographed document A/CN.4/SC.2/WP.6.

bound by treaties contracted by them before they came under French protection. In strict legal theory ought to be bound by treaties specifically entered into on their behalf by France as the protector State.

(c) Compare the practice of Malaya, a protectorate under the British until attainment of independence in 1957.

6. State succession issues may also arise when former colonial territories have, prior to independence, been subjected by the metropolitan Powers to leases and international servitudes in favour of other sovereign States.

(i) The leased military bases in the British West Indies, of which the Chaguaramas in Trinidad is the best known, present peculiar problems of their own. In the absence of any express treaty provisions, a tripartite negotiation between the British, the American and the Trinidad Governments has been going on for some two years now.

N. B.: It is significant that the United States Government has declared its stand to be that, on the attainment of independence by the respective West Indian Colonies concerned, all military base leasehold agreements must be negotiated anew.

(ii) Despite the current revolution in Cuba, the Guantanamo Naval Base Agreement with the United States of America has not been expressly repudiated.

7. (i) The scope and variety of the problems posed by the new States and by contemporary international practice emphasize the urgent need for an objective and analytical re-appraisal of the law of State succession today. The alternative to the rule of law in this sphere is chaos. There could be an all too easy recourse to the plea of the doctrine of the *clausula rebus sic stantibus*.

(ii) Already, a theory is being advocated to the effect that independence puts an end to all the treaty obligations previously assumed by the metropolitan Powers on behalf of the newly independent States. This is as difficult to accept as is the equally controversial theory of universal succession.

(iii) There can be no valid substitute for a close and painstaking study and analysis of the policies and practices of the newly independent States and of the attitude of the Secretary-General of the United Nations, as the depositary, to these matters.

Examples:

- (a) India has not made an official list of treaties to which she regards herself as having "succeeded" at independence.
- (b) Nigeria has also not made any list of those of the 234 treaties to which she is supposed to have "succeeded" at independence. This has been because the texts of only some 169 treaties are so far available to her.
- (c) Ghana has submitted to the United Nations the selected list of the treaties to which she regards herself as having "succeeded": see Summary of the practice of the Secretary-General as depositary of multilateral conventions (ST/LEG/7), p. 60, foot note 57. It is to be noted that she has not limited the devolution clause to multilateral treaties, but it is not clear whether bilateral treaties are also covered by this clause.
- (d) Wherever there is a devolution clause, the Secretary-General of the United Nations has due regard to the policies and attitudes of the successor States concerned in following the provisions of such a clause.

The practice of the Secretariat is first to ascertain whether the treaty contains a territorial application clause and whether it was in fact applied to the particular colony before independence, next to send to every new Member State of the United Nations an up-to-date list of all multilateral treaties deposited with it in accordance with the Charter and to which the relevant metropolitan Power was a party prior to the Member State's inde-

pendence. The latter is thereby invited to declare its attitude to such treaties. It is noteworthy that no new State has so far accepted the invitation.

N. B.: If the treaty does not contain a territorial application clause or where it can be shown that despite the inclusion of such a clause the treaty was never in fact applied to the colony prior to independence, the United Nations Secretariat does not normally refer it to the new Member State for a declaration, as it assumes that the latter is not a successor State under the treaty.

But, in regard to the *Convention on the Privileges and Immunities of the United Nations*, the Secretary-General's assumption (and decision) that it is of application in all colonies was called in question by Morocco which denied that it had "succeeded" to this Convention in virtue of France's participation as protector State. Tunis and Malaya have, however, accepted the Secretary-General's ruling.

(iv) Special attention should be paid to the legal effects of devolution clauses upon third parties to the treaties in question.

(a) The great question here is surely to determine when lack of protest on the part of other States parties to a treaty can be taken to imply their *tacit consent*:

The I.C.J. held in the *Reservations to the Genocide Convention Case* that the reservations became part of the Convention by the tacit consent of the other parties to it.

(b) But this doctrine of tacit consent should not be carried too far.

(c) Civil law systems are more apt than Anglo-Saxon ones to accept novation of a contract by implication or stipulation for the benefit of third parties.

(v) Does a presumption in favour of State succession in the case of newly independent States make for legal continuity and international order, rather than the opposite theory of non-succession?

With proper qualifications and exceptions, the former offers a more rational basis for the continued integrity of international law and the facts of international life.

MEMORANDUM ON THE TOPIC OF SUCCESSION OF STATES AND GOVERNMENTS — AN OUTLINE OF METHOD AND APPROACH TO THE SUBJECT

Submitted by Mr. Abdul H. TABIBI³

State succession in general is a thorny subject and that is why the literature of international law offers divided and sometimes confusing principles, but, nevertheless, lawyers tend to regard the State as eternal, and, in their view, the death of a State is regarded as an exception.⁴

We must admit that in our day the law and function of treaties has greatly changed and this change is obvious during the last century. The treaty law surpassed the customary international law because the customary international law did not save the world from the horror of two world wars and both the League and the United Nations were established on the basis of treaties; the Charter of the United Nations is the new instrument of positive international law. In the law of treaties a new field has emerged, the law of State succession. World War II brought a number of frontier changes and many nations in Asia and Africa and other parts of the world achieved independence to assume new obliga-

³ Originally circulated as mimeographed document A/CN.4/SC.2/WP.2.

⁴ R. W. G. DeMuralt, *The Problem of State Succession with Regard to Treaties*.

tions in the expanding community of nations. A number of frontier and territorial changes took place by force or by agreement, new circumstances were created to find the effects of treaty concluded by nations before and after the territorial changes or the effects of treaties after secession. Annexation, fusion with other States, entry into federal union, dismemberment of partition and finally separation or secession, make it indeed necessary to study the question of codification of the law of State succession, and Governments, particularly on the basis of the practices of State, and priority must be given to its consideration in the work of International Law Commission.

In a world in which all the desirable habitable territory belongs to one nation or another and the expansion of one State means the waning of another, it is of prime importance that some device should and must be found, accepted and applied to equitably solve the serious problems of personal and public rights and obligations that arise, and to bring nations in close co-operation who are in feud and disagreement.⁵

The solution of such problems cannot be left to the mercy of the strong nations or the bargaining of military Powers. As in private law this problem has found solution, it is much more important to find means and devices for the solution of this important question.

Many writers in the past, despite the importance and the challenging character of the problems raised as a result of change in the shape of the State, referred to this important area only to pass quickly to other subjects—but from the work of the publicist of international law three main theories of State succession can be found, namely the theory of universal succession, a doctrine taken from Roman law and based on the analogy of the State to a private individual, and influence of this doctrine can be found in the thinking of many authorities from the time of Grotius to the present day. When this theory was considered in international law it led to another doctrine that a State had a “personality” composed by, unity of territory, population, and political organization. The second doctrine which was developed by Huber differs from the Roman concept and is based on the theory of “continuity or universal succession”. But there is no doubt that the third theory which is supported very strongly by Keith, and which he describes with the term “singular succession” because of its analogy to that doctrine in early Teutonic private law, is supported by many others.

There is no doubt, however, that these three theories give different results on application, for, as Wilkinson believes, a State could apply any one or all three theories in different cases or at different times. But the best solution and validity to the acceptance of any of these theories should be based on the general practice of States.

Approach to the question

The International Law Commission should try not to be confused with doctrine, but should search devices on the basis of the practice of States. The term “State succession” should not be used too vaguely or loosely, but it should concentrate on territorial re-organization accompanied by a change of sovereignty. In my view it is more wise to separate the subject of succession of States from the succession of Governments. The International Law Commission should draw a distinction between the State and its Government, as Willoughby states in his “Fundamental Concept of Public Law” that by the term State is understood the political person or entity which possesses the law-making right. By the term Government is understood the agency through which the will of the State is formulated, expressed and executed.⁶

In governmental changes there are no shifts of boundaries,

⁵ Herbert A. Wilkinson, *The American Doctrine of State Succession*.

⁶ W. W. Willoughby, *Fundamental Concepts of Public Law*, chapter V, p. 49.

no transfer of sovereignty, and therefore, the effects of governmental transformations are usually different.⁷ That is why in the first meeting of the Sub-Committee on Succession of States and Governments on 10 May 1962 I had the honour to propose that the study of State succession should be made separately from the subject of succession of Governments, the latter being an important question in itself, for which study is necessary and priority should be given.

The scope of the study of State succession should be limited and precise, and must cover the essential elements which are necessary for the creation of practical devices to solve the present difficulties arising out of the result of colonialism and imposition of territorial and boundary changes which are contrary to the will of the inhabitants and contradictory to the principle of self-determination.

The most important question on which the Commission should concentrate is whether new States are bound by the treaties of their predecessors and whether a party to the treaty is obliged to be under the same obligation towards the successor States who have come with new obligations and a clean slate to the world. Although the answer to this question in the view of almost all general publicists of international law is negative, it is necessary to establish basic principles on this subject to be applied universally. It is important that these devices should be studied on the basis of those treaties of a “personal” nature because the treaty falls to the ground at the same time as the States. This question is particularly important because of the faith of many treaties concluded by colonial Powers and now the aftermath of independence creates many problems which should be solved.

In conclusion, we might say that now there is sufficient material available regarding the practice of States to make it possible to find positive devices of law on the subject of succession to treaty rights and obligations. It is also necessary for any special rapporteur who deals with the subject to avoid general theories on the subject of State succession—instead, to search on the main road, as Hall believes,⁸ which is the “personality of the State”, changed conditions and the will of the contracting parties about the right of succession. There are other factors which should be examined for the purpose of the formulation of legal rules.

WORKING PAPER

Submitted by Mr. Shabtai ROSENNE⁹

I. Introduction

1. Pursuant to the decisions of the Sub-Committee and of the Commission at its 14th Session, this paper indicates some tentative views regarding the approach to and scope of the subject, thus amplifying my remarks during the Commission's 634th meeting.¹⁰

2. The Commission has so far refrained from taking any decision on whether what General Assembly resolution 1686 (XVI) terms “Succession of States and Governments” consists of one or of two questions. Some elucidation of this aspect now seems necessary. In so far as earlier official work on the codification of international law has attempted any differentiation, it appears that what has been denominated the “so-called succession of Governments” has been described as concerning itself with “the rights and obligations of a Government which

⁷ H. A. Wilkinson, *The American Doctrine of State Succession*, p. 17.

⁸ *International Law*, eighth edition, 1926, p. 114.

⁹ Originally circulated as mimeographed document A/CN.4/SC.2/WP. 3.

¹⁰ See *Yearbook of the International Law Commission*, 1962, vol. I.

has been successful in a civil war with respect to rights and obligations of the defeated *de facto* Government" and "with the affirmation of the principle which is well recognized, that the obligations of a State continue notwithstanding any changes of government or of the form of government of the State in question".¹¹ (*Survey of international law in relation to the work of codification of the International Law Commission*, memorandum submitted by the Secretary-General (A/CN.4/1 Rev.1), para. 47). That memorandum stresses that any attempt to codify the rules governing this latter principle would not be feasible without a parallel attempt to qualify some such rules as that the obligations in question must have been validly contracted, or that their continuation cannot be inconsistent with any fundamental changes in the structure of the State accompanying the revolutionary change of government. Recognizing that any attempt to formulate such principles and their qualifications would raise "problems of great legal and political complexity", the memorandum, nevertheless, did not see in that any decisive argument against including the topic within the scheme of codification.

3. On the other hand, both the Commission in its report on the work of its first session (A/925, paras. 15 and 16) and the General Assembly in resolution 1686 (XVI) paragraph 3 (a), referred to the "topic of Succession of States and Governments" [my emphasis]. The debates preceding resolution 1686 (XVI) may support a view that the General Assembly regarded this item as constituting a single topic, or at least that it wished the International Law Commission to initiate work on a single topic which would combine relevant elements of the two traditional headings of succession. This may be regarded as having been confirmed at the seventeenth session of the General Assembly.¹²

4. This approach, which avoids technical, and probably artificial, differentiations, is seen as appropriate to contemporary requirements. The necessity for some measure of general legal regulation arises above all from the problems generated by the emancipation and independence of territories and peoples, in nearly all parts of the world, which have achieved their independence after the Second World War. The technical manner and the formal process by which this independence has been achieved vary. In some instances the acquisition of independence may have taken the form, technically, of a change of government, such change being the product of due constitutional process or not, as the case may be. In others, the process of emancipation and independence of colonial territories has clearly created a new international personality. In some cases the transition was peaceful, in others it was accompanied by the use of force and acts of warfare, sometimes with and sometimes without the co-operation of the metropolitan State. There are even to be found instances in which the transfer of power took place in more than one step, leading perhaps to the phenomenon of double succession (Mali). Common to the process in all types of emancipation and independence is the fact that as one of the consequences of the achievement of independence, the political, social, economic and cultural aims of the State change: and in the light of that, the prospect of a successful outcome for a project of codification based upon technical distinctions between succession of States and succession of Governments may be taken to be problematical. For the urgency demonstrated by the General Assembly is to be

¹¹ This quotation is used for purposes of exemplification only: it is doubtful if "Succession of Governments" need be concerned only with the Government which has been successful in a civil war. Probably an expression such as "change of regime" would be more apt.

¹² Note that at the seventeenth session of the General Assembly (1962) an attempt was made, in the three-Power draft resolution (A/C.6/L.501) to redefine the topic as "State Succession", but this was not adopted by the Sixth Committee in its resolution on the report of the International Law Commission covering the work of its fourteenth session (A/C.6/L.503). See General Assembly resolution 1765 (XVII) of 20 November 1962.

found precisely in the far-reaching practical consequences of independence, and not in the purely legal difficulties occasioned by the distinction between succession of States, and succession of Governments, as rubrics in the formal exposition of the rules of international law. The conclusion therefore is that for present purposes — though only for present purposes — the traditional distinction is not relevant, and that the Sub-Committee should propose to treat the topic of succession primarily in the context of those contemporary needs which have arisen as a consequence of the magnificent progress of emancipation.¹³

5. It is also necessary to consider at this early stage, even if only in a preliminary and a tentative manner, the form in which the work of codification is to be consummated. Despite the very strong tendency which has been manifested in recent years to consummate all the work of codification by general multilateral conventions concluded in conferences of plenipotentiaries convened under the auspices of the General Assembly, the question arises whether this would be the most appropriate form for regulating the codification of this topic. In this regard, several factors appear to be relevant. It is likely that close study of the material to be made available to the Commission in response to the circular note recently sent to Governments¹⁴ will disclose that many of the acute problems are essentially bilateral and not altogether suitable for regulation by means of a general multilateral convention. Secondly, with perhaps relatively few and isolated exceptions, and dependent upon what will be accepted as the proper scope of the topic (see para. 10 below), in all probability it will be found that while the number of "successor States" (i.e. the States which have achieved their independence since the Second World War) may reach the figure of nearly fifty, the number of non-Successor States having direct concrete interest in the matter is relatively small, being limited (except, perhaps, as regards general multilateral treaties) to the former metropolitan States on the one hand, and the few non-metropolitan States whose nationals were widely engaged in economic enterprises in the former dependent territories, on the other. In these circumstances it may be questioned whether other States will be sufficiently concerned to warrant an assumption of their willingness to participate actively in any universal international conference convened with the object of concluding a general international convention on the topic.¹⁵ Thirdly, in many cases it will, it is believed, be found that the practical problems have been regulated by bilateral arrangements, and in these circumstances the project of codification would be reduced to the formulation of a series of residual rules operative only in the absence of specific stipulation.

6. The following alternatives could be considered:

(a) The Commission could draw up a set of general principles representing its consensus on the matter, for submission to the General Assembly. Precedents of such a character can be found in some of the earlier work of the Commission.

(b) The Commission could submit to the General Assembly a set of model rules, not intended to be combined into a general international convention, which could guide States in their dealing with concrete problems. Such model rules, which would be fuller than principles, could deal in some detail with the different types of problems which call for regulation.

7. Whatever method is followed, it seems essential that the Commission should take the initiative for the preparation of

¹³ For these — and other — reasons the question arises whether the term "succession" itself is appropriate.

¹⁴ Report of the Commission covering the work of its fourteenth session (A/5209), para. 73.

¹⁵ The small participation in the Conference on the Elimination or Reduction of Statelessness comes to mind as an instance of a project of codification and progressive development which, important though it is, did not attract universal interest.

an adequate and reliable survey of contemporary State practice. Material for this will undoubtedly be forthcoming from the replies of Governments to the circular note. However, mere republication of this material, as it is received, in the *United Nations Legislative Series* would not be sufficient. A comprehensive analytical restatement of that material, together with the material which has been promised by the Secretariat, could constitute a reliable and objective guide to current practice of considerable practical value. A precedent for such a compilation exists in the Secretariat's *Commentary on the Draft Convention on Arbitral Procedure* (A/CN.4/92).¹⁶

8. In view of the fact that questions of succession frequently give rise to differences not only on the inter-governmental level but also in the relations of the successor Government with foreign individuals, and that the settlement of such differences may itself occasion political difficulties and international tension, the question arises to what extent should adjudicative procedures be regarded as essential for this aspect of the law and international relations, and what type of procedures would be suitable.

II. Scope of the topic

9. Two factors at least cause difficulties in defining the scope of the topic. The first is that in one sense it can be said that the topic of succession impinges on a great number of the institutes of contemporary international law. The second (which is related) is that very little attempt has been made in the past by Governments and others, urging priority treatment for the topic, to indicate what in their view should be included within its scope.

10. It might be useful, before considering the scope of the work to be undertaken, to investigate what may legitimately be excluded from its scope. Guidance on this appears in Article 2, paragraph 7, of the Charter itself, namely matters which are essentially within the domestic jurisdiction of a State. The effect of identifying and applying the concept of domestic jurisdiction would be, broadly speaking, to exclude all questions appertaining to the legal relationships between the new State and its nationals when those relationships are a continuation of identical relations previously subsisting between the former Government of the dependent territory and the same individuals who were then subjects of that Government. (On the other hand, their exclusion would not necessarily apply in the case of aliens.) Questions analogous to succession may arise in those relationships. However, these are not questions of succession under international law. An exclusion of this nature would cover a vast area of relationships to which considerable attention is devoted in the literature, but the relevance of which to general international law is not always self-evident. These questions include, for instance, such matters as: (a) the effect of the emancipation on the domestic legal system itself; (b) questions of purely private law rights and obligations between the individual, formerly a subject of the metropolitan Power, and the independent Government, as well as those anchored in domestic constitutional law; (c) the rights of officials of the former government who became nationals of the new State; (d) the status of various transactions concluded prior to independence, which were and remain governed exclusively by domestic law, such as contracts, internal debts, tax liabilities, franchises granted to persons who have become nationals of the new States; (e) torts, etc. It is difficult to see why such matters come within the scope of any international regulation of the question of succession. In this connexion, attention may be drawn to leading decisions of the Supreme Court of Israel in *Shimshon Palestine Portland Cement Factory Ltd. v. the Attorney-General*, *International Law Reports*, 1950, p. 72 and *Sifri v. Attorney-General*, *ibid.*, p. 92.

11. A broad exclusion of that nature would leave for examination matters which under general international law

do not come within the scope of the principle of domestic jurisdiction. For practical purposes, it is believed that this examination can for the present be limited to questions connected with: (a) the law of treaties; (b) the economic rights of nationals of foreign States; and (c) certain miscellaneous questions, especially some aspects of the public debt.

III. The Law of Treaties

12. The first, and from the point of view of method, perhaps the principal, question that arises in connexion with succession and the law of treaties, is whether the Commission is to deal with it in the context of its work on the law of treaties, or not. One of the previous Special Rapporteurs on the law of treaties included some provisions relating to succession in the scope of the law of treaties¹⁷ but it appears that our present Special Rapporteur on the law of treaties has not yet expressed any firm opinion on the matter beyond his general remarks at the Commission's 630th meeting.¹⁸

13. In considering this question, regard must be had to the draft articles on the law of treaties prepared by the Commission at its 14th session,¹⁹ and to certain guiding lines which the Commission then adopted. Of particular significance is that the Commission has apparently eschewed attempts to classify treaties by reference to their subject-matter, with, however, two major exceptions, namely the general multi-lateral treaty (as defined in article 1 of the 1962 draft) and the constitution of international organizations (referred to in article 3 of the same draft). But when the literature, and the practice, of succession are examined, it will be found that the classification of treaties from the point of view of their subject-matter and their operation may come to occupy a more prominent role: at least there will be found a well-marked tendency to make the automatic transmission of treaty obligations by operation of law from the former sovereign to the new sovereign depend upon a purported classification of treaties.

14. For instance, it is sometimes asserted that what are frequently called "dispositive treaties" or treaties creating local obligations subsist despite change of sovereignty. The reference here is to international treaties and treaty settlements which define and delimit international frontiers. This theory has obvious practical advantages despite its theoretical awkwardness, in so far as it is intended to give effect to the certainty, stability and finality of agreed frontiers. However, closer inspection of the various types of treaties cited as illustrations for the theory shows that often they go further than to determine and delimit frontiers, and lay down detailed regulations for the regime applicable to frontier traffic and relations of the population of the frontier area, rights to or over different natural features constituting the frontier and even rights exercisable over the territory of another State remote from the frontier area, etc. The Sub-Committee, it seems, should consider the problem which this theory attempts to answer. If the Commission persists in its unwillingness to base its codification of the general law of treaties on a system of treaty classification founded upon the subject-matter and operation of treaties, the question will arise whether, in dealing with succession, some other legal basis does not exist which would in practice achieve the same results as regards the stability of the frontiers

¹⁷ Sir Gerald Fitzmaurice, first report on the law of treaties (A/CN.4/101), article 6; second report on the law of treaties (A/CN.4/107), article 17, section I A (i), and see paragraph 95 of his commentary on that provision; on the relations between succession and the termination of the treaty by operation of law through application of the principle of *rebus sic stantibus*, see *ibid.*, article 21(3); fourth report on the law of treaties (A/CN.4/120), articles 2(1) (c), 6, 21, 28; fifth report on the law of treaties (A/CN.4/130), articles 15, 27, dealing with the transmission of treaty rights and duties by operation of law.

¹⁸ See *Yearbook of the International Law Commission*, 1962, vol. I.

¹⁹ See *ibid.*, vol. II, pp. 161 *et seq.*

¹⁶ United Nations publication. Sales No. 1955.V.1.

as is sought to be achieved by the theory of the perpetuation of the dispositive treaties, but which at the same time would not come into conflict with the Commission's attitude towards the general law of treaties.

15. The approach adopted by the Commission in 1962 for the general law of treaties could facilitate separate treatment of the problem of succession and treaties. For instance, the Commission's proposals on the matter of participation in treaties, contained in articles 8 and 9 of its 1962 draft, may be found to have practical consequences as regards succession. Thus the question whether new States are to be regarded as automatically parties to general multilateral treaties and to multilateral treaties not of a general character in the sense of paragraph (6) of the commentary to articles 8 and 9 of the draft articles which had been applicable to their territory prior to independence is likely to become a problem which can be solved by administrative means such as are envisaged in paragraph (10) of that same commentary.²⁰ It is believed that the Commission would perform a valuable service were it able to clarify the law and the procedures to govern this aspect. Similar considerations may be found to be present as regards the issue of membership in international organizations. Since 1955, all newly created States have on their request been almost automatically admitted into the United Nations, and hence become eligible for membership in the specialised agencies; and if this policy is continued, the type of problem which arose for example in connexion with the membership of India and Pakistan in the United Nations will be plainly exceptional and for that reason probably not suitable for general regulation.²¹

16. The Secretariat has undertaken to prepare a working paper on the succession of States under general multilateral treaties of which the Secretary-General is the depositary. The question arises whether this would be sufficient, and it is suggested to request the Secretariat to expand the scope of its paper by including material relating to the practice followed by the specialized agencies, and if possible of other international organizations and of Governments which are depositaries of international treaties.²² Furthermore, there is believed to exist a certain amount of bilateral practice on this question which may also be relevant. An example is seen in the recent Note dated 9 December 1961, from the Prime Minister of Tanganyika to the Secretary-General, and that dated 2 July 1962 from the Government of the United Kingdom, both of which were circulated to Member States through the Secretariat of the United Nations.²³

17. But the real problem regarding the law of treaties seems to lie in a different direction. It is usual, though not invariable, as part of the process of emancipation, for the metropolitan State and the authorities of the new State to agree that the new State shall be bound by the international agreements to which the former dependent territory was party prior to its emancipation, in accordance with the terms of each individual treaty. Such a blanket formula has several immediate consequences. First, it attempts to place the whole of the problem of the succession of the new State to previously existing

treaty rights and duties on a basis of treaty law, and thereby to make reliance on general international law unnecessary. Against this, on the other hand, it gives rise to many difficulties in practice, as the Government of Israel had occasion to point out in a reply which it submitted to the Commission in 1950.²⁴ Further instances of difficulties were given by our colleague, Mr. Elias, at the Commission's 629th meeting.²⁵ The problems—raising in a peculiar way the question of *pacta in favorem tertii* and *in detrimentum tertii*—requiring further elucidation seem to include the following:

(a) How far is the usual blanket type of stipulation merely a bilateral matter between its contracting parties, and how far is it capable of constituting *prima facie* assumption of treaty obligations by the new State in its relations with other States, not parties to that bilateral transaction? Does it embrace treaties which the metropolitan State concluded on its own account, by virtue of its own sovereignty, and those which the metropolitan State simply extended to the dependent territory, by virtue of a territorial application clause, as distinct from treaties which the metropolitan State concluded in the name of the dependent territory? Both from the theoretical point of view and from the practical point of view these distinctions seem to be of considerable significance.

(b) How far does that type of stipulation confer on the new States the right to insist upon the observance of the treaties to which the stipulation refers by the other party or parties to those treaties, such parties themselves remaining strangers to the transaction in which the blanket stipulation was included?

(c) To what extent are the other parties to a given treaty entitled to rely upon such a blanket stipulation (to which they themselves are strangers) in their legal relations with either the former metropolitan State or with the newly emancipated State? This is probably the most crucial aspect which the Commission will have to elucidate.

(d) Does the blanket stipulation operate in the same manner for multilateral and for bilateral treaties?

(e) What is the position where no such blanket stipulation exists?

The solution to the above problems may be closely connected with the conclusions which the Commission will reach on the relevant general aspects of the law of treaties.

18. Such indications—they are not exhaustive—of the special character of the problems posed by the succession for the law of treaties suggest that, should the Commission decide to consider the question of succession and treaties otherwise than as part of its general work on the law of treaties, a sufficient number of problems exist for which a coherent programme of work could be produced. However, should the Commission proceed in that way, obviously full co-ordination will have to be maintained between the Special Rapporteur on this aspect of the law of succession and the Special Rapporteur on the law of treaties, and the point of departure to be adopted in connexion with succession to treaties must be consistent with the Commission's general conceptions on the law of treaties.

IV. Economic rights of nationals of foreign States

19. *Ratione personae*, a distinction exists between aliens (in the newly independent States) who are nationals of the former metropolitan State, and aliens who are nationals of

²⁰ In this connexion, attention is drawn to the discussion in the 748th to 752nd meetings of the Sixth Committee, and General Assembly resolution 1766 (XVII) of 20 November 1962.

²¹ The particularity of that solution seems to be implicit in the report of the Sixth Committee on the question. *Official Records of the General Assembly, Second Session (1947)*, First Committee, p. 582 (A/C.1/212).

²² Particular importance is believed to attach to a full description of the practice of the International Labour Organisation and the World Health Organization in this regard. On the existence of special considerations "which give international Labour Conventions a more durable character than treaty engagements of a purely contractual character", see *The International Labour Code, 1951*, vol. I (1952) p. xcvi.

²³ Since some members of the Sub-Committee may not be familiar with this correspondence, the text of it is included in the annex to this Working Paper.

²⁴ Document A/CN.4/19, *Yearbook of the International Law Commission, 1950*, vol. II, pp. 206-18, especially paragraphs 19 to 28. For a fuller account of the considerations which found expression in that reply, see Rosenne, "Israel et les Traités internationaux de la Palestine", *Journal du Droit International*, 77 (1950), p. 1140.

²⁵ See *Yearbook of the International Law Commission, 1962*, vol. I.

third States. From the aspect of the root of title, a distinction exists between economic rights of aliens resulting from activities conducted on the basis of an international treaty concluded between the metropolitan State and a third State, for example a treaty of establishment, the terms of which were applicable to the dependent territory, and economic rights of aliens resulting from activities conducted on the basis of direct agreement, such as a concession, between the Government of a former dependent territory and the foreign economic interests. The Commission will have to examine all these aspects.

20. As far as concerns economic activities of aliens conducted on the basis of international agreements, the future legal status of those activities and the extent of the rights of the aliens claiming them would appear to stand or fall according as the newly independent State is legally bound by the stipulations of the international treaty in question. That being so, this aspect would not appear to call for special treatment. On the other hand, if the caducity of the international treaty, followed by the lapse of particular rights previously enjoyed by aliens, leads to the abandonment of tangible assets in the territory of the new State, the question which arises for examination is whether and to what extent and under what conditions the successor State ought to make compensation for those assets.

21. As far as concerns concessions, it may be recalled that, as in the case of international treaties, so also in the case of concessions it is frequent for the authorities of the successor State to agree formally with the previous metropolitan Government in a blanket provision to recognise the validity of all subsisting concessions in accordance with their terms for their unexpired duration. Such a blanket provision may well give rise to legal problems not dissimilar from those which arise in connexion with the law of treaties. Much may depend on the circumstances of the negotiation of such a blanket provision. Furthermore, a question may exist of the initial validity of the concession in the light of the international agreements (if any) which determined the status of the dependent territory and the rights and duties of the metropolitan State over it. Practice shows that this aspect may be of particular significance when the concessions or other privileges were granted while the territory was under some form of international protection such as that inherent in the Mandates and Trusteeships systems, or, possibly, in the provisions of Chapter XI of the Charter relating to non-self-governing territories. Cf. para. 29 of the Report of the Committee on Information from Non-Self-Governing Territories (A/5215), Official Records of the General Assembly, Seventeenth Session, Suppl. No. 15 (1962).

22. In this connexion, the real problem which the Commission will have to examine thoroughly concerns the extent of the widely held theory that there exists in international law a general principle of respect for private rights, and the implications of that theory for the problem of succession. As Kaeckenbeek has pointed out,²⁶ apart from international obligations accepted by the State as such under a treaty or otherwise, the question when the legislature should overrule vested rights or capitulate before them is always and exclusively a question of policy, of public interest, which the State alone is competent to decide. "And we must not forget that almost every social change . . . plays havoc with some vested rights". The Commission would be performing a valuable service, the implications of which may well extend beyond the law of succession as such, were it to succeed, after careful analysis of the conflicting interests involved, in effecting a just balance

²⁶ "The Protection of Vested Rights in International Law", *British Year Book of International Law*, 17 (1936), 1, at p. 15. For other references, see my article "The Effect of Change of Sovereignty on Municipal Law" in *British Year Book of International Law*, 27 (1950), at p. 281, footnote 3. See also Mr. García Amador's fourth report on international responsibility (A/CN.4/119).

between the necessity for maintaining a measure of stability such as the principle of respect for private right embodies, and the necessity for a regulated change such as is implicit in that very political process which leads first to the political independence of the new State and then to its economic independence. This problems is in evidence in the documents of the Commission on Permanent Sovereignty over Natural Resources (documents in the A/AC.97/. . . series) and the activities of the Economic and Social Council related thereto.

V. Miscellaneous

23. Among the miscellaneous questions, that of the disposal of the external public debt of a new State is of importance in so far as it is not covered by bilateral agreement between the new State and the former metropolitan State. The external public debt, by which is meant loans floated in foreign markets, has to be kept distinct from the internal public debt which, under the principles suggested in paragraph 10 above, is not a matter regulated by general international law.

24. It seems clear that in the same way that the question of succession and treaties stands in close relation to the Commission's work on the law of treaties, so does the codification of the other aspects of succession stand in some relationship with other items being considered by the Commission and by other competent organs of the United Nations. For instance, some of the problems discussed in section IV of this working paper have a connexion with some aspects of the problem of responsibility of States,²⁷ while others are undoubtedly similar to questions which have been debated in the General Assembly and in the Economic and Social Council and its competent subsidiary organ in connexion with the agenda item of sovereignty over natural resources. It seems that the Sub-Committee is called upon to determine concretely the relationship between the topic of succession and these other related topics, and the priorities to be accorded. It also has to be considered for how long after independence the transitional rules of the topic of succession can legitimately endure. Keeping in mind provisions such as Article 2, paragraph 1, and Article 78, of the Charter, it would appear that, once the transition to independence has been effected and the purely economic consequences of the regime of dependency fairly liquidated, new States stand on exactly the same basis as "old" States under general international law with regard to any measures they may be entitled to adopt in order to ensure that political independence shall be accompanied by economic independence and that each State may freely use its own natural resources for the betterment of the condition of its own citizens.

VI. Conclusions

25. The conclusions of this working paper are that in order to decide on the scope of an approach to the topic, the Sub-Committee has to examine the following questions:

(a) For present purposes, does the Commission have to codify two distinct topics — succession of States and succession of Governments — or can it combine the relevant elements into a single topic of succession of States and Governments (paragraphs 2 - 4)?

(b) In what form will the work of codification be consummated (paragraphs 5 - 7)?

(c) The settlement of disputes (paragraph 8).

(d) The exclusion of matters governed by domestic law, from the scope of the topic, and the consequent limitations of its scope (paragraphs 9 - 11).

(e) On the law of treaties:

²⁷ There are other areas in which the topic of succession impinges on aspects of the topic of State responsibility, for instance the impact of State succession as regards nationality on the so-called nationality of claims rule, from the point of view of the claimant State.

(i) Is this aspect to be treated as part of the law of treaties or separately (paragraphs 12-14 and 18)?

(ii) Particular questions relating to succession to various types of multilateral treaties (paragraphs 15 and 16).

(iii) The legal consequences of the blanket stipulation between the new State and the former metropolitan State regarding the continuation in force of treaties — multilateral and bilateral — formerly applicable to the territory of the new State (paragraph 17).

(f) On the question of economic rights:

(i) The classification of the legal basis under which the economic activities of aliens were conducted prior to the achievement of independence and the conclusions to be drawn therefrom (paragraphs 19 and 20).

(ii) Questions of concessions and the nature and extent of the principle of respect for private rights (paragraphs 21 and 22).

(g) The question of the public debt of the former dependent territory (paragraph 23).

(h) The relationship of the Commission's work on succession with:

(1) its work on the topic of responsibility of States, and
(2) other relevant work being undertaken by other organs of the United Nations (paragraph 24).

(i) Recommendations to the Commission regarding:

(1) the appointment of a Special Rapporteur; (2) his precise terms of reference, and (3) the time schedule for the progress of the work.

Annex

1. FROM THE PRIME MINISTER OF TANGANYIKA TO THE SECRETARY-GENERAL OF THE UNITED NATIONS (9 December 1961)

Your Excellency,

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

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

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

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

Tanganyika may, on a basis of reciprocity, rely as against Tanganyika on the terms of such treaty.

It would be appreciated if Your Excellency would arrange for the text of this declaration to be circulated to all Members of the United Nations.

I have the honour, etc.

2. FROM THE PERMANENT REPRESENTATIVE OF THE UNITED KINGDOM TO THE SECRETARY-GENERAL OF THE UNITED NATIONS (2 July 1962)

Your Excellency,

I have the honour by direction of Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, to refer to the Note dated the 9th of December, 1961, addressed to Your Excellency by the then Prime Minister of Tanganyika, setting out his Government's position in relation to international instruments concluded by the United Kingdom, whose provisions applied to Tanganyika prior to independence.

Her Majesty's Government in the United Kingdom hereby declare that, upon Tanganyika becoming an independent Sovereign State on the 9th of December, 1961, they ceased to have the obligations or rights, which they formerly had, as the authority responsible for the administration of Tanganyika, as a result of the application of such international instruments to Tanganyika.

I am to request that this statement should be circulated to all Members of the United Nations.

I have the honour, etc.

THE SUCCESSION OF STATES AND GOVERNMENTS THE LIMITS AND METHODS OF RESEARCH

Submitted by Mr. Erik CASTREN²⁸

When the International Law Commission of the United Nations considered whether to include in its programme problems concerning the succession of States and Governments — which may here be referred to under the common name of "international (legal) succession" — and the further problem which aspects should then be investigated, in what way and in which order, practically all members of the Commission participating in the discussion agreed that these questions are important and that their solving is rather urgent. As to the limitation of the topic and the manner of its examination differing opinions were, however, expressed both in the Commission and in the Sub-Committee set up to prepare an investigation of these questions. Doubts were even expressed in the Commission as to the very existence of international succession. If these doubts were justified, then the task of the Commission would be solved simply by a presentation of this negative opinion. It is, however, hard to believe that the General Assembly would have recommended a study of this problem and that the Commission would have included it in the original programme if so meagre a result had been intended.

Several studies, some of an extensive and others of a more restricted nature, have been written on international succession, and in these the concept and nature of this legal institute have been studied, and different theories and ideas presented either to support or to contest its existence. Where international succession is understood to signify some kind of a general transfer of rights and duties between international persons regardless of their will, a firm stand must be taken against it. On the other hand, it has to be admitted that State practice, which at least in some respects has to be regarded as of equi-

²⁸ Originally circulated as mimeographed document A/CN.4/SC.2/WP.4.

valent standing to customary law, admits the principle that the successor State may make use of certain rights which previously belonged to its predecessor in relationship with other States and human beings, and further that the successor is also partly bound by the duties of the predecessor State. It is of negligible importance whether these rights and duties are interpreted as being transferred to the successor State or whether independent rights and duties similar to those belonging to the predecessor State are in question. The main thing is that there is a right or a duty based either on international customary law or on some treaty. The boundaries for international succession dealing with States—which may be called State succession—are however uncertain, there are no general agreements on State succession and even the international customary law on it is defective.

As far as *Governments* are concerned, the new Government may in general, in accordance with international law, derive rights from the international acts of the predecessor Government, while it is also bound to respect the treaties made on behalf of that State and its international agreements in general. Difficulties do arise, however, when a Government has gained power by unconstitutional means and especially during an insurrection or a civil war, when there may be several governments, and also at the end of such an exceptional period.

It is always possible to speak of an international succession when rights and duties are transferred from one international person to another. But State succession in a more restricted sense, which is now the question nearest at hand, signifies legal problems arising in connexion with *territorial changes*. Territorial changes are still possible, although it must be said that even general international law nowadays prohibits the acquiring of territory from other States by means of a war or by other forcible acts. It is possible to exchange territories, for example in connexion with the defining of boundaries or by means of voluntary cessions against monetary or other compensation. States may also form among themselves different types of unions of States, while, on the other hand, unions of States may dissolve. Trust territories, colonies and even some parts of the mother country may gain independence. Changes of territory are manifold, and the legal problems of succession vary accordingly. The most noticeable difference lies between two main cases, when a State (*a*) disappears completely from the international scene and (*b*) loses only a part of its territory. But if the loss of territory is considerable, it may mean the dissolution or end of the State, and a great loss of territory may also have a practical bearing on the ability of the State to discharge its international obligations (*clausula rebus sic stantibus*). State succession may also have extraterritorial effects, as has been pointed out by some members of the Commission. In so far as the attitude of third States in regard to the legal effects of territorial changes is not considered, the following two cases are nearest to the question at issue: (*a*) the fate of State-owned property situated outside the territory of the State (in a third country) at the time of the fall of the State and (*b*) the effect of the change of territory on the nationality of its citizens resident in a third country. When State succession is investigated, attention should also be directed to the difference between such cases on the one hand, dealing only with mutual relations of States, and, on the other hand, such cases in which there is on the one side an individual, for whom the nationality (or the absence of it) may also have an importance. In general, States do not have duties in international law in relation to individuals excepting foreigners, but the position of a foreign State and its national, who, for instance, is the creditor of another State, is also different, which results from the fact (among others) that the State even in private law relationships is, on account of its power, in a more advantageous position than the private individual. And if the private person is, in addition to this, under the territorial supremacy of the successor State, this may also have a weakening effect on that individual's legal position.

In one meeting of the Sub-Committee it was suggested that, by reason of the extent of the problem of international succes-

sion, some questions belonging to it should at least temporarily be left aside, which solution seems sensible and expedient. Following this principle of elimination, it would seem that questions of the succession of governments could be postponed for the time being for the following reasons. Some of these questions are rather clear, as for instance that a change of government does not affect the identity of the State nor its international personality. Other questions, such as the position of an insurgent government, may be too complicated, for the doctrine differs even in regard to some of the main questions, and State practice varies greatly. In all these questions problems dealing with the responsibility of States—for instance, how the new government must treat international obligations which the predecessor government has incurred by exceeding its powers—must be faced; these problems are intended to be separately studied within the Commission. In addition, it must be taken into account that in the Commission's future programme of work the question of the recognition of Governments (and States) already appears separately. Lastly, questions concerning the succession of Governments are not as important as many problems relating to State succession. It has, on the other hand, also been pointed out in the Sub-Committee that problems of the succession of Governments and States have such a close connexion that a real difference between them cannot be drawn. It is, however, not clear if this is so, but if it is, the former should be studied in connexion with the latter.

At the Commission's session the possibility was even mentioned of the succession to a state of war. Such special cases, which are based on a situation contrary to international law, ought to be left outside a legal investigation.

Instead it is possible to think of the study of international succession being extended so as to cover the problem whether membership in an international organization may be based on the membership of another State (the predecessor or mother country)—this is, in fact, connected with the problem whether the rights and duties based on a treaty are transferable—and the problem whether there exists a succession, and, if so, in what way, between international organizations (the dissolved and the newly created). In this respect the Secretariat of the United Nations has already promised to provide the Commission with material. A certain amount of practice has already occurred, although no customary law can here be spoken of. The question may have a considerable practical importance. The latter part of it, i.e., the succession between international organizations, is quite distinct and it may thus be studied either simultaneously with the problem of State succession or subsequently to it.

The limitation of the problem concerning international succession and the method of dealing with it depend greatly on whether it is the intention to draft a mere collection of legal rules (a code) or an international treaty. Both approaches can be defended but perhaps weightier reasons speak for the latter solution. These reasons are to a great extent the same as those which made the Commission, in regard to the problem of treaties, change from a code to a treaty-basis. A treaty has naturally considerably greater practical importance, and by means of a treaty it is easier to bring new States more extensively within the confines of international law, as they themselves can participate in the drafting of the new principles and rules. The codification of the problems of State succession in the form of a treaty may, nevertheless, cause special difficulties, because the questions have a strong political character, and because established practice, as has been mentioned, is to a great extent lacking. Because of this it is perhaps necessary to be satisfied with a treaty or several treaties, which allow many exceptions and far-reaching reservations and which present several alternatives, sometimes mere recommendations; this method has been used before. Because of the differences between the problems and in order to promote the establishment of treaty relationships it is probably more suitable to draft several treaties. In these treaties one has to try to create, as far as possible, some uniformity instead of the present varied

practice and to establish the most important principles protecting certain rights. Thus it is not enough to rest content with a mere codification, but the creation of new, expedient rules must be pursued. If the form of a treaty is chosen, this means, among other things, that the Commission must not complicate the treaty drafts with theoretical views and declaratory statements, the correct place for which is the report of the rapporteur and the comments on the draft treaty. The Commission must also limit itself to the study of primarily new cases, although in the light of the teachings of history, cases such as gaining independence since the end of the Second World War, transfers of territory and the formation and dissolution of unions of States. The Commission must be in closer contact than usual with the Governments and respective international organizations in order to obtain from them the necessary material and in order to know how they approach the proposals planned, because of the wide implications and difficulties of the question it may perhaps be necessary for the Sub-Committee which has been established to continue its activity even during the intervals of the Commission's sessions, but in such a way that the independent position and responsibility of the rapporteur is preserved.

It has already been pointed out that the problem of international succession is connected with many other important fields of international law, such as State responsibility. Therefore a problem to be solved is where the limits should be drawn so as to avoid encroaching on other and wider questions. As to the order of investigation there are several different possibilities, because the division can be made in many different ways. It would seem most appropriate to follow the example of those theorists who would make the main division on a material basis, that is, according to what kind of rights and duties are in question. But within the confines of each group of topics the next division must be made dependent on whether there is a case of complete destruction of the State or only a partial loss of its territory. In addition, the extra-territorial effects of succession have to be dealt with when the need arises. In accordance with what has been said above one could begin with the effects of territorial changes on treaties, which would make a suitable continuation, or perhaps completion, of the present main study of the Commission. It is naturally possible to deal with questions of the succession of treaties in connexion with the law of treaties, but it seems as if they rather belonged to the confines of the institute of succession, and this seems to be also the opinion of the present and some previous rapporteurs of the Commission who dealt with the legal problem of treaties. When investigating succession to treaties, special attention should be paid to the nature of the treaties, i.e., whether they are personal or territorial. In this connexion the extensive and controversial problem of international servitudes should be dealt with, even if it should not perhaps be treated too extensively. When investigating treaties the question should also be dealt with from the point of view of the State which has acquired new territories in the first place on the basis of the principle of movable treaty boundaries, which principle, however, is not unconditional. Difficult problems can appear in regard to the treaties establishing and dissolving unions of States.

The fate of State-owned property in connexion with territorial changes makes up the next group of questions. Even here, different situations must be investigated taking into account the nature and extent of the territorial changes. The location of the property and its nature (public and financial property) must also be taken into attention, although in actual practice this distinction is not made when deciding the fate of the property.

Particularly far-reaching and difficult problems are connected with the question what stand to take with regard to the economic obligations of State towards other States and individuals. There are different opinions on this among the theorists, and State practice has varied greatly in different times and countries. Theorists often try to derive some legal rules from general principles of law, in which quite commonly the duty

to respect the so-called acquired rights is spoken of, but in actual practice the political and expedient aspects of the questions are usually decisive. When a State disappears it is especially important that the successor State undertakes certain responsibilities for the clearance of the debts and other economic obligations of its predecessor. The territory is transferred with its servitudes: *res transit cum suo onere*; but if there are several successor States, great difficulties may arise in agreeing on the basis of the division of debts and encumbrances. If there has been some State-owned property as security for the debts, this security should be respected, and if the newly-independent State has had financial autonomy, it ought to be responsible for its debts continuously. Some debts, such as war debts and those which have been regarded as damaging the State acquiring the territory, are not in general carried over. This is also the case with claims for damages based on those actions of the predecessor State which have been deemed to be contrary to international law. On the other hand, administrative debts, such as the wages and pensions of officials, should always be respected. Concessions may be abolished or their conditions changed only in exceptional cases, and then the losses involved must be compensated for.

As has been already pointed out, the citizens of the successor State — either old or new — are, in regard to these as well as to many other questions, in a worse position than foreigners and foreign States, in so far as the home State can in general treat them at will, unhindered by international law, presuming always that general human rights are not violated. When State succession is investigated one meets very often, both when treating the debts of the State and also in the cases mentioned below, the same problems which appear in the treatment of aliens, which in its turn is closely connected with the problem of State responsibility. The duties of the successor State as to the aliens resident in the new territory and to their economic interests there are nearest regulated by the general rules concerning the treatment of aliens. If it is once agreed that the (limited) protection of the property and other so-called acquired rights belong to the principles governing the treatment of aliens, then, so long as the rights arose legally, it is immaterial how and in the jurisdiction of which State they arose. The cancellation of rights can also take place under certain circumstances even if these rights have been granted by the State concerned. On the other hand, it is possible to consider that in a case of this kind there must be particularly strong grounds to justify the modification of the contracts and the cancellation of the rights.

Accordingly a territorial change has in general the most noticeable effect on the legal position of the indigenous population which comes under the territorial and personal supremacy of the new territorial Power. But in regard to this problem of nationality several problems may already appear, for example concerning those people who at the time of the territorial change are abroad and who do not return to their home State, while the right of option, as far as it is admitted, is by itself quite a difficult problem. In general it is held that the successor State has a free hand to arrange conditions within the new territory even to the extent of incorporating it into its existing domains, which leads to a complete change in the legal and in the administrative and judicial institutions. The handling of pending legal and administrative cases creates difficult problems. Their handling may be interrupted and begun anew, but in general retroactive actions should be avoided, and it is not always even possible to undo what has already been done. State practice varies greatly in regard to all these questions, and it would be good if at least some leading principles could be adopted in this matter.

When the Commission begins, in due course, to investigate the above-mentioned extensive and complicated questions, perhaps in the order mentioned above, attention must — as has already been said — be paid once again to the necessity of trying to avoid going too far into such common problems as for instance those concerning the recognition of Governments and the responsibility of the State especially in regard

to the treatment of aliens. How this limitation is to be made, is, for the time being, difficult to say. The Commission should, as has also been mentioned before, investigate new cases, because the treaty drafts to be proposed can gain acceptance only if they are based on present State practice. But in planning treaty rules their compliance with present international law and its most important principles, a part of which have been expressed in the Charter of the United Nations, must be observed. Because practice is not uniform and because differences of opinion are possible even in regard to the principles governing State succession, the Commission will apparently have to suggest many new principles, which is likely to make its task more difficult and to make the creation of a treaty binding the different States equally difficult. To begin with one should perhaps be satisfied with partial solutions between a limited number of States, but even such a result ought to be regarded as satisfactory.

WORKING PAPER

Submitted by Mr. Milan BARTOS

The writer considers that the Sub-Committee, while not neglecting the general rules governing the subject under study, should devote its attention mainly to the question of succession of States and Governments raised by the birth and creation of new States through the application of the principles of self-determination of peoples embodied in the United Nations Charter. As a contribution to the study of this question, he submits the following considerations and suggestions to the Sub-Committee.

General considerations

One of the questions arising out of the succession of States is that of the fate, and prolongation of the validity, of international treaties concluded by States whose sovereign rights or territories are transferred to a new State. The doctrine of successor States, built up over the centuries, played a particularly important part in connexion with the unification of Germany and Italy in the nineteenth century, and the Versailles Treaty system, especially the treaties relating to the succession of Austria-Hungary and the Ottoman Empire. Many writers see in these cases the confirmation of the rules derived from the emancipation of the Latin American States and consider that, on the basis of these treaties and of practice, it is possible to establish the definitive rules of public international law on the succession of States, or rather on the prolongation of treaty relations when there is a change in sovereignty over a territory.

Whether what takes place is the creation of new States, or secession, or emancipation, it is important in practice to determine the position of third States as regards their rights and duties *vis-à-vis* the new sovereign Power in the territory to which the treaty with the former sovereign State applies; but it is even more important to determine the material and legal status of the independent or emancipated State. For the question whether all ties with the partners of the former sovereign Power are broken or whether certain particular treaty relations subsist is not a matter of indifference to that State either. The absolute repudiation of such treaty relations by the new State would appear at first sight to ensure that there will be no acceptance of passive succession, i.e. acceptance of unfavourable treaties which may have been concluded by a foreign master without regard to the needs or interests of the liberated territory and its population. Such a situation, however, would put the newly created State in difficulties, at least for a time, for it would have no treaty relations with

other States, perhaps not even its neighbours, with the consequence that even its frontiers, transit requirements, water supply, use of waterways, etc. could be called in question. On the other hand, if the old rule is maintained that treaties termed *traités internationaux réels*—i.e. treaties relating to the status of the territory, to territorial servitudes and to privileges granted with regard to investments—continue in force, then the right of self-determination and the unrestricted sovereignty of the emancipated people is challenged once more, as, consequently, is also the inalienable right of that people to the sources of its national wealth. All these treaties may have settled certain questions in a manner at variance with the views of the people whose right to self-determination has found expression in its emancipation; consequently, if such treaties are recognized as remaining in force, the question arises whether the people concerned have really gained their freedom, or whether these treaties do not represent the vestiges of colonialism and the basis for what is now called “neo-colonialism”—one of the phenomena contrary to the principle of decolonization which, deriving as it does from the right of self-determination, has become one of the guiding principles of the international practice established by the will of States within the framework of the United Nations. Here, as in many other branches of public international law, traditional rules must necessarily be intermingled with modern concepts; or rather it is necessary to bring these traditional rules into accord with the principles of the United Nations Charter and with the gradual evolution resulting from its development and application.

This paper is confined to the problem of the continuance of the treaty relations of newly created States and emancipated territories under treaties entered into by the Power which formerly exercised sovereignty over the territory; attention must accordingly be drawn to two groups of treaties. The first comprises treaties concluded in its own name by the former sovereign Power and applied in accordance with general principles to all the territories under its control, or expressly rendered applicable to the territory in question by virtue of the colonial clause incorporated in such treaties. The second group comprises treaties concluded by the former sovereign Power acting in the name of the territory now emancipated, either as the administering authority of a trust territory or as the protecting Power or other high authority for a dependent territory. Some jurists seek the key to a practical solution in this division into two groups. They recognize that the newly-created State is entitled to consider treaties in the first group as applying solely and exclusively to the former sovereign Power; with the termination of its authority over the territory, the contractual bond was also dissolved, and hence these treaties do not concern the new sovereign Power; in other words, the validity of the treaties with respect to the territory in question ceased with the extinction of the former master's sovereign rights over that territory. In certain cases, the supporters of this view refuse to recognize any transfer of the treaty relationship to the new sovereign Power, i.e. to the newly-created State, with the transfer of sovereignty over the territory. This theory makes it possible for the new State to decline to accept the succession except with *beneficium inventarii*, but it may also place it in a difficult position *vis-à-vis* third States, with which its relations will not be regulated by treaty, since third States will no longer have the same obligations in regard to its subjects as when they were considered to be subjects of the former sovereign Power. This situation has very unfortunate consequences for workers from an emancipated State employed in a third State: it deprives them of all the rights they enjoyed as subjects of the colonial Power with which the third State had treaty relations. As to the second group of treaties, it is claimed that they are directly binding on the territory, that is to say on the State newly established in the territory, since these treaties were concluded in the name of the territory by an administering authority empowered to act in its name. However, the population of the territory, i.e. the people who exercised the right of self-

²⁹ Originally circulated as mimeographed document A/CN.4/SC.2/WP.5.

determination and set up the new State, were not consulted. And even consultation would be no guarantee that such treaties were drawn up in conformity with their wishes and interests and with the principles on which their right of self-determination is based. The writer considers it justifiable to maintain, as do most of the States set up by the peoples of emancipated colonies, that the difference between these two groups of treaties is only apparent, and that in both cases the treaties were concluded in the exercise of its own will and authority by the former sovereign Power, which was alien to the liberated people, even if it had a mandate from the international community to administer and represent the territory.

To these two groups of treaties, the writers who defend the interests of the former sovereign Power add a third group, comprising treaties concluded with third States by the local government of the territory which has now been liberated and become an independent sovereign State, but under the aegis of the former sovereign Power, i.e. of the colonial master or administering authority. It is held that the local government represented the territory and its population, and that the Power exercising sovereignty over the territory merely added its authority to the will of the representatives of the territory to conclude a treaty, thus enabling it to have international effect. The writer considers it justifiable to reject this group of treaties as necessarily surviving the rule of the former sovereign Power, for it is certain, or at least probable, that the dependent government was not in a position to make any valid assessment of the interests of the population of the territory and to dissociate them from the interests of the colonial master or administering authority, or at least from its influence, on which the granting of authority depended. Consequently, this group of treaties will not be discussed separately here.

In the writer's opinion, the treaties in force at the time when a territory is emancipated form an indivisible whole and must be brought into harmony with the law of the newly-created State and with the right of its people to self-determination. They must not stand in the way of the liberation and sovereign will of the emancipated people and cannot bind it for the future. But in practice, the States created after the Second World War in the course of the struggle for national liberation and the action taken by the United Nations to implement the right of self-determination and decolonization, have not all adopted the same solution to the problem of their position in regard to international treaties and other obligations left behind by the former master of the territory, whether conqueror or administrator. They all agree that the old rules of public international law on succession to treaty relations cannot be applied, or cannot be applied in their entirety, to the new situation, in which the territorial problem is not to be settled by the principle of legitimate possession of the territory, but by the principle of the right of peoples to self-determination. Broadly, it may be said that there are four theories covering the situation that has arisen.

I. *Theory of the tabula rasa*

The first and most radical theory is based on the principle that the emancipation of a territory and the creation of a new sovereign State produces a *tabula rasa* situation as regards treaty relations, so that the new State is not generally bound by former ties and does not inherit any contractual obligations. The former sovereign Power did not act in the name of the population, but by virtue of its colonial or administrative authority; hence, all the effects of the treaty ceased with the termination of that authority. This theory seems to be closest to the concept of the right of self-determination; the act of emancipation would eliminate all traces of colonialism. The advocates of this theory claim that it presents no danger for third States, since they can establish treaty relations with the new sovereign Power if they reach agreement with it to conclude new treaties or extend former ones. However, this theory meets with objections from various quarters — even

from those who defend the interests of the emancipated territory. Third States maintain that under former treaties they acquired certain rights in good faith and even that legal situations were created to their advantage and that of their inhabitants, whereas they now suddenly find themselves in an unregulated, if not an illegal, situation. The more moderate objectors observe that the *tabula rasa* can have no effect, at least on established legal situations, which must be respected in accordance with the treaties with the former sovereign Power that were in force when the new State was created. This view is certainly not without foundation and practical importance; but there is also no denying that these allegedly legally established situation, mainly concessions and the right to settle and work (which are acts of colonization) granted by the former sovereign Power to foreign States, to corporate bodies set up under their private law (generally large companies) and to their nationals, often represent a burdensome colonial heritage detrimental to the economic freedom of the emancipated State. Consequently, this provisional respect allegedly due to rights acquired by virtue of former treaties is also a dangerous influence for self-determination and one that cannot be uniformly regulated. It is for this reason that the advocates of the *tabula rasa* theory propose examining whether the legal situations established are, or are not, compatible with the right of the liberated people to self-determination. It is difficult to establish objective criteria for settling this question. Every people knows what it wants. It is precisely because the objective criteria are uncertain, that it is for the newly-created State to decide for itself whether, and to what extent, it will respect rights deriving from treaties in force at the time of its emancipation. This subjective act of itself deprives these rights of their contractual nature and provides a new basis for them — an ephemeral and precarious concession by the new sovereign Power, which may reverse its decision to tolerate such situations in its territory. The *tabula rasa* theory also deprives the newly created State of protection for its rights and interests and those of its citizens in the territory of third States where they previously enjoyed a certain guaranteed legal status based on treaties concluded between third States and the former sovereign Power. This is only logical, since a treaty cannot create rights for the benefit of one party only. Even less tenable is the view of certain defenders of the emancipated States' interests, that the *tabula rasa* principle must not be interpreted in an absolute sense. According to that view, a new State can release itself from treaty provisions which are not consistent with its emancipation or with the right of its people to self-determination, but can leave in force those treaty provisions which it does not regard as a continuation of colonialism. A treaty, however, forms a single whole, and either it remains in force under changed conditions or it ceases to be in force; otherwise, the emancipated State would be in a more favourable position than a third State which was a party to the treaty.

II. *Right of option concerning the validity of treaties*

Another theory is that the new State has the right to choose among the treaties it inherits, i.e. it has the right to declare which contractual relations, or rather which treaties, it proposes to keep in force. Treaties not remaining in force would not be mentioned in the declaration. It is assumed that the new State is entitled to make a positive choice, a treaty ceasing to be in force *ipso facto* by the mere fact of not being maintained in force. This system is not unknown in the practice of international law. The peace treaties drafted at the Paris Conference of 1946 contain a provision along these lines for the benefit of the victorious Powers, which had the option of maintaining certain treaties with the vanquished Powers in force, while the others ceased to be in force automatically on the expiry of the time-limit for the option. In theory, this practice is considered to be based on the will of the parties (recognition by the vanquished Power expressed in the peace treaty and option exercised by the Power enjoying the advantage). It is, however, very difficult to draw any analogy with

this system. The question arises why certain contracting parties should be placed in a less favourable position than the new State, and why they should passively accept the choice of the new State as a legal fact on which their treaty relations depend. The position is quite different where a peace treaty is concerned; in that case the vanquished State accepts, by signing the treaty, the obligation to respect the choice. The supporters of this theory rightly argue that the former sovereign Power was not able to bind the new sovereign Power and that the new State, in accordance with its people's right to self-determination, is alone competent to judge whether treaties previously concluded conform with its interests, in other words, whether it wishes to assume the obligations imposed by those treaties. But this is not the foundation of the right of option. The supporters of this theory also rely on United Nations practice with respect to multilateral treaties, which is that the Secretariat receives from the new State a declaration of the obligations it accepts under treaties formerly applied to its territory, thus maintaining the continuity of the treaty relations. It must be particularly stressed that this United Nations practice applies to multilateral treaties to which all States, or at least all States Members of the United Nations, can accede. New States submit such declarations to the Secretary-General, or some other depositary, usually on admission to the United Nations. Bilateral and plurilateral treaties, which are not open to accession, cannot be compared to these treaties, so that this Secretariat practice cannot contribute to creating an obligation for the other contracting parties to accept the right of new States to exercise an option. Attention must nevertheless be drawn to certain features of this practice of new States within the framework of the United Nations. They consider, first and foremost, that they are continuing the treaty relations established by the former sovereign Power, i.e. maintaining the continuity of the validity of the treaty. The United Nations Secretariat, in its capacity of depositary, transmits their declarations to the States parties to the treaty. The present writer does not know whether any State party to a treaty has observed that this is not continuation of the treaty relationship, but accession by the new State. The question whether continuity must be legally recognized and the treaty considered valid for the new State by virtue of the treaty relationship with the Power formerly exercising sovereignty over the territory, may be important in fact. If it is a matter of confirming treaty obligations with retroactive effect from the date on which the new State was created, hence *ex tunc*, is this confirmation generally necessary? And what becomes of treaties not so confirmed? Does this mean that, from the time when the new State is created until the time when the confirmatory declaration is deposited, the old treaty remains in force for the new State, or that the treaty is *in suspensa* for that State, but is given retroactive effect by the act of confirmation? The latter interpretation would mean that the right of option really exists for new States, at least in the case of open multilateral treaties. However, although no comments to that effect have been made to the Secretariat—or at least none have come to the writer's knowledge—in practice it is held by some that there is no continuity of the validity of the old treaty; the new declaration represents accession to the open treaty, the act of accession being based not on the former treaty relationship, but on the new capacity of the emancipated State, as a State or even as a Member of the United Nations, and on the nature of the treaty itself, to which all States, or all States Members of the United Nations can accede. It seems that the Universal Postal Union has accepted this view and has, in all such cases, applied the procedure for the admission of a new State and its accession to the Universal Postal Convention. The writer has been unable to establish whether, in the interval between the creation of the new State and the admission of the territory in question, the latter is considered as a territory to which the contractual régime of the Universal Postal Union applies. According to the information available it is a *de facto* rather than a *de jure* relationship, i.e. the universal régime is applied in postal relations, but the new State cannot be considered

as having a contractual relationship under the International Postal Conventions as a whole. It appears from the foregoing that there is no real justification for the doctrine that the new State has a right of option regarding the treaty relations to be applied to its territory by virtue of treaties concluded by the former sovereign Power, for that doctrine would give the new State a privileged position compared with the other contracting party and thus upset the principle of equality of the contracting parties. Conversely, if equality of the contracting parties is to be guaranteed, the right of option must be granted not only to the new State, but also to the other contracting party. There would, in reality, no longer be a right of option, but the possibility of express or tacit prolongation of treaty relations. This is, in fact the third theory, which will be discussed later.

Attention must also be drawn to a further variant of the doctrine of option. Its advocates raise the question of the divisibility of treaties: the treaties concluded by the former sovereign Power often contain provisions which are useful to the new State and its population, though they contain other provisions which are not in conformity with its interests, with the object of self-determination or with the situation of the newly independent State. It is held that the new State can maintain those parts of a treaty which provide for normal relations between States and reject those parts which bear the mark of colonialism or are at variance with normal contractual relations between equals. This trend is undoubtedly consistent with the principles deriving from the Charter and the policy of the United Nations; but it would be impossible, in law, to recognize this special kind of option, which would give the new State twofold discretionary powers. The first would be the right of option itself, of which no more need be said, since the matter was examined in the previous paragraph. The second would be the right of the new State to maintain only certain parts of the former treaty. This would only upset the balance between the contracting parties even further, since not all the unfavourable provisions necessarily bear the stamp of the colonial heritage; in treaty relations there are often clauses which represent a sort of compensation for the privileges granted under other provisions. It is obvious that such clauses could only be revised by agreement between the contracting parties and, in case of agreement, with the tacit consent of the other contracting party. It is no longer a matter of exercising the right of option, but of confirming and modifying the former treaty relationship, i.e. the conclusion of a new treaty modifying the old one, and the question whether the former treaty continues in force or a new treaty relationship is created is of no importance in this case.

Another important question which arises in practice in connexion with the exercise of the new State's option, even where open multilateral treaties are concerned, is whether, when making a declaration by which the former treaty is kept in force with legal continuity, the new State can qualify its declaration by withdrawing or adding reservations to the treaty whose continuation in force is confirmed. The writer sees no difficulty as regards the withdrawal or reservations made by the former sovereign Power concerning the application of the treaty to the territory now represented by the new State. Reservations to treaties can be withdrawn or revoked by the contracting party concerned. As regards continuity, however, the question still arises. The treaty relationship subsists, but the present writer considers that in such cases the reservation ceases to be effective when the declaration of withdrawal is submitted to the depositary, not when the new State is created. The withdrawal of the reservation takes effect in accordance with the rules governing the legal effect of such declarations, and does so at the time of notification. This means that third States would not be obliged to accord to the new State, and to its subjects, the rights kept in abeyance by the reservation during the interval. The situation is much more difficult, however, if the new State formulates a reservation which was not made by the former sovereign Power. There is no doubt that such a reservation affects the

substance of the obligations under the treaty, and that in this case what happens is not that the former treaty relationship is confirmed but that a new one is established. In any event, from the date when the reservation is formulated, in other words from the date on which it takes effect, the new State must be considered to have acceded to the treaty subject to that reservation. The reservation will, in any case, take effect *ex nunc*. But what happens if objection is made to the reservation? Must the new State be considered to have confirmed the former treaty relationship, which will then take effect with respect to that State regardless of the fate of the reservation? Or, conversely, must its declaration be considered to constitute an acceptance of, or accession to, the treaty, as the case may be, with the proviso that the condition contained in the reservation forms an integral part of the declaration of accession, so that the new State is entitled to make its accession to the treaty conditional on the fate of the reservation, in so far as it does not itself withdraw the reservation if it is not accepted? In the absence of a consistent practice in the matter, it is difficult to express a definite opinion without examining specific cases. In practice, however, the right of new States to formulate necessary reservations is recognized in principle, provided that the pre-existing treaty relationship is confirmed. The majority of States do not consider this confirmation to be an act prolonging the treaty relationship, but treat it as equivalent to accession and permit the new State to avail itself of the right to make reservations, although the time-limit for their formulation (as specified in the treaty) has expired. This is justified by the fact that the new State was unable to exercise its right to formulate reservations within the specified time-limit, for the simple reason that it did not exist at the time. The fact that the right was not exercised by the former sovereign Power is not considered decisive, since its interests and acceptance of the full scope of the treaty obligations were not necessarily in accordance with the interests and views, or even with the needs and circumstances, of the new State. This tolerance is consistent with respect for the right of self-determination of the people of the new State and with the desire to see the greatest possible number of States participate in multilateral agreements aiming at universality, even if such participation is limited by the conditions of the reservation; of course, the reservation must be admissible, or compatible with the object and purpose of the treaty.

III. Theory of continuity with right of denunciation

The third theory is much simpler. It is based on the idea that there is general succession of the new State and its government organs to the former sovereign Power and its government. The object of this approach is to prevent the new State from being left without any treaty relations with third States, which might, in certain circumstances, place it in an illegal position. It is considered, however, that the new State is not thereby left without any remedy, since that State and the other contracting party can denounce treaties they do not wish to maintain in force, acting under the provisions of the inherited treaties and within the normal time-limits for denunciation. Two periods can be distinguished in regard to a treaty which is denounced: the first runs from the creation of the new State to the expiry of the period of notice for denunciation, when denunciation begins to take effect; the second starts when denunciation takes effect. During the first period, the treaty is presumed to be in force and nothing can change that presumption. Denunciation does not prove that the treaty is not in force; it rather confirms that it is in force, but will cease to be so when denunciation takes effect. In the second period, the treaty ceases to have effect, but this cessation is *ex nunc*, i.e. from the time when the denunciation became effective, and not *ex tunc*, from the time when the new State was created. The opposite view, namely that denunciation takes effect *ex tunc*, is a return to the doctrine of option, but of option in a negative sense, by which some new States have tried to explain the effect of their denunciation of inherited

treaties. This would mean only one thing: that the new State has an option to set aside some of the existing treaties. The writer does not believe that this is the case, but considers that according to this theory all existing treaties remain in force. This view has met with a very serious well-founded objection, namely that it is not consistent with the creation of the new State resulting from the exercise of the right of self-determination. Even assuming that the new State wishes to maintain treaty relations with the former partners of the Power which formerly exercised sovereignty over its territory, there is no doubt that there are provisions in the old treaties, and even whole treaties, which are not consistent with the political position and status of a new independent State. This is also true of certain so-called statutory provisions governing the territory and of certain so-called "real" or local provisions. Can the former partner demand, after the creation of the new independent State, that that State observe provisions which are at variance with its status as an independent State? The writer considers justified and legally well-founded the attitude of certain new States which, while recognizing the existing treaty relationship in principle, refuse in exceptional cases to consider themselves bound by treaties which are at variance with general contractual obligations, and he believes that they are entitled to refuse to recognize the validity of such treaty provisions. These provisions have lapsed, that is to say they are no longer in accord with international relations and they cease to be valid without it being necessary to invoke the *rebus sic stantibus* clause. From this point of view, there are still certain situations that are not clear, and although they are being gradually clarified, it is not without difficulty or resistance from third States which benefit by treaty provisions of this kind. However, this process of settlement and clarification is tending in practice towards adaptation of the treaty relationship to the principles of the United Nations and respect for the independence of the new State, i.e. in the direction of the newly created situation, provided, of course, that the Government of the new State is resolute and capable of defending the interests of its people.

IV. Right to a period of reflection

The fourth theory is only a modification of the third. It is the theory put forward by the Government of the Republic of Tanganyika in a general declaration communicated to the Secretary-General of the United Nations. In that declaration, Tanganyika recognizes the validity of all the treaty obligations accepted for its territory by the former sovereign Power, but limits the duration of its own resultant obligations to the next two years. In practice, this is an invitation to the other contracting parties to settle their treaty relations bilaterally with the Government of Tanganyika within two years, unless they wish the declaration to have, with respect to them, the effect of a general denunciation of all the treaties in question. This declaration also constitutes a communication from the Government of Tanganyika signifying that, after two years, it will exercise an option regarding the multilateral treaties it wishes to maintain in force. This theory of the "period of reflection" (as the writer called it during a discussion in the International Law Commission) is open to criticism on several points. Is Tanganyika not reserving the right to consider all the treaties as being extended for two years from the date of its declaration, without authorizing its treaty partners to make necessary and desired denunciations before the expiry of that period? The writer does not believe that Tanganyika can impose such an alternative or force the other contracting parties to maintain treaty relations with it against their will. The question then arises whether Tanganyika, by this declaration, has taken over obligations deriving from treaties which must be regarded as incompatible with its new status. In the writer's opinion, this declaration does not validate so-called "absolving treaties", since they are invalid not by reason of the will of the contracting parties, but by reason of objective circumstances. Lastly, it has been openly asked whether, in the case of multilateral treaties, there can be provisional accession or provisional maintenance in force, and even if that is possible, what will

become of treaties in respect of which Tanganyika, within two years of its declaration, neither confirms that it will remain a contracting party, nor notifies its denunciation in order to render them ineffective with regard to itself. It has also been asked whether Tanganyika is entitled to denounce these treaties within the prescribed time-limit for denunciation, with effect before two years have elapsed since the date of the declaration, thus reducing the period during which it has undertaken to observe the contractual obligations taken over.

V. Other possibilities

There can be no doubt that other theories could be developed regarding the fate of the treaties in force when a new State is created. The International Law Commission has heard statements explaining the difficulties of new States in regard to the fate of existing treaties and their doubts about applying the legal rules on the succession of States where new States have been created within the framework of the legal system instituted by the United Nations Charter and the general lines of United Nations policy on the liquidation of colonial regimes. Their views have not been explained in detail, but it has been made clear that many rules of so-called traditional law are incompatible with present conditions and that it is necessary, by codifying the rules of international law on the succession of States and Governments without delay, to settle cases of conflict between the aspiration of new States and the claims of the treaty partners of the former sovereign Powers that the new States must at all costs respect the treaty obligations existing when they gained their independence, regardless of how the treaty provisions affect the newly created state of affairs and the exercise of the right of self-determination.

General conclusions

It is agreed that this is one of the most immediate problems of public international law. The writer is deeply convinced that it must be solved by combining the rules of traditional international law with rules based on modern concepts. Rules must therefore be formulated in a spirit of progressive development of international law, which will certainly make it necessary to revise some old ideas and work towards other institutions of contemporary international law and international practice, which require that purely legal arguments be brought into line not only with the present tendency to create new States, but also with the tendency to eliminate all relics of colonialism. In other words, the whole approach must be in the spirit of the policy of decolonization, but a policy of decolonization which spares the new States the difficulties of a dearly-bought emancipation.

In this connexion, one of the difficulties of the new States arises from the fact that at the time of their emancipation, most of them concluded a series of treaties with the former sovereign Power, on whose attitude the date on which emancipation would take effect often depended. These treaties are partly the price of freedom paid to the former master, but they also contain provisions benefiting third parties, i.e. provisions relating to the obligations of the new State towards the treaty partners of the former sovereign Power. Both kinds of provision are designed to safeguard established rights, or their continued existence under the future regime of independence of the emancipated territory. These provisions are not only legal or economic in character; in some cases, they are political or even military (compulsory accession to certain treaties or political groups, federation of States, military alliances, bases for armed forces). The question seriously arises whether these treaties have any binding force for the newly created States. Admittedly, they were concluded as a result of political negotiations, though some of them were stipulated before the proclamation of independence and signed after it (but generally before the withdrawal of the former master's troops); yet it is difficult to consider them as representing freely accepted international treaty obligations, or their signatories as the genuine representatives of the new sovereign State and its

people. (In several cases experience has confirmed that these so-called transitional governments were organs of the former masters, or represented a group of genuinely national forces chosen by the former masters to return the power to them, thus uniting their interests with those of the new ruling group.) Disputes concerning the binding force of this kind of treaty arise after independence has been established for some time, when the new regime has grown stronger and the administration of the State has passed into the hands of genuine representatives of the people. In practice, these disputes often arise when the exhilaration of independence is over and people begin to consider the price paid for it and the demands by which the beneficiaries of the treaties seek to continue a disguised form of colonial exploitation and influence. The emancipated State then invokes the incompatibility of the treaty provisions with the principles of the United Nations Charter governing relations between States and with the position of a sovereign State enjoying equality of rights. The beneficiaries of the provisions, on the other hand, claim that each of these treaties was freely negotiated without any physical pressure, and is not a treaty inherited from the former sovereign Power, but a new treaty concluded with the representatives of the independent State. Consequently, they demand full application of the treaty in accordance with the principle *pacta sunt servanda*. The writer does not consider that the fate of these treaties must be decided in an absolutely uniform manner and that they must be declared invalid *a priori*. He believes that they belong to a special class, and must be regarded as voidable treaties—that the whole of such treaties, or some of their provisions, can be attacked if it is shown that they are incompatible with the status of the new independent State and that they represent the continuation of a special, inequitable influence for the benefit of the former sovereign Power or of third States which have abused their power and influence. In the writer's opinion, these treaties should be regarded as being suspended by reason of an objection by the State threatened, and the question of their validity should be decided by the International Court of Justice or a political organ of the United Nations. Such treaties form a special class which should not be overlooked.

This paper has only one purpose: to show that the creation of new States by virtue of the right of self-determination has raised a new problem of international law, which consists in examining, in the light of United Nations principles, the fate of international treaties applying to a liberated territory up to the time of its emancipation, and effectively placing the new State in a position of complete political, economic and social independence *vis-à-vis* the former colonial Power or trusteeship authority.

WORKING PAPER

Submitted by Mr. Manfred LACHS³⁰

1. By a decision taken at its fourteenth session (A/5209, para. 72) the International Law Commission requested the members of the Sub-Committee to prepare individual memoranda which were meant to facilitate the discussion at its meeting to be held between 17 and 25 January 1963.

2. These memoranda were intended to deal "essentially with the scope of and approach to the subject" of succession of States and Governments.

3. The present writer was entrusted with the task of preparing "a working paper containing a summary of the views expressed in the individual reports".

He received memoranda from the following members of the

³⁰ Originally circulated as mimeographed document A/CN.4/SC.2/WP.7.

Sub-Committee: Mr. Milan Bartos, Mr. Erik Castrén, Mr. T. C. Elias, Mr. Shabtai Rosenne and Mr. Abdul H. Tabibi.

The present working paper constitutes therefore an attempt to summarize the views presented in these five papers.

I. Preliminary remarks

There seems to be common agreement among the authors of the memoranda as to the need of paying special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II. It is therefore suggested that the problems concerning new States be given special treatment and that the whole topic be viewed in the light of contemporary needs. Where differences do arise they concern issues of proportion and emphasis. There seems to be little doubt that this chapter has a special bearing on the approach to the whole problem as reflected in the memoranda.

II. The scope of the subject

1. Succession of States and Governments: one or two topics? Question of priority

The problem was touched upon during the preliminary discussion in the Commission and is further developed in the papers submitted.

The following views should be recorded:

A. In favour of dividing the two topics and of postponing the treatment of that concerning the succession of governments

Reasons:

- (a) Some of the problems involved in the latter are clear (for example, identity and personality of the State), while some others are too complicated (for instance, insurgent Governments);
- (b) The latter topic is linked with the issues of responsibility and recognition which will be dealt with separately;
- (c) The problem is not one of primary importance.

B. In favour of treating both issues as a single topic

Reasons:

- (a) The General Assembly regarded both as constituting one topic, or "at least wished the International Law Commission to initiate work on a single topic which would combine relevant elements of the two traditional headings of succession";
- (b) In recent developments, particularly the creation of so many independent States, the technical distinction between succession of States and succession of Governments "may be taken to be problematical".

C. In favour of giving priority to the topic of succession of States and studying succession of Governments in connexion with it

This procedure is suggested by way of a compromise and concession to those who claim that the two topics have a close connexion with each other.

D. In favour of concentrating on issues of succession of States as the result of the application of the principle of self-determination

This proposal is supported by the claim that a great number of new and hitherto unknown problems have been posed by the creation of new States by virtue of the principle of self-determination contained in the Charter of the United Nations, and that they require urgent solution.

2. Delimitation of the topic

A. Relationship to other subjects on the agenda of the International Law Commission

(a) Law of treaties

It is pointed out that succession in respect of treaties could be dealt with as part of the report on the law of treaties (the Special Rapporteur on the law of treaties has not expressed any definite views on the subject). It seems, however, that the common view is in favour of including it in the topic of succession. At the same time it is indicated that the approach of the International Law Commission to the law of treaties would facilitate the treatment of the subject (mention is made *inter alia* of articles 8 and 9 of the 1962 draft). But it is also suggested that the classification of treaties, which the International Law Commission so far has been unwilling to accept, becomes of importance.

(b) Responsibility

The fact that this subject is also on the agenda of the International Law Commission calls for special attention in order to avoid overlapping.

(c) Co-ordination of the work of the three Special Rapporteurs

In view of the above it is recommended that the three Special Rapporteurs (on the law of treaties, on responsibility and on succession) keep in close touch and co-ordinate their work.

B. Exclusion of certain issues

Attention is drawn to the need to eliminate a series of subjects, thus leaving them outside the scope of the study to be undertaken. Particular reference is made to those which are covered by Article 2, paragraph 7, of the Charter of the United Nations. The following subjects are mentioned, among others:

- (a) the effect of the creation of a new State on the domestic legal system itself;
- (b) question concerning rights and duties based on private or public law, in the relationship between individuals, formerly subjects of the metropolitan Power, and the new Government;
- (c) contracts, torts, internal debts, tax liabilities and franchise concerning persons who have become nationals of the new State.

3. Division of the topic

A. Broad outline

In a broad outline the following headings are suggested:

- (a) Succession in respect of treaties;
- (b) Succession in respect of membership of international organizations;
- (c) Succession in respect of rights and duties resulting from other sources than treaties (concerning individuals);
- (d) Succession between international organizations;
- (e) Adjudicative procedures for the settlement of disputes.

B. Detailed division of the subject

Several criteria are offered, on the whole those traditionally used:

- (a) by the origin of succession:
 - disappearance of the State;
 - birth of a new State;
 - territorial changes of existing States;
- (b) by the source of rights and obligations:
 - treaties;
 - property;
 - contracts in general;
 - concessionary rights;
 - servitudes;

public law (administrative and nationality problems);
torts;

(c) by territorial effects:

within the territory of the State concerned;
extra-territorial;

(d) *ratione personae*:

rights and obligations between the States directly concerned;
rights and obligations towards other States;
rights and obligations of nationals of the former metropolitan States;
rights and obligations of nationals of third States.

III. *The approach to the subject*

1. *The point of departure — evaluation of the present state of the law on succession*

This is clearly stated in one of the memoranda:

“there are no general agreements on State succession, and even the international customary law on it is defective”.

2. *The objective*

Elaboration of detailed replies to the question: to what extent is the successor State bound by the obligations of its predecessor, and to what extent is it to benefit from its rights?

A very general indication of how this is to be achieved can be found in the formula: “that it should be limited and precise and must cover the essential elements which are necessary for the creation of practical devices to solve the present difficulties”.

3. *Guiding criteria*

These are of the essence, as it is upon them that the direction of the future work depends. The following are mentioned:

(a) Primary consideration should be given to the principle of self-determination and the interests of the newly-born States.

(b) The principle of respect for economic rights, private or vested rights, and its effect on succession. Within a more general consideration: the relationship between change and stability.

(c) The place to be given to the time-factor: how long do the effects of succession operate after the acquisition of independence? How long do they limit the freedom of action of the new State?

4. *Codification or progressive development*

There seems to be common agreement that some of the old principles should be revised in the light of recent developments. In this connexion several suggestions are made: among them an empirical and flexible approach is advocated “as a rational basis for the continued integrity of international law and the facts of international life”.

5. *Treaties*

Special attention is paid to succession problems resulting from treaties.

A. *Universal and singular succession*

Many objections are raised against universal succession for both theoretical and practical reasons. It is pointed out, with reference to recent practice, that many of the treaties in question are even unknown to the new countries, some of them are labelled as “models of evasive draftsmanship”, while in other cases extremely complicated and confused situations have been created (the case of the Congo and Katanga is offered as illustration).

The negation of treaty succession on the one hand releases the new State from burdensome obligations, but at the same time deprives it of many rights from which it might have

wished to benefit. On the other hand, it is argued that the maintenance of many of the territorial treaties may amount to depriving the new States of their rights of self-determination, including the right to dispose freely of their natural resources.

Some of the memoranda raise important issues of principle and detail, and offer definite suggestions of solutions.

B. *Type of treaties*

(a) treaties concluded by the old sovereign on behalf of all the territories under his jurisdiction or applied to the territory in question by virtue of the colonial clause,

(b) treaties concluded by the old sovereign acting on behalf of the territory in question as its trustee, protector etc.

(c) treaties concluded by the local administration of the territory which has achieved independence, but acting under the auspices of the metropolitan power.

The memorandum in question rejects any differentiation between these types of treaties, suggesting that all of them have one thing in common: the fact that they were concluded by the former sovereign who was an outsider.

(d) It assimilates to them also a fourth type of treaty — treaties between the old sovereign and the new State concluded on the eve of the latter's acceding to independence or immediately after it (they deal mainly with economic, political and military questions).

In this connexion four approaches are mentioned:

(a) the theory of the *tabula rasa* — the new State is not bound by any treaty and inherits no contractual obligation,

(b) the theory of the right of option concerning the validity of the treaties in question (an analogy is drawn with the provisions of the Peace Treaties of 1946, and the United Nations practice with regard to multilateral treaties),

(c) the theory of continuation with the right of denunciation,

(d) the theory of the right for a time limit for reflection (the recent case of Tanganyika is quoted in this connexion).

Positive and negative elements of each of them are recorded.

C. *The effect of the prima facie assumption of the treaty by the new States*

The question is raised of the extent to which the usual blanket formula accepted by the new State binds it with regard to agreements of the former Sovereign.

These are some of the more important problems submitted in the memoranda.

6. *The form of the final work of the Commission on the subject*

The memoranda contain in this respect some tentative proposals which are worth recording.

A. *Multilateral treaty*

The advantage of adopting this solution is stressed in view of its greater practical importance and the facilities it offers in bringing the new States into the confines of international law.

B. *Several treaties* providing for alternative texts or containing recommendations only. Suggested as an alternative in view of the difficulties *one multilateral treaty* may present, namely the political character of the issues involved, and the lack of established practice.

C. *Set of principles or model Rules as a guide for States, to be approved by the General Assembly.*

This solution is backed by the following considerations:

(a) most of the problems are of a bilateral character and “not altogether suitable for regulation by means of a general multilateral convention”;

(b) the number of interested States is limited: about 50 successor States on the one hand, and a few former metropolitan States on the other;

(c) practical problems are being settled by bilateral agreements, thus reducing codification to a series of residual rules.

IV. *Miscellanea*

The memoranda contain some other suggestions and recommendations. Those which require mention concern the future work of the International Law Commission in this field:

A. The Sub-Committee should continue even after the Special Rapporteur is selected;

B. Apart from the documents already submitted the Secretariat should be requested to prepare:

(a) an analytical restatement of the material which will be forthcoming from replies of Governments;

(b) a working paper covering the practice of specialized agencies and other international organizations in the field of succession.