YEARBOOK OF THE INTERNATIONAL LAW COMMISSION
1962
Volume II

Documents of the fourteenth session including the report of the Commission to the General Assembly

UNITED NATIONS
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UNITED NATIONS New York, 1964
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A/CN.4/SER.A/1962/Add.1

Price: $U.S. 2.50 (or equivalent in other currencies)
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REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY


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I. Origin and background of the study

1. The present study was prepared by the Codification Division of the Office of Legal Affairs at the request of the International Law Commission. The Commission's decision to initiate the study was taken at its twelfth session (1960), in pursuance of General Assembly resolution 1453 (XIV) of 7 December 1959. The Assembly resolution was prompted by a resolution on the matter taken by the United Nations Conference on the Law of the Sea held in 1958 at Geneva. A brief review of these resolutions and of their background will help to clarify the purpose of the study.

2. At its eighth session (1956) the International Law Commission completed the final draft of its articles concerning the Law of the Sea and this draft was subsequently referred by the General Assembly to the above-mentioned United Nations Conference on the Law of the Sea. Article 7 of the draft dealt with bays; paragraphs 1 to 3 contained a definition of a bay and laid down rules for the delimitation of internal waters in a bay (the coasts of which belong to a single State), while paragraph 4 read in part as follows:

"4. The foregoing provisions shall not apply to so-called historic bays..."
3. Although much attention was given in the reports of the Special Rapporteur and in the discussions of the Commission to the substantive provisions on bays in article 7 in its successive stages of development, there is little in the records of the Commission to shed light on the concept of "historic bays" referred to in paragraph 4 of the article.

4. A clause regarding "historic bays" did not appear in the first two reports on the territorial sea prepared by the Special Rapporteur. He submitted, however, at the fifth session of the Commission, an addendum to his second report in which he presented redrafts of certain articles contained in the second report, among them the article on bays. These new drafts were largely inspired by solutions proposed by a group of experts to a number of technical problems which had been referred to them by the Special Rapporteur. As redrafted, the article on bays, in its first paragraph, gave a definition of "a bay in the juridical sense" and thereafter stated:

"Historic bays are excepted; they shall be indicated as such on the maps."

In his third report, submitted at the sixth session of the Commission, the Special Rapporteur transferred this clause regarding "historic bays" from the text of the article to the commentary. At the following session, he submitted a new redraft of the article on bays and in the text of that redraft the clause regarding "historic bays" reappeared. However, now the clause excepted "historic bays" not from the general definition of a bay but from the rules regarding the drawing of closing lines in bays. Another difference from the previous formulation of the clause was that the provision that "historic bays" should be marked on the maps, had been omitted.

5. In this form, i.e., as a proviso excepting "historic bays" from the rules regarding drawing closing lines in bays, the clause was included in article 7 (on bays) of the preliminary draft on the regime of the territorial sea which was adopted by the Commission at its seventh session and circulated to the Member States for observations.

6. In its reply the Union of South Africa pointed out that the commentary accompanying the article seemed to indicate that the real intention of the Commission was to exempt "historic bays" not only from the rules on the drawing of closing lines but also from the other rules on bays laid down in the article. The Special Rapporteur and the Commission agreed, and the clause regarding "historic bays" was, consequently, in the final draft of the article formulated as set out above in paragraph 2 of this paper.

7. In the course of the discussions in the Commission of the article on bays in its successive formulations, only passing references were made to "historic bays". The debates, as a consequence, did not substantially contribute to the clarification of the concept.

8. In order to provide the United Nations Conference on the Law of the Sea with material relating to "historic bays", a memorandum on the subject was prepared by the Codification Division and circulated as a preparatory document of the Conference. It was pointed out in the memorandum that historic rights were claimed not only in respect of bays but also in respect of other maritime areas. However, as the purpose of the memorandum was to shed light on the concept of "historic bays" referred to in the draft of the International Law Commission, the emphasis was on this latter concept, and historic claims to other waters were dealt with only incidentally. The content of the memorandum was succinctly set out in its paragraph 5 as follows:

"5. Part I describes the practice of States by reference to a few examples of bays which are considered to be historic or are claimed as such by the States concerned. Part II then proceeds to cite the various draft codifications which established the theory of "historic bays", and the opinions of learned authors and of Governments on this theory. Part II discusses the theory itself, inquiring into the legal status of the waters of bays regarded as historic bays, and setting forth the factors which have been relied on for the purpose of claiming bays as historic. The final section is intended to show that the theory does not apply to bays only but is more general in scope."

9. The United Nations Conference on the Law of the Sea which met in Geneva on 24 February 1958 referred those articles of the International Law Commission draft dealing with the territorial sea and the contiguous zone, including article 7 on bays, to its First Committee. At the third meeting of the Committee, in connexion with the organization of the Committee's work, the representative of Panama proposed that the Committee should set up a sub-committee to examine the question of bays and in particular the problem of the legal status of "historic bays". The representative referred to the above-mentioned Secretariat memorandum and stated that it was "essential that the international instruments to be drafted by the Conference should deal with such questions as the definition of historic bays, the rights of the coastal State or States, the procedure for declaring a bay 'historic', the conditions for recognition by other States, and the peaceful settlement of disputes arising from objections by other States".  

1956: see, respectively, Yearbook of the International Law Commission, 1952, volume I, pages 188-190: Yearbook, 1953, volume I, pages 205-216, 251, 279-80; and Yearbook, 1956, volume I, pages 190-193. In the 1955 discussion, Sir Gerald Fitzmaurice affirmed that the concept of "historic bays" formed part of international law (Yearbook, 1955, volume I, page 209), while Mr. García-Amador and Mr. Hsu (ibid., pages 210 and 211) said that they had doubts about "historic bays". Mr. García-Amador contended that this concept only benefited old countries having a long history and that there were many comparative newcomers to the international community—countries in Latin America, the Middle East and the Far East—which could not claim such historic rights. The reference to "historic bays" in the relevant article was, however, adopted without any member voting against it (ibid., page 214).


9 Ibid., page 2.
The work of the First Committee with respect to these problems would, in the opinion of the representative, be considerably facilitated if it appointed a sub-committee specifically concerned with the law relating to bays.\(^\text{10}\)

10. After a short discussion of the matter in the First Committee, the Chairman suggested that, as the forthcoming general debate in the Committee would probably make clear what other sub-committees would be needed, and it was desirable to consider the composition of all the sub-committees at the same time, the Panamanian proposal should be held over for the time being, on the understanding that he would bring it before the Committee at an early convenient date. The representative of Panama agreed to that procedure.

11. In the discussion at the third meeting and the general debate in the First Committee, the Panamanian proposal won support from several delegations, in particular those of Saudi Arabia, Yemen, El Salvador,\(^\text{12}\) and Pakistan,\(^\text{13}\) while the representative of the United Kingdom\(^\text{14}\) expressed doubts regarding the usefulness of a study of the matter by a sub-committee. The representative of the Federal Republic of Germany\(^\text{15}\) said that he thought that it would be difficult to establish general rules applicable to "historic bays".

Mr. J. P. A. François, the International Law Commission's special rapporteur on the law of the sea, who was present at the Conference as an expert to the Secretariat, also advised against setting up a sub-committee to deal with "historic bays". In his view, the Conference did not have at its disposal the material needed for a thorough study of the question, and the Conference might therefore merely use the term "historic bays" and leave it to be construed, in case of dispute, by the Court, with due regard for all the features of the special case, which could not possibly be provided for in a general rule.\(^\text{16}\)

If necessary, he added, the International Law Commission could be instructed to study acquisition by prescription, with special reference to "historic bays".\(^\text{16}\)

12. When the Panamanian proposal was taken up for decision at the twenty-fifth meeting of the First Committee,\(^\text{17}\) the representative of India stated that although his delegation was highly interested in the question of "historic bays", he felt that the Committee had neither the time nor the material available to deal with the matter properly. Each bay, he said, having its own particular characteristics, a mass of data would have to be sifted and collated before any general principles could be established. Instead of setting up a sub-committee, the Conference should therefore adopt a resolution recommending that the General Assembly make arrangements for further study of the question of "historic bays" by whatever body it might consider appropriate. The representative of Panama indicated his willingness to accept this idea put forth by India and consequently to withdraw his own proposal. At the suggestion of the Chairman, the Committee thereafter agreed to postpone its decision until the text of a joint proposal by the delegations of India and Panama along these lines had been submitted.

13. In the meantime, the delegation of Japan submitted a proposal containing a definition of "historic bays". The delegation proposed that paragraph 4 of article 7, on bays, should be replaced by the following text:

"4. The foregoing provisions shall not apply to historic bays. The term 'historic bays' means those bays over which coastal State or States have effectively exercised sovereign rights continuously for a period of long standing, with explicit or implicit recognition of such practice by foreign States."\(^\text{18}\)

The representative of Japan explained that his delegation has submitted this proposal because the definition of "historic bays" was part of the task of codification and could not be left to arbitral tribunals or courts dealing with particular disputes regarding such bays.\(^\text{19}\)

The definition included in the proposal had been prepared with the aid of the Secretariat's memorandum on "historic bays" (A/CONF.13/1).\(^\text{20}\)

14. The representative of Thailand agreed with the Japanese delegation that the definition of the term "historic bays" should not be left to any court or tribunal, but on the other hand he considered that the definition included in the Japanese amendment was not precise enough. The representative of the Soviet Union urged that the Japanese amendment should not be considered until the Committee was ready to take up the Indian-Panamanian proposal referred to above.\(^\text{20}\)

15. At its forty-eighth meeting the First Committee had before it both the Japanese amendment to article 7 and a draft resolution submitted jointly by India and Panama and reading as follows:\(^\text{21}\)

"The First Committee,

"Considering that the International Law Commission has not provided for the régime of historic waters including historic bays,

"Recognizing the importance of the juridical status of such areas,

"Desires to request the Secretary-General of the United Nations to arrange for the study of the régime of historic waters including historic bays and the preparation of draft rules which may be submitted to a special conference."

16. As far as the records of the meeting\(^\text{22}\) show, no explanation was given why the subject of the proposed study in the joint draft resolution was described as "historic waters including historic bays", not merely "historic bays" which was the term used in paragraph 4 of article 7 and also in the original Panamanian proposal to set up a sub-committee. When introducing the draft resolution, one of the sponsors used the term "historic waters" while the other used the term "historic bays".

\(^\text{11}\) Ibid.
\(^\text{21}\) A/CONF.13/C.1/L.158, op. cit., page 252.
\(^\text{22}\) Op. cit., pages 14-1-1-8. It may be of interest in this respect to note that during the deliberations in the First Committee on the question of historic title to maritime areas came up not only in regard to bays but also in connexion with the problem of the delimitation of the territorial seas of two States whose coasts are opposite or adjacent to each other (article 12 of the Convention on the Territorial Sea and the Contiguous Zone); see op. cit., pages 187-193.
17. The attention of the Committee was in fact focused on other aspects of the draft resolution. It was in particular pointed out that the resolution should rightly be in the name of the Conference not of the First Committee, and also that it was more seemingly for the Conference to address itself to the General Assembly than to the Secretary-General. Both these points were admitted by the sponsor. Another change which was of more substantive importance was also accepted by the sponsors. Their attention was drawn to the possibility that the study might result in the conclusion that in view of the diversity of the particular cases of “historic waters, including historic bays” no general rules could be drawn up. The representative of India replied that no general rules could, of course, be drafted if it was clearly impossible to do so, and that it was precisely the object of the proposed study to determine whether such rules could be drafted.

18. In view of the various points brought up during the discussion, a decision on the draft resolution and on the Japanese amendment was further postponed.

19. The matter came before the First Committee again at its sixty-third meeting. India and Panama now submitted a revised version of their draft resolution, reading as follows:

“The First Committee,

“Considering that the International Law Commission has not provided for the régime of historic waters including historic bays,

“Recognizing the importance of the juridical status of such areas,

“Recommends that the Conference should refer the matter to the General Assembly of the United Nations with the request that the General Assembly should make appropriate arrangements for the study of the juridical régime of historic waters including historic bays, and for the result of these studies to be sent to all Member States of the United Nations.”

In this wording, the draft resolution was adopted by the First Committee. The delegation of Japan withdrew its amendment to article 7.

20. It might be useful to point out that in the revised draft resolution which was adopted, the word “juridical” had been inserted before the word “régime” so as to clarify the character of the study to be undertaken. The points made in discussion referred to above had also been taken into consideration in the revised version.

21. The resolution adopted by the First Committee was submitted to the Conference in the Committee’s report on its work. The resolution was adopted without discussion, by the Conference, at its twentieth plenary meeting. The clause in the article on bays stating that the provisions of the article did not apply to “historic bays” was adopted in the wording proposed by the International Law Commission and quoted above in paragraph 2 of this paper.

22. In consequence, the following resolution dated 27 April 1958 was transmitted to the General Assembly:

“The United Nations Conference on the Law of the Sea,

“Considering that the International Law Commission had not provided for the régime of historic waters, including historic bays,

“Recognizing the importance of the juridical status of such areas,

“Decides to request the General Assembly of the United Nations to arrange for the study of the juridical régime of historic waters, including historic bays, and for the communication of the results of such study to all States Members of the United Nations.”

23. The General Assembly, at its 752nd plenary meeting on 22 September 1958, placed on the agenda of its thirteenth session the item “Question of initiating a study of the juridical régime of historic waters, including historic bays” and referred it to the Sixth Committee. After a short discussion, the Committee adopted and recommended to the General Assembly a draft resolution whereby the Assembly would postpone consideration of the question to its fourteenth session. This draft resolution was approved by the General Assembly at its 783rd plenary meeting, on 10 December 1958.

24. At its fourteenth session, the General Assembly again referred the item to the Sixth Committee which discussed it at its 643rd to 646th meetings. In the course of the debate some representatives discussed the substance of the question, but most of the speakers reserved their position on the substance and limited themselves to the problem of how the study of the question should be organized. In the end there was general agreement that the study of the question should be entrusted to the International Law Commission. The Sixth Committee unanimously adopted and submitted to the General Assembly a draft resolution to that effect, and at its 847th plenary meeting on 7 December 1959, the Assembly adopted the following resolution 1453 (XIV):

“The General Assembly,

“Recalling that, by a resolution adopted on 27 April 1958, the United Nations Conference on the Law of the Sea requested the General Assembly to arrange for the study of the juridical régime of historic waters, including historic bays, and for the communication of the results of the study to all States Members of the United Nations,

“Requests the International Law Commission, as soon as it considers it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays, and to make such recommendations regarding the matter as the Commission deems appropriate.”

25. General Assembly resolution 1453 (XIV) was included in the agenda of the twelfth session of the International Law Commission and discussed at its 544th meeting on 20 May 1960. As might be expected, the discussion mainly dealt with the methods of the study to be undertaken.

27 See Official Records of the General Assembly, Thirteenth Session, Sixth Committee, 597th and 598th meetings and annexes to agenda item 58.


26. According to one school of thought which turned out to be the minority opinion, the Commission should invite the Member States to send to the Secretariat all available documentation concerning those historic waters, including historic bays, which were subject to their jurisdiction and to indicate the regime claimed by them for these waters. Only from such data provided by Governments could the Commission, according to this view, learn the rules of customary international law concerning historic waters. Although it was not the task of the Commission to decide on particular claims to these waters, nevertheless, it must discover what bays and other waters were claimed as historic and on what grounds, in order to be able to determine the principles governing the juridical régime of historic waters on the basis of existing international custom.

27. The majority of the members of the Commission, on the other hand, feared that if Governments were invited to specify their claims to historic waters they might be tempted, as a matter of prudence, to protect their position by advancing all their claims, including possibly some totally new ones. They might also thereby commit themselves to a rigid attitude which could make a solution of the problem more difficult in the future. Furthermore, possibly exaggerated claims would not be a suitable basis for the formulation of principles on the matter. Those members who held this opinion therefore felt that the Commission should first determine the principles governing the matter and then invite the Governments to comment on those principles. If the Governments so wished they could, of course, in their observations on the principles, refer to particular claims to historic waters.

28. While the majority of the members of the Commission were against requesting information from Governments at the present stage, they considered that in order to expedite the Commission's work in this field, some action should be undertaken forthwith. It was therefore decided to request the Secretariat to follow up the work begun by the preparation of the memorandum on "historic bays" mentioned above in paragraph 8. This decision was set out in paragraph 40 of the Commission's report on its twelfth session (A/4425) as follows:

"... The Commission requested the Secretariat to undertake a study of the juridical régime of historic waters, including historic bays, and to extend the scope of the preliminary study outlined in paragraph 8 of the memorandum on historic bays prepared by the Secretariat in connexion with the first United Nations Conference on the Law of the Sea..."

29. Paragraph 8 of the memorandum referred to in the quotation reads:
"8. As indicated in part II of this paper, the theory of historic bays is of general scope. Historic rights are claimed not only in respect of bays, but also in respect of maritime areas which do not constitute bays, such as the waters of archipelagos and the water area lying between an archipelago and the neighbouring mainland; historic rights are also claimed in respect of straits, estuaries and other similar bodies of water. There is a growing tendency to describe these areas as 'historic waters', not as 'historic bays'. The present memorandum will leave out of account historic waters which are not also bays. It will, however, deal with certain maritime areas which, though not bays stricto sensu, are of particular interest in this context by reason of their special position or by reason of the discussion or decisions to which they have given rise."

30. It is apparent from what has been said above that the subject-matter of the study to be undertaken is wider in scope than the subject-matter of the memorandum on "historic bays" (A/CONF.13/1) prepared by the Secretariat with the purpose of shedding light on the clause exempting such bays from the provision of the article on bays contained in the International Law Commission's draft on the law of the sea. The subject-matter was widened to include also other "historic waters" than "historic bays". On the other hand, very little information can be gathered from the discussions related above as to the scope and meaning of the term "historic waters" or as to the relationship between that term and the term "historic bays". This was to be expected as the discussion was mainly concerned with methods and procedures for dealing with the matter. Moreover, as will be seen below, the question of the relationship between the terms "historic bays" and "historic waters" does not involve major problems.

31. Another point which clearly emerges from the foregoing is that the study at the present stage should not have as its purpose to attempt to establish a list of existing "historic bays" and other "historic waters". As far as "historic bays" are concerned, the previous Secretariat memorandum (A/CONF.13/1) contains a comprehensive enumeration of such bays and it would be difficult to make useful additions thereto without consulting the Governments.80

32. The purpose of the study should rather be to discuss the principles of international law governing the régime of "historic waters". The question then arises how these principles can be ascertained. The proper inductive method would be to study the particular cases of "historic waters" and see what common principles can be abstracted from them. This procedure would, however, seem to require that the first step should be to establish a collection of cases which would be as complete as possible. That would mean that the Governments must be approached with a request to provide information. On the other hand, if not every governmental claim to "historic waters" is to be accepted, some principles would be needed in the light of which the claims could be evaluated. Theoretically at least, there seems to be a dilemma here: in order to decide whether a claim to "historic waters" is rightful, it is necessary to have principles of international law by which the claims can be appraised, but in order not to be arbitrary these principles must be based on the actual practice of States in these matters. As usual the dilemma can be solved only in a pragmatic way. There is already available considerable material in the form of known claims to "historic waters", discussion of the subject in the literature of international law and previous attempts to establish and formulate the relevant principles. Most of the material has already been recorded in the Secretariat memorandum on "historic bays" (A/CONF.13/1). On this basis it is possible to analyse and discuss important aspects of the question and to arrive at certain tentative conclusions which can be further developed and where necessary modified in the light of information and observations received at a later stage from Governments. The present paper is conceived as a contribution to this initial or tentative discussion of the subject. Its purpose is to bring to

80 The question of establishing a list of historic waters is discussed more extensively below in paragraphs 165-176.
light, analyse and discuss problems connected with the subject rather than to present complete solutions to these problems. In order to be useful and to advance the study of the relevant problems, the paper must go beyond the mere enumeration of the various opinions expressed in theory and practice. Without presuming to give judgements on these opinions, it will sometimes be necessary to point out difficulties which seem to be inherent in some of them and to express a preference for others.

II. Juridical régime of historic waters, including historic bays

A. Preliminary explanation of the terms "historic waters" and "historic bays"

33. It is hardly necessary to go deeply into the matter of "historic waters" to realize that this is a subject where superficial agreement among authors and among practitioners conceals several controversial problems as well as some obscurity or at least lack of precision. Nobody would contest that there are cases in which a State has a valid historic title to certain waters adjacent to its coasts, but when it comes to a more precise definition of this title, its relation to the rules of international law for the delimitation of the maritime territory of a State or the question of the circumstances in which the historic title may arise, agreement is far from complete. Although it would have been convenient to be able to give, at the outset, a definition of "historic waters", this is therefore not possible. Without an examination and discussion of the controversial problems involved, the presentation of a definition would be premature. Furthermore, as was said above, the purpose of the present preparatory study is not so much to provide ready-made solutions to the relevant problems as to indicate these problems and so to prepare the way for the International Law Commission's consideration of the matter. In other words, in the paper an attempt will be made to set forth, analyse and clarify a number of problems connected with the concept or theory of "historic waters", departing from the fact that it is universally recognized in the doctrine and practice of international law that States may under certain circumstances on historic grounds have valid claims to certain waters adjacent to their coasts.

34. One of the lesser problems which, at least in a preliminary way, should be clarified is the terminological question arising from the use in theory and practice rather indiscriminately of the terms "historic bays" and "historic waters". These two terms are obviously not synonymous; the latter term has a wider scope, as is also apparent from the expression used in the resolutions of the Conference on the Law of the Sea and the General Assembly, namely, "historic waters, including historic bays". It is a fact that the term "historic bays" is more frequently used or has until recent times been more frequently used than "historic waters". This circumstance cannot, however, be taken as evidence that the more general view is that only bays, not other waters, may be claimed by States on an historic basis. On the contrary, it can be said that all those authorities who have directed their attention to the problem seem to agree that historic title can apply also to waters other than bays, i.e., to straits, archipelagos and generally to all those waters which can be included in the maritime domain of a State. If the term "historic bays" has been used more frequently than "historic waters", this is mainly due to the fact that claims on an historic basis have been made more often with respect to what were called or considered to be bays than to other waters. In principle, as was said in the Secretariat memorandum (A/CONF.13/1), referred to above in paragraph 29, "the theory of historic bays is of general scope", i.e., it applies also to other maritime areas than bays. Sir Gerald Fitzmaurice no doubt expressed a generally held opinion when he stated that:

"... there seems to be no ground of principle for confining the concept of historic waters merely to the waters of a bay... Even if the cases would in practice be fewer, a claim could equally be made on an historic basis to other waters...".

It may be of interest to note that in the Fisheries case between the United Kingdom and Norway, both parties agreed that the theory of "historic waters" was not limited to bays. It will be seen below that the legal status of "historic bays" may be different from that of other "historic waters", but that circumstance obviously does not weaken the position that an historic title can exist to other waters than bays.

35. It is easily discernible that many of the problems and difficulties inherent in the theory of "historic waters" have their origin or are conditioned by the circumstances in which the theory arose and was developed. A short description of the background of the theory, in fact and in law, should therefore facilitate its understanding.

B. Concept of "historic waters"

1. Background

36. There are above all two factors which have contributed to the emergence and development of the concept of "historic waters". One important factor was the controversial status of the international legal rules relating to the delimitation of the maritime territory of the State. Without taking a position regarding the question whether or not there ever was a generally accepted maximum width of the territorial sea or a maximum breadth of the opening of bays, it can safely be said that these questions through the ages were enveloped in controversy and therefore appeared to both lawyers and laymen as subject to doubt. In these circumstances it was natural that States laid claim to and exercised jurisdiction over such areas of the sea adjacent to their coasts as they considered to be vital to their security or to their economy. When a controversy arose after a State had for some time exercised jurisdiction over such an area of the sea, and the opponent State alleged that, according to the general rules of international law relating to the delimitation of territorial waters, the area in question was outside such waters, it was also natural for the defendant State to reply not only that it had a different opinion about the content of the applicable rule of general international law but also that by force of long usage it now had an historic title to the area. In the course of time there occurred quite a number of cases in which a State
asserted its sovereignty, based on historic rights, over certain maritime areas, whether or not according to general international law rules such areas might be outside its maritime domain. No attempt will be made in this paper to enumerate these cases; an enumeration and description of many of them may be found in the Secretariat's memorandum on "historic bays" (A/CONF.13/1), pages 3 et seq.

37. The second important factor in the development of the concept and theory of "historic waters" was the attempts, official and unofficial, to substitute for the controversial and doubtful international law relating to the delimitation of territorial waters a set of clear-cut, generally acceptable, written rules on the subject. For various such projects, reference may also be made to the aforementioned Secretariat memorandum (A/CONF.13/1), pages 14 et seq. As pointed out in that memorandum (pages 2-3), a codification of the international law rules relating to the delimitation of territorial waters and in particular regarding the delimitation of bays would in several cases have conflicted with existing situations. In other words, considerable maritime areas over which States claimed and exercised sovereignty would, if the codification were accepted, fall outside the jurisdiction of these States and belong instead to the high seas. It is obvious that a codification having such consequences would not commend itself to the States affected. The proposed rules would stand a better chance of being accepted if they included a clause excepting from its regulations waters to which a State had a historic title. As a consequence, the proposed codifications dealing with the delimitation of territorial waters generally contained such clauses in varying formulations. The concept of "historic waters" came to be considered as an indispensable concept without which the task of establishing simple and general rules for the delimitation of maritime areas could not be carried out. Gidel expresses this thought when he says:

"The theory of 'historic waters', whatever name it is given, is a necessary theory; in the delimitation of maritime areas, it acts as a sort of safety valve; its rejection would mean the end of all possibility of devising general rules concerning this branch of public international law . . ."33

38. In summary, the concept of "historic waters" has its root in the historic fact that States through the ages claimed and maintained sovereignty over maritime areas which they considered vital to them without paying much attention to divergent and changing opinions about what general international law might prescribe with respect to the delimitation of the territorial sea. This fact had to be taken into consideration when attempts were made to codify the rules of international law in this field, i.e., to reduce the sometimes obscure and contested rules of customary law to clear and generally acceptable written rules. It was felt that States could not be expected to accept rules which would deprive them of considerable maritime areas over which they had hitherto had sovereignty. The Second Committee of the 1930 Hague Codification Conference said in its report:

"One difficulty which the Committee encountered in the course of its examination of several points of its agenda was that the establishment of general rules with regard to the delimitation of territorial seas would, in theory at any rate, effect an inevitable change in the existing status of certain areas of water. In this connection, it is almost unnecessary to mention the bays known as 'historic bays'; and the problem is besides by no means confined to bays, but arises in the case of other areas of water also. The work of codification could not affect any rights which States may possess over certain parts of their coastal sea, and nothing, therefore, either in this report or in its appendices, can be open to that interpretation."

39. The circumstance that the existence of historic rights to certain areas of the sea came to be of particular interest in connexion with the endeavour to formulate general rules of international law on the delimitation of the territorial sea had as a consequence a tendency to consider the juridical régime of "historic waters" as an exceptional régime. The protagonists of the codification of international law in this field understood that, as a practical matter, a long-standing exercise of sovereignty over an area of the sea could not suddenly be invalidated because it would not be in conformity with the general rules being formulated. On the other hand, as the purpose of the codification was the establishment of general rules it was natural to look upon these historic cases as exceptions from the rule. Gidel succinctly expressed this view as follows:

". . . while the theory of historic waters is a necessary theory, it is an exceptional theory . . ."35

40. Whether or not the régime of "historic waters" is an exceptional régime may seem to be an academic question. In reality, it is of practical importance with respect to the question of what is needed to establish title to such waters. If the right to "historic waters" is an exceptional title which cannot be based on the general rules of international law or which may even be said to abrogate these rules in a particular case, it is obvious that the requirements with respect to proof of such title will be rigorous. In these circumstances the basis of the title will have to be exceptionally strong. The reasons for accepting the title must be persuasive; for how could one otherwise justify the disregarding of the general rule in the particular case? To quote Gidel again:

"The coastal State which makes the claim of 'historic waters' is asking that they should be given exceptional treatment; such exceptional treatment must be justified by exceptional conditions."

41. Both from the theoretical and from the practical point of view, it is therefore important to examine, analyse and clarify the notion that the régime of "historic waters" is an exceptional régime.

2. Is the régime of "historic waters" an exceptional régime?

42. It is probably true that, at least among the writers on the subject, the dominant opinion is that "historic waters" constitute an exception to the general rules of international law governing the delimitation of the maritime domain of a State. Gidel has been quoted above as an adherent of that opinion. His thoughts on the matter are expressed in greater detail in the following passage:

33 Gidel, op. cit., page 651.
35 Gidel, op. cit., pages 651.
36 Gidel, op. cit., page 655.
An examination of the facts shows: (1) that certain States have claimed as part of their maritime domain waters which under the generally accepted rules applicable in principle to such areas would have had to be considered as part of the high seas, and (2) that such claims have often been recognized by other States.

This state of affairs has given rise to a theory commonly referred to as the theory of 'historic bays': it has tried, with varying success, to identify a possible link between these different exceptional situations, whose only common feature appears to be their derogation from the generally accepted rules. Since it is necessary, if the general rule is not to be destroyed, to limit the claims of States tempted to nullify the generally recognized rules for determining areas that have a juridical status other than that of the high seas, the 'historic bays' theory has aimed at making such derogations subject to certain conditions, on which agreement, both in the doctrine and in practice, appears not to be complete.87

In this statement the exceptional character of "historic waters" is strongly emphasized as well as the necessity of limiting claims of this nature in order not to jeopardize the general rules regarding the delimitation of the maritime domain of States. It is also interesting to note that Gidel mentions two facts as bases of the concept of historic waters: a claim by a State to a maritime area which according to the general rules would be high seas; and the recognition by the other States of this exceptional claim. This indicates the connexion, according to this view, between the exceptional nature of the claim and a requirement that in order to be the basis of a valid title, the claim has to be combined with some form of recognition by the other States. We shall come back to this important proposition later. Here it is sufficient to point out the connexion as it appears in Gidel's statement.

A similar position is taken by another prominent authority on these matters. In an article discussing the law and procedure of the International Court of Justice, Sir Gerald Fitzmaurice says with reference to the Fisheries case between the United Kingdom and Norway:

"The Norwegian contention was essentially an attempt to remove from the conception of 'historicity' of given rights, the element of prescription, that is, in effect, the element of an adverse acquisition of rights in the face of existing law. Yet this element is of the essence of the matter, for a title or right based on historic considerations only becomes material when (and indeed assumes that) the actions involved are not or could not be justified according to the recognized rules, and can therefore be justified, if at all, only by reference to some special factor such as an historic right.

"As was suggested in the United Kingdom's written reply in the Fisheries case, this right takes the form essentially of a 'validation in the international legal order of a usage which is intrinsically invalid, by the continuance of the usage over a long period of time'.88

Sir Gerald is here referring to the subsidiary claim in the Fisheries case whether Norway, even if the general rules of international law did not allow it to do so, had an historic right to delimit its waters in the manner provided by the Norwegian legislation and opposed by the United Kingdom. In his view, such an historic right would be an adverse acquisition of certain maritime areas, an acquisition on the basis of a title which in the particular case would constitute an exception to or an abrogation of the general rule. A similar thought is expressed in the following passage from another article of his on the law and procedure of the Court:

"It has for long been part of international law that, on a basis of long-continued use and treatment as part of the coastal domain, waters which would not otherwise have that character may be claimed as territorial or as internal waters . . ."89

44. In the opinion of Sir Gerald, the exceptional nature of the historic title also has as a consequence that some form of acquiescence on the part of other States is necessary.40 Further attention to this aspect of the problem will be given below.

45. Other authors who consider the régime of "historic waters" to be an exception to the general rules are, e.g., Westlake, Fauchille, Pitt-Cobett, Higgins and Colombos, Balladore Pallieri and others. Pertinent quotations from their works are found in the Secretariat memorandum on "historic bays" (A/CONF.13/1), pages 18-20.

46. The view that "historic waters" constitute an exception to the generally valid rules regarding the delimitation of maritime areas was argued by the United Kingdom in the Fisheries case. A summary of its position is set out in the reply of the United Kingdom as follows:

"(i) A State is entitled to a belt of territorial waters of a certain breadth—the generally accepted limit is three miles—but Norway has an historic or prescriptive title to a belt of four miles.

"(ii) The belt of territorial waters must be measured from a base-line, which, subject to certain exceptions, must follow the low-water mark on the land.

"(iii) Where there are bays or similar indentations of the coast (whatever name these indentations have) which are of a certain character and where there are islands off the coast, there are rules of general international law which permit the base-line of territorial waters to cease to follow low-water mark on the land and to enclose as national waters certain areas of sea.

"(iv) A State can only establish a title to areas of sea which do not come within these general rules of international law on the basis of an historic or prescriptive title."

47. In the opinion of the United Kingdom there were two essential elements in such an historic or prescriptive title, namely:

"(i) Actual exercise of authority by the claimant State;

"(ii) Acquiescence by other States."42

48. The connexion between the exceptional character of the claim to an historic title and the requirement of acquiescence by other States is clear from the following statement by the United Kingdom:

49. In contrast to this theory according to which the régime of “historic waters” is an exceptional régime, there is another opinion which denies that there exist general rules of international law regarding the delimitation of bays and other maritime areas from which the régime of “historic waters” could be an exception. In a study on “historic bays” Bourquin has developed this line of thought. He says that:

“... Before taking a position on the theory of ‘historic bays’, one must ask oneself whether ordinary law subjects the delimitation of territorial bays to strict rules. The answer to this question cannot fail to influence the way in which one regards the practical importance and juridical function of historic titles. Is there a rule, valid for all States, which would limit the width of the opening of territorial bays to a given distance? More precisely, has the so-called ten-mile rule, generally advanced by those who favour a rigid delimitation, been consecrated by customary law?"

50. After having reached the conclusion that no such fixed limitation of the opening of a bay exists in general international law and that in any case:

“The character of a bay depends on a combination of geographical, political, economic, historical and other circumstances...”

he continues:

“If it is agreed that the solution given by ordinary law to the problem of the territoriality of bays is not a matter of a mathematical limitation of their width but depends on an appreciation of the various elements that make up the character of the particular bay, the notion of ‘historic titles’ assumes a meaning that is quite different from that given it by those who favour the ten-mile rule. ‘Historic title’ no longer has the function of making an otherwise illegal situation legitimate. It is no longer a means whereby the coastal State can include a part of the high seas in its domain. It is no longer connected with the idea of usucapion. It is one element along with others characterizing a particular state of affairs, which must be considered as a whole and in its various aspects.

“Where long usage is invoked by a State, it is a ground additional to the other grounds on which its claim is based. In justification of its claim, it will be able to point not only to the configuration of the bay, to the bay’s economic importance to it, to its need to control the bay in order to protect its territory, etc., but also to the fact that its acts with respect to the bay have always been those of the sovereign and that its rights are thus confirmed by historical tradition.”

51. As he does not consider the régime of historic bays as a deviation from general rules of international law, Bourquin is inclined to de-emphasize the importance of the acquiescence of other States. The historic title is for him “a juridical consolidation by the effect of time”, and such title is created by “the peaceful and continuous exercise of sovereignty”. Therefore, “While it is wrong to say that the acquiescence of these States [foreign States] is required, it is true that if their reactions interfere with the peaceful and continuous exercise of sovereignty, no historic title can be formed.”

As said before, this question will be further analysed later on; the purpose of mentioning it here is to point out the connexion between the author’s concept of “historic bays” and his attitude regarding the requirement of acquiescence on the part of foreign States.

52. In the Fisheries case, Norway took a similar position. The argument was, however, not limited to “historic bays” but referred to “historic waters” in general:

“In sum, it is not at all the function of an historic title, as conceived by the Norwegian Government and invoked in the present case, to legalize an otherwise illegal situation, but rather to confirm the validity of a situation.

“The Norwegian Government does not believe it necessary to discuss to what extent parts of the high seas may be included in the maritime domain of the State by virtue of an historic title, since the question does not arise in this case. It would only arise if the general rules which the United Kingdom Government alleges to be applicable to the delimitation of the maritime domain were really in force. But, the Norwegian Government has demonstrated that they are not and that they have never acquired the stability of customary rules...

“The Norwegian Government recognizes that the usage on which an historic title is based must be peaceful and continuous, and consequently that the reaction of foreign States constitutes an element to be taken into account in an appreciation of such title; but it completely rejects the thesis of the adverse Party that the acquiescence of other States is the only basis of an historic title, which would then be virtually indistinguishable from the juridical institution of recognition.

“The Norwegian Government considers that the absence of reaction by other States endows usage with the peaceful and continuous character it must have in order to give rise to an historic title.

“As to the consequences that must be deemed to ensue in this connexion from opposition by certain States, the Norwegian Government believes that it is a specific question, that each case must be judged in the light of its circumstances; that not all protests can be placed on the same footing; that, in any case, isolated opposition is incapable of preventing the creation of an historic title; and that in decisions in such matters one should bear in mind the wise counsel of the maxim quieta non movere.”

53. Also Counsel for Norway said, as quoted by the Court in its judgement:

“The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of...”

50 Ibid.
sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law."52

54. Without passing judgment on these two opposing opinions, it may be pointed out that there seem to be certain difficulties inherent in the view that title to "historic waters" is an exception to the general rules of international law regarding the delimitation of the maritime domain of the State and that such title therefore must be based on some form of acquiescence on the part of the other States. If such general rules exist, and whatever their contents may be, they must obviously be customary rules. When the Geneva Convention on the Territorial Sea and the Contiguous Zone comes into force and is widely ratified, this situation will change to a certain extent.58 For the present, however, the general rules in this field from which the régime of "historic waters" would be an exception could only be customary rules. This means that both the general rules and the title to "historic waters" would be based on usage. Why then should the latter be considered as exceptional and also inferior with regard to its validity, so that the acquiescence of the other States would be necessary to validate the title? The facts on which the title to "historic waters" are based belong to the usage in this field, no less than the facts on which the general customary rules would be based. And the opinio juris exists in the case of "historic waters" just as much as in the case of the so-called general rules.

55. If there are general rules in this field, the most that could be asserted is that, within the framework of customary international law, certain maximum limits for the territorial sea and the width of the opening of bays are generally applicable and that in certain cases there exist an historic title to waters which do not come within these limits. The so-called general rules would then be "general" in the sense only that they would be more generally applicable than the "exceptional" title to "historic waters". But they would not be "general" in the sense of having a superior validity in relation to the "exceptional" historic title. Both the general rules and the historic title would be part of customary international law, and there would be no grounds for claiming a priori that the historic title is valid only if based on the acquiescence of the other States.

56. However, it might be doubted whether it is even possible in this manner to distinguish within the framework of customary international law between a "general" régime and an "exceptional" régime based on an historic title. It may well be argued that a distinction between "general" and "exceptional" in this case would be wholly arbitrary. It could be said that only by a priori classifying certain cases as exceptional, or by a priori classifying certain cases as normal, can one arrive at general customary rules regarding such questions as the limits of the territorial sea, bays, etc.

57. Furthermore, it may even be doubted whether there exist at present any general customary rules regarding the delimitation of the maritime domain of States. The fact is that through the ages many conflicting opinions have been expressed in the doctrine and in practice on these problems and that claims to maritime areas have been made by States on grounds which have varied greatly both within the same period of time and from one time to another. International doctrine and practice therefore present a rather confusing picture in this respect. It is to be expected that the Geneva Conventions will, when they come into force, bring more stability to this field, but as far as the customary law is concerned the situation is far from clear.

58. If that is true, the view that the régime of "historic waters" is an exceptional régime which deviates from certain precise general rules of customary international law becomes even more doubtful. If the rules of customary international law on fundamental questions such as the breadth of the territorial sea or the width of the opening of bays are in dispute between the States, where are the general rules from which the historic title would be an exception? In these circumstances, would not the most realistic view be not to relate the claim or right to "historic waters" to any general customary rules on the delimitation of maritime areas, as an exception or not an exception from such rules, but to consider the title to "historic waters" independently, on its own merits.54

59. It follows that also the problem of the elements constituting title to "historic waters" and the question of proof have to be considered independently and not on the assumption that the title to "historic waters" constitutes an exception to general international law. In particular, the question if, or to what extent, a claim by a State to "historic waters" is subject to the acquiescence of other States has to be studied without being prejudiced by the a priori postulate that this is an exceptional claim.

60. Some authors who consider that the régime of "historic waters" is an exception to the general rules of international law regarding the delimitation of bays and other maritime areas use the existence of "historic bays" as conclusive proof of the existence of such general rules. Gidel says:

"The simple existence of this category of 'historic bays', which is not questioned by anyone, is of itself enough to demonstrate conclusively the existence of customary international law in the matter."55

This argument seems based on a petitio principii, for only if it is already assumed that the régime of "historic bays" is an exception to certain general rules does the existence of "historic bays" imply the existence of such general rules. Sir Gerald Fitzmaurice places the argument on a more practical level:

"... it must be assumed that the historic principle remains—and if this is admitted, it follows at once that international law, even if it does not impose a ten-mile limit [for bays], must still impose some limit, for if there were no legal limitation on the size of bays all reason for claiming a bay on historic grounds would disappear."56

There would, however, be a practical reason for claiming an historic title to bays or other maritime areas even if there is no generally accepted legal limitation on the size of bays or the breadth of the territorial sea. It is sufficient that the claiming State itself or other States

52 I.C.J. Reports, 1951, page 133.
58 See below, paragraphs 72-79.
56 British Year Book of International Law, 1954, page 416.
hold that there is such a limitation to make it understandable that a State may wish to base its claim on historic grounds. Only if there existed general and absolute agreement among the States that there was no limitation, would it be pointless to claim a maritime area on historic grounds. It could even be asserted that it is the uncertainty of the legal situation, not the certainty that general rules of international law on the matter exist, which has given rise to the claims which form the factual basis of the theory of "historic waters".

61. Intimately connected with the view that the régime of "historic waters" forms an exception to general international law is the idea that the title to "historic waters" is a kind of prescriptive right. This thought is clearly expressed in some of the statements quoted above. It may therefore be of interest briefly to examine that idea.

3. Is the title to "historic waters" a prescriptive right?

62. There has been much debate regarding the existence of prescription in international law. Of the two main forms of prescription, "extinctive prescription" (prescription liseratore), or loss of a claim by failure to prosecute it within a reasonable time, has no application in the present context. In connexion with "historic waters" it is the other form of prescription, namely "acquisitive prescription" (prescription acquisitive), which may be of interest.

63. "Acquisitive prescription" means that a title to something, e.g., a territory, is acquired by prescription, i.e., by the lapse of time under certain circumstances. Within the category of "acquisitive prescription" two sub-categories can be distinguished. One is acquisitive prescription based on "immemorial possession". In this case the original title is uncertain. It may have been a valid title or not; in any case the long lapse of time makes it impossible to establish what the original legal situation was. This uncertainty is cured and a valid title is considered to be acquired by "immemorial possession". The existence in international law of this kind of "acquisitive prescription" does not seem to be disputed. More controversial is the question whether the other sub-category of "acquisitive prescription" has a place in international law. In this case, which is said to be akin to the usucapio of Roman law, the original title of the possessor is known to be defective. But because the possessor has enjoyed uninterrupted possession for a period of time under certain conditions which are considered to imply acquiescence (in any case tacit consent) on the part of the rightful title owner, the possessor is held to have acquired through prescription a full and complete title. Some authors have denied that this sort of acquisitive prescription exists in international law, because no fixed time for the necessary possession can be found there, in contrast to the situation in municipal law where precise time-limits are prescribed. The majority of writers, however, consider this to be a detail which should not prevent the acceptance in international law of this kind of prescription which they find necessary for the preservation of international order and stability. Some even think that no distinction should be made between the two sub-categories of "acquisitive prescription", because the "immemorial possession" cannot in practice be required to be literally "immemorial" and that therefore, as far as the lapse of time is concerned, the two sub-categories tend to merge.68

64. This argument for the assimilation of the two sub-categories is, however, hardly sufficient. There is another important difference between them, namely, a difference with respect to the original title. In one case the original title is uncertain, in the other case it is known to be defective. It would seem that the requirements for remedying uncertainty should be less stringent than those necessary to cure known illegality.

65. To what extent can the concept of prescription be applied to "historic waters"? This problem has to be approached with some circumspection, for although there seems to be no reason why prescription should not apply to maritime areas as well as to areas of land, that does not necessarily mean that acquisitive prescription in both its forms is applicable to "historic waters". If, for instance, there is a dispute between two States regarding the sovereignty over a certain area of water, it is thinkable that one of the parties to the dispute might base its case on a prescriptive right to the area. But that would hardly be a case of "historic waters". The theory of "historic waters" is not used to decide whether a maritime area belongs to one State or another. "Historic waters" are not waters which originally belonged to one State but now are claimed by another State on the basis of long possession. They are waters which one State claims to be part of its maritime territory while one or more other States may contend that they are part of the high seas. To what extent then is prescription applicable to this latter situation?

66. As far as the first form of acquisitive prescription is concerned, i.e., prescription based on "immemorial possession", this kind of prescriptive right does not seem to differ much from the historic title envisaged in the theory of "historic waters". It refers to a situation where the original title is uncertain and is validated by long possession. It is approximately the same situation as in the case of "historic waters". If nothing more is implied in the term "prescriptive right", its application to "historic waters" seems innocuous, although not particularly useful.

67. If, on the other hand, the term "prescriptive right" refers to the second sub-category of acquisitive prescription, mentioned above, it is more difficult to accept the concept of prescription as applicable to "historic waters". In this case, prescription would mean that an originally defective or invalid title is cured by long possession. If applied to "historic waters" that would imply the assumption that according to the general rules of international law the waters were originally high seas, but that through the effect of time (in the proper circumstances) an exceptional historic title to the waters had emerged in favour of the coastal State. In other words, to consider the title to "historic waters" as a prescriptive right in this latter sense would really be to embrace the idea that the title to "historic waters" is an exception to the general rules of international law regarding the delimitation of maritime areas.

68. It is to be feared that this is usually what is implied when the term "prescriptive right" is used in connexion with "historic waters". In order to avoid that by the use of that term unwarranted assumptions are

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brought into the argument, it would therefore be preferable not to refer to the concept of prescription in connexion with the régime of "historic waters".

4. Relation of "historic waters" to "occupation"

69. Another term which is occasionally used in connexion with "historic waters" is "occupation", and it may therefore be useful briefly to examine whether there is a significant relation between these two concepts.

70. As is well known, occupation is an original mode of acquisition of territory. It is defined by Oppenheim as follows:

"Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as is at the time not under the sovereignty of another State." 69

A similar definition is given by Fauchille:

"Generally speaking, occupation is the taking by a State, with the intention of acting as the owner, of something which does not belong to any other State but which is susceptible of sovereignty." 69

Both authors agree that because of the freedom of the high seas, those seas cannot be the object of occupation. 61

71. This doctrine that occupation is an original mode of acquisition of territory but one which is not applicable to the high seas seems to be generally accepted at the present time. A State could therefore hardly claim an area of water on the basis of occupation unless it affirmed that the occupation took place before the freedom of the high seas became part of international law. In that case the State would claim acquisition of the area by an occupation which took place long ago. Strictly speaking, the State would, however, not assert an historic title but rather an ancient title based on occupation as an original mode of acquisition of territory. The difference may be subtle but should in the interest of clarity not be overlooked: to base the title on occupation is to base it on a clear original title which is fortified by long usage.

5. "Historic waters" as an exception to rules laid down in a general convention

72. The difficulties inherent in the conception that the régime of "historic waters" is an exception to customary law have been discussed above. What is the situation when the customary rules of international law regarding the delimitation of the maritime domain of the State are codified? Does the régime of "historic waters" then become an exceptional régime in the sense that strict requirements regarding the establishment of an area as "historic waters" are justified? To give an answer, it is necessary to study the content of the codified rules, the circumstances in which the rules were adopted and the intention of the parties accepting them.

73. As the nearest approach to a codification of the rules of international law regarding the territorial sea, the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone is of particular interest. As mentioned above, references to historic title occur in articles 7 and 12 of that Convention. Article 7, which deals with bays the coasts of which belong to a single State, contains a final paragraph stating that the foregoing provisions of the article shall not apply to so-called "historic bays". In paragraph 1 of article 12, regarding the delimitation of the territorial seas of States whose coasts are opposite or adjacent, there is a clause saying that the provisions of the paragraph shall not apply where by reason of historic title it is necessary to delimit the territorial seas in a different manner.

74. It seems to be clear both from the texts and from the relevant discussions at the Conference, related above in the first section of this paper, that the purpose of these exception clauses in articles 7 and 12 was to maintain with respect to the historic titles mentioned the status quo ante the entry into force of the Convention. As was indicated previously in this paper, the Second Committee of the 1930 Hague Codification Conference took the position in its report that the proposed codification of the rules of international law regarding territorial waters should not affect the historic rights which States might possess over certain parts of their coastal sea. Articles 7 and 12 show that the 1958 Geneva Conference on the Law of the Sea took the same position regarding historic rights in relation to bays bordered by a single State or the delimitation of the territorial seas of States whose coasts are opposite or adjacent to each other.

75. The question arises, however, what the situation is in cases where the historic title has not been expressly reserved in the Convention. In principle, it seems that the answer must be: if the provisions of an article should be found to conflict with an historic title to a maritime area, and no clause is included in the article safeguarding the historic title, the provisions of the article must prevail as between the parties to the Convention. This seems to follow a contrario from the fact that articles 7 and 12 have express clauses reserving historic rights; articles without such a clause must be considered not to admit an exception in favour of such rights.

76. Obviously the situation is different where a certain subject-matter has not been regulated by the Convention. Such is the case with respect to bays, the coasts of which belong to two or more States, and also in regard to the breadth of the territorial sea. Here the subject-matter is left completely untouched by the Convention; and as the Convention contains no relevant general rules, it would of course be pointless to reserve historic rights in this respect. 62

77. Three hypotheses may therefore be envisaged:

(i) The historic title relates to maritime areas not dealt with by the Convention and the Convention has consequently no impact on the title;

(ii) The historic title relates to areas dealt with by the Convention but is expressly reserved by the Convention.


61 Oppenheim, op. cit., page 556; Fauchille, op. cit., page 702.

62 It may be interesting to note that while various proposals for regulating the breadth of the territorial sea were submitted at the two Geneva Conferences on the Law of the Sea, none of these proposals contained clauses reserving historic titles to certain areas of the sea. It was also fairly apparent from the discussion that the aim of the proposals was to arrive at rules which would have universal application. If any of the proposed regulations of the breadth of the territorial sea had been accepted, such regulation would then have prevailed over conflicting historic titles to maritime areas. In view of the fact that none of the proposals acquired the necessary majority, it might perhaps be worth while, if and when the question of the breadth of the territorial sea is again taken up for solution, to consider whether an agreement on a proposal might be facilitated if it contained a clause reserving historic rights.
vention. Also in this case the Convention has no impact on the title;

(iii) The historic title is in conflict with a provision of the Convention and is not expressly reserved by the Convention. In that case, the historic title is superseded as between the parties to the Convention.

78. One can, of course, say in a certain sense that an historic title which is expressly reserved, as is the case in articles 7 and 12 of the Convention, thereby is implicitly qualified as an exception. But it must not be forgotten that the whole purpose of making the historic title an exception from the general rules contained in the main provisions of the relevant article is to maintain the historic title. It is not the intention, by excepting it, to subject the historic title to stricter requirements but to maintain the status quo ante with respect to the title. It would therefore be a fallacy if, from the fact that the Convention in certain cases excepts historic rights, one would draw the conclusion that the Convention requires stricter proof of the historic title than was the case before the conclusion of the Convention. In reality, the Convention simply leaves the matter; both regarding the existence of the title and the proof of the title, in the state in which it was at the entry into force of the Convention.

79. The above discussion of the general aspects of the concept of “historic waters”, its relation to general international law and to certain other concepts such as prescription and occupation, has cleared the way for a more or less concrete study of the juridical régime of “historic waters”. The first problem to be taken up is the question, what conditions must be fulfilled in order that an historic title to water areas may arise or, in other words, the question of the elements constituting a title to “historic waters”.

C. Elements of title to “historic waters”

80. There seems to be fairly general agreement that at least three factors have to be taken into consideration in determining whether a State has acquired a historic title to a maritime area. These factors are: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States. First, the State must exercise authority over the area in question in order to acquire a historic title to it. Secondly, such exercise of authority must have continued for a considerable time; indeed it must have developed into a usage. More controversial is the third factor, the position which the foreign States may have taken towards this exercise of authority. Some writers assert that the acquiescence of other States is required for the emergence of an historic title; others think that absence of opposition by these States is sufficient.

81. Besides the three factors just referred to a fourth is sometimes mentioned. It has been suggested that attention should also be given to the question whether the claim can be justified on the basis of economic necessity, national security, vital interest or a similar ground. According to one view, such grounds should even be considered to form the fundamental basis for a right to “historic waters”, so that they would be sufficient to sustain the right even if the historic element were lacking.

82. These various factors will be examined below. In order not to complicate the discussion unnecessarily, it is assumed that there is only one coastal State claiming historic title to the area. In a separate sub-section, the situation will thereafter be studied which arises when “historic waters” are bordered by two or more States.

83. The method to be used will be an analysis of problems and principles rather than a discussion of cases. For a more detailed presentation of both case law and opinions of writers reference may be made to the Secretariat memorandum on “historic bays” (A/CONF.13/1).

1. Exercise of authority over the area claimed

84. Various expressions are used in theory and practice to indicate the authority which a State must continuously exercise over a maritime area in order to be able validly to claim the area on the basis of an historic title. As examples may be mentioned: “exclusive authority”, “jurisdiction”, “dominion”, “sovereign ownership”, “sovereignty”. The abundance of terminology does not, however, mean that there is a great and confusing divergence of opinion regarding the requirements which this exercise of authority would have to fulfill. On the contrary there seems to be rather general agreement as to the three main questions involved, namely, the scope of the authority, the acts by which it can be exercised and its effectiveness.

(a) Scope of the authority exercised

85. There can hardly be any doubt that the authority which a State must continuously exercise over a maritime area in order to be able to claim it validly as “historic waters” is sovereignty. An authority more limited in scope than sovereignty would not be sufficient to form a basis for a title to such waters. This view, which does not seem to be seriously disputed, is based on the assumption that a claim to an area as “historic waters” means a claim to the area as part of the maritime domain of the State. It is logical that the scope of the authority required to form a basis for a claim to “historic waters” will depend on the scope of the claim itself. If, therefore, as is the generally accepted view, a claim to “historic waters” means a claim to a maritime area as part of the national domain, i.e., if the claim to “historic waters” is a claim to sovereignty over the area, then the authority exercised, which is a basis for the claim, must also be sovereignty.

86. This interrelationship between the scope of the claim and the scope of the authority which the claiming State must exercise, and also the soundness of the assumption that the claim to “historic waters” is a claim to sovereignty over the waters, may be illustrated by an example. Suppose that a State asserted, on a historical basis, a limited right related to a certain maritime area, such as the right for its citizens to fish in the area. This would not in itself be a claim to the area as “historic waters”. Nor could the State, even if it so wanted, claim the area as its “historic waters” on the basis of the fact that its citizens had fished there for a long time. The claim would in such case not be commensurate with the factual activity of the State or its citizens in the area. Suppose on the other hand that the State has continuously...
asserted that its citizens had the exclusive right to fish in the area, and had, in accordance with this assertion, kept foreign fishermen away from the area or taken action against them. In that case the State in fact exercised sovereignty over the area, and its claim, on a historical basis, that it had the right to continue to do so would be a claim to the area as its "historic waters". The authority exercised by the State would be commensurate with the claim and would form a valid basis for the claim (without prejudice to the condition that the other requirements for the title must also be fulfilled).

87. The reasoning may be summarized as follows. A claim to "historic waters" is a claim by a State, based on an historic title, to a maritime area as part of its national domain; it is a claim to sovereignty over the area. The activities carried on by the State in the area or, in other words, the authority continuously exercised by the State in the area must be commensurate with the claim. The authority exercised must consequently be sovereignty, the State must have acted and act as the sovereign of the area.65

88. This does not mean, however, that the State must have exercised all the rights or duties which are included in the concept of sovereignty. The main consideration is that in the area and with respect to the area the State carried on activities which pertain to the sovereign of the area. Without venturing to present a catalogue of such activities, some examples may be given to illustrate the kind of acts by which the authority required as a basis for the claim might be established.

(b) Acts by which the authority is exercised

89. It may be useful to begin by quoting the opinions of some prominent writers on the subject. Gidel, in discussing what he calls the actes d'appropriation to which the claiming State must have proceeded, states as follows:

"It is hard to specify categorically what kind of acts of appropriation constitute sufficient evidence: the exclusion from these areas of foreign vessels or their subjection to rules imposed by the coastal State which exceed the normal scope of regulations made in the interests of navigation would obviously be acts affording convincing evidence of the State's intent. It would, however, be too strict to insist that only such acts constitute evidence. In the Grisbarna dispute between Sweden and Norway, the judgement of 23 October 1909 mentions that 'Sweden has performed various acts...owing to her conviction that those regions were Swedish, as, for instance, the placing of beacons, the measurement of the sea, and the installation of the light-boat, being acts which involved considerable expense and in doing which she not only thought that she was exercising her right but even more that she was performing her duty.'"66

90. Regarding the kind of acts mentioned in the first part of the above quotation, Bourquin is virtually in agreement with Gidel. Bourquin says:

"What acts under municipal law can be cited as expressing its desire to act as the sovereign? That is a matter very difficult, if not impossible, to determine a priori. There are some acts which are manifestly not open to any misunderstanding in this regard. The State which forbids foreign ships to penetrate the bay or to fish therein indisputably demonstrates by such action its desire to act as the sovereign."67

He is more doubtful or flexible with respect to the measures of assistance to navigation mentioned in the second part of Gidel’s statement.

"There are, however, some borderline cases. Thus, the placing of lights or beacons may sometimes appear to be an act of sovereignty, while in other circumstances it may have no such significance."68

91. Bustamante, in a draft convention prepared by him with a view to assisting the 1930 Hague Codification Conference, included an article relevant to the question now discussed. It reads as follows:

"There are expected from the provisions of the two foregoing articles, in regard to limits and distance, those bays or estuaries called historic, viz., those over which the coastal State or States, or their constituents, have traditionally exercised and maintained their sovereign ownership, either by provisions of internal legislation and jurisdiction, or by deeds or writs of the authorities."69

92. Substantially the same article was included in the "project", submitted in 1933 to the Seventh International Conference of American States by the American Institute of International Law.70

93. In the Fisheries case, Norway stated in its Counter-Memorial:

"It cannot seriously be questioned that, in the application of the theory of historic waters, acts under municipal law on the part of the coastal State are of the essence. Such acts are implicit in an historic title. It is the exercise of sovereignty that lies at the basis of the title. It is the peaceful and continuous exercise thereof over a prolonged period that assumes an international significance and becomes one of the elements of the international juridical order."71

And having asked how sovereignty is asserted, the Counter-Memorial replies:

"Above all, by action under municipal law (laws, regulations, administrative measures, judicial decisions, etc.)."72

94. The United Kingdom Government, while emphasizing that they were not in itself sufficient to establish the title, agreed that such acts by the State under municipal law (actes d'ordre interne) were essential to the establishment of an historic title to a maritime territory.73

95. These examples furnish some guidance as to the kind of acts which are required. In the first place

65 Cf. Johnson, op. cit., pages 344-345 regarding the exercise of authority necessary as a basis for acquisitive prescription.
66 Gidel, op. cit., page 633.
67 Bourquin, op. cit., page 43.
68 Cf. see also the statements emanating from the Ministry of Foreign Affairs of the Netherlands in 1848 and quoted by Gidel, op. cit., page 633, footnote 3.
69 Bustamante, The Territorial Sea (1930), page 142.
70 See the Secretariat memorandum on "historic bays" (A/CONF.13/1), page 14.
72 Ibid., page 568.
the acts must emanate from the State or its organs. Acts of private individuals would not be sufficient unless, in exceptional circumstances, they might be considered as ultimately expressing the authority of the State. As Sir Arnold McNair said in his dissenting opinion in the Fisheries case:

"Another rule of law that appears to me to be relevant to the question of historic title is that some proof is usually required of the exercise of State jurisdiction, and that the independent activity of private individuals is of little value unless it can be shown that they have acted in pursuance of a licence or some other authority received from their Governments or that in some other way their Governments have asserted jurisdiction through them."\(^{74}\)

96. Furthermore, the acts must be public; they must be acts by which the State openly manifests its will to exercise authority over the territory. The acts must have the notoriety which is normal for acts of State. Secret acts could not form the basis of a historic title; the other State must have at least the opportunity of knowing what is going on.\(^{75}\)

97. Another important requirement is that the acts must be such as to ensure that the exercise of authority is effective.

(c) Effectiveness of authority exercised

98. On this point there is full agreement in theory and practice. Bourquin expresses the general opinion in these words:

"Sovereignty must be effectively exercised; the intent of the State must be expressed by deeds and not merely by proclamations."\(^{76}\)

99. This does not, however, imply that the State necessarily must have undertaken concrete action to enforce its relevant laws and regulations within or with respect to the area claimed. It is not impossible that these laws and regulations were respected without the State having to resort to particular acts of enforcement. It is, however, essential that, to the extent that action on the part of the State and its organs was necessary to maintain authority over the area, such action was undertaken.

100. The first requirement to be fulfilled in order to establish a basis for a title to "historic waters" can therefore be described as the effective exercise of sovereignty over the area by appropriate action on the part of the claiming State. We can now proceed to the second requirement, namely, that this exercise of sovereignty continued for a time sufficient to confer upon it the quality of usage.

2. Continuity of the exercise of authority: usage

101. A study of the extensive material included in the Secretariat memorandum on "historic bays" (A/CONF.13/1) and drawn from State practice, arbitral and judicial cases, codification projects and opinions of learned authors, provides ample proof of the dominant view that usage is required for the establishment of title to "historic waters". This view seems natural and logical considering that the title to the area is an historic title.\(^{77}\) A great variety of terms is used in describing and qualifying the usage required. A few of the terms employed in the codification projects mentioned in the memorandum\(^{78}\) may illustrate this variety: "continuous usage of long standing" ([usage continu et séculaire]) (Institute of International Law 1894), "international usage" (Institute of International Law 1928), "established usage" (Harvard draft 1930), "continued and well-established usage" (American Institute of International Law 1925), "established usage generally recognized by the nations" (International Law Association 1926), "immemorial usage" (Japanese International Law Society 1926), "continuous and immemorial usage" (Schücking draft 1926).

102. The term "usage" is not wholly unambiguous. On the one hand it can mean a generalized pattern of behaviour, i.e., the fact that many persons behave in the same (or a similar) way. On the other hand it can mean the repetition by the same person of the same (or a similar) activity. It is important to distinguish between these two meanings or "usage", for while usage in the former sense may form the basis of a general rule of customary law, only usage in the latter sense can give rise to a historic title.

103. As was established above, a historic title to a maritime area must be based on the effective exercise of sovereignty over the area by the particular State claiming it. The activity from which the required usage must emerge is consequently a repeated or continued activity of this same State. The passage of time is therefore essential; the State must have kept up its exercise of sovereignty over the area for a considerable time.

104. On the other hand, no precise length of time can be indicated as necessary to build the usage on which the historic title must be based. It must remain a matter of judgement when sufficient time has elapsed for the usage to emerge. The addition of the adjective "immemorial" is of little assistance in this respect. Taken literally "immemorial" would be a wholly impractical notion;\(^{79}\) the term "immemorial" could, therefore, at the utmost be understood as emphasizing, in a vague manner, the time-element contained in the concept of "usage". It will anyhow be a question of evaluation whether, considering the circumstances of the particular case, time has given rise to a usage.

105. Usage, in terms of a continued and effective exercise of sovereignty over the area by the State claiming it, is then a necessary requirement for the establishment of a historic title to the area by that State. But is usage in this sense also sufficient? There seems to be practically general agreement that besides this national usage, consideration must also be given to the international reaction to the said exercise of sovereignty. It is sometimes said that the national usage has to develop into an "international usage". This may be a way of underlining the importance of the attitude of foreign States in the creation of an historic title; in any case, a full understanding of the matter requires an analysis of the question how and to


\(^{75}\) The question of knowledge on the part of foreign States is further discussed below in paragraph 125 et seq.


\(^{77}\) Regarding the opinion which pays less attention to the passage of time and lays more emphasis on the vital interests of the State claiming the area, see below paragraphs 124 et seq.

\(^{78}\) Pages 14-15.

\(^{79}\) Cf. Johnson, op. cit., page 339.
what extent the reaction of foreign States influences the growth of such a title.

3. Attitude of foreign States

106. In essence, this is the problem of the so-called acquiescence of foreign States. As was indicated above, according to a widely held opinion acquiescence in the exercise of sovereignty by the coastal State over the area claimed is necessary for the emergence of an historic title to the area. The connexion between this requirement of acquiescence and the opinion that "historic waters" are an exception to the general rules of international law governing the delimitation of maritime areas was also pointed out above. It might be recalled that the argument was on the following lines. The State which claims "historic waters" in effect claims a maritime area which according to general international law belongs to the high seas. As the high seas are *res communis omnium* and not *res nullius*, title to the area cannot be obtained by occupation. The acquisition by historic title is "adverse acquisition", akin to acquisition by prescription, in other words, title to "historic waters" is obtained by a process through which the originally lawful owners, the community of States, are replaced by the coastal State. Title to "historic waters", therefore, has its origin in an illegal situation which was subsequently validated. This validation could not take place by the mere passage of time; it must be consummated by the acquiescence of the rightful owners.

107. The argument seems logically to imply that acquiescence is a form of consent. However, here a difficulty arises. If acquiescence is a form of consent, acquiescence would amount to recognition of the sovereignty of the coastal State over the area in question and reliance on a historic title would be superfluous. If the continued exercise of sovereignty during a length of time had to be validated by acquiescence in the meaning of consent by the foreign States concerned, the lapse of time, i.e., the historical element, would be immaterial.

108. Some of the defenders of the concept of acquiescence, on the one hand, desiring to avoid a confusion with recognition and, on the other hand, unwilling to concede that the continued exercise of sovereignty by the coastal State over the area claimed could in itself constitute a historic title to the area, have endeavoured to vindicate the idea of acquiescence by interpreting it as an essentially negative concept. The term "acquiescence" is said to "describe the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights",80 or to mean that the foreign States "have simply been inactive".81 The historic title would then be based on the continued effective exercise of sovereignty by the coastal States over the area in question combined with the inaction of the other States. In this view,

"the true role of the theory [of historic rights] is to compensate for the lack of any evidence of express or active consent by States, by creating a presumption of acquiescence arising from the facts of the case and from the inaction and toleration of States."82

109. It is interesting to note that the protagonists of the concept of acquiescence, if they reduce this concept to mean merely inaction or toleration, arrive at a position which is very near to the one taken by those who oppose the idea that the régime of "historic waters" is an exceptional régime and the consequent idea that the acquiescence of foreign States is necessary to acquire a title to historic waters. Bourquin, who as was seen above, is a spokesman for the latter opinion, states the following:

"While it is wrong to say that the acquiescence of these States is required, it is true that if their reactions interfere with the peaceful and continuous exercise of sovereignty, no historic title can be formed.

"In such cases the question to be asked is not whether the other States consented to the claims of the coastal State but whether they interfered with the action of that State to the point of divesting it of the two conditions required for the formation of an historic title.

"Obviously only acts of opposition can have that effect. So long as the behaviour of the riparian State causes no protest abroad, the exercise of sovereignty continues unimpeded..."

"The absence of any reaction by foreign States is sufficient."83

110. The similarity of the final positions arrived at, both by some of the proponents and some of the opponents of the notion of acquiescence is striking: both seem to agree that inaction on the part of foreign States is sufficient to permit the emergence of a historic right. This would seem to suggest that the term "acquiescence" is ambiguous. In these circumstances, it might perhaps be better, in the interest of clarity, not to use the term "acquiescence" in this context. The term seems at least *prima facie* to convey the idea of consent and its use can therefore result in the conclusion that a historic title can arise only if concurrence on the part of foreign States has been demonstrated in a positive way. If the proponents of the necessity of acquiescence really have in mind only the negative aspect, i.e., toleration on the part of the foreign States, it would be preferable to use the term "toleration" which better expresses their thoughts. Moreover, there should be no difficulty in dropping the term "acquiescence" once the dubious theory that title to "historic waters" constitutes an exception to general international law has been discarded.

111. "Toleration" is furthermore the expression used by the International Court of Justice in the *Fisheries* case when discussing Norway's historic title to the system of delimitation which was an issue in the dispute. The Court said, *inter alia*:

"In the light of these considerations, and in the absence of convincing evidence to the contrary, the Court is bound to hold that the Norwegian authorities applied their system of delimitation consistently and uninterruptedly from 1869 until the time when the dispute arose. From the standpoint of international law, it is now necessary to consider whether the application of the Norwegian system encountered any opposition from foreign States..."

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80. McGibbon, "The Scope of Acquiescence in International Law" in *British Year Book of International Law*, vol. 31 (1953), page 143.

81. Fitzmaurice in *British Year Book of International Law*, vol. 30 (1953), page 29.


83. Bourquin, op. cit., page 46. Bustamante is also against the idea of consent, see op. cit., page 100.
The Court continued further on in its judgement:

"The Court notes that in respect of a situation which could only be strengthened with the passage of time, the United Kingdom Government refrained from formulating reservations.

"The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."85

In the Court's opinion, the consistent and prolonged application of the Norwegian system combined with the general toleration of foreign States gave rise to a historic right to apply the system. This opinion seems to correspond fairly well to the final positions taken both by the proponents and the opponents of the concept of "acquiescence", as set out in paragraphs 108 and 109.

112. However, even if it may be said that, whether the term "acquiescence" or the term "toleration" is used, there is substantial agreement that inaction on the part of foreign States is sufficient to permit an historic title to a maritime area to arise by effective and continued exercise of sovereignty over it by the coastal State during a considerable time, all difficulties in this respect are not solved. It is true, of course, that if there has been no reaction at any time from any foreign State, then there is no difficulty. But what happens if at any one time or another opposition from one or more foreign States occurred? Does any kind of opposition by any one State at any time preclude the historic title? It is prima facie highly improbable that the terms "inaction" or "toleration" would have to be interpreted so strictly. Before attempting a more precise answer, it would, however, be useful to examine more closely the three points which seem to be involved, namely, (i) what kind of opposition would prevent the historic title from emerging, (ii) how widespread in terms of the number of opposing States must the opposition be, and (iii) when must the opposition occur.

113. With regard to the first point, it is obvious that the opposition ending the inaction must be expressed in some kind of action. In the passage quoted above in paragraph 109, Bourquin states that:

"... if their reactions [i.e., of foreign States] prevent the peaceful and continuous exercise of sovereignty, no historic title can be formed."86

Indeed, it is hardly doubtful that opposition by force on the part of foreign States would be a means of interrupting the process by which a historic title is formed. On the other hand it cannot be assumed that Bourquin, despite the use of the word "paisible", would consider only opposition by force as effectively preventing the creation of a historic title. He also says in the passage quoted above that:

"...so long as the behaviour of the riparian State causes no protest abroad, the exercise of sovereignty continues unimpeded."87

This seems to imply also a protest could be a means of hindering the emergence of a historic right.

114. If that is so, Bourquin's view would not be far from the opinion expressed by Fitzmaurice in these words:

"Protest, in some shape or form or equivalent action, is necessary in order to stop the acquisition of a prescriptive right."88

In a footnote Fitzmaurice goes on to describe the action in question as follows:

"Apart from the ordinary case of a diplomatic protest, or a proposal for reference to adjudication, the same effect could be achieved by a public statement denying the prescribing country's right, by resistance to the enforcement of the claim, or by counter-action of some kind."89

115. These are some of the acts by which the opposition of foreign States could be expressed, and there are, no doubt, other means which could be used. More important than establishing a list of acts, is to emphasize that whatever the acts they must effectively express a sustained opposition to the exercise of sovereignty by the coastal State over the area in question. To quote Fitzmaurice again:

"Moreover the protest must be an effective one depending on what the circumstances require. A simple protest may suffice to begin with, but this may not be enough as time goes on."90

Should despite the protest the coastal State continue to exercise its sovereignty over the area, the opposition on the part of the foreign State must be maintained by renewed protests or some equivalent action.

116. The second point to be examined is how wide the opposition must be, to prevent the creation of a historic title. Is it sufficient that a single State effectively expresses its opposition? Hardly anybody would go as far as that. Gidel says on this point:

"A single objection formulated by a single State will not invalidate the usage; furthermore all objections cannot be placed on an equal footing, regardless of their nature, the geographical or other situation of the objecting State."91

Bourquin92 agrees with Gidel that one opposing State would not be sufficient to invalidate the usage. This seems, moreover, to be a generally accepted opinion. If the total absence of opposition is not a necessary requirement for the emergence of a historic right, it would seem to be a matter of judgement, subject to the circumstances in the particular case, how widespread the opposition must be to prevent the historic title from materializing.

117. In this connexion it is interesting to note, in the above quotation, that Gidel is not willing to place all the opposing States on the same level. The opposition of one State may according to circumstances carry more weight than the opposition of another State.
Fitzmaurice follows the same line of reasoning when he says:

"It is obvious that, depending on the circumstances, the acquiescence of certain States must be of far greater weight and moment in establishing the existence of a prescriptive or historic right than that of others. Thus the consent, either expressly given or reasonably to be inferred, of those States which, whether on account of geographical proximity, or commercial or other interest in the subject-matter, etc., are directly affected by the claim, may be almost enough in itself to legitimize it; while a clear absence of consent on the part of such States would certainly suffice to prevent the establishment of the right. Equally, acquiescence or refusal on the part of States whose interest in the matter, actual or potential, is non-existent, or only slight, may have little practical significance."

118. The position, outlined in the passages quoted from Gidel and Fitzmaurice, that the same weight need not be accorded to the attitude of each State, seems to be reasonable and realistic. It may, perhaps, be pointed out, however, that this position is hardly consonant with the assumption that the right to "historic waters" is an exception to the general rules of international law. If that assumption were correct, if the States claiming historic waters were really claiming a part of the high seas, a part of a res communis, unless a historic title could be established, it would seem that any State, any member of the community of States, should be able to prevent by its opposition the emergence of the historic title. How could in such case some States be entitled to give away rights which belong to all States and how could in the matter of acquiescence or opposition greater weight be given to one State than to the other? On the other hand, if it is admitted that the legal situation regarding the delimitation of the maritime territory of States is not clear, that the customary international law in this respect is in doubt, and that it is against that background that the existence or non-existence of historic rights to particular areas has to be considered, then the view seems sensible and practical that this question of opposition is a question of appreciation, not a question of arithmetic, and that the opposition of one State in view of the circumstances in the particular case may well be of greater importance than that of another State.

119. In this connexion, it may be useful to try to visualize how a dispute with respect to "historic waters" is most likely to arise. Although it is theoretically possible, it is not probable that a dispute will arise because all or most foreign States refuse to recognize the historic right of a coastal State to a certain maritime area. Many States may have no great interest in the question and would therefore have no reason to go out of their way to antagonize the coastal State. The dispute would be most likely to arise through the opposition of neighbouring States or of those States which have a particular interest in the area. It would therefore be only natural if the arbitrator or tribunal having to settle the dispute paid particular attention to the previous attitude of those States and, in determining the existence of an historic title, gave special weight to the fact that these States, in the formative period of the disputed title, had or had not effectually opposed the exercise of sovereignty by the coastal State over the area in question.

120. With regard to point two, relative to the question how wide-spread the opposition must be to preclude the emergence of an historic title, it may therefore be said that this is a matter of appreciation in the light of the circumstances in each case. How this appreciation may be made, can be illustrated by the last part of the statement of the International Court of Justice in the Fisheries case, referred to above in paragraph 111:

"The notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."

121. It remains to deal with the third point, namely, the question at what time the opposition must occur in order to prevent the creation of an historic title. It is evident that the opposition must have been effectively expressed before the historic title came into being. After a State has exercised sovereignty over a maritime area during a considerable time under general toleration by the foreign States, and an historic right to the area has thus emerged, it is not possible for one or more States to reverse the process by coming forward with a protest against the accomplished fact. The historic title is already in existence and stands despite the belated opposition.

122. However, by this general and rather obvious statement the problem is not solved. There are in any case two questions which need to be discussed in this connexion. The first question is: how long is the considerable time during which sovereignty has to be exercised and tolerated? The second question is: from what moment does this time start to run?

123. Regarding the first question it can only be said that the length of time necessary for a historic right to emerge is a matter of judgement; no precise time can be indicated. However, as the exercise of sovereignty has to develop into a usage the length of time must be considerable. Reference may be made in that respect to the explanations given above in paragraphs 101-104.

124. The second question has several aspects. In the first place the time cannot begin to run until the exercise of sovereignty has begun. As was said above, the exercise of sovereignty must be effective and public and the time can therefore not begin to run until these two conditions have been fulfilled.

125. Here a problem arises: is it sufficient that the exercise of sovereignty is public or is it also necessary that the foreign States actually have knowledge of this exercise of sovereignty? In other words, can a foreign State offer as a valid excuse for its inaction, the fact that it had no actual knowledge of the situation, and demand that the time within which it must manifest its opposition should be construed to run only from the moment it received such knowledge?

126. Those who consider the right to "historic waters" to be an exception to general international law and therefore have a tendency to require at least tacit or presumed consent on the part of foreign States, are also inclined to require knowledge of the situa-
tion by these States, in order that absence of opposition may be held against them. For instance Fitzmaurice states:

"Clearly, absence of opposition is relevant only in so far as it implies consent, acquiescence or toleration on the part of the States concerned; but absence of opposition per se will not necessarily or always imply this. It depends on whether the circumstances are such that opposition is called for because the absence of it will cause consent or acquiescence to be presumed. The circumstances are not invariably of this character, particularly for instance where the practice or usage concerned has not been brought to the knowledge of other States, or at all events lacks the notoriety from which such knowledge might be presumed: or again, if the practice or usage concerned takes a form such that it is not reasonably possible for other States to infer what its true character is."95

127. The preference is evident in the quotation for a system according to which consent or acquiescence on the part of foreign States is required and consequently also their knowledge of the situation. On the other hand, the language used seems to indicate that also implied consent and presumed knowledge would be sufficient. The requirement of knowledge and consent seems to be more theoretical than real; in the end the author seems to be satisfied with notoriety from which knowledge may be presumed.

128. In any case, nobody seems to demand that the coastal State must formally notify each and all of the foreign States that it has assumed sovereignty over the area, before the time necessary to establish a usage will begin to run. If that is so, the notoriety of the situation, the public exercise of sovereignty over the area, would in reality be sufficient. It may, moreover, be recalled that in the Fisheries case, the International Court of Justice referred to

"the notoriety essential to provide the basis of an historic title."96

129. Against this opinion that notoriety is sufficient, the objection has been made that its effect would be to place an excessive burden of vigilance on States, as they would be forced to follow the activities of the legislative and executive organs of other States more closely than is usually the case.97 It is, however, doubtful if this objection is justified. It may be argued that if a State had a real interest in a maritime area it would be natural for that State to follow closely what was going on there, and that the fact that the State was unaware of the situation was a good indication that its interest in the area was slight or non-existent. It might happen that at a later stage the State developed an interest in the area and so became aware of the circumstance that the coastal State for a long time had exercised sovereignty over it. If the newcomer State now found that this was against its interests, is it really a justifiable view to assert that this State could validly object to the coastal State's claim to an historic title to the area on the ground that it did not know until recently what was going on in the area?

130. In conclusion therefore, there seem to be strong reasons for holding that notoriety of the exercise of sovereignty, in other words, open and public exercise of sovereignty, is required rather than actual knowledge by the foreign States of the activities of the coastal States in the area.

131. Assuming now that the time necessary for the formation of a historic title has begun to run, sufficient opposition to block the title may not be forthcoming immediately. One or two States may protest, but still the over-all situation may be one of general toleration on the part of the foreign States. Opposition may build up successively and finally reach a stage where it no longer can be said that the exercise of sovereignty of the coastal State over the area is generally tolerated. Thereby the emergence of the historic title will be prevented, provided that this stage is not reached too late, i.e., at a time when the title has already come into existence because sufficient time under the condition of general toleration has already elapsed. There would therefore be a kind of race taking place between the lapse of time and the building up of the opposition. The outcome of the race is necessarily a matter of judgement as there are no precise criteria to be applied to either of the two competing factors. There is no precise time limit for the lapse of time necessary to allow the emergence of the historic right, and there is no precise measure for the amount of opposition which is necessary to exclude "general toleration".

132. This concludes the discussion of the three factors which according to the dominant opinion have to be taken into consideration in determining whether a right to "historic waters" has arisen. The result of the discussion would seem to be that for such a title to emerge, the coastal State must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration of the community of States.

133. It remains to study the fourth factor which is sometimes referred to, namely, the question of the vital interests of the coastal State in the area.

4. Question of the vital interests of the coastal State in the area claimed

134. The Secretariat memorandum on "historic bays" (A/CONF.13/1), paragraphs 151 et seq., describes a view taken by some authors and Governments, according to which a right to "historic bays" may be based not only on long usage, but also on other "particular circumstances" such as geographical configuration, requirements of self-defence or other vital interests of the coastal State. The origin of this idea is usually ascribed to Dr. Drago's dissenting opinion in the North Atlantic Coast Fisheries Arbitration (1910) where he stated that:

"a certain class of bays, which might be properly called the historical bays, such as Chesapeake Bay and Delaware Bay in North America and the great estuary of the River Plate in South America, form a class distinct and apart and undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage and above all, the

95 British Year Book of International Law, vol. 30 (1935), page 33.
96 I.C.J. Reports, 1951, page 139.
97 Cf. British Year Book of International Law, vol. 30 (1953), page 42.
requirements of self-defence, justify such a pretension.\textsuperscript{98} The basis for Dr. Drago's statement is evidently that in the classical cases of "historic bays" such as Chesapeake Bay and Delaware Bay, such "particular circumstances" were put forward in justification of the claims.

135. The significance of this line of thought is not so much that usage may have to be fortified by other reasons such as geographical configuration or vital interest in order to form a firm basis for a claim to "historic bays". It is rather that these other "particular circumstances" may justify the claim without the necessity of establishing also "immemorial usage". This is in any case the direction in which the idea developed, as may clearly be seen from the information given in the Secretariat memorandum.

136. Illuminating in this respect is article 7 of the draft international convention submitted at the Buenos Aires Conference of the International Law Association in 1922 by Captain Storny, reading as follows: "A State may include within the limits of its territorial sea the estuaries, gulfs, bays or parts of the adjacent sea in which it has established its jurisdiction by continuous and immemorial usage or which, when these precedents do not exist, are unavoidably necessary according to the conception of article 2; thus is to say, for the requirements of self-defence or neutrality or for ensuring the various navigation and coastal maritime police services."\textsuperscript{99}

137. Also important is the statement of the Portuguese representative at the 1930 Hague Codification Conference: "Moreover, if certain States have essential needs, I consider that those needs are as worthy of respect as usage itself, or even more so. Needs are imposed by modern social conditions, and if we respect age-long and immemorial usage which is the outcome of needs experienced by States in long past times, why should we not respect the needs which modern life, with all its improvements and its demands, imposes upon States?\textsuperscript{100}

138. There is undoubtedly some justification for this view, and it is also understandable that it appeals to States which reached independence rather late and therefore are not able to base these claims on long usage.\textsuperscript{101}

139. On the other hand it hardly seems appropriate to deal with the problem of these vital needs in the context of "historic bays". Bourquin, who otherwise appreciates the importance of the vital interests of the States with regard to bays, says in this respect: "But why should this factor be considered strictly within the context of 'historic titles'? However widely the concept of a 'historic title' is construed, surely it cannot be claimed in circumstances in which the historic element is wholly absent. The 'historic title' is one thing; the 'vital interest' is another."\textsuperscript{102} It is difficult to disagree with that opinion.

140. Attention may also be drawn to another aspect of the matter, which seems worth considering. In a convention on the territorial sea, it makes good sense to reserve the position of "historic bays". On the contrary, giving the parties the right to claim "vital bays" would come near to destroying the usefulness of any provision in the convention regarding the definition or delimitation of bays.

5. Question of "historic waters" the coasts of which belong to two or more States

141. In the foregoing discussion, it has been assumed that there was only one riparian State bordering the area in question and that therefore one State alone was interested in claiming it. What is the situation if there are two or more States bordering the area? Will that circumstance materially change the requirements discussed above for the emergence of an historic title to the area? Without pretending to deal with the matter exhaustively, a few considerations may be offered with respect to this problem.\textsuperscript{103}

142. These questions may be discussed in regard to two different geographical settings both of which are in some way related to the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.

143. Article 12 of the Convention deals with the situation where the coasts of two States are opposite or adjacent to each other, and paragraph 1 of the article provides as follows: "Where the coasts of two States are opposite or adjacent to each other, and paragraph 1 of the article provides as follows:

"Moreover, if certain States have essential needs, I consider that those needs are as worthy of respect as usage itself, or even more so. Needs are imposed by modern social conditions, and if we respect age-long and immemorial usage which is the outcome of needs experienced by States in long past times, why should we not respect the needs which modern life, with all its improvements and its demands, imposes upon States?\textsuperscript{100}

144. It does not seem that in this case the fact that there is more than one coastal State would materially change the requirements for the establishment of an historic title. There is no doubt that an historic title can arise in that situation; at least this is assumed by the wording of the article. In other words, the emergence of an historic title for one of the coastal States is not prevented by the mere existence of another coastal State. On the other hand, in evaluating the attitude of the foreign States regarding the claim to an historic title,\textsuperscript{105} it would seem reasonable to pay special attention to the attitude of the other coastal States.

145. The second geographical situation of relevance is the case of a bay bordered by two or more States.\textsuperscript{106} This situation is related to the above-mentioned Geneva Convention in a negative way, as its article on bays (article 7) deals only with bays the coasts of which

\textsuperscript{98} See quotation in A/CONF.13/1, paragraph 92.
\textsuperscript{99} Ibd., paragraph 152.
\textsuperscript{100} Ibd., paragraph 155.
\textsuperscript{101} See the statement by Mr. García-Amador in the International Law Commission and referred to in the footnote to paragraph 7 above.
\textsuperscript{102} Bourquin, op. cit., page 51, quoted and translated in A/CONF.13/1, paragraph 155.
\textsuperscript{103} Cf. above paragraphs 117-119.
\textsuperscript{105} Cf. Gidel, op. cit., pages 626-627.
belong to a single State. The reason for this limitation on the scope of the article was that the International Law Commission, which prepared the text following the basis of the Convention, considered that it did not have enough information regarding bays surrounded by two or more States to include provisions regarding them. The question of such bays was therefore left open as far as the Convention is concerned, and it would, indeed, seem to be a problem which could be discussed in depth only after additional information on the matter has been received from Governments. The few remarks which are made below in this paper are therefore of a very preliminary character.

146. Historic claims to a bay bordered by two or more States might be envisaged in two different circumstances. The claim may be made jointly by all the bordering States or it may be presented by one or more, but not all of these States.

147. If all the bordering States act jointly to claim historic title to a bay, it would seem that in principle what has been said above regarding a claim to historic title by a single State would apply to this group of States. One problem which might be raised in this connexion, without any attempt being made to solve it, is whether sovereignty over the bay must during the required period have been exercised by all the States claiming title or whether it is sufficient that during that period one or more of them exercised sovereignty over the bay.

148. The second hypothesis in which a claim to a bay bordered by two or more States might be envisaged arises where only one or several of them jointly, but not all of them, claim the area. In this case, it is rather improbable that a historic title to the bay could ever arise in favour of the claiming State or States. For it must be expected that an attempt to exercise sovereignty over the bay on the part of one or some of the riparian States would cause immediate and strong opposition on the part of the other riparian State or States. It would therefore be difficult to imagine that the requirement of toleration by foreign States could in these circumstances be fulfilled. It must be emphasized in this connexion that, when it was said above that the opposition of one or two foreign States would not necessarily exclude the existence of a general toleration on the part of foreign States, this statement referred to waters bordered by a single coastal State. In the case of a bay surrounded by several States, the persistent opposition by one or more of the riparian States to the exercise of sovereignty over the bay by one or more of the other riparian States must naturally be of great if not decisive importance in evaluating whether or not the requirement of toleration had been fulfilled.

D. Burden of proof

149. As the existence of a right to “historic waters” is to such a large extent a matter of judgement, the question of proof and in particular the problem of the burden of proof would seem to be of a rather secondary interest. The task of the parties to a dispute seems to be less to establish certain facts than to persuade the judges to follow their respective opinions regarding the evaluation of the facts. Still the question of the burden of proof cannot be ignored, in particular since it is one of the problems usually raised in connexion with the right to “historic waters”.

150. In the memorandum of the Secretariat on “historic bays” (A/CONF.13/I), paragraphs 164-166, attention was drawn to certain significant statements in doctrine and practice regarding the onus of proof with respect to “historic waters”. Gidel is quoted as follows:

“The onus of proof rests on the State which claims that certain maritime areas close to its coast possess the character of internal waters which they would not normally possess. The coastal State is the petitioner in this sort of action. Its claims constitute an encroachment on the high seas; and it would be inconsistent with the principle of the freedom of the high seas, which remains the essential basis of the whole public international law of the seas, to shift the onus of proof onto the States prejudiced by that reduction of the high seas which is the consequence of the appropriation of certain waters by the claimant State.”

151. Reference is also made to Basis of Discussion No. 8 submitted to the 1930 Hague Codification Conference and reading:

“The belt of territorial waters shall be measured from a straight line drawn across the entrance of a bay, whatever its breadth may be, if by usage the bay is subject to the exclusive authority of the coastal State; the onus of providing such usage is upon the coastal State.”

152. Finally it is pointed out that in the Fisheries case, the United Kingdom and Norway agreed that the onus of proof was on the State claiming a historic title, although they disagreed regarding the conditions and nature of the proof.

It may be interesting to quote the parties themselves in that respect. The Norwegian Government stated in its Counter-Memorial under the title “the proof of an historic title”:

“...The usage must be proved by the State which invokes it. Regarding this principle the Norwegian Government agrees with the United Kingdom Government. But it does not agree with it regarding the conditions of proof to be met and especially regarding the nature of the elements of proof to be produced.”

The United Kingdom Government said:

“The Norwegian Government...while disputing the contentions of the United Kingdom Government in regard to the conditions and nature of the proof of an historic title, agrees that the burden of proof lies upon the State which invokes the historic title. This admission that the burden of proof lies upon the claimant State was only to be expected in view of the abundant authority to that effect. The role of the historic element being to validate what is an exception to general rules and therefore intrinsically invalid, it is natural that the burden of proof should so emphatically be placed upon the coastal State. ...”

107 Gidel, op. cit., page 632.
claimant State. Some who hold that view are mainly influenced, as is evident from the statements of Gidel and of the United Kingdom, by their belief that the historic title is an exception to the general rules of international law and that "historic waters" is an encroachment on the freedom of the high seas. The difficulties involved in this line of reasoning have been referred to above and may be borne in mind also with respect to the question of the burden of proof. Others who say that the burden of proof lies upon the claimant may do so merely because it seems to restate a widely accepted procedural rule. It can, however, be doubted that the rule that the State claiming historic title has the burden of proof is equal to the procedural rule that the claimant must prove his case. The meaning of the former rule is evidently that the burden of proof lies on the State claiming the title whether that State is the claimant or the defendant in a dispute.

154. Moreover, the statement that the burden of proof is on the State claiming the historic title does not have a very precise meaning. It is significant in that respect that it could be accepted by both parties in the Fisheries case although they disagreed sharply as to what had to be proved and how. For the purpose of a useful discussion of the question, it is necessary to relate the burden of proof to the various factors which must be present to create an historic title to a maritime area.

155. As was pointed out above, the first requirement for the development of an historic right to a maritime area is the effective exercise of sovereignty over the area by the State claiming the right. There seems to be no doubt that the State claiming the area has to show that it has exercised the required sovereignty. To do that it would have to prove certain facts such as for instance that in certain instances it enforced its laws and regulations in or with respect to the area. These facts the State must prove to the satisfaction of the arbitrator (or Court or whoever has to decide whether the title exists or not). The opposing State (or States) might perhaps allege other facts intended to show that the required exercise of sovereignty did not take place, and the latter State must then show these facts to the satisfaction of the arbitrator. Each of the opponents therefore bears the burden of proof with respect to the facts on which they rely. On the basis of the facts which he considers to be proved, the arbitrator then decides whether it has been demonstrated that the required sovereignty was exercised. Obviously, this involves an evaluation not only of the evidence presented regarding the facts but also of the importance of these facts as signs of the alleged exercise of sovereignty. If the arbitrator finds that effective sovereignty has not been exercised, the State claiming the historic title loses this necessary basis for its claim. In that sense the burden of proof with respect to the exercise of sovereignty is undoubtedly on the State claiming the title.

156. In order to give rise to an historic title, the exercise of sovereignty, as was seen above, must not only be effective but also prolonged, continued. It must develop into a national usage. To persuade the arbitrator that this is the case, the State claiming title would again bring forward certain facts such as the fact that the enforcement of its laws and regulations had gone on for a number of years. These facts the State would have to prove. The opposing State (or States) might again allege other facts which in its opinion indicated that the claiming State had not been able to maintain its authority over the area uninterruptedly and that therefore, no prolonged, continued exercise of sovereignty had taken place. The opposing State would have to prove the facts on which its contentions were based. The arbitrator would then again have to evaluate the facts which he considers as established in order to decide whether or not an effective exercise of sovereignty by the State claiming title had taken place continuously during a sufficient period for a usage to have developed. If he finds that this was not the case, the State claiming title would have lost a necessary basis for its claim and in that sense it therefore carries the burden of proof regarding this point.

157. The third factor to take into consideration in relation to the emergence of an historic title is the attitude of the foreign States. The problem of the burden of proof is slightly more complicated with respect to this factor, because of the two views opposing each other in this respect: one, that "acquiescence" in the meaning of tacit or presumed consent by the foreign States is required for the emergence of the historic title, and the other, that "general toleration" on the part of these States is sufficient. The general pattern of proof will, however, be the same as in regard to the previous factors. Whether the State claiming the title endeavours to prove "acquiescence" or "toleration", it will assert certain facts in support of its contention that "acquiescence" (or "toleration") existed, and these facts the State would have to prove to the satisfaction of the arbitrator. And similarly the opponent (or opponents) would bring forward certain facts in support of his assertion that "acquiescence" (or "toleration") did not exist; for these facts, the opponent would have the burden of proof. The facts upon which the claiming State and the opposing State (or States) rely may not be the same, if they attempt to prove (or disprove) "acquiescence" as if they attempt to prove (or disprove) "toleration", but in either case they have the burden of proof for the facts which they allege. Whether "acquiescence" or "toleration" is required is not a question of fact but a question of law, and each of the parties will no doubt try to persuade the arbitrator that its view in this respect is correct, but this is not a question of evidence. Finally the arbitrator will decide whether "acquiescence" or "toleration" is the necessary requirement and on the basis of the facts he will also decide whether the requirement of "acquiescence" (or "toleration") was fulfilled. If he comes to the conclusion that this was not the case, the State claiming title loses an indispensable basis for its claim of title, and in that sense it bears the burden of proof.

158. In summarizing this discussion of the problem of the burden of proof, it may be said that the general statement that the burden of proof is on the State claiming historic title to a maritime area is not of much value. If the statement means that, should the arbitrator (or whoever has to decide) not find that all the elements of the title (all the requirements for the existence of the title) are present, the State claiming the title will lose, then the statement simply asserts the obvious. The elements of the title have evidently to be proved to the satisfaction of the arbitrator, otherwise he will not accept the title. And this holds true whether or not the title is considered to be an exception to the general rules of international law, so that burden of proof is not really a logical consequence of the allegedly exceptional character of the title. In a dispute, each
party has to prove the facts on which he relies, otherwise the arbitrator will not take these alleged facts into account. Furthermore, as regards the interpretation of the law and the evaluation of the facts in the light of this interpretation, each party will naturally try to persuade the arbitrator to adopt the party’s views in this respect; to the extent that the party does not succeed in this, it will obviously have to bear the burden of his failure.

159. On the basis of what has just been said, it is submitted that it would be unnecessary, and possibly misleading, to include in a regulation of the régime of “historic waters” a general statement regarding the burden of proof. It would seem preferable to leave that question to be solved by the procedural rules which may be applicable in a particular case.

E. LEGAL STATUS OF THE WATERS REGARDED AS “HISTORIC WATERS”

160. The main question to be discussed in this section is whether “historic waters” are internal waters of the coastal State or are to be considered as part of its territorial sea. The importance of this problem lies in the fact that, according to the international law of the sea, the coastal State must allow the innocent passage of foreign ships through its territorial sea, but has no such obligation with respect to its internal waters.

161. As far as “historic bays” are concerned, the matter was dealt with in paragraphs 94-136 of the Secretariat memorandum on “historic bays” (A/CONF.13/1), and reference is made to the material and discussion which may be found there.

162. In paragraph 101 of the memorandum it is pointed out that, until the International Law Commission in its drafts on the law of the sea made a clear distinction between the “territorial sea” and “internal waters”, the terminology used both in the doctrine and in State practice was ambiguous. “Territorial waters” could be used as a term comprehending both the “territorial sea” and “internal waters”; what is now known as “internal waters” was therefore often referred to as “territorial waters”. In attempting to ascertain the opinions of authors and Governments in this field, one has therefore to take care not to be misled by the uncertain terminology used.

163. If allowance is made for this problem of terminology, the dominant opinion, as gathered from the statements assembled in the memorandum, seems to be that “historic bays” the coasts of which belong to a single State are internal waters. This was to be expected, for it is generally agreed that the waters inside the closing line of a bay are internal waters and that the territorial sea begins outside that line.

164. On the other hand, it should be recalled that the right to “historic bays” is based on the effective exercise of sovereignty over the area claimed, together with the general toleration of foreign States. The sovereignty exercised can be either sovereignty as over internal waters or sovereignty as over the territorial sea. In principle, the scope of the historic title emerging from the continued exercise of sovereignty should not be wider in scope than the scope of the sovereignty actually exercised. If the claimant State exercised sovereignty as over internal waters, the area claimed would be internal waters, and if the sovereignty exercised was sovereignty as over the territorial sea, the area would be territorial sea. For instance if the claimant State allowed the innocent passage of foreign ships through the waters claimed, it could not acquire an historic title to these waters as internal waters, only as territorial sea.

165. The seeming contradiction between the statement that “historic bays” are internal waters, and the conclusion that waters claimed on the basis of the exercise of sovereignty as over the territorial sea cannot be internal waters but only part of the territorial sea, is really one of terminology. In the latter case, it would be preferable not to speak of an “historic bay” but of “historic waters” of some other kind.

166. What was said above refers to “historic waters”, the coasts of which belong to a single State. The principle set out in paragraph 164 would, however, apply in the case of bays bordered by two or more States as well. Whether the waters of the bay are internal waters or territorial sea would depend on what kind of sovereignty was exercised by the coastal States in the formative period of the historic title to the bay.

167. The same principle also applies to “historic waters” other than “historic bays”. These areas would be internal waters or territorial sea according to whether the sovereignty exercised over them in the course of the development of the historic title was sovereignty as over internal waters or sovereignty as over the territorial sea.

F. QUESTION OF A LIST OF “HISTORIC WATERS”

168. It is easy to see that claims to “historic waters” may be a source of considerable uncertainty regarding the delimitation of the maritime domain of States. As was shown above, the determination of the question whether or not such a claim is legitimate depends to a large extent on the evaluation of the circumstances in the particular case. Even if general agreement was reached on the principles involved, the application of these principles would not be without complications. The question how to avoid or reduce this uncertainty has held the attention of both authors and Governments, especially in connexion with the attempts to codify the rules of international law regarding the territorial sea.111

169. In the course of the preparatory work for the 1930 Hague Codification Conference, Schücking, the rapporteur of the sub-committee dealing with problems connected with the law of the territorial sea, suggested the establishment of an International Waters Office which would register rights possessed by the riparian States outside the proposed fixed zone of their territorial seas, including rights to “historic waters”. Applications for registration of such rights could be made within a time limit and application could be opposed by other States within a time limit. A procedure was also provided for settling disputes arising in case of such opposition.112 The idea of an International Waters Office was however later dropped by the rapporteur.113

170. Bustamante in his “project of convention”, prepared in order to help the work of the 1930 Codification Conference, suggested a similar scheme, with the Secretariat of the League of Nations playing a role corre-

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111 See for instance references in Gidel, op. cit., pages 636-638.
113 Ibid., page 72.
171. In the discussions at the 1930 Codification Conference, the representative of Greece stated that it would be useful to adopt Schücking's proposal “that an international organ should be established to draw up in advance a list of historic bays”.116

172. The representative of Great Britain said:

“May I add one other thing? It is quite clear that neither this Conference nor any Committee nor Sub-Committee of it could possibly undertake to draw up a list of historic bays. Yet the matter is one of great importance, and some machinery ought to be devised by which the various nations of the world can exchange views on this point, with the object ultimately of obtaining a list of historic bays agreed internationally.

“At a later stage, I shall propose that the Conference should suggest, before its work is completed, the setting up of some small body which might examine the claims of the various nations to historic bays with a view to making a report and possibly recommendations on the subject at a later date, to Geneva or elsewhere. The subject is one which has caused much friction and much dispute in the past and this seems to be a golden opportunity first of all to settle the principles on which the classification is to be based, and then, having settled the principles, to agree upon some list which will be binding for the future.”116

173. Finally the representative of Portugal spoke in the same sense as follows:

“In the considerations it adduced today, the British delegation spoke of the establishment of an international organization. I venture to remind you that article 3 of Professor Schücking's draft speaks of the creation of an International Waters Office. After discussion by the Committee, Professor Schücking agreed to omit that article. I brought it forward again, but it was not taken into account either by the Committee of Experts or by the Preparatory Committee.

“This idea has now been put forward once again. On behalf of the Portuguese delegation, I wish to say that, from the general point of view, I am prepared to agree to the establishment of such an organization, provided that the character and functions with which it is endowed are satisfactory.”117

174. The Second Committee of the Codification Conference in its report referred to the question of “historic waters” and, as was seen above, stated that the work of codification could not affect such rights. The Committee thereafter added:

“On the other hand, it must be recognized that no definite or concrete results can be obtained without determining and defining those rights. The Committee realizes that, in this matter too, the work of codification will encounter certain difficulties.”118

175. While it no doubt would be convenient and desirable from the point of view of clarity and certainty to establish an agreed list of “historic waters”, it is doubtful whether a practicable approach to the problem would be to ask Governments to register their claims within a certain time and likewise request opponents of the claims to register their objections within a certain time. The advantage would, of course, be, after the expiration of the deadlines, that the unopposed claims would be considered as accepted, that no new claims could be made and that only the opposed claims would have to be settled. One weakness of such a scheme is, however, that it would be binding only on the States adhering to it, so that its effectiveness would depend upon how many and perhaps which States accepted it. Unless adherence by the totality of the States could be achieved, new claims could, in any case, not be excluded. Moreover, the scheme would involve the obvious danger that it might provoke a number of unnecessary disputes, as States would be tempted, in order to be on the safe side, to overstate both their claims and their objections. The net result might be less rather than more certainty.

176. It could therefore be argued that little advantage would be achieved by undertaking the rather formidable task of establishing a list of “historic waters”. It might also be said that such an enterprise would be pointless as long as the question of the breadth of the territorial sea has not been settled. Under these circumstances the question is, whether it would not be preferable to limit the study to the principles of the matter and leave particular cases to be settled if and when they become the object of an actual dispute.

G. SETTLEMENT OF DISPUTES

177. Should a dispute arise, it would, however, be useful if means for the settlement of disputes were already agreed upon. It might therefore be desirable to supplement any agreement on substantive rules or principles relating to “historic waters” by provisions for the settlement of disputes regarding the interpretation or application of such rules or principles. As to the procedure to be followed in regard to such settlement, one might use as a pattern either the machinery set up by the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas or the methods outlined in the Optional Protocols concerning the Compulsory Settlement of Disputes adopted at the 1958 Geneva Conference on the Law of the Sea and at the 1961 Vienna Conference on Diplomatic Intercourse and Immunities.

178. In the former case, disputes would be referred to a special commission, unless the parties agreed to seek a solution by another method of peaceful settlement, as provided for in Article 33 of the Charter of the United Nations. The members of the commission would be named by agreement between the States in dispute or, failing agreement, by the Secretary-General of the United Nations.

179. If on the other hand the pattern of the optional protocols is followed, disputes would be brought before the International Court of Justice by the application of one of the parties. The parties could agree to resort to

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114 The relevant provisions of the Bustamante procedure may be found in the Secretariat memorandum on “historic waters”, paragraph 209.
116 Ibid., pages 104-105.
117 Ibid., page 107.
118 Ibid., page 211.
an arbitral tribunal instead of the Court, and they could also agree to adopt a conciliation procedure before going to the Court.

180. The settlement of disputes regarding rights to “historic waters” is complicated by a peculiar difficulty. If the final decision in a dispute goes against the State claiming the area, it might be expected that the State would give up its claim and the matter would be settled once and for all. On the other hand, should the decision be in favour of the State claiming the area, this decision would bind only the other party to the dispute, and other States might later return to the charge and open up new disputes regarding the claim. The same could of course happen when the claiming State loses, if that State, while respecting the decision in its relations with the other party to the dispute continued to exercise sovereignty over the area in relation to other States or their citizens. In other words, although a dispute regarding an area of “historic waters” was finally settled between the State claiming the area and an opposing State, the matter whether this area is “historic waters” could be reopened by other States, which would not be bound by the first settlement. Even if the dispute was decided by the highest international court in existence, the International Court of Justice, its decision would be binding only on the parties to the dispute, as stipulated in Article 59 of its Statute. A third State would still be legally free to dispute the claim, and a final decision of the question whether an area is or is not “historic waters” would therefore be hard to obtain. Naturally, if in one dispute it decided that the area was “historic waters” of a certain State, the International Court of Justice in all probability would come to the same conclusion in another dispute; similarly, a decision by a special commission or an arbitral decision on the matter in one case would probably carry considerable weight in another case. Still, the question would not be legally settled once and for all, and the possibility of new disputes would remain.

181. The experience of the two above-mentioned conferences indicates that it would probably be practical to embody the provisions for the settlement of disputes in a separate optional protocol. Some States might be willing to accept certain substantive rules or principles on “historic waters”, but not to submit themselves to a compulsory procedure for the settlement of disputes. By including the substantive and the procedural rules in separate instruments, these States would be able to adhere to the former although they could not subscribe to the latter.

III. Conclusions

182. The above discussion of the principles and rules of international law relating to “historic waters, including historic bays” would seem to justify a number of conclusions, provided that it is understood that some of these must necessarily be highly tentative and more in the nature of bases of discussion than results of an exhaustive investigation of the matter.

183. In the first place, while “historic bays” present the classic example of historic title to maritime areas, there seems to be no doubt that, in principle, a historic title may exist also to other waters than bays, such as straits or archipelagos, or in general to all those waters which can form part of the maritime domain of a State.

184. On the other hand, the widely held opinion that the régime of “historic waters” constitutes an exception to the general rules of international law regarding the delimitation of the maritime domain of the State is debatable. The realistic view would seem to be not to relate “historic waters” to such rules as an exception or not an exception, but to consider the title to “historic waters” independently, on its own merits. As a consequence one should avoid, in discussing the theory of “historic waters”, to base any proposed principles or rules on the alleged exceptional character of such waters.

185. In determining whether or not a title to “historic waters” exists, there are three factors which have to be taken into consideration, namely,

(i) The authority exercised over the area by the State claiming it as “historic waters”;
(ii) The continuity of such exercise of authority;
(iii) The attitude of foreign States.

186. First, effective exercise of sovereignty over the area by the claiming State is a necessary requirement for title to the area as “historic waters” of that State. Secondly, such exercise of sovereignty must have continued during a considerable time so as to have developed into a usage. Thirdly, the attitude of foreign States to the activities of the claiming State in the area must have been such that it can be characterized as an attitude of general toleration. In this respect the same weight need not be given to the attitude of all States. Particularly, it would seem reasonable, in the case of a State (or States) claiming historic title to waters bordered by two or more States, to accord special importance to the attitude of the other riparian State (or States).

187. It is apparent from this description of the requirements which must be fulfilled for a title to “historic waters” to emerge, that the existence of such a title is to a large extent a matter of judgment. A large element of appreciation seems unavoidable in this matter, but it is possible that Government comments on the three factors listed above could yield a number of concrete examples which might serve as illustration and guidance.

188. The burden of proof of title to “historic waters” is on the State claiming such title, in the sense that, if the State is unable to prove to the satisfaction of whoever has to decide the matter that the requirements necessary for the title have been fulfilled, its claim to the title will be disallowed. In a dispute both parties will most probably allege facts in support of their respective contentions, and in accordance with general procedural rules each party has the burden of proof with respect to the facts on which he relies. It is therefore doubtful whether the general statement that the burden of proof is on the State claiming title to “historic waters”, although widely accepted, is really useful as a definite criterion.

189. The legal status of “historic waters”, i.e., the question whether they are to be considered as internal waters or as part of the territorial sea, would in principle depend on whether the sovereignty exercised in the particular case over the area by the claiming State and forming a basis for the claim, was sovereignty as over internal waters or sovereignty as over the territorial sea. It seems logical that the sovereignty to be acquired should be commensurate with the sovereignty actually exercised.

190. The idea of establishing a definitive list of “historic waters” in order to diminish the uncertainty which claims to such waters might cause has serious
drawbacks. An attempt to establish such a list might induce States to overstate both their claims and their opposition to the claims of other States, and so give rise to unnecessary disputes. Moreover, it would in any case be extremely difficult, not to say impossible, to arrive at a list which would be really final.

191. On the other hand, it would be desirable to establish a procedure for the obligatory settlement of disputes regarding claims to “historic waters”. As a pattern for such a procedure one might use the relevant provisions of the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas; in that case disputes would be referred to a special commission, unless the parties agreed on another method of peaceful settlement. Or one could follow the optional protocols adopted at the 1958 Geneva Conference on the Law of the Sea and the 1961 Vienna Conference on Diplomatic Intercourse and Immunities; disputes would then lie within the compulsory jurisdiction of the International Court of Justice, subject to the possibility of having recourse also to a conciliation procedure or to arbitration.

192. For practical reasons, an agreement on the settlement of disputes might preferably be included in a protocol separate from any instrument containing substantive rules on “historic waters”. In that way, States which would be unwilling to subscribe to a procedure for the compulsory settlement of disputes could adhere to the substantive rules agreed upon.
# LAW OF TREATIES

[A/63/772, 26 March 1988]

DOCUMENT A/CN.4/144

First report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur

[Original text: English]

[26 March 1962]

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Chapter II. The rules governing the conclusion of treaties by States (continued)

A. Summary of the Commission's Proceedings

(1) At its first session in 1949 the International Law Commission placed the "Law of Treaties" amongst the topics listed in paragraphs 15 and 16 of its report for that year as being suitable for codification and appointed Mr. J. L. Brierly as Special Rapporteur for the subject. It also decided to give this subject priority. However, owing to the various special tasks assigned to the Commission by the General Assembly and to the necessity for completing for the Assembly subjects like the law of the sea and diplomatic—and consular—intercourse and immunities, the Commission found it necessary again and again to postpone its consideration of the law of treaties. A number of important reports were produced by its successive Special Rapporteurs; but—with the exception of a special report on the subject of reservations to multilateral conventions in 1951, and work in 1959 on a substantial part of Sir G. Fitzmaurice's report on the framing, conclusion and entry into force of treaties—the Commission was not able to do much more than give occasional glances at these reports.

(2) At its second session in 1950 the Commission devoted its 49th to 53rd meetings to a preliminary discussion of Mr. J. L. Brierly's first report (A/CN.4/23) and also had available to it replies of Governments (A/CN.4/19) to a questionnaire addressed to them by the Special Rapporteur. A majority of the Commission favoured the explanation of the term 'treaty' as a 'formal instrument' rather than as an 'agreement recorded in writing'. Mention was frequently made by members of the Commission of the desirability of emphasizing the binding character of the obligations under international law established by a treaty.

“A majority of the Commission were also in favour of including in its study agreements to which international organizations are parties. There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration.”

(3) At its third session in 1951, the Commission had before it two reports from Mr. Brierly, one (A/CN.4/43) a continuation of the Commission's general work on the law of treaties and the other (A/CN.4/41) a special report on "reservations to multilateral conventions" called for by the General Assembly at the same time as it had requested an advisory opinion from the International Court of Justice on the particular problem of reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. As to the Commission's opinions and recommendations on the special subject of reservations to multilateral conventions, there is no need to summarize them here, since this is done with some fullness in the appendix to the present report. Its general work on the law of treaties at its third session was summarized by the Commission in its report for 1951 as follows (A/1858, paragraphs 74 and 75):

“At the third session of the Commission, Mr. Brierly presented a second report on the law of treaties. In this report, the special rapporteur submitted a number of draft articles which he had proposed in the draft convention contained in his report to the previous session.

“In the course of eight meetings (namely the 84th to 88th, and 98th to 100th meetings), the Commission considered these draft articles as well as some others contained in the first report of the special
rapporteur. Various amendments were adopted and tentative texts were provisionally agreed upon. These texts were referred to the special rapporteur, who was requested to present to the Commission, at its fourth session, a final draft, together with a commentary thereon. The special rapporteur was also requested to do further work on the topic of the law of treaties as a whole and to submit a report thereon to the Commission.

But the Commission also took a further decision at that session concerning the question of international organizations already mentioned in its report for 1950. At its 98th meeting, it adopted "the suggestion put forward the previous year by Mr. Hudson, and supported by other members of the Commission, that it should leave aside, for the moment, the question of the capacity of international organizations to make treaties, that it should draft the articles with reference to States only and that it should examine later whether they could be applied to international organizations as they stood or whether they required modifications".

(4) At its fourth session in 1952 the Commission had before it a "Third Report on the Law of Treaties" (A/CN.4/54) prepared by Mr. Brierly, who, however, had meanwhile resigned his membership of the Commission. In the absence of its author the Commission did not think it expedient to discuss that report, and it confined itself to electing Mr. H. Lauterpacht to succeed Mr. Brierly as Special Rapporteur.

(5) At its fifth session in 1953 the Commission received a report from Mr. Lauterpacht (A/CN.4/63) containing draft articles and commentaries on a number of topics in the law of treaties but, owing to its other commitments, was unable to take up the report at that session. It therefore instructed Mr. Lauterpacht to continue his work and present a further report. At its sixth session in 1954 the Commission duly received Mr. H. Lauterpacht's second report (A/CN.4/87) but was again unable to take up the subject. Meanwhile Mr. (by then Sir H.) Lauterpacht had resigned from the Commission on his election as judge of the International Court of Justice, and at its seventh session in 1955 the Commission elected Sir G. Fitzmaurice as Special Rapporteur in his place.

(6) At the next five sessions of the Commission, from 1956 to 1960, Sir G. Fitzmaurice presented five separate and comprehensive reports on the law of treaties, covering respectively (a) the framing, conclusion and entry into force of treaties (A/CN.4/101), (b) the termination of treaties (A/CN.4/107), (c) essential and substantial validity of treaties (A/CN.4/115), (d) effects of treaties as between the parties (operation, execution and enforcement) (A/CN.4/120) and (e) treaties and third States (A/CN.4/130). During these years the Commission's time was largely taken up with its work on the law of the sea and on diplomatic and consular intercourse and immunities, so that, apart from a brief discussion of certain general questions of treaty law at the 368th to 370th meetings of its 1956 session, it was only able to concentrate upon the law of treaties at its eleventh session in 1959. At that session it devoted some twenty-six meetings8 to a discussion of Sir G. Fitzmaurice's first report on the framing, conclusion and entry into force of treaties, and provisionally adopted the texts of fourteen articles, together with their commentaries (A/4169, chapter II).

However, the time available was not sufficient to enable the Commission to complete its series of draft articles on this part of the law of treaties.9 In its report for 1959 the Commission drew particular attention (ibid., paragraph 18) to the fact that it did not envisage its work on the law of treaties as taking the form of one or more international conventions but had favoured the idea of "a code of a general character". The reasons for preferring a "code" were stated to be twofold (ibid., citation from Sir G. Fitzmaurice's first report):

"First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based."

Mention was also made of possible difficulties that might arise if the law of treaties were to be embodied in a multilateral convention and then some States did not become parties to it or, having become parties to it, subsequently denounced it. On the other hand, it recognized that these difficulties arise whenever a convention is drawn up embodying rules of customary law. Finally, it underlined that, if it were decided to cast the code in the form of a multilateral convention, considerable drafting changes, and possibly the omission of some material, would almost certainly be required.

(7) The twelfth session, in 1960, was almost entirely taken up with consular intercourse and immunities and ad hoc diplomacy, so that no further progress was made with the law of treaties during that session. Then Sir G. Fitzmaurice had himself to retire from the Commission on his election as judge of the International Court of Justice, and at the thirteenth session, in 1961, the Commission elected Sir H. Waldock to succeed him as Special Rapporteur for the law of treaties. At the same time the Commission took the following general decisions as to its work on the law of treaties (A/4843, paragraph 39):

"(i) That its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention;

"(ii) That the Special Rapporteur should be requested to re-examine the work previously done in this field by the Commission and its Special Rapporteurs;

"(iii) That the Special Rapporteur should begin with the question of the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the whole subject in two years."

The first of these decisions, as will be appreciated from the observation in the report for 1959, marked a radical change in the Commission's approach to its work on the law of treaties. Instead of a mere expository statement

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8 Chapter II of the Commission's report for 1959 contains article 1-10, and 14-17 of a proposed chapter of a comprehensive code on the law of treaties.
of the law, it now envisaged the preparation of draft articles capable of serving as the basis for a multilateral convention. Only in this way, it felt, were really concrete results likely to be obtained from its work on this subject.

B. Scope of the present draft articles

(8) The Special Rapporteur, in accordance with the Commission’s decision, has aimed at preparing a group of draft articles which might provide the basis for a convention on the “conclusion” of treaties. “Entry into force” has been regarded as naturally associated with, if not actually part of, “conclusion”, while the subject of “registration of treaties” has been added as belonging essentially to the procedure of treaty-making and as being closely linked in point of time to entry into force. It is believed that, if the Commission finds it possible to reach a wide measure of agreement upon draft articles covering these three topics, they will furnish the basis either for a self-contained convention on the “conclusion, entry into force and registration of treaties” or for a separate chapter in a larger convention covering the whole or a large part of the law of treaties. Having regard to the success achieved in the law of the sea by dealing successively in a series of separate conventions with more or less self-contained sections of the subject, and bearing in mind the almost unmanageable size of the total corpus of the law of treaties, it is believed that a somewhat similar procedure could usefully be adopted also for this subject. Accordingly, the Special Rapporteur has thought it right to try and prepare for the Commission’s consideration as closely integrated and self-contained a group of articles on the conclusion, entry into force and registration of treaties as possible.

(9) The present articles differ considerably from those adopted by the Commission in 1959, in more than one respect. First, in draft articles on the conclusion of treaties it has not seemed appropriate to include articles 3 and 4 of the 1959 draft, which dealt with the “concept of validity” and “general conditions of obligatory force”. These two articles found a place at the beginning of the 1959 draft because in that draft the “conclusion” of treaties was envisaged as part of a general chapter on the “validity” of treaties, belonging more particularly to the subject of “formal validity”. This method of arrangement may have been appropriate enough for an expository code, but it seems to be somewhat too jurisprudential for a convention. As Sir G. Fitzmaurice pointed out in his first report (A/CN.4/101), the “conclusion” of treaties can be regarded either as a process or as a substantive matter relating to the validity of treaties. Clearly, the topic of “conclusion” of treaties has both aspects; but in the draft articles of a convention on the “conclusion, entry into force and registration of treaties” it would appear unnecessary — and perhaps rather artificial — to begin with solemn pronouncements about the concept of the validity of treaties and the general conditions of obligatory force. Secondly, and also for the reason that the Commission has changed from an expository code to the draft articles of a convention, the purely explanatory material in article 5 and paragraph 1 of article 6 of the 1959 draft has been omitted. Thirdly, the present draft aims at a more complete statement of the procedural aspects of treaty-making by adding such matters as the correction of errors in the text and the functions of a depository and, as already mentioned, registration of treaties, which were not included in Sir G. Fitzmaurice’s draft of this topic. This seems to be not only justifiable but even necessary, if the emphasis is shifted, as the Special Rapporteur thinks that it must be in a convention, from the “validity” to the “process” aspect of conclusion of treaties.

(10) The present draft naturally owes much to the valuable studies of Mr. Brierly and Sir H. Lauterpacht and especially to the detailed scientific exposition of the various topics by Sir G. Fitzmaurice. It also takes account of the provisional conclusions reached by the Commission itself at previous sessions, and has drawn inspiration from the debates at those sessions. But, although much of the ground covered by the present articles has been covered in previous reports, the conversion of the previous draft into the basis for a convention has necessitated a complete re-examination of it. Moreover, the previous work of the Commission had left unresolved a number of important and controversial matters, such as capacity to enter into treaties, ratification, reservations to multilateral conventions and the question of a “right” to participate in multilateral conventions, which provided difficult problems for the Special Rapporteur and must now engage the attention of the Commission. The draft articles have been arranged provisionally in five chapters, (a) “general provisions”, (b) “the rules governing the conclusion of treaties by States”, (c) “the entry into force and registration of treaties”, (d) “corrections of errors and the functions of depositaries”, and (e) “the treaties of international organizations”.

(11) The last chapter is purely tentative and the Commission may not wish to carry its examination of treaty-making by international organizations very far until it has had the comments at any rate of the United Nations and the specialized agencies. In 1959 (A/4169, chapter II, para. 6 of commentary to article 2), as previously in 1951 (98th meeting), the Commission decided to leave aside for the moment the question of the capacity of international organizations to make treaties; it decided to draft the articles with reference to States only and to examine later whether they could be applied to international organizations as they stood, or whether they required modifications. On the other hand, the Commission fully accepted that international organizations may possess treaty-making capacity and that international agreements concluded by international organizations possessing such capacity fall within the scope of the law of treaties. For in explaining what it meant by the phrase “other subjects of international law possessed of treaty-making capacity” the Commission said that the “obvious case” is that of international organizations. One course, no doubt, might be to leave aside altogether the question of the treaties of international organizations until the whole of the Commission’s work on the law of treaties, as it affects States, is complete and then to consider just how much of it is applicable to organizations. But, as already pointed out, the conclusion, entry into force and registration of treaties, with which the present articles are concerned, is to a large extent a self-contained branch of the law.

4 Article 102 of the Charter requires treaties to be registered “as soon as possible”, while the Committee adopted by the General Assembly on 14 December 1916 provide that they shall not be registered until they have entered into force; see further the Commentary to article 22.

5 A/4159, loc. cit. In truth, international organizations now figure almost as prominently as States in the United Nations Treaty Series.
The conclusion, entry into force and registration of treaties

Text of draft articles with commentary

Chapter 1. General provisions

ARTICLE 1. DEFINITIONS

For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

(a) "International agreement" means an agreement intended to be governed by international law and concluded between two or more States or other subjects of international law possessing international personality and having capacity to enter into treaties under the rules set out in article 3 below, which has executed acts by which it has definitively given its consent to be bound by a treaty in force; "Presumptive party" means a State or other subject of international law which has qualified itself to be a "party" to a treaty which has not yet entered into force.

(b) "Treaty" means any international agreement in any written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation).

(c) "Party" means a State or other subject of international law, possessing international personality and having capacity to enter into treaties under the rules set out in article 3 below, which has executed acts by which it has definitively given its consent to be bound by a treaty in force; "Presumptive party" means a State or other subject of international law which has qualified itself to be a "party" to a treaty which has not yet entered into force.

(d) "Bilateral treaty" means a treaty participation in which is limited to two parties and no more. "Pluralateral treaty" means a treaty participation in which is open to a restricted number of parties and the provisions of which purport to deal with matters of concern only to such parties. "Multilateral treaty" means a treaty which, by its terms or by the terms of a related instrument, has either been made open to participation by any State without restriction, or has been made open to participation by a considerable number of parties and either purports to lay down general norms of international law or to deal in a general manner with matters of general concern to other States as well as to the parties to the treaty.

(e) "Full powers" means a formal instrument issued by the competent authority of a State authorizing a given person to represent the State either for the purpose of negotiating or signing a treaty or of executing an instrument relating to a treaty.

(f) "Adoption" means the act whereby the negotiating States express their final concurrence in the formulation of the text of a proposed treaty.

(g) "Authentication" means the act whereby the text of a treaty is rendered definitive and final ne varietur.

(h) "Signature" means the acts whereby a duly authorized representative of a State or other Subject of international law signs the treaty on behalf of such State or other Subject of international law, and includes initialling where, under the provisions of article 8 below, initialling is equivalent to a full signature. "Signature ad referendum" means a signature expressly made conditional upon reference to and confirmation by the State or other Subject of international law whose representative has so worded his signature.

(i) "Ratification" means the international act whereby a State, which has affixed its signature to a treaty upon condition of subsequent ratification or approval, confirms and renders definitive its consent to be bound by the treaty.

(j) "Accession" means the international act whereby a State which is not a signatory to a treaty, under a power conferred upon it by the terms of the treaty or of another instrument, expresses its will to "accede" or "adhere" to the treaty and thereby definitively gives its consent to be bound by the treaty.

(k) "Acceptance" means the international act whereby a State gives its consent to be bound by a treaty, either as a definitive confirmation of a signature previously affixed to the treaty or as an original and definitive expression of its consent to be bound.

(l) "Reservation" means a unilateral statement whereby a State, when signing, ratifying, acceding to or accepting a treaty, specifies as a condition of its consent to be bound by the treaty a certain term which will vary the legal effect of the treaty in its application between that State and the other party or parties to the treaty. An explanatory statement or statement of intention or of understanding as to the meaning of the treaty, which does not amount to a variation in
the legal effect of the treaty, does not constitute a reservation.

(m) "Depositary" means the State or international organization designated in a treaty to be the custodian of the authentic text and of all instruments relating to the treaty and to perform with reference to such treaty and instruments the functions set out in article 25 below.

Commentary

(1) Paragraphs (a) and (b) of article 1 give effect to decisions previously reached by the Commission. After some initial hesitation in 1950 (50th, 51st and 52nd meetings) the Commission decided in 1951 and again in 1959 (A/4169, chapter II, articles 1 and 2) that its codification of the law of treaties should cover all international agreements in writing, whatever their form or appellation, and that it should deal with treaties concluded by international organizations as well as by States.

(2) Paragraph (a) defines an "international agreement" which is, of course, the essential basis for the existence of a "treaty". The definition is in somewhat broader terms than that found in article 2 of the 1959 draft, some of the elements in the 1959 draft—written form and expression in a single instrument or in related instruments—appear to belong rather to the definition of "treaty" and will be found in paragraph (b). The two main elements in the present definition are (i) "intended to be governed by international law" and (ii) "between two States or other subjects of international law possessing international personality and having capacity to enter into treaties". As to the first element, the Commission felt in 1959 that the element of subjection to international law is so essential a part of an international agreement that it should be expressly mentioned in the definition. There may be agreements between States, such as agreements for the acquisition of premises for a diplomatic mission or for some purely commercial transaction, the incidents of which are regulated by the local law of one of the parties or by a private law system determined by reference to conflict of laws principles. Whether in such cases the two States are internationally accountable to each other at all may be a nice question; but even if that were held to be so, it would not follow that the basis of their international accountability was a treaty obligation. At any rate, the Commission was clear that it ought to confine the notion of an "international agreement" for the purposes of the law of treaties to one the whole formation and execution of which (as well as the obligation to execute) is governed by international law.

(3) The second element in the definition concerns the character and capacity that the parties to an agreement must possess, if it is to be considered an international agreement. Capacity to enter into treaties is dealt with in article 3, and on this point, therefore, reference should be made to the commentary attached to that article, where the question of statehood and personality as an element in treaty-making capacity is also discussed. Here it is enough to indicate what the words "two or more States or other subjects of international law possessing international personality and having capacity to enter into treaties" are intended, on the one hand, to include and, on the other, to exclude. The phrase "other subjects of international law" is designed (a) to leave no doubt as to the right of entities such as the Holy See to be considered parties to international agreements and (b) to admit the possibility of international organizations being parties to international agreements. The obvious case is the United Nations, whose capacity to be a party to treaties was expressly recognized in the Regulations adopted on 14 December 1946 by the General Assembly, concerning the Registration and Publication of Treaties and International Agreements, and whose international personality and treaty-making capacity was affirmed by the International Court of Justice in the case of Reparations for Injuries Suffered in the Service of the United Nations. In fact, the number of international agreements concluded by international organizations in their own names, both with States and with each other, and registered as such with the Secretariat of the United Nations, is now very large, so that inclusion in the general definition of "international agreements" for the purposes of the present articles seems really to be essential.

(4) But it is not enough that the party to the agreement should be a "State" or that it should be a "subject of international law"; it must also possess "international personality" and have "capacity to enter into treaties". This requirement is designed to exclude a State which is subordinated to another State, whether under a federal constitution or otherwise, and which under the applicable constitutional agreements or arrangement does not possess any distinct international personality and treaty-making capacity (see paragraphs 2-5 of the commentary to article 3). It is also designed to exclude any question of agreements made by States or organizations with private individuals or with corporate legal persons from the category of international agreements. While opinions may differ—and the Commission itself was divided in 1959—on the question whether individuals and corporations can be regarded as subjects of international law, there seems to be no disposition to dissent from the view that agreements made by them cannot fall within the concept of an "international agreement" or a "treaty" for the purposes of the present articles. It is true that the question has been raised by some authorities as to whether a concession or contract between a State and a foreign corporation may not in certain circumstances be governed by the "general principles of law", as a system of what has been referred to as "trans-national law"—a system more or less intermediate between municipal and international law. Whether or not that view is accepted, there does not appear to be any question of foreign concessions or contracts being considered to be governed by the law of "treaties" or of "international agreements" as this law has hitherto been understood and applied. Certainly, the International Court of Justice in the Anglo-Iranian Oil Company Case appears to have regarded the concessionary "convention" between Iran and the foreign company as something fundamentally different from a treaty or international agreement.

(5) Paragraph (d) embraces within the term "treaty" every international agreement in writing, whether formal or informal, whether embodied in a

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6 The expression "1959 draft" means, in the context of this report, the draft articles 1-10 and 14-17 adopted by the Commission at its eleventh session (A/4169, chapter II).

7 See article 4, paragraph 1 (c).


10 I.C.J. Reports, 1952, p. 112.
single instrument or in two or more related instruments and whatever title or name is given to it. The wording of the definition of "treaty" in paragraph (b) differs to some extent from that in article 1, paragraph 1, of the Commission's 1959 draft, primarily because, as already indicated above, some elements of the present definition of "treaty" were attached in 1959 to the definition of "international agreement". But the substance of the present definition and of that in the 1959 draft is believed to be the same. The adoption of this broad definition, which sweeps into the law of treaties every form of international agreement in writing, is held by the Commission to be called for by reason of the following considerations.11

(6) Although the term "treaty" in one sense connotes a particular type of international agreement, the single formal instrument which is commonly subject to ratification, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument nor usually subject to ratification, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an "agreed minute" or a "memorandum of understanding", could not appropriately be called formal instruments, and yet they are undoubtedly international agreements subject to the law of treaties. A general code on the law of treaties must cover all such agreements, whether embodied in one instrument or in two or more related instruments, and whether the instrument is "formal" or "informal". The question whether, for the purpose of describing all such instruments and the law relating to them, the expressions "treaties" and "law of treaties" should be employed, rather than "international agreements" and "law of international agreements", is a question of terminology rather than of substance.

(7) This view is in conformity with the pronouncement of the Permanent Court of International Justice in the Austro-German Customs Régime Case,12 where the Court said:

"From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols or exchanges of notes."

Much the same view is generally to be found amongst writers and was expressed as long ago as 1869 by the eminent jurist Louis Renault,13 when he spoke of a treaty as being:

"... every agreement arrived at between... States, in whatever way it is recorded (treaty, convention, protocol, mutual declaration, exchange of unilateral declaration)" [translation].

(8) Two further factors militate strongly in favour of this view:

(a) In the first place, the "accord en forme simplifiée"—to use the apt French term—so far from being at all exceptional, is very common. The number of such agreements, whether embodied in a single instrument or in two or more related instruments, is now very large—much larger than that of the treaty or convention stricto sensu, i.e. the single formal instrument. Their use is moreover steadily increasing, as was convincingly shown by Sir H. Lauterpacht in his first report (A/CN.4/63, commentary to article 2).

(b) The juridical differences, in so far as they really exist at all, between treaties stricto sensu and "accords en forme simplifiée" lie almost exclusively in the field of form, and of the method of conclusion and entry into force. The law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements. In relation to these matters, there are admittedly some important differences of a juridical character between certain classes or categories of international agreements. But these differences spring neither from the form, the appellation, nor any other outward characteristic of the instrument in which they are embodied: they spring exclusively from the content of the agreement, whatever its form, and from the particular character, not of that form, but of that content. It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of a code on the law of treaties merely because, in the field of form pure and simple, and of the method of conclusion and entry into force, there may be certain differences between such agreements and treaties stricto sensu. At the most, such a situation might make it desirable, in that particular field and in the section of the code dealing with it, to institute certain differences of treatment between different forms of international agreements. But the question arises whether it is necessary to do even that.

(9) None of the Special Rapporteurs has in fact found it necessary to distinguish between the different kinds of treaty in that way. Distinctions, where they exist, normally reveal themselves unaided owing to the nature of their subject-matter, and do not need to be expressly characterized as applicable only to certain forms of international agreements. For example, the legal incidents of ratification can have no application to classes of agreements that do not require ratification. But if the code indicates in what circumstances agreements are not subject to ratification, there is no need to make express distinctions between different forms of agreements. Moreover, as Sir H. Lauterpacht pointed out, even in the case of ratification, where the designation of agreements as "treaties" may appear to have particular relevance, there are no classes of international agreements which are inherently inadmissible of ratification. An "exchange of notes", for example, although normally not subject to ratification, is sometimes made by an express provision in the notes exchanged.

(10) The present Rapporteur is of the view that it is undesirable and unnecessary to draw distinctions between different categories of international agreements merely on the basis of their form and designation. As was pointed out by the Commission in 1959, distinctions of other kinds do exist, for example,
between bilateral, plurilateral and multilateral treaties, and, where appropriate, these distinctions find a place in the draft articles (e.g. articles 5, 13, 18, 19 and 20).

(11) Another consideration is that, even in the case of single formal agreements—treaties in the narrower sense of the word—an extraordinarily rich and varied nomenclature has developed which serves to confuse the question of classifying international agreements. Thus, in addition to “treaty”, “convention” and “protocol”, we do not infrequently find titles such as “declaration”, “charter”, “covenant”, “pact”, “act”, “statute”, “agreement”, “concordat”, whilst names like “declaration” and “agreement” and “modus vivendi” may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as “agreement”, “exchange of notes”, “exchange of letters”, “memorandum of agreement”, or “agreed minutes”, may be more common than others.16

(12) Accordingly, the need for some generic term to cover all forms and designations of international agreements is evident. Although some of the members of the Commission in 1959 would have preferred to confine the use of the word “treaty” to its classical meaning of a single formal instrument, the general feeling was that it is the right word to use as the generic term embracing written international agreement. Its use for this purpose is supported by two important provisions of the Statute of the International Court of Justice. In Article 36, paragraph 2, amongst the matters in respect of which States parties to the Statute can accept the compulsory jurisdiction of the Court, there is listed “a. the interpretation of a treaty”. But clearly, this cannot be intended to mean that States cannot accept the compulsory jurisdiction of the Courts for purposes of the interpretation of international agreements not actually called treaties, or embodied in instruments having another designation. Again, in Article 38, paragraph 1, amongst the elements which the Court is directed to apply in reaching its decisions, there is listed “a. international conventions”. But equally, this cannot be intended to mean that the Court is precluded from applying other kinds of instruments embodying international agreements, but not styled “conventions”. On the contrary, the Court must and does apply them. The fact that in one of these two provisions dealing with the whole range of international agreements the term employed is “treaty” and in the other the even more formal term “convention” serves to confirm that use of the term “treaty” generically in the present articles to embrace all international agreements is perfectly legitimate. Moreover, the only real alternative would be to use for the generic term the phrase “international agreement”, which would not only make the drafting more cumbersome but would sound strangely today, when the “law of treaties” is the term almost universally employed to describe this branch of international law.

(13) The word “treaty” has accordingly been used throughout the present articles as a generic term covering international agreements as a whole. In its 1959 draft (article 1, paragraph 2), the Commission faced its definition of “treaty” as a generic term with the words “Unless the context otherwise requires”. These words have been omitted from paragraph (b) of the present article, because it is thought that, if the word “treaty” is defined as having a generic meaning for the purpose of the draft articles, its use with a particular meaning ought, if possible, to be avoided. It has not been found necessary to employ the term in its particular sense in the present articles concerning the conclusion, entry into force and registration of treaties, and it may be doubted whether the need will be found to exist in other branches of the law of treaties. The one place where it might have been very convenient to have a term covering treaties in the classical sense is in article 10, for the purpose of distinguishing agreements presumed to be subject to ratification from those presumed not to require it. If it is considered that a satisfactory formula has been found, or can be devised, to distinguish between formal and less formal agreements in that context, then the Special Rapporteur believes that it will be possible to confine the use of the term “treaty” to its generic sense.17

(14) With one exception, the remaining paragraphs do not appear to require any explanation, since the definitions explain themselves, or at least do so when read in conjunction with the articles to whose subject-matter they particularly relate. The exception is subparagraph (d), which defines “bilateral”, “plurilateral” and “multilateral” treaty. The first of these definitions needs no comment, but the second and third make a distinction which is important but not easy to draw with precision. The distinction finds a place in article 5, concerning the adoption of the text of the treaty, articles 7 and 13, concerning respectively the right to sign and the right to accede to a treaty, articles 18 and 19, concerning consent and objection to reservations, and article 20, concerning entry into force of treaties. In its 1959 draft, the Commission itself drew a distinction between plurilateral and multilateral treaties in article 6 (adoption of the text) and article 17 (the right to sign) without, however, formulating a fully considered definition of the two terms. In its commentary upon article 1, paragraph 1, the Commission referred to a “plurilateral” treaty as one made “between a restricted number or group of States”, and referred to a “multilateral” treaty as “e.g. a general multilateral convention concluded at a conference convened under the auspices of an international organization”. The text of article 6 paragraph 4 (b) spoke of “treaties negotiated between a restricted group of States”, evidently meaning “plurilateral” treaties, and distinguished these treaties from the “multilateral treaties negotiated at an international conference” and from the “treaties drawn up in an international organization or at an international conference convened by an international organization” which were dealt with in sub-paragraphs (e) and (d). The text of article 17 spoke of “plurilateral treaties negotiated between a regional or other restricted group of States”, contrasting them with “general multilateral treaties”. The commentary upon that article, in discussing the question whether international law recognizes the existence of any abstract right of participation, said that no prob-

16 In his article “The Names and Scope of Treaties” (American Journal of International Law, 51 (1957), No. 3, p. 574), Mr. Denys P. Myers considers no less than thirty-eight different appellations. See also the list given in Sir H. Lauterpacht’s first report (A/CN.4/63), paragraph 1 of the commentary to his article 2.

17 Truth to tell, if “treaty” were to be given a secondary meaning of “treaty stricto sensu”, the formulation of that secondary meaning might not be free from difficulty in drafting, e.g. with regard to “Protocol”, “Final Act” and “Procès-verbal”.
lem could arise with reference to “treaties (e.g. of a regional character) negotiated between a restricted number or group of States”; and it added: “The problem was therefore confined to general multilateral treaties or conventions, and even so not necessarily all of them, for it was only in relation to such as could be said to be of general interest to all States or intended to create norms of general international law, that it was suggested that international law did, or should, postulate an inherent right of participation for every State.” Thus the 1959 report gives certain indications as to what the Commission had in mind in distinguishing between “plurilateral” and “multilateral” treaties; but these indications scarcely constitute the kind of definition which might provide a sufficient basis for distinguishing between “plurilateral” and “multilateral” treaties for the purpose of applying to them differing legal régimes. If the treaty is expressly made open to participation by any State, it identifies itself as a multilateral treaty. But for other cases the definition is not one which it is easy to formulate with any degree of precision. In the first place, mere restriction of the treaty to specified States is not a sufficient criterion because many multilateral treaties are so restricted, even although the class of participating States may be a very wide one; indeed, it is because participation in the treaty is technically “closed” that the question of the existence of a right of accession for other States arises. Secondly, a purely numerical test would scarcely be feasible, for it would be a nice question to determine when the number of States becomes sufficiently large for the treaty to be regarded as having passed from the plurilateral to the multilateral category. Moreover, it is possible for a treaty to be concluded by a considerable number of States on a regional or other limited basis. Nor in some cases will it necessarily be clear whether a treaty deals with a matter which is properly to be considered as one of “general concern”. From one point of view, a matter which is properly to be considered as one of particular international interest, such as the supply of meteorological information or the white slave traffic, seems rather to be of general concern when it deals with a matter of general interest, such as the supply of meteorological information or the white slave traffic, and deals with it in a general manner. The definition tentatively put forward in the text seeks to combine the element of “number” with that of the general character of the subject-matter of the treaty.

**Article 2. Scope of the present articles**

1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every international agreement which under the definitions laid down in article 1, paragraphs (a) and (b), constitutes a treaty for the purpose of these articles.

2. The fact that, by reason of the definitions in article 1, paragraphs (a) and (b), an international agreement not in written form or a unilateral declaration or any other form of international act is excluded from the application of the present articles shall not be understood as affecting in any way such legal force as these agreements or acts may possess under general international law.

3. Nothing contained in the present articles shall affect in any way the characterization or classification of particular international agreements under the international law of any State, whether for the purposes of its domestic constitutional processes or otherwise.

**Commentary**

1. Paragraph 1 is sufficiently explained by the discussion of “international agreement” and “treaty” in the commentary on paragraphs (a) and (b) of article 1. Here, the words “except to the extent that a particular context may otherwise require” preface the statement as to the scope of the present articles simply as a recognition of the fact that some of their provisions are, either by their express terms or by their inherent nature, only applicable to certain kinds of treaties. A provision relating to multilateral treaties could hardly, for example, have any application to “exchanges of notes”.

2. Paragraph 2 does two things. First, it emphasizes that the draft articles do not cover international agreements not drawn up in written form, and that they have no reference to unilateral declarations or to any other international act falling outside the definitions in article 1, paragraphs (a) and (b). Secondly, it preserves whatever legal force such oral agreements and unilateral instruments or acts may possess under general international law. In short, without going any further into the matter, paragraph 2 acknowledges the existence of oral agreements such as that resulting from the Ihlen Declaration in the Eastern Greenland Case and of written undertakings such as declarations under the Optional Clause of the Statute of the Court; and it puts on record that their omission from the draft articles is not to be understood as in any way altering the legal position in regard to them.

3. Paragraph 3 is designed to safeguard the position of States in regard to their internal law and usages, and more especially in connexion with the ratification of treaties. In many countries, it is a constitutional requirement that international agreements in a form considered under the internal law or usage of the State to be a “treaty” must be “ratified” by the legislature or have their ratification authorized by it—perhaps by a specific majority; whereas other forms of international agreement are not subject to this requirement. Moreover, recourse is not infrequently had to less formal types of international agreement for the very purpose of obviating the need of bringing the agreement before the legislature, either because its subject-matter appears to render this unnecessary or for other reasons. Accordingly, it is quite essential that the definition given to the term “treaty” in the present articles should do nothing to disturb or affect in any way the existing domestic rules or usages which govern the classification of international agreements.

**Article 3. Capacity to become a party to treaties**

1. Capacity in international law (hereafter referred to as international capacity) to become a party to treaties is possessed by every independent State, whether a unitary State, a federation or other form of union of States, and by other subjects of international law invested with such capacity by treaty or by international custom.

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18 Series A/B No. 53.
19 This point is referred to again in the commentary on article 10.
2. (a) In the case of a federation or other union of States, international capacity to be a party to treaties is in principle possessed exclusively by the federal State or by the Union. Accordingly, if the constitution of a federation or Union confers upon its constituent States power to enter into agreements directly with foreign States, the constituent State normally exercises this power in the capacity only of an organ of the federal State or Union, as the case may be.

(b) International capacity to be a party to treaties may, however, be possessed by a constituent State of a federation or union, upon which the power to enter into agreements directly with foreign States has been conferred by the Constitution:

(i) If it is a member of the United Nations, or
(ii) If it is recognized by the federal State or Union and by the other contracting State or States to possess an international personality of its own.

3. (a) In the case of a dependent State the conduct of whose international relations has been entrusted to another State, international capacity to enter into treaties affecting the dependent State is vested in the State responsible for conducting its international relations, except in the cases mentioned in sub-paragraph (b).

(b) A dependent State may, however, possess international capacity to enter into treaties if and in so far as:

(i) The agreements or arrangements between it and the State responsible for the conduct of its foreign relations may reserve to it the power to enter into treaties in its own name; and

(ii) The other contracting parties accept its participation in the treaty in its own name separately from the State which is responsible for the conduct of its international relations.

4. International capacity to become a party to treaties is also possessed by international organizations and agencies which have a separate legal personality under international law if, and to the extent that, such treaty-making capacity is expressly created, or necessarily implied, in the instrument or instruments prescribing the constitution and functions of the organization or agency in question.

Commentary

(1) The draft articles adopted by the Commission in 1959 did not contain an article on capacity to conclude treaties. The reason was that, without in any way committing itself, the Commission had provisionally adopted a plan for the intended code of treaty law under which the question of "capacity of parties" was to be dealt with in part II of the code as one of the topics of the "essential or substantive validity" of treaties, part I being confined to matters relating to the "formal" validity of treaties (A/4169, chapter II, paragraph 14). Capacity under international law to become a party to treaties has, however, a dual aspect, since it touches the question, what kind of legal persons are necessary as parties to an agreement if it is to be considered a treaty, as well as the question of the validity under international law of the agreement claimed to be a treaty. No doubt, it was for this reason that Sir H. Lauterpacht in his first report (A/CN.4/63) dealt in detail with capacity to enter into treaties, both in his commentary upon his article 1, covering the essential requirements of a treaty, and in his article 10, covering "capacity of the parties" in its relation to the substantive validity of a treaty. Now that the Commission is engaged in formulating draft articles for a possible convention on treaty law, it may feel that to omit "capacity of parties" from the provisions concerning the conclusion of treaties would leave a noticeable gap in the articles, and the Special Rapporteur has accordingly prepared the present article for the Commission's consideration.

(2) Paragraph 1 sets out the general rule in regard to treaty-making capacity. In formulating it, the Special Rapporteur has taken account of the opinion expressed by the Commission in its commentary on article 2 of its 1959 draft that, whereas treaty-making capacity involves international personality in the sense that all entities having treaty-making capacity necessarily have international personality, it does not follow that all international persons have treaty-making capacity. The phrase "other subjects of international law invested with such capacity by treaty or by international custom" is designed primarily to cover the cases of international organizations and agencies and other entities like the Holy See. In its 1959 commentary the Commission said:

"It has always been a principle of international law that entities other than States might possess international personality and treaty-making capacity. An example is afforded by the case of the Papacy, particularly in the period immediately preceding the Lateran Treaty of 1929, when the Papacy exercised no territorial sovereignty. The Holy See was nevertheless regarded as possessing international treaty-making capacity. Even now, although there is a Vatican State which is under the territorial sovereignty of the Holy See, treaties entered into by the Papacy in general, entered into not by reason of territorial sovereignty over the Vatican State, but on behalf of the Holy See, which exists separately from that State."

States, including dependent States, and international organizations are dealt with in more detail in the further paragraphs of this article, but it has not been thought necessary to deal more specifically with the Holy See.

(3) Paragraph 2 seeks to cover the cases of federal States or Unions of States where the treaty-making capacity may under their constitutions be to some extent shared between the federation or Union and its component units. The subject is not free from difficulty, as can be seen from its somewhat different treatment in the reports of Sir H. Lauterpacht and Sir G. Fitzmaurice. The former, who did not, however, formulate any draft rules on the point, appears to have considered that the component States of a federation may in certain circumstances have a measure of treaty-making capacity, and even that agreements between the two component States of a federation can be considered treaties in the international sense (A/CN.4/63, commentary on articles 1 and 10). He referred in this connexion to the application by municipal tribunals of the doctrine of rebus sic stantibus to "treaties" between two component States of the German Federation in the case of Bremen v. Prussia20 and of the Swiss Federation in the case of Canton of Thurgau v. Canton.

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20 Annual Digest of Public International Law Cases, 1925-6, Case No. 266.
of St. Gallen. Sir G. Fitzmaurice, on the other hand, in an article of his drafted under the same objective, (A/CN.4/115) strictly confined international capacity to conclude treaties to the federation itself and declined to attribute any treaty-making capacity to a component State in its own right; and he regarded any treaty-making authority conferred upon a component State simply as the authority of a subordinate agent or organ contracting on behalf of the federation. In other words, what is given in paragraph (a) of the present draft article as the normal rule was put forward by Sir G. Fitzmaurice as the sole rule.

(4) However close the analogy may be between international treaties and agreements between two component units of a federation or Union of States, it seems impossible to regard the latter agreements as examples of the exercise of international treaty-making capacity without risking confusion between the spheres of operation of international and domestic law. Normally, at any rate, agreements between component States of a federation operate within the régime of the constitutional law of the federation; if the federation subsequently dissolves, questions may arise as to the status of the agreements, but that problem belongs to another branch of the law of treaties. Accordingly, although in certain types of federation inter-State or inter-provincial agreements may appear to be similar to treaties, it does not seem appropriate to classify these agreements as arising from the exercise of international treaty-making capacity. No such agreement, it is believed, has ever been registered under the relevant provisions of the Covenant or Charter.

On the other hand, it may perhaps be thought to go too far in the opposite direction to deny altogether the possibility of any separate treaty-making capacity for the component State of a federation or union, even in those cases where both the domestic constitution and foreign States have recognized the component State to possess a measure of international personality. The examples, if not numerous, are important and difficult to overlook in draft articles on the law of treaties; for the Ukraine and Byelorussia are not only Members of the United Nations but have also been admitted as parties to many multilateral treaties in their own right. If both the federal constitution and third States recognize a component State to possess a measure of separate international personality, it seems difficult to deny it any international treaty-making capacity in the present articles. Nor is the question purely academic, because it may be necessary to know in a given case whether the other contracting States must look to the component State alone for the performance of the obligations undertaken in the treaty or whether the federation is also liable for the non-performance of the treaty by the component State. It is indeed possible that the component State might make a reservation not made by the federation itself. Accordingly, a rule has been formulated in paragraph (b) of the present article which, while not contemplating an unrestricted right for component States to claim treaty-making capacity, admits such capacity to the extent that the State's separate international personality is recognized both by the constitution of the federation and by the other contracting State or States.

(5) An analogous problem is posed by protectorates and other dependent States in cases where the treaties or arrangements establishing the status of dependency place the general conduct of the State's foreign relations in the hands of another State but do not exclude all possibility of agreements being made directly between the dependent State and a foreign State. For example, the Court said in the case concerning the Rights of Nationals of the United States of America in Morocco, that Morocco had "made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and on behalf of Morocco, and, in principle, all of the international relations of Morocco"; but that Morocco had nevertheless "remained a sovereign State" and had "retained its personality as a State under international law": moreover, as was mentioned by Sir H. Lauterpacht (A/CN.4/63, commentary to article 10), Morocco was admitted to the signature of a number of multilateral treaties as a separate party in its own right, even while still under the protection of France. And Tunisia was another example of the same kind. In such cases, the protected State would seem to retain a measure of treaty-making capacity in its own right, even although its exercise may be subject to the consent of the protecting Power. It scarcely seems possible, however, to attribute the same measure of treaty-making capacity to a self-governing territory not possessing the character of a State. It is true that a dependent self-governing territory has sometimes been admitted to separate participation in multilateral treaties, usually of a technical or economic character, in its own name. But it seems doubtful whether in such cases the other contracting parties do or can legally look upon the self-governing territory as a distinct juridical person and a responsible party to the treaty entirely separate from the parent State.

(6) Paragraph 4 of this article seeks to state the general rule in regard to the treaty-making capacity of international organizations and agencies. The view has previously been expressed in the introduction to this report that the appropriate method of dealing with treaty-making by international organizations is to deal with it in a separate chapter, and that it may be wondered why it is proposed to include a rule concerning their treaty-making capacity in the present article. The reason is that it seems logical to regard treaty-making capacity as a general matter distinct from the procedure of treaty-making, and to include it in chapter I. If this arrangement is accepted, then the appropriate place for the general rule concerning the treaty-making capacity of organizations is in the present article. As to the rule proposed in paragraph 4, it is based upon principles analogous to those laid down by the International Court of Justice in its opinion on "Reparations for Injuries Suffered in the Service of the United Nations" for determining the capacity of the United Nations to present an international claim. In particular, it is based upon the statement of the Court that: "Under international law, the Organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties."

21 Ibid., 1927-8, Case No. 289.


23 E.g. Universal Postal Union, World Health Organization and International Trade Organization.

24 I.C.J. Reports, 1949, p. 171, at p. 179.

25 Ibid., p. 182.
Chapter II. The rules governing the conclusion of treaties by States

Article 4. Authority to negotiate, sign, ratify, accede to or accept a treaty

1. A representative of a State purporting to have authority to negotiate and draw up the terms of a treaty on behalf of his State shall be required, except in the cases mentioned in paragraph 3, to furnish or exhibit credentials issued by the competent authority in the State concerned and providing evidence of such authority. He is not, however, required for these purposes to be in possession of full-powers to sign the treaty.

2. (a) A representative of a State purporting to have authority to sign (whether in full or ad referendum), ratify, accede to or accept a treaty on behalf of his State shall be required, except in the cases mentioned in paragraph 3 (b) below, to produce full-powers which invest him with authority to execute the act in question.

(b) Full-powers shall be in the form prescribed by the law and practice of the State concerned and shall emanate from the competent authority in that State. They may either be in a form restricted to the execution of the particular act concerned or in the form of a general grant of full-powers which covers the execution of that particular act.

(c) In case of delay in the transmission of the instrument of full-powers, a letter or telegram evidencing the grant of full-powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated may be employed provisionally as a substitute for full-powers, subject to the production in due course of an instrument of full-powers, executed in proper form. Similarly, full-powers issued by a State's permanent representative to an international organization may also be employed provisionally as a substitute for full-powers issued by the competent authority of the State concerned, subject to the production in due course of an instrument of full-powers executed in proper form.

3. (a) Heads of a diplomatic mission have authority ex officio to negotiate a bilateral treaty between their State and the State to which they are accredited and to authenticate its text. They are, however, bound to furnish or exhibit specific authority to execute any of these matters which, in principle, are left to be determined by the domestic laws and usages of each State. Nor is it necessary for them to produce full-powers specifically authorizing him, as the case may be, to sign, ratify, accede to or accept the treaty in question. In point of fact, the normal practice in regard to instruments of ratification, accession and acceptance appears to be that the instruments are executed directly by the Head of State or Head of Government or by the Minister of Foreign Affairs, in which case they fall under the exception in paragraph 3 (a). Nevertheless, the execution of these acts is sometimes entrusted to the head of a diplomatic mission or the permanent representative of the State at the headquarters of an international organization, and the production of full-powers will be necessary.

In 1959, the Commission was divided on the question whether full-powers are necessary for signature ad referendum as well as for signature in full, partly because it lacked information as to the actual practice of Governments and partly because of differences of view as to the exact legal effect of signature ad referendum. The practice of Governments in regard to treaties of which the Secretary-General of the United Nations is depositary indicates that no distinction is made for this purpose between signature in full and signature ad referendum. The Commission may feel that it now has a sufficient basis for framing the rule in that sense, and paragraph 2 (a) has therefore been drafted in that form for the Commission's consideration.

(4) Paragraph 2 (b) deals with the form of full-powers. While the procedure of ratification of an international act is regulated by international law, the particular forms used for full-powers and the particular authorities within the State which invest them are matters which, in principle, are left to be determined by the domestic laws and usages of each State. Normally, full-powers are issued ad hoc for the execution of the particular act in question, but there does not

Commentary

(1) In the Commission's 1959 draft articles the authority of representatives to negotiate was dealt with in article 6, paragraphs 2 and 3, and their authority to sign in article 15. The Commission itself did not have time to consider the questions of ratification, accession and acceptance, so that there is no provision in the 1959 draft articles concerning authority to execute these acts; and Sir G. Fitzmaurice's drafts on these matters do not cover the point. Nevertheless, the question of the representative's authority does arise also in regard to ratification, accession and acceptance; and, in order to avoid repetition, it seems better to cover all four cases of authority to exercise the treaty-making power on behalf of a State in a single article. The present article, therefore, contains the substance of the provisions of article 6, paragraphs 2 and 3, and article 15 of the Commission's 1959 draft, with some modifications and additions; while the present commentary also incorporates the relevant parts of the 1959 Commentary.

(2) Paragraph 1 deals with authority to negotiate, as distinct from authority to sign. While authority to sign, if possessed by the representative at the stage of negotiation, may reasonably be held to imply authority to negotiate, the reverse is not true; and, except in the cases mentioned in paragraph 3 (a), a further authority specifically empowering him to sign will be required before signature can be affixed. Per contra it is not necessary, for the purposes of negotiating and drawing up a treaty, to be in possession of full-powers to sign; credentials or ex officio authority under paragraph 3 suffice for these purposes.

(3) Paragraph 2 (a) lays down the general rule that, except for Heads of State, Heads of Government or Foreign Ministers, who are exempted in paragraph 3 (a), a representative is required to produce full-powers specifically authorizing him, as the case may be, to sign, ratify, accede to or accept the treaty in question. In point of fact, the normal practice in regard to instruments of ratification, accession and acceptance appears to be that the instruments are executed directly by the Head of State or Head of Government or by the Minister of Foreign Affairs, in which case they fall under the exception in paragraph 3 (a). Nevertheless, the execution of these acts is sometimes entrusted to the head of a diplomatic mission or the permanent representative of the State at the headquarters of an international organization, and the production of full-powers will be necessary.

See Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7), paragraph 37.

Sec: ibid., paragraph 31.
appear to be any reason why full-powers should not be couched in a general form provided that they leave no doubt as to the scope of the powers which they confer. Some countries, it is believed, may adopt the practice of issuing to certain Ministers, as part of their normal commissions, general or standing full-powers which, without mentioning any particular treaty, confer on the Minister general authority to sign treaties or categories of treaties on behalf of the State. 

In addition, some permanent representatives at the headquarters of international organizations, that are the depositaries of multilateral treaties, are clothed by their States with general full-powers, either included in their credentials or contained in a separate instrument. It also appears that during regular sessions of the General Assembly the permanent representatives are sometimes given general full-powers with respect to agreements which may be concluded during the session (see Summary of the Practice of the Secretary-General (ST/LEG/7), paragraph 35). The Commission will be glad eventually to have information from Governments as to their practice in regard to “general” full-powers. In the meanwhile, it seems justifiable tentatively to insert in paragraph 2(b) a provision admitting the sufficiency of full-powers framed to cover treaties generally or specific categories of treaty. But, whether the full-powers be general or particular, they must be sufficient to invest the representative with authority to execute the particular act in question—signature, ratification, accession or acceptance, as the case may be.

(5) Paragraph 2 (c) recognizes a practice of comparatively recent development which is of considerable utility and should serve to render initialling and signature ad referendum unnecessary save in exceptional circumstances. If the promised full-powers do not in due course arrive, the signature provisionally admitted on the emergency basis contemplated in this sub-paragraph naturally becomes a nullity and the State concerned is in the same position as if its signature had never been affixed to the treaty.

The Summary of the Practice of the Secretary-General (ST/LEG/7), paragraph 29, states that since 1949 “full-powers issued by a permanent representative to the United Nations acting on instructions from his Government have in practice been accepted as having the same validity as full-powers transmitted by telegraph for purposes of signing conventions which are subject to ratification”. The part played by permanent representatives to international organizations in modern diplomatic life is now so well recognized and so important that it seems desirable to take account of the practice of the Secretariat of the United Nations in the present connexion. If the head of a diplomatic mission may issue a letter provisionally evidencing the grant of full-powers, there would certainly seem to be no reason why the Head of a permanent mission to an international organization should not do the equivalent on the same provisional basis for the purpose of signing, ratifying, acceding to or accepting a treaty for which the organization is the depositary. A sentence covering this point has accordingly been inserted in paragraph 2(c) and is submitted for the Commission’s consideration.

(6) Paragraph 3 (a) notices a well-established exception to the rule that the representative of a State deputed to negotiate a treaty on its behalf must furnish credentials evidencing his authority to negotiate the treaty. Such authority is inherent in the Head of a diplomatic mission in virtue of his credentials as such and the functions of his office. Thus, article 3 (c) of the Vienna Convention on Diplomatic Relations provides that “the functions of a diplomatic mission consist, inter alia, in . . . negotiating with the Government of the receiving State”.

Paragraph 3 (b) notices equally well-established exceptions not only to the rule concerning the furnishing of credentials but also to the rule concerning the furnishing of full-powers. It is inherent in the office and function of Heads of State, Heads of Government and Foreign Ministers that they possess authority both to negotiate a treaty and to sign, ratify, accede to or accept a treaty on behalf of their State. In the case of Foreign Ministers, the inherent authority of the Minister to bind his Government in negotiations with a foreign State was expressly recognized by the Permanent Court of International Justice in the Eastern Greenland case, in connexion with an oral undertaking by the Foreign Minister of Norway, commonly referred to as the “Iliden Declaration”.

ARTICLE 5. ADOPTION OF THE TEXT OF A TREATY

1. The adoption of the text or texts setting out the provisions of a proposed treaty takes place:

(a) In the case of a bilateral treaty, by mutual consent of the parties;

(b) In the case of a plurilateral treaty, by unanimity unless the States concerned shall decide by common consent to apply another voting rule;

(c) In the case of a multilateral treaty drawn up at an international conference convened by the States concerned, by any voting rule that the conference shall, by a simple majority, decide to apply;

(d) In the case of a multilateral treaty drawn up at an international conference convened by an international organization, by any voting rule that may be prescribed in the constitution of the organization, or in a decision of the organ competent to determine the voting rule, and, failing any such decision, by the rule that the conference shall by a simple majority decide to apply;

(e) In the case of a multilateral treaty drawn up in an international organization, by any voting rule that may be prescribed in the constitution of the organization or, failing any such constitutional provision, in a decision of the organ competent to decide the voting rule.

2. The participation of a State in the adoption of the text of a treaty, whether in negotiation or at an international conference, shall not place it under any obligation to proceed afterwards to sign, ratify, accede to, or accept the said treaty. A fortiori, such participation shall not place it under any obligation to carry out the provisions of the treaty.

3. Nothing contained in paragraph 2 of this article shall, however, affect any obligation that a State participating in the drawing up of a treaty may have, under general principles of international law, to refrain for the time being from any action that might frustrate or prejudice the purposes of the proposed treaty, if and when it should come into force.

28 See paragraph 3 of the commentary on article 15 of the Commission’s 1959 draft.

Commentary

(1) This article incorporates the substance of article 6, paragraph 4, and of article 8 of the draft articles approved by the Commission in 1959. It does not seem to the Special Rapporteur that the provisions of article 7 of the 1959 draft are suitable for inclusion in a convention, as distinct from an expository code. Article 7 of that draft read as follows:

"Elements of the text"

"1. It is not a juridical requirement of the text of a treaty that it should contain any particular rubric, such as a preamble or conclusion, or other special clause.

2. However, in addition to a statement of its purpose and an indication of the parties, provisions normally found in the text of a treaty are those concerning the date and method of the entry into force of the treaty, the manner of participation of the parties, the period of its duration, and other formal and procedural matters.

3. In those cases where a treaty provides expressly that it shall remain open for signature, or provides for ratification, accession, acceptance, coming into force, termination or denunciation, or any other matter affecting the operation of the treaty, it should indicate the manner in which these processes are to be carried out and the requisite communications to the interested States which are to be made."

These provisions appear to point out what it is desirable that a model text of a treaty should contain rather than to state rules of law. The Special Rapporteur therefore suggests that it is unnecessary to do more than to recall them in the commentary to the present article.

(2) Paragraph 1 of the present article embodies and largely repeats the rules set out in paragraph 4 of article 6 of the 1959 draft concerning the voting rules for the adoption of the text of a treaty, with the difference that those rules are here set out under five heads instead of four. The reason which led the Special Rapporteur to make this change is that paragraphs (c) and (d) of the 1959 draft really cover three, not two, distinct types of case, and it seemed simpler to treat them in three separate paragraphs.

(3) Paragraph 1 of the present article deals with the voting rule by which the text of the treaty is adopted, i.e., the voting rule by which the form and content of the proposed treaty is settled. At this stage, the negotiating States are concerned only with drawing up the text of the treaty as a document setting out the provisions of the proposed treaty, and their votes, even when cast at the end of the negotiations in favour of adopting the text as a whole, relate solely to this process. A vote cast at this stage, therefore, is not in any sense an expression of the States' agreement to be bound by the text, which can only become binding upon it by a further expression of its consent (signature, ratification, accession or acceptance) in accordance with the provisions of articles 7 to 16 of these draft articles.

(4) Sub-paragraphs (a) and (b) of paragraphs 1 express the obvious principles (a) that the text of a bilateral treaty can only be adopted by mutual consent and (b) that the rule of unanimity must also apply in the case of treaties negotiated between a small number or a restricted group of States for some specific common purpose, unless they agree—by unanimous vote—to adopt a different voting rule.

(5) The main problem is the voting rules for adopting general multilateral treaties, and here a distinction has to be made between treaties drawn up at conferences convened by the negotiating States themselves and those drawn up either within an international organization or at a conference called by an international organization. For in the latter type of case the organization itself may play a role in settling the voting rule.

(6) Sub-paragraph (c) deals with the first type of case, where the conference is convened by the States themselves. There seems to be little doubt that up to the First World War the unanimity rule generally applied also at this type of conference, and in 1959 some members of the Commission considered this still to be the basic rule in the absence of an express decision to the contrary. The general feeling in the Commission, however, was that in recent times the practice at large international conferences of adopting texts by some kind of majority had become so invariable that it would now be unrealistic to postulate any other system. A conference can still, of course, decide to proceed by unanimity, but in the absence of any such decision it must now be assumed that it will proceed on the basis of a majority voting rule. The only questions now are, what is the majority to be and how is the conference to decide on that majority—i.e., does this initial decision itself require to be taken by unanimity, or can it equally be taken by majority vote and, if so, by what majority?

(7) The Commission had some initial doubts in 1959 as to exactly how far it is appropriate for a code of treaty law to lay down voting rules for an international conference convened by States for the purpose of drawing up the text of a treaty. Ultimately, however, while considering that it should refrain from laying down a hard and fast voting rule for the adoption of the treaty, the Commission concluded that it is essential to prescribe by what means the conference should arrive at its decision concerning the voting rule. It might be true that a conference would usually arrive at it somehow, but perhaps only after long procedural debates, delaying the start of the substantive work of the conference. Once this view had been adopted by the Commission, there was general agreement that the rule of the simple majority as the basis of the adoption by the conference of its rules of procedure, including its substantive voting rule, was the only practicable one. The Conference's substantive voting rule—i.e., for the adoption of texts, and for taking any other non-procedural decisions, would then be such as the Conference, by a simple majority, decided upon. This substantive voting rule might itself be a simple majority rule, or it might be two-thirds, or even, theoretically, unanimity.

(8) Sub-paragraph (d) deals with the case, now increasingly common, where a multilateral treaty is drawn up at a conference convened by an international organization. The constitutions of some organizations, such as the International Labour Organisation, prescribe in detail the method by which treaties concluded under their auspices shall be drawn up. Those of others do not. However, the appropriate organ of the

30 The rule of the simple majority vote for procedural decisions is universally admitted; but the discussion here relates to substantive decisions—in particular those leading to the adoption of texts.
organization, if it is constitutionally empowered to do so, may, in deciding to convene a conference, prescribe the voting rule in advance as one of the conditions for doing so. In the absence of any rule having been laid down in advance either by the constitution or by the decision of the organization, the determination of the voting rule clearly rests with the conference itself, and that determination, as in cases under sub-paragraph (c), should itself be made by a simple majority. Thus, according to the Secretary of the Commission, the practice of the Secretariat of the United Nations, when the General Assembly convenes a conference, is, after consultation with the groups and interests mainly concerned, to prepare provisional or draft rules of procedure for the conference, including a suggested voting rule, for adoption by the conference itself. But it is left to the conference to decide whether to adopt the suggested rule or replace it by another.

(9) Sub-paragraph (e) deals with the case where the treaty is drawn up within the international organization itself. In these cases it would seem that, if the constitution of the organization does not prescribe the voting rule, the determination of the rule must rest with the organ competent under the constitution to lay down the voting rule; in other words, either with the organ within which the treaty is to be drawn up or some other organ competent to give directions to it concerning the voting rule to be applied.

(10) Paragraphs 2 and 3 of the present article embody, with some redrafting, the two paragraphs of article 8 of the 1959 draft, which was entitled "Legal consequences of drawing up the text". This title, as the 1959 commentary conceded, was "slightly elliptical", in that the primary rule stated in the article, as in paragraphs 2 and 3 of the present article, was that adoption of the text of a treaty does not involve legal consequences. That being so, the present Rapporteur does not think it justifiable to place these paragraphs in a separate article, and suggests that the proper place for them is in the present article. Truth to tell such "direct or positive" legal consequences as might seem to follow from participation in the adoption of the text of a treaty really attach to participation in the "authentication" of the text, which falls under the next article. This seems to the Special Rapporteur to be another reason why it may be better not to have a separate article which deals with the so-called "legal consequences of drawing up the text".

(11) Paragraph 2 of the present article has been drafted somewhat differently from article 8, paragraph 1, of the 1959 draft, to which it corresponds. The phrase "does not involve any obligation to accept the text", found in the 1959 draft, seems to the Special Rapporteur to be open to objection on two grounds. First, the "acceptance" of a treaty text is a technical process in treaty-making (see article 16 of the present draft) and it seems better to avoid the use of the word "accept" in its non-technical meaning, so far as possible. Second, the phrase "accept the text" is ambiguous and confusing in the context of this paragraph. For the chief object of this paragraph is to underline the distinction between "adopting" the "text" and "agreeing" to the "treaty" itself. The intention in the paragraph, as the 1959 commentary confirms, was to emphasize that adoption of the text does not involve any obligation to carry out the treaty, but the words "accept the text" used in the paragraph do not express that intention and may confuse the issue. In any event, it seems desirable also to make the point that participation in the adoption of the text involves no obligation to proceed afterwards to become a party to the treaty; this point has accordingly been added.

Article 6. Authentication of the text as definitive

1. Unless another procedure has been prescribed in the text or agreed upon by the negotiating States, the text of the treaty as finally adopted may be authenticated in any of the following ways:

(a) Initialling of the text by the representatives of the States concerned;

(b) Incorporation of the text in the Final Act of the conference in which it was adopted;

(c) Incorporation of the text in a resolution of an international organization in which it was adopted or in a resolution of one of its organs or in any other manner prescribed by the Constitution of the organization concerned.

2. In addition, signature of the text by a representative of a negotiating State, whether a full signature or signature ad referendum, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another manner with respect to that State under the provisions of paragraph 1 of this article.

3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty. No additions or amendments may afterwards be made to the text except by means of the adoption and authentication of a further text providing for such additions or amendments.

Commentary

(1) This article repeats, with minor drafting changes, the provisions of article 9 of the 1959 draft, and the commentary which follows repeats, in abbreviated form, the 1959 commentary.

(2) Authentication of the text is necessary in order that, before the negotiating States are called upon to decide whether they will become parties to the treaty or not—or in some cases before they are called upon to decide whether they will even sign it, as an act of provisional consent to the treaty—they may know finally and definitively what is the text of the treaty which, if they take these decisions, they will be signing or becoming parties to. It is clear that such steps as signature, ratification, accession, bringing into force, etc., can only take place on the basis of a text the terms of which have been settled, and are not open to change. There must come a point, therefore, at which the process of negotiation or discussion is halted, and the text which the parties have agreed as a text is estabilished as being the text of the proposed treaty. Whether the States concerned will eventually become bound by this treaty is of course another matter, and remains quite open. None is committed at that stage. But if they are eventually to become bound, they must have, as the basis of any further action, a final text not susceptible of alteration. Authentication is the process by which this final act is established, and it consists in some act or procedure which certifies the text as the correct and authentic text.

(3) Accordingly, once a recognized procedure of authentication has been carried out in relation to a
text, any subsequent alteration of it results not merely in an amended text, but in a new text, which will then itself require authentication or reauthentication in some way. Thus, where signature is itself the method of authentication, changes effected after signature would require the text to be re-signed or re-initialled, or a new text to be drawn up and signed; or alternatively a separate protocol registering and authenticating the changes would have to be drawn up and signed. In general, no changes could be made to the original signed text or signature copy itself, for then the parties would be on record as having signed a text different from the one which, at the actual date of signature, they did sign. If changes should be made on the original signed text or signature copy, they would themselves require to be signed or initialled, and dated. The document as a whole would then stand authenticated as the actual text of the treaty. But final establishment of the text at some point there must be, and, in order to register and stabilize this text as the basis for ratification (where necessary) and entry into force, there must be an eventual authentication of it in its final form by some recognized method.

(4) The same considerations apply, mutatis mutandis, and perhaps even more obviously, where authentication of the original text has taken place, not by signature but, e.g., by embodiment of the text in its final act of a conference, or in a resolution of an organ of an international organization. Any subsequent alteration of it would result in a new text, itself requiring authentication by the same or some other recognized means.

(5) Previous drafts and codes of the law of treaties have not recognized authentication as a distinct and necessary part of the treaty-making process. The reason appears to be that until comparatively recently signature was the normal method of authenticating a text and that signature always has another and more important function; for it also operates as an expression of the State's consent to be bound by the treaty (either conditionally upon ratification or unconditionally if the treaty is not subject to ratification). The authenticating aspect of signature is consequently masked by being merged in its consent aspect. This was pointed out by Professor Brierly in his first report (A/CN.4/23, commentary on his article 6), where he went on to explain that in recent years other methods of authenticating texts of treaties on behalf of all or some of the negotiating parties have been devised. He gave as examples the incorporation of unsigned texts of projected treaties in signed Final Acts of diplomatic conferences, the special procedure of the International Labour Organisation under which the signatures of the President of the International Labour Conference and of the Director-General of the International Labour Office authenticate the texts of labour conventions, and treaties which are not signed at all but opened for accession and whose texts are authenticated by being incorporated in a resolution of an international organization. Professor Brierly considered, as is the view also of the Commission, that these developments in treaty-making practice render it desirable to emphasize in the draft the distinction between signature of the texts of treaties as a means of mere authentication and signature as the process, or part of the process, whereby a State or international organization expresses its consent to be bound by the treaty.

(6) The foregoing comments, it is thought, provide a sufficient explanation of the provisions of the present article. It may, however, be added that signature has been dealt with separately in paragraph 2, instead of being included in paragraph 1, primarily for the reason that, whereas the processes listed in paragraph 1 are always, or almost always, acts of authentication, this is not the case with signature, which may not be an act of authentication if the text has already been authenticated by another process, such as incorporation in the Final Act of a conference.

(7) The Commission decided in 1959 that there is no need to provide expressly in the draft that sealing; i.e., the affixing of seals as well as signatures to the treaty, which was a common practice in the past, is unnecessary despite the appearance in a treaty of the common-form recital "have signed the present treaty and affixed thereto their seals". The Commission—and the present Special Rapporteur—is of the same view—thought it would be sufficient to mention the point in the commentary.

**ARTICLE 7. THE STATES ENTITLED TO SIGN THE TREATY**

1. In the case of bilateral and plurilateral treaties the right to sign the treaty shall be confined to the States participating in the adoption of the text and to such other States as, by the terms of the treaty or otherwise, they may agree to admit to the signature of the treaty.

2. In the case of multilateral treaties the right to sign shall be governed by the following rules:

(a) Where the treaty specifies the particular States or categories of States which are to be admitted to the signature, only those States or categories of States have the right to sign;

(b) Where the treaty does not contain any provision on the matter, every State invited to participate in the negotiations, or to attend the conference at which the text of the treaty is drawn up shall have the right to sign the treaty;

(c) Where the treaty does not contain any provision on the matter and is one which has been left open for signature, States other than those referred to in sub-paragraph (b) may be admitted to the signature of the treaty:

(i) If the treaty is already in force and more than four years have elapsed since the adoption of the text, then with the consent of two-thirds of the parties to the treaty;

(ii) If the treaty is already in force but not more than four years have elapsed since the adoption of the text, or if the treaty is not yet in force, then with the consent of two-thirds of the States that participated in the negotiations, or attended the conference, at which the text was drawn up.
Commentary

(1) This article repeats, with some changes, the provisions in article 17 of the 1959 draft articles, which were approved by the Commission; and the present commentary reproduces the substance of the 1959 commentary, though with considerable abbreviation of the first five paragraphs. The present Special Rapporteur's explanations of certain changes in the provisions in article 17 of the 1959 draft articles, following below.

(2) The article deals with the conditions under which a State may have a right to sign a treaty, and touches one aspect of the question whether a State can ever be said to have a right to insist on becoming a party to multilateral treaties which are of general interest or lay down norms of general international law. No problem exists in the case of bilateral or plurilateral treaties, since it is clear that outside States can only become parties to these treaties with the consent of the other States concerned, either expressed in the treaty itself or in an agreement separately arrived at. In the case of multilateral treaties, however, the problem is a real one, and especially today, since there are many newly created States, and numbers of multilateral treaties may, by their terms, no longer be open to signature or accession. The Commission in 1959, while recognizing the need to lay down provisions on this matter, considered that any abstract right of participation in a multilateral treaty that may exist or be thought desirable cannot be wholly divorced from the method by which it may be exercised in the concrete case. In other words, any right of participation in multilateral treaties of a general character must be related to the existing procedures of treaty-making in the international community, and to the accepted methods of admitting States to participation in multilateral treaties. If this conclusion is accepted, the problem resolves itself into considering, with reference to each method separately (signature, ratification, accession, acceptance), what States or categories of States have or should have the right to participate in the treaty through the particular method concerned. This was the solution adopted by the Commission in 1959, and it did not then attempt to reach a final decision concerning the inclusion of a general article about participation in multilateral treaties. It decided to defer this decision until after the drafting of the individual articles on the right to sign, ratify, accede, etc. The exchange of views in the Commission on the question of a general right of participation is, however, relevant to the understanding of the proviso contained in the present article concerning the right to sign, and in those of articles 13 and 16, concerning the right to accede to or accept a treaty; and it will therefore be summarized in the paragraphs which now follow.

(3) The discussion centred upon the question whether international law does, or ought to, postulate an inherent right of participation for every State in multilateral treaties which are intended to create general norms of international law or are otherwise of general interest to all States. Some members of the Commission considered that such an inherent right ought to be postulated on the ground that it is for the general good that all States should become parties to such treaties, and that in a world community of States, no State should be excluded from participation in treaties of this character.

(4) Other members of the Commission, who did not share this view, pointed out that, even if the right were to be admitted in principle, great practical difficulties would arise in putting it into effect. Either a treaty of this kind makes provision for the States or category of States to be admitted to participation, or it does not. If it does not, either expressly or by implication, exclude any State then there is no problem. Any State may participate in the treaty by taking the prescribed steps. If on the other hand the treaty contains some limitation, then it is virtually impossible to admit that a State not covered can, by pleading an alleged inherent right, insist on participation, thus overriding the wishes and intentions of the framers of the treaty, as expressed in it.

(5) These members pointed out that the problem really arises at an earlier stage, when the decision is taken who are to be the "framers of the treaty"—in short, who are to be invited to the conference at which the treaty is drawn up? As a rule, participation in the conference (or the right to participate, whether exercised or not) normally determines the right of participation in the treaty. If the eventual treaty does not limit the class of States which may participate, no difficulty arises; if, however, it does impose a limitation, it would usually be found that the designated class was the same as that invited to the conference. In so far as there is a problem, therefore, it can only be dealt with at the invitation stage. It cannot be met by a rule overriding the express provisions of the treaty about participation, which would not, indeed, be juridically possible.

(6) The further point was made that any inherent right of participation, if admitted, would give rise to serious difficulties in relation to the recognition or non-recognition of States or Governments. Even although the mere fact that a State is a party to a multilateral treaty does not of itself involve recognition of that State or its Government by other parties, nevertheless serious political and other problems would arise if parties to a treaty found themselves obliged to admit as a party States or Governments which they might perhaps have expressly intended to exclude by the wording of the participation clause.

(7) As to the problem of the new State which wants to become a party to an old treaty, the Commission, although considering this to be an important matter, thought that it is mainly a question of accession and belonged more particularly to that subject. It was pointed out that the dimensions of the problems are in practice slight. Most general treaties of the kind involved have accession clauses. The problem arises primarily in the case of the older treaties which are no longer open for signature and which either do not expressly provide for accession or which, like The Hague Conventions of 1899 and 1907 concerning the Pacific Settlement of International Disputes or the Barcelona Convention of 1921,\footnote{Convention on the Régime of Navigable Waterways of International Concern, Barcelona, 1921, League of Nations, Treaty Series, vol. VII, pp. 36-63.} contain an accession clause limiting the right of accession to certain States.

(8) Paragraph 1 of the present article contains the substance of paragraph 1 of article 17 of the Commission's draft, the differences in the wording being merely drafting changes. Paragraph 2 contains the substance of paragraph 2 of the Commission's former article 17, and the wording of sub-paragraphs (a) and
(b) is almost the same as that of the corresponding sub-paragraphs of the Commission’s draft. These two sub-paragraphs have, however, been transposed because the reverse order seems to be rather more logical and to give a somewhat neater draft. No further explanations of paragraph 1 and paragraph 2 (a) and 2 (b) seem to be necessary, beyond those already contained in paragraphs 1-7 of the present commentary.

(9) It is, however, necessary to provide a more detailed commentary on paragraph 2 (c). It is clear that where a treaty is not left open for signature, States which do not sign on the occasion of the signature cannot do so afterwards. Where, however, the treaty remains open for signature, the question may arise of signature by a State not included amongst the sub-paragraph (b) category of States, i.e., those invited to participate in the negotiation or conference. The existing rule is that, in principle, the treaty is not open to signature by such a State. But it seems desirable to encourage the States concerned to consider allowing such a State to become a signatory in certain circumstances, and a specific provision has been inserted in the draft articles for this purpose. The insertion of this provision seems to be particularly necessary in order to cover the possibility of a signature by a new State which may have attained independence after the close of the negotiations or conference but while the treaty is still open to signature. Accordingly, paragraph 2 (c) provides that the signature of a State not included in the categories in paragraph 2 (b) should be admitted if two-thirds of the States entitled to a voice in the matter consent.

Opinions may differ as to what States are, or ought to be, entitled to a voice in deciding whether States not included in the categories in paragraph 2 (b) should be admitted to the signature of the treaty. If, for example, the treaty, while still open to signature by States comprised in the categories mentioned in paragraph 2 (b), is already in force, it is arguable that the right to open the treaty to signature by additional States should be confined to actual parties to the treaty; but it is not absolutely clear that this is necessarily the right solution, because some treaties are expressed to come into force after very few signatures and the “actual parties” might represent a very small proportion of the interested States. In the other case, where the treaty is not yet in force, it is arguable that all the States which actually attended the negotiations or conference, whether signatories or not, should be entitled to a voice in the decision; but here again, it is not clear that the right of negotiating States which have refrained from signing for so long that they may be thought not to have the intention to sign at all ought to be recognized. In 1959, the Commission thought that to cover all the various uncertainties would require a considerable elaboration of the article, which it did not feel called upon to undertake at that time. As, however, the Commission is now required to submit the present draft articles in their final form, the Special Rapporteur has thought it incumbent upon him to consider whether any further elaboration of paragraph 2 (c) is desirable to take account of those uncertainties. It seems to him that the second type of case, where the treaty is not in force, can properly be left out of account because the probability will then be that comparatively few States will have taken the steps necessary for actual participation in the treaty and there is no very strong argument for limiting the right of decision to them. On the other hand, it does seem desirable to place some limit on the right of negotiating States to a voice in the matter if the treaty is in force and a considerable time has elapsed without their having become parties to it. Accordingly, paragraph 2 (c) limits their right to a period of four years after the adoption of the text, after which only the actual parties are to have a voice in the matter. It would be possible, perhaps, to devise other more complicated formulae based on the proportion of the actual parties to the number of the States that negotiated the treaty which might be considered more scientific. A somewhat simpler rule on the lines of the present draft is, however, believed to be preferable.

(10) It will be appreciated, from what has been said above, that the provisions of paragraph 2 (c) of the present article relate only to the right to sign a treaty. The more general question whether and to what extent a State may have a right to become a party to multilateral treaties is dealt with in article 13 in connexion with the right to accede to a treaty.

**Article 8. The Signature or Initialling of the Treaty**

1. (a) Signature of a treaty shall normally take place at the conclusion of the negotiations or of the meeting or conference at which the text has been adopted.

(b) The States participating in the adoption of the text may, however, provide either in the treaty itself or in a separate agreement:

(i) That signature shall take place on a subsequent occasion; or

(ii) That the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (a) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the Government of the State concerned, in which case the signature is provisional and subject to confirmation within a reasonable time by the State on whose behalf it was made.

(b) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

(c) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the treaty.

3. (a) The treaty, instead of being signed, may be initialled, in which event the effect of the initialling shall be as follows:

(i) If it is carried out by a Head of State, Head of Government or Foreign Minister with the intention that it shall be the equivalent of a full signature, it shall operate as a full signature of the treaty on behalf of the State concerned;

(ii) In other cases it shall operate only as an authentication of the text, and a further separate act of signature is required to constitute the State concerned a signatory of the treaty.

(b) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not

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33 States which, although invited, failed to attend could not, however, have any legitimate claim to a voice in the decision.
that of the initialling, shall be the date upon which the State concerned shall become a signatory of the treaty.

Commentary

(1) The present article contains the substance of articles 16 and 10 of the Commission's 1959 draft articles, and the commentary which follows incorporates the appropriate parts of the 1959 commentaries relating to these two articles. It seems convenient to bring the provisions of the two articles together, rather than to place them in two quite widely separated articles, as was the case in the 1959 draft. For both articles concern the carrying out of the act (or sometimes an embryo act) of signature, and both touch the question of the date upon which a State becomes the signatory to a treaty. Moreover, from one point of view the question of the time and place of signature dealt with in article 16 of the 1959 draft would seem logically to precede the questions of signature ad referendum and initialling.

(2) The antithesis in paragraph 1 of the present article is between the treaty that remains open for signature until a certain date—or else indefinitely—and the treaty that does not. Most treaties, in particular bilateral treaties and treaties negotiated between a restricted number or group of States, do not remain open for signature. They are signed either immediately on the conclusion of the negotiation, or on some later date especially appointed for the purpose. In either case, States intending to sign must do so on the occasion of the signature, and cannot do so thereafter. They may of course still be able to become parties to the treaty by some other means, e.g., accession (as to which see articles 13-16).

In the case of general multilateral treaties, or conventions negotiated at international conferences, there has for some time been a growing tendency to include a clause leaving them open for signature until a certain date (usually six months after the conclusion of the conference). In theory, there is no reason why such treaties should not remain open for signature indefinitely, and cases of this are on record; however, the utility and practicability of that must depend on the character of the particular treaty. The practice of leaving multilateral treaties open for signature, at least for a reasonable period, has considerable advantages. The closing stages of international conferences are apt to be hurried. Often the Governments at home are not in possession of the final text, which may only have been completed at the last moment. For that reason, many of the representatives are not in possession of authority to sign the treaty in its final form. Yet even in those cases where it is possible to become a party to a treaty by accession, many Governments would prefer to do so by signature and ratification. It is also desirable to take account of the fact that Governments which are not sure of being able eventually to ratify (or accede) may nevertheless wish for an opportunity of giving that provisional measure of assent to the treaty which signature implies. These preoccupations can most easily be met by leaving the treaty open for signature at the seat of the "headquarters" Government or international organization. It can then be signed by any person producing a valid full-power to do so, such as the diplomatic or permanent representative of the signing State at the seat in question, or by a Foreign Minister or other authorized person present there, or having gone specially for the purpose.

(3) Paragraphs 2 and 3 deal with the mysteries of signature ad referendum and initialling. Signature ad referendum, as indicated in paragraph 2, is not of course a full signature, but it will rank as one if subsequently confirmed by the Government on whose behalf it was made. Initialling, as appears in paragraph 3, is capable of being the equivalent of a full signature only if two conditions are fulfilled:

(i) That it is carried out by a person having inherent authority by reason of his office to bind his State; and

(ii) That it is done with the intention that it shall be the equivalent of a full signature.

In all other cases initialling is an act only of authentication of the text.

The principal differences between initialling and signature ad referendum therefore are:

(a) Whereas signature ad referendum is basically both an authenticating act (where the text has not otherwise been authenticated already) and a provisional signature of the treaty, initialling is and always remains an authenticating act only, which is incapable of being transformed into full signature by mere confirmation; and

(b) Whereas confirmation of a signature ad referendum has retroactive effect causing the signature ad referendum to rank as a full signature from the date of its original affixation, a signature subsequent to initialling has no retroactive effect and the State concerned becomes a signatory only from the date of the subsequent act of signature.

(4) There may also be a certain difference in the occasions on which these two procedures are employed. Initialling is employed for various purposes. One is to authenticate a text at a certain stage of the negotiations, pending further consideration by the Governments concerned. It may also be employed by a representative who has authority to negotiate, but is not in possession of (and is not at the moment able to obtain) an actual authority to sign. Sometimes it may be resorted to by a representative who, for whatever reasons, is acting on his own initiative and without instructions, but who nevertheless considers that he should carry out some sort of act in relation to the text. Signature ad referendum may also be resorted to in some of these cases, but at the present time is probably employed mainly on actual governmental instructions in cases where the Government wishes to perform some act in relation to the text, but is unwilling to be committed to giving it even the provisional consent that a full signature would imply.

34 Article 14 of the Convention on the Pan American Union, adopted at Havana on 18 February 1928, provides as follows: "The present Convention shall be ratified by the signatory States and shall remain open for signature and for ratification by the States represented at the Conference and which have not been able to sign it". This Convention, together with seven further Conventions adopted at the Sixth Pan-American Conference held at Havana, merely states that the Convention shall remain open for signature and ratification, without specifying any time limit.

35 Such cases are infrequent but have occurred. The intention may be inferred from the instrument as a whole or from the surrounding circumstances.

36 Today, when a telegraphic authority, pending the arrival of written full powers, would usually be accepted (see article 4 above, and the commentary thereto), the need for recourse to initialling on this ground ought only to arise infrequently.
Article 9. Legal effects of a full signature

1. Full signature of a treaty, as stated in paragraph 2 of article 6, automatically constitutes an act authenticating the text of the treaty, if such authentication has not already taken place by another procedure.

2. In cases where the treaty signed is subject to ratification or acceptance, or where the signature itself has been given subject to subsequent ratification or acceptance, full signature shall not constitute the State concerned a party, whether actual or presumptive, to the treaty but shall only constitute it a signatory to the treaty with the following effects:

(a) The signatory State shall be entitled to proceed to the ratification or, as the case may be, acceptance of the treaty on compliance with any provisions in the treaty relating to ratification or acceptance.

(b) The signatory State shall be under an obligation to examine the question of the ratification or, as the case may be, acceptance of the treaty in good faith with a view to its submission to the competent organs of the State for ratification or acceptance; and if the treaty itself or the constitution of an international organization within which the treaty was adopted expressly so provides, the signatory State shall be under an obligation to submit the question of the ratification or, as the case may be, acceptance of the treaty to the consideration of its competent organs.

(c) The signatory State, during the period before it shall have notified to the other States concerned its decision in regard to the ratification or acceptance of the treaty or, failing any such notification, during a reasonable period, shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty or to impair its eventual performance.

(d) The signatory State shall have the right, as regards any other State concerned, to insist upon the observance of the provisions of the treaty regulating signature, ratification, acceptance, accession, reservations, deposit of instruments and any other such matters.

(e) The signatory State shall also be entitled to exercise any other rights specifically conferred by the treaty itself or by the present articles upon a signatory State.

3. (a) In cases where the treaty signed is not subject to ratification and where the signature itself makes no mention of its being conditional upon subsequent ratification or acceptance, the signature is subject to ratification or acceptance by the State on whose behalf it is affixed to the treaty, full signature shall have the following effects:

(i) If the treaty is to come into force upon the occasion of its signature by the negotiating States, or if it is already in force or is brought into force by the particular signature in question, the signature shall constitute the State concerned an actual party to the treaty immediately.

(ii) If the treaty is to come into force upon a future date or event, the signature shall constitute the State concerned a presumptive party to the treaty pending its entry into force, and an actual party if and when the treaty comes into force.

(b) A signatory State which, under the provisions of sub-paragraph 3 (a) (ii) above, is merely a presumptive party to the treaty, pending the entry into force of the treaty:

(i) Shall be under an obligation in good faith to refrain from any action calculated to frustrate the objects of the treaty, provided that, if after the lapse of a reasonable time from the date of signature the treaty is not yet in force, it shall be at liberty to notify the other signatory States that it no longer considers itself bound by such obligation;

(ii) Shall be entitled to exercise the rights mentioned in paragraph 2 (d) and (e) of the present article as possessed by a signatory State whose signature is subject to ratification or acceptance.

Commentary

1. The matters covered by this article were not dealt with in the Commission’s 1959 draft, but they were the subject of article 5 in Sir H. Lauterpacht’s report (A/CN.4/63) and articles 28-30 in that of Sir G. Fitzmaurice (A/CN.4/101). It is not easy to state the legal effects of full signature in a satisfactory, and still less in a simple, manner; for the legal effects of signature are connected also with the subjects of authentication and ratification, while the legal incidents of a signature which is subject to ratification or acceptance are by no means free from uncertainty.

2. In order to underline the difference between the legal effects of a signature which gives the State’s final consent to be bound by the treaty and one which is conditional upon a further act of ratification or acceptance, Sir G. Fitzmaurice’s draft made a distinction between the “concluding” and the “operative” effects of signature. The difficulty about making this distinction is that it involves erecting the phrase “to conclude a treaty” into a technical term and attributing to it a meaning different from that with which it seems to be used in everyday speech. The phrase “to conclude a treaty”, as Sir G. Fitzmaurice himself recognized, is an ambiguous one and, in truth, it seems as often as not to be used even by lawyers with the opposite meaning of reaching a final agreement to be bound by a treaty. Another difficulty is that it may be a little misleading to place so much emphasis on the “concluding” effects of a signature which is still subject to ratification or acceptance, because it is quite clear that the subsequent ratification or acceptance may introduce new reservations materially changing for the ratifying or accepting State the terms of the treaty to which the signature attached. Accordingly, while retaining the idea of the distinction between the legal effects of a signature which requires a further act of ratification or acceptance and one which does not, the present draft article does not explain this distinction in terms of a difference between the “concluding” and “operative” effects of signature.

3. Paragraph 1 restates, for the sake of completeness, the rule that, if the text has not already been authenticated in one of the ways mentioned in article 6, paragraph 1, full signature (and signature ad referendum) will automatically constitute an authentication of the text by the signatory State.

4. Paragraph 2 deals with the cases where the signature does not constitute a final expression of the State’s consent to be bound by the treaty but requires a further act of ratification or of acceptance to have that...
The primary effect of the signature in these cases is to establish the right of the signatory State to participation in the treaty by subsequently proceeding to ratification or, as the case may be, acceptance of the treaty; and sub-paragraph 2 (a) records that primary right.

(5) Sub-paragraph 2 (b) follows the opinion of Sir H. Lauterpacht and Sir G. Fitzmaurice that the signatory State in these cases is under a certain, if somewhat intangible, obligation of good faith consequent to the signature. The precise extent of this obligation is not clear. That there is no actual obligation to ratify under modern customary law is certain, and the rule concerning ratification is so stated in the article which follows. Sir H. Lauterpacht considered that signature "implies an obligation to be fulfilled in good faith to submit the instrument to the proper constitutional authorities for examination with the view to ratification or rejection". This formulation, logical and attractive though it may be, appears to go beyond any obligation that is recognized in State practice. For there are many examples of treaties that have been signed and never submitted afterwards to the constitutional organ of the State competent to authorize the ratification of treaties, without any suggestion being made that it involved a breach of an international obligation. Governments, if political or economic difficulties present themselves, undoubtedly hold themselves free to refrain from submitting the treaty to parliament or to whatever other body is competent to authorize ratification. No doubt it was for this reason that Sir G. Fitzmaurice felt bound to "state the proposition in somewhat cautious and qualified terms". In fact, the proposition ultimately formulated in article 30 (b) of his draft is so qualified by reservations and alternatives that it is doubtful whether it retains even the shadow of an obligation. The Special Rapporteur recognizes that even the obligation formulated in the present draft is both tenuous and imperfect; but imperfect obligations of good faith are not uncommon in international law, and treaty practice, as it is today, would scarcely seem imposed by the Constitution of the International Labour Organization.

(6) Sub-paragraph (c) again follows the line taken by Sir H. Lauterpacht and Sir G. Fitzmaurice, who gave their support to the proposition in the Harvard Research Draft that "It would seem that one signatory State has the right to assume that the other will regard the signature as having been seriously given, that ordinarily it will proceed to ratification, and that in the meantime it will not adopt a policy which would render ratification useless or which would place obstacles in the way of the execution of the provisions of the treaty, once ratification has been given". Although, as has been said previously, this proposition seems to state the question of "proceeding to ratification" more strongly than State practice warrants, its recognition of a general obligation of good faith to refrain during at least some period from acts calculated to frustrate the object of the treaty appears to be both generally accepted by writers who have examined the point and supported by decisions of international tribunals. The Permanent Court itself, as Sir H. Lauterpacht pointed out, seems to have recognized in the Case of certain German Interests in Polish Upper Silesia that a signatory State's misuse of its rights in the interval before ratification may amount to a breach of the treaty; and see also McNair, Law of Treaties (1961), pp. 199-205; Faulchille, Traité de droit international public (1926), vol. 1, part III, p. 320; Bin Cheng, General Principles of Law, pp. 109-111; Megalidis v. Turkey, 1927-8 Annual Digest of International Law Cases, Case No. 272. The failure to specify the duration of the obligation may appear to introduce an element of uncertainty into the rule, but what is the appropriate period may well vary with the circumstances of the treaty, and the Special Rapporteur hesitates to suggest a specific period of years.

(7) Signature of a treaty, it appears to be accepted, confers a certain limited status upon the signatory State with respect to the treaty, though the precise nature of this status may not be easy to define. A signatory State has a certain interest, presumably of a contractual kind, in the execution of the procedural provisions of the treaty and, at any rate until the treaty is in force, is entitled to a voice in any decision in regard to the execution of these provisions. For example, it has a right, within certain limits, to a voice in opening the treaty to signature or accession by additional States, and a right to object to reservations outside the terms of the treaty made by other signatories. In its Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide the Court itself recognized that signature "establishes a provisional status" in favour of the signatory State which entitles it to formulate objections of a provisional kind to reservations made by other signatories. Sub-paragraph (d) seeks to formulate the rights of a signatory in regard to what Lord McNair terms the "mechanics" of the treaty. And sub-paragraph (e) notices the possibility that the treaty itself may contain specific provisions in regard to the rights of signatories, whilst the present articles recognize that a signatory has a certain right to object to reservations and certain other rights, although these may sometimes also be enjoyed by States which participated in the negotiations but did not sign the treaty.

(8) Paragraph 3 deals with the case of a signature which is finally binding. Sub-paragraph (a) makes the obvious point that the signatory State becomes an actual party to the treaty, if the treaty is either already in force or actually brought into force by the signature, but in other cases only makes it a "presumptive" party until the date when the treaty enters into force.

(9) A signatory State which is an actual party is, of course, fully subject to all the rights and obligations of the treaty; but it is thought that this is a point which "goes without saying" and need not be mentioned in the text. The status of a signatory State, however, that is,
of a "presumptive" party, is less clear and raises problems analogous to those of a signatory whose signature is subject to ratification. Accordingly, the obligations and rights of a "presumptive" party are set out in sub-paragraph 3 (b) in a manner parallel to those of a signatory whose signature is subject to ratification.

**Article 10. Treaties Subject to Ratification**

1. Ratification, as defined in article 1, is necessary in order to render definitive a State's consent to be bound by a treaty in cases where the treaty itself expressly contemplates that it shall be subject to ratification by the signatory States.

2. (a) In cases where the treaty contains no provisions in regard to its ratification, the treaty shall not require ratification by the signatory States:

   (i) If the treaty is one signed by the Heads of the Contracting States;

   (ii) If the treaty itself provides that it shall come into force upon signature or upon a particular date or event;

   (iii) If an intention to dispense with ratification is to be inferred from the fact that the treaty modifies, adds to or annuls a prior treaty which was not itself made subject to ratification, or from other circumstances, showing that the signatures were intended, without ratification, to constitute the final expression of the State's consent to be bound by the treaty;

   (iv) If the treaty is in the form of an exchange of notes, exchange of letters, agreed minute, memorandum of agreement, agreed arrangement, inter-governmental agreement or other such less formal treaty.

   (b) However, if in cases falling under the preceding provisions of this paragraph the representative of a particular State has expressly signed the treaty "subject to ratification", or if the credentials, full-powers or other instrument issued to him and duly exhibited by him to the representative or representatives of the other contracting State or States expressly limit the authority conferred upon him to signing "subject to ratification", then ratification shall be necessary in the case of that particular State.

3. (a) In all other cases where the treaty contains no provisions in regard to its ratification, the treaty shall require ratification by the signatory States in order to render definitive the consent of each State to be bound by the treaty.

   (b) However, if the credentials, full-powers or other instrument issued to the representative of a particular State authorize him by his signature alone, without ratification, to express finally the consent of his State to be bound by the treaty, ratification shall not be necessary in the case of that particular State.

4. (a) Whenever a State's signature of a treaty is subject to ratification in accordance with the provisions of the preceding paragraphs of this article, the ratification of the treaty shall be at the discretion of the State concerned, unless it has expressly undertaken to ratify the treaty.

   (b) The fact that the full-powers of the representative signing or acceding to a treaty are in a form apparently implying a promise or an intention to proceed to ratification shall not constitute an undertaking to ratify a treaty which is subject to ratification.

**Commentary**

(1) This article attempts to set out the rules determining the cases in which ratification is necessary in order to complete a signature and to render it a final expression of the State's consent to be bound by the treaty. The word "ratification", as the definition of it in article 1 indicates, is used here and throughout these draft articles exclusively in its international sense of the formal act whereby a State confirms its previous signature of a treaty and by that act finally consents to be bound by the treaty. Parliamentary "ratification" or "approval" of a treaty under municipal law is not, of course, unconnected with "ratification" in international law, since without it the executives of some countries may not be clothed in certain cases with the necessary constitutional authority to perform the international act of ratification. A question may in this way arise as to whether a treaty, ratified by the executive on the international plane but without the necessary authority of a prior parliamentary ratification, should or should not be regarded as valid in international law—a controversial question which will have to be considered in due course by the Commission. But it remains true that the international and parliamentary ratifications of a treaty are entirely separate procedural acts carried out on two different planes.

(2) The modern institution of ratification in international law developed in the course of the nineteenth century under the influence of France and the United States. Earlier, ratification had been an essentially formal and limited act by which, after a treaty had been drawn up, a Sovereign confirmed, or finally verified, the full-powers previously issued to his representative to negotiate the treaty. It was then not an approval of the treaty itself but a confirmation that the representative had been invested with authority to negotiate it and, that being so, there was an obligation upon the Sovereign to ratify his representative's full-powers, if these had been in order. France and the United States, however, used ratification as the means of submitting the treaty-making power of the executive to parliamentary control, and ultimately the doctrine of ratification underwent a fundamental change. It became established that (a) the act of ratification confirms the representative's signature of the treaty, (b) the treaty itself is subject to subsequent ratification by the State before it becomes binding, and (c) the act of ratification is at the discretion of the State, which is not obliged to ratify its representative's signature, even although he had full-powers to negotiate it. Furthermore, this development in the institution of ratification took place at a time when the great majority of international agreements were formal treaties. Not unnaturally, therefore, it came to be the opinion that the general rule is that ratification is necessary to render a treaty binding, unless it is a treaty concluded between Heads of State, or unless it has been agreed that the treaty shall be binding without ratification (see, for example, Hall, *International Law*, § 110; Crandall, *Treaties, Their Making and Enforcement*, § 3; Fauchille, *Traité de droit international public*, vol. 1, part III, p. 317; Oppenheim, *International Law*, vol. 1, § 512; Harvard Research Draft, A.J.I.L., vol. 29, Special Supplement, p. 756).

(3) Meanwhile, however, the expansion of intercourse between States, especially in economic and technical fields, led to the ever-increasing use of less formal types of international agreements, amongst which were exchanges of notes and inter-governmental
agreements; and these agreements were usually intended by the parties to become binding by signature alone. Indeed, sometimes recourse has been had to these less formal types of agreement for the very purpose of avoiding the delay involved in complying with a constitutional requirement for obtaining parliamentary approval for the international ratification of a "treaty". On the other hand, an exchange of notes or other informal agreement, though employed for its ease and convenience, has sometimes expressly been made subject to ratification because of political considerations in one or the other of the contracting States. The general result of this development has been to obscure in international law both the scope of the term "treaty" and the law in regard to ratification. Yet another complicating factor has been the emergence of new methods of authenticating multilateral treaties without the signature of individual States, and of becoming a party to such treaties by the process only of accession or acceptance.

(4) Faced with these developments in State practice, Professor Brierty in his first report went so far as deliberately to omit all reference to ratification in his draft articles (A/CN.4/23, articles 6, 7 and 8 and commentary). The Commission, however, considered—and rightly so—that this solution did not do justice to the role still played by ratification in the conclusion of treaties, and was unacceptable. Professor Brierty's second report (A/CN.4/43) accordingly introduced a draft article on ratification based on article 7 of the Harvard Research Draft, and ultimately the Commission itself tentatively adopted his article 4 in the following terms:

"A State is not deemed to have undertaken a final obligation under a treaty until it has ratified that treaty, provided, however, that it is deemed to have undertaken a final obligation by its signature of the treaty:

"(a) If the treaty so provides; or

"(b) If the treaty provides that it shall be ratified but that it shall come into force before ratification; or

"(c) If the form of the treaty or the attendant circumstances indicate an intention to dispense with ratification."

(5) Sir H. Lauterpacht in his first report (A/CN.4/63) put forward a revised and amplified version of the article tentatively adopted by the Commission in 1951, the theory of which, of course, was that, in the absence of some contrary indication, a treaty is not binding without ratification. This version, which he repeated in his second report (A/CN.4/87, article 6), read as follows:

"2. In the absence of ratification a treaty is not binding upon a contracting party unless:

"(a) The treaty in effect provides otherwise by laying down, without reference to ratification, that it shall enter into force upon signature or upon any other date or upon a specified event other than ratification;

"(b) The treaty, while providing that it shall be ratified, provides also that it shall come into force prior to ratification;

"(c) The treaty is in the form of an exchange of notes or an agreement between government departments;

"(d) The attendant circumstances or the practice of the contracting parties concerned indicate the intention to assume a binding obligation without the necessity of ratification."

At the same time, however, Sir H. Lauterpacht put forward for consideration an alternative draft, the theory of which was the exact opposite (A/CN.4/63, article 6, alternative paragraph 2):

"Confirmation of the treaty by way of ratification is required only when the treaty so provides."

In his second report (A/CN.4/87) the following year he qualified this alternative draft to the extent of adding:

"However, in the absence of express provisions to the contrary, ratification is in any case necessary with regard to treaties which, having regard to their subject matter, require parliamentary approval or authorisation of ratification in accordance with the constitutional law or practice of the countries concerned."

In his commentaries Sir H. Lauterpacht, explaining why he had submitted two apparently contradictory versions of the rule for determining when treaties require ratification, said the controversy as to which of the two versions is right is to a large extent theoretical. The more formal types of instrument include, almost without exception, express provisions on the subject of ratification, and occasionally this is so even in the case of exchanges of notes and inter-departmental agreements. Moreover, whether they are of a formal or of an informal type, treaties normally either provide that the instrument shall be ratified or, by laying down that it shall enter into force upon signature or upon a specified date or event, dispense with ratification. Total silence on the subject is exceptional, and the number of cases that remain to be covered by a general rule is very small. Accordingly, the controversy on the subject is to a large extent theoretical. This does not mean that the Commission is absolved from the task of formulating a rule for the small residuum of cases in which the parties have left the question open. For it is one of the purposes of codification to provide for such cases where the question is not regulated by the parties, and only if a clear presumptive rule is laid down will the parties themselves know in future whether or not an express provision is necessary to give effect to their intentions. But, if the first version of the rule, which makes ratification necessary unless it is expressly or impliedly excluded, is adopted, the qualifying exceptions which have to be inserted in order to bring it into accord with modern practice are so numerous as almost to bridge the gap between that version and the other one under which ratification is unnecessary, unless expressly stipulated for by the contracting States. Consequently, the difference in the practical effect of choosing one version of the rule rather than the other would not be substantial.

Sir H. Lauterpacht himself considered that there is a "slight preponderance of considerations in favour of the requirement of ratification unless dispensed with expressly or by implication". At the same time he felt it necessary to emphasize that "the most recent practice shows an increasing number of treaties which come into force without ratification". Referring to statistical information contained in a then recent article, he made the following comparisons between the treaties registered with the League of Nations and those registered with the United Nations (1946-51):

“(a) While 50 per cent of those registered with the League entered into force by ratification, the figure for the United Nations is only 25 per cent;

“(b) While 40 per cent of those registered with the League were described as ‘treaties’ or ‘conventions’ (instruments normally brought into force by ratification), the figure for the United Nations is only 15 per cent;\(^42\)

“(c) While only about 30 per cent of those registered under the League were in the form of agreements (instruments \textit{not} normally brought into force by ratification), the figure for the United Nations is as much as 45 per cent;\(^43\)

“(d) While a large number of instruments are now being brought into force, not by ratification, but by exchange of ‘notes of approval’, this was not formerly the case.”

He considered it to be a legitimate deduction from these statistics that Governments now attach importance to treaties—however designated—entering into force without ratification in an increasing number of cases. This deduction did not, however, lead him to alter his view as to the rule to be adopted by the Commission. The increased tendency towards dispensing with ratification did not necessarily, he thought, indicate a change in the views of Governments as to the presumptive rule in regard to the need for ratification. Moreover, the general importance of the State interests regulated by treaty requires that the presumptive—residuary—rule should be based on ratification being the normal requirement. For the same reason he urged that, even if the other rule—with a presumptive against the need for ratification—were adopted in his new alternative draft by adding an exception making ratification necessary in the case of “treaties which, having regard to their subject matter, require parliamentary approval or authorization of ratification in accordance with the constitutional law or practice of the countries concerned”.

(6) Sir G. Fitzmaurice, in his first report (A/CN.4/101, article 32 and commentary), also dealt with this matter, accepting much of Sir H. Lauterpacht’s exposition of the problem but differing as to the rule to be adopted as the residuary rule. He recalled that as early as 1934 he had expressed the view that the older doctrine, which presumes ratification to be necessary unless dispensed with, did not correspond with modern practice and said that the statistical information furnished by Sir H. Lauterpacht showed that that doctrine was even less in accordance with the practice of today. The basic rule which he proposed, therefore, was:

“Treaties are subject to ratification in all those cases where they so specify; otherwise, in general, they are not. There is no principle or rule of law according to which treaties are tacitly assumed to be subject to ratification, whether this is provided for or not.”

His draft then went on to emphasize that, if by reason of the particular subject matter of the treaty or the constitutional requirements of the State concerned it was desired that the treaty should be conditional upon subsequent ratification, the onus would be on the signatory States to insert the necessary provision for that purpose. On the other hand, it recognized that an express provision would not be necessary \textit{in the treaty itself}, if instead the authority of a particular State’s representative negotiating the treaty had been expressly limited to a signature subject to ratification, and this fact had been formally communicated to the other prospective signatories, without encountering any objection; and similarly, if the signature itself had been expressly given “subject to ratification” and not met with objection from the other signatories. In either of these cases the particular State concerned was to have the right subsequently to deposit an instrument of ratification and, on so doing, become a party to the treaty.

Sir G. Fitzmaurice considered the traditional doctrine to have been “decisively refuted by the fact that States have never been content to rely upon it” in that they always provide expressly for ratification when they want it but are quite content to rely on silence precisely in those cases where they do not want it. If there were a basic rule requiring ratification, one would expect to find treaties expressly dispensing with the need for ratification, but these are extremely rare. On the other hand, there are innumerable cases of treaties providing expressly for ratification. Admittedly, there are mechanical reasons for making special mention of ratification in order to indicate how, where and when it is to be effected. But the very fact that such provisions are necessary for effecting ratification makes it all the more difficult to presume that, in cases of silence upon the point, the ratification of the treaty was intended. Moreover, since in such cases there will \textit{ex hypothesi} be no provisions concerning deposit and exchange of ratifications, practical difficulties will arise both as to how ratification is to be effected and as to the date for the treaty to enter into force.

These considerations, coupled with the increasing use in modern practice of instruments coming into force upon signature and the decreasing proportion of treaties made subject to ratification, plus the fact that the necessity for ratification is largely a domestic matter, were thought by Sir G. Fitzmaurice to lead to the conclusion that the residuary rule must be that, in the absence of express provision for ratification, it is to be presumed not to have been intended and to be unnecessary. This inference is, in his view, entirely legitimate because the parties are at perfect liberty to require it, or to insist on a form of treaty in which it would be natural to insert a provision for ratification. It must be assumed that Chancelleries and Foreign Ministries are all well versed in treaty law and practice and that, if they allow their representatives to sign a treaty without provision for ratification, it must be because they do not intend it to be necessary. Today, with modern communications, Governments are able to be in constant touch with their representatives negotiating a treaty.

(7) There is considerable force in the points made by Sir G. Fitzmaurice and, if it were possible to adopt as the residuary rule the principle that ratification is not necessary unless expressly or impliedly contemplated in the treaty, it would have the advantage of simplicity. The Special Rapporteur felt bound, however, to take account also of the opinion

\(42\) Thus of the “treaties” in the League of Nations Treaty Series only one was not ratified. All “treaties” in the United Nations Treaty Series were ratified.

\(43\) In the League of Nations Treaty Series 40 per cent of “agreements” were ratified. In the United Nations Treaty Series 15 per cent of “agreements” were ratified.
of Sir H. Lauterpacht, expressed after an exhaustive study of the problem, that (i) there is still a slight preponderance of considerations in favour of the opposite rule and (ii) that if a rule excluding the need for ratification were to be adopted, it would still be necessary to qualify it by laying down that that rule does not apply to "treaties which, having regard to their subject matter, require parliamentary approval or authorization of ratification in accordance with the constitutional law or practice of the countries concerned". The introduction of any such qualification into the rule appears to the Special Rapporteur to be open to serious objection. Not only would the rule lose its simplicity but the qualification, by reason of its imprecise character, would render the scope of the rule uncertain and perhaps even dependent upon the subjective determination of the interested State as to the requirements of its constitution. Consequently, if the rule favoured by Sir G. Fitzmaurice has to be qualified in the way advocated by Sir H. Lauterpacht in order to protect the position of States with strict constitutional requirements concerning the ratification of treaties, it is doubtful whether the rule is acceptable at all. It is true that Sir G. Fitzmaurice did not think it necessary to qualify the rule in this way. But against this must be set the fact that Lord McNair\(^4^4\) takes the same position as Sir H. Lauterpacht that the preferable residuary rule is that ratification is required unless the need for it is excluded either by the terms of the treaty or by the nature or form of the treaty or the circumstance of its negotiation. It may also be suspected that States with strict constitutional requirements in regard to ratification may not readily be brought to accept the residuary rule favoured by Sir G. Fitzmaurice.

(8) The truth may be that the residuary rule is different for "formal" and "informal" types of treaty, and that there are really two rules. Exchange of notes and other less formal types of treaty having been introduced in order to avoid the formalities of the classical types of treaty, it is not surprising that the presumption is that they are not subject to ratification unless the treaty provides otherwise. On the other hand, the classical forms of "treaty" having previously been considered to be subject to ratification and still being more commonly used when important matters falling under domestic constitutional requirements are in issue, it would not be surprising that States should still presume them to be subject to ratification, unless the treaty itself dispenses with ratification. This is the position reflected in the drafts of the Commission in 1951 and of Sir H. Lauterpacht in 1953-4 and it seems to be the view acted upon by the majority of States in their treaty-practice. The present article has therefore been prepared on the basis that the presumption is against the need for ratification in the case of less formal types of treaty (paragraph 2 (a) (iv)) and in favour of it in other cases (paragraph 3). The main difficulty, owing to the diversity of treaty forms and nomenclature, is to draft a satisfactory formulation of the types of treaty where the presumption is against ratification. If this can be achieved, the Commission may feel that the solution adopted in the present article is preferable to the one suggested by Sir G. Fitzmaurice. Under this solution it is comparatively easy to safeguard the position of a State, like the United Kingdom, which regards its signature as binding unless expressly made subject to ratification. Under Sir G. Fitzmaurice's rule, however attractive its simplicity may be, it is not so easy to safeguard satisfactorily the position of States with strict constitutional requirements in regard to the ratification of "treaties".

(9) Paragraph 1 of the draft does not appear to require comment. Apart from the possible case of a so-called "accession" made subject to ratification, which is dealt with in article 14, ratification always presupposes a previous signature of the treaty and is therefore a process normally confined to signatory States.

(10) Paragraph 2 (a) sets out the cases in which, when the treaty is silent upon the question of ratification, ratification is not necessary to render the signature a definitive expression of consent to be bound. Sub-paragraphs (i)-(iii) comprise cases where ratification is not required, whether the treaty is of a formal or informal type. The first category of case, Heads of State treaties, is an old, established, exception to the requirement of ratification,\(^4^5\) and although signature by Heads of States is now comparatively rare, it may be desirable to mention it.

The second category is that of cases where the treaty, by specifying that the treaty shall come into force upon signature or upon a given date or event, without saying a word about ratification, implies dispenses with ratification. As Sir H. Lauterpacht pointed out in his first report (A/CN.4/63, footnote 39), a very large proportion of modern bilateral treaties fall within this category; in consequence it is only in a comparatively few cases that a bilateral treaty does not specify the way in which it is to come into force and thereby fails to dispense with the need for ratification.

The third category comprises cases where it is to be inferred from the circumstances of the treaty that ratification is not required, and a typical case is the treaty which is an instrument ancillary to another treaty which was not itself subject to ratification. It is not possible to define exhaustively the circumstances which would suffice to bring a treaty within this category, but another example may be the case where the subject matter of the treaty is such as to require it to come into force immediately, if the treaty is to serve any purpose.

The fourth category is limited to less solemn forms of treaty and lays down as the basic residuary rule the presumption that, if the treaty makes no mention of ratification, the treaty is not subject to ratification. That this is the general practice with regard to exchange of notes seems to be entirely clear from the results of a study of the League of Nations and United Nations Treaty Series made by a Swedish writer,\(^4^6\) published in 1953, in which he said:

"Exchanges of notes frequently lack provisions concerning the mode of entry into force; in such cases they are not as a rule ratified. Of the League treaties, some seventy-five such exchanges of notes were found, and none of them was ratified. Of the United Nations treaties, some 125 such exchanges


\(^{4^5}\) Fitzmaurice, "Do Treaties Need Ratification?", British Year Book of International Law, 1934, p. 119.

of notes were found, and only one of them was ratified."

And the general practice appears to be much the same in regard to other treaties of such less formal kinds; if ratification is required, the treaty is expressed to be subject to ratification. 47

Paragraph 2 (b) provides for the possibility that in cases where, under the provisions of paragraph 2 (a), the treaty is not in principle subject to ratification the representative of a particular State may nevertheless be required by his own Government, or may himself decide, to make his signature subject to ratification.

(11) Paragraph 3 (a), for reasons which have already been explained in paragraphs 4-9 above, lays down as the residuary rule for treaties not of a less formal type—treaties stricto sensu—that ratification is presumed to be required where the treaty is silent upon the question of ratification.

Paragraph 3 (b) seeks to take account of the position of States like the United Kingdom, whose constitutional practice it is to authorize their representatives to bind the State by signature alone unless instructed to make the signature subject to ratification.

(12) Paragraph 4 (a) states what is today an undisputed rule that, where a treaty is subject to ratification, it is at the discretion of the State concerned whether to ratify the treaty or not. Sir H. Lauterpacht, in his first report (A/CN.4/63, commentary on article 5) gave reasons for thinking that in many cases States may be under a strong moral obligation to ratify a treaty that they have signed. But under the modern law that obligation can never be a legal one unless the treaty itself imposes an obligation on the Signatory State to ratify the treaty, as has sometimes happened in the case of peace treaties; and then, as Sir G. Fitzmaurice pointed out, the truth is that the treaty is really binding upon signature and the subsequent ratification is a political rather than legal act (A/CN.4/101, commentary on articles 32 and 42).

Paragraph 4 (b) is intended to cover a point to which Sir G. Fitzmaurice drew attention (ibid., commentary on article 32). For historical and traditional reasons many common forms of full-powers imply, or seem to imply, a promise that ratification will be forthcoming in due course, but these forms are empty relics from the past when ratification performed a quite different function, and today no legal obligation to ratify can be spelt out from them.

ARTICLE 11. THE PROCEDURE OF RATIFICATION

1. (a) Ratification shall be carried out by means of a written instrument, executed by an authority competent under the laws of the ratifying State to execute instruments of ratification, and declaring that the State confirms and ratifies its consent to be bound by the treaty to which its signature is already affixed.

(b) The form of instruments of ratification shall be governed by the internal laws and usages of the ratifying State.

2. (a) Unless the treaty itself provides that contracting States may elect to become bound by part or parts only of the treaty, the instrument of ratification must extend to the whole treaty.

(12) Paragraph 4 (a) states what is today an undisputed rule that, where a treaty is subject to ratification, it is at the discretion of the State concerned whether to ratify the treaty or not. Although it is necessary, (b) An instrument of ratification, if it is to qualify as an effective act of ratification, must contain a definitive expression of the State's consent to be bound by the treaty; it may not be made conditional upon the occurrence of a future event, such as the receipt of deposit of the ratifications or accessions of other States. Any conditions embodied in an instrument of ratification shall be treated as equivalent to reservations and their validity and effect shall be determined by the principles governing the validity and effect of reservations.

3. Instruments of ratification become operative by being communicated to the other signatory States or to the depositary of the instruments relating to the treaty. If the treaty itself lays down the procedure by which they are to be communicated, instruments of ratification become operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise laid down by the signatory States, instruments of ratification shall become operative:

(a) In the case of a bilateral treaty, upon the formal communication of the instrument of ratification to the other Contracting Party, and normally by means of an exchange of the instruments duly certified by the representatives of the States carrying out the exchange;

(b) In the case of a plurilateral or multilateral treaty adopted at an international conference convened by the States concerned, upon deposit of the instrument of ratification with the Government of the State in which the treaty was signed;

(c) In the case of a multilateral treaty adopted in an international organization, upon deposit of the instrument of ratification with the secretariat of the organization in question.

4. When an instrument of ratification is deposited with a Government or with the secretariat of an international organization under sub-paragraph (b) or (c) of the preceding paragraph, the ratifying State shall have the right to an acknowledgement of the deposit of its instrument of ratification; and the other signatory States shall at the same time have the right to be notified promptly of both the fact of such deposit and the terms of the instrument of ratification.

Commentary

(1) The tentative draft articles adopted by the Commission in 1951 did not deal with the modalities of ratification, and it was not until Sir G. Fitzmaurice's first report that the subject was examined in any detail (A/CN.4/101, article 31 and commentary). The present article, which takes account of his draft article 31 and commentary in that report, is more elaborate and attempts, in the light of State practice and of the practice of depositaries of treaties, to formulate rules concerning the modalities of ratification to cover the various situations in which, owing to the silence of the treaty, the need for such rules may arise.

(2) Paragraphs 1 and 2 concern the preparation of the international instrument by the communication of which the State is to effect the international act of ratifying the treaty. Paragraph 1 (a) expresses the principle that ratification is a solemn act which must be carried out by means of a formal written instrument unambiguously declaring the will of the State to ratify the treaty and executed by an authority competent under its laws to do so. Although it is necessary,
as Sir G. Fitzmaurice emphasizes, to distinguish clearly between ratification as an internal procedure and as an act operating in the relations between States, it remains true that the actual form in which an international act of ratification is drawn up is determined by the internal laws and usages of each State. It is this principle which paragraph 1 (b) declares.

(3) Paragraph 2 (a) follows necessarily from the fact that what a State is entitled to ratify is its previous signature of the text of the treaty as a whole. Accordingly, although it may be admissible to attach reservations to the ratification of a treaty, it is not admissible to select parts only of the treaty for ratification. Occasionally, however, treaties are found which expressly authorize States to ratify a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification is admissible. The rule here stated seems to be generally accepted, and is endorsed in the Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements, p. 24. But it is possible to imagine cases where the line between partial ratification and ratification subject to a reservation might appear to be more one of form than of substance. Paragraph 2 (b) carries further and makes more specific the principle expressed in paragraph 1 (a), that the instrument of ratification must unambiguously declare the State's consent to be bound by the treaty. The expression of consent must be definitive and may not be made subject to a condition precedent, although it may be made subject to reservations.

(4) Paragraph 3 concerns the execution of the act of ratification by its delivery—its communication—to the other signatory States. Normally, the procedure for accomplishing this is laid down in the treaty itself and paragraph 3 recognizes that fact. It goes on, however, to make provision for any cases where the treaty is silent as to the procedure and specifies for such cases the procedures most commonly found in the relevant treaty-clauses in modern practice.

(5) Paragraph 4 declares that the right of the ratifying State to an acknowledgement of the deposit of the instrument of ratification and the right of other signatories to be notified promptly of the ratification.

**Article 12. Legal effects of ratification**

1. Ratification constitutes the ratifying State an actual Party to the treaty immediately:
   (a) If the treaty is already in force when the ratification takes place, or
   (b) If the ratification itself operates to bring the treaty into force.

2. In other cases ratification constitutes the ratifying State:
   (a) A presumptive Party to the treaty, pending its entry into force; and
   (b) An actual Party to the treaty, if and when it comes into force.

3. Pending the entry into force of a treaty and provided always that its entry into force is not unreasonably delayed, a ratifying State, although not bound by the treaty itself, is subject under general international law:
   (a) To an obligation not to withdraw the ratification;
   (b) To refrain from any action calculated to frustrate the objects of the treaty or to impede its eventual performance.

4. Unless the treaty provides otherwise, ratification shall not have any retroactive effects. In particular, the ratifying State's consent to be bound by the treaty shall operate only from the date of ratification and shall not be held to operate from the date of the signature which the ratification confirms.

**Commentary**

(1) This article embodies the substance of the principles stated in article 33 of Sir G. Fitzmaurice's draft. Paragraphs 1 and 2 deal with the effects of ratification in making the ratifying State a party to the treaty and to a large extent speak for themselves. Paragraphs 1 (b) and 2 (b) have in mind the particular but frequent case where the treaty provides that it shall come into force after the deposit of a specified number of ratifications.

(2) Paragraph 3 sets out the position of a State which has ratified but is not yet a party to the treaty because the treaty will not enter into force until further States have either ratified, acceded to, or accepted the treaty. Paragraph 3 (a) deals with a further aspect of the definitive character of ratification which, once duly effected, may not be withdrawn. Paragraph 3 (b) repeats, for a State which has ratified, the obligation of good faith which also attaches in certain measure to a signatory under article 9, paragraph 2 (c), above. Just as a signature conditional upon ratification, being an inchoate act of participation in the treaty, involves a certain obligation to refrain from action calculated to frustrate its objects and execution, so also—and *a fortiori*—does this obligation attach to ratification by which the State becomes a presumptive party to the treaty.

(3) Paragraph 4 declares what is believed now to be the undisputed principle that, on ratification, the rights and obligations of the treaty become applicable to the ratifying State only as from the date of ratification, not as from that of signature. The ratification does not operate retrospectively to make the signature a binding act of consent on the date when it was affixed to the treaty. Formerly, when ratification was regarded as obligatory and a mere formality confirmatory of the authority to sign, it was generally held to operate retrospectively and to make the treaty effective as from signature. This view continued to be echoed by writers and by some municipal courts, even after the institution of ratification had undergone the fundamental change which has already been described in the commentary to article 10 above (see Harvard Research Draft, pp. 799-812). But the theory of the retroactivity of ratification has long since been rejected in State practice; the European Commission of Human Rights, for example, has consistently held that the rights and obligations of the European Convention of Human Rights become applicable with respect to each individual signatory State only as from the date of the deposit of its instrument of ratification (see Year Book of the European Commission and Court, vol. 1, pp. 137-49 and vol. 2, pp. 215, 376, 382, etc.).

**Article 13. Participation in a treaty by accession**

1. (a) A State has the right to become a party to a treaty by accession, as defined in article 1, where the
treaty itself or an instrument related to the treaty expressly provides that the treaty shall be open to accession either generally or by particular States or categories of States of which the acceding State is one.

(b) A multilateral treaty, unless it expressly provides otherwise, shall be deemed to extend the right of accession to any State that was invited to participate in the negotiations or to attend the conference at which the treaty was drawn up, but failed to qualify itself to become a party to the treaty by any of the procedures specifically established in the treaty.

2. Unless the treaty itself otherwise provides, a State not possessing the right to accede to the treaty under the provisions of the preceding paragraph may nevertheless acquire the right to accede to a treaty:

(a) In the case of a bilateral treaty, by the subsequent agreement of the two States concerned;

(b) In the case of a plurilateral treaty,

(i) Where the treaty is not yet in force, or where the treaty is already in force but four years have not yet elapsed since the adoption of its text, with the subsequent consent of all the negotiating States, or

(ii) Where the treaty is already in force and four years have elapsed since the adoption of its text, with the subsequent consent of all the parties to the treaty;

(c) In the case of a multilateral treaty drawn up at an international conference convened by the States concerned,

(i) Where the treaty is not yet in force or where the treaty is already in force but four years have not yet elapsed since the adoption of its text, with the subsequent consent of two-thirds of the negotiating States, or

(ii) Where the treaty is already in force and four years have elapsed since the adoption of its text, with the subsequent consent of two-thirds of the parties to the treaty;

(d) In the case of a multilateral treaty either drawn up in an international organization or at an international conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ.

3. A State desiring to accede to a multilateral treaty under sub-paragraphs (c) and (d) of the preceding paragraph shall transmit a written request to that effect to the depositary of the treaty in question, whose duty it shall be:

(a) In the case of a treaty drawn up at an international conference convened by the States concerned, to communicate the request to the States designated in paragraph 2 (c) of this article as States whose consent or objection is material for determining the admission of additional States to participation in the treaty;

(b) In the case of a treaty drawn up in an international organization or at an international conference convened by an international organization,

(i) To communicate the request to all members of the organization which is a party, or entitled to become a party, to the treaty; and

(ii) To bring the matter, as soon as possible, before the competent organ of the organization concerned.

4. (a) The consent of a State to which a request has been communicated under sub-paragraph (a) of the preceding paragraph shall be presumed after the expiry of twelve calendar months, if no objection to the request has been notified by it to the depositary during that period.

(b) If a State to which a request has been communicated under either sub-paragraph (a) or sub-paragraph (b) of the preceding paragraph shall have notified the depositary of its objection to the request before the expiry of twelve calendar months from the date of the communication, and the requesting State shall nevertheless have been admitted to accede to the treaty under paragraph 2 (c) or (d) of this article, the treaty shall not apply in the relations between the objecting and the requesting States.

5. A purported accession to a treaty shall only be effective to constitute the acceding State a party to the treaty, if it is in conformity with the terms of the treaty, instrument or decision creating the right to accede and regulating its exercise.

Commentary

(1) Accession is the traditional method by which a State may, in certain circumstances, become a party to a treaty of which it is not a signatory. The subject of accession was not reached by the Commission when it discussed Sir G. Fitzmaurice’s draft articles in 1959 and the last time that it was considered by the Commission was in 1951 on the basis of Professor Brierly’s second report (A/CN.4/43). The Commission then drew up a tentative draft article of three short paragraphs which, in addition to defining accession, laid down the principles that: (i) a State may only accede when the treaty contains provisions allowing it to do so or with the consent of all the parties to the treaty, and (ii) unless otherwise provided in the treaty, accession is only possible after the treaty has come into force. Sir G. Fitzmaurice included both these principles in his draft articles (A/CN.4/101, article 34 and commentary) whereas Sir H. Lauterpacht in his reports (A/CN.4/63, article 6 and commentary, and A/CN.4/87, article 7 and commentary) questioned their correctness in the light of modern practice. It is therefore necessary for the present Special Rapporteur to state his position in regard to them.

(2) It will be convenient to begin with the second point, that “unless otherwise provided in the treaty, accession is only possible after the treaty has come into force”. It is true that the law was so stated in the Harvard Research Draft (p. 822), where it was said that the power to accede to a treaty is usually contained in one of its clauses and cannot, therefore, be effective until the treaty is in force, and where a certain amount of State practice was cited in support of the claimed principle. The force of the logical argument, as Sir H. Lauterpacht said, is open to doubt; pushed to its reductio ad absurdum, it would equally mean that signature and ratification of a treaty are impossible until the treaty is in force. Clearly, however, the consent to accession expressed in the text of a treaty is by itself a sufficient basis for the accession of a non-signatory State, just as it is for the signature and ratification of signatories. As to the State practice,
Sir H. Lauterpacht showed (A/CN.4/63, commentary to article 6) that in a series of treaties between 1929 and 1939 this practice appeared to have changed and that the preponderant practice of Governments is now in the opposite direction from that indicated in the Harvard Research Draft. Sir G. Fitzmaurice (A/CN.4/101, commentary to article 34), while recognizing that there are now some exceptions, more especially where the text of the treaty is "adopted" and not signed at all, considered that the practice mentioned by Sir H. Lauterpacht "represented a lax, mainly pre-war, practice that ought not to be encouraged", and he accordingly reaffirmed the rule, subject to certain admitted exceptions.

(3) The present Special Rapporteur is entirely of the opinion of Sir H. Lauterpacht. An examination of the most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty, either expressly by allowing accession to take place before the date fixed for the entry into force of the treaty, or impliedly by making the entry into force of the treaty conditional on the deposit, inter alia, of instruments of accession. The modern practice has gone so far in this direction that the Special Rapporteur believes that it is no longer appropriate to lay down, even as a residuary rule, the principle that accession is inoperative prior to the entry into force of the treaty. On this point, he recalls and adopts as his own the following statement of Sir H. Lauterpacht:

"Important considerations connected with the effectiveness of the procedure of conclusion of treaties seem to call for a contrary rule. Many treaties might never enter into force but for accession. Where the entire tendency in the field of conclusion of treaties is in the direction of elasticity and elimination of restrictive rules it seems undesirable to burden the subject of accession with a presumption which practice has shown to be in the nature of an exception rather than the rule."

Accordingly, the principle laid down in paragraph 3 (b) of the present article is in the opposite sense from that tentatively adopted by the Commission in 1951.

(4) Turning now to the first point, the conditions under which a State may be entitled to accede to a treaty, no great problem exists in the case of bilateral or plurilateral treaties. The right to accede is determined by the provisions of the treaty and, if the treaty contains no provisions concerning accession, then a State may only accede with the consent of all the States entitled to a voice in the matter. A question may, it is true, be raised as to the States which should have a voice in the matter—all the negotiating States or only States which become parties to the treaty? The problem is analogous to that which arises under paragraph 2 (c) of article 7 in regard to the right to sign, and it is suggested de lege ferenda that here too, if the treaty is already in force and four years have elapsed since the adoption of the text, then only actual parties should have a voice in the matter.

(5) The question, under what conditions a State may be entitled to accede to a multilateral treaty, on the other hand, raises the fundamental problem of whether States have an automatic right to participate in treaties of this kind. This problem has already been referred to in the commentary upon article 7, where mention was made of the Commission's discussion of the problem during its 1959 session, at which it had concluded that the problem primarily concerned the right to participate in a treaty by accession.

(6) In 1959 (502nd, 503rd and 504th meetings, discussion on article 34) many members of the Commission expressed strong approval of the general idea that treaties of a universal character should be open to participation by all States and particular emphasis was placed on the desirability of new States having the right to become parties to such treaties. Attention was also drawn to the practice concerning general multilateral treaties concluded under the auspices of the United Nations, participation in which is now invariably made open to any State which is a Member of the United Nations or of a specialized agency or is a Party to the Statute of the International Court of Justice, and to any other State which is invited by the General Assembly to participate in the treaty. However, although it was recognized that the practice of international organizations is not uniform in the matter, it was generally agreed that there is a strong modern trend towards the widest possible participation in treaties of a universal character. Some members, however, pointed out that political considerations—whether springing from non-recognition or from other causes—may come into play when it is a question of establishing treaty relations between States, and that international law has not hitherto compelled States to accept treaty relations with another State in regard to any type of treaty, if they did not wish to do so. One suggestion that met with considerable support was that at any rate those States which had been invited to attend the conference at which the treaty was drawn up should be regarded as having a right to participate, because the invitation to the conference could properly be considered as implying a consent to participation in the treaty. Other suggestions that received support were: (a) that a distinction should be drawn between bilateral, plurilateral and multilateral treaties; (b) that in the case of multilateral treaties drawn up at an international conference the rule should be laid down de lege ferenda that the admission of further States to participation in the treaty would require the consent of a majority (either a simple majority or two-thirds) of the interested States; and (c) that in the case of multilateral treaties concluded under the auspices of an international organization the admission of additional States should be by decision of the organization concerned. It was also stressed by some members of the Commission that modern multilateral treaties normally contain satisfactory accession clauses so that the problem of the accession of the new States is one which primarily relates to the older multilateral treaties.

(7) The Special Rapporteur finds himself in general accord with the various points and suggestions made during the 1959 discussion, which are set out in the preceding paragraph; and they will be found expressed in the present draft. It is true that in the Polish Upper Silesia case the Permanent Court said, with reference to an armistice convention, that when a treaty does not provide for any right of accession it is not possible to presume the existence of such a right. But to make that presumption, as the Commission proposes, where the treaty is a multilateral treaty and where the presumption is only to be made in favour of States which were invited to attend the international conference that drew up the treaty, does not appear to be unreasonable or in conflict with the general principle acted on by the...
Permanent Court. The rest of the Commission’s proposals relate to the extension of the right to participate to additional States by decisions subsequent to the treaty and that is, of course, entirely different thing. There the main problem is to find suitable procedures for reconciling the sovereign rights of the States parties to the treaty with the principle of the widest possible participation in multilateral treaties, in other words, suitable procedures for obtaining the necessary consent to the extension of the right to participate to additional States.

(8) At the same time, however, it seems doubtful whether, even in the sphere of multilateral treaties, States will be ready to agree to a rule under which a State could be forced to enter into treaty relations with another State to whose participation in the treaty it actively objected. The question then is whether, in laying down the rules that an outside State may be entitled to accede to a treaty with the consent of a two-thirds majority or, as the case may be, at the invitation of an international organization, it is necessary to provide that, if an individual State notifies its objection to the participation of the State concerned, the treaty shall not be applicable as between the objecting and the accepting State, even although the latter has been admitted to accede to the treaty under one or other of these rules. No doubt, it may fairly be urged that the norms contained in multilateral treaties are, ex hypothesi, of a general character which should in principle be applicable between all the parties to the treaty. But the matter is not so simple as that. Quite apart from the fact that multilateral treaties frequently contain at least some new provisions agreed to de lege ferenda, there may be jurisdictional clauses, either within the treaty or in other instruments, which are brought into play by the linking together of the two States in mutual treaty relations. An analogous, though not identical, problem exists in regard to reservations where it seems to be established law that a State may prevent treaty relations from coming into being between itself and the reserving State by objecting to the latter’s reservation. Having regard to the fundamental role played by the consent of the individual State in the formation of treaty relations, a provision to the same effect has been included in paragraph 4 (b) of the present article for the Commission’s consideration.

(9) Paragraph 1 of the draft covers rights of accession conferred by the treaty itself either expressly or by implication. Sub-paragraph (a) requires no comment. Sub-paragraph (b) seeks to give effect to the suggestion made in 1959, and referred to in paragraphs 6 and 8 above, that States invited to participate in a conference can reasonably be considered to have a right of accession by reason of the consent implied in that invitation.

(10) Paragraph 2 covers rights of accession conferred by consents given subsequently to the adoption of the text of the treaty. Sub-paragraphs (a) and (b) deal with the cases of bilateral and plurilateral treaties, where the principle of unanimous consent operates in any decision to admit an additional party to accession. The only point that seems to require comment is the introduction into sub-paragraph (b) of a distinction between the position before and the position after the expiry of a period of four years. The problem here is the extent to which the right of a signatory State to veto accession by an additional State, when the signatory itself has not yet taken the necessary steps to become a party and shows no signs of ever doing so. In principle, every signatory has a voice in decisions to widen the participation in the treaty but, when the treaty has come into force, it is arguable that at some moment in history the time should come when the parties and the parties only should have the power of decision. Sir G. Fitzmaurice suggested that the point might be covered by a rule stating that, when the treaty is in force, the decision should rest with the parties “after consultation with any States entitled to become parties by ratification”. That rule seems, however, to be open to objection. In the first place, the treaty may be expressed to come into force after only two or three States have become parties, in which case the treaty might come into force very quickly and the signatory States be deprived of their right to an actual voice in the decision at an unjustifiably early date. In the second place, an obligation to “consult” the other signatories laid down as an express obligation might leave the parties in some doubt as to how much weight to attach to an objection by a mere signatory. It seems preferable, in the interests of clarity and certainty to put a time limit—a reasonably generous time limit—on the exercise of the rights of a mere signatory after the treaty has once been brought into force by the ratifications, or other final acts of consent, of other signatories. This will both preserve the signatory’s legitimate voice in the matter in the early period after the adoption of the treaty and bring it to an end when its exercise ceases to be legitimate.

(11) Sub-paragraph (c) deals with the case of a multilateral treaty drawn up at an international conference convened by the States concerned, and adopts the suggestion made in 1959 that the admission of a right of accession for additional States should be by consent of a two-thirds majority of the States entitled to a voice in the matter. Here again the problem arises of the extent of the right of a signatory State which does not proceed to ratify, or otherwise become a party to, the treaty within a reasonable time and the same solution is suggested as in the case of plurilateral treaties. The process of obtaining the necessary consents after a conference attended by a large number of States has broken up is somewhat laborious and it has been thought desirable, in paragraph 3 of the present article, to make specific provision for the procedure to be followed when a State applies to be allowed to accede to a multilateral treaty drawn up in this way.

(12) Sub-paragraph (d) deals with the cases where the treaty has been drawn up either in an international organization or at a conference convened by an international organization; and it adopts in both cases the principle that the admission of additional States to participate in the treaty is to be effected by decision of the competent organ of the organization. Accession clauses which confer upon an international organization the power to extend participation in a multilateral treaty to additional States are now common, and the practice is both logical and convenient. For it affords a regular and easily operated procedure for dealing with proposals to enlarge the circle of participants in such a treaty. When the treaty has been drawn up in the organization itself and the text adopted by a decision or resolution of its competent organ, no possible doubt can exist as to the legitimacy of the rule proposed. When, however, the treaty has been drawn up merely at a conference convened by an organization, the question may fairly be raised whether the power of decision should not lie rather with the States responsible for
drawing up the treaty and framing its "final clauses". A conference convened by an organization, it may be said, does not differ in any essential way from a conference convened by the States themselves, and to place the power of decision in regard to widening the circle of the parties to the treaty in the hands of the organization is an interference with the sovereign rights of the States participating in the conference. Under the existing law that may, strictly speaking, be the position. On the other side, it can be urged that, when an international organization decides to invite specified States or categories of States to an international conference for the purpose of drawing up a multilateral treaty, it already asserts a certain authority with respect to the determination of the participants in the treaty. It is true that the States responding to the invitation have it in their power at the conference to lay down in the treaty provisions regulating the right of accession to it. It is also true that some of the States attending the conference may not be members of the organization, as was the case, for example, at the Geneva Conference on the Law of the Sea and the Vienna Conference on Diplomatic Intercourse and Immunities. Nevertheless, it does not seem a big step to propose, de lege ferenda, that, unless the treaty itself otherwise provides, the power to invite additional States to accede to the treaty should vest in the organization which was responsible for convening the treaty-making conference. If such a rule were to be laid down in the present articles, it would be understood by non-member States attending any future conference that, unless another rule were to be laid down in the treaty, the question of inviting additional States to accede would be decided by the competent organ of the organization. Moreover, it would be open to the organization to obtain the views of any non-member State that participated in the drawing up of the treaty and, if its procedure permitted, to allow the non-member State to participate in the decision. The very fact that a number of multilateral treaties in the drafting of which non-member States participated already contain a rule of this kind suggests that its adoption in the present article would not be inappropriate.

If the Commission does not accept this way of looking at the matter, the logical course will presumably be to place multilateral treaties drawn up at a conference convened by an international organization under the same rule as those drawn up at other conferences, in other words, under the two-thirds rule of sub-paragraph (c).

(13) Paragraphs 3 and 4 contain the procedure which is suggested for dealing with requests to be allowed to accede to a multilateral treaty. It is based on the procedure already followed in many cases by depositaries with regard to reservations and objections to reservations. Multilateral treaties today may be adopted by anything up to one hundred States and if the rule of admission to a right of accession by consent of a two-thirds majority is to be workable, it seems essential to have some such procedure as that set out in paragraph 3 of the draft.

(14) It also seems essential for the effectiveness of that rule that after a certain period of time the silence of a State confronted with a request for a right to accede should be presumed to constitute consent, and paragraph 4 (a) proposes that this should be the case after the expiry of twelve months. Whether twelve months is too long a period may be a question, for shorter periods have been accepted in some treaties for the purpose of presuming consent to reservations; but twelve months is the period recommended in a recent resolution of the Inter-American Council of Jurists dealing with reservations to multilateral treaties. A shorter period may well be appropriate in treaty provisions when the parties have expressed their readiness to accept it. But in a general provision it may be necessary to allow a longer period, in order that the provision may meet with the assent of the great majority of States. It is for this reason that a twelve months period is the period inserted in the draft.

(15) Paragraph 4 (b), for the reason already explained in paragraph 8 of this commentary, provides that, if a State gives timely notice of its objection to a request, the treaty shall not in any event be applicable in the relations between the objecting and requesting States.

(16) Finally, it is necessary to consider the special problem of opening to the accession of new States those older multilateral treaties whose circle of eligible parties is now closed owing to the terms of their participation clauses. The difficulty here is that, even if the present articles were to contain a provision specifically creating a right to accede to such treaties and were to be adopted at an international conference as a convention on the conclusion of treaties, they might not be sufficient to achieve the object. A convention only binds the parties to it, and unless all the surviving parties to the older multilateral treaties in question became actual parties to the new convention on the conclusion of treaties, there might be doubt about the effectiveness of the convention to create the right of accession. Only recently, in the Aerial Incident case, the International Court of Justice affirmed that the Charter itself—or more precisely the Statute of the Court annexed to the Charter—was "without legal force so far as non-signatory States were concerned". It is normally a long time before any considerable proportion of the States, which participated in the adoption of a multilateral treaty, take the further steps necessary to make them actual parties to it. In consequence, a convention codifying the law governing the conclusion of treaties would be unlikely to be a very expeditious or a very effective instrument for extending the participation of the older multilateral treaties to new States.

This leads the Special Rapporteur to suggest that it may be better to seek for the solution of this problem in procedures outside those envisaged in the present articles. 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 believed that action of this kind has been taken in some cases.

49 Equally, of course, some members of the organization voting afterwards upon the proposal to extend the circle of parties to the treaty might have failed to attend the conference.
50 For example, the four Conventions resulting from the Geneva Conference of 1958 on the Law of the Sea and the Vienna Convention of 1961 on Diplomatic Relations.
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 any State Member of the United Nations or of a specialized agency or Party to the Statute of the International Court of Justice and to any other State invited by decision of the General Assembly. There would, of course, be a few non-member States whose consent would also be necessary, but it would not be impossible to devise a means of associating these States with the resolution. Apart from possible political difficulties arising out of problems of State succession, such a resolution might be expected to command almost unanimous support and, if so, to provide a basis for the accession of additional States, and more especially new States, to a number of multilateral treaties of a universal character. Alternatively, the General Assembly might draw up a list of the treaties accession to which by additional States is desirable and invite the States parties to them to open these treaties to accession by the above-mentioned categories of States, pointing out that a number of recent multilateral treaties contain accession clauses of this kind.

**ARTICLE 14. THE INSTRUMENT OF ACCESSION**

1. (a) Accession shall be carried out by means of a written instrument, executed by an authority competent under the laws of the acceding State to execute instruments of accession and notifying the State’s accession to the treaty.

(b) The form of instruments of accession shall be governed by the internal laws and usages of the acceding State.

2. (a) Unless the treaty itself provides that contracting States may elect to become bound by part or parts only of the treaty, the instrument of accession must extend to the whole treaty.

(b) An instrument of accession may not be made conditional upon the occurrence of a future event such as the ratifications or accessions of other States. Any other conditions embodied in an instrument of accession shall be treated as equivalent to reservations and their validity and effect shall be determined by the principles governing the validity and effect of reservations.

3. Unless an instrument of accession expressly provides that it shall be subject to subsequent ratification or acceptance by the acceding State, it shall be taken as constituting a definitive expression of the acceding State’s consent to be bound by the treaty.

4. *Mutatis mutandis*, the provisions of paragraphs 3 and 4 of article 11 of the present articles concerning the coming into operation of instruments of ratification shall also apply to the coming into operation of instruments of accession.

**Commentary**

1. The modalities of accession are similar to those of ratification, and the comments on article 11 are to a large extent applicable also to the provisions of this article.

2. The only provisions appearing to require additional comments are those in sub-paragraphs 2 (b) and 2 (c), which mention the possibility of an accession being made subject to ratification. Accession, like ratification, is generally regarded as an act which by its very nature is a definitive expression of consent to be bound by the treaty and therefore an act which is not, in principle, capable of being made subject to ratification. Nevertheless, during the League of Nations period there were a number of examples of accessions being made subject to ratification, and their admissibility was considered by the Assembly in 1927, which passed the following resolution:

"The procedure of accession to international agreements given subject to ratification is an admissible one which the League should neither discourage nor encourage. Nevertheless, if a State gives its accession, it should know that, if it does not expressly mention that this accession is subject to ratification, it shall be deemed to have undertaken a final obligation. If it desires to prevent this consequence, it must expressly declare at the time of accession that the accession is given subject to ratification."

Sir G. Fitzmaurice, pointing out that an accession subject to ratification is not an accession at all (A/CN.4/101, commentary to article 35), criticized the practice of doing so as really amounting to an attempt to secure the status of signatory after the date of signature has passed. He also considered it to be "desirable that the various acts and concepts involved in treaty-making should preserve their respective special uses and distinctive juridical characteristics, and not become blurred by being resorted to out of place". On scientific grounds there is much to be said for this point of view, and the Commission will certainly wish to give it full consideration.

3. However, after studying the relevant passages in the Summary of the Secretary-General’s Practice (ST/LEG/7, paragraphs 47-49), the Special Rapporteur feels that the Commission may wish to see the article formulated in accordance with the League of Nations resolution. Sir Gerald Fitzmaurice had not known of any examples of this practice having occurred since 1945, whereas it appears from the Secretary-General’s Summary that the United Nations Secretariat has encountered some instances of this practice. The Secretary-General states that the position he takes, when he receives an instrument of accession subject to ratification, is similar to that taken by the League of Nations Secretariat. He considers it “simply as a notification of the Government’s intention to become a party”, and he does not notify the other States of its receipt. Furthermore, he draws the attention of the Government to the fact that the instrument does not entitle it to become a party and underlines that “it is only when an instrument containing no reference to subsequent ratification is deposited that the State will be included among the parties to the agreement and the other Governments concerned notified to that effect”.

The Secretary-General’s treatment of the matter seems to go some way towards meeting Sir G. Fitzmaurice’s point that the various acts and concepts involved in treaty-making should preserve their respective special uses and distinctive juridical characteristics; for the Secretary-General makes it clear that an accession subject to ratification is not an accession, and he gives no encouragement to the idea that it can be regarded as in any sense a “signature”.

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(4) Accession subject to ratification, it is clear, is more a political gesture of support for the treaty than a legal act of participation in the treaty. Nevertheless, as it is apparently found in practice and is considered by some States to be useful, it seems desirable to cover it in the draft articles, if only for the purpose of leaving no doubt about its ineffectiveness as an act of participation in a treaty. Accordingly, while paragraph 3 of this article, in line with the League of Nations resolution, does not go to the length of prohibiting the deposit of an instrument of accession subject to ratification, the next article expressly states that it only constitutes a notice of intention to accede and that accession will not take place unless and until a new unconditional instrument of accession is deposited. Paragraph 3 of the present article also states that, unless accession is expressly made subject to ratification, it shall be considered to be intended as a final act of consent to the treaty; this follows from the very nature of accession as an act of final consent, and accords with the practice of the Secretariats both of the League of Nations and of the United Nations.

**Article 15. Legal effects of accession**

1. An instrument of accession which is expressed to be subject to ratification or approval operates only as a conditional notification of the acceding State's intention to become bound by the treaty. A State depositing such an instrument shall not therefore become a party to the treaty, whether actual or presumptive, unless and until it shall have deposited a further instrument notifying its definitive accession to the treaty.

2. Accession, when definitive, shall have the same legal effects as those stated in article 12 to be consequent upon ratification.

**Commentary**

(1) Accession, like ratification, is intrinsically an act by which a State commits itself definitively to participation in the treaty. Accordingly, when a State deposits an instrument of accession which is expressed to be subject to subsequent ratification or approval, it executes an act which falls short of, and does not constitute, accession to the treaty. Nor can its effect be said to be equivalent to that of signature; for signature has its own special function and status. Nor can there be any question of the deposit of the instrument making the State a *provisional* party to the treaty; for the subsequent ratification or approval of the State is a condition *precedent* to its becoming bound by the treaty.

Accession "subject to ratification or approval" is therefore believed to have, strictly speaking, no positive legal effects, and this appears to be the view taken by the Secretary-General in his capacity as depositary of multilateral treaties. As already mentioned in paragraph 3 of the commentary upon the previous article, when the Secretary-General receives an instrument of accession given subject to ratification, he considers it simply as a notification of the Government's intention to become a party and he does not notify the other States of its receipt. He draws the attention of the Government to the fact "that the instrument does not entitle it to become a party and that it is only when an instrument containing no reference to subsequent ratification is deposited that the State will be included among the States parties to the agreement and the other Governments notified to that effect" (ST/LEG/7, p. 26). Paragraph 1 of the present article endorses this practice and emphasizes the absence of any positive legal effects consequent upon an accession "subject to ratification or approval".

(2) Accession, when definitive, has precisely the same legal effects as those already stated in article 12 for ratification. Sir G. Fitzmaurice, it is true, mentions the possibility of a treaty reserving certain rights to signatories and ratifying States, to the exclusion of acceding States. Any such special rights would, however, be additional to the normal legal effects mentioned in article 12, and it is not thought necessary to refer to this point in the present article. Paragraph 2, therefore, simply provides that the legal effects of a definitive accession shall be the same as those of ratification as set out in article 12.

**Article 16. Participation in a treaty by acceptance**

1. States may become parties to a treaty by acceptance, as defined in article 1 of the present articles, in the following cases:

(a) Where the treaty expressly provides that it may be signed subject to subsequent acceptance by the signatory State; and

(b) Where the treaty expressly provides that States may become parties to it directly by acceptance without prior signature.

2. In cases falling under paragraph 1 (a) of this article, the procedure and legal effects of acceptance shall be determined by reference, *mutatis mutandis*, to the provisions of articles 11 and 12 governing the procedure and legal effects of ratification.

3. In cases falling under paragraph 1 (b) of this article, the procedure and legal effects of acceptance shall be determined by reference, *mutatis mutandis*, to the provisions of articles 14 and 15 governing the procedure and legal effects of accession.

4. Unless the context otherwise requires, the signature of a treaty subject to "approval" and a treaty opened to "approval" without prior signature shall be regarded as equivalent respectively to the signature of a treaty subject to "acceptance" and a treaty opened to "acceptance" without prior signature, and the foregoing provisions of the present article shall accordingly apply.

**Commentary**

(1) The draft articles tentatively adopted by the Commission in 1951 did not contain any provisions in regard to "acceptance" as a method of becoming a party to a treaty. The explanation is that, although "acceptance" has been deliberately introduced into treaty practice in the past twenty years as a new procedure for becoming a party to treaties, it does not really represent a new method of entering into treaty obligations. The innovation is one of terminology rather than of substance; for, if the treaty is open to "acceptance" without prior signature, the method is indistinguishable from that of accession, while, if acceptance is to follow upon a prior signature, the method is indistinguishable from that of ratification. Sir H. Lauterpacht also was doubtful about recognizing "acceptance" as a procedure distinct from ratification, and compromised by inserting a draft article in brackets, at the same time commenting that he was not certain that it ought to be retained (A/CN.4/63, article 8 and commentary).
17. POWER TO FORMULATE AND WITHDRAW ARTICLES

be treated as equivalent to "acceptance".

context otherwise requires" the term "approval" should be found used with a special sense. Accordingly, para-

the example given on page 18 of the Handbook of tion, as defined in article 1, unless:

acceding to or accepting a treaty, to formulate a reserva-

ments that had been brought into force by "approval".

the present Special Rapporteur has hesitated to give it specific mention in the draft articles. Other non-

classical terms are to be found in State practice and it is not easy to see where the line should be drawn. However, "approval" now appears to have established itself and to be sufficiently common, more especially in treaties to which international organizations are parties, to require mention. One writer, for example, has said that in the United Nations Treaty Series for the years 1946-51 he found no less than ninety instruments that had been brought into force by "approval". In general, "approval" seems to be used as a synonym for one or other of the two uses of "acceptance" referred to in the present article. But it appears from the example given on page 18 of the Handbook of Final Clauses (ST/LEG/6) that it may sometimes be found used with a special sense. Accordingly, paragraph 4 of the present article states that "unless the context otherwise requires" the term "approval" should be treated as equivalent to "acceptance".

ARTICLE 17. POWER TO FORMULATE AND WITHDRAW RESERVATIONS

1. (a) A State is free, when signing, ratifying, acceding to or accepting a treaty, to formulate a reservation, as defined in article 1, unless:

(i) The making of reservations is prohibited by the terms of the treaty, or excluded by the nature of the treaty or by the established usage of an international organization; or

(ii) The treaty expressly restricts the making of reservations to a specified category, or specified categories, of reservation and the reservation in question does not fall within the category or categories mentioned in the treaty; or

(iii) The treaty expressly authorizes the making of a specified category, or specified categories, of reservation, in which case the formulation of reservations falling outside the authorized category or categories is by implication excluded.

(b) The formulation of a reservation, the making of which is expressly prohibited or impliedly excluded under any of the provisions of sub-paragraph (a), is inadmissible unless the prior consent of all the other interested States has been first obtained.

2. (a) When formulating a reservation under the provisions of paragraph 1 (a) of this article, a State shall have regard to the compatibility of the reservation with the object and purpose of the treaty.

(b) The effect of the formulation of a reservation upon the legal relations between the reserving State and the other State or States signing, ratifying, acceding to or accepting the treaty shall be determined by reference to the provisions of articles 18 and 19 below.

3. (a) Reservations shall be formulated in writing either:

(i) On the face of the treaty itself, and normally in the form of an adjunct to the signature of the representative of the reserving State;

(ii) In a Final Act of a conference, protocol, procès-verbal or other instrument related to the treaty and executed by a duly authorized representative of the reserving State;

(iii) In the instrument by which the reserving State ratifies, accedes to or accepts the treaty, or in a procès-verbal or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the reserving State.

(b) A reservation formulated at the time of a signature which is subject to ratification or acceptance shall continue to have effect only if the instrument of ratification or acceptance either repeats the reservation or incorporates it by reference, or the reserving State at the time of ratification clearly expresses in some other manner its intention to maintain the reservation.

4. (a) The formulation of a reservation when signing a treaty at a meeting or conference of the negotiating States shall be communicated to the representatives of the other signatory State or States at or before the time of signature of the treaty. Such communication shall be presumed in the case of a reservation formulated in the manner mentioned in sub-paragraph (a) (i) and (ii) of the preceding paragraph.

(b) The formulation of a reservation by a State signing, ratifying, acceding to, or accepting a treaty subsequently to the meeting or conference at which it was adopted shall be communicated to all other States which are, or are entitled to become, parties in accordance with the procedure, if any, prescribed in the treaty for such communications.

(c) If no procedure has been prescribed in the treaty in regard to the communication of reservations but the treaty designates a depositary of the instruments relating to the treaty, then the formulation of the reservation shall be communicated to the depositary, whose duty is shall be:

(i) To transmit the text of the reservation to all other States who are, or are entitled to become, parties to the treaty; and

(ii) To draw the attention of such States to the time limit within which an objection to the reservation should be filed under the provisions of the treaty or, failing any such provisions,

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under paragraph 3 (b) of the next succeeding article.

5. However, in any case where a reservation is formulated to an instrument which is the constituent instrument of an international organization and the reservation is not one specifically authorized by such instrument, it shall be communicated to the Head of the secretariat of the organization concerned in order that the question of its admissibility may be brought before the competent organ of such organization.

6. A State which has formulated a reservation is free to withdraw it unilaterally, either in whole or in part, at any time, whether the reservation has been accepted or rejected by the other States concerned. Withdrawal of the reservation shall be effected by written notification to the depositary of instruments relating to the treaty and, failing any such depositary, to every State which is or is entitled to become a party to the treaty.

ARTICLE 18. CONSENT TO RESERVATIONS AND ITS EFFECTS

1. A reservation, since it purports to modify the terms of the treaty as adopted, shall only be effective against a State which has given, or is presumed to have given, its consent thereto in accordance with the provisions of the following paragraphs of this article.

2. (a) Consent to a reservation shall be held to have been given expressly if such consent is stated:

(i) In the treaty itself;

(ii) In the Final Act of the conference at which the treaty was drawn up, in a protocol of signature or of exchange of ratifications, in a process-verbal or other instrument related to the treaty and executed by a duly authorized representative of the consenting State;

(iii) In the instrument by which the consenting State ratifies, accedes to or accepts the treaty, or in a process-verbal or other instrument accompanying the instrument of ratification, accession or acceptance and drawn up by the competent authority of the consenting State;

(iv) In a formal notification of such consent issued by the competent authority of the consenting State and addressed either to the State or States concerned or to the depositary of instruments relating to the treaty.

(b) Consent to a reservation shall also be held to have been given expressly where the treaty itself authorized the making of a particular reservation or category of reservations and the reservation falls within the terms of the authorization.

3. (a) Any State which is or is entitled to become a party to a treaty shall be deemed to have consented to a reservation in any case where the reservation was formulated on the face of the treaty or in the Final Act of the conference or in a process-verbal or other instrument related to the treaty and it then made no objection to the reservation.

(b) Any such State shall also be deemed to have consented to a reservation to a plurilateral or multilateral treaty in any case where the reservation was communicated to the State in question and twelve calendar months have since elapsed without any notice of objection to the reservation having been lodged by that State; provided that, in the case of a multilateral treaty, a State which at the time of such communication was not a party to the treaty shall not be deemed to have consented to the reservation if it shall subsequently lodge an objection to the reservation, when executing the act or acts necessary to qualify it to become a party to the treaty.

(c) A State which acquires the right to become a party to a treaty after a reservation has already been formulated shall be presumed to consent to the reservation:

(i) In the case of a plurilateral treaty, if it executes the act or acts necessary to enable it to become a party to the treaty;

(ii) In the case of a multilateral treaty, if it executes the act or acts necessary to qualify it to become a party to the treaty without signifying its objection to the reservation.

4. (a) In the case of a bilateral treaty, the consent of the other negotiating State to the reservation shall automatically establish the reservation as a term of the treaty between the two States.

(b) Unless the treaty shall otherwise provide or another rule be applicable under the constitution or usages of an international organization or under a decision of its competent organ:

(i) The consent, express or implied, of all the States participating in the adoption of the text of a plurilateral treaty is necessary to establish the admissibility of a reservation not specifically authorized by the treaty, and to constitute the reserving State a party to the treaty; provided that the consent of a State which after the expiry of twelve months from the date of lodging an objection has not yet executed a definitive act qualifying it to become a party to the treaty shall be dispensed with, and provided that, if the treaty is in force and not less than four years have elapsed since the adoption of its text, the consent only of the parties to the treaty shall be required;

(ii) The consent, express or implied, of any other State which is a party or a presumptive party to a multilateral treaty shall suffice, as between that State and the reserving State, to establish the admissibility of a reservation not specifically authorized by the treaty, and shall at once constitute the reserving State a party to the treaty with respect to that State.

(c) In the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, the consent of the organization, expressed through a decision of its competent organ, shall be necessary to establish the admissibility of a reservation not specifically authorized by such instrument, and to constitute the reserving State a party to the instrument.

5. (a) When the treaty has entered into force, a reservation which has been established as admissible in accordance with the provisions of the present article shall operate:

(i) To exempt the reserving State from the provisions of the treaty to which the reservation relates to the extent of the matters covered by the reservation; and

(ii) Reciprocally to entitle any other party to the treaty to claim the same exemptions from the provisions of the treaty in its relations with the reserving State.
(b) The reservation of one party to a plurilateral or multilateral treaty shall operate only as between the reserving State and the other parties to the treaty; it shall not affect in any way the rights and obligations of the other parties to the treaty inter se.

**Article 19. Objection to reservations and its effects**

1. (a) With the exception of the cases mentioned in sub-paragraph (b), any State which is or is entitled to become a party to a treaty shall have the right to object to any reservation not specifically authorized by the terms of the treaty.

   (b) In the case of a plurilateral treaty, however, a State shall not have the right to object to a reservation:

      (i) If it acquired the right to become a party to the treaty after the reservation had already been formulated; or

      (ii) If more than four years have elapsed since the adoption of the text or the treaty and it has not yet executed the act or acts necessary to enable it to become a party to the treaty.

2. (a) An objection to a reservation shall be formulated in writing by the competent authority of the objecting State or by a representative of the State duly authorized for that purpose.

   (b) The objection shall be communicated to the reserving State and to all other States, which are or are entitled to become parties to the treaty, in accordance with the procedure, if any, prescribed in the treaty for such communications.

3. (a) In the case of a plurilateral or multilateral treaty, an objection to a reservation shall not be effective unless it has been lodged before the expiry of twelve calendar months from the date when the reservation was formally communicated to the objecting State; provided that, in the case of a multilateral treaty, an objection by a State which at the time of such communication was not a party to the treaty shall nevertheless be effective if subsequently lodged when the State executes the act or acts necessary to enable it to become a party to the treaty.

   (b) In the case of a plurilateral treaty, an objection by a State which has not yet become a party to the treaty, either actual or presumptive, shall:

      (i) Cease to have effect, if the objecting State shall not itself have executed a definitive act of participation in the treaty within a period of twelve months from the date when the objection was lodged;

      (ii) Be of no effect, if the treaty is in force and four years have already elapsed since the adoption of its text.

4. When an objection has been made to a reservation in conformity with the provisions of the present article and the reserving State does not withdraw its reservation:

   (a) In the case of a bilateral treaty, the treaty falls to the ground;

   (b) In the case of a plurilateral treaty, unless the treaty shall otherwise provide or another rule be applicable under the constitution or usages of an international organization or under a decision of its competent organ, the reserving State shall be excluded from participation in the treaty;

   (c) In the case of a multilateral treaty, the objections shall preclude the entry into force of the treaty as between the objecting and the reserving States, but shall not preclude its entry into force as between the reserving State and any other State which doe not object to the reservation;

   (d) In the case of a treaty which is the constituent instrument of an international organization, the decision of the competent organ of the organization rejecting the reservation shall exclude the reserving State from participation in the treaty.

5. A State which has lodged an objection to a reservation shall be free to withdraw it unilaterally, either in whole or in part, at any time. Withdrawal of the objection shall be effected by written notification to the depositary of the instruments relating to the treaty, and failing any such depository, to every State which is or is entitled to become a party to the treaty.

**Commentary on articles 17, 18 and 19**

(1) These three articles have to be read together because the power of a State to formulate reservations to a treaty cannot be considered separately from the corresponding power of other States to accept or reject the reservation. Indeed, there is an inherent ambiguity in saying, as is usually said, that a State may "make" a reservation; for the very question at issue is whether a reservation formulated by one State can be held to have been effectively "made" unless and until it has been assented to by the other interested States. Accordingly, the present draft seeks to cover the "making" of reservations in three connected articles dealing with (i) the "formulation" of reservation, (ii) consent to reservations and its effects and (iii) objection to reservations and its effects. Reservations to bilateral treaties present no problem. Reservations to plurilateral treaties pose certain problems with regard to the conditions under which States are entitled to express their consent or objection to a reservation; but the basic principle appears to be generally accepted that reservations to plurilateral treaties require the consent of all the parties to the treaty, unless in a particular case the treaty or the constitution of an international organization provides that the consent of a majority will suffice. The real difficulty arises in the case of reservations to multilateral treaties, where the basic principle with regard to the acceptance of reservations is controversial and where the reconciliation of the respective interests of the reserving State and the other States participating in the treaty presents problems of considerable complexity.

(2) The subject of reservations to multilateral treaties has been much discussed during the past twelve years and opinion has been sharply divided both in the International Court of Justice and in the General Assembly on the fundamental question of the extent to which the consent of other interested States is necessary to the effectiveness of a reservation to this type of
treaty. In 1951, the traditional doctrine under which a reservation, in order to be valid, must have the assent of all the other interested States was not accepted by the majority of the Court as applicable in the particular circumstances of the Genocide Convention; moreover, while they considered the traditional doctrine to be of “undisputed value”, they did not consider it to have been “transformed into a rule of law”. Four judges, on the other hand, dissented from this view and set out their reasons for holding that the traditional doctrine must be regarded as a generally accepted rule of customary law. Later that same year, the Commission in a report to the General Assembly on the general question of reservations to multilateral conventions (A/1858, chapter II) recommended the adoption of the traditional doctrine as the general rule, notwithstanding that the Court had not accepted it as applicable in the particular instance of the Genocide Convention. This recommendation was not, however, accepted at the ensuing session of the General Assembly; on the contrary, a substantial group of States showed themselves entirely unwilling to endorse the traditional doctrine as the general rule for multilateral treaties, and even those States that were in favour of maintaining the traditional doctrine showed some disposition to modify it by substituting a two-thirds majority principle for the principle of unanimous consent. The resolution ultimately adopted by the Assembly (resolution 598 (VI) of 12 January 1952) did not attempt to express any definite conclusion on the question, but simply requested the Secretary-General, as depositary of numerous multilateral treaties, to accept the deposit of instruments containing or relating to reservations and to communicate their texts to all States concerned without passing upon their legal effect. The question was subsequently taken up again in the Commission, first, by Sir H. Lauterpacht in his reports of 1953 and 1954, and then by Sir G. Fitzmaurice in his report of 1956. The former, while thinking the unanimity rule to be the existing rule, did not consider it to be satisfactory and made four alternative proposals, two of which envisaged acceptance by a two-thirds majority and the other two submission of the admissibility of reservations either to a committee of the negotiating States or to a chamber of the Court. Sir G. Fitzmaurice, on the other hand, recommended the Commission to revert to the unanimity rule which it favoured in 1951, subject to two modifications: (i) a presumption that failure to object to a reservation during a period of three months amounts to tacit consent and (ii) after a treaty has been in force for five years only the objection of an actual party to the treaty should be effective to bar a reserving State from participation in the treaty.

The draft articles now placed before the Commission have been prepared after careful consideration of the Opinion of the Court and the dissenting judges concerning reservations to the Genocide Convention, the proceedings in the Sixth Committee and the General Assembly, and the reports and proceedings of the Commission itself. No doubt the Commission will wish to consult the original records of the various proceedings and the full reports of the Commission's previous Special Rapporteurs. But, having regard to the complexity of the question and the extent of the records, it has been thought useful to append to the present commentary a substantial Note summarizing the previous discussions of the problem of reservations to multilateral treaties since it first came before the Commission in 1950 (see appendix below).

(3) The very fact that in the General Assembly different groups of States have already voiced somewhat contrary opinions on the fundamental question of the extent to which the effectiveness of a reservation depends on the consent of other interested States, renders the Commission's task of formulating general rules to govern reservations to multilateral treaties a delicate one. The draft provisions relating to multilateral treaties now submitted to the Commission discard the principle of unanimous consent which the Commission made the basis of its previous recommendations in 1951, and which Sir G. Fitzmaurice made the basis of his proposals in 1956; and they do not embrace any of the alternative proposals put forward by Sir H. Lauterpacht in 1953-4. Accordingly, the present Special Rapporteur feels it incumbent upon him to explain at the outset the reasons which have led him to suggest a different solution to this problem from any previously proposed either by the Commission or by the eminent Special Rapporteurs who have preceded him.

(4) The situation of the Commission today with regard to this question differs in several important respects from its situation when it drew up its report in 1951. First, it cannot fail to recall that its carefully considered proposals based upon the principle of unanimous consent did not commend themselves to a majority of States in the Assembly, many of which favoured a more flexible system under which a reserving State would be considered a party to a multilateral treaty vis-à-vis any State that did not give notice of its objection to the reservation. Secondly, the international community itself has undergone rapid expansion since 1951, so that the very number of potential participants in multilateral treaties now seems to make the unanimity principle less appropriate and less practicable. Thirdly, ever since 12 January 1952, i.e., during the past ten years, the system which has been in operation is de facto for all new multilateral treaties of which the Secretary-General is the depositary has approximated to the “flexible” system advocated by the larger of the two main groups of States in the General Assembly in 1951. For the Secretariat's practice with regard to all treaties concluded after the General Assembly's resolution of 12 January 1952 has been officially stated to be as follows:

“In the absence of any clause on reservations in agreements concluded after the General Assembly resolution on reservations to multilateral conventions, the Secretary-General adheres to the provisions of that resolution and communicates to the States concerned the text of the reservation accompanying an instrument of ratification or accession without passing on the legal effect of such documents, and 'leaving it to each State to draw legal consequences from such communications'. He transmits the observations received on reservations to the States concerned, also without comment. A general table is kept up to date for each convention, showing the reservations made and the observations transmitted thereon by the States concerned. A State which has deposited an instrument accompanied by reservations is counted among the parties required for the entry into force of the agreement.'


55 Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7), paragraph 80.
It is true that the Secretary-General, in compliance with the General Assembly’s resolution, does not “pass upon” the legal effect either of reservations or of objections to reservations, and each State is free to draw its own conclusions regarding their legal effects. But, having regard to the opposition of many States to the unanimity principle and to the Court’s refusal to consider that principle as having been “transformed into a rule of law”, it seems certain that under the present system a State making a reservation will in practice be considered a party to the convention by the majority of those States which do not give notice of their objection to the reservation.

(5) Another consideration is that under a so-called flexible system, as under the unanimity system, the essential interests of each individual State are to a very great extent safeguarded by the two fundamental rules:

(a) That a State which within a reasonable time signifies its objection to a reservation is entitled to regard the treaty as not in force between itself and the reserving State;

(b) That a State which assents to another State’s reservation is nevertheless entitled to object to any attempt by the reserving State to invoke against it the obligations of the treaty from which the reserving State has exempted itself by its reservation.

It is true that in the case of multilateral law-making treaties, as Sir G. Fitzmaurice has emphasized, the equality between a reserving and non-reserving State, which is the aim of the above-mentioned rules, may in practice be less than complete. For a non-reserving State, by reason of its obligations towards other non-reserving States, will feel bound to comply with the whole of the treaty, including the provisions from which the reserving State has exempted itself by its reservation. Accordingly, the reserving State will be in the privileged position of being exempt itself from certain of the provisions of the treaty, while having the assurance that the non-reserving States will observe those provisions. Too much weight ought not, however, to be given to this point. For normally the State wishing to make a reservation would already have the assurance that the non-reserving State would be obliged to comply with the provisions of the treaty by reason of its obligations to other States, even if the reserving State remained completely outside the treaty. By entering into the treaty subject to its reservation, the reserving State at least submits itself in some measure to the régime of the treaty. The position of the non-reserving State is not made in any respect more onerous if the reserving State becomes a party to the treaty on a limited basis by reason of its reservation. Even in those cases where there is such a close connexion between the provisions to which the reservation relates and other parts of the treaty that the non-reserving State is not prepared to become a party to the treaty at all vis-à-vis the reserving State on the limited basis which the latter proposes, the non-reserving State can prevent the treaty coming into force between itself and the reserving State by the simple expedient of objecting to the reservation. Thus, the point to which Sir G. Fitzmaurice drew attention only appears to have real significance in cases where the non-reserving State would never itself have consented to become a party to the treaty, if it had known that the other State would do so subject to the reservation in question. And it may not be unreasonable to suggest that if a State attaches so much importance to maintaining the absolute integrity of particular provisions its appropriate course is to protect itself during the drafting of the treaty by obtaining the agreement of the negotiating States to the insertion of an express clause prohibiting the making of the reservations which it considers to be so objectionable.

(6) There remain the important questions whether a more flexible system might possibly have detrimental effects on (i) the drafting of multilateral treaties or (ii) the integrity of the text of the treaty adopted by the negotiating States. As to the first question, it may be doubted whether the drafting of multilateral treaties would be sensibly affected. The treaty-text will normally require the approval of at least a two-thirds majority of the negotiating States, and it must continue to be the prime object of that majority to agree upon the best text that expert drafting can provide. The second question, the threat to the integrity of the treaty, was emphasized by the Commission itself in 1951 with reference to the Pan-American system (A/1858, chapter II, paragraph 52):

“The Pan-American practice is likely to stimulate the offering of reservations; the diversity of these reservations and the divergent attitude of States with regard to them tend to split up a multilateral convention into a series of bilateral conventions and thus to reduce the effectiveness of the former.”

That a more flexible system may tend in some measure to stimulate the formulation of reservations and in that way to reduce the full effectiveness of the text as adopted can scarcely be denied. But it seems important to consider in exactly what measure the effectiveness of a multilateral treaty is reduced and to what extent the reduction in effectiveness may be compensated for by an increase in the number of States participating in the treaty.

(7) The detrimental effect of reservations upon the integrity of the treaty may, in the opinion of the present Rapporteur, easily be exaggerated. The treaty itself remains the sole authentic statement of the common agreement between the participating States. The majority of reservations relate to a particular point which a particular State for one reason or another finds difficult to accept, and the effect of the reservation on the general integrity of the treaty is minimal; and the same is true even if the reservation in question relates to a comparatively important provision of the treaty, so long as the reservation is not made by more than one or two States. In short, the integrity of the treaty would only be materially affected if a reservation of a somewhat substantial kind were to be formulated by a number of States. This might, no doubt, happen; but even then the treaty itself would remain the sole authentic statement of the common agreement between the participating States. What is essential to ensure both the effectiveness and the integrity of the treaty is that a sufficient number of States should become parties to it, accepting the great bulk of its provisions. The Commission in 1951 said (ibid., loc. cit.) that the history of the conventions adopted by the Conference of American States “had failed to convince it that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party vis-à-vis non-objecting States”. Nevertheless, a power to formulate reservations must in the nature of things tend to make it easier for some States to execute the act necessary to
bind themselves finally to participation in the treaty and therefore tend to promote a greater measure of universality in the application of the treaty. Moreover, in the case of general multilateral treaties, we see that not infrequently a number of States have, to all appearance, firmly resolved to participate in the treaty subject to one or more reservations. Whether these States, if objection had been taken to their reservations, would have preferred to remain outside the treaty rather than to withdraw their reservation is a matter which is not known. But when today the number of the negotiating States may not be far short of one hundred States with very diverse cultural, economic and political conditions, it seems legitimate to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties. It may not unreasonably be thought that the failure of negotiating States to take the necessary steps to become parties to multilateral treaties at all is a greater obstacle to the development of international law through the medium of treaties than the possibility that the "integrity" of such treaties may be unduly weakened by the free admission of reserving States as parties to them. There may also perhaps be some justification for the view that, in the present era of change and of challenge to traditional concepts, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved and expressed in a multilateral treaty may become the one most suited to the immediate needs of the international community.

(8) The system proposed in the draft articles for multilateral treaties which do not contain provisions regulating the making of reservations is founded upon the present practice in regard to multilateral treaties of which the United Nations is the depository; and it is comparable to the flexible system applied in the Organization of American States. The Inter-American system contemplates that the reserving State should give prior notice of its intention to formulate the reservation and that this notice of intention should be circulated to the other members of the Organization of American States before any instrument of ratification, accession or acceptance is deposited. The idea is that the other member States should, as it were, be consulted before the reserving State executes the act which will make it a party to the treaty. Under this system the reserving State can take into account the reactions of the other member States before finally executing its act of participation in the treaty. Under the United Nations system, on the other hand, there is not normally any prior consultation and the reservation is communicated to the other interested States after the reserving State has attached its signature to the treaty or deposited its instruments of ratification, accession or acceptance. The substantial difference between the two systems seems to be that under the Inter-American system the reserving State has a period of grace during which it may modify or withdraw its reservation or even withdraw its participation in the treaty altogether, whereas under the United Nations system the reserving State becomes a party to the treaty immediately and, although it may certainly withdraw its reservation altogether in the face of the objection of other States, its power to modify the reservation, except by obtaining the fresh consent of all the interested States, may be doubtful, since the original reservation may have already been accepted by some States. Nevertheless, attractive although the idea of prior consultation may be in principle, the United Nations system appears to be more practical for multilateral treaties open to participation by upwards of one hundred States, and seems to involve less risk of serious delay in the coming into force of such treaties.

Commentary on article 17

(9) Paragraph 1 of this article deals with the power to formulate, that is, to propose, a reservation when signing, ratifying, acceding to or accepting a treaty. It accepts the view that, unless the treaty itself, either expressly or by clear implication, forbids or restricts the making of reservations, a State is free, in virtue of its sovereignty, to formulate such reservations as it thinks fit. But the formulation of a reservation that is not one expressly authorized by the treaty takes the reserving State's signature, ratification or accession or acceptance. The substantial difference is that, when a reservation is formulated which is not prohibited by the treaty, the other States are called upon to indicate whether they accept or reject it but, when the reservation is one prohibited by the treaty, they have no need to do so, for they have already expressed their objection to it in the treaty itself.

(10) Paragraph 2 (a), which lays down as a principle that States, in formulating a reservation not expressly authorized, should have regard to the compatibility of the reservation with the object and purpose of the convention, has been included in the article with a certain amount of hesitation. This was, of course, the principle applied by the International Court in the Reservations to the Genocide Convention case as the criterion for determining whether a reserving State can be still regarded as a party to the Convention notwithstanding the fact that its reservation has been objected to by one or more States. Applied in this way as the test of a State's right to be considered a party to the treaty, the principle met with strong criticism in some quarters, and not least in the Commission itself in 1951. For it was said—and rightly—that in any given case the question of the compatibility or incompatibility of a particular reservation with the object and purpose of the treaty depends to a considerable extent on the conclusions reached as to exactly how much of the subject-matter of the treaty is to be regarded as representing the "object and purpose of the treaty" and as to exactly which provisions are to be regarded as material for the achievement of that "object and purpose". But these are questions on which opinions, and especially the opinions of the parties themselves, may well differ, so that the principle applied by the Court is essentially subjective and unsuitable
for use as a general test for determining whether a reserving State is or is not entitled to be considered a party to a multilateral treaty. The test is one which might be workable if the question of "compatibility with the object and purpose of the treaty" could always be brought to independent adjudication; but that is not the case, and the general view seems to be that the principle of "compatibility with the object and purpose" cannot be adopted as the general criterion for determining the status of a reserving State as a party to the treaty. The Special Rapporteur believes these criticisms of the Court's criterion to be well founded, and in articles 18 and 19 proposes that the Commission should adopt instead the flexible Inter-American system, which operates on the basis of the purely objective criterion of each State's consent or objection to the particular reservation in question.

Nevertheless, the Court's criterion of "compatibility with the object and purpose of the convention" does express a valuable concept to be taken into account both by States formulating a reservation and by States deciding whether or not to consent to a reservation that has been formulated by another State. Moreover, some representatives in the Sixth Committee and General Assembly thought that the Court's criterion could be given a more general application. The Special Rapporteur, although also of the opinion that there is value in the Court's principle as a general concept, feels that there is a certain difficulty in using it as a criterion of a reserving State's status as a party to a treaty in combination with the objective criterion of the acceptance or rejection of the reservation by other States. First, the principle of consent would lose much of its value as a simple and objective test, if it could be overridden or qualified by reference to another subjective and indeterminate criterion. Secondly, in some cases the two criteria might even give inconsistent results. Accordingly, the Special Rapporteur has tentatively inserted in paragraph 2 (a) for the Commission's consideration a provision stating the Court's concept as a general principle to be taken into account, notwithstanding attaching any sanction to it or giving it any express place in articles 18 and 19, where the objective criteria of "consent" and "objection" are adopted as the tests for determining the legal relations between a reserving State and other parties to the treaty. Paragraph 2 (b) needs no comment.

(11) Paragraph 3 (a) deals with the modalities of formulating reservations and does not appear to require comment. Paragraph 3 (b), which covers the special case of a reservation attached to the signature of a treaty which is subject to ratification (or acceptance), is perhaps more controversial. The present draft takes the line that the reservation will be presumed to have lapsed unless some indication is given in the instrument of ratification that it is maintained. The Harvard Research Draft (article 15 (d)) put the rule in the opposite way, laying down that ratification would automatically be considered to be ratification of the treaty subject to the reservation. The authors of the Harvard Research Draft admitted that some writers (e.g. Fauchille) considered that the reservation must be repeated, but agreed that such a rule would be inconsistent with the theory that a reservation made at the time of signature forms part of the text as adopted. On the other hand, in 1959 the Inter-American Council of Jurists recommended a rule which would require the reservation to be "reiterated" before the deposit of the instrument of ratification, although the United States delegation found that rule to be "unacceptable in the form in which it has been drafted". Clearly, different opinions may be held as to what exactly is the existing rule on the point, if indeed any rule exists at all. But the Special Rapporteur suggests that a rule requiring some form of confirmation of the reservation in the instrument of ratification is desirable in the interests of certainty, and is more in harmony with the modern concept of the ratification process as a confirmation of the signature but of the treaty than the rule proposed in the Harvard Research Draft.

(12) Paragraph 4 prescribes that reservations must be communicated to all the other interested States and contains provisions in regard to the procedure to be followed in making such communications.

Paragraph 5 has been inserted to cover a point to which attention is drawn in paragraph 81 of the Summary of the Practice of the Secretary-General (ST/LEG/7), where it is said:

"If the agreement should be a constitution establishing international organization, the practice followed by the Secretary-General and the discussions in the Sixth Committee show that the reservation would be submitted to the competent organ of the organization before the State concerned was counted among the parties. The organization alone would be competent to interpret its constitution and to determine the compatibility of any reservation with its provisions."

Paragraph 6 declares the absolute right of a State to withdraw a reservation unilaterally, even when the reservation has been accepted by other States.

Commentary on article 18

(13) Paragraph 1 of this article lays down the fundamental principle that, by attaching a reservation to its signature, ratification, accession or acceptance, a State is in fact making a new proposal which must be assented to by the other State before any contractual nexus can arise between them. Paragraph 2 (a) recites the ways in which express consent to a reservation may be given in advance by the insertion in the treaty of an express authority to make the particular reservation in question.

(14) Paragraph 3 deals with what may be a more controversial question, namely, the question of implied consent to a reservation. That the principle of presuming consent to a reservation from absence of objection has been admitted into State practice cannot really be doubted; for the Court itself in the Reservations to the Genocide Convention case spoke of "very great allowance" being made in international practice for "tacit assent to reservations". If the Commission in its 1951 report did not specifically refer to consent being presumed from absence of objection, its proposals involved the application in some measure of the principle of tacit consent. And the drafts of both Sir H. Lauterpacht and Sir G. Fitzmaurice provided that the consent of a State should be presumed conclusively after a period of three months, if no objection has been raised to the reservation. Furthermore, a rule specifically stating that consent will be presumed after a period of three, or in some cases six, months is to be found in some modern conventions, while other conventions...
achieve the same result by limiting the right of objection to a period of three months.\(^57\) Again, in 1959, the Inter-American Council of Jurists\(^68\) recommended that, if no reply had been received from a State to which a reservation had been communicated, it should be presumed after one year that the State concerned had no objection to the reservation. On the other hand, it is stated in the Final Act of the Inter-American Council of Jurists that the United States delegation made a reservation on this point, saying that it considered the recommended rule to be “undesirable”.\(^59\)

(15) It has, of course, to be admitted that there may be a certain degree of rigidity in a rule under which tacit consent will be presumed after the lapse of a fixed period. It is also true that, under the “flexible” system now proposed, the acceptance or rejection by a particular State of a reservation made by another primarily concerns their relations with each other, so that there may not be the same urgency to determine the status of a reservation as under the system of unanimous consent. Nevertheless, it seems very undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State under a treaty of universal concern. A State participating in the adoption of the text of a plurilateral or multilateral treaty must be deemed to be aware that under generally accepted treaty-making practice States are free to put forward reservations of their own when the reservation in question is not one prohibited by the treaty. This being so, good faith in the application of the procedural provisions of the treaty, and especially those dealing with participation in the treaty, would seem to require that States adopting a plurilateral or multilateral treaty should take note of the formulation of reservations and voice any objection that they may have to the reservation with reasonable expedition in order that the position of the reserving State under the treaty may be clarified. And, on the same basis, if a State voices no objection or hesitations in regard to a reservation, it seems reasonable to hold that after an appropriate interval the State shall be presumed to have acquiesced in the participation of the reserving State in the treaty subject to the reservation. Nor does it seem possible to make this presumption dependent on some positive act of recognition of the reserving State as a party to the treaty. Under modern practice it is the depositary alone who deals with each State in regard to the procedural clauses of the treaty, and the risk would be that a State which had kept silent in regard to another State’s reservation would only take a clear position in the matter after a dispute had arisen between it and the reserving State. It is for reasons such as these that it has been thought advisable to lay down in paragraph 3 (b) of article 18 that if a State has voiced no objection to a reservation during a period of twelve months, it shall be presumed to have consented to the reservation.

(16) Seeing that in a number of treaties States have found it possible to accept periods as short as three or six months, the question may be asked why it has been thought necessary to propose a period of twelve months in the present draft. But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, and a somewhat different thing to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point. States may, therefore, find it easier to accept a general time limit for voicing objections, if a longer period is proposed. Secondly, as already noted, the Inter-American Council of Jurists in 1959 appears to have favoured the longer period here proposed. Again, there may even be cases where a Government desires to bring another State’s reservation before the competent organ of the State in connexion, perhaps, with the State’s own decision to ratify the treaty. It seems prudent, therefore, to have a long rather than a short period for the general rule. Furthermore, the arguments in favour of a time limit do not appear to be so strong under the flexible system for reservations to multilateral treaties in the case of a State which is not already a party to the treaty; for by delaying a decision it is not prejudicing the position of the reserving State vis-à-vis any State. Accordingly, it seems possible in such a case to lessen the rigidity of the rule by allowing an objection made on ratifying, or accrediting, to the treaty to be effective, notwithstanding the expiry of the twelve months’ period. This qualification of the rule is not possible in the case of plurilateral treaties because there the delay in taking a decision does place in suspense the status of the reserving State vis-à-vis all the States participating in the treaty.

(17) Paragraph 3 (c) covers the case of a State invited to become a party to a treaty by accession or otherwise at a date when certain States have already become parties or presumptive parties to it subject to reservations. One alternative is to hold that a State responding to such an invitation must take the treaty and the reservations previously attached to the treaty by some States as it finds them; in other words, to hold that the newly invited State shall in any event be bound by reservations formulated prior to its participation in the treaty. In the case of plurilateral treaties, this appears to be the rule applied. For a reservation to a plurilateral treaty requires the unanimous consent of the participating States and, once this has been obtained, it becomes established as an admitted reservation attached to the treaty. It is, therefore, perfectly logical that a newly invited State should only be able to participate in the treaty on the basis of accepting it as already modified with respect to the reserving State by the admission of the reservation; and this is the principle suggested for plurilateral treaties in paragraph 3 (c). Quite different considerations are the other hand; under a multilateral treaty, if the “flexible system” of determining the admissibility of reservations is adopted. Under this system corporate acceptance of reservations by the whole body of participating States is not necessary and the admissibility of a reservation is a matter which concerns each State individually; moreover, the consent of any one State to a particular reservation is limited in its effects to the relations between that State and the reserving State. Accordingly, there does not seem to be any good reason under this system for a newly invited State to be deprived of all right to object to reservations formulated prior to its participation in the treaty. On the contrary, the principle of equality seems to require that the newly

\(^{57}\) E.g. the Conventions on the Declaration of Death of Missing Persons, 1930, and on the Nationality of Married Women, 1957 (both 90 days).

\(^{58}\) Final Act of the Fourth Meeting of the Inter-American Council of Jurists, p. 29.

\(^{59}\) Ibid., p. 86.
invited State should have that right and the appropriate
time for it to exercise that right would appear to be
when it executes the act by which it becomes a party
to the treaty. It follows that, if the newly invited State
does not then notify its objection to previously formul-
ated reservations, it should be presumed to have
assented to them.

(18) Paragraph 4 sets out the basic rules concerning
the States whose consents are required for the admission
of a reservation, and, in considering these rules, it is
necessary to bear in mind the principle in paragraph
3 (b) that consent will be implied from the absence of
any objection during a period of twelve months. It is
also to be noted that the rules set out in this para-
graph concerning plurilateral and multilateral treaties
are subject to the proviso that another rule is not
applicable either under the treaty itself or under the
constitution or usages of an international organization.

One object of this proviso is to safeguard any such
special usages as those applicable in the Organization
of American States.

In the case of bilateral and plurilateral treaties the
basic rule laid down is that a reservation not authorized
by the treaty must have the consent of all the other
States which are or are entitled to become parties to
the treaties. There is, however, an exception to this
rule in the case of plurilateral treaties where it is sug-
gested de lege ferenda that, if four years have elapsed
after the date of the adoption of the treaty and a State
has not entered into any definitive commitment to be
bound by the treaty, the consent of that State should
be dispensed with. The Commission recognized in 1951
(A/1858, chapter II) that it would be an abuse if a
signatory State were to object to another State’s reser-
vation and then refrain from entering into any com-
mitment itself to be bound by the treaty. The rule
that the Commission suggested was that an objection
should be disregarded if after the expiry of twelve months
the objecting State had not itself ratified or otherwise
accepted the treaty. Sir G. Fitzmaurice, on the other
hand, proposed the following rule in article 39, para-
graph 1 (ii) of his draft articles (A/CN.4/101): “If
the treaty has been in force for not less than five years,
the reservation need only be circulated to and be met
with absence of objection on the part of the States
actually parties to the treaty at the date of circulation
so long as these number not less than 20 per cent of
the States originally entitled to become parties.” This
rule, which would only operate five years after the
treaty had already been in force, seems to be somewhat
too remote in its application to provide a satisfactory
answer to the problem. On the other hand, the general
idea in it that, after the treaty comes into force, the
right to pronounce upon the validity of reservations
should sooner or later pass exclusively to the States
which have committed themselves to participation in
the treaty, seems to be valid. The Special Rapporteur
suggests that both the principle proposed by the
Commission in 1951 and the idea in Sir G. Fitzmaurice’s
draft should be retained and both elements will be
found in paragraph 4 (b) (i) of the present article.

The rule suggested by Sir G. Fitzmaurice has been
considerably modified, however, by reducing the period
to four years60 and by making it operate from the
date of the adoption of the text, not that of the entry
into force of the treaty. The resulting position under

60 This is the same period as that suggested in the analogous
case of the right of States to a voice in deciding whether to
invite new States to accede to the treaty (see article 13 above).
(b) Where the treaty itself does not lay down any rules for its coming into force and where no other rule is applicable under the constitution or usages of an international organization, the entry into force of the treaty shall be determined by reference to the provisions in the following paragraphs of the present article.

2. (a) Where a bilateral or plurilateral treaty is one which under the provisions of chapter II is to become binding upon signature alone, it shall be deemed to come into force:

(i) Upon the date of signature, if it shall have been signed upon that date by all the States which adopted it; and

(ii) If not, then upon the date when the last of the signatures of the States which adopted the treaty shall have been affixed to the treaty.

(b) Where a bilateral or plurilateral treaty is one which under the provisions of chapter II is subject to subsequent ratification or acceptance and lays down that ratification or acceptance is to be effected by a specified date, it shall be deemed to come into force upon that date provided that:

(i) If the treaty indicates the number of States whose ratifications or acceptances shall be necessary to bring the treaty into force, the required number of instruments of ratification or acceptance shall have been deposited by that date;

(ii) If the treaty contains no indications as to the number of ratifications or acceptances required, all the States which adopted the treaty shall have deposited their instruments of ratification or acceptance by that date.

(c) In a case similar to that in sub-paragraph (b) but where the treaty does not lay down that the ratifications or acceptances are to be effected by a specified date, it shall be deemed to come into force upon that date provided that:

(i) If ratifications are to be exchanged, then upon the date of the exchange of ratifications;

(ii) If the ratifications or acceptances are to be deposited, then upon the date of the deposit of the last of the required instruments of ratification or acceptance; and

(iii) If no provision has been made either for the exchange or for the deposit of ratifications or acceptances, then upon ratification or acceptance by all the States which adopted the treaty and the notification by each State to the other of such ratification or acceptance.

3. (a) Where a multilateral treaty is one which under the provisions of chapter II is to become binding upon signature alone, the treaty shall be deemed to come into force:

(i) Upon the date of signature, if it shall have been signed upon that date by all the States which adopted it;

(ii) If not, then upon the date when the signatures of not less than one-fourth of the States which adopted the treaty shall have been affixed to the treaty.

(b) Where a multilateral treaty is one which under the provisions of chapter II is subject to subsequent signature, ratification, accession or acceptance and provides for any of these acts to take place by a specified date, it shall be deemed to come into force:

(i) Upon the date specified, if not less than one-fourth of the States which adopted the treaty shall have affixed their signatures or, as the case may be, deposited their instruments of ratification, accession or acceptance by that date; and

(ii) If not, then upon the first date thereafter when not less than one-fourth of those States shall have executed the act or acts necessary to qualify them to be parties to the treaty.

(c) In a case similar to that in sub-paragraph (b) but where the treaty does not lay down that the signatures, ratifications, accessions or acceptances are to be effected by a specified date, it shall be deemed to come into force upon the first date when not less than one-fourth of the States which adopted the treaty shall have executed the act or acts necessary to qualify them to be parties to the treaty.

4. If a treaty provides that it shall be subject to ratification or acceptance and at the same time specifies a fixed date for its entry into force, it shall enter into force:

(i) Upon the specified date, if the ratifications or acceptances required under the treaty have been completed; and

(ii) If not, so soon after that date as such ratifications or acceptances have been completed.

5. A treaty shall enter into force for any particular State when it shall have executed an act definitively qualifying it to be a party to the treaty and either

(i) The treaty is already in force; or

(ii) The treaty is brought into force by the execution of the act which definitively qualifies the State in question to be a party to the treaty.

6. Notwithstanding anything contained in the preceding paragraphs of this article, a treaty may prescribe that it shall come into force provisionally on signature or on a specified date or event, pending its full entry into force in accordance with the rules laid down in this article.

7. Nothing in the present article is to be understood as precluding the possibility of the provisions of a treaty being brought into force by the subsequent agreement or subsequent acts of the States concerned.

Commentary

(1) This article deals with the conditions which the treaty itself must satisfy before it can be considered as having come into force, and the conditions under which each individual State qualifies to be considered an actual party to the treaty. The basic rule, set out in paragraph 1 (a), is that it is in the hands of the negotiating States themselves to determine the mode and date of the entry into force of the treaty. The only point that need be discussed is the proviso that, if the parties themselves have not fixed the number of the States whose definitive commitment to be bound by the treaty is necessary to bring it into force, there must as a minimum be two States mutually bound to each other under the treaty. Clearly, unless this is so the treaty, as such, can have no application; but the proviso, as it has been formulated in the text, does raise the problem of reservations. If one or other of the first two States has subscribed to the treaty subject to a reservation, can the treaty be said to come into force until it is clear that no objection is being raised to the reservation? The Secretary-General's practice for multilateral treaties is to treat a signature, ratification, accession or acceptance subject to a reservation as
equivalent to a full signature, ratification, etc., for the purpose of clauses which specify a given number of signatures, ratifications, etc., as a condition for the entry into force of the treaty. It may not therefore be fully consistent with this practice to provide that there must at least be two States mutually bound under the treaty before it can come into force. But it seems necessary to state the minimum rule in this way in order to avoid the meaningless situation of having a treaty in force but no two States able to invoke its provisions against each other. No doubt, it might be possible to regard each State as having entered into a unilateral engagement under the treaty, even although they were not mutually bound; but that would hardly seem to be a case of a treaty having come into force; see Hudson, *International Legislation*, vol. 1, p. lv.

As to paragraph 1 (b), the only point that need be mentioned is the reference to the constitutional provisions or usages of an international organization. This is intended to safeguard and underline the character of a regional or other group system such as the Inter-American usages in regard to treaties concluded within the Organization of American States.

(2) Paragraph 2 covers where a bilateral or plurilateral treaty makes no provision for its entry into force. Sub-paragraph (a) concerns treaties not subject to ratification. Here, it seems to be generally accepted that the treaty is to be presumed to come into force upon the date of signature and, if the signatures are not all affixed upon the same date, then upon the date of the last signature; see Harvard Research Draft, pp. 795-6.

Sub-paragraph (b) concerns cases where the treaty is subject to ratification and specifies a date by which ratification is to take place. The rules stated in the text are based on those proposed *de lege ferenda* by Sir G. Fitzmaurice in article 41 (3) of his draft (A/CN. 4/101). It appears to be a reasonable presumption in these cases that the entry into force of the treaty was intended to turn upon the date specified for ratification. The present view, however, differs from that of Sir G. Fitzmaurice in two respects. His text was designed to cover multilateral as well as plurilateral treaties, and no doubt it was for this reason that he sought to mitigate the rule of unanimity by proposing that, in the absence of indications in the treaty that unanimity is required, it should be enough to obtain the ratifications or acceptances of two-thirds of the participating States. The present draft deals quite differently with multilateral treaties in the next paragraph, and it seems correct in the case of plurilateral treaties to lay down the classical rule of unanimity except where the treaty itself provides otherwise. As already mentioned, special usages, such as those of the Inter-American system, are excepted in paragraph 1 (b).

(3) Paragraph 2 (c) deals with the case of a treaty which is subject to ratification or acceptance but is silent as to the date on which ratification or acceptance is to take place. Here the general view seems to be that the Contracting States must be presumed to have intended the treaty to come into force upon the exchange of ratifications or acceptances, if this takes place, and, if not, upon the deposit of the last of the required instruments; see Harvard Research Draft, p. 796, and article 41 (2) of Sir G. Fitzmaurice's draft.

(4) Paragraph 3 covers cases where a multilateral treaty makes no provision for its entry into force and sets out rules analogous to those given in paragraph 2 for plurilateral treaties. The chief difference is as to the quorum—the minimum number of States that must be bound—necessary before the treaty can come into force, when the treaty itself is silent upon the point. In the case of multilateral treaties the rule of unanimity must surely be regarded as out of the question. To presume that the Contracting States contemplated that all must be bound before the treaty could enter into force would almost be to presume that they intended it never to come into force. One possibility would be to presume that the Contracting States intended the treaty to come into force as soon as not less than two States had become mutually bound under the treaty. It could be urged that a large number of multilateral treaties fix a definite number, such as twenty, and that, if nothing is said in the treaty as to the number, the Contracting States must have been content that the treaty should come into force for each State as it subscribed to the treaty. But cases also exist, e.g. the Geneva "Red Cross" Conventions of 1949,61 where the Contracting States have specifically provided that the treaty shall come into force after not less than two States have committed themselves to the treaty. In truth, the varied treaty practice hardly justifies the making of any clear presumptions as to the intentions of Contracting States, and all that seems possible is for the Commission to propose what it thinks will be a reasonable residuary rule. A glance at the treaty clauses collected on pages 21-38 of the *Handbook of Final Clauses* (ST/LEG/6) will reveal the extent of the variations in the "entry into force" clauses of modern treaties, and that the different types of clause cannot easily be attributed to definite categories of treaties. Clauses requiring between twenty and twenty-six States to have committed themselves are quite common, but clauses fixing a smaller number are found, and even clauses bringing the treaty into force as each State singly commits itself to the treaty. The Commission, in formulating a single broad rule, may think it necessary to take a conservative view of the probable intentions of States on this point. The figure twenty represents today between a fourth and a fifth of the number of States likely to adopt a treaty at a large multilateral conference, and the Special Rapporteur suggests that the Commission could adopt as a reasonable general rule a quorum of either one-fourth or one-fifth, and in paragraph 3 of the present article has tentatively adopted one-fourth as the minimum number for multilateral treaties.

(5) Paragraph 4 deals with a case which may sometimes arise through inadvertence in drafting and to which attention is drawn in the Harvard Research Draft (pp. 791-2). The authors of that draft would seem to be clearly right in saying that the requirement of ratification (or acceptance) must prevail over the fixing of the date, if that requirement turns out not to have been satisfied before the date fixed by the treaty for its entry into force.

(6) Paragraph 5 merely declares the obvious rule that for any particular State to be subject to the rights and obligations of a treaty, two conditions must be satisfied: (a) the treaty itself must be in force as a treaty and (b) it must be in force with respect to that particular State.

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61 These Conventions were to come into force "six months after not less than two instruments of ratification have been deposited".
(7) Paragraph 6 seeks to cover what in modern practice is a not infrequent phenomenon—a treaty brought into force provisionally, pending its full entry into force when the required ratifications or acceptances have taken place. Sir G. Fitzmaurice covered this point exclusively in article 42 of his draft as part of the “legal effects” of entry into force, but it seems equally to have a place in the present article. For a treaty clause having this effect is, from one aspect, a clause relating to a mode of bringing a treaty into force. Accordingly, this aspect is mentioned here and the “legal effects” of provisional entry into force is dealt with in the next article.

(8) Sir G. Fitzmaurice included in his draft a further provision (paragraph 5) worded as follows: “A treaty may come into force whatever its terms, if the signatories proceed to execute its terms, if the signatories proceed to execute it, pro tanto, if it is put into application between a limited number of them”. The present Special Rapporteur hesitates to include this provision in the draft as a positive rule. So much may depend upon the provisions and circumstances of the treaty and the nature of the acts which are relied upon as establishing that it has been brought into force by the parties outside the procedures contemplated in the treaty. Furthermore, there may be juridical problems as to whether a particular case is really one of the entry into force of the original treaty or of some fresh form of agreement. The Special Rapporteur has therefore inserted tentatively for consideration a negative clause simply reserving the point.

ARTICLE 21. LEGAL EFFECTS OF ENTRY INTO FORCE

1. (a) On entering into force a treaty shall automatically become binding upon all the States parties to the treaty.

(b) The rights and obligations contained in the treaty shall accordingly come into operation for each State at once upon its becoming a party to it, unless the treaty itself shall provide that all or any of those rights or obligations shall only come into operation upon a future date.

(c) Unless the treaty itself shall expressly provide for the retrospective operation of all or any of its clauses, the rights and obligations laid down in the treaty shall come into operation for each party only from the date of the entry into force of the treaty with respect to that particular party.

2. (a) When a treaty lays down that it shall come into full force provisionally upon a certain date or event, the rights and obligations contained in the treaty shall come into operation for the parties to it upon that date or event and shall continue in operation upon a provisional basis until the treaty enters into full force in accordance with its terms.

(b) If, however, the entry into full force of the treaty is unreasonably delayed and, unless the parties have concluded a further agreement to continue the treaty in force on a provisional basis, any of the parties may give notice of the termination of the provisional application of the treaty; and when a period of six months shall have elapsed, the rights and obligations contained in the treaty shall cease to apply with respect to that party.

Commentary

(1) Paragraph 1 (a) simply declares the basic rule that the entry into force of the treaty automatically makes it binding upon the parties. There is a certain importance in stating this obvious principle, because, even although the treaty itself may postpone the operation of the rights or obligations in the treaty, the position of a State after the entry into force of the treaty is radically different from what it was before that event. Prior to the entry into force of the treaty, as has already been noticed in article 9, a State may be under certain obligations of good faith to refrain from acting in such a way as to frustrate the objects of the treaty. But after entry into force it is no longer merely a question of good faith but of an obligation under the treaty itself.

(2) Paragraph 1 (b) also deals with an obvious point, namely that there may be a difference between the entry into force of the treaty and the operation of the rights and obligations laid down in it.

(3) Paragraph 1 (c) deals with what is generally considered today to be an unquestionable principle, though even as late as 1935 it was regarded in the Harvard Research Draft as requiring extended discussion. This principle is that a treaty has no retrospective effects unless the treaty expressly so provides; and that this principle obtains equally in cases where the treaty was signed subject to ratification. It is now beyond doubt that ratification is ratification of the treaty itself and not merely a confirmation of a previous acceptance of the treaty.

(4) Paragraph 2 seeks to formulate the legal effects of the provisional entry into force of a treaty. Clearly the rule in 2 (a) follows simply from the provisional nature of the entry into force. Sub-paragraph (b) is put forward de lege ferenda for the Commission’s consideration. It seems evident that if the necessary ratifications or acceptances etc. are unreasonably delayed so that the provisional period is unduly prolonged, there must come a time when States are entitled to say that the provisional application of the treaty must come to an end. Sir G. Fitzmaurice states this as a rule (commentary on his article 42, paragraph 1). It seems desirable, however, for the Commission to try and give a little more definition to the rule, and perhaps to make withdrawal from the provisional application of the treaty and orderly process. The suggestion in the draft is that at least six months’ notice ought to be given before withdrawal becomes effective. The draft also suggests that withdrawal would only affect the particular party concerned. But this may be a matter for further examination.

ARTICLE 22. THE REGISTRATION AND PUBLICATION OF TREATIES

1. Every treaty entered into after 24 October 1945, the date of the coming into force of the Charter of the United Nations, by any Member of the United Nations or by any State party to the present articles, shall as soon as possible be registered (or filed and recorded if appropriate) with the Secretariat of the United Nations and published by it, if such registration and publication have not already been effected.

2. Registration shall not take place until the treaty has come into force between two or more of the parties thereto.

3. (a) Registration of a treaty shall be effected ex officio by the United Nations where:

(i) The United Nations is itself a party to the treaty; or
(ii) The United Nations has been specifically authorized by the treaty to effect registration; or

(iii) The United Nations is the depository of a multilateral treaty.

(b) A treaty may be registered by a specialized agency where:

(i) The constituent instrument of the specialized agency provides for such registration;

(ii) The treaty has been registered with the specialized agency pursuant to the terms of its constituent instrument; or

(iii) The specialized agency has been authorized by the treaty to effect registration.

(c) A treaty may also be registered by any party thereto.

4. (a) The registration of a treaty either by the United Nations or by a specialized agency in accordance with sub-paragraphs (a) and (b) of the preceding paragraph relieves all the parties to the treaty of the obligation to register.

(b) The registration of a treaty by a party to the treaty in accordance with sub-paragraph (c) of the preceding paragraph relieves all other parties to the treaty of the obligation to register.

5. When a treaty has been registered with the Secretariat of the United Nations, a certified statement regarding any subsequent action which effects a change in the parties thereto, or the terms, scope or application thereof, shall also be registered with the Secretariat of the United Nations.

6. No party to any treaty entered into after 24 October 1945, which has not been registered in accordance with the provisions of the present article, may invoke that treaty before any organ of the United Nations.

Commentary

(1) Articles 22 and 23 recall the obligations contained in Article 102 of the Charter concerning the registration and publication of treaties and the regulations adopted by the General Assembly in its resolution of 14 December 1946 for implementing those obligations. Neither Professor Briehl nor Sir G. Fitzmaurice included any provisions concerning the registration and publication of treaties in their draft articles covering the framing and conclusion of treaties. Sir H. Lauterpacht, on the other hand, included in the final section of his code (A/CN.4/63)—after sections covering "reality of consent" and "legality of object"—a brief article (article 18) stating that "Treaties entered into by Members of the United Nations subsequent to their acceptance of the Charter of the United Nations cannot be invoked by the parties before any organ of the United Nations unless registered, as soon as possible, with the Secretariat of the United Nations". Moreover, although his actual article merely restated in a combined form the provisions found in paragraphs 1 and 2 of Article 102 of the Charter, Sir H. Lauterpacht suggested in his commentary that the Commission should consider whether "it ought not, in the exercise of its function to develop international law, to formulate a rule both more comprehensive and more explicit than that formulated in the present article on the basis of Article 102 of the Charter". And the rule he suggested would have run as follows: "A treaty concluded by a Member of the United Nations shall be void if not registered with the United Nations within six months of its entry into force."

(2) The present Special Rapporteur considers that the registration and publication of treaties should find a place in the draft articles on the law of treaties and that the appropriate part of the draft in which to include them is the present chapter. It is true that, if regard is had primarily to the sanction in paragraph 2 of Article 102 of the Charter, registration may seem to be concerned with the question of the enforceability of treaties. But the substantive obligation of registration is one which, in point of time, is closely associated with the conclusion and entry into force of treaties. Thus, Article 102 requires registration to be effected "as soon as possible", while the regulations adopted by the General Assembly state that registration is to be effected "when the treaty has come into force between two or more parties thereto". It seems to the Special Rapporteur that the substantive obligation rather than the sanction ought to determine the placing of registration of treaties in the draft articles, and that the above-mentioned provisions of the Charter and the Assembly's regulations would justify the Commission in placing it immediately after "entry into force", either in the same or in a separate chapter.

(3) The Special Rapporteur doubts whether it is either desirable or necessary for the Commission to propose that the sanction for non-registration of treaties contained in Article 102 of the Charter should be made more stringent. But in any event the rule suggested by Sir H. Lauterpacht involves a direct amendment of an express provision of the Charter, and its inclusion in the present articles seems for that reason alone to be altogether out of the question. The two articles now proposed for the Commission's consideration incorporate the substance of the provisions of the two paragraphs of Article 102 of the Charter and articles 1-7 of the General Assembly's regulations with only such minor drafting adjustments as are necessary to fit them into the different context of the present articles. The idea of the Special Rapporteur has been to include those provisions of Article 102 and the regulations which touch the rights and obligations of States and organizations in regard to the registration and publication of treaties and to omit those which concern primarily the Secretary-General's administrative functions with respect to the register itself.

(4) Paragraph 1 restates and makes applicable to all future treaties the basic provision in Article 102, paragraph 1, of the Charter. Members of the United Nations are, of course, already under this obligation, which dates from 24 October 1945, the date of the coming into force of the Charter. Although the Charter obligation is limited to States and to States Members of the United Nations, and virtually all international organizations have been in the practice of registering treaties with the Secretariat of the United Nations in voluntary compliance with Article 102, paragraph 1. It therefore seems reasonable to lay down in sub-paragraph (b) of the present article that every registrable treaty entered into by a non-Member State between the coming into force of the Charter and the coming into force of the present articles shall as soon as possible be registered, if registration has not already been effected in voluntary compliance with the Charter provision. This would

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62 The regulations were adopted by General Assembly resolution 97 (I) of 14 December 1946 and amended by General Assembly resolutions 364 B (IV) of 1 December 1949 and 482 (V) of 12 December 1950.
have the effect of extending, through the present articles, the operation of Article 102 of the Charter to any non-member States which may subscribe to the present articles.

(5) Paragraph 2 restates the provision in article 1 (2) of the General Assembly's regulations, which is really an interpretation of Article 102 of the Charter by the Assembly; for the Assembly has in effect said that "as soon as possible" does not mean as soon as possible after the drawing up of the treaty but as soon as possible after its entry into force with respect to at least some parties.

(6) Paragraph 3 sets out the contents of article 1, paragraph 3, and article 4 of the General Assembly's regulations.

(7) Paragraph 4 restates the provisions of article 3 of the General Assembly's regulations. The order of the two paragraphs of article 3 has been reversed, because the obligation of an individual party to register a treaty appears to be an obligation which is residiary in the sense that, if the treaty is one capable of being registered by the United Nations or by a specialized agency, registration by those bodies is a virtual certainty unless an administrative lapse occurs; and on registration being effected by the United Nations or a specialized agency, the individual party is relieved of his obligation.

(8) Paragraph 5 restates the provision contained in article 2, paragraph 1, of the General Assembly's regulations. This provision, which calls for the registration of subsequent, related, instruments affecting the operation of the treaty, represents a not unimportant supplement to the obligation stated in Article 102 of the Charter.

(9) Paragraph 6 restates the sanction laid down in Article 102, paragraph 2, of the Charter, and in a form to make it applicable to all treaties entered into after the coming into force of the Charter. The United Nations is entitled to lay down the conditions under which treaties may be invoked by any State, whether Member or non-member, in the proceedings of organs of the United Nations, and it would seem to be logical to make this provision of universal application, in order to encourage a world-wide system of registration of treaties.

**APPENDIX**

**Historical summary of the question of reservations to multilateral conventions**

(1) Certain reservations made to the Second Opium Convention of 1925 brought the question of reservations to multilateral treaties to the attention of the League of Nations, and in 1927 the Council of the League adopted a report on the question drawn up by the Committee for the Progressive Codification of International Law. The relevant passage in the report ran as follows:

"In order that any reservation whatever may be validly made in regard to a clause of the treaty, it is essential that this reservation should be accepted by all the contracting parties, as would have been the case if it had been put forward in the course of the negotiations. If not, the reservation, like the signature to which it is attached, is null and void."

Thus, under the League of Nations practice a State could only become a party to a multilateral treaty subject to a reservation if the reservation received the unanimous assent of all the Contracting States. When the United Nations was established and took over the depositary functions of the League, the Secretariat applied the same principles in regard to reservations as those previously followed by the League of Nations Secretariat. Difficulties having arisen in 1950 in determining the date of the entry into force of the Convention on the Prevention and Punishment of the Crime of Genocide by reason of the fact that some of the ratifications were accompanied

(a) However, the date of registration of a treaty registered ex officio by the United Nations shall be the date on which the treaty first came into force between two or more of the parties thereto.

3. A certificate of registration signed by the Secretary-General or his representative shall be issued to the registering party or agency and also upon request, to any party to the treaty or international agreement registered.

4. The foregoing provisions of the present article, which incorporate the provisions, as amended, of articles 5, 6 and 7 of the regulations adopted by the General Assembly of the United Nations on 14 December 1946, to give effect to Article 102 of the Charter, shall be subject to alteration by any amendments that may from time to time be made to those regulations by the General Assembly.

**Commentary**

(1) The principle upon which the draft articles concerning registration of treaties have been drawn up has already been explained in paragraph (3) of the commentary to the previous article. The present article reproduces the substance of articles 5 to 7 of the General Assembly's regulations.

(2) Paragraph 1 reproduces almost verbatim the provisions of article 5 of the regulations.

(3) Paragraph 2 reproduces article 6 of the regulations almost verbatim but divides it into two rules. The reason for this drafting change is that the "provided that" clause in the second part of article 6 is not really a proviso at all but a distinct and completely different rule for a particular class of treaty.

(4) Paragraph 3 reproduces textual terms of article 7 of the regulations, as amended by General Assembly resolution 482 (V) of 12 December 1950.
by reservations, the Secretary-General brought the matter before the General Assembly. In doing so, he submitted a full report (A/1372) on the existing practice of the Secretariat, the substance of which, for present purposes, was contained in the following passages of the report:

"While it is universally recognized that the consent of the other governments concerned must be sought before they can be bound by the terms of a reservation, there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State objecting to a reservation." (Paragraph 2.)

"In the absence of stipulations in a particular convention regarding the procedure to be followed in the making and accepting of reservations, the Secretary-General, in his capacity as depositary, has held to the broad principle that a reservation may be definitively accepted only after it has been ascertained that there is no objection on the part of any of the other States directly concerned. If the convention is already in force, the consent, express or implied, is thus required of all States which have become parties up to the date on which the reservation is offered. Should the convention not yet have entered into force, an instrument of ratification or accession offered with a reservation can be accepted in definite deposit only with the consent of all States which have ratified or acceded by the date of entry into force.

"Thus, the Secretary-General, on receipt of a signature or instrument of ratification or accession, subject to a reservation, to a convention not yet in force, has formally notified the reservation to all States which may become parties to the convention. In so doing, he has also asked those States which have ratified or acceded to the convention to inform him of their attitude towards the reservation, at the same time advising them that, unless they notify him of objections thereto prior to a certain date—normally the date of entry into force of the convention—it would be his understanding that they had accepted the reservation. States ratifying or acceding without express objection, subsequent to notice of a reservation, are advised of the Secretary-General's assumption that they have agreed to the reservation. If the convention were already in force when the reservation was received, the procedure would not differ substantially, except that a reasonable time for the receipt of objections would be allowed before tacit consent could properly be assumed." (Paragraphs 5 and 6.)

"The rule adhered to by the Secretary-General as depositary may accordingly be stated in the following manner:

"A State may have a reservation when signing, ratifying or acceding to a convention, prior to its entry into force, only with the consent of all States which have ratified or acceded thereto up to the date of entry into force; and may do so after the date of entry into force only with the consent of all States which have therefofore ratified or acceded." (Paragraph 46.)

(2) Meanwhile, the subject had already come before the Commission during the discussion of Professor Brierly's first report on the law of treaties (A/CN.4/23) at its second session in 1950, at which time the Court had not yet been asked for its advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Later that year, the General Assembly by resolution 478 (V) requested the Court to give an advisory opinion on the particular question of reservations to the Genocide Convention, and at the same time invited the Commission "in the course of its work on the codification of the law of treaties to study the question of reservations to multilateral conventions, both from the point of view of codification and from that of the progressive development of international law". The Commission was requested to give priority to this study and to report thereon to the General Assembly in time for the next session. In due course, Professor Brierly submitted for discussion at the Commission's 1951 session a special report on reservations to multilateral conventions (A/CN.4/L.41) to which were attached annexes containing (a) a summary of the debates in the Sixth Committee and General Assembly, (b) a summary of the opinions of writers, (c) examples of treaty clauses on the making of reservations and (d) a review of State practice. A further annex (e) contained an elaborate series of possible treaty clauses drafted in consultation with the Secretariat and consisting of the question of (i) the admissibility of reservations, (ii) the States entitled to be consulted as to the admissibility of reservations, (iii) the functions of the depositary and (iv) the procedure for objections to reservations. In addition, the Commission received valuable memoranda from Mr. Gilberto Amado (A/CN.4/L.9) and Mr. Georges Scelle (A/CN.4/L.14).

(3) Before the Commission met to consider this report the Court had rendered its Advisory Opinion on Reservations to the Genocide Convention (I.C.J. Reports, 1951, p. 15). By a majority of seven votes to five the Court advised:

"Question I:"

"That a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

"Question II:"

"(a) That a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

"(b) That if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

"Question III:"

"(a) That an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

"(b) That an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect."
opinion, considered the principle of the integrity of the convention to be a rule of positive international law. Citing the special report of Professor Brierly and the memoranda of the United Nations himself had said in 1950 that there has not been unanimity either as to the procedure to be followed by a depositary in obtaining the necessary consent or as to the legal effect of a State's objecting to a reservation.

Of the five dissenting Judges one, Judge Alvarez, considered that owing to its particular nature the Genocide Convention did not admit of any reservations at all. The remaining four, Judges Guerreiro, McNair, Read and Hsu Mo, in a joint opinion, considered the principle of the integrity of the convention to be a rule of positive international law. The opinions of Fauchille, Sir William Malik, Accioly and Podesta Costa, and referring to the practice of the League and United Nations Secretariats as well as to the report of the League Committee for the Progressive Development of International Law adopted by the Council in 1927 and to the Harvard Research Draft, these judges came to the conclusion that the principle of the need for unanimous assent to reservations—the principle hitherto applied by the Secretariats of the League and the United Nations—had been accepted as a rule of law as well as an administrative practice. They pointed out that the contrary practice of the Pan American Union, permitting a reserving State to become a party, despite the objections of other States to the reservation, was based on the prior agreement of the Contracting States given at the Lima Conference of 1938. They further said that they were unable to accept the criterion of "compatibility with the object and purpose of the convention", favoured by the Court, (a) because it was a new rule for which they could find no legal basis and (b) because the subjective character of the criterion, whose application would be dependent on the individual appreciation of each State, would mean that there would be no finality or certainty as to the status of the reserving State as a party to the Convention.

The Commission also examined the system of the Organization of American States. Under this system a State proposing to make a reservation communicates it to the Pan American Union, which in turn inquires of the other signatory States whether or not to maintain its reservation. If the reserving State maintains a reservation to which objection has been taken, it advises that the reserved State is to be considered a party to the convention for the purpose of the right of intervention under Article 63 of the Court's Statute, and in some cases the doubt even whether sufficient ratifications, accessions, etc., have taken place to bring the convention into force. And, owing to these difficulties, it advised that the criterion adopted by the Court in the case of the Genocide Convention is not suitable for application to multilateral conventions in general (para. 24).

The Commission, while recognizing that a system of this kind, designed to ensure the greatest number of ratifications, might be regarded by a continental or regional organization as suitable to its needs, found the Pan-American system not to be suitable for application to multilateral conventions in general. The reasons which it gave for this finding were:

"...an examination of the history of the conventions adopted by the Conferences of American States over the past twenty-five years has failed to convince the Commission that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party vis-à-vis non-objecting States. In some multilateral conventions, the securing of universality may be the more important consideration; and when this is the case, it is always possible for States to adopt the procedure followed by the Pan American Union by inserting a suitable provision to this effect in the convention. But there are other multilateral conventions where the integrity and the uniform application of the convention are more important considerations than its universality, and the Commission believes that this is especially likely to be the case with conventions drawn up under the auspices of the United Nations. These conventions are of a law-making type in which each State accepts limitations on its own freedom.

Mr. Yepes dissented from this part of the Commission's report.
of action on the understanding that the other participating States will accept the same limitations on a basis of equality. The Pan American Union practice is likely to stimulate the offering of reservations; the diversity of these reservations and the divergent attitude of States with regard to them tend to split up a multilateral convention into a series of bilateral conventions and thus to reduce the effectiveness of the former.”

The Commission did not, therefore, recommend the application of the Pan-American system, except when the parties to the Convention had indicated their intention to adopt it (ibid., para. 22).

(5) The Commission’s own approach to the problem was governed by the following general considerations (ibid., para. 23):

“When a multilateral convention is open for States generally to become parties, it is certainly desirable that it should have the widest possible acceptance. The very fact of its being open in this way indicates that it deals with some subject of wide international concern regarding which it is desirable to reform or amend existing laws. On the other hand, it is also desirable to maintain uniformity in the obligations of all the parties to a multilateral convention, and it is often more important to maintain the integrity of a convention than to aim, at any price, at the widest possible acceptance of it. A reserving State proposes, in effect, to insert into a convention a provision which will exempt that State from certain of the consequences which would otherwise devolve upon it from the convention, while leaving the other States which are or may become parties to it fully subject to those consequences in their relations inter se. If a State is permitted to become a party to a multilateral convention while maintaining a reservation over the objection of any party to the convention, the latter may well feel that the consideration which prompted it to participate in the convention has been so far impaired by the reservation that it no longer wishes to remain bound by it.”

It also emphasized that it is always within the power of negotiating States to deal with the question of reservations in the text of the convention itself, and highly desirable that they should do so. For then provisions may be inserted depending, in some measure at least, on the relative emphasis to be placed on maintaining the integrity of the text, or on facilitating the widest possible acceptance of it, even in varying terms. It suggested that, if the treaty places no limit on the admissibility of reservations, and if there is no established organizational procedure concerning reservations, the negotiating States should themselves establish in the text of the treaty a procedure covering in particular the following points (ibid., para. 27):

“(a) How and when reservations may be tendered;
(b) Notifications to be made by the depositary as regards reservations and objections thereto;
(c) Categories of States entitled to object to reservations, and the manner in which their consent thereto may be given;
(d) Time limits within which objections are to be made;
(e) Effect of the maintenance of an objection on the participation in the convention of the reserving State.”

The Commission, while recognizing that no single rule uniformly applied could be wholly satisfactory to cover all the cases where the negotiating States have omitted to deal with the question of reservations, considered that its task was to recommend the rule which would be the most suitable for application in the majority of cases; and it suggested that, subject to certain modifications, the previous practice of the Secretary-General would furnish such a rule. The modifications which the Commission had in mind related to the question how far a signatory State, whose signature is still subject to ratification or acceptance, should have the right to advance objections to reservations. On this question, it said (ibid., para. 29):

“...”

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*This sentence perhaps put the matter a little strongly, since, in principle, a reservation only operates in the relations of States with the reserving State.*
time of signature may become a party to the convention only in the absence of objection by any State which has previously signed the convention; when the convention is open to signature during a limited fixed period, only in the absence of objection by any State which becomes a signatory during that period.

“(5) If ratification or acceptance in some other form, after signature, is requisite to bring a multilateral convention into force:

“(a) A reservation made by a State at the time of signature should have no effect unless it is repeated or incorporated by reference in the later ratification or acceptance by that State;

“(6) A State, which tenders a ratification or acceptance with a reservation may become a party to the convention only in the absence of objection by any other State which, at the time the tender is made, has signed or ratified or otherwise accepted the convention; when the convention is open to signature during a limited fixed period, also in the absence of objection by any State which signs, ratifies or otherwise accepts the convention after the tender is made but not before the expiration of this period; provided, however, that an objection by a State which has merely signed the convention should cease to have the effect of excluding the reserving State from becoming a party, if within a period of twelve months from the time of the making of its objection the objecting State has not ratified or otherwise accepted the convention”.

(6) The Court’s Opinion and the Commission’s report were considered together at the sixth session of the General Assembly, which adopted resolution 598 (VI), dealing with the particular question of reservations to the Genocide Convention separately from that of reservations to other multilateral conventions. With regard to the Genocide Convention it requested the Secretary-General to conform his practice to the Court’s Advisory Opinion and recommended thereby that, although the system, as the United Nations of which he is the depositary, it requested the Secretary-General:

(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.

The resolution, being confined to future conventions, is limited to conventions concluded after 12 January 1952, the date of the adoption of the resolution, so that the former practice still applies to conventions concluded before that date.

As to future conventions, the General Assembly did not endorse the Commission’s proposal to retain the former practice subject to minor modifications. Instead, it directed the Secretary-General, in effect, to act simply as a registry and circulating agent for instruments containing reservations or objections to reservations, without drawing any legal consequences from them. The resolution is, therefore, entirely “neutral” as to the answers to be given to the questions which States should have the right to lodge objections to reservations and what should be the legal effect of such objections.

(7) The General Assembly was unable to adopt a more positive rule because it was sharply divided on the merits of the Commission’s proposals embodying the traditional concept of the integrity of the convention. A substantial group of States favoured the traditional system advocated by the Commission. At the same time, in the Sixth Committee a number of these States expressed support for a modification of it suggested by the United Kingdom to meet the criticism that under the traditional system it is possible for a single State, by its objection,

to exclude a reserving State altogether and thereby frustrate the will of the majority who might be ready to accept the reservation. The suggestion was that the requirement of unanimous consent to a reservation might be replaced by one of acceptance by a qualified majority, such as three-quarters or two-thirds, of the States concerned.

On the other hand, a no less substantial—and perhaps largergroup of States favoured a less strict practice, arguing that a more flexible system is necessary with regard to reservations in order to safeguard the sovereign equality of States and, as most conventions are now accepted by a majority vote, to safeguard the position of the out-voted minority. They also urged that a more flexible system would make possible a wider acceptance of conventions and thus contribute to the development of international law; and they emphasized that one State should not be able to veto reasonable reservations to which other States might agree. This group was itself somewhat divided as to the effect of objections to reservations. Some States considered that States, by virtue of their sovereignty, have an inalienable right to make reservations and that an objection to a reservation, being an interference with that sovereignty, is without any legal effect. Several others in this group, however, considered that a more general application could be given to the Court’s criterion according to which a State, to whose reservation objection has been taken, may nevertheless become a party if its reservation is compatible with the object and purpose of the convention.

In addition, a number of States belonging to the second group which were members of the Organization of American States argued in favour of the Pan-American system. They said that the circulation of reservations enabled States to judge whether to maintain them in face of the objections of other States and that the system as a whole facilitated acceptance of conventions. Several States in the first group, however, including two members of the Organization of American States, maintained that the Pan-American system might be suitable for a relatively homogeneous community like the Latin American States, it would not be suitable for the more diverse and less closely knit community of the United Nations.

A few States considered that it was impossible to apply a single rule to all multilateral conventions and that an attempt should be made to define categories of conventions and establish rules applicable to each category. There was also considerable support for the view that the Assembly should not try to take a final decision on the matter at its sixth session, but should refer it back to the Commission in the hope that it would be possible to formulate a rule combining the best features of the systems so far advocated and meeting with a wide measure of agreement.

(8) Confronted with the General Assembly’s neutral resolution and with the divergent views expressed by States in the Sixth Committee and Assembly, Sir H. Lauterpacht in his two reports (A/CN.4/63 and A/CN.4/87) put forward a number of alternative draft articles for consideration. His primary draft read as follows (A/CN.4/87, article 9):

“Unless otherwise provided by the treaty, a signature, ratification, accession, or any other method of accepting a multilateral treaty is void if accompanied by reservations not agreed to by all parties to the treaty.”

This draft restated in brief form the principle of the integrity of the convention—the need for unanimous consent to reservations—embodied in the Commission’s report to the General Assembly which Sir H. Lauterpacht regarded “as probably still representing the existing law”. He considered it to be the function of the Commission to state that principle as the rule de lege lata “even if only as a preliminary to a formulation of a more satisfactory solution de lege ferenda”. He underlined, however, that the Commission had been requested to examine the subject from the point of view of the progressive development, as well as the codification, of the law and suggested that the Commission ought now to recognize that the unanimity rule had been found to be unsatisfactory and unacceptable to a large number of States.

On this basis he put forward four alternative draft articles, all of which were founded upon the following considerations
that the draft would be much clarified if the treaty itself were
prescribed, or that an objection ceases to be valid if the objecting
treaty of two-thirds of the States "qualified to offer objec-
organization concerned should request the International Court
in the criteria adopted for determining whether the reserving
reserving State would become a party to the convention:
Alternative A envisaged that a State formulating a reserva-
accepting the treaty have declined to agree to the reservation,
the treaty was to be considered a party to the convention:
Alternative B was a much simplified version of alternative A,
in that it abandoned the concept of provisional participation.
In effect, it merely provided that a State would or would not
become a party according as, after a period to be prescribed
in the convention, the reservation had or had not met with the
agreement of two-thirds of the States "qualified to offer objec-
tions to the reservation". Nor did it define or limit in any way
the reserving State; and, subject to articles 38 and 39
alternative C envisaged that the parties, or the international
organization responsible for establishing the text of the treaty,
should designate a committee with competence to decide upon
the admissibility of reservations to which objection has been
made.
Alternative D envisaged that the parties or the international
organization concerned should request the International Court
to designate a Chamber of Summary Procedure to decide on
the admissibility of reservations to which objection has been
made.
Sir H. Lauterpacht explained in the commentary to his second
report that alternatives A, B, C and D could be conceived of
as possible rules to replace the unanimous consent prin-
ciple advocated by the Commission in 1951 or as solutions
recommended by the Commission which the parties could
choose according to the circumstances of each treaty. And he
added that it would be necessary for the Commission to decide
whether to formulate one of these alternatives as the new basic
rule or whether to "reaffirm" the unanimous consent principle
and to offer these alternatives merely as recommended pro-
cedures to replace that rule if the parties to a particular treaty
so wished. Since the Commission is today definitely embarked
upon the task of preparing the draft articles of a convention,
Sir H. Lauterpacht's alternatives A, B, C and D, whatever
value they may have as providing model precedents for the
draftsmen of particular treaties, are now only of interest to the
Commission in so far as they may offer a possible basis for
formulating a rule for general application in cases where
the question of reservations has not been dealt with in the
treaty itself. Viewed from this angle, alternative A, under
which the status of reserving States may be only provisional
for as long a period as three years, appears to the present
Special Rapporteur to suffer from such evident disadvantages
as to be unacceptable as a general rule. Again, alternatives C
and D, ideal solutions although they may be when States are
agreeable to submit their disputes to decision by an independent
body, appear to be so unlikely to meet with general acceptance
at the present time that the adoption of either of them in the
Commission's draft articles does not seem to be advisable.
International practice does show some recourse to an analogous
solution in particular cases, namely to the use of the competent
organ of an international organization for determining the
admissibility of reservations to multilateral conventions drawn
up within the organization; and that more special question
may merit further consideration. There remains alternative B,
which incorporates the two-thirds principle suggested by the
United Kingdom and favourably commented upon by some other
States in the Sixth Committee in 1951. As Sir H. Lauterpacht
himself recognized that alternative B required further amplifi-
cation, it suffices to note that one of the solutions put forward
by him was the maintenance principle with a two-
thirds majority substituted for unanimity.
(9) Sir G. Fitzmaurice in articles 37-40 of his report (A/
CN.4/101) submitted a more elaborate and more precise set
of rules concerning reservations, the detailed provisions of
which have served as a valuable guide to the present Special
Rapporteur. That report has not, however, been before the
Commission, and there are certain basic points in Sir G. Fitz-
maurice's approach to the subject on which the Special Rap-
porteur would have liked to have had the Commission's opinion
before drafting the present report. Sir G. Fitzmaurice, while
making every provision for tacit consent to reservations through
omission to object, nevertheless made the principle of unanimous
consent the basis of his draft articles, as appears from the
following provisions of his draft:
Article 37 (2)
"Reservations...must be brought to the knowledge of the
other interested States; and, subject to articles 38 and 39
below, must be assented to expressly or tacitly by all those
States."
Article 38
"In the case of bilateral treaties, or plurilateral treaties
made between a limited number of States for purposes
special interests, those States, no reservations may be
made, unless the treaty in terms so permits, or all the other
negotiating States expressly so agree."
Article 39 (3)
"In the case of general multilateral treaties...if a reserva-
tion meets with objection, and if the objection is maintained
withstanding any explanations or assurances given by the
reserving State, the latter cannot become, or rank as, a party to the treaty unless the reservation is withdrawn."

**Article 39 (4)**

"Unless and until a reservation has been circulated and is ascertained to have met with no final objection, and thus have been accepted, the reserving State cannot be taken into account in any computation of the number of parties to the treaty ...."

In his commentary upon article 37 Sir G. Fitzmaurice referred to a study of the whole subject which he had written in a United Kingdom law review, and recommended that in any code on the law of treaties the Commission should adhere to the same basic view as that which had inspired its report to the General Assembly on reservations to multilateral conventions, 1951.

Sir G. Fitzmaurice, it will be seen, did not propose that the Commission should modify the principle that reservations require the consent of the other interested States, even to the extent of substituting a two-thirds majority for unanimity. He urged that the consent principle is mitigated in practice *inter alia* by the considerations that (i) any negotiating State may seek to have inserted in the treaty an express provision permitting certain reservations or classes of reservations, (ii) if the treaty does not contain such a provision, it may still seek specific acquiescence for any particular reservation it desires to make, (iii) tacit acquiescence may be inferred from silence, (iv) States do not in practice normally refuse their consent unless the reservation is clearly unreasonable and such as ought not to be admitted. And he suggested that all legitimate requirements would be met if the Commission's draft further provided:

(i) That in the case of reservations formulated after the treaty has been drawn up, the acquiescence of a State would be presumed if no objection had been received within a period of three months; and

(ii) That after the treaty has been in force for a certain period of time—and the period he suggested was five years—only the objections of actual parties to the treaty should be taken into account, provided that they represented a reasonable proportion of those entitled to become a party to the treaty. Thus, he thought that, unless the treaty itself otherwise provides, the rule of unanimity should continue to apply, qualified only by provisions (a) making absence of objection for three months equivalent to a definitive expression of consent and (b) nullifying, when the treaty has been in force for five years, the objection of any State which has not itself proceeded to become a party to the treaty.

(10) Finally, in 1959, the question of reservations to multilateral treaties was considered by the Inter-American Council of Jurists, with a view to drawing up principles to be followed by the Pan American Union in discharge of its functions as a depository of inter-American treaties. The Council ultimately resolved to recommend the adoption of the following rules (reproduced in document A/CN.4/124, para. 94): "

I. In the case of ratification or adherence with reservations, the ratifying or adhering State shall send to the Pan American Union, before depositing the instrument of ratification or adherence, the text of the reservations it proposes to make so that the Pan American Union may transmit them to the other signatory States for the purpose of ascertaining whether they accept them or not."

"The Secretary-General shall inform the State that made the reservations of the observations made by the other States. The State in question may or may not proceed to deposit the instrument of ratification or adherence with the reservations, taking into account the nature of the observations made thereon by the other signatory States."

"If a period of one year has elapsed from the date of consultation made to a signatory State without receiving a reply, it shall be understood that that State has no objection to make to the reservations."


"If, notwithstanding the observations that have been made, the State maintains its reservations, the juridical consequences of such ratification or adherence shall be the following:

"(a) As between States that have ratified without reservations, the treaty shall be in force in the form in which the original text was drafted and signed."

"(b) As between the States that have ratified with reservations and those that have ratified and accepted such reservations, the treaty shall be in force in the form in which it was modified by the said reservations."

"(c) As between the States that have ratified with reservations and those that have ratified but have not accepted the reservations, the treaty shall not be in force. In any event the State that rejects the reservations and the one that has made them may expressly agree that the treaty shall be in force between them with the exception of the provisions affected by the reservations."

"(d) In no case shall reservations accepted by the majority of the States have any effect with respect to a State that has rejected them."

"II. Reservations made to a treaty at the time of signature shall have no effect if they are not reiterated before depositing the instrument of ratification."

"In the event the reservations are affirmed, consultations will be made in accordance with rule I."

"III. Any State may withdraw its reservations at any time, either before or after they have been accepted by the other States. A State that has rejected a reservation may later accept it."

The Council then added that both the making of reservations and the acceptance or rejection of them or the abstention from any comment upon them are acts inherent in national sovereignty. The Council further recommended that reservations should be precise and indicate exactly the clause or rule to which they relate.

The resolution of the Inter-American Council of Jurists concerning reservations to multilateral treaties was, however, made subject to certain reservations by four States, and these reservations were as follows *(ibid., para. 95)*:

**Reservation of Brazil:**

The delegation of Brazil abstains from voting on rule I, paragraphs (b) (c) and (d) with respect to reservations to multilateral treaties, in view of the opinion maintained by the Government of Brazil regarding the principle of the compatibility of reservations with the objective or purpose of the treaties to which they refer.

**Statement of the United States of America:**

The United States delegation makes the following statement with respect to two of the provisions in the draft resolution on the Judicial Effects of Reservations to Multilateral Facts:

(a) The provision in paragraph I of the resolution, that the failure of a party to the convention to reply within a year to a notice of a reservation filed by a ratifying or adhering party shall be construed as acceptance of the reservation, is undesirable.

(b) The requirement of paragraph II of the resolution, under which reservations filed at the time of signature must also be reiterated prior to the deposit of the ratification, is unacceptable to the United States delegation in the form in which it has been drafted.

The United States delegation therefore reserves its position on both these provisions.

**Reservation of Bolivia:**

The delegation of Bolivia abstains from voting on the draft resolution dealing with reservations to multilateral treaties, because it regards as inappropriate any statement "in the abstract" on the acceptance or rejection of reservations on multilateral treaties, without a prior definition of the subject matter of these reservations and the significance thereof.
Chapter IV. The correction of errors and functions of depositaries

ARTICLE 24. THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS NO DEPOSITORY

1. Where a typographical error or omission is discovered in the text of a treaty for which there is no depositary after the text has been signed, the signatory States shall by mutual agreement correct the error either:

(a) By having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

(b) By drawing up and executing a separate protocol or procès-verbal setting out the errors in the text and the corrections which the parties have agreed to make to the text; or

(c) By preparing a corrected text of the whole treaty and executing it afresh in the same manner as the erroneous text that is being replaced.

2. The provisions of paragraph 1 shall also apply mutatis mutandis to any case where there are two or more authentic texts of such a treaty which are discovered not to be concordant and the parties are agreed in considering that the wording of one of the texts is inexact and requires to be amended in order to bring it into harmony with the other text or texts.

3. Whenever the text of a treaty has been corrected or amended under the preceding paragraphs of the present article, the corrected or amended text shall be deemed to have come into force on the date of the original text, unless the States concerned shall otherwise decide.

Commentary

(1) Errors and inconsistencies are not uncommonly found in the texts of treaties and it seems desirable to include provisions in the draft articles concerning methods of rectifying them. The present article deals with the situation where an error is discovered in a bilateral treaty or in a plurilateral treaty for which there is no depositary; and also with the situation where there are two or more authentic texts of such a treaty and they are discovered not to be concordant. In these cases the correction of the error or inconsistencies would seem to be essentially a matter for agreement between the signatories to the treaty. Neither the Harvard Research Draft, nor Satow’s Diplomatic Practice, nor the reports of previous Rapporteurs contain any information on this question; and in formulating the provisions of the present article the Special Rapporteur has had regard primarily to the precedents given on pages 93 to 101 of volume V of Hackworth’s Digest of International Law.

(2) The normal techniques used for correcting errors appear to be those in (a) and (b) of paragraph 1. Only in the extreme case of a whole series of errors would there be any occasion for starting afresh with a new text as contemplated in paragraph (c); since, however, one such instance is given in Hackworth, op. cit., that of the United States-Liberia Extradition Treaty of 1937, the Special Rapporteur has included a provision allowing for the substitution of a completely new text.

(3) The same techniques appear to be appropriate for the rectification of discordant texts where there are two or more authentic texts in different languages. Thus, a number of the precedents given in Hackworth concern the rectification of discordant passages in one of two authentic texts; for example, the Commercial Treaty of 1938 between the United States and Norway (page 93) and the Naturalisation Convention of 1907 between the United States and Peru (page 96).

(4) Since what is involved is merely the correction or rectification of an already accepted text, it seems clear that, unless the parties otherwise agree, the corrected or rectified text should be deemed to operate from the date when the original text came into force. On the other hand, it would not be right to say that it should be deemed to date back to the adoption of the original text, since that might complicate the position where a faulty text has been submitted by one or other party to its legislature for approval or ratification.

ARTICLE 25. THE CORRECTION OF ERRORS IN THE TEXTS OF TREATIES FOR WHICH THERE IS A DEPOSITORY

1 (a). Where a typographical error or omission is discovered in the original text of a treaty for which there is a depositary, after the text has been authenticated, the depositary:

(i) Shall notify the error to all the States which participated in the adoption of the text and to any other States that may subsequently have signed or accepted the treaty and inform them that it is proposed to correct the error if within a specified time limit no objection shall have been raised to the making of the correction; and

(ii) Shall in particular invite any States that may have already signed or accepted the treaty to give their consent to the said correction.

(b) If on the expiry of the specified time limit no objection has been raised to the correction of the text, the depositary:
(1) Shall make the correction in the text of the treaty, initialing the correction in the margin; and

(ii) Shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the States mentioned in sub-paragraph (a) (i) of the present paragraph.

2. Where a typographical error or omission is discovered in a certified copy of such a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to all the States mentioned in paragraph 1 (a) (i) of the present article.

3 (a). Where there are two or more authentic texts of such a treaty which are discovered not to be concordant, and a proposal is made that the wording of one of the texts should be amended in order to bring it into harmony with the other text or texts, the depositary:

(i) Shall notify the lack of concordance in the texts to all the States mentioned in paragraph 1 (a) (i) of the present article and inform them of the proposal to amend the text in question; and

(ii) Shall at the same time communicate to each State a certified copy of the text as amended, or of such parts only as it is proposed to amend, and request it within a specified time limit to notify the depositary whether it has any objection to the text being amended as proposed.

(b) If on the expiry of the specified time limit no objection has been raised to the amendment of the text the depositary:

(i) Shall either replace the offending text with the new text appropriately endorsed and duly initialled, or as the case may be, make the correction of the offending passages in the text and initial the corrections in the margin; and

(ii) Shall draw up and execute a *procès-verbal* of the substitution or, as the case may be, rectification of the text and transmit a copy of the *procès-verbal* to each of the States mentioned in paragraph 1 (a) (i) of the present article.

4. If an objection is raised to a proposal to correct or amend a text under the provisions of paragraphs 1 or 3 of the present article, the depositary shall notify the objection to all the States concerned together with any other replies received in response to the notifications mentioned in paragraphs 1 (a) and 3 (a). However, if the treaty is one drawn up either within an international organization or at a conference convened by an international organization, the depositary shall also refer the proposal to correct or amend the text and the objection to such proposal to the competent organ of the organization concerned.

5. Whenever the text of a treaty has been corrected, amended or replaced under the preceding paragraphs of the present article, the corrected or amended text shall be deemed to come into force on the same date as the original text, unless the States concerned shall otherwise decide.

Commentary

(1) This article covers the same problems as article 24, but in cases where the treaty is a multilateral or plurilateral treaty for which there is a depositary. Here the process of obtaining the agreement of the interested States to the correction or rectification of the texts is complicated by the number of the States and it is only natural that the techniques used should hinge upon the depositary. In formulating the provisions set out in the article the Special Rapporteur has based himself upon the information contained in the Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements. This information, together with a number of precedents, will be found on pages 8-10, 12, 19-20 and 39 (footnote), and in annexes 1 and 2 of that Summary.

(2) The technique employed is for the depositary to notify all the States that took part in the adoption of the treaty or who have subsequently signed or accepted it of the error or inconsistency and of the proposal to correct or amend the text, while at the same time specifying an appropriate time limit within which any objection must be raised. Then, if no objection is raised, the depositary, as agent for the interested States, proceeds to make the correction or amendment, draw up a *procès-verbal* recording the fact and circulate a copy of the *procès-verbal* to the States concerned. The precedent on page 9 of the Summary of Practice perhaps suggests that the Secretary-General considers it enough, in the case of a typographical error, to obtain the consent of those States which have already signed the offending text. In laying down a general rule, however, it seems safer to say that notifications should be sent to all the interested States, since it is conceivable that arguments might arise as to whether the text did or did not contain a typographical error, e.g. in the case of wrong punctuation that may affect the meaning.

(3) The only further point that may call for comment is, perhaps, the mention in paragraph 4 of the reference of a dispute concerning the amendment of a text to the competent organ of the international organization concerned, in cases where the treaty was either drawn up in the organization or at a conference convened by it. This provision is inspired by the precedent of the rectification of the Chinese text of the Genocide Convention mentioned on page 10 of the Summary of Practice.

ARTICLE 26. THE DEPOSITARY OF PLURILATERAL OR MULTILATERAL TREATIES

1. The depositary of a plurilateral or multilateral treaty shall normally be the State or international organization in whose archives the original texts of the treaty are required to be deposited under an express provision in the treaty.

2. If such a treaty should fail to designate a depositary of the treaty, and unless the negotiating States shall have otherwise determined, the depositary shall be:

(a) In the case of a treaty drawn up within an international organization or at an international conference convened by an international organization, the said organization; or

(b) In the case of a treaty drawn up at a conference convened by the States concerned, the State on whose territory the conference is convened.

3. In the event of a depositary declining or failing to take up its functions, the negotiating States shall consult together concerning the nomination of another depositary.
Commentary

1. Paragraph 1 deals with the normal case where a plurilateral or multilateral treaty designates a particular State or organization as depositary, in which event nothing further is needed to complete the appointment of the depositary.

2. A depositary is really a necessity for the smooth-working administration of a multilateral treaty and is a great convenience even for a plurilateral treaty. Accordingly, if the negotiating States should fail to nominate a depositary in the treaty itself, paragraph 2 provides either for an international organization or for the "host" State of the conference at which the treaty was drawn up to act as depositary. The actual provisions of paragraph 2 are believed to reflect existing practice in the designation of depositaries in plurilateral and multilateral treaties.

3. The Special Rapporteur is not aware of any case in which a depositary has declined or failed to act; but this might presumably happen in the case of a depositary called upon to act under the provisions of paragraph 2 of the present article. Accordingly, it has been thought desirable, ex abundanti cautela, to cover the point in paragraph 3.

5. The depositary of a multilateral treaty, on receiving a request from a State desiring to accede to the treaty, shall as soon as possible take steps to communicate the request to the States indicated in article 13, paragraph 3, of the present articles, and in appropriate cases to bring the matter before the competent organ of the international organization concerned in accordance with the provisions of the same paragraph.

6. In regard to any reservation, the depositary shall have the duty:

(a) To verify that the reservation is not one expressly prohibited or impliedly excluded by the terms of the treaty and for that reason inadmissible under article 17, paragraph 1, of the present articles;

(b) To verify that the manner in which the reservation has been formulated complies with the provisions of article 17, paragraph 3, of the present articles;

(c) To comply with any provisions of the treaty concerning the communication of reservations to other States; and subject to any such provisions, to transmit the text of the reservation to all other States which are, or are entitled to become, parties to the treaty;

(d) To draw the attention of all such States to any time limit specified in the treaty within which objections to the reservation are required to be filed; and failing any such time limit, to draw their attention to the provisions of article 18, paragraph 3 (b) of the present articles;

(e) To verify that any notifications of consent or objection to a reservation have been duly formulated in accordance with the provisions of article 18, paragraph 2, and article 19, paragraph 2, of the present articles;

(f) To communicate to all other States which are, or are entitled to become, parties to the treaty, any notifications received of consent or objection to a reservation and also any notifications of the withdrawal either of a reservation or of an objection to a reservation.

7. Where the treaty is to come into force upon its signature by a specified number of States or upon the deposit of a specified number of instruments of ratification, acceptance or accession or upon some uncertain event, the depositary shall have the duty:

(a) To inform promptly all the States which are, or are entitled to become, parties to the treaty, of the coming into force of the treaty when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled;

(b) To draw up a proces-verbal of the entry into force of the treaty, if the provisions of the treaty so require.

Commentary

1. The depositary of a plurilateral or multilateral treaty plays a significant procedural role in what is really the internal administration of the treaty; and a number of the functions of a depositary have already been mentioned in connexion with preceding provisions of the present articles. It seems convenient, however, to collect together in a single article the main functions of a depositary relating to the conclusion and entry into force of treaties and that is the purpose of article 26. In drafting its provisions the Special Rapporteur has
naturally paid particular attention to the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*.

(2) Paragraph 1 of the draft requires no comment.

(3) Paragraphs 2 and 3 deal with the functions of the depositary in relation to the original text or texts of the treaty, and as the agent of the interested States for receiving, keeping and communicating all instruments and notice relating to the treaty. Paragraph 3 makes it clear that the depositary is not a mere postbox, but has a certain duty to verify that any signatures or instruments are in due form.

(4) Paragraph 4 recalls the duties laid upon a depositary in article 13, paragraph 3, of the present articles for the purpose of facilitating the accession of States, and especially of new States, to multilateral treaties.

(5) Paragraph 5 sets out the implications for a depositary of the provisions of articles 17-19 relating to reservations.

(6) Paragraph 6 deals with the depositary’s duty to notify the interested States of the coming into force of the treaty, when this is dependent on a specified number of States signing, ratifying, acceding to or accepting the treaty. The *Summary of the Practice of the Secretary-General* speaks of this duty as the depositary’s function to “determine” the date of entry into force. It is not clear to the Special Rapporteur whether the word “determine” is meant to convey that the depositary is authorized to determine with binding effect the date of entry into force. The point is one of substance and could give rise to controversy if, for example, a depositary were to take into account a ratification that was subject to a reservation to which strong objections were taken. However normal it may be for States to accept the depositary’s appreciation of the date of the entry into force of a treaty, it seems doubtful whether the negotiating States intend to confer upon a depositary an absolute right unilaterally to determine the date of entry into force. Accordingly paragraph 6 does not go beyond requiring the depositary to inform the interested States of the date when, in its opinion, the conditions for the entry into force of the treaty have been fulfilled.

(7) Chapter VIII of the *Summary of the Practice of the Secretary-General* contains a quite extensive account of the Secretary-General’s practice as depositary when confronted with (a) territorial application clauses and (b) the emergence of new States. This practice appears to the Special Rapporteur to relate closely to branches of the law of treaties which fail to be dealt with either in a later group of draft articles or in connexion with State succession. Accordingly, it did not seem to him appropriate to include in the present article the functions of a depositary set out in chapter VIII of that *Summary*. Indeed, some of the practice relating to so-called State succession may be controversial, so that the definition of the depositary’s functions with regard to it must await the Commission’s discussion of that subject.
FUTURE WORK IN THE FIELD OF THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

[Agenda item 2]

DOCUMENT A/CN.4/145

Working paper prepared by the Secretariat

[Original text: French]

[22 March 1962]

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Introduction

(a) Resolution 1505 (XV)

1. In its resolution 1505 (XV) of 12 December 1960, the General Assembly decided to place on the provisional agenda of its sixteenth session the question entitled "Future work in the field of the codification and progressive development of international law", in order to study and survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification and for the progressive development of international law".

2. The resolution also invited Member States to submit in writing to the Secretary-General, before 1 July 1961, any views or suggestions they might have on this question for consideration by the General Assembly.

3. The Secretary-General received observations from seventeen Governments and communicated them to Member States in document A/4796 and Add.1-8. A summary of these replies, prepared by the Secretariat, was issued as document A/C.6/L.491 and Corr.1 and 2.

4. The International Law Commission devoted a number of meetings to this question at its thirteenth session (614th to 616th meetings).

5. In accordance with resolution 1505 (XV), the General Assembly placed the question on the agenda of its sixteenth session and referred it, for study and report, to the Sixth Committee, which considered it at its 713th to 730th meetings, from 14 November to 13 December 1961.

(b) Resolution 1686 (XVI)

6. On the recommendation of the Sixth Committee, the General Assembly, on 18 December 1961, adopted resolution 1686 (XVI), reading as follows:

"The General Assembly,
"Recalling its resolution 1505 (XV) of 12 December 1960,
"Considering that the conditions prevailing in the world today give increased importance to the role of international law in relations among nations,
"Emphasizing the important role of codification and progressive development of international law with a view to making international law a more effective means of furthering the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations,

"Mindful of its responsibilities under Article 13, paragraph 1 a, of the Charter to encourage the progressive development of international law and its codification,

"Having surveyed the present state of international law with particular regard to the preparation of a new list of topics for codification and progressive development of international law,

"1. Expresses its appreciation to the International Law Commission for the valuable work it has already..."
accomplished in the codification and progressive development of international law;

“2. Takes note of chapter III of the report of the International Law Commission covering the work of its thirteenth session;

“3. Recommends the International Law Commission:

“(a) To continue its work in the field of the law of treaties and of State responsibility and to include on its priority list the topic of succession of States and Governments;

“(b) To consider at its fourteenth session its future programme of work, on the basis of sub-paragraph (a) above and in the light of the discussion in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and of the observations of Member States submitted pursuant to resolution 1505 (XV), and to report to the Assembly at its seventeenth session on the conclusions it has reached;

“4. Decides to place on the provisional agenda of its seventeenth session the question entitled ‘Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations’.”

7. The only paragraph of this resolution requiring action by the Commission is paragraph 3, which is itself divided into two sub-paragraphs. Sub-paragraph (a) requires no comment. Sub-paragraph (b), however, which recommends the Commission to consider its future programme of work, raises many problems in connexion with the selection of possible topics.

(c) Programme of work established by the International Law Commission in 1949

8. At its first session in 1949, the International Law Commission established a programme of work on the basis of a memorandum prepared by the Secretariat, entitled Survey of International Law in relation to the Work of Codification of the International Law Commission.2

9. The Commission considered twenty-five topics, which are listed in the report of its first session.3 After due deliberation, it drew up a provisional list of fourteen topics selected for codification; it was understood that the list was only provisional and that additions or deletions might be made after further study by the Commission or in compliance with the wishes of the General Assembly.4

(d) Work completed by the International Law Commission

10. Since its first session, the International Law Commission has studied the following topics: régime of the high seas; régime of territorial waters; nationality, including statelessness; diplomatic intercourse and immunities; consular intercourse and immunities; and arbitral procedure. The Commission has also studied the question of the continental shelf and the conservation of the living resources of the high seas in connexion with the law of the high seas.5 At the request of the General Assembly, it has prepared a draft declaration on the rights and duties of States and a draft code of offences against the peace and security of mankind, formulated the Nürnberg principles, and considered ways and means for making the evidence of customary international law more readily available, the problem of international criminal jurisdiction, the question of defining aggression and the question of reservations to multilateral conventions.

(e) Topics under study or to be studied by the International Law Commission

11. Several reports have been submitted by the Special Rapporteurs on two other topics—the law of treaties and State responsibility—and the International Law Commission has begun discussion of these questions. In its resolution 1686 (XVI), the General Assembly recommended the Commission to continue its studies of these topics. The law of treaties is included in the agenda of the present session. The new Rapporteur on this topic, Sir Humphrey Waldock, will be submitting a report (A/CN.4/144). Mr. Garcia Amador, the Rapporteur on the topic of State responsibility, is no longer a member of the Commission, and the question of his successor will have to be considered. In the same resolution, the Assembly requested the International Law Commission to include the topic of succession of States and Governments on its priority list.

12. In addition, the General Assembly had previously referred the following questions to the International Law Commission:

(a) In its resolution 1289 (XIII) of 5 December 1958, it invited the Commission to give further consideration to the question of relations between States and inter-governmental international organizations at the appropriate time, after study of consular intercourse and immunities and ad hoc diplomacy had been completed by the United Nations. The Commission, at its eleventh session, took note of that resolution and resolved that in due course consideration would be given to the matter.

(b) In its resolution 1400 (XIV) of 21 November 1959, it requested the International Law Commission, as soon as it considered it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum. The Commission, at its twelfth session, took note of that resolution and decided to defer further consideration of that question to a future session.

(c) In its resolution 1453 (XIV) of 7 December 1959, it requested the Commission, as soon as it considered it advisable, to undertake the study of the question of the juridical régime of historic waters, including historic bays. The Commission, at its twelfth session, decided to defer consideration of that subject to a future session. A study on the subject, prepared by the Secretariat, will be circulated at the present session of the Commission (A/CN.4/143).

13. Lastly, in its resolution 1687 (XVI) of 18 December 1961, the General Assembly requested the

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2 United Nations publication, Sales No.: 48.V.1 (1).
4 Ibid., para. 16.
5 The six topics in the list of fourteen which have not yet been studied by the Commission are: recognition of States and Governments, succession of States and Governments, jurisdictional immunities of States and their property, jurisdiction with regard to crimes committed outside national territory, treatment of aliens, right of asylum.
International Law Commission as soon as it considered it advisable, to study further the subject of special missions and to report thereon to the General Assembly.

(f) Purpose and scope of the present document

14. Apart from these topics, which are still before the International Law Commission, the replies by Governments (A/4796 and Add.1-8) have indicated a number of topics suitable for codification by the Commission; some already appeared in the list of fourteen topics or in the list of twenty-five topics drawn up by the Commission in 1949, while others were new subjects, in the sense that the Commission had never considered making a study of them.

15. The present document has been prepared on the basis of the replies by Governments. However, the question of peaceful coexistence, which was suggested by several Governments for codification and which was the subject of a number of statements in the Sixth Committee, has not been included in view of the fact that the Sixth Committee has proposed to the General Assembly that it should place on the provisional agenda of its seventeenth session the question entitled “Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations” (see above, resolution 1686 (XVI), operative paragraph 4).

16. The study consists of a summary, topic by topic, of the ideas expressed in the replies of Governments and in statements made in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly. The opinions of members of the International Law Commission have been included. Where appropriate, the views of members of the League of Nations Committee of Experts for the Progressive Codification of International Law at its fourth session from 1925 to 1928 have been given. Use has also been made of the Survey of International Law in relation to the Work of Codification of the International Law Commission, a memorandum prepared in 1949 by the Secretariat in accordance with article 18, paragraph 1, of the Statute of the International Law Commission, which states that: “The Commission shall survey the whole field of international law with a view to selecting topics for codification, having in mind existing drafts, whether governmental or not”. Account has also been taken, where this was found necessary, of studies undertaken or decisions reached by other United Nations bodies and inter-governmental or other organizations. Lastly, the summary is accompanied by a number of commentaries and notes.

17. This document is divided into two parts: part I deals with the possibility of codifying topics included in the lists drawn up by the International Law Commission in 1949, part II with the possibility of codifying new topics, using that adjective in the sense already indicated.

Part I. Possibility of codifying the topics included in the list drawn up by the International Law Commission in 1949

1. Recognition of States and Governments

18. At its first session, held at Geneva in 1925, the Committee of Experts for the Progressive Codification of International Law decided, during the debate on its agenda, to withdraw the item entitled “Form of Recognition of Governments: International Position of Governments which have not been formally recognized”.

19. Dr. José Léon Suarez (Argentina), who had proposed the inclusion of the item, emphasized its extreme importance. He mentioned, inter alia, that “misunderstandings and difficulties arose every moment”. He admitted that “it was legitimate for States occasionally to exercise measures of coercion for reasons of a political kind, but when those reasons did not exist considerable delays occasionally occurred because there was no test by which the form of recognition of a Government could be regulated”. In his opinion, “the moment a sovereign State possessed a Government there ought to be an international formula or practice which would permit the automatic recognition of the existence of that Government”.8

20. On the other hand, Professor James Leslie Brierly (United Kingdom) said that the Committee “should refuse to discuss this question of all others since the regulation of it by means of international conventions was neither desirable nor desirable. The difficulties arising from it and the delicacy of the question were well known, and, from a purely legal point of view, it was a subject which neither could nor ought to be treated judicially. To take an analogy, it was as though a State passed a law regulating the choice of friends to be adopted by its citizens. Such a law, if passed, would be null and void at the outset and the same was true of a regulation of international relations”.9

21. Mr. Charles de Visscher (Belgium) and Mr. Fromageot (France) supported that view.

22. Dr. Barboza de Magalhaes (Portugal) suggested that “perhaps an immediate study could be made of the form which this recognition should assume, which was a legal question”.

23. Professor Diena (Italy) thought that the Committee could also undertake the examination of the international position of Governments which had not been formally recognized, because that was an essentially legal question.

24. The Committee decided to delete the question from its agenda, on the understanding that Dr. Suarez could “present at the next session a detailed list of the points involved in the question”.

25. Dr. Suarez agreed with the view of the majority that the inquiry should be put aside “for reasons of a political nature, but he desired the Committee to state definitely that the question was an urgent one, that had been put aside for political reasons, and that he personally would have desired to see it investigated”.

26. The International Commission of American Jurists introduced the question of recognition into five of the nine articles10 of its Project No. 2 entitled “States: Existence—Equality—Recognition”, which was prepared in 1927 for the Sixth International Conference of American States.

27. Two articles (articles 6 and 7) of the Convention on the rights and duties of States, adopted in 1933

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9 Ibid.

10 See American Journal of International Law, vol. 22 (1928), Special Supplement, p. 240.
by the Seventh International Conference of American States, dealt with recognition.11

28. The topic was also the subject of a resolution adopted by the Institute of International Law in 1936.12

29. The Harvard Research began a study of the question of recognition but did not make sufficient progress to be able to prepare a draft convention.

30. In 1949, at the first session of the International Law Commission, Mr. Alfaro, Mr. Brierly, Mr. Córdova, Mr. Sandström, Mr. Scelle and Mr. Yepes expressed support for codification of the topic “recognition of States and Governments”. The Chairman, Mr. Hudson, pointed out that the subject had several aspects and had often been considered a political rather than a legal question.

31. Mr. Córdova said that by providing for the admission of new States to the United Nations, the Charter had tacitly acknowledged that collective recognition of such States was possible. That was further reason for not omitting that question from the list of subjects suitable for codification.

32. Mr. Scelle was of the opinion that the objection that had been raised that the question was political rather than legal was not pertinent; the Commission’s task was precisely to distinguish what was legal even in the most political questions.

33. Mr. Yepes pointed out that the recognition of a new State should not be confused with that of a new Government. It was the latter only which had a political rather than a legal character.

34. Mr. Brierly observed that his opinion had changed since the time of the League of Nations and he thought that an attempt should be made to codify the question, even if it was not certain to be successful.

35. At the thirteenth session of the International Law Commission, Mr. Bartos suggested that the topic should be codified.14

36. Of the Governments which submitted replies to the General Assembly at its sixteenth session, three expressed support for a study of the question: Ghana (A/4796/Add.1), Venezuela (A/4796/Add.5) and Yugoslavia (A/4796).

37. In its observations, Colombia (A/4796) pointed out: “The Charter of the Organization of American States refers incidentally to the recognition of States in article 9. Furthermore, in so far as the question of recognition of Governments is concerned, the antecedents for relations between American States include the Tobar (Minister for Foreign Affairs of Ecuador, 1908) doctrine and the Estrada (Minister for Foreign Affairs of Mexico, 1930) doctrine. Also relevant are resolutions 35 and 36 of the Ninth International Conference of American States dealing with the right of legation and the recognition of de facto Governments, as well as the work done on this latter topic by the Inter-American Juridical Committee and the Inter-American Council of Jurists and reported on in the records of the four meetings of the latter body.”

38. The Netherlands (A/4796/Add.7) considered that discussion of the topic “might be postponed for the time being because a number of basic questions are interwoven with political considerations”.15


40. The representative of Yugoslavia, enlarging on the ideas contained in his Government’s reply, stated inter alia that it was not so much a matter of “seeking to find an answer to the classical question of the relationship between the declarative and constitutive theories of recognition, although that matter, too, would have to be treated within the framework of the codification of the general topic”. The main point was “to ascertain the criteria that had recently governed the recognition of States and Governments and to find out whether certain general rules might be established on that basis. In addition, the legal significance of admission to membership in the United Nations and in other international organizations, more specifically as regards collective recognition, should be defined. Of no less urgency was the question of the recognition of insurgents and of Governments. The uniformity of practice which could be achieved through the codification of those rules would be of considerable interest from the point of view of establishing more stable relations among States and of facilitating the position of newly independent States”.

41. On the other hand, the representative of Brazil (A/C.6/SR.721) included the topic among those which were essentially dominated by political considerations. In his view “The Commission was unlikely to succeed in attempts to deal with subjects of that type for while it might produce clever formulations, it would not achieve effective solutions”.

2. Succession of States and Governments

42. The League of Nations Committee of Experts left this matter aside, although Mr. de Visscher was in favour of including it in the list of topics for codification.16 The Survey of International Law states that “Considerations of justice and of economic stability in the modern world probably require that in any system of general codification of international law the question of State succession should not be left out of account” and that topic “would seem to deserve more attention in the scheme of codification than has been the case hitherto”.17

43. At the first session of the International Law Commission, Mr. Alfaro, Mr. Córdova, Mr. François and Mr. Scelle spoke in favour of codification of the topic. In the absence of objection,18 the question was included in the provisional list of topics for codification.19

44. At the thirteenth session of the International Law Commission, Mr. Bartos, Mr. Padilla Nervo, Mr. Pal, Mr. Tunkin and Mr. Zourek suggested that the topic should be codified.19

45. In their replies submitted to the Assembly at its sixteenth session, eight Governments indicated that they favoured a study of the topic: Austria (A/4796/Add.6), Belgium (A/4796/Add.4), Ceylon (A/4796/Add.8), Ghana (A/4796/Add.1), Mexico (A/4796/Add.7).

18 Summary records of the 614th and 615th meetings.
19 Summary record of the fifth meeting, paragraphs 14-15.
10 Summary records of the 614th and 615th meetings.
Add.1), the Netherlands (A/4796/Add.7), Venezuela (A/4796/Add.5) and Yugoslavia (A/4796).

46. In its comments, Mexico stated that "Since many new nations have recently become independent, this problem takes on particular importance. A study of the topic would naturally involve important questions of all kinds: the validity of treaties, the problem of nationalities, inheritance, debts, acquired rights, indemnification, compensation and, in addition, certain problems which might arise concerning membership in international organizations. Problems which in future might emerge in the converse case of the amalgamation or federation of a number of States might also be included in a study of this topic".

47. In the opinion of Yugoslavia, the topic had "a substantial impact upon a number of questions of vital concern to the newly independent States and their efforts towards full and complete emancipation".

48. The discussion in the Sixth Committee revealed a very clear tendency in favour of codification of the topic. There was no opposition.

49. Resolution 1686 (XVI) of 18 December 1961 recommended the International Law Commission, inter alia, "to include on its priority list the topic of succession of States and Governments".

3. JURISDICTIONAL IMMUNITIES OF STATES AND THEIR PROPERTY

(a) General immunity

50. This is a topic on which the domestic case-law of States has produced a greater abundance of material than in any other branch of international law. It covers the entire field of the jurisdictional immunities of States and their property, their ships, their sovereigns and their armed forces. There is, moreover, a very extensive bibliography on the subject.

51. The Committee of Experts for the Progressive Codification of International Law dealt with the topic, starting with its third session in 1927. It adopted a questionnaire No. 11 dealing with the competence of the courts in regard to foreign States.

52. After full discussion, the Committee was of opinion that, even though the conclusion of a uniform agreement between the Powers might meet with serious difficulties, these difficulties were not the same for all parts of the subject, and it felt that it was desirable to ascertain, exception always being made of the case of acts of State: "Whether and in what cases, particularly in regard to action taken by a State in the exercise of a commercial or industrial activity, a State can be liable to be sued in the courts of another State".20

53. The Committee's rapporteur on the subject, Mr. Matsuda (Japan), concluded: "It is unanimously admitted that the courts of one State have no jurisdiction over another State where the foreign State is sued for acts accomplished by it in the exercise of its sovereign rights. Apart from this case, the opinion of writers and experts in the various countries is divided".21

54. In its Second Report to the Council,22 the Committee of Experts stated that, in its view, the topic was "ripe" for codification.23

55. Out of twenty-four replies received from Governments, twenty-one recognized that codification of the topic was desirable and possible, while only three expressed the opposite view.

56. It must be acknowledged, however, that some of the Governments which were in favour of the codification of the topic formulated a number of important reservations.24

57. A draft convention with a detailed commentary was prepared by the Harvard Research.25

58. There is also a Brussels Convention of 10 April 192626 for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, which provides for the immunity of such vessels and their cargo in time of peace.

59. The Convention on the Territorial Sea and the Contiguous Zone, adopted in 1958 by the United Nations Conference on the Law of the Sea, also contains an article 22 which deals with the immunities enjoyed by Government ships.27

60. At the first session of the International Law Commission, the question28 was placed, without objection, in the list of topics for codification. Mr. Sandström and Mr. Spiropoulos were in favour of its codification.29

61. In the replies by Governments submitted to the General Assembly at its sixteenth session, two Governments—Belgium (A/4796/Add.4) and the Netherlands (A/4796/Add.7)—suggested that the topic should be studied.

62. Belgium stated that "it would seem logical, after the consideration of these problems [succession of States, special missions and right of asylum], to examine the question of the jurisdictional immunities of States and of their property".

63. In the course of the discussion in the Sixth Committee, the representatives of Belgium (A/C.6/SR.721), Denmark (A/C.6/SR.725), Ireland (A/C.6/SR.727) and New Zealand (A/C.6/SR.719) express themselves in favour of a study of the topic.

64. The representative of Brazil (A/C.6/SR.721) said that a sensible solution of some aspects of that problem would encourage trade between countries with different social systems. Although his delegation realized that the subject was a controversial one it would not oppose its reference to the International Law Commission for study.

65. According to the Survey of International Law, "it is doubtful whether considerations of any national interest of decisive importance stand in the way of a codified statement of the law commanding the agreement of a vast majority of nations on this matter".20

(b) Immunity with respect to commercial transactions

66. The codification of a more limited aspect of the question of the jurisdictional immunities of States and their property was proposed by Ceylon (A/4796/Add.8). This was the question of the jurisdictional

24 Ibid., p. 93.
28 Initially entitled "Jurisdiction over foreign States".
immunities of States with respect to commercial transactions. There exist a great number of publications and judicial decisions on this subject.

67. The Asian-African Legal Consultative Committee considered this question at its first session (New Delhi, 1957).

68. A final report on the immunities of States with respect to commercial and other transactions of a private nature was adopted at the second session (Cairo, 1958).31 This final report was revised at the third session (Colombo, 1960).32

4. JURISDICTION WITH REGARD TO CRIMES COMMITTED OUTSIDE NATIONAL TERRITORY

69. The Committee of Experts for the Progressive Codification of International Law, which considered this topic in 1926 at its second session,33 restricted the problem to the competence of States, in criminal cases, with regard to crime committed outside their territory by persons other than their own nationals.

70. A sub-committee, of which Mr. Brierly was the rapporteur, had to answer the question whether it is possible to lay down, by way of conventions, principles governing the criminal competence of States in regard to offences committed outside their territories, and, if so, what these principles should be.

71. In his report,34 Mr. Brierly stated: “The practice of States is far from uniform. Nor is it easy, except in the case of those States which maintain the territorial theory, to infer from the practice adopted by a State the theory upon which it bases its assumption of jurisdiction, since we cannot safely argue from the fact that a State assumes jurisdiction only in certain cases that it regards those cases as the only ones in which the assumption of jurisdiction would be legitimate. It would, however, appear that there are few, if any, States which would maintain the view that international law leaves an absolute discretion in this matter to every State. Most States, if not all, would appear to regard the territorial basis of jurisdiction as the normal rule, and the question of real doubt is whether international law permits any, and, if so, what exceptions from it. We felt assured that any conventional regulation of the matter would necessarily have to be based on this assumption”.

72. Among the exceptions to the territorial theory, the one most commonly invoked is that in favour of jurisdiction in regard to crimes against the security or good name of a State.

73. In the Committee,35 the rapporteur explained that, while the question whether it is possible to lay down by way of conventions principles governing the criminal competence of States in regard to offences committed outside their territories seemed a simple one in certain respects, it nevertheless presented a major practical difficulty which arose from the fact that there was no uniform practice in the matter. There were two completely opposed viewpoints, each represented by a large group of States. Furthermore, some States claimed the right to punish certain crimes committed outside their own territory, not only by their nationals, in which case the right to claim jurisdiction was unquestioned, but also by aliens. On the other hand, other States, which maintained the so-called “territorial” theory, no more claimed to have jurisdiction over aliens for acts committed outside their territory than they recognized that other States might exercise their jurisdiction in the contrary case.

It would be difficult, the rapporteur continued, to reach agreement in the Committee if a compromise was not adopted, and a compromise implied concessions on the part of the two legal schools.

After a close study of the special questions to which attention was drawn by the Brierly report and by Mr. de Visscher, a member of the sub-committee, the Committee found that “international regulation by way of a general convention, although desirable, would encounter grave political and other obstacles”.36

74. The Committee limited its action to communicating Mr. Brierly’s report to the Governments “to give them the opportunity of profiting by the light [he had] thrown on the subject”.

75. This question was the subject of regulations laid down in the Havana Convention of 1928 (the Bustamante Code) and of resolutions adopted by the Institute of International Law at Munich in 1938 and at Cambridge in 1931.37 It has been studied at a series of international congresses on comparative and criminal law. The Harvard Research examined the subject and prepared a draft convention, according to which “The investigation indicates that States have much more in common with respect to penal jurisdiction than is generally appreciated”.38

76. At the first session of the International Law Commission, Mr. Brierly, Mr. Scelle and Mr.Spiropoulos expressed themselves in favour of codification of the question but did not recommend that it should be given priority. Mr. Córdova opposed its codification.39 The Commission decided to inscribe the question on its provisional list.

77. Mr. Scelle thought that that question was of the utmost interest both in itself and also in so far as it related to the formulation of the principles of Nürnberg and the drafting of an international criminal code.

78. Mr. Hudson and Mr. Koretsky pointed out that the question concerned national jurisdiction only in the case of crimes committed abroad by aliens, and that, viewed from that angle, it had no connexion with the principles of Nürnberg nor with the code of laws on crimes against the peace and security of humanity.

79. Mr. Brierly shared the optimistic views of the Harvard Research on the possibility of codification of the subject.

80. Mr. Spiropoulos thought that the problem was clearly a question of international law of great practical interest.

81. Mr. Córdova thought a distinction should be made between crimes committed abroad against a State and those committed against an individual. In his opinion, the first category only could be considered an appropriate topic for codification.

82. In the replies from Governments which were submitted to the General Assembly at its sixteenth

31 Asian-African Legal Consultative Committee, second session, pages 29 to 51.
32 Ibid., third session, pages 55-81.
33 L. of N., Committee of Experts, second session, twelfth meeting.
35 Twelfth and thirteenth meetings, 19 January 1926.
36 L. of N., C.50.M.27.1926.V.
37 See Annuaire de l'Institut de droit international, 1931, pp. 145-152.
38 AJJ.L., vol. 29 (1935), Supplement, p. 446.
39 Summary record of the fifth meeting, paras. 47-54.
5. THE LEGAL STATUS OF ALIENS

83. The movement towards codification has not yet affected this topic, apart from the somewhat general provisions of the Convention concerning the status of aliens 40 adopted by the Sixth International Conference of American States in 1928 on the basis of a project prepared by the International Commission of American Jurists 41 in 1927, and certain aspects discussed at The Hague in 1930 in connexion with the responsibility of States for damage to the person and property of aliens (taxation of aliens, right of establishment, right to follow any occupation, etc.).

84. The Economic Committee of the League of Nations prepared a draft convention 42 on this subject; the text was submitted to the International Conference on Treatment of Foreigners which met in Paris from 5 November to 5 December 1929 but which did not succeed in adopting a convention. 43

85. According to the Survey of International Law, "In one definite respect the law relating to the treatment of aliens would seem to require authoritative statement or restatement, namely, with regard to (1) the full equal protection of such rights as they possess by the law of the State, and (2) absolute recognition and protection of what the Charter of the United Nations describes as human rights and fundamental freedoms." 44

86. "It is possible that in the recent experience of various controversies on the subject there may be discernible a solution which would act both as an inducement to and as a basis of codification." 45

87. At the first session of the International Law Commission, Mr. Sandström, Mr. Scelle and Mr. Spiropoulos supported the inclusion of this question, which was not opposed. 46 The Chairman (Mr. Hudson) thought that the question could be linked up with the question of State responsibility. Mr. Sandström thought that it served as an introduction to the latter question. In Mr. Scelle's view, the question of State responsibility was subordinate to that of the treatment of aliens, since the responsibility only arose if the State was under an obligation to treat aliens in a certain way. At the thirteenth session of the International Law Commission, Mr. Ago suggested codification of the question. 47

88. In the replies from Governments which were submitted to the General Assembly at its sixteenth session, Ceylon (A/4796/Add.8), Ghana (A/4796/Add.1) and Venezuela (A/4796/Add.5) proposed that the question should be studied.

89. During the discussions in the Sixth Committee, the representative of New Zealand (A/C.6/SR.719) supported that proposal.

90. The Asian-African Legal Consultative Committee considered the treatment of aliens at its second session, the Netherlands (A/4796/Add.7) and Venezuela (A/4796/Add.5) expressed the view that the question should be studied.

91. The question of the right of political refuge, though closely linked to that of the non-extradition of persons charged with political offences, is a much broader topic. It has again become a subject of urgent interest in the past fifteen years and its importance is beyond question, for the principle of the right of refuge is not uniformly accepted even by States which are relatively liberal in this matter.

92. The American States concluded a Pan American Convention on the right of asylum (diplomatic asylum) 48 in 1928; in addition, the Seventh International Conference of American States adopted a general Convention of Political Asylum 49 in 1933. In 1954, the Tenth Inter-American Conference adopted a Convention on Diplomatic Asylum and a Convention on Territorial Asylum. 50

93. At the first session of the International Law Commission, Mr. Alfaro, Mr. Scelle and Mr. Yepes suggested that this question should be included in the list 51 and the Commission so decided.

94. The General Assembly adopted at its fourteenth session resolution 1400 (XIV) of 21 November 1959, requesting the International Law Commission, as soon as it considered it advisable, to undertake the codification of the principles and rules of international law relating to the right of asylum. The International Law Commission took note of this resolution at its twelfth session (1960) but decided to defer consideration of the question to a future session.

95. At the General Assembly's fifteenth session, when the report of the International Law Commission on the work of its twelfth session was under discussion in the Sixth Committee, the United Kingdom representative (A/C.6/SR.652) expressed the view that a draft declaration on the right of asylum was an item which the Committee could usefully discuss.

96. The representative of Bolivia (A/C.6/SR.652), supported by the representative of Spain (A/C.6/SR.653), proposed that the Sixth Committee should take up the question to consider its legal aspects, the social aspects being within the competence of the Commission on Human Rights and the Third Committee.

97. The Commission on Human Rights has been dealing with this question since its thirteenth session in 1957. After discussion at its fifteenth (1959) and sixteenth (1960) sessions, the Commission adopted a draft declaration in 1960 and transmitted it to the Economic and Social Council which, by its resolution 772 E

See Asian-African Legal Consultative Committee, third session, Colombo 1960, pp. 82-161.

A/CN.4/139, annex 1.

Ibid., section entitled "Status of aliens and State responsibility."


920 II.


Ibid., p. 46.

Ibid., p. 47.

Summary record of the fifth meeting, paras. 96-99.

Summary record of the 615th meeting, para. 32.

Cairo, 1958) and third (Colombo, 1960) sessions. At its fourth session (Tokyo, 1961) it adopted a set of eighteen articles setting forth principles concerning admission and treatment of aliens. At its fifth session (Rangoon, 1962) the Committee was to study the topic of State responsibility and the diplomatic protection of citizens abroad.
(XXX), transmitted it in turn to the General Assembly. The draft Declaration on the Right of Asylum (A/4792, annex) prepared by the Commission on Human Rights is now before the Third Committee. After a procedural discussion, the Third Committee decided at its sixteenth session to examine the Declaration "as early as possible" during the seventeenth session. The General Assembly endorsed this decision by its resolution 1682 (XVI) of 18 December 1961.

98. The replies from Governments which were submitted to the General Assembly at its sixteenth session showed that five countries had proposed that the question should be studied: Belgium (A/4796/Add.4), Ceylon (A/4796/Add.8), Colombia (A/4796), Ghana (A/4796/Add.1) and Venezuela (A/4796/Add.5).

99. During the discussions in the Sixth Committee, the representative of Colombia (A/C.6/SR.727) proposed, inter alia, in a draft resolution (A/C.6/L.496) that the International Law Commission should include the topic of the right of asylum on its priority list. The representative of the United Arab Republic (A/C.6/SR.723), the representative of Nicaragua (A/C.6/SR.722) and the representative of Belgium (A/C.6/SR.721) were in favour of study of the subject. However, the Colombian proposal met with some opposition on the ground, not that the question of the right of asylum was unworthy of United Nations attention, but that it was already on the agenda of the International Law Commission, which would study it in due course. As a result, the Colombian representative later withdrew his proposal on the understanding that his views and those of the representatives who supported them would be brought to the attention of the International Law Commission.

7. SOURCES OF INTERNATIONAL LAW

100. Project No. 4 on the "Fundamental Bases of International Law", prepared by the American Institute of International Law in 1925, is devoted almost exclusively to the various aspects of the sources of international law. 58

101. At the first session of the International Law Commission, Mr. Brierly considered that the codification of this question would have more disadvantages than advantages. Mr. Spiropoulos observed that the question was of no practical interest. 57 The Commission did not place it on the list.

102. Mexico (A/4796/Add.1) requested that this question should be studied. It stated its grounds for the request in the following terms: "There is need for a re-examination of this question in the light of the many and varied decisions and resolutions of all kinds, some of doubtful legal validity, which have been adopted by the various international organizations. The actions of these organizations undoubtedly have a strong impact on international affairs and contribute in one form or another to the creation of international law. As the creation of international law in this manner is becoming daily more important, this might be a profitable topic of study for the International Law Commission." The Mexican representative in the Sixth Committee reiterated his Government's observations (A/C.6/SR.722).


56 Summary record of the fourth meeting, para. 67 and 68.

8. RECOGNITION OF ACTS OF FOREIGN STATES

103. At the first session of the International Law Commission (fifth meeting), Mr. Hudson, the Chairman, "thought the title of the topic—'Recognition of acts of foreign States'—unsatisfactory, in view of the fact that the word 'recognition' had in this case a different meaning from the one it had in the words 'recognition of States'. The recognition of the acts of foreign States signified the effect given in a State to the acts of another State".

104. He said that "there was a considerable amount of documentation on certain aspects of the question. There were, for example, two conventions on the recognition and enforcement of the arbitral awards of foreign courts which had been concluded under the auspices of the League of Nations. One of the Conventions prepared by the Hague Conference on Private International Law dealt with the enforcement of judicial decisions of foreign courts in a limited field. Moreover, Mr. Feller had made a valuable contribution to the draft convention on judicial assistance prepared by the Harvard Research". 58

105. Mr. Feller (Secretariat) pointed out that "the subject was a very broad one in view of the numerous acts of States and of the complexity of the problems that each of those acts might raise. The Legal Department, while recently studying a question of such secondary importance as the international effect of the declaration of the decease of a person reported missing during the war, had had occasion to ascertain that even on so limited a subject there already existed a great deal of documentation and that numerous difficulties were occasioned by differences in national legislation. It did not seem, therefore, that the Commission could, at that juncture, do more than codify certain specific questions that might be of some particular interest, such as the procedure to be followed in the hearing of witnesses in a foreign country". 59

106. Only Mr. Sandström, who pointed out that the question bordered on both international public and private law, was in favour of its codification.

107. Mr. Spiropoulos emphasized the complexity of the question, which came within the scope of international public, private and even administrative law. The question was not included in the preliminary list of topics for codification.

108. Venezuela (A/4796/Add.5) requested that the question should be studied.

9. TERRITORIAL DOMAIN OF STATES

109. This question, which was proposed by Venezuela (A/4796/Add.5), figures prominently in works on international law, but there is little to be gained by its codification.

110. Although declarations have been made and multilateral instruments concluded on various occasions with respect to frontiers and the acquisition of territorial sovereignty, the efforts made at codification have paid very little attention to the law concerning national territory.

111. However, the American Institute of International Law prepared in 1925 two projects entitled respectively "National Domain" and "Rights and Duties
of Nations in Territories in Dispute on the Question of Boundaries".  

112. Rights and claims to territories have traditionally been regarded as synonymous with the vital interests of States and the codification of certain principles might lead to a revival of territorial claims which have long been in abeyance. In fact, there are few States which have no territorial claims to make, if only trifling ones.

113. Frontiers, whether of ancient or of recent origin, are rarely considered definitive; the Franco-Spanish frontier, the oldest in Europe, is hardly more than three centuries old and despite complete demarcation still gives rise to minor disputes from time to time.

114. In the draft Declaration on the Rights and Duties of States adopted by the International Law Commission at its first session (A/925, part II), there are two articles dealing with this question.

115. Article 9 stipulates: "Every State has the duty to refrain from resorting to war as an instrument of national policy, and to refrain from the threat or use of force against the territorial integrity ... of another State . . . ."

116. Article 11 states: "Every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of article 9".

117. At the first session of the International Law Commission, Mr. Alfaro and Mr. Spiropoulos said they did not think that the problem of the territorial domain of States was suitable for immediate codification.

118. The Chairman (Mr. Hudson) "pointed out a matter which, though not suitable for codification, deserved study, namely, the principles governing the frontiers of States and also certain recent practices such as, for example, the arrangement for neutral zones between States made between Saudi Arabia and Iraq in order to protect the interests of the nomad populations by avoiding a fixed frontier" (summary record of the fifth meeting, para. 61). The question was not taken up by the International Law Commission.

10. PACIFIC SETTLEMENT OF DISPUTES

119. The subject covers the very wide field of prohibition of war, procedures for investigation, mediation and conciliation, the arbitral or judicial settlement of disputes and the obligatory jurisdiction of the International Court of Justice.

(a) General remarks

120. The Permanent Court of Arbitration established in 1907 was followed by the system of settlement of disputes established by the Covenant of the League of Nations, the creation of the Permanent Court of International Justice and the General Act for the Pacific Settlement of International Disputes of 26 September 1928, leading finally, after the collapse of the League of Nations, to the system established by the United Nations Charter, notably Article 2 (3).

121. The Permanent Court of Arbitration is continuing to discharge its modest function; the Permanent Court of International Justice has become the International Court of Justice. The General Act was revised in 1949 (by General Assembly resolution 268 A (III)), but by 1952 it had still been ratified by only four States (Belgium, Denmark, Norway and Sweden). From 1952 to 1961 only one ratification was recorded, that of Luxembourg. The functions of conciliation and arbitration and the jurisdiction of the Court are being made use of with some success, but not sufficiently in the view of some. The jurisdiction of the International Court of Justice is not obligatory, and arbitration and conciliation cannot take place without the agreement of all parties. The weakness of the system is obvious.

122. At the Assembly's sixteenth session, the Israel representative stated in the Sixth Committee (A/C.6/SR.726) that the time had come to pass under review all the established machinery for the peaceful settlement of international disputes. There was no assurance that the existing procedures for settlement were really reliable, and their overhaul and adaptation to the contemporary patterns and conceptions of international intercourse were long overdue. The Israel delegation considered that, if complete machinery for the peaceful settlement of international disputes was to be established, it would be worth instructing the Sixth Committee to undertake a legal study on the same lines as that being made at the political level by the First Committee, particularly in the field of disarmament.

123. Similarly, the representative of Argentina (A/C.6/SR.720) stated that it was essential to attempt, by both codification and progressive development, to establish a complete legal system of methods for securing the peaceful solution of international disputes. The representative of Indonesia (A/C.6/SR.726) also spoke in favour of a study of the question by the International Law Commission.

124. Such statements left no doubt of the need to improve the system. However, the Interim Committee set up under General Assembly resolution 111 (II) of 13 November 1947 had undertaken a systematic study of methods of the pacific settlement of disputes. It had even set up a sub-committee for that purpose which had submitted a preliminary report to the Assembly at its fourth session.  

125. In 1950, the Interim Committee created a Sub-Committee on International Co-operation in the Political Field; this Sub-Committee submitted a report to the General Assembly and to Member States "for information". The report, which is very detailed, is on the whole of a historical character. A study prepared by Mr. Garcia Amador entitled "Regional action for pacific settlement within the framework of the Charter" appears in an appendix. The study compares the inter-American system for pacific settlement with that of the Charter, and examines the possibility of regional action for pacific settlement by the organs of the United Nations.

126. At the first session of the International Law Commission, Mr. Alfaro proposed that the pacific settlement of international disputes should be included in the list of topics for codification. He envisaged the question as a whole, in accordance with Article 2 (3) of the Charter. Only Mr. Scelle supported the pro-
posal (summary record of the fifth meeting, paras. 69-82).

127. Mr. Brierly, Mr. Córdova, Mr. Sandström and Mr. Spiropoulos opposed it. The question was not included in the list of topics for codification. Mr. Brierly observed that the General Act of 1928 had always been a dead letter, and there was every reason to fear that the same fate would befall any similar document.

128. Mr. Córdova “suggested that consideration of that question should be deferred, because the time did not seem ripe”; he thought, however, that in view of the provisions of Article 2 (3) of the Charter, that topic would have to be codified sooner or later.

(b) Prohibition of war


130. Czechoslovakia proposed (A/4796/Add.3) “...the elaboration of legal principles to govern the prohibition of aggressive wars and laying down the responsibility for the violation of peace (definition of aggression, prohibition of use of weapons of mass destruction, consequences of the responsibility for a violation of peace and security)”.

(c) Recourse to procedures for investigation, mediation and conciliation

131. The observations submitted by the Government of Colombia to the General Assembly at its sixteenth session, include the following passage (A/4796): “The International Law Commission has already examined the topic of arbitral procedure and produced a model set of rules which is submitted to the General Assembly and which the latter transmitted to Governments in November 1958 for comments and to be taken into account in drawing up treaties of arbitration. The Commission, as the codifying organ of the United Nations has still, however, to consider the other procedures for pacific settlement provided for both in Article 33 of the Charter of the United Nations and in article 21 of the Charter of the Organization of American States, viz., good offices, mediation, investigation and conciliation—judicial procedure being regulated by the Statute of the International Court of Justice annexed to the Charter of the United Nations. With regard to such procedures for the pacific settlement of international disputes, there are many Inter-American precedents having a bearing on codification (Treaty to Avoid or Prevent Conflicts between the American States (Gondra Pact), approved at the Fifth International Conference of American States and centred around the investigation procedure; General Convention on Inter-American Conciliation, General Treaty of Inter-American Arbitration and Protocol of Progressive Arbitration, all approved at the International Conference of American States on Conciliation and Arbitration held at Washington in 1929; Anti-War Treaty of Non-Aggression and Conciliation (Saavedra Lamas Pact), concluded at Rio de Janeiro in 1933; Inter-American Treaty on Good Offices and Mediation, adopted by the Inter-American Conference for the Maintenance of Peace at Buenos Aires in 1936; Inter-American Treaty on Pacific Settlement (Pact of Bogotá), approved at the Ninth International Conference of American States”.

132. Consequently the Colombian Government proposed the study of the following question: “Pacific settlement of international disputes: procedures for investigation, mediation and conciliation”.

133. The Colombian representative enlarged on this idea in the Sixth Committee (A/C.6/SR.723), developing it and acknowledging that his proposal would in fact mean studying the general question of the rights and duties of States.

134. The representative of Indonesia (A/C.6/SR. 726) expressed views identical with those of the Colombian Government.

135. The question presents an undeniable interest. The local conflicts which break out at various points in the world necessitate the creation of numerous investigation, mediation and conciliation commissions.

136. The United Nations has already set up more than ten conciliation commissions. They have functioned, with varying degrees of success, in Greece, Palestine, Indonesia, Korea, Kashmir and Laos.

(d) More frequent recourse to arbitral and judicial settlement

137. In its observations, the Danish Government (A/4796/Add.1) stated that it could not but... 'welcome any proposal tending to enlarge the scope of arbitral and judicial procedures in international relations. Far from being met with criticism, the International Law Commission ought to be encouraged to pursue its efforts in this direction'.

138. In the Swedish Government’s view (A/4796):

...one of the most important questions of the day is that of strengthening the role of international law in the settlement of conflicts between States.

"Under Article 2 of the Charter of the United Nations, Member States are enjoined to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered. Nowadays, however, many disputes which lend themselves to settlement by the International Court of Justice or by other international judicial or arbitral bodies are not submitted for such settlement, with the result that they continue to burden relations between the States concerned. In view of this state of affairs, consideration should be given to the means by which States might be induced to resort more frequently to a judicial or arbitral settlement of their disputes. The Swedish Government considers that this question is of such importance that it should be given priority on the list of topics to be studied by the International Law Commission."

139. During the Sixth Committee’s debates at the sixteenth session of the General Assembly, the Swedish representative (A/C.6/SR.724) expanded his Government’s arguments. He was supported by the representatives of Ireland (A/C.6/SR.727) and Pakistan (A/C.6/SR.720).

140. With regard to the draft on arbitral procedure prepared by the International Law Commission between 1950 and 1958, the General Assembly in its resolution 1262 (XIII) of 14 November 1958 confined itself to bringing “the draft articles on arbitral procedure contained in the report of the Inter-
national Law Commission to the attention of Member States for their consideration and use, in such cases and to such extent as they consider appropriate, in drawing up treaties of arbitration or compromise, and to inviting Governments to send to the Secretary-General any comments they may wish to make on the draft, and in particular on their experience in the drawing up of arbitral agreements and the conduct of arbitral procedure, with a view to facilitating a review of the matter by the United Nations at an appropriate time”.

(e) Obligatory jurisdiction of the International Court of Justice

141. During the Sixth Committee’s debates at the fifteenth session of the General Assembly, the representatives of Afghanistan (A/C.6/SR.660), Canada (A/C.6/SR.656) and the United Kingdom (A/C.6/SR.652) put forward the question of the obligatory competence of the International Court of Justice as one of the topics to be studied by the International Law Commission. The representative of Burma (A/C.6/SR.653) stated that “adequate measures should be taken . . . to educate world public opinion to accept the United Nations as the organ for laying down international law and the International Court of Justice as the forum for the determination of international disputes”.

142. Ghana (A/4796/Add.1) asked that this question should be studied.

143. In its observations, the Danish Government (A/4796/Add.1) stated: “Codification and development of international law should be contemplated as only one aspect of the rule of law in international relations, and should—in addition to the purposes immediately served—contribute towards the creation of conditions in which the compulsory jurisdiction of the International Court of Justice may gain extended recognition”. The Danish representative in the Sixth Committee stated (A/C.6/SR.725) during the debates at the sixteenth session that his delegation considered that the Sixth Committee would be “the appropriate forum for a thorough debate on that well-defined and vital field of international law”. The Swedish representative (A/C.6/SR.724) also hoped that the Sixth Committee would take up the question “unless the International Law Commission inserted in it its list of priority topics”.

144. The Netherlands Government (A/4796/Add.7) was of the opinion that “a further development in this field is urgently called for but that the preparatory work should be left to other bodies”.

145. The representative of Ghana (A/C.6/SR.723) suggested that the Court should be permitted to decide what was within the domestic jurisdiction of a State, just as domestic courts decided whether or not they had jurisdiction in a particular matter. He stated that he was in favour of the obligatory jurisdiction of the Court. The Israel representative (A/C.6/SR.726) supported that proposal.

11. LAW OF WAR AND NEUTRALITY

146. At its first session (9th meeting), in 1925, the Committee of Experts for the Progressive Codification of International Law decided to adjourn for consideration at a later date the various problems connected with war and neutrality. Such consideration never took place, despite the Committee’s concern to leave “untouched the question of what extent it ought to deal with the laws of war”.

147. Mr. Fromageot criticized the phrase “law of war”, which appeared to establish “a special code of law for war, whereas there was only one international code of law, which was the law of nations. When war occurred, it was subject to special rules, but the law of nations continued to be fully binding on all non-combatants”.

148. In its report the Committee of Three Jurists appointed by the Council of the League of Nations on 14 December 1928 to prepare The Hague Codification Conference included in its proposal for the publication in the form of a code of conventions open to States in general, item 13 entitled “Conventions on the law of war: (a) Land, (b) Sea, (c) Air”. At its first session, the International Law Commission “considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that, although the term ‘laws of war’ ought to be discarded, a study of the rules of governing the use of armed force—legitimate or illegitimate—might be useful. The punishment of war crimes, in accordance with the principles of the Charter and judgement of the Nürnberg Tribunal, would necessitate a clear definition of those crimes and, consequently, the establishment of rules which would provide for the case where armed force was used in a criminal manner. The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace”.

150. During the debates on this question in the Commission (sixth meeting), Mr. Scelle expressed the view that the topic should be examined, but under another heading. Since the Charter had envisaged to organize an international police force for the prevention of war, the regulation of the employment of an international police force should be one of the chief preoccupations of the Commission; specific rules, he thought, should be established for that most dangerous executive function.

151. Mr. Sandström wondered whether the question presented by Mr. Scelle did not fall within the province of the progressive development of international law rather than that of its codification. Mr. Spiropoulos agreed with Mr. Sandström that war was a possibility but that, since the greater part of the law of war had already been codified by international conventions, in particular by The Hague Convention and by the London Declaration, it would be enough to apply those conventions.

146. Ibid.
148. Ibid.
66 League of Nations, A.12.1929.V. The Committee consisted of Mr. Diena, Mr. Guerrero and Mr. Schücking.
152. At the fifteenth session of the General Assembly, the representative of Ceylon (A/C.6/SR.668) proposed that the law of neutrality should be codified.

153. In its observations (A/4796/Add.6), Austria proposed the codification of the laws of war and neutrality.

154. The Austrian Government observed that the "provisions of the Charter may have had an effect other than abrogation on traditional norms of international law. Some norms, for instance, may have to be modified in order to correspond to the regulations of the Charter. This is especially true for the laws of war and neutrality which reflect the State practice of the nineteenth century and do not, therefore, provide for military actions of a world organization of States".

155. On the other hand, the Netherlands Government (A/4796/Add.7) was of the opinion "that the laws of war—though their adaptation to modern methods of warfare is an urgent necessity—are not susceptible of codification, since this topic is closely connected with problems of disarmament which are under discussion in other bodies of the United Nations".

156. It is to be noted that in 1949 the International Committee of the Red Cross convened a conference which adopted four conventions—the so-called Geneva Conventions of 12 August 1949—on the amelioration of the condition of the wounded and sick in armed forces in the field, on the amelioration of the condition of the wounded, sick and shipwrecked members of armed forces at sea, on the treatment of prisoners of war, and on the protection of civilian persons in time of war.

12. FUNDAMENTAL RIGHTS AND DUTIES OF STATES

157. At its first session, in 1949, the International Law Commission, under the terms of General Assembly resolution 178 (II) of 21 November 1947, adopted a draft Declaration on Rights and Duties of States. That draft, which consisted of fourteen articles, was based on a draft submitted by Panama. The International Law Commission also used a Secretariat memorandum entitled "Preparatory study concerning a Draft Declaration on the Rights and Duties of States".

158. In its resolution 375 (IV) of 6 December 1949, the General Assembly noted the draft Declaration on Rights and Duties of States and transmitted it to Member States, requesting their comments. Because of the few comments it received, the Assembly decided, in resolution 596 (VI) of 1 December 1951, to postpone consideration of the draft Declaration until a sufficient number of States had transmitted their comments and suggestions and in any case to undertake consideration as soon as a majority of Member States had transmitted such replies. By the end of 1952, only eighteen States had replied. Since no comments have been received since that time, there have been no further developments in regard to the question.

159. Venezuela (A/4796/Add.5), as one of the Governments which, at the sixteenth session, had submitted observations in accordance with resolution 1505 (XV), suggested that priority might be given in the future work of the International Law Commission to the fundamental rights and duties of States.

160. At the sixteenth session of the General Assembly, the Nicaraguan representative (A/C.6/SR.722) in the Sixth Committee included the question among those topics for which codification was urgently needed. Similarly, the Mexican representative (A/C.6/SR.722) referred to the necessity of drawing up a set of rules concerning the rights and duties of States. He stated that developments in the past fifteen years might make it necessary to adapt the Declaration, which the International Law Commission had drafted in 1949 to the new conditions now prevailing. In his view, the draft was far from perfect and the Mexican delegation had serious reservations respecting it; but it could be amended and improved. The 1949 draft and other documents, such as chapter III of the Charter of the Organization of American States, might serve as a guide. Although it did not make a formal proposal, the Mexican delegation believed that it would be appropriate to draw the attention of the International Law Commission to that problem.

161. The Brazilian representative (A/C.6/SR.721), on the other hand, wished to avoid as far as possible the preparation of academic documents devoid of practical significance, such as the Declaration on the Rights and Duties of States.

Part II. Possibility of codifying "new" topics

1. LAW OF SPACE

162. At the fifteenth session of the General Assembly, during the discussion in the Sixth Committee on the report of the International Law Commission, the representatives of Afghanistan (A/C.6/SR.660), Mexico (A/C.6/SR.665) and the Philippines (A/C.6/SR.663) proposed that the Commission should undertake the study of the legal aspects of the use of outer space.

163. Among the replies from Governments transmitted in accordance with resolution 1505 (XV), Afghanistan (A/4796) and Mexico (A/4796/Add.1) proposed that the legal aspects of outer space should be studied. Mexico expressed the following opinion: "Apart from the military and political aspects of this problem, which are being studied by other United Nations organs, it would appear that an attempt might be made at the same time to formulate certain minimum basic rules—without of course attempting, at this stage, to produce a complete code—which might even help in future studies of the military and political aspects of the problem".

164. Burma (A/4796) suggested the study of sovereignty in air space and Ghana (A/4796/Add.1) that of the law of space.

165. During the discussion in the Sixth Committee at the sixteenth session of the General Assembly, the representative of Ghana (A/C.6/SR.723) stated that an international convention codifying the rules of outer space was urgently necessary, but that, until the initial survey in that field was undertaken, many important questions would remain unanswered. The representatives of Nepal (A/C.6/SR.728) and Mexico (A/C.6/SR.722) also advocated the codification of the law of outer space. The representative of Nicaragua (A/C.6/SR.722) said that he would prefer a study of the "law of aviation" which would cover atmospheric and outer space and also installations and facilities.
166. On the other hand, the representative of Brazil (A/C.6/SR.721) was of the opinion that the International Law Commission was unlikely to succeed in the legal study of outer space, because it would not achieve effective solutions. The representatives of the United Kingdom (A/C.6/SR.717) and the United States (A/C.6/SR.722) also thought that the question was too technical for the International Law Commission.

167. This topic has already been the subject of a number of studies. At its session in Neuchâtel in 1959, the Institute of International Law established a commission to study the law of celestial space. The International Law Association dealt with the topic at its fifty-ninth Conference held at Hamburg in 1960.

168. By its resolution 1348 (XIII) of 13 December 1958, the United Nations General Assembly established an ad hoc Committee on the Peaceful Uses of Outer Space, and finally, by its resolution 1472 (XIV) of 12 December 1959, a Committee on the Peaceful Uses of Outer Space.

169. By its resolution 1721 (XVI) of 2 January 1962, the General Assembly invited the Committee on the Peaceful Uses of Outer Space to study and report on the legal problems which might arise from the exploration and use of outer space. The Committee met at Headquarters on 19 March 1962. It was decided to establish a legal sub-committee.

2. LAW OF INTERNATIONAL ORGANIZATIONS

170. In the replies from Governments transmitted under resolution 1505 (XV), the following four subjects were proposed for codification:

(a) Status of international organizations and the relations between States and international organizations;

(b) The validity of norms of international law with regard to the entrance of new members in the international community;

(c) The responsibility of international organizations;

(d) The law of treaties in respect of international organizations.

171. The first topic was proposed by Austria (A/4796/Add.6) and the Netherlands (A/4796/Add.7), and the three others by Austria.

172. Among its comments, the Austrian Government stated that "International organizations partake, within the express or implied powers conferred upon them by their statute, in international intercourse. Some aspects of the existence of international organizations as international legal phenomena are covered by international conventions which have been concluded for or by individual organizations. To other aspects of the external relations of international organizations, for which no such conventions exist, the traditional norms of international law can be applied only to a limited degree".

173. The question has already been touched upon by the General Assembly. By its resolution 1289 (XII) of 5 December 1958, it invited the International Law Commission to consider the question of relations between States and international organizations "at the appropriate time, after study of diplomatic intercourse and immunities, consular intercourse and immunities and ad hoc diplomacy has been completed by the United Nations and in the light of the results of that study and of the discussion in the General Assembly".

174. At its eleventh session (1959), the International Law Commission took note of the resolution and decided to consider the topic in due course.

175. At the sixteenth session of the General Assembly, the representative of Indonesia in the Sixth Committee (A/C.6/SR.726) suggested the study of the law of international organizations and the representative of the United Arab Republic (A/C.6/SR.723) suggested the consideration of the relations between States and international organizations.

176. It would seem that the law of international organizations is appropriate for codification and that codification would meet a growing need. The number of regional or universal inter-governmental organizations is continually increasing, and is now about 150. Their relations among themselves and with Governments raise complex legal problems which are not always settled satisfactorily. Almost a century has elapsed since the establishment of the Universal Postal Union, the ancestor of international organizations. An established practice has come into being and there are numerous texts. Volumes 10 and 11 of the United Nations Legislative Series "Legislative texts and treaty provisions concerning the legal status, privileges and immunities of international organizations" each contain about 400 pages (ST/LEG/SER.B/10 and 11).

3. HUMAN RIGHTS AND DEFENCE OF DEMOCRACY

(a) Preparation of a draft Convention for the defence of democracy, to be co-ordinated with the work currently being done along those lines by the Organization of American States and the Inter-American Commission for the Protection of Human Rights

177. The preparation of a draft convention was proposed by Venezuela (A/4796/Add.5).

178. The Government of Colombia in its comments (A/4796) stated: "Another topic studied by the Inter-American Council of Jurists is the effective exercise of representative democracy, which has been placed on the provisional agenda of the Eleventh Inter-American Conference. Since, however, this topic is relatively political in nature and within the inter-American region organization comes by way under article 5 (4) of the Charter of Bogota, it might for the moment be regarded as exclusively inter-American. The same would seem to apply to the topic of the juridical relationship between respect for human rights and the exercise of representative democracy, which is also a subject of study by the Inter-American Council of Jurists and has been dealt with in a report to the Eleventh Inter-American Conference".

(b) International protection of human rights through the creation of a special international court

179. The subject was proposed by Colombia (A/4796).

180. The representative of Argentina in the Sixth Committee stated at the sixteenth session of the General Assembly that his Government considered that a vigorous effort should be made to ensure international protection of human rights by establishing procedures which, while respecting State sovereignty, would grant the individual the safeguards necessary to the full enjoyment of his rights.

181. The representative of Colombia submitted a draft resolution (A/C.6/L.493), the operative part of
which provided for the inclusion in the agenda of the seventeenth session of the Assembly of the question of the establishment of an international tribunal for the protection of human rights. That draft was subsequently replaced by an amendment (A/C.6/L.496). In the course of the debate the representative of Colombia withdrew his proposal, accepting the fact that most representatives, while recognizing the importance of the question, felt that its inclusion in the agenda of the next session of the General Assembly was inappropriate, since it had already for some years been on the agenda of the Commission on Human Rights (A/5036, para. 37).

182. The question of the establishment of an international court of human rights was, indeed, raised at the second (1947), third (1948) and fifth sessions (1949) of the Commission on Human Rights.

183. An Australian draft (E/CN.4/AC.1/27) of thirty-two articles for a statute of an international court of human rights on those lines was submitted in 1948.

184. At its 132nd meeting in 1949, the Commission on Human Rights adopted a resolution deciding to request the Secretary-General to transmit to the Governments of Member States, for their comments, the proposal submitted by Australia (E/CN.4/AC.1/27). Some comments were received and were reproduced in document E/CN.4/366.

185. The question was included on the agenda of the sixth, seventh, eighth, ninth, tenth and eleventh sessions of the Commission on Human Rights (1950-1955). At its eleventh session in 1955 (E/2731 and Corr.1, page 4), the Commission decided that that question (agenda item 18) should no longer have priority and it was not subsequently discussed.

186. The Secretariat of the Commission on Human Rights has been informed of the Colombian proposal. It would therefore be preferable for the International Law Commission to leave the Commission on Human Rights to deal with that question. In any case the representative of Colombia wished the question to be referred to the Assembly and not to the International Law Commission.

(c) Jurisdiction of international courts and organizations with special reference to the plea of exclusion by the domestic jurisdiction in relation to questions affecting human rights

187. This question was proposed by the Government of Ceylon (A/4796/Add.8).

4. INDEPENDENCE AND SOVEREIGNTY OF STATES

(a) The acquisition of statehood

188. This question was proposed by the Government of Ghana (A/4796/Add.1). At the sixteenth session of the General Assembly, the representative of Ghana (A/C.6/SR.723) stated in the Sixth Committee that the matter was "obviously important", as "the expansion of international society by the emergence of new States was fast being relegated to history; in fact, after General Assembly resolution 1514 (XV) on the granting of independence to colonial countries and peoples had been fully implemented, new States would come into being only by the disintegration, disruption or total extinction of the existing States and the formation of new groupings through fission or fusion. Then the birth of a new State and its recognition would be linked inextricably to the problem of State succession".

(b) The right of a State, in particular a new State, to determine, to implement and to perfect in its political form, socially and economically in conformity with the professed ideology and to take all necessary steps to accomplish this, e.g., decolonization, normalization, nationalization, and also steps to control all its natural resources and ensure that those resources are utilized for the interests of the State and the people

and

(c) The right of every State to take steps which, in its opinion, are necessary to safeguard its national unity, its territorial integrity and for its self-defence.

189. These two topics were proposed by Indonesia (A/4796/Add.2).

(d) Elaboration of legal principles ensuring the granting of independence to colonial countries and peoples

190. This topic was proposed by Czechoslovakia (A/4796/Add.3). It relates particularly to the right of nations to self-determination, ensuring to nations full sovereignty over their natural resources, the complex of problems of recognition, State succession and others.

191. The question of sovereignty over natural resources was the subject of a study prepared by the Secretariat at the request of the Commission on Permanent Sovereignty over Natural Resources established under resolution 1314 (XIII) of 12 December 1958.

192. The Commission held three sessions between 1959 and 1961. In a resolution adopted in 1961, it requested the International Law Commission, in connexion with the question of permanent sovereignty over natural resources, to speed up its work on the topic of the responsibility of States.70

193. The Second Committee, to which the report of the Commission on Permanent Sovereignty over Natural Resources was referred, did not have time to consider the latter’s resolution.

194. By resolution 1720 (XVI) of 19 December 1961, the General Assembly deferred the question to its seventeenth session.

(e) Acts of one State in the territory of another State

195. The topic was proposed by the Netherlands (A/4796/Add.7). It is related to that of the jurisdiction and responsibility of States.

(f) The principle of non-intervention

196. Study of this topic was proposed by Mexico (A/4796/Add.1). At the inter-American level, a Convention containing five articles, signed at Havana in 1928, sets out the obligations and rights of States in cases of civil war.71 In the view of the Government of Mexico, consideration should be given to the desirability of extending the provisions of that Convention to all countries or perhaps of formulating new provisions that would be in keeping with present conditions and be universally applicable.

197. At the sixteenth session of the General Assembly, the representative of the Union of Soviet Socialist Republics in the Sixth Committee suggested the

70 E/3511; A/AC.97/13, annex.

codification of the question of the sovereignty of States and the principle of non-interference (A/C.6/SR.717).

198. The representative of Mexico (A/C.6/SR.722) pointed out that, in view of the current importance of the question of non-intervention, its study should be undertaken as soon as possible.

(g) The principle of self-determination of peoples

199. Study of this topic was proposed by Austria (A/4796/Add.6).

200. The principle appears in the draft International Covenants on Human Rights, in article 1 of the draft Covenant on Economic, Social and Cultural Rights and in article 1 of the draft Covenant on Civil and Political Rights. In addition, on 14 December 1960 the General Assembly adopted resolution 1514 (XV) setting forth a Declaration on the granting of independence to colonial countries and peoples. At its sixteenth session, the General Assembly, by resolution 1654 (XVI) of 27 November 1961, established a Special Committee to examine the application of the Declaration set forth in resolution 1514 (XV) and to report to it at its seventeenth session. The Special Committee began its work on 20 February 1962 at Headquarters.

5. Enforcement of international law

201. The topic was proposed by the Government of Ghana (A/4796/Add.1).

202. In a statement in the Sixth Committee during the sixteenth session of the General Assembly, the representative of Ghana (A/C.6/SR.723) said that this topic was closely related to the acceptance by all States of the compulsory jurisdiction of the International Court of Justice. If it were possible to enforce international law against all nations in all cases, many of the difficulties at present confronting the world would be obviated. His delegation hoped that the topic would receive early attention.

203. The representative of Argentina (A/C.6/SR.720) stated that his Government considered it essential to attempt, by both codification and progressive development, to establish a complete legal system of methods for securing the peaceful solution of international disputes and to create additional means of ensuring peace through the rule of law.

6. Utilization of international rivers

204. The Netherlands (A/4796/Add.7) requested that this matter should be studied by the International Law Commission.

205. At the fourteenth session of the General Assembly, the representative of Bolivia in the Sixth Committee pointed out that the utilization of international rivers was governed by law which was purely customary, ill-defined and lacking in uniformity. He therefore suggested that the International Law Commission should include in its agenda the question of the utilization and exploitation of international waterways.

206. Several representatives emphasized the complexity of the problem, which would necessarily require suitable technical knowledge.

207. Other representatives were of the opinion that an attempt to codify the matter would be premature and could do more harm than good. It would be better to leave it to the International Law Commission to decide whether the utilization of international rivers was an appropriate subject for codification.

208. Accordingly, on the recommendation of the Sixth Committee, the General Assembly adopted on 21 November 1959 resolution 1401 (XIV) which requested:

"the Secretary-General to prepare and circulate to Member States a report containing:

"(a) Information provided by Member States regarding their laws and legislation in force in the matter and, when necessary, a summary of such information:

"(b) A summary of existing bilateral and multilateral treaties;

"(c) A summary of decisions of international tribunals, including arbitral awards;

"(d) A survey of studies made or being made by non-governmental organizations concerned with international law".

209. The Secretariat has undertaken this work, and a report on the subject and a volume of the United Nations Legislative Series devoted to treaties and national laws concerning the exploitation and utilization of international rivers are to appear early in 1963.

210. At the sixteenth session of the General Assembly, the representative of Iran in the Sixth Committee suggested (A/C.6/SR.725) that the International Law Commission "could well use the research accomplished by the Secretariat as a starting point for an international convention. Such a convention would serve to regulate the use of international rivers by riparian States on the basis of well-defined rules and thus put an end to numerous disputes on the subject".

7. Economic and trade relations

(a) The rules governing multilateral trade

211. In proposing the study of this topic, the Yugoslav Government (A/4796) stated that "the rules governing international trade, and more especially trade among States with different economic and social systems, raise a number of novel problems to which satisfactory solutions should now be sought in the interest of the normal development of both economic and political relations in a particularly sensitive area of world affairs. What we have in mind here are not, of course, the technical aspects of the legal regulation of international trade, but the new institutions and rules that have arisen since the Second World War and which make the general pattern of international trade very much different from what it had previously been."

212. At the sixteenth session of the General Assembly, the Yugoslav representative developed these ideas in a statement in the Sixth Committee (A/C.6/SR.714).

(b) The rules pertaining to the various forms of economic assistance to under-developed countries

213. This topic was also proposed by Yugoslavia (A/4796). In its observations the Yugoslav Government stated that: "The question of promoting the economic development of the hitherto under-developed countries is generally recognized to be one of the foremost international problems of our time. The various forms of assistance that are now given to the develop-
ment of these countries—economic and technical, multi-
lateral and bilateral—have considerable legal implica-
tions and call for the determination of the principles
of international law that should govern their application
if they are to achieve their basic purposes”.

214. In the Sixth Committee, the Yugoslav repre-
sentative (A/C.6/SR.714) argued that “in codifying
the legal rules concerning economic and technical assist-
ance, the [International Law] Commission should not
enter into technical questions, but should seek to define,
in the light of general international law, the respective
positions of the States and organizations concerned.
His delegation was convinced that existing legal stand-
ards could provide a basis for establishing some rules
which had been reaffirmed many times in the practice
of the post-war period. For example, the requirement
that no political or other conditions should be attached
to the aid extended to under-developed countries was
now a generally recognized legal rule”.

215. On the other hand, the representative of the
United Kingdom, referring to the two topics suggested
by Yugoslavia, stated in the Sixth Committee (A/C.6/
SR.717) that both tasks seemed more appropriate for
an economic body than for the International Law Com-
mission. He further stated that some aspects of interna-
tional trade might be covered by other subjects, such
as the jurisdictional immunities of States.
SUCCESSION OF STATES AND GOVERNMENTS

DOCUMENT A/CN.4/149 AND ADD.1

The succession of States in relation to membership in the United Nations:
memorandum prepared by the Secretariat

I. INTRODUCTION

1. At a meeting of the Sub-Committee on the Succession of States and Governments held during the fourteenth session of the International Law Commission, the Secretary of the Commission stated that the Secretariat would undertake the preparation of a memorandum on the problem of succession of States in relation to membership of the United Nations. The Commission took note of this statement in its report.1

2. This memorandum is accordingly submitted for the use of the Sub-Committee and of the Commission. In this regard there are three significant cases. The first is that of the admission of Pakistan in 1947; that was the first occasion on which a new State whose territory had formerly formed part of a Member of the United Nations was admitted to the Organization. Though the issue of succession was raised, Pakistan went through the usual procedure for admission, and that procedure has been followed by all other new States which formerly were parts of Members and which have been admitted to the United Nations. The second case is the formation in 1958 of the United Arab Republic by union between Egypt and Syria. The third case is the departure of Syria from the United Arab Republic in 1961.

II. THE ADMISSION OF PAKISTAN TO MEMBERSHIP, 1947

3. In August 1947, an original Member of the United Nations divided into two States, India and Pakistan. Before the arrival of the date set for this change (15 August 1947), the Secretariat, for the purposes of its administrative functions, was obliged to consider the legal consequences in regard to membership and representation in the United Nations. A legal opinion of 8 August 1947 by the Assistant Secretary-General for Legal Affairs was approved and made public by the Secretary-General.2 This legal opinion was as follows:

“The Indian Independence Act provides that on the fifteenth day of August, 1947, two Independent Dominions shall be set up in India to be known respectively as India and Pakistan. Under this Act, the new Dominion of India will consist of all the territories of British India except certain designated territories which will constitute Pakistan.

“What is the effect of this development on membership and representation of India in the United Nations?

“From the legal standpoint, the Indian Independence Act may be analysed as effecting two separate and distinct changes:

“1. From the viewpoint of international law, the situation is one in which a part of an existing State breaks off and becomes a new State. On this analysis, there is no change in the international status of India; it continues as a State with all the treaty rights and obligations, and consequently, with all the rights and obligations of membership in the United Nations. The territory which breaks off, Pakistan, will be a new State; it will not have the treaty rights and obligations of the old State, and it will not, of course, have membership in the United Nations.

“In international law, the situation is analogous to the separation of the Irish Free State from Great Britain, and of Belgium from the Netherlands. In these cases, the portion which separated was considered a new State; the remaining portion continued as an existing State with all the rights and duties which it had before.

“2. Apart from the question of separation, the Independence Act has effected a basic constitutional change in India. The existing State of India has become a Dominion, and consequently, has a new status in the British Commonwealth of Nations, independence in external affairs, and a new form of government. It is clear, however, that this basic constitutional change does not affect the international personality of India, or its status in the United Nations. The only question it raises is whether new credentials should be requested for the Indian representatives in the organs of the United Nations. Although there is no precedent for this situation in the United Nations, there is some basis in diplomatic practice for requesting new credentials in cases of States which have undergone a change of sovereignty, as from a monarchy to a republic. It would, therefore, seem appropriate for the Secretary-General to suggest to the Government of India that in view of the change in sovereignty, it would be desirable to have new credentials issued to the Indian representatives by the Head of the Government or the Foreign Minister of the new Dominion of India.

“In conclusion, the effect of the Independence Act may be summarized as follows:

2 The facts of this case are also summarized in the Repertory of Practice of United Nations Organs, vol. I, Article 4, paras. 32-37.
"1. The new Dominion of India continues as an original Member State of the United Nations with all rights and obligations of membership.

"2. Pakistan will be a new non-member State. In order for it to become a Member of the United Nations, it would have to apply for admission pursuant to Article 4 of the Charter, and its application would be handled under the pertinent rules of procedure of the General Assembly and the Security Council.

"3. The representatives of India on the Economic and Social Council and the representative of India participating in the discussion of the Indonesian case in the Security Council should be requested to submit new credentials after August 15 issued by the Head of Government, or the Foreign Minister of the new Dominion of India."

4. In the meanwhile, the representatives of India and Pakistan had been considering the problem of the devolution of international rights and obligations, and arrived at an agreement which, though reached on 6 August, was not promulgated until 14 August, and was communicated to the United Nations only on 27 August 1947, in a letter from the representative of India. The agreement was promulgated by the Governor-General in the Schedule to the Indian Independence (International Arrangements) Order, 1947, which provided that:

"The agreement set out in the Schedule to this Order shall, as from the appointed day, have the effect of an agreement duly made between the Dominion of India and the Dominion of Pakistan."

5. The agreement read as follows:

"Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan"

"1. The international rights and obligations to which India is entitled and subject immediately before 15 August 1947, will devolve in accordance with the provisions of this agreement.

"2. (a) Membership of all international organizations together with the rights and obligations attaching to such membership, will devolve solely upon the Dominion of India.

"For the purposes of this paragraph any rights or obligations arising under the Final Act of the United Nations Monetary and Financial Conference will be deemed to be rights or obligations attached to membership of the International Monetary Fund and to membership of the International Bank for Reconstruction and Development.

"(b) The Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organization as it chooses to join.

"3. (a) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.

"(b) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion.

"4. Subject to articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions."

6. On 15 August 1947, the date on which Pakistan became independent, the Minister for Foreign Affairs of Pakistan sent the following cable to the Secretary-General:

"On behalf of the Government of Pakistan, I have the honour to say that in my Government's view both the Dominions of India and Pakistan should become Members of the United Nations, automatically, with effect from 15 August. If, however, this view is not accepted, I hereby apply for the admission of Pakistan as a Member of the United Nations. Pakistan is prepared to accept the obligations contained in the Charter of the United Nations."

7. The Security Council took up the application of Pakistan on 18 August 1947. The Council decided to consider the matter directly, without previous reference to its Committee on the Admission of New Members. The claim of Pakistan to succession to the membership of India was not specifically considered, but after a brief discussion in which the representative of India supported "the application of Pakistan for membership", the Council voted unanimously in favour on "the question of admitting Pakistan to membership in the United Nations."

8. Thereafter the President of the Council and the Secretariat prepared a draft resolution which the Council discussed and adopted on 21 August 1947. In its operative part the resolution provided that the Council recommended "to the General Assembly that it admit to membership in the United Nations the following applicants: "Yemen and Pakistan."

9. This resolution was transmitted to the General Assembly, which referred the item to the First Committee. At the opening of the debate in that Committee on 24 September 1947, the representative of Argentina declared that in his view Pakistan was already a Member of the United Nations since with India it inherited..."
the original membership held by the previous Indian Government. He would have had no objection if the United Nations had decided that both India and Pakistan were new States, and should submit applications for membership; but not to treat both Dominions on the same footing constituted an unfounded discrimination, since both should have been regarded as original Members, or, alternatively, both should have been considered new Members. Accordingly he submitted a draft resolution whereby the General Assembly would declare Pakistan a Member of the United Nations as from 15 August 1947, and would also declare that the positions occupied by the representatives of India in commissions, committees and sub-committees up to 15 August 1947 should be understood “as being occupied as from that date by the representatives of the Dominion of India”.

10. The representative of Australia said that he did not believe the procedure which had been followed was incorrect; since India retained membership in the Economic and Social Council, it seemed to have been tacitly agreed that it had assumed the international rights and obligations of the former State of India. He submitted a draft resolution by which the Assembly would decide to admit Pakistan and Yemen as Members.

11. In the ensuing discussion some representatives supported the views of Argentina and others of Australia, but it was generally agreed that it was undesirable to delay the participation of Pakistan in the Organization. The Committee unanimously adopted the draft resolution submitted by Australia, but decided to refer the legal problem raised by the representative of Argentina to the Sixth Committee for consideration and report; the opinion of the Sixth Committee was, however, to be for use in future cases only and would have no bearing on the recommendation of the First Committee concerning the admission of Pakistan.

12. On 30 September 1947 the General Assembly considered and adopted the draft resolution recommended by the First Committee deciding to admit Pakistan and Yemen as Members; it became resolution 108 (11). The resolution provided:

“The General Assembly,

“Taking note of the applications for membership submitted to the United Nations by Pakistan and Yemen, and of the recommendation of the Security Council that the Assembly admit Pakistan and Yemen to membership,

“Determines that Pakistan and Yemen are, in its judgement, peace-loving States, within the meaning of Article 4 of the Charter, and are able and willing to carry out their obligations under the Charter, and consequently,

“Decides to admit Pakistan and Yemen as Members of the United Nations.”

13. In depositing his country’s instrument of adherence to the Charter at the same meeting, the representative of Pakistan declared:

“In one sense, the admission of Pakistan to the United Nations is not the admission of a new Member. Until 15 August of this year, Pakistan and India constituted one State. On 15 August they agreed to constitute themselves into two separate sovereign States. One chose to continue to call itself by the old name of India, which had applied to the whole of the country, and the other elected to call itself by the name of Pakistan.

“Inasmuch as Pakistan had been a part of India, it was, in effect under the latter name, a signatory to the Treaty of Versailles and an original Member of the League of Nations. In the same sense, Pakistan, as a part of India, participated in the San Francisco Conference in 1945 and became a signatory to the United Nations Charter. Therefore Pakistan is not a new Member of the United Nations, but a co-successor to a Member State which was one of the founders of the Organization.”

14. The Sixth Committee on 6 and 7 October 1947 considered the general question put to it by the First Committee, which was worded as follows:

“What are the legal rules to which, in the future, a State or States entering into international life through the division of a Member State of the United Nations should be subject?”

15. The discussion opened with a statement by the Rapporteur of the Committee, Mr. Georges Kaeckenhoeck (Belgium), who suggested three paragraphs summarizing the governing principles. The Committee adopted these principles, which were transmitted in a letter of 8 October 1947 from the Chairman of the Sixth Committee to the Chairman of the First Committee.

16. The letter read in part as follows:

“...After having considered the problem, the Sixth Committee agreed on the following principles:

“1. That, as a general rule, it is in conformity with legal principles to presume that a State which is a Member of the Organization of the United Nations does not cease to be a Member simply because its Constitution or its frontier have been subjected to changes, and that the extinction of the State as a legal personality recognized in the international order must be shown before its rights and obligations can be considered thereby to have ceased to exist.

“2. That when a new State is created, whatever may be the territory and the populations which it comprises and whether or not they formed part of a State Member of the United Nations, it cannot under the system of the Charter claim the status of a Member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter.

“3. Beyond that, each case must be judged according to its merits.

10 A/C.1/187; ibid., p. 582, annex 14e.
11 A/C.1/188; ibid., p. 582, annex 14f.
13 92nd plenary meeting; ibid., pp. 311-320.
14 Ibid., p. 317.
15 42nd and 43rd meetings; General Assembly, Official Records, Second Session, Sixth Committee, pp. 37-44.
17 A/C.1/212; General Assembly, Official Records, Second Session, First Committee, pp. 582-583, annex 14g.
III. Formation of the United Arab Republic, 1958

17. The following note, dated 24 February 1958, was sent to the Secretary-General by the Foreign Minister of the United Arab Republic:18

"The plebiscite held in Egypt and Syria on 21 February 1958 having made clear the will of the Egyptian and Syrian people to unite their two countries in a single State, the Minister for Foreign Affairs of the United Arab Republic has the honour to notify the Secretary-General of the United Nations of the establishment of the United Arab Republic, having Cairo as its capital, and the election, in the same plebiscite, of President Gamal Abdel Nasser as President of the new Republic."

18. A further note of 1 March 1958 from the Foreign Minister to the Secretary-General stated as follows:18

"The Minister for Foreign Affairs presents his compliments to H.E. the Secretary-General of the United Nations and, in pursuance of his note dated 24 February 1958, regarding the formation of the United Arab Republic and the election of President Gamal Abdel Nasser, has the honour to request the Secretary-General to communicate the content of the above-mentioned note to the following:

1. All the States Members of the United Nations;
2. Other principal organs of the United Nations;
3. Subsidiary organs of the United Nations, particularly those on which Egypt or Syria, or both, are represented.

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

19. In accordance with the request, the Secretary-General on 7 March 1958 transmitted the two notes to all Members of the United Nations and to principal and subsidiary organs of the Organization. The Secretary-General’s note of transmittal stated:20

"...The Secretary-General has now received credentials for Mr. Omar Loutfi as Permanent Representative of the United Arab Republic to the United Nations, signed by the Minister for Foreign Affairs of the Republic. In accepting this letter of credentials the Secretary-General has noted that this is an action within the limits of his authority, undertaken without prejudice to and pending such action as other organs of the United Nations may take on the basis of notification of the constitution of the United Arab Republic and the Note of 1 March 1958."

20. The Trusteeship Council was then in session. The President of the Council, at the end of a meeting on the morning of 7 March 1958,21 read out the note from the Secretary-General, and stated that the Secretariat would make the necessary administrative arrangements for the next meeting of the Council. At the beginning of the following meeting,22 a number of representatives welcomed the representative of the United Arab Republic to the Council; a few reserved their position, but there was no objection to the seating of the United Arab Republic. Thereafter the representatives of the Republic without objection took their seats in all the organs of the United Nations of which Egypt or Syria, or both, had been members.

21. The First United Nations Conference on the Law of the Sea was also in session, and the note verbale of the Secretary-General, with the two annexed notes from the United Arab Republic, was circulated as a Conference document.23 At a plenary meeting on 18 March 1958,24 the President of the Conference, after referring to the notes, welcomed the leader of the delegation of the United Arab Republic, who was subsequently welcomed also by a number of delegations.

IV. Resumption of independence by Syria, 1961

22. A revolution broke out on 28 September 1961 in the Syrian Region of the United Arab Republic, and soon established control of the whole territory of the Region. By a cable dated 30 September 1961,25 the new President of the Council of Ministers and Minister for Foreign Affairs of the Syrian Arab Republic informed the President of the General Assembly that he had taken office at noon on the previous day. On 5 October 1961 the President of the United Arab Republic announced on the radio that his Government would not oppose the readmission of Syria to the United Nations. On 8 October 1961, the Prime Minister of Syria again cabled the President of the General Assembly as follows:26

"I have the honour to refer to my cable dated 30 September 1961 in which I informed you I had been named President of the Council of Ministers and Minister of Foreign Affairs of the Syrian Arab Republic and assured you of the firm adherence of my Government to the principles of the United Nations and of my Government's desire to exercise its international relations on the basis of justice and peace. It may be recalled that the Syrian Republic was an original Member of the United Nations under Article 3 of the Charter and continued its membership in the form of joint association with Egypt under the name of United Arab Republic. In resuming her formal status as an independent State the Govern-

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19 S/3976, annex II; ibid., p. 32.
20 See, for example, S/3976, loc. cit.
21 879th meeting, para. 52.
22 880th meeting.
25 A/4913—S/4957.
26 A/4914—S/4957.
ment of the Syrian Arab Republic has the honour to request that the United Nations take note of the resumed membership in the United Nations of the Syrian Arab Republic. By separate communication I am submitting the credentials of the Delegation of Syria to the sixteenth session of the General Assembly, I also have the honour to request that the contents of this cable be communicated to the following:

“(1) All Members of the United Nations;

“(2) Principal and subsidiary organs of the United Nations.”

23. The two cables were published on 9 October 1961 as documents of the General Assembly and the Security Council. At a meeting of the General Assembly on the morning of 13 October 1961,27 the President of the Assembly drew attention to the communications from Syria, and stated:

“I have consulted many delegations on this question and the consensus seems to be that, in view of the special circumstances of this matter, Syria, an original Member of the United Nations, may be authorized to be represented in the General Assembly as it has specifically requested. The numerous consultations that I have held lead me to believe that there is no objection to such a course on the part of any delegation. Therefore, if no objection is raised before the beginning of this afternoon’s plenary meeting, I shall request the Secretariat to take the necessary measures so that the delegation of the Syrian Arab Republic may take its seat in the General Assembly as a Member of the United Nations.”

24. At the following meeting on the afternoon of the same day,28 the President of the General Assembly announced that:

“...following the declaration that I made this morning at the beginning of the meeting, I have received no objection on the part of any delegation or of any Member State of our Organization. Accordingly, the necessary measures have been taken, and the delegation of the Syrian Arab Republic has taken its seat in the Assembly as a Member of our Organization, with all the obligations and rights that go with that status.”

25. Thereafter Syria became a member of all organs composed of all Members of the Organization. The United Arab Republic retained all its memberships in organs. Syria again participated in the Advisory Commission of the United Nations Relief and Works Agency for Palestine Refugees in the Near East, of which Syria had become a member before the United Arab Republic was formed in 1958.

V. THE ADMISSION OF MALI AND SENEGAL TO MEMBERSHIP, 1960

26. There is a fourth case which, while not relating to succession to an already existing membership in the United Nations, should nevertheless be mentioned in this memorandum. That is the case in which the Federation of Mali, after having been recommended by the Security Council for membership, divided into the two separate Republics of Mali and Senegal. The Security Council thereafter made new recommendations for the admission of Mali and Senegal, and the earlier recommendation respecting the Federation of Mali was treated as without effect. The details are given below.

27. By a telegram dated 23 June 1960,29 the Government of the Federation of Mali informed the Secretary-General that the Federation, having acceded to full independence on 20 June 1960, had decided to apply for membership in the United Nations. The Security Council, at its 859th meeting on 28 June 1960, adopted a resolution30 recommending to the General Assembly that the Federation be admitted to membership.

28. On 20 August 1960 the Government of Senegal cabled the Secretary-General31 that on the same day the Legislative Assembly of Senegal had adopted an Act declaring the withdrawal of Senegal from the Federation and proclaiming the independence of the Republic; in the same telegram the new Republic requested admission to the United Nations. The request for admission was renewed in telegrams of 23 August and 22 September 1960.32

29. On 20 September 1960 the General Assembly admitted a number of States to membership, but postponed the consideration of the Security Council’s recommendation concerning the Federation of Mali.33

30. By a letter and a telegram, both dated 22 September 1960,34 the Secretary-General was informed that the Sudanese Republic, which had been a part of the Federation of Mali, had adopted the name Republic of Mali and had proclaimed its independence; the new Republic requested admission to the United Nations.

31. The Security Council, at its 907th meeting on 28 September 1960, considered the separate applications by the two new Republics. After a discussion in which two representatives expressed the view that the division of the federation into two States had “nullified” the Council’s resolution of 28 June 1960,35 the Security Council adopted two resolutions36 recommending the admission of Senegal and Mali, respectively. On the same day, 28 September, the General Assembly adopted resolutions 1490 (XV) and 1491 (XV), admitting Senegal and Mali to membership in the United Nations.

27 S/4347; Security Council, Official Records, Fifteenth Year, Supplement for April, May and June 1960, p. 34.
28 S/4357; ibid., p. 37.
29 S/4470, annex 1; Security Council, Official Records, Fifteenth Year, Supplement for July, August and September 1960, pp. 120-121.
31 864th plenary meeting, paras. 55 and 56.
33 907th meeting, paras. 32 and 88.
Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary: memorandum prepared by the Secretariat

[Original: English/French]
[10 December 1962]

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Introduction

1. During the fourteenth session of the International Law Commission the Secretary of the Commission stated that the Secretariat would undertake the preparation of a memorandum on the problem of succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary, and this statement was noted in the Commission's report. This memorandum has been prepared in consequence.

2. The object of this survey is to give a complete account of the practice, both of States and of the Secretary-General, concerning State succession in relation to all of the general multilateral treaties of which the Secretary-General is the depositary. This includes both treaties concluded under the auspices of the United Nations and also treaties concluded under the auspices of the League of Nations, for which the Secretary-General took over the depositary functions in accordance with General Assembly resolution 24 (I) of 12 February 1946.

3. In the course of the performance of the functions of registration and publication of treaties under Article 102 of the Charter, the United Nations Secretariat has also been notified by certain other depositaries (the International Labour Organisation, Poland, Switzerland etc.) of cases of succession to treaty obligations; many of these cases are given brief mention herein. Sufficient time has not, however, been available to make a complete study of the practice under other treaties than those for which the Secretary-General is the depositary; such a study would require the making of inquiries of numerous other depositaries.

4. A brief account of the practice concerning succession under United Nations and League of Nations treaties was given in the "Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements", published in August 1959. Since that date, over two dozen new States have come into existence, and the practice has correspondingly increased in volume. This memorandum covers the depositary practice of the Secretary-General up to 1 December 1962.

5. The following part of this memorandum, chapter I, surveys the practice with respect to treaties concluded under the auspices of the League of Nations. Chapter II surveys the practice with respect to treaties concluded under the auspices of the United Nations. In chapter II the various cases of possible succession are examined in chronological order, except that, for purposes of convenient reference, the group of States which became independent in 1960 and were admitted...
to membership in the United Nations in the same year is treated in alphabetical order.

6. Chapter III consists of a general summary of the cases of the practice previously described on a State by State basis, and particular attention is given to points of practical importance which remain unsettled or on which there is a divergence of views.

7. The annex to this memorandum contains a collection of provisions on succession to treaties. Most of these provisions are from agreements between new States and their predecessors, but some are from the national laws of the new States.

8. For convenience, United Nations treaties are referred to in the memorandum by short titles. The appendix shows for each short title the full title and the citation of the treaty in question.

Chapter I. Succession to rights and obligations under treaties concluded under the auspices of the League of Nations

9. There have been certain differences of practice depending upon whether the League of Nations treaties were or were not amended by protocols concluded under the auspices of the United Nations. The two classes of League treaties will therefore be examined separately.

A. League of Nations treaties amended by United Nations Protocols

i. Treaties amended by the 1946 Protocol on Narcotics


Article V of the Protocol provides:

"The present Protocol shall be open for signature or acceptance by any of the States Parties to the Agreements, Conventions and Protocols on Narcotic Drugs of 23 January 1912, 11 February 1925, 19 February 1925, 13 July 1931, 27 November 1931 and 26 June 1936, to which the Secretary-General of the United Nations has communicated a copy of the present Protocol."

Article VII, paragraph 2 of the Protocol provides:

"The amendments set forth in the annex to the present Protocol shall come into force in respect of each Agreement, Convention and Protocol when a majority of the Parties thereto have become Parties to the present Protocol."

11. It was accordingly necessary for the Secretary-General to ascertain what States were parties to the treaties being amended, both in order to determine the States to which copies of the 1946 Protocol on Narcotics should be sent, and to determine when the amendments of the various treaties would enter into force. Certain of the original Members of the United Nations—in particular, Iraq, Lebanon, Syria and the Philippines—have only recently attained full independence and have not separately been parties to the treaties, but one or more of the treaties had been extended to them by the Powers formerly responsible for their international relations. Jordan was in the same position, except that it was not then a Member of the United Nations. The Secretary-General satisfied himself that all five of the new States in question considered themselves bound by the treaties which had formerly been made applicable to their territories, and accordingly treated them as parties to those treaties by sending copies of the Protocol to them. Iraq, Lebanon, Syria and the Philippines all became parties to the Protocol; Jordan did not do so, but acceded to certain of the League treaties as amended. Indonesia also chose not to rely on succession, but acceded to certain of the treaties as amended.

12. A question later arose, which was not settled by the text of the Protocol, whether certain countries were bound by the International Opium Convention of 23 January 1912. Lebanon, Syria and the Philippines deposited declarations with the Secretary-General, received on 24 May 1954, 20 January 1954 and 30 September 1959, respectively, recognizing that they were bound by the 1912 Convention. Other States which have recognized themselves as bound through succession by the 1912 Convention are Ceylon, Cambodia, Laos, Viet-Nam and the Federation of Malaya.

ii. Treaties amended by other United Nations Protocols

13. A number of new States have recognized that they continued to be bound by the old treaties as amended by the Protocol, by virtue of succession to States which were parties to the treaties and later became parties to the Protocol. As this situation does not represent direct succession to the League treaties, it is discussed in chapter III of this memorandum.

14. The same procedure was followed with respect to the later United Nations protocols amending League conventions. All those protocols have final clauses like those of the Protocol on Narcotics, opening the protocols for signature or acceptance only to parties to the old treaties, and providing for the entry into force of the amendments when a majority (or a specified number) of those States have become parties to the protocols. In each case the Secretary-General ascertained whether the old treaties had been made applicable in the territories of the new States, and whether those States considered themselves bound; if so, he sent copies of the protocols to those States. On the whole, fewer States were involved than in the case of the Narcotics Protocol of 1946. Of the States to whom copies of the protocols were sent, some became parties to them, while others have not yet done so. The following States, by virtue of succession to other States parties to the League conventions, have become parties to United Nations amending protocols:


- Burma
- Lebanon
Pakistan\(^5\)
Sierra Leone
Syria

(b) Protocol signed at Lake Success, New York, on 12 November 1947, to amend the Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications, concluded at Geneva on 12 September 1923:

Burma
Pakistan

(c) Protocol signed at Paris on 9 December 1948, amending the International Convention relating to Economic Statistics, signed at Geneva on 14 December 1928:

Burma
Pakistan

(d) Protocol signed at Lake Success, New York, on 4 May 1949, amending the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on 4 May 1910:

Ceylon
India (which had not separately become a party to the old treaty)
Iraq
Pakistan

(e) Protocol signed at Lake Success, New York, on 4 May 1949, amending the International Agreement for the Suppression of the White Slave Traffic, signed at Paris on 18 May 1904 and the International Convention for the Suppression of the White Slave Traffic, signed at Paris on 4 May 1910:

Ceylon
India (which had not separately become a party to the old treaties)
Iraq
Pakistan

(f) Protocol signed on 7 December 1953, amending the Slavery Convention signed at Geneva on 25 September 1926:

Burma
Guinea
Morocco

B. League of Nations Treaties Not Amended by United Nations Protocols

15. No systematic attempt has yet been made by the Secretary-General to ascertain what States are parties by succession to League of Nations treaties other than those which have been amended by United Nations Protocols. Nevertheless the matter has come up with regard to various particular treaties.

16. Certain new States have of their own accord informed the Secretary-General that they consider that they continue to be bound by various League treaties. Thus Pakistan, by a letter from the Permanent Mission to the United Nations received on 29 July 1953, informed the Secretary-General that by reason of article 4 of the Schedule to the Indian Independence (International Arrangements) Order, 1947, the rights and obligations under the following agreements devolved upon Pakistan, and that Pakistan “therefore considers itself a party to these agreements”:

i. Convention on Certain Questions relating to the Conflict of Nationality Laws, signed at The Hague, 12 April 1930;\(^7\)

ii. Protocol relating to a Certain Case of Statelessness, signed at The Hague, 12 April 1930;\(^7\)

iii. Special Protocol concerning Statelessness, signed at The Hague, 12 April 1930;\(^7\)

17. It may be noted that the third of these agreements, the Special Protocol concerning Statelessness, though ratified by India in 1932, has not yet entered into force. The Secretary-General by a circular note\(^10\) informed Governments of the receipt of the communication from Pakistan.

18. Pakistan has also sent communications to the Secretary-General recognizing that it continues to be bound by the Convention relating to the Simplification of Customs Formalities, signed at Geneva on 3 November 1923.\(^11\) These communications, the first of which was received on 27 January 1951,\(^12\) relate to the designation of organizations for the purpose of delivering certificates of origin under paragraph 2 of article 11 of the Convention. The Secretary-General by circular notes has informed Governments of the receipt of each communication.

19. Laos on 24 November 1956 deposited with the Secretary-General a declaration stating that, as it had succeeded to the rights and obligations arising out of the application by France in the territory of Laos of the Convention and Statute on Freedom of Transit, signed at Bangkok on 24 November 1956, it recognized that it continues to be bound by the Convention and Statute and undertook to apply them in its own name. The Secretary-General sent a circular note to Governments about the deposit of the declaration.\(^14\)

20. In certain other cases, States parties to League treaties have requested the Secretary-General, in his capacity as depository, to ascertain whether certain new States consider themselves bound through succession by the obligations of those treaties. In all cases the Secretary-General has made an inquiry of the new State, and has transmitted the reply, if any, to the State which requested the information, but he has not informed other Governments. The States listed under each of the following treaties have, by notes verbales addressed to the Secretary-General, informed him that they consider themselves bound by those treaties:

i. Convention signed at Geneva on 19 March 1931 for the Settlement of Certain Conflicts of Laws in connexion with Cheques, and Protocol\(^15\)

Indonesia

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\(^5\) In signing the Protocol the representative of Pakistan made the following declaration: “The representative of Pakistan wishes to indicate that in accordance with paragraph 4 of the Schedule to the Indian Independence Order, 1947, Pakistan considers itself a Party to the International Convention for the Suppression of the Traffic in Women and Children concluded at Geneva on 30 September 1921 by the fact that India became a Party to the above-mentioned International Convention before the 15th day of August 1947.”

\(^6\) See annex, No. 2.

\(^7\) League of Nations Treaty Series, vol. CLXXIX, p. 89.

\(^8\) Ibid., vol. CC, p. 540.

\(^9\) League of Nations document C.27.M.161931.V.

\(^10\) CN.84.1953.TREATIES, 24 August 1953.


\(^12\) CN.36.1937.TREATIES, 20 April 1951.


\(^14\) CN.117.1956.TREATIES.


*Federation of Malaya*

iii. Convention signed at Geneva on 19 March 1931 on the Stamp Laws in connexion with Cheques:

*Federation of Malaya*

Indonesia

iv. Convention signed at Geneva on 19 March 1931 providing a Uniform Law for Cheques with Annexes and Protocol:

Indonesia.

21. On the other hand, certain Governments, in response to such inquiries, have informed the Secretary-General that they do not consider themselves bound by the treaties in question. Thus Indonesia, in a note verbale of 16 September 1959, stated, in regard to the continued to be bound by treaties applied to their territories by their predecessors. The practice will be referring to the treaties concluded under the auspices of the League of Nations.

23. At the beginning of the existence of the United Nations the problem of succession arose only with respect to treaties concluded under the auspices of the League of Nations. As time went on, however, an increasing number of United Nations treaties were concluded, and were applied or extended to dependent territories which then became independent States. The United Nations gradually developed a practice for ascertaining whether the new States considered that they continued to be bound by treaties applied to their territories by their predecessors. This practice will be considered in this section separately for each State which came into being, in chronological order of the date of independence; however, the seventeen States which attained independence in 1960 and were admitted to the United Nations in September and October of that year are treated in alphabetical order so as to facilitate reference. Short titles have been used in referring to the treaties concluded under the auspices of the United Nations. The full titles and citations of all those treaties are given in the appendix.

24. Jordan, which attained independence on 22 March 1946, was the first new State to come into being after the birth of the United Nations. The agreement between Jordan and the United Kingdom on succession to treaty rights and obligations is reproduced in the annex, No. 1. For the Secretary-General the only problem of succession in respect of Jordan related to treaties concluded under the auspices of the League of Nations. The position of Jordan in regard to those treaties has been examined in the preceding section of this memorandum.

25. *India* and *Pakistan* attained independence on 15 August 1947. India was an original Member of the United Nations, and continued to be a Member after independence and the separation of Pakistan; Pakistan was admitted to membership on 30 September 1947. India and Pakistan reached an agreement on devolution of international rights and obligations which was promulgated by the Governor-General in the Indian Independence (International Arrangements) Order, 1947 (see annex, No. 2).

26. India before its independence had, as a Member of the League of Nations and the United Nations, become a separate party to numerous treaties of the League and to the 1946 Protocol of the United Nations amending the narcotics treaties, and continued to be regarded as a party after independence. Pakistan's succession to India as a party to the League treaties has been examined in the preceding section.

27. *Burma* became independent on 4 January 1948, and was admitted to the United Nations on 19 April 1948. The agreement between Burma and the United Kingdom on succession to international rights and obligations is reproduced in the annex, No. 3. Burma's succession to League treaties has been discussed above. There were relatively few United Nations treaties to which Burma could have succeeded, and apparently no inquiry was made on the point. One of those treaties was the 1946 Convention on the Privileges and Immunities of the United Nations, to which Burma became a party by accession in 1955.

28. *Ceylon* became independent on 4 January 1948, and was admitted to the United Nations on 19 April 1948. The agreement between Ceylon and the United Kingdom on succession to international rights and obligations is reproduced in the annex, No. 4.

29. Ceylon's succession to the obligations of League treaties has been discussed above. By a note verbale dated 27 November 1957, received on 4 December 1957, the Foreign Minister of Ceylon notified the Secretary-General that his country was applying in its own name the 1925 Opium Convention and the 1931 Convention on Narcotic Drugs, both as amended by the 1946 Protocol.

30. *Israel* declared itself independent on 15 May 1948, and was admitted to the United Nations on 11 May 1949. It has not recognized that it continues to be bound through succession by any treaty of which the Secretary-General is the depositary. The position of Israel has been explained in a reply to a questionnaire of the International Law Commission (A/CN.4/19; Yearbook of the Commission, 1950, vol. II, pp. 206-218).

31. *Indonesia*'s independence was provided for in an agreement with the Netherlands which came into force on 27 December 1949, and which contained provisions on the devolution of treaty obligations (reproduced in the annex, No. 5). Indonesia was admitted to the United Nations on 28 September 1950.

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16 Ibid., vol. 143, p. 337.
17 Ibid., vol. 143, p. 7.
18 Ibid., vol. 143, p. 355.
32. Indonesia, after being admitted as a contracting party to the General Agreement on Tariffs and Trade on 27 February 1950 by a decision of the other contracting parties, addressed to the Secretary-General a declaration acknowledging “that the rights and obligations of the Kingdom of the Netherlands arising out of the signature or acceptance of the following Protocols to the General Agreement... are to be considered as rights and obligations of the Republic of Indonesia inasmuch as such Protocols are applicable to the jurisdiction of the Republic of Indonesia”.

In addition, Indonesia recognized that it was bound by a notification made by the Netherlands under one of the GATT Protocols.

33. Indonesia notified the Secretary-General on 8 March 1950 that it considered itself bound by the 1931 Convention on Narcotic Drugs. On 3 April 1958, however, Indonesia deposited with the Secretary-General an instrument of accession to the 1931 Convention as amended by the 1946 Protocol, instead of simply becoming party to the 1931 Convention.

34. Laos, Cambodia and Viet-Nam were granted independence within the French Union on various dates in 1949; Laos and Cambodia were admitted to membership in the United Nations on 14 December 1955.

35. A joint notification of 7 October 1950 from France and Laos informed the Secretary-General of the transfer by the French Government to the Government of Laos of the duties and obligations arising from the following agreements:

   i. 1925 Agreement on Opium, as amended by the 1946 Protocol;
   ii. 1925 Opium Convention, as amended by the 1946 Protocol;
   iii. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
   iv. 1948 Protocol on Drugs.

In the cases of Cambodia and Viet-Nam, similar notifications were made on 11 August 1950 and 3 October 1951, respectively, in regard to the same treaties, except that Cambodia’s notification did not mention the 1948 Protocol on Drugs.

36. The Sudan became independent on 1 January 1956 and was admitted to the United Nations on 12 November 1956. No agreement with the former Condomini (Egypt and the United Kingdom) on the devolution of treaty obligations has been registered with the Secretariat. By a letter dated 5 September 1957, received on 10 September 1957, the Permanent Representative of the Sudan stated that he had been instructed to inform the Secretary-General that his country “declares herself bound by the accession made on her behalf in 1927 by the Condomini to the Slavery Convention of 25 September 1926”, and also to that Convention as amended by the 1953 Protocol.

37. Tunisia became independent on 20 March 1956, and was admitted to the United Nations on 12 November 1956. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat. By a letter dated 7 December 1956, the Secretary inquired whether Tunisia considered itself bound by the following treaties whose application had been extended to that country:

   i. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;
   ii. 1910 Convention on the White Slave Traffic, as amended by the 1949 Protocol;
   iii. 1925 Opium Convention, as amended by the 1946 Protocol;
   iv. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
   v. 1948 Protocol on Drugs.

No reply was received to this inquiry. By a communication received on 24 October 1957, Tunisia recognized that it continues to be bound by the 1951 conventions of the International Labour Organisation; these declarations have been registered with the United Nations Secretariat by the Director-General of the International Labour Office.

38. Morocco regained its independence through the termination of the protectorates and of the special status of Tangier on various dates between March and October 1956. It concluded with France an agreement on 26 May 1956 whose provisions relating to treaty obligations are reproduced in the annex, No. 6. Morocco was admitted to the United Nations on 12 November 1956.

39. By letters of 29 May, 30 August and 14 September 1956 Morocco inquired of the Secretary-General about the method of becoming party, in accordance with the procedure in effect, to various treaties including the 1949 Convention on Road Traffic and the 1951 Convention on the Status of Refugees, both of which had been made applicable in Morocco by France. By a letter of 25 October 1956 the Secretariat replied:

   (Translation) “... The Secretary-General, in the exercise of his depositary functions under the relevant conventions, has always considered it desirable that the status of States succeeding to the rights and obligations arising out of conventions should be clearly defined in relation to the other participating States. That is the reason for the practice, based on the relevant general principles of international law, by which a State assuming the conduct of its own foreign relations is requested to indicate to the Secretary-General by a formal notification those international conventions and agreements concluded in its name by which it acknowledges itself to be bound...”.

Accordingly Morocco, by a declaration dated 3 November 1956 and received on 7 November 1956, signed by the Minister for Foreign Affairs, recognized that it continued to be bound by the following treaties:

   i. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;
   ii. 1910 Convention on the White Slave Traffic, as amended by the 1949 Protocol;
   iii. 1925 Opium Convention, as amended by the 1949 Protocol;
   iv. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
   v. 1948 Protocol on Drugs;
   vi. 1949 Convention on Road Traffic;

Morocco has also made declarations, which have been registered with the Secretariat, recognizing that it con-
continues to be bound by at least four conventions of the International Labour Organisation.

40. Ghana became independent on 6 March 1957, and was admitted to the United Nations on 8 March 1957. It had with the United Kingdom on 25 November 1957 an exchange of notes relating to succession to treaty obligations (reproduced in part in the annex, No. 7). By a letter dated 18 March 1958 the Secretary-General referred to the exchange of notes, and to the fact that the United Kingdom had extended the application of the following treaties to the Gold Coast:

i. 1912 Opium Convention, as amended by the Protocol of 1946;
ii. 1925 Opium Convention, as amended by the Protocol of 1946;
iii. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
iv. 1948 Protocol on Drugs;
v. 1921 Convention on Traffic in Women and Children;
vi. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;
vii. 1910 Convention on the White Slave Traffic, as amended by the 1949 Protocol;
viii. 1923 Convention on Obscene Publications, as amended by the 1947 Protocol;
ix. 1910 Agreement on Obscene Publications, as amended by the 1949 Protocol;
x. 1952 Convention on Importation of Commercial Samples;
xii. 1950 Agreement on the Importation of Educational, Scientific and Cultural Materials.

The letter stated that it was the understanding of the Secretariat that, pursuant to its agreement with the United Kingdom, the Government of Ghana considered itself bound by those treaties, and requested confirmation.

41 By a letter dated 29 March 1958, received on 7 April 1958, the Permanent Secretary of the Ministry for Foreign Affairs confirmed that Ghana considered itself bound by all of the foregoing treaties.

42. Ghana acceded to the Convention on the Privileges and Immunities of the United Nations on 5 August 1958, and to the Convention on the Privileges and Immunities of the Specialized Agencies on 9 September 1958. No inquiry had been made as to whether Ghana considered itself bound through succession by those conventions.

43. The Federation of Malaya became independent on 31 August 1957, and was admitted to the United Nations on 17 September 1957. By a letter dated 20 September 1957, the Secretariat, referring to article 169 of the Constitution of the Federation, stated that as the United Kingdom had acceded to the Convention on the Privileges and Immunities of the United Nations, it was the Secretariat’s understanding that the Federation considered itself bound by the Convention; confirmation of this understanding was requested. By a letter dated 16 October 1957, the Permanent Secretary of the Ministry of External Affairs replied that

"... Whilst the Federation considers itself bound by the Convention to which the United Kingdom acceded in 1946 on behalf of the territory of the Federation, this is not by reason of Article 169 of the Constitution...

"The privileges and immunities of the United Nations in the independent Federation of Malaya depend for their legal force upon the Diplomatic Privileges (United Nations and International Court of Justice) Order, 1949... The Order formed part of the existing law of the Federation in operation immediately before independence and was continued in force after independence by Article 162 of the Constitution."

44. By letters dated 9 December 1957, the Secretariat, referring to an exchange of notes between the Federation and the United Kingdom which had been registered with the Secretariat on 25 October 1957, stated that it was the Secretariat’s understanding that the Federation considered itself bound by certain treaties extended to its territory, and requested confirmation. The treaties listed in the letters were the following:

i. 1925 Opium Convention, as amended by the 1946 Protocol;
ii. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
iii. 1948 Protocol on Drugs;
iv. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;
v. 1910 Convention on the White Slave Traffic, as amended by the 1949 Protocol;
vi. 1910 Agreement on Obscene Publications, as amended by the 1949 Protocol;
vii. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;
viii. 1910 Agreement on Obscene Publications, as amended by the 1949 Protocol;
ix. 1921 Convention on the Traffic in Women and Children, as amended by the 1947 Protocol;

45. By a letter dated 29 April 1958, received on 7 May 1958 from the Foreign Ministry, the Federation declared itself bound by the treaties numbered xii, xiii and xiv in the foregoing list. By a further letter dated 14 August 1958 received on 21 August 1958, the Permanent Secretary of the Ministry of External Affairs stated that the Federation considered itself bound by the treaties numbered i, ii, iii, vi, vii, viii, and xi, in the foregoing list. By a third letter dated 29 June 1959, the Permanent Representative of the Federation stated that his country considered itself bound by the treaties numbered ix and x in the list. The letter also explained that the treaties numbered iv, v and vi had never been extended to Malaya by the United Kingdom, and thus the Federation did not consider itself bound by them.

20 Reproduced in annex, No. 8.
46. In 1961 one of the specialized agencies, noting that the Federation had recognized that it continued to be bound by the 1946 Convention on the Privileges and Immunities of the United Nations, requested the Secretary-General to inquire whether Malaya also considered itself bound by the 1947 Convention on the Privileges and Immunities of the Specialized Agencies. Accordingly the Secretary-General wrote to the Federation on 28 November 1961, referring to the previous actions of Malaya with respect to succession to treaties, and also to the fact that a Diplomatic Privileges (Specialized Agencies) Order 1949 was in effect at the time of independence, and stating his understanding that the Federation likewise considered itself bound by the Specialized Agencies Convention. The Foreign Ministry replied by a letter dated 23 March 1962, received on 29 March 1962, confirming this understanding.

47. Thus the Federation of Malaya recognized that it continue to be bound by all the treaties applicable in its territory about which the Secretary-General inquired.

48. The United Arab Republic was formed by the union of Egypt and Syria as the result of a plebiscite held on 21 February 1958. By a note dated 1 March 195821 the Foreign Minister of the Republic informed the Secretary-General that

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

Accordingly, for the duration of the union, the Secretary-General, in his publication on the Status of Multilateral Conventions22 listed the United Arab Republic as a party to all the treaties to which Egypt or Syria had been parties before the Union was formed; under the name of the Republic it was indicated whether Egypt or Syria or both had taken action in respect of the treaty in question.

49. Guinea became independent on 2 October 1958, and was admitted to the United Nations on 12 December 1958. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

50. The Secretary-General, by a letter dated 18 February 1959, inquired whether Guinea considered itself bound by the following treaties, which had been applied to its territory before independence:

i. 1946 Convention on the Privileges and Immunities of the United Nations;
ii. 1951 Convention on Refugees;
iii. 1912 Opium Convention;
iv. 1925 Opium Convention, as amended by the 1946 Protocol;
v. 1948 Protocol on Drugs;
vi. 1953 Opium Protocol;
vii. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;

51. As no reply was received, a new letter was sent on 5 December 1961 regarding the same list of treaties, and in addition the 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol, and the 1933 Convention on the Traffic in Women. In this letter it was explained that the Opium Protocol of 1953 was not yet in force, though it had been ratified by France; if, however, Guinea considered itself bound by the ratification, it would be included in the list of parties as soon as the Protocol entered into force.

52. By a letter dated 21 March 1962, received on 30 March 1962, the Minister for Foreign Affairs of Guinea informed the Secretary-General that his country considered itself bound by the Convention of 1926 on Slavery. By a further letter of 14 April 1962, received on 26 April 1962, the Minister for Foreign Affairs notified the Secretary-General that Guinea considered itself bound by the Opium Convention of 1925, as amended by the Protocol of 1946.

53. Guinea has not yet replied concerning the other nine treaties about which inquiry was made.

54. Cameroon became independent on 1 January 1960, and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

55. By a letter dated 21 April 1960, the Prime Minister of Cameroon inquired from the President of the Permanent Central Opium Board as to the method by which his country could become party to the treaties on narcotics. The letter was transmitted to the Secretary-General as depositary of the treaties. The Secretary-General replied by a letter dated 21 March 1961, stating in part:

(Translation) "...It should be noted that the practice generally followed by the new States with regard to the rights and obligations arising out of international agreements made applicable to their territory before they attained independence is to acknowledge themselves to be bound by these agreements through a formal notification addressed to the Secretary-General. This procedure has the advantage of preserving continuity in the application of these agreements, to which the new State becomes a party in its own name as of the date of independence..."

The letter then gave the following list of treaties to which that procedure was applicable:

i. 1946 Convention on the Privileges and Immunities of the United Nations;
ii. 1951 Convention on Refugees;
iii. 1912 Opium Convention;
iv. 1925 Opium Convention, as amended by the 1946 Protocol;
v. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
vi. 1948 Protocol on Drugs;
vii. 1933 Convention on the Traffic in Women;

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viii. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;
ix. 1910 Convention on the White Slave Traffic, as amended by the 1949 Protocol;
x. 1949 Convention on Road Traffic;
xii. 1926 Convention on Slavery;
xi. 1953 Convention on the Political Rights of Women (which France had ratified with a declaration).

It was also explained that France had ratified the Opium Protocol of 1953, but that the Protocol was not yet in force.

56. By a series of letters dated between 16 October 1961 and 1 March 1962, the Minister for Foreign Affairs of Cameroon notified the Secretary-General that Cameroon recognized that it continues to be bound by all the treaties in the foregoing list except for the 1949 Convention on Road Traffic and the 1953 Convention on the Political Rights of Women, about which it has not yet expressed its position. Cameroon also notified the Secretary-General that it considered itself bound by the 1953 Opium Protocol.

57. By a declaration of 7 June 1960, transmitted to the Director-General of the International Labour Office and registered by him with the United Nations Secretariat, Cameroon recognized that it continued to be bound by eleven conventions of the International Labour Organisation.

58. As the result of a plebiscite held in February 1961, the Southern Cameroons, which had formed part of the Trust Territory of the Cameroons under the administration of the United Kingdom, became part of the Federal Republic of Cameroon on 1 October 1961.

59. On 28 August 1962, the Federal Republic of Cameroon declared to the Director-General of the International Labour Office that it was bound, in respect of the Federated State of Eastern Cameroon (the former Trust Territory under French administration), by the eleven conventions of the International Labour Organisation which were the subject of its declaration of 7 June 1960; it also declared that it was bound, in respect of the Federated State of Western Cameroon (formerly under United Kingdom administration), by fourteen conventions of the International Labour Organisation. Only two of these conventions are in force in both Eastern and Western Cameroon, that is, throughout the territory of the Federal Republic.

60. The Central African Republic became independent on 13 August 1960, and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

61. By letters of 20 March and 14 December 1961 the Secretary-General inquired whether Chad considered itself bound by the same treaties as are referred to above in the case of Cameroon and the Central African Republic (see the list in para. 55 above). No reply has yet been received. Chad, however, on 10 November 1960 recognized that it continues to be bound by eleven conventions of the International Labour Organisation, and these actions have been registered with the United Nations Secretariat.

62. The Central African Republic also notified the Secretary-General that it considered itself bound by certain treaties which had never been extended by France to its territory. These notifications, by agreement with the Government were treated as accessions.

63. By a note verbale of 25 October 1962, the Minister for Foreign Affairs of the Central African Republic made the following statement in reply to the Secretary-General's request for materials relating to succession of States:

(Translation) “In regard to international relations, treaties concluded by the former colonizing Power in the name of its overseas territories can be considered to remain in force only in respect of those clauses which are not incompatible with the independence of the new sovereign States. Accordingly the Central African Republic reserves the right to denounce treaties which do not appear to it to recognize its newly-acquired sovereignty. This position is supported by that of international organizations which require a State that has become independent to re-accede to the conventions governing them.”

64. Chad became independent on 11 August 1960, and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

65. By letters of 20 March and 14 December 1961 the Secretary-General inquired whether Chad considered itself bound by the same treaties as are referred to above in the case of Cameroon and the Central African Republic (see the list in para. 55 above). No reply has yet been received. Chad, however, on 10 November 1960 recognized that it continues to be bound by eleven conventions of the International Labour Organisation, and these actions have been registered with the United Nations Secretariat.

66. The Republic of the Congo (Brazzaville) became independent on 15 August 1960, and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

67. By communications of 20 March and 1 November 1961, the Secretary-General inquired whether the Republic considered itself bound by the same treaties as were listed in the letters to Cameroon, the Central African Republic and Chad (see para. 55 above). On 15 May 1962 the Congo (Brazzaville) deposited with the Secretary-General an instrument of accession to the 1949 Convention on Road Traffic, which was included in the list in the Secretary-General's letters. Subsequently, however, by a note verbale dated 11 October 1962, the Ministry for Foreign Affairs declared:

(Translation) “In accordance with the usages of international law and because of the circumstances in which the Republic of the Congo attained international sovereignty, it considers itself a party to the treaties and conventions signed before its independence by the French Republic and extended to the latter to its former overseas territories, in so far as those treaties and conventions have not been
expressly denounced by the Republic of the Congo or tacitly rescinded by a text replacing them."

The Republic has also recognized that it continues to be bound by twelve conventions of the International Labour Organisation, by the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules relating to International Carriage by Air, and by The Hague Protocol of 28 September 1955 modifying that Convention.

68. The Republic of the Congo (Leopoldville) became independent on 30 June 1960, and was admitted to the United Nations on 20 September 1960. No agreement with Belgium on the devolution of treaty obligations has been registered with the Secretariat.

69. On 6 March 1961 the Secretary-General received a declaration signed by the President of the Republic on 18 February 1961, whereby the Congo declared itself the successor of the Belgian Congo with respect to the 1949 Convention on Road Traffic, and recognized that that Convention and its annexes continued to be in force in its territory.

70. By a letter of 12 December 1961 the Secretary-General requested the Congo (Leopoldville) to confirm that it considered itself bound by the following treaties, which according to United Nations archives were applicable in its territory:

i. 1946 Convention on the Privileges and Immunities of the United Nations;  
ii. 1948 Convention on Genocide;  
iii. 1912 Opium Convention;  
iv. 1925. Opium Convention, as amended by the 1946 Protocol;  
v. 1931 Narcotics Convention, as amended by the 1946 Protocol;  
vi. 1948 Protocol on Drugs;  
vii. 1953 Opium Protocol;  
viii. 1923 Convention on Obscene Publications, as amended by the 1947 Protocol;  
ix. 1910 Agreement on Obscene Publications, as amended by the 1949 Protocol;  
x. 1952 Convention on Importation of Commercial Samples;  
xii. 1954 Convention on Customs Facilities for Touring;  
xiii. 1954 Additional Protocol on Tourist Publicity Documents;  
xiv. 1950 Agreement on Importation of Educational, Scientific and Cultural Materials.

71. By a letter dated 29 December 1961, received on 16 January 1962, the Minister for Foreign Affairs replied that

(Translation) “...In general the Republic of the Congo considers itself the successor, as an independent and sovereign State of the Belgian Congo with regard to international conventions, which it acknowledges to remain in force in its territory.”

He added that his Ministry was studying the question whether each of the treaties in question had been ratified for or extended to the Belgian Congo.

72. By a note verbale dated 16 April 1962, received on 3 May 1962, the Ministry for Foreign Affairs informed the Secretary-General that the Congo Government considered itself bound by the 1950 Agreement on Importation of Educational, Scientific and Cultural Materials (No. xiv in the above list). By a letter of 23 May 1962 the Minister for Foreign Affairs informed the Secretary-General that his Government considered itself bound by the treaties numbered ii, iii, iv, v, vii, viii, ix and x in the above list.

73. By a letter of 16 July 1962, the Secretary-General sent to the Congo copies of the instruments by which Belgium had extended to its territory certain treaties on which the Republic had not yet indicated its position. The letter also stated:

(Translation) “Lastly, with regard to the Convention on the Privileges and Immunities of the United Nations, I have the honour to inform you that the Belgian Government deposited the instrument of accession to that Convention with the Secretary-General on 25 September 1948. In the absence of a territorial application clause, this Convention is considered to apply to territories represented internationally by the acceding States.”

74. In a reply dated 7 May 1962, received on 13 August 1962, the Minister for Foreign Affairs stated that his Government considered itself bound by the 1948 Protocol on Drugs. The letter also stated:

(Translation) “The Government of the Congo cannot consider itself bound by the Convention on the Privileges and Immunities of the United Nations... Although this Convention has been ratified by Belgium, there is no provision in the law of the Congo under which it could be applied to this country. In any event, it does not appear to have been applied to the Congo before the latter attained independence. It does not seem to contain any provision for its automatic entry into force in the dependent territories of acceding States...”

The letter informed the Secretary-General that research was continuing to ascertain whether the three remaining treaties about which the Republic had not yet indicated its position (i.e., those numbered xi, xii and xiii in the foregoing list) had ever been published by Belgium in the legislation of the Congo. The Republic has recognized that it continues to be bound by sixteen ILO Conventions and by the four Geneva Conventions of 1949 for the protection of war victims; its declarations to that effect have been registered with the Secretariat by the respective depositaries.

75. Cyprus became independent on 16 August 1960 and was admitted to the United Nations on 20 September 1960. The agreement between Cyprus and the United Kingdom on the devolution of treaty rights and obligations is reproduced in the annex, as No. 9.

76. By letters of 28 February and 6 December 1961 the Secretary-General, referring to the agreement on devolution, stated that it was his understanding that Cyprus considered itself bound by the treaties whose application had been extended to it by the United Kingdom, and requested confirmation of that understanding. The list of treaties given in the letters was as follows:

i. 1946 Convention on the Privileges and Immunities of the United Nations;  
ii. 1947 Convention on the Privileges and Immunities of the Specialized Agencies;
iii. 1951 Convention on Refugees;
iv. 1912 Opium Convention;
v. 1925 Opium Convention, as amended by the 1946 Protocol;
vii. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
vii. 1948 Protocol on Drugs;
viii. 1921 Convention on Traffic in Women and Children;
ix. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;
x. 1910 Convention on the White Slave Traffic, as amended by the 1949 Protocol;
xi. 1923 Convention on Obscene Publications, as amended by the 1947 Protocol;
pii. 1910 Agreement on Obscene Publications, as amended by the 1949 Protocol;
iii. 1952 Convention on Importation of Commercial Samples;
iv. 1954 Convention on Customs Facilities for Touring;
v. 1954 Additional Protocol on Importation of Tourist Publicity Documents;
vi. 1954 Customs Convention on Private Road Vehicles;
vii. 1956 Customs Convention on Commercial Road Vehicles;
viii. 1956 Customs Convention on Containers;
ix. 1956 Customs Convention on Aircraft and Pleasure Boats;
xx. 1949 Convention on Road Traffic;
xxi. 1950 Agreement on Importation of Educational, Scientific and Cultural Materials;
xxii. 1957 Convention on the nationality of Married Women;
xxiii. 1926 Slavery Convention, as amended by the 1953 Protocol;
xxiv. 1956 Supplementary Convention on Slavery;
xxv. 1958 Convention on the Territorial Sea and Contiguous Zone;*24
xxvi. 1958 Convention on the High Seas;*24
xxvii. 1958 Convention on Fishing.*24

77. By a letter dated 9 May 1962, received on 11 May 1962, the Permanent Mission of Cyprus, on instructions from its Government, informed the Secretary-General that Cyprus considered itself bound by the 1956 Supplementary Convention on Slavery (No. xxiv in the foregoing list), and by a letter dated 29 June 1962, received on 6 July 1962, that Cyprus considered itself bound by the 1949 Convention on Road Traffic (No. xx). The Ministry of Foreign Affairs is still studying the application to Cyprus of the other treaties in the list. In addition, declarations by which Cyprus recognized that it continues to be bound by eleven ILO Conventions have been registered with the Secretariat.

78. Dahomey became independent on 1 August 1960, and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

79. By a letter of 20 March 1961 the Secretary-General inquired whether the Republic considered itself bound by the same treaties as were listed in the letters to Cameroon, the Central African Republic, Chad and the Congo (Brazzaville) (see para. 55 above). By notes verbales dated 30 November 1961 and 14 February 1962, received on 5 December 1961 and 4 April 1962, Dahomey declared that it considered itself bound by nine of those treaties. Dahomey has not yet indicated its position in respect of the 1946 Convention on the Privileges and Immunities of the United Nations, the 1912 Opium Convention, the 1953 Convention on the Political Rights of Women and the 1953 Opium Protocol. Declarations by Dahomey recognizing that it continues to be bound by twelve ILO Conventions, the four Geneva Conventions of 1949 for the protection of war victims, the Warsaw Convention of 1929 on International Carriage by Air and The Hague Protocol of 1955 modifying that Convention have been registered with the Secretariat by the respective depositaries.

80. Gabon became independent on 17 August 1960, and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

81. By letters of 20 March and 14 December 1961 and 18 October 1962 the Secretary-General inquired whether Gabon considered itself bound by the same treaties as were listed in the letters to Cameroon, the Central African Republic, etc. No reply has yet been received. Gabon, however, on 14 October 1960 recognized that it continued to be bound by twelve conventions of the International Labour Organisation.

82. The Ivory Coast became independent on 7 August 1960, and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

83. By a letter dated 20 March 1961, the Secretary-General inquired whether the Ivory Coast considered itself bound by the same treaties as were listed in the letters to Cameroon, the Central African Republic, etc. (see para. 55 above). By letters of 10 May, 22 June and 7 December 1961 the President of the Republic, Minister for Foreign Affairs, informed the Secretary-General that his Government considered itself bound by all the treaties listed (including the 1953 Opium Protocol, which was not yet in force), with the exception of the 1953 Convention on the Political Rights of Women, which had never been applied by France to the Ivory Coast.

84. Poland, acting as depositary, has informed the Secretary-General that the Ivory Coast has recognized that it is bound by the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules relating to International Carriage by Air, by the Supplementary Protocol to the Convention, and by the Hague Protocol of 28 September 1955 modifying the Warsaw Convention. Declarations by the Ivory Coast, recognizing that it continues to be bound by thirteen ILO Conventions and by the four Geneva Conventions of 1949 for the protection of war victims, have also been registered by the Secretariat.

*24 At the date of independence this Convention had been ratified by the United Kingdom but was not yet in force.
85. Madagascar became independent on 3 August 1960, and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

86. By a letter of 20 March 1961 the Secretary-General inquired whether Madagascar considered itself bound by the same treaties as were listed in the letter to Cameroon, the Central African Republic, etc. By a note dated 27 May 1961, the Ministry for Foreign Affairs replied:

(Translation) "This, however, is a point of international law on which the highest legal authorities to whom it has been submitted have been unable to give a conclusive opinion. Consequently it seems hard to formulate any principle, and each particular case should be examined with care."

87. By a further letter dated 6 February 1962, the Foreign Ministry stated:

(Translation) "After examining the question, the Malagasy Government considers that it ought in principle to acknowledge itself bound by the Agreements and Conventions entered into in its name by France before the Malagasy Republic became independent.

"Although this principle has been accepted, it nevertheless seems essential that in the case of each Convention a formal notification should be sent to you by which the Malagasy Government would declare itself bound..."

88. Thus far, Madagascar, by notifications dated 15 May 1962 and 22 June 1962, signed by the Minister for Foreign Affairs, has declared that it considers itself bound by the 1946 Convention on the Privileges and Immunities of the United Nations, and by the 1949 Convention on Road Traffic. By a letter dated 23 May 1962 the Foreign Minister informed the Secretary-General:

(Translation) "The other Conventions of which the application has been extended to Madagascar and which you have kindly listed for me are at present being examined by the departments concerned. Notifications declaring that the Malagasy Government is bound by them will reach you from time to time, together with any reservations it may be found necessary to make in regard to them."

89. Poland, acting as depositary, has registered with the Secretariat a declaration by which Madagascar recognized that it continued to be bound by the 1946 Convention on the Privileges and Immunities of the United Nations, and by the 1949 Convention on Road Traffic, but has not yet replied about the other treaties. Poland has, however, declared itself bound through succession to France by thirteen Conventions of the International Labour Organisation.

90. Mali became independent on 22 September 1960, and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

91. By letters of 20 March and 14 December 1961 and 18 October 1962 the Secretary-General inquired whether Mali considered itself bound by the same treaties as were listed in the letters to Cameroon, the Central African Republic etc. (see para. 55 above),

92. Niger became independent on 3 August 1960 and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

93. By a letter of 20 March 1961 the Secretary-General inquired whether Niger considered itself bound by the same treaties as were listed in the letter to Cameroon, the Central African Republic etc. By a letter dated 18 August 1961, received on 25 August 1961, the Foreign Affairs Department replied that Niger considered itself bound by all of the treaties listed, except for the 1953 Convention on the Political Rights of Women and the 1953 Opium Protocol, with regard to which a further inquiry has been made. Niger has also recognized that it continues to be bound by the Warsaw Convention of 12 October 1929 for the Unification of Certain Rules relating to International Carriage by Air, and by The Hague Protocol of 28 September 1955 modifying that Convention, and by twelve Conventions of the International Labour Organisation.

94. Nigeria became independent on 20 August 1960, and was admitted to the United Nations on 7 October 1960. It had on 1 October 1960 an exchange of letters with the United Kingdom on succession to international rights and obligations (reproduced in the annex, No. 10).

95. By a letter dated 1 October 1960, received on 19 October 1960, the Prime Minister of Nigeria informed the Secretary-General that his Government in its capacity as a contracting party to the General Agreement on Tariffs and Trade, acknowledged itself bound by forty-two international instruments (protocols, procès-verbaux, declarations, notifications etc.) relating to GATT. Nigeria has also recognized itself bound by fifteen ILO Conventions and by the four Geneva Conventions of 1949 for the protection of war victims.

96. By a letter of 28 February 1961, the Secretary-General, referring to the above-mentioned exchange of letters of 1 October 1960, stated that it was his understanding that Nigeria considered itself bound by the following treaties which had been made applicable to it by the United Kingdom, and requested confirmation:

i. 1946 Convention on the Privileges and Immunities of the United Nations;
ii. 1947 Convention on the Privileges and Immunities of the Specialized Agencies;
iii. 1912 Opium Convention;
iv. 1925 Opium Convention, as amended by the 1946 Protocol;
v. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
vi. 1948 Protocol on Drugs;
vii. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;
viii. 1923 Convention on Obscene Publications, as amended by the 1947 Protocol;
3. The United Kingdom's recognition of the independence of the Federation of Nigeria considered itself bound by all of the treaties listed. It has, however, confirmed that it is bound by thirteen Conventions of the International Labour Organisation.

102. Somalia became independent on 1 July 1960 and was admitted to the United Nations on 20 September 1960. An exchange of letters with Italy or with the United Kingdom on succession to treaty rights and obligations has not yet been registered with the Secretariat, but has recently come to its knowledge, and is reproduced in the annex, No. 11.

103. By a letter of 6 December 1961 the Secretary-General inquired as to the attitude of Somalia with regard to succession to the rights and obligations of certain treaties. The letter listed first the treaties which had been made applicable both by Italy to the former Trust Territory of Somaliland and by the United Kingdom to former British Somaliland. They were the following:

   1. 1946 Convention on the Privileges and Immunities of the United Nations;
   2. 1912 Opium Convention;
   3. 1925 Opium Convention, as amended by the 1946 Protocol;
   4. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
   5. 1948 Protocol on Drugs;
   6. 1923 Convention on Obscene Publications, as amended by the 1947 Protocol;
   7. 1910 Agreement on Obscene Publications, as amended by the 1949 Protocol;
   8. 1926 Slavery Convention, as amended by the 1953 Protocol;

104. The letter listed the treaties which had applied only to the Trust Territory. They were the following:

   i. 1921 Convention on Traffic in Women and Children, as amended by the 1947 Protocol;
   ii. 1950 Convention on Declaration of Death of Missing Persons;
iii. 1957 Protocol for extending the validity of the Convention on Declaration of Death of Missing Persons.

105. The letter further listed the following treaties which had applied only to British Somaliland:
   i. 1947 Convention on the Privileges and Immunities of the Specialized Agencies;
   ii. 1951 Convention on the Status of Refugees;
   iii. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;
   iv. 1952 Convention on Importation of Commercial Samples;
   v. 1954 Convention on Customs Facilities for Touring;
   vi. 1954 Additional Protocol on Importation of Tourist Publicity Documents;
   vii. 1954 Customs Convention on Private Road Vehicles;
   viii. 1956 Customs Convention on Commercial Road Vehicles;
   ix. 1956 Customs Convention on Aircraft and Pleasure Boats;
   x. 1950 Agreement on Importation of Educational, Scientific and Cultural Materials;
   xi. 1957 Convention on the Nationality of Married Women.

106. No reply has been received to this letter. Somalia has, however, recognized that it continues to be bound by certain conventions of the International Labour Organisation. With respect to two such conventions which Italy had declared applicable to the Trust Territory and the United Kingdom to British Somaliland, Somalia, according to a statement registered by the Director-General of the ILO with the United Nations Secretariat, recognized that the conventions “will continue to be in force in the Somali Republic as from 18 November 1960”. With respect to seven such conventions which had applied in the Trust Territory but not in British Somaliland, Somalia recognized that the conventions “will continue to be in force for the part of the territory of the Somali Republic which was formerly the Trust Territory from 18 November 1960”. With respect to six such conventions which had applied in British Somaliland but not in the Trust Territory, Somalia recognized that the conventions “will continue to be in force for the part of the territory of the Somali Republic which was formerly British Somaliland as from 18 November 1960”.

107. Togo became independent on 20 April 1960, and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

108. By letters dated 20 March and 14 December 1961, the Secretary-General inquired whether Togo considered itself bound by the same treaties as were listed in the letters to Cameroon, the Central African Republic etc. (see para. 55 above). By a letter dated 23 February 1962 the Minister for Foreign Affairs informed the Secretary-General that the following treaties had been extended to Togo before its independence by France and remain applicable:
   i. 1946 Convention on the Privileges and Immunities of the United Nations;
   ii. 1951 Convention on the Status of Refugees;
   iii. 1925 Opium Convention, as amended by the 1946 Protocol;
   iv. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
   v. 1948 Protocol on Drugs;
   vi. 1949 Convention on Road Traffic;
   vii. 1926 Slavery Convention.

109. Togo also stated that it did not consider itself bound by the 1953 Convention on the Political Rights of Women. It has not yet expressly stated its attitude on the other treaties listed in the Secretary-General’s letters. Declarations by which Togo recognized that it continues to be bound by twelve ILO Conventions and by the four Geneva Conventions of 1949 for the protection of war victims have been registered with the Secretariat.

110. Upper Volta became independent on 5 August 1960 and was admitted to the United Nations on 20 September 1960. No agreement with France on the devolution of treaty obligations has been registered with the Secretariat.

111. By letters of 20 March and 14 December 1961, the Secretary-General inquired whether Upper Volta considered itself bound by the same treaties as were listed in the letters to Cameroon, the Central African Republic etc. By a letter dated 19 April 1962, received on 27 April 1962, the Minister for Foreign Affairs stated:

(Translation) “The Upper Volta, as a sovereign independent State, does not acknowledge itself bound by the Agreements signed by France before the Republic of Upper Volta became independent.”

112. This position of principle seems, however, to admit of some exceptions. The Government of Switzerland, as depository of the four 1949 Geneva Conventions for the protection of war victims, has transmitted to the Secretary-General a copy of a declaration signed by the Minister for Foreign Affairs of Upper Volta, stating that:

(Translation) “The four 1949 Geneva Conventions for the protection of war victims apply by law to the territory of the Republic of the Upper Volta in virtue of their ratification by France on 28 June 1951.”

Upper Volta has also declared that it continues to be bound by thirteen ILO Conventions concluded by France.

113. Mauritania became independent on 28 November 1960, and was admitted to the United Nations on 27 October 1961. No agreement with France on succession to treaty obligations has been registered with the Secretariat.

114. By letters of 16 November 1961 and 19 October 1962 the Secretary-General inquired whether Mauritania recognized that it continued to be bound by the same treaties as were listed in the letters to Cameroon, the Central African Republic etc. No reply has yet been received. Mauritania has, however, declared that it continues to be bound by thirteen Conventions of the International Labour Organisation which were extended to its territory by France, and by the four Geneva Conventions of 1949 for the protection of war victims.

115. Sierra Leone became independent on 27 April 1961 and was admitted to the United Nations on 27 September 1961. It had on 5 May 1961 an exchange of letters with the United Kingdom on succession to
international rights and obligations which is reproduced in the annex, No. 12.

116. By a letter dated 16 August 1961, received on 23 August 1961, the Minister of External Affairs of Sierra Leone informed the Secretary-General that his Government, in its capacity as a contracting party to the General Agreement on Tariffs and Trade, acknowledged itself bound by forty-two international instruments (protocols, procès-verbaux, declarations, notifications etc.) relating to GATT.

117. By a letter of 25 January 1962 the Secretary-General, referring to the above-mentioned exchange of letters of 5 May 1961, stated that it was his understanding that Sierra Leone considered itself bound by the following treaties which had been made applicable to it by the United Kingdom, and requested confirmation:

i. 1946 Convention on the Privileges and Immunities of the United Nations;
ii. 1947 Convention on the Privileges and Immunities of the Specialized Agencies;
iii. 1912 Opium Convention;
iv. 1925 Opium Convention, as amended by the 1946 Protocol;
v. 1931 Convention on Narcotic Drugs, as amended by the 1946 Protocol;
vi. 1948 Protocol on Drugs;
vii. 1921 Convention on Traffic in Women and Children;
viii. 1904 Agreement on the White Slave Traffic, as amended by the 1949 Protocol;
ix. 1910 Convention on the White Slave Traffic, as amended by the 1949 Protocol;
x. 1923 Convention on Obscene Publications, as amended by the 1947 Protocol;
xii. 1910 Agreement on Obscene Publications, as amended by the 1949 Protocol;
xiii. 1952 Convention on Importation of Commercial Samples;
xiv. 1954 Convention on Customs Facilities for Touring;
xv. 1954 Additional Protocol on Importation of Tourist Publicity Documents;
xvi. 1954 Customs Convention on Private Road Vehicles;
xvii. 1956 Customs Convention on Containers;
xviii. 1956 Customs Convention on Commercial Road Vehicles;
ixix. 1956 Customs Convention on Aircraft and Pleasure Boats;
xx. 1949 Convention on Road Traffic;
xxi. 1950 Agreement on Importation of Educational, Scientific and Cultural Materials;
xxii. 1957 Convention on the Nationality of Married Women;
xxiii. 1926 Slavery Convention, as amended by the 1953 Protocol;
xxiv. 1956 Supplementary Convention on Slavery;
xxv. 1958 Convention on the Territorial Sea and Contiguous Zone;
xxvi. 1958 Convention on the High Seas;
xxvii. 1958 Convention on Fishing.

118. By a note verbale dated 28 February 1962, received on 13 March 1962, the Ministry of External Affairs confirmed that Sierra Leone was bound by all of the treaties listed. Sierra Leone has also declared that it continues to be bound by sixteen ILO Conventions.


120. The President of the Council of Ministers on 22 October 1961 cabled the Director-General of the World Health Organization as follows:

“I have the honour to inform you that Syria has been always a member of WHO and since 1958 has continued so to be jointly with Egypt under the name of the United Arab Republic. This union having been dissolved on 28 September last the Syrian Arab Republic resumes its seat at WHO. I take this occasion to assure you that the Syrian Arab Republic remains bound mutatis mutandis by all the agreements, arrangements and obligations which were binding between WHO and the United Arab Republic at the time of the constitution of the Syrian Arab Republic. I shall be glad if you will kindly acknowledge receipt of this cable and communicate a copy of it to all WHO member States.”

121. Similar cables were sent to the Director-General of UNESCO on 25 October 1961, and to the Secretary-General of IMCO on 2 November 1961; they were presumably sent to other specialized agencies as well. The Secretary-General of IMCO transmitted the cable to the Secretary-General of the United Nations as depositary of the IMCO Convention. Syria resumed its membership in WHO and UNESCO, of which it had been a member before 1958, in the same way that it resumed its membership in the United Nations.

122. Before the formation of the United Arab Republic in late February 1958, Syria had not completed the formal steps to become a member of IMCO. The Syrian Foreign Ministry, by a note verbale received on 12 February 1958, had informed the Secretary-General of the United Nations that Syria had adopted a law authorizing acceptance of the IMCO Convention, but no instrument of acceptance was ever deposited for Syria; Egypt, however, deposited an instrument of acceptance in 1954, and the United Arab Republic confirmed its acceptance of the Convention on 17 March 1958.

123. The Secretary-General, by a letter dated 14 November 1961, informed Syria that to become a member of IMCO it would be necessary to become party to the Convention by the procedure provided therein (signature, signature subject to acceptance followed by acceptance, or acceptance).

124. In a letter of 11 December 1961 the Secretary-General stated that it was his understanding, of which confirmation was requested, that Syria, having resumed its status as an independent State and as a Member of the United Nations continued to be bound by signatures, ratifications and accessions done on behalf of Syria before the formation of the United Arab Republic. He also stated that it appeared from various statements made on behalf of Syria that the Syrian Government recognized various actions taken in respect of United Nations treaties by the United Arab Republic as binding upon Syria and inquired as to the
position of the Government in this regard. The actions taken by the United Arab Republic during the period between its formation and Syria's resumption of independence were the following:

i. Accession to the 1950 Convention on the Traffic in Persons;
ii. Acceptance of amendments to articles 24 and 25 of the Constitution of the World Health Organization;
iii. Declaration that the 1954 Convention on Customs Facilities for Touring, the 1954 Additional Protocol on Importation of Tourist Publicity Documents, and the 1954 Customs Convention on Private Road Vehicles were applicable to the Syrian Province;
iv. Accession to the 1956 Supplementary Convention on Slavery;
v. Accession to the 1958 Convention on Foreign Arbitral Awards.

In the “Status of Multilateral Conventions” (ST/LEG/3/Rev.1) issued on 31 December 1961, the Secretary-General indicated that Syria was bound by all treaties concluded by Syria before the formation of the United Arab Republic, and by all treaty actions taken by the Republic, during the period of union, in respect of the Syrian Province; the situation was explained in a footnote (p. 1-3).

125. The Permanent Representative of Syria, by a letter dated 19 July 1962, transmitted to the Secretary-General an unofficial translation of a legislative decree of 13 June 1962 (reproduced in the annex, No. 13) providing for the continuance in force of international instruments relating to GATT, were to be considered as rights and obligations of Tanganyika 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.”

128. The Secretary General circulated the declaration as requested. The Permanent Representative of the United Kingdom replied as follows in a letter dated 2 July 1962:

“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 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.”

129. By a letter dated 9 January 1962, received on 18 January 1962, the Prime Minister of Tanganyika informed the Secretary-General that his Government, in its capacity as a contracting party to the General Agreement on Tariffs and Trade, declared that the rights and obligations of the United Kingdom in respect to Tanganyika, arising out of forty-two international instruments relating to GATT, were to be considered as rights and obligations of Tanganyika as from the date of independence.

130. By a letter dated 24 September 1962 the Prime Minister informed the Secretary-General that Tanganyika considers itself bound by the 1946 Convention on the Privileges and Immunities of the United

131. Algeria, Burundi, Jamaica, Rwanda, Trinidad and Tobago, Uganda and Western Samoa all became independent in 1962, and all of them except for Western Samoa, which has not applied for admission, have been admitted to the United Nations. Some of these countries probably have concluded agreements with their predecessors on succession to treaty rights and obligations, but no such agreements have yet been registered with the Secretariat. The Secretary-General has already sent letters to some of the countries inquiring whether they recognize themselves as bound by treaties applied to their territories by their predecessors, and other such letters are now (in December 1962) being prepared. No replies have yet been received.

Chapter III. General summary

A. Notifications concerning succession made by new States of their own accord

132. In some cases new States, after the attainment of their independence, declare of their own accord to the Secretary-General that they consider themselves bound by treaties applied or extended to their territories by their predecessors. Apart from these cases, however, there are others in which States, as a regular part of the process of joining an international institution, declare their succession to particular treaty obligations. In the case of the General Agreement on Tariffs and Trade, as each new State is admitted to the status of a contracting party, it notifies the Secretary-General that it considers itself bound by the GATT Protocols and other international instruments of which the Secretary-General is the depositary (and also notifies the Executive Secretary of GATT that it considers itself bound by the instruments of which he is the depositary). It also appears, from the statements which the Director-General of the International Labour Office registers with the Secretariat, that part of the regular procedure of admission of new States to the ILO is a declaration by them to the Director-General that they recognize that they continue to be bound by the obligations arising from the provisions of the international labour conventions which their predecessors have made applicable to their territories.

B. Letters from the Secretary-General inquiring about succession

133. A letter is addressed to each new State about succession to United Nations treaties. If an agreement between the new State and its predecessor providing for assumption of treaty rights and obligations by the new State has been registered with the Secretariat or has otherwise come to the knowledge of the Secretary-General, the letter refers to that agreement and continues on the following lines:

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

134. If, however, there is no information as to any agreement or other provision in effect in the new State about the devolution of treaty obligations, the letter is on the following lines:

"It will be noted that certain of these instruments had been made applicable to your country, before it attained independence, by the Government of [the predecessor State], which was then responsible for the foreign relations of [the new State]. In this connexion, I have the honour to call to your attention the practice which has developed regarding the succession of new States to the rights and obligations arising out of multilateral treaties applied in their territory by the States formerly responsible for their foreign relations. Under this practice, the new States generally acknowledge themselves to be bound by such treaties through a formal notification addressed to the Secretary-General by the Head of the State or Government or by the Minister for Foreign Affairs. The effect of such notification, which the Secretary-General, in the exercise of his depositary functions, communicates to all interested States, is to consider the new State as a party in its own name to the treaty concerned as of the date of independence, thus preserving the continuity of the application of the treaty in its territory..."

"The Secretary-General would be grateful if you would notify him of the position of your Government in regard to the treaties enumerated in the list referred to above, so that he may inform all interested States accordingly."

C. Lists of treaties about which new States are consulted with regard to succession

135. Each letter of the kind described above contains a list of treaties about which inquiry is made as to succession. This memorandum will now describe the types of treaties which are included in such lists, and the types of treaties not included.

i. Types of treaties included in the lists

136. The lists include all the multilateral treaties of the United Nations (with some exceptions, which will be discussed below) which, according to the archives of the Secretariat, were applicable in the territory of the new State before its independence. It likewise includes all the treaties of the League of Nations which have been amended by United Nations protocols, and which were similarly applicable.

137. Treaties applicable to the territory of the new State. In ascertaining whether a treaty was applicable in the territory, the terms of the treaty, if any, on territorial application are first examined. Some treaties have territorial clauses providing procedures for extension to dependent territories, and it can readily be
ascertained whether the treaty was extended to the territory in question. Other treaties are limited in their geographical scope; for example, certain League of Nations treaties on opium are limited to the Far Eastern territories of the parties, and the Secretary-General in reply to inquiries by some African States, has informed them that it is impossible for them either to succeed or accede to those treaties. Some United Nations treaties are likewise regional in scope; for example, the Convention regarding the Measurement and Registration of Vessels Employed in Inland Navigation, done at Bangkok on 22 June 1956, is open only to States falling withing the geographical scope of the Economic Commission for Asia and the Far East, and States outside that area cannot become bound by it.

138. If there is no provision on territorial application, action has been based on the principle, frequently supported by representatives in the General Assembly, that the treaty was automatically applicable to all the dependent territories of every party. In the case of such treaties, however, it has occurred that the new State has declined to recognize itself as bound on the ground that the treaty was never promulgated as part of the internal law of the territory (see above under Congo (Leopoldville), para. 74, and under Ivory Coast, para. 83).

139. The relevant question determining the inclusion of a treaty in the list is whether the treaty was applied before independence in the territory of the new State, and not whether the new State, after its independence, would be able to take action to become a party. Thus, for example, in 1957 the Federation of Malaya was consulted about succession to the obligations of the 1949 Agreement for provisional application of the Draft Customs Conventions, which had been extended to Malaya by the United Kingdom under the territorial application clause of the Agreement. The Federation would not have been able to accede to the Agreement, which was open only to the Governments invited to take part in the preparation of the Draft Conventions. The Federation recognized itself bound by the Agreement.

140. Likewise, since 1957 new States, after they have become Members of the United Nations, have been consulted about succession to the obligations of the 1946 Convention on the Privileges and Immunities of the United Nations, and since 1961, to those of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies. The former is open only to Members of the United Nations, and the latter only to members of the specialized agencies; new States (except for the special case of Syria's resumption of independence) do not have such membership on the date of independence, and would thus be unable to accede to the Conventions between the date of independence and the date of acquiring such memberships. Western Samoa, however, which has not applied for membership in the United Nations, was not consulted about succession to the obligations of the 1946 Convention on the Privileges and Immunities of the United Nations; that country was admitted, after independence, as a member of the World Health Organization, and was consequently asked whether it recognized itself as bound by the 1947 Convention on the Privileges and Immunities of the Specialized Agencies.

141. Succession to treaty obligations by States with more than one predecessor. It may occur that the new State has more than one predecessor State. For example, the United Arab Republic succeeded to Egypt as to part of its territory, and to Syria as to the other part; the Federal Republic of Cameroon succeeded to France as to part of its territory, and to the United Kingdom as to the other part; and Somalia succeeded to Italy as to part, and to the United Kingdom as to the other part. In all three cases the internal laws of the two parts remained different after the union, and the law of one part was not extended to the other. In the case of Somalia, and also in certain correspondence with the United Arab Republic about the application of the 1947 Convention on the Privileges and Immunities of the Specialized Agencies, the United Nations Secretariat has taken the view that the new State could succeed to the rights and obligations of any treaty applicable to either part of the country, but only provided that the State recognizes that their application should extend to its entire territory (see para. 103).

142. Some of the States concerned, however, have taken a different view. The United Arab Republic declared in 1958 that the treaties of Egypt and Syria remained “valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law” (see para. 48). Cameroon (see para. 59) and Somalia (see para. 106) recognized that they continued to be bound by international labour conventions, but only within their original territorial limits of application; the International Labour Office has registered declarations to that effect with the Secretariat. Some difficulties may be anticipated from this kind of limited succession, for example, in respect of treaties which are applicable abroad or on the high seas, or which are otherwise impossible to apply on a purely regional basis; the question may also arise whether a State which recognizes itself bound by a treaty in respect of only part of its territory is able to exercise the full rights of a party in taking actions provided for in the treaty or otherwise open only to parties.

143. Treaties not yet in force. The lists of treaties sent to new States have since 1958 included not only treaties which are in force, but also treaties which are not yet in force, in respect of which the predecessor State has taken final action to become bound, and to extend the treaty to the territory which has later become independent. France in 1954 ratified and Belgium in 1958 acceded to the 1953 Opium Protocol, which is not yet in force; both countries also notified the Secretary-General of the extension of the Protocol to their dependent territories. Cameroon, the Central African Republic, the Congo (Brazzaville), the Congo (Leopoldville) and the Ivory Coast have recognized themselves as bound by the instruments deposited by their respective predecessors. In March 1960 the United Kingdom ratified the 1958 Conventions on the Territorial Sea and Contiguous Zone, on the High Seas, and on Fishing, which do not contain any territorial application clauses. Nigeria and Sierra Leone have recognized themselves as bound by these ratifications. It may also be mentioned that Pakistan in 1953 spontaneously informed the Secretary-General that it was bound by the action of the United Kingdom in re-
ciate member of IMCO, but after independence it be-

in order to become a member of IMCO it would have

of the United Arab Republic, but was informed that

acceptance, and not by succession (see paras. 98-99).

came a full member by the deposit of an instrument of

the period of union.

It has been considered that these provisions

tions of such accession are determined by agree-

ment between the Council and the Government con-

cerned. It has been considered that these provisions

require new States to follow the procedures laid down

in the treaties in order to become parties.

146. Nigeria as a dependent territory was an asso-

ciate member of IMCO, but after independence it be-

came a full member by the deposit of an instrument of

acceptance, and not by succession (see paras. 98-99).

Syria, upon its resumption of independence, again exer-

cised the rights of membership in all organizations of

which it had been a member before the formation

of the United Arab Republic, but was informed that

in order to become a member of IMCO it would have

to take the ordinary measures provided in the Con-

vention, without being able to succeed to the mem-

bership of the United Arab Republic (see paras. 122-

123). Thus Syria, on re-establishing its independence,

reacquired its own rights which existed before the

union in respect of international organizations, but did

not inherit such rights from the United Arab Republic.

It may be noted, however, that Syria adopted a law

(see annex, No. 13) by which it declared that it had

inherited the memberships in international organizations

which the United Arab Republic had acquired during

the period of union.

147. On the other hand, when the United Arab

Republic was formed in 1958 by the Union of Egypt and

Syria, which were both members of WHO, the Re-

public continued without interruption to be a member of

WHO (and also a Member of the United Nations).

148. It may be noted that the International Coffee

Agreement. 1962, 30 of which the Secretary-General is

also the depository, and which establishes the Interna-

tional Coffee Organization, provides in article 67,

paragraph 4:

"The Government of a territory to which the

Agreement has been extended under paragraph (1)

of this Article and which has subsequently become

independent may, within 90 days after the attainment

of independence, declare by notification to the Secre-

tary-General of the United Nations that it has as-

sumed the rights and obligations of a Contracting

Party to the Agreement. It shall, as from the date

of such notification, become a party to the Agree-

ment."

149. This provision of course establishes a different

procedure from that under the constitutions of the

other organizations referred to above.

150. Treaties that have ceased to be in force or are

superseded. For obvious reasons, no inquiries are made

about treaties which, by the date of independence, have

ceased to be in force. Furthermore, the 1949 Agreement

for Provisional Application of the Draft Customs Con-

ventions is superseded by later agreements, and has

been denounced by many of its parties. Though it still

has not arisen in practice in which a new State, since 1961

new States have not been asked whether they consider

themselves bound by it.

151. Treaties signed, but not ratified, by the prede-

cessor State. The lists of treaties sent to new States have

not included any treaties which have been only signed,

but not ratified, by predecessor States. No case has

yet arisen in practice in which a new State, in reliance

on a signature by its predecessor, has submitted for

deposit an instrument of ratification to a treaty. There

is considerable practice to the effect that a new State

can inherit the legal consequences of a ratification by

its predecessor of a treaty which is not yet in force

(see para. 143); but it is not yet clear whether the

new State can inherit the legal consequences of a simple

signature of a treaty which is subject to ratification.

The case presents some practical importance, since

numerous League of Nations treaties, some of which

were signed, but never ratified, by France, the United

Kingdom, etc., are not now open to accession by new

States, 31 and new States have sometimes indicated an

interest in becoming parties to those treaties. The ques-

tion of opening those treaties to new States has been

referred to the International Law Commission by Gen-

eral Assembly resolution 1766 (XVII).

152. International instruments relating to GATT.

The Secretary-General does not consult new States

about succession to the various protocols and other

instruments relating to the General Agreement on

Tariffs and Trade, because the Contracting Parties have

their own procedure in the matter. After a new State

becomes a Contracting Party through the decision of

the other Contracting Parties, it makes a notification

to the Secretary-General by which it recognizes itself

as bound by the various GATT instruments concluded

prior to 1 February 1955, of which the Secretary-

General is the depository, and also a notification to

the Executive Secretary of the Contracting Parties of


31 See A/C.6/L.498 for a list of these treaties.
GATT, who is the depositary of GATT instruments concluded after 1 February 1955.

153. **League of Nations treaties not amended by United Nations Protocols.** When the predecessor State is a party to a League treaty which has been amended by a protocol approved by the General Assembly of the United Nations but that State has not become a party to the protocol, the new State is consulted as to whether it considers itself bound by the League treaty, in order to determine whether the new State should be invited to become party to the protocol (which is open only to parties to the League treaty), or should be invited to become party to the League treaty as amended (which is usually open to, among others, all Members of the United Nations). If, on the other hand, the predecessor State was party both to the League treaty and to the United Nations protocol, the new State is consulted as to whether it considers itself bound by the League treaty as amended.

154. The Secretary-General, however, has not yet of his own accord consulted new States about succession to League treaties which have not been amended, because such action does not seem to be required by General Assembly resolution 24 (I) of 12 February 1946, under which the Secretary-General has functions in respect of those treaties. There would be some legal problems in connexion with such action. In the first place, it would be necessary to establish a list of the League treaties that are still in force, and this would require a study not only of whether each treaty has been denounced by the parties but also whether the treaty can still be executed after the disappearance of the organs of the League, whether the treaty has been superseded among the parties by a new treaty, whether the treaty has fallen into desuetude, etc. Then it would be necessary to draw up a list for each treaty of what States could have succeeded to its rights and obligations, sometimes through several consecutive successions. The General Assembly by resolution 1766 (XVII) has referred to the International Law Commission a problem relating to the unamended League treaties, and possibly at a later stage of consideration the Assembly may request that action be taken to clarify the status of those treaties.

155. When a party to a League treaty has made an inquiry whether a new State regards itself as bound by it, the Secretary-General transmits the inquiry to the new State, unless he has the information already at its disposal.

**D. SUMMARY OF ACTIONS BY STATES WITH REGARD TO SUCCESSION TO TREATIES**

156. Since 1956, when the practice of inquiring about succession to treaties of the United Nations developed to approximately its present extent, the following States have declared that they continue to be bound by all the treaties about which inquiries were made, or by all treaties made applicable to their territory by their predecessors:

- Central African Republic
- Congo (Brazzaville)³²
- Ivory Coast (except for one treaty not promulgated internally)

Ghana³³
- Malaya³³
- Morocco³³
- Nigeria³⁵
- Sierra Leone³³
- Syria³³
- United Arab Republic³³

157. The following States have recognized that they continue to be bound by some of the treaties concluded by their predecessors and made applicable to their territories, but have not yet replied with regard to other such treaties:

- Cameroon
- Congo (Leopoldville)
- Cyprus³⁴
- Dahomey
- Guinea
- Madagascar
- Mali
- Senegal
- Tanganyika
- Togo
- Tunisia.

158. The following States have not yet replied to the inquiries about United Nations treaties, but have declared that they continue to be bound by the obligations of various conventions of the International Labour Organisation:

- Chad
- Gabon
- Somalia
- Mauritania.

159. Three States have stated that they are not bound by treaties which contain no territorial application clause, on the ground that before independence those treaties had not been promulgated in internal law (see paras. 74, 83 and 109).

160. Two States have stated that they are not bound by particular League of Nations treaties which contain territorial application clauses and were specifically extended to their territories by their predecessors (see paras. 21 and 22). Those States have, however, declared that they continued to be bound by other such treaties.

161. One State (see para. 30) has not recognized itself as bound by any of the treaty obligations of its predecessor. Another State (see paras. 111-112) has declared to the Secretary-General that it does not consider itself bound by treaties concluded by its predecessor, but has recognized that it continues to be bound by a number of treaties that have other depositaries.

162. As for the procedure by which States recognize that they continue to be bound, most have made formal notifications which, as stated in letters from the Secretary-General (see para. 134), are signed by the Head of State or Government or Minister for Foreign Affairs. A few States, however, have sent communications from an official of the Foreign Ministry or from the Permanent Mission to the United Nations, acting under instructions.

³² The Congo (Brazzaville), however, deposited an instrument of accession to one treaty by the obligations of which it could have recognized itself as continuing to be bound.

³³ For the agreement or other official text relating to succession by this State, see the annex.

³⁴ Idem.
163. States which have recognized that they continue to be bound by treaties concluded by their predecessors have often exercised the rights granted to parties by those treaties and have thus indicated that they consider that they have succeeded to the rights, as well as to the obligations, of parties. Thus, for example, States that have declared that they continue to be bound by the 1949 Convention on Road Traffic have notified the Secretary-General of the distinctive letters selected by them in accordance with paragraph 3 of annex 4 of that convention, and also have considered that they acquire the right of parties at any time to exclude annexes 1 and 2 from their application of the Convention. Moreover, some States which have recognized that they continue to be bound by the 1951 Convention on Refugees have broadened the scope of its geographical application beyond that given to it by their predecessors, through the exercise of an option granted to parties by the Convention.

164. In general, new States which have recognized that they continued to be bound by treaties have considered themselves bound from the time of their attainment of independence. With regard to international labour conventions, however, it is the custom for new States to consider themselves bound only as of the date on which they are admitted to the International Labour Organisation.

ANNEX

GENERAL PROVISIONS ON DEVOLUTION OF TREATY RIGHTS AND OBLIGATIONS

**No. 1. Jordan**


**Article 8, paragraph 2**

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

The Treaty of Alliance of 15 March 1948 (United Nations Treaty Series, vol. 77, p. 77) between the United Kingdom and the Hashemite Kingdom of Jordan contains no similar provision, but it was indicated in an exchange of letters of the same date that the omission "does not imply any intention to derogate from the principles set forth in" article 8 of the Treaty of Alliance of 22 March 1946.

The Treaty of Alliance of 1946 was abrogated by an exchange of notes dated 13 March 1957.

**No. 2. India and Pakistan**


The agreement set out in the Schedule to this Order shall, as from the appointed day, have the effect of an agreement duly made between the Dominion of India and the Dominion of Pakistan.

**Schedule**

Agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan

1. The international rights and obligations to which India is entitled and subject immediately before 15 August 1947 will devolve in accordance with the provisions of this agreement.

2. (a) Membership of all international organizations together with the rights and obligations attaching to such membership will devolve solely upon the Dominion of India.

   For the purposes of this paragraph any rights or obligations arising under the Final Act of the United Nations Monetary and Financial Conference will be deemed to be rights or obligations attached to membership of the International Monetary Fund and to membership of the International Bank for Reconstruction and Development.

   (b) The Dominion of Pakistan will take such steps as may be necessary to apply for membership of such international organization as it chooses to join.

3. (a) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.

   (b) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion.

4. Subject to articles 2 and 3 of this agreement, rights and obligations under all international agreements to which India is a party immediately before the appointed day will devolve both upon the Dominion of India and upon the Dominion of Pakistan, and will, if necessary, be apportioned between the two Dominions.

**No. 3. Burma**


**Article 2**

All obligations and responsibilities heretofore devolving on the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Burma, devolve upon the Provisional Government of Burma. The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Burma shall henceforth be enjoyed by the Provisional Government of Burma.

**No. 4. Ceylon**


...  

6) All obligations and responsibilities heretofore devolving on the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Ceylon devolve upon the Government of Ceylon. The reciprocal rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Ceylon shall henceforth be enjoyed by the Government of Ceylon.

Article 5

1. The Kingdom of the Netherlands and the Republic of the United States of Indonesia understand that, under observance of the provisions of paragraph 2 hereunder, the rights and obligations of the Kingdom arising out of treaties and other international agreements concluded by the Kingdom shall be considered as the rights and obligations of the Republic of the United States of Indonesia only where and inasmuch as such treaties and agreements are applicable to the jurisdiction of the Republic of the United States of Indonesia and with the exception of rights and duties arising out of treaties and agreements to which the Republic of the United States of Indonesia cannot become a party on the ground of the provisions of such treaties and agreements.

2. Without prejudice to the power of the Republic of the United States of Indonesia to denounce the treaties and agreements referred to in paragraph 1 above or to terminate their operation for its jurisdiction by other means as specified in the provisions of those treaties and agreements, the provisions of paragraph 1 above shall not be applicable to treaties and agreements in respect of which consultation between the Republic of the United States of Indonesia and the Kingdom of the Netherlands shall lead to the conclusion that such treaties and agreements do not fall under the stipulations of paragraph 1 above.

No. 6. MOROCCO


Article 11

Morocco shall assume the obligations arising out of international treaties concluded by France on behalf of Morocco and out of such international instruments relating to Morocco as have not given rise to observations on its part.

No. 7. GHANA


(i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Ghana, be assumed by the Government of Ghana;

(ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to the Gold Coast shall henceforth be enjoyed by the Government of Ghana.

No. 8. FEDERATION OF MALAYA


(i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument are, from 31 August 1957, assumed by the Government of the Federation of Malaya so far as such instruments may be held to have application to or in respect of the Federation of Malaya.

(ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to or in respect of the Federation of Malaya are, from 31 August 1957, enjoyed by the Government of the Federation of Malaya.

No. 9. CYPRUS


Article 8

(1) All international obligations and responsibilities of the Government of the United Kingdom shall henceforth, in so far as they may be held to have application to the Republic of Cyprus, be assumed by the Government of the Republic of Cyprus.

(2) The international rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of their application to the territory of the Republic of Cyprus shall henceforth be enjoyed by the Government of the Republic of Cyprus.

No. 10. NIGERIA


(i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument shall henceforth, in so far as such instrument may be held to have application to Nigeria, be assumed by the Government of the Federation of Nigeria;

(ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Nigeria shall henceforth be enjoyed by the Government of the Federation of Nigeria.

No. 11. SOMALIA


With reference to the Treaty of Friendship concluded this day between our two countries, I have the honour to inform Your Excellency as follows:

(1) It is agreed that, upon the entry into force of the aforesaid Treaty, the Government of Somalia shall succeed the Italian Government in all the rights and obligations arising out of international instruments concluded by the Italian Government, in its capacity as the Administering Authority for the Trust Territory, in the name of and on behalf of Somaliland up to 30 June 1960;

(2) In accordance with the purposes and the principle of Article 12 of the Trusteeship Agreement for Somaliland of 27 January 1950, the Italian Government considers itself bound to provide the attached list of the multilateral agreements entered into by Italy before 1950 on humanitarian, social, health, legal and administrative matters and applied to Somaliland.

Upon the accession of Somalia to independence, all responsibilities and all obligations assumed by the Italian Government under these agreements, in so far as they extend to Somalia, shall cease with regard both to the Somali Government and to third States.

This note, the list which accompanies it, and the reply which Your Excellency will kindly send me, shall constitute an agreement between the two Governments and shall form an integral part of the aforesaid Treaty.

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Multilateral Agreements entered into by the Italian Government and extended to Somalia

30 September 1921—Geneva, Convention for the Suppression of the Traffic in Women and Children;
12 September 1923—Geneva, Convention for the Suppression of the Circulation of, and Traffic in, Obscene Publications;
10 April 1926—Brussels, Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels;
21 June 1926, Sanitary Convention concerning Protection against Epidemic Diseases;
25 September 1926, Geneva, Slavery Convention;
7 June 1930—Geneva, Conventions for the unification of the law of negotiable instruments:
(B) Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, with Annexes and Protocol;
(C) Convention for the settlement of Certain Conflicts of Laws in connection with Cheques, and Protocol;
(A) Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, and Protocol;
(B) Convention providing a Uniform Law for Bills of Exchange and Promissory Notes, with Annexes and Protocol;
(C) Convention for the settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes, and Protocol;
19 March 1931—Geneva, Conventions for the unification of the law of negotiable instruments:
(A) Convention providing a Uniform Law for Cheques, with Annexes and Protocol;
(B) Convention for the Settlement of Certain Conflicts of Laws in connection with Cheques, and Protocol;
(C) Convention on the Stamp Laws in connection with Cheques, and Protocol;
13 July 1931—Geneva, Convention for limiting the Manufacture and regulating the Distribution of Narcotic Drugs;
12 April 1933—The Hague, Sanitary Convention for Aerial Navigation;
11 October 1933—Geneva, Convention for facilitating the International Circulation of Films of an Educational Character;
29 May 1933—Rome, Convention for the Unification of Certain Rules relating to the Precautionary Attachment of Aircraft;
24 May 1934—Brussels, Additional Protocol to the Convention for the Unification of Certain Rules relating to the Immunity of State-owned Vessels, signed at Brussels on 10 April 1926;
22 December 1934—Paris, International Agreements concerning: (A) The Suppression of Consular Visas on Bills of Health; (B) The Suppression of Bills of Health;

No. 12. Sierra Leone


(i) All obligations and responsibilities of the Government of the United Kingdom which arise from any valid international instrument shall be assumed by the Government of Sierra Leone as from 27th April 1961, in so far as such instrument may be held to have application to Sierra Leone;
(ii) The rights and benefits heretofore enjoyed by the Government of the United Kingdom in virtue of the application of any such international instrument to Sierra Leone shall, as from 27th April 1961, be enjoyed by the Government of Sierra Leone.

No. 13. Syria

Legislative Decree No. 25 of 13 June 1962.

Article 1

The obligations assumed under any bilateral international treaty, agreement or convention during the period of the Union with Egypt are considered to be in force in the Syrian Arab Republic until such instrument is amended or denounced by the Syrian Arab Republic or by the other Parties in accordance with its provisions.

Article 2

The obligations assumed under any multilateral treaty, agreement, convention or instrument of participation in an international institution or organization during the period of the Union with Egypt are considered to be in force in the Syrian Arab Republic until such instrument is denounced in accordance with its provisions.

Appendix

List of full titles and citations of United Nations multilateral treaties referred to by short titles in the memorandum*

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*The treaties are arranged in the chronological order of the short titles used in the memorandum; treaties of the same year are in alphabetical order. In the citations, United Nations Treaty Series is abbreviated as U.N.T.S., and League of Nations Treaty Series as L.N.T.S.
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**Digest of the decisions of international tribunals relating to State succession:**

**study prepared by the Secretariat**

**[Original text: English]**

**3 December 1962**

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Introduction

1. At its 668th meeting on 26 June 1962 the International Law Commission took note of the undertaking of the Secretariat to prepare a digest of the decisions of international tribunals in the matter of State succession (A/5209, para. 72). In pursuance of that undertaking, the following Digest has been prepared to cover the pertinent decisions of the International Court of Justice, the Permanent Court of International Justice, the Permanent Court of Arbitration and of other international tribunals whose awards are contained in the *Reports of International Arbitral Awards*, vols. I-X.1 In view of the fact that many of the cases were only concerned incidentally with questions of State succession or were largely determined in the light of particular treaty provisions, attention has been concentrated on those parts of the decisions which have most relevance as indications of the general principles involved.

2. The decisions have been arranged under topic headings, with cross-references to decisions under other headings where appropriate. The heading of each case lists the title, date, parties, arbitrator or tribunal, and source reference.

I. General

(A) Mode of transfer of sovereignty

COLOMBIA-VENEZUELA BOUNDARY CASE (1922)

Colombia v. Venezuela

Arbitrator (Swiss Federal Council) appointed under a Special Agreement of 3 November 1916

*Reports of International Arbitral Awards*, vol. I, p. 229

3. A dispute arose between Colombia and Venezuela regarding the execution of an arbitral award given in 1891, under which certain boundary territories occupied by Venezuela were awarded to Colombia. After Colombia had attempted to execute the award in part, the two States agreed to request the Swiss Federal Council to decide whether or not any further formalities were required before the award could be put into effect.

4. In the course of its award the Swiss Federal Council stated that there was no binding rule of international law requiring the formal transfer of territory, although numerous examples existed where such a transfer had been required under treaty. Such examples, however, related to real cessions of territory, transferred by one State which renounced sovereignty to another which acquired it. Even if there was a rule requiring the formal transfer of territory—which was not the case—this could not operate as regards the boundary between Colombia and Venezuela since both States were deemed to have had sovereignty over their respective territories since 1810 under the principle *uti possidetis juris*. This principle, which was agreed to by both Colombia and Venezuela and formed part of their respective constitutions, provided that their boundaries should follow those laid down by the Spanish authorities in respect of the different territorial units existing prior to the establishment of the independent Latin American republics. In these circumstances, stated the Tribunal, "il n'y a ni cédant, ni cessionnaire". The Tribunal added:

"L'Etat qui occupait un territoire dont la souveraineté a été reconnue à l'autre Etat n'a aucun titre pour opérer la remise d'un territoire qu'il détient sans droit; sa possession a cessé d'être légitime le jour de l'entrée en vigueur de la sentece. L'Etat dont l'occupation est contraire à la sentence n'a d'autre devoir que d'évacuer le territoire dont il s'agit, et l'autre Etat
which the Arbitral Tribunal rejected the contention of Great Britain that in the case of cession, as opposed to conquest, the successor State was liable for the delicts of the preceding State. See too, Lighthouses Case, Claim No. 12 A, paras. 93-94 infra.

5. During this arbitration regarding the interpretation of article 260 of the Treaty of Versailles, which provided for the payment of reparations by Germany, Germany contended that the article could not apply in respect of territory forming part of Czechoslovakia and the Serb-Croat-Slovene State, which had previously belonged to Austria-Hungary, since this territory had not been "ceded" within the meaning of article 260, the Treaties of St. Germain and Trianon referring only to a "revocation" of rights over the territory concerned by Austria and Hungary in favour of Czechoslovakia and the Serb-Croat-Slovene State. The Arbitrator conceded that Czechoslovakia and the Serb-Croat-Slovene State were already in existence and had been exercising authority over the territory in question at the date of the signature of the Peace Treaties, to which they were parties. However, he held that such circumstances did not preclude a cession of territory formerly part of the Austro-Hungarian Monarchy on the part of Austria and Hungary.

""Cession" d'un territoire veut bien dire renonciation faite par un Etat en faveur d'un autre Etat aux droits et titres que pourrait avoir au territoire en question le premier de ces Etats. Que l'Etat en faveur duquel la renonciation est faite est deja en possession des territoires en question sans contestation de la part de l'Etat renonçant et que cette possession est le resultat d'un mouvement spontane de la population n'empeche pas que la renonciation ne constitue une "cession"."" 

6. See also the Hawaiian Claims, para. 91 infra, in which the Arbitral Tribunal rejected the contention of the British Government that in the case of cession, as opposed to conquest, the successor State was liable for the delicts of the preceding State. See too, Lighthouses Concession Case, Claim No. 12 A, paras. 93-94 infra.

ILOILO CLAIMS (1925)
Great Britain v. United States

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910
Reports of International Arbitral Awards, vol. VI, p. 158

7. In August 1898, after the Spanish-American War, a "Protocol of Agreement" was drawn up between Spain and the United States under which the United States occupied Manila, pending the conclusion of a treaty between the two Governments. Spain ceded the Philippines to the United States by a Treaty signed on 10 December 1898, in which it was provided that Spain should evacuate the islands after the exchange of ratifications. However, before the exchange of ratifications in April 1899, the local Spanish commander at Iloilo announced his intention to withdraw and actually evacuated the town on 24 December 1898, when it was occupied by Filipino insurgents. Although United States forces arrived in the harbour of Iloilo on 28 December in response to requests from local businessmen, including some of the British claimants, they did not occupy the town until 10 February 1899. The insurgents burned down the town on 11 February. The claims presented were on behalf of British subjects whose property had been destroyed. In the course of its decision rejecting the contention of Great Britain that there had been culpable delay on the part of the United States authorities, the Tribunal stated that:

"... there was no duty upon the United States under the terms of the Protocol, or of the then unratiﬁed treaty, or otherwise, to assume control at Iloilo. De jure there was no sovereignty over the islands until the treaty was ratified. Nor was there any de facto control over Iloilo assumed until the taking up of hostilities against the United States on the part of the so-called Filipino Republic required it on February 11, 1899." 

Lighthouses Case Between France and Greece (1934)
France v. Greece
Permanent Court of International Justice, Series A/B No. 62

8. In this case an express treaty provision, determining the conditions under which the successor State was subrogated to the position of the preceding State as regards concessions, was held to be unaffected in its operation by the fact that, at the date when the concession had been renewed, the territory concerned was already under the de facto occupation of the successor State. In April 1913, when the contract renewing a lightly used concession was concluded between the Ottoman authorities and the French concession holder, some of the territories affected were no longer under Turkish control, having been occupied by troops of the Balkan allies in the course of the Balkan wars. Moreover, the legislative decree issued by the Sultan authorizing the renewal was not ratified by the Turkish Parliament until the winter of 1914-1915, when some of the territories concerned had already been ceded to Greece.

9. The Court did not find it necessary to express its opinion on the effect, according to the general rules of international law, of the grant of concessions by the territorial sovereign in occupied territory as regards the successor State, since the matter was covered by the terms of article 9 of Protocol XII of the Treaty of Lausanne, 1923. This provided expressly that successor States of the Ottoman Empire were to be subrogated as regards concession contracts entered into with the Ottoman authorities prior to 29 October 1914, in so far as concerned territories detached from Turkey under the Treaty of Lausanne, and prior to the coming into force of the respective treaties of peace in so far as concerned territories detached from Turkey after the Balkan wars. Since no such territories had been assigned to Greece before the entry into force of the Treaty of London in November 1913, the Court held that Greece was bound to respect the concession, which had been duly entered into in April 1913 according to Ottoman law.

Lighthouses in Crete and Samos (1937)

France v. Greece

Permanent Court of International Justice, Series A/B No. 71

10. The Permanent Court of International Justice was asked by France and Greece to decide whether the principle laid down in the Court's earlier Judgment in the Lighthouses Case applied as regards lighthouses situated in Crete and Samos. In its earlier Judgment the Court held that the contract entered into in 1913 between the French concession holders and the Ottoman Government was duly entered into and is accordingly operative as regards the Greek Government in so far as concerns lighthouses situated in the territories assigned to it after the Balkan wars or subsequently. The Greek Government argued that the wide measure of autonomy enjoyed by Crete and Samos had caused Turkey to lose sovereignty over these islands even before 1913. The concessionary contract entered into by the Ottoman authorities in 1913 was not therefore validly concluded in respect of them, nor could they have been detached from Turkey by a transfer of sovereignty to Greece at a subsequent date.

11. The Court held, however, that Crete and Samos could only be regarded as detached if there had been an "entire disappearance of any political link", and that, notwithstanding their practical autonomy, both had remained part of the Ottoman Empire, under the sovereignty of the Sultan, until the treaties of cession had been concluded at a date subsequent to that of the renewal of the concessionary contract. The contract was therefore "duly entered into and ..operative as regards the Greek Government" in so far as it concerned lighthouses situated on Crete and Samos, which territories had been assigned to that Government after the Balkan wars.

See also Lighthouses Concession Case, Claims Nos. 11 and 4, paras. 96-100 infra.

(B) Date of Transfer of Sovereignty

Ottoman Public Debt Arbitration (1925)

Bulgaria, Iraq, Palestine, Transjordan, Greece, Italy and Turkey

Arbitrator (Borel) appointed under articles 46 and 47 of the Treaty of Lausanne, 1923, by the Council of the League of Nations

Reports of International Arbitral Awards, vol. I, p. 529

12. Amongst the points raised in the course of the arbitration was whether the date of transfer of territorial sovereignty was the actual date of effective transfer or that laid down in the particular treaty of cession. Bulgaria argued that she should not be held responsible for the territories detached from her under the Treaty of Neuilly up to 9 August 1920, the date when the Treaty came into force, but only until October or December 1919, when the territories concerned had been occupied by the Allied Powers in a manner which had amounted to a virtual execution of an anticipated transfer of sovereignty. The Arbitrator held that, although Bulgaria had lost the revenues for the territories during the intervening period, nevertheless the date of de facto transfer could not prevail over the clear wording of the Treaty of Lausanne which referred to the date on which the Treaty of Neuilly came into force.

"Dès lors, le transfert de souveraineté ne peut être considéré comme effectué juridiquement que par l'entrée en vigueur du Traité qui le stipule et à dater du jour de cette mise en vigueur. Une dérogation à ce principe ne peut être admise que si elle est nettement convenue dans le Traité en cause."

13. Greece argued that she had only acquired sovereignty over the territories ceded to her by the Allied Powers (to which in turn they had been ceded by Bulgaria under the Treaty of Neuilly in 1920) at the date when the transfer had been ratified in 1924. It was held by the Arbitrator, however, that, having regard to the common intent of the parties, responsibility for the share of the debt of the territories in question between 1920 and 1924 should be borne by Greece, to which the territories had actually passed.

Lighthouses Concession Case (1956)

France v. Greece

Arbitral Tribunal established under a Special Agreement of 15 July 1931

Award dated 24-27 July 1956

14. After two related decisions of the Permanent Court of International Justice, arbitral proceedings were held in order to settle outstanding differences between the Greek Government and the French Company which held a lighthouse concession from the Ottoman Government operative in territory ceded to Greece. In the course of an introductory historical survey, the Tribunal dealt with the question of the date when certain territorial changes after the Balkan wars and after the First World War should be considered to have taken place. In the Ottoman Debt Arbitration it had been held that the date of the transfer to Greece of responsibility for part of the Ottoman debt relating to Western Thrace should not be that of the Treaty of Lausanne in 1924, as Greece asserted, nor October or December, 1919, the date of de facto loss of sovereignty by Bulgaria, but August 1920, the date when the Treaty of Neuilly came into force. The Tribunal adopted the decision of the Arbitrator (Borel) in the earlier case, in accordance with the following reasoning:

"Le Tribunal s'est demandé quelles considérations — identiques différentes — doivent présider à la solution de la question parallèle de savoir à quelle date s'est opérée la subrogation des deux États successeurs successifs, la Bulgarie et la Grèce, dans les droits et charges découlant de la concession des phares en ce qui concerne la Thrace occidentale. La question n'est pas d'une grande importance pratique parce que le seul phare existant dans cette région pari être celui de Dédéyagatch, mais elle a un interêt théorique indéniable. Si la solution de M. Borel, dictée par des considérations propres au passage des dettes publiques, était applicable également à la transition des droits et charges découlant de concessions, la Bulgarie devrait être considérée comme État successeur pour la Thrace occidentale du 25 août 1913 (date de l'entrée en vigueur du traité de Bucarest, répartissant les anciens territoires turcs entre les Alliés balti-
providing for the appointment of a Commissioner to Austria and Hungary and her allies during the First World War. In 1924 a Tripartite Agreement was signed, but before the entry into force of the Treaty of Versailles whereby the territory concerned was ceded to Poland.

(A) Succession of States and Governments

Administrative Decision No. I (1927)

United States, Austria, Hungary

Claims Commissioner (Parker) appointed under Special Agreement of 20 November 1924

Reports of International Arbitral Awards, vol. VI, p. 203

16. In 1921 the United States entered into two Treaties with Austria and Hungary in order to secure certain rights to compensate the United States and its nationals in respect of damage caused by the acts of Austro-Hungary and her allies during the First World War. In 1924 a Tripartite Agreement was signed, providing for the appointment of a Commissioner to settle claims falling under the terms of the two Treaties. In the course of Administrative Decision No. I, laying down certain general principles to govern the detailed awards, the Commissioner stated that:

"The Austria and the Hungary dealt with by the United States in entering into the Treaties of Vienna and of Budapest respectively not only bore little resemblance either to the Government or the territory of the Dual Monarchy with which the United States had been at war but differed essentially from the former Austrian Empire and the former Kingdom of Hungary."11

Moreover, he held that the latter two States had had no international status. The Commissioner concluded, however, that under the Treaties of Vienna and of Budapest, Austria and Hungary had agreed to pay compensation in respect of certain of the acts of the former Austro-Hungarian Monarchy.14

Case Concerning German Reparations Under Article 260 of the Treaty of Versailles (1924)

Germany v. Reparations Commissions

Arbitrator (Beichmann) appointed under Protocol of 30 December 1922

Reports of International Arbitral Awards, vol. I, p. 429

17. In the course of this arbitration14 the Arbitrator found that, although the preamble of the Treaties of St. Germain and Trianon stated that the former Austro-Hungarian Monarchy had ceased to exist, nevertheless, the Treaties were based on the supposition that Austria and Hungary represented the former State, at least as regards the cession of territory.

18. See also the Ottoman Public Debt Arbitration,15 in which the Arbitrator stated that: "En droit international, la République turque doit être considérée comme continuant la personnalité de l'Empire ottoman."

(D) Succession to Territorial Claims

Case of Clipperton Island (1931)

Mexico v. France

Arbitrator (King of Italy) appointed under a Special Agreement of 2 March 1909

Reports of International Arbitral Awards, vol. II, p. 1105

19. In this dispute between France and Mexico regarding their rival claims to sovereignty over the Island of Clipperton, Mexico contended that the Island had been discovered by Spanish sailors in the 16th century and that, by the law then in force, it had been given to Spain from whom it had passed to Mexico, as Spain's successor, in 1836.

20. The Arbitrator held that, even assuming the discovery to have been made by Spain, it would be necessary for Mexico to show that Spain had effectively exercised the right of incorporating the Island in her possessions, but that Spain had not done so. Since Mexico had similarly failed to exercise any right of sovereignty before the arrival of French sailors on the Island, it was therefore a territorium nullius at the latter date and the French claim to sovereignty, based on effective occupation, was to be preferred. See also Island of Palmas Case, paras. 31-32 infra.

(E) Transfer of Real Rights or International Servitudes

Case Concerning Right of Passage Over Indian Territory (merits) (1960)

Portugal v. India

International Court of Justice, I.C.J. Reports, 1960, p. 6

21. Portugal claimed before the International Court that she had a right of passage through intervening Indian territory to the extent necessary for the exercise

11 Award of 24-27 July 1956, at pp. 67-8.
13 See para. 109 infra.
14 For other aspects of the Award see para. 5 supra.
15 See para. 109 infra.
of her sovereignty over two small enclaves and that India had refused to recognize the obligations imposed by this right.

22. In support of her claim Portugal relied in part on certain agreements concluded in the 18th century between Portugal and the local Maratha ruler. Although the Court found that the agreements concerned amounted only to a revenue grant, and not to a grant of sovereignty together with a right of passage, it appears to have assumed that any such rights granted would have been binding on successor States. The Court found, however, that:

"... the situation underwent a change with the advent of the British as sovereign of that part of the country in place of the Marathas. The British found the Portuguese in occupation of the villages and exercising full and exclusive administrative authority over them. They accepted the situation as they found it and left the Portuguese in occupation of and in exercise of exclusive authority over, the villages. The Portuguese held themselves out as sovereign over the villages. The British did not, as successors of the Marathas, themselves claim sovereignty, nor did they accord express recognition of Portuguese sovereignty, over them. The exclusive authority of the Portuguese over the villages was never brought in question. Thus Portuguese sovereignty over the villages was never brought in question. Thus Portuguese sovereignty over the villages was recognized by the British in fact and by implication and was subsequently recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory."

23. Concerning the right of passage, the Court reached the conclusion that:

"... with regard to private persons, civil officials and goods in general there existed during the British and post-British periods a constant and uniform practice allowing free passage between Damman and the enclaves. This practice having continued over a period extending beyond a century and a quarter unaffected by the change of régime in respect of the intervening territory which occurred when India became independent, the Court is, in view of all the circumstances of the case, satisfied that that practice was accepted as law by the Parties and has given rise to a right and a correlative obligation."

In the case of armed forces and armed police, the Court found that their passage had been dependent on the discretionary power of the territorial sovereign and that no right of passage as such existed in favour of Portugal.

"The course of dealings established between the Portuguese and the British authorities with respect to the passage of these categories excludes the existence of any such right. The practice that was established shows that, with regard to these categories, it was well understood that passage could take place only by permission of the British authorities. This situation continued during the post-British period."

24. The Court held that India had not acted contrary to its obligations regarding the passage of private persons, since such passage was subject at all times to India's power of regulation and control.

25. See also Case of the Free Zones of Upper Savoy and the District of Gex, paras. 34-35 infra, in which the Permanent Court of International Justice held that obligations in the nature of real rights had been created, which attached to the District of St. Gengolph and remained binding upon the successor State after sovereignty had passed from Sardinia to France.

II. State succession in relation to treaties

(A) Succession to treaty rights and obligations

CASE CONCERNING RIGHTS OF NATIONALS OF UNITED STATES OF AMERICA IN MOROCCO (1952)

France v. United States

International Court of Justice, I.C.J. Reports 1952, p. 176

26. The United States contended that certain enactments made during the French Protectorate over Morocco were inapplicable to United States nationals without its consent, by virtue of the consular jurisdiction granted under Treaties between Morocco and the United States dating from before the establishment of the Protectorate. Both parties assumed that such Treaties subsisted.

27. Regarding the Treaty of Fez under which the Protectorate was established, the International Court stated:

"Under this Treaty, Morocco remained a sovereign State but it made an arrangement of a contractual character whereby France undertook to exercise certain sovereign powers in the name and in behalf of Morocco, and, in principle, all of the international relations of Morocco. France, in the exercise of this function, is bound not only by the provisions of the Treaty of Fez, but also by all treaty obligations to which Morocco had been subject before the Protectorate and which have not since been terminated or suspended by arrangement with the interested State."

28. The Court also implied that Treaties concluded by France pursuant to the powers which Morocco had conferred on France by the Treaty of Fez would continue to bind Morocco after the Protectorate ended.

TUNIS AND MOROCCO NATIONALITY DECREES (1923)

France, Great Britain

Permanent Court of International Justice, Series B, No. 4

29. In support of its contention that certain Decrees regulating nationality in Tunis and Morocco were not applicable to British subjects, Great Britain relied on certain Treaties concluded with Tunis and Morocco before the establishment of the French Protectorates there. Under these Treaties, of 1825 and 1856 respectively, British subjects enjoyed "a measure of extraterritoriality incompatible with the imposition of another nationality." In reply, France contended that the Treaties concerned had lapsed by virtue of the doctrine clausula rebus sic stantibus, the caputalitary régime having lost its reason of existence with the setting up of a judicial system in conformity with French legislation.

20 I.C.J. Reports, 1952, at p. 188.
21 P.C.I.J., Series B, No. 4, at p. 29.
30. The Court did not find it necessary to rule upon this point, other than by stating that no pronouncement could be made without recourse to the principles of international law concerning the duration of the validity of treaties. The Court did, however, conclude that the question raised did not "by international law, fall solely within the domestic jurisdiction of a State". The Court also recognized that, so far as Morocco was concerned, Great Britain had continued to exercise capitulatory rights in the French Protectorate of Morocco. See also Finnish Shipowners Case, paras. 106-107 infra.

(B) Succession to Treaty Rights and Obligations Relating to Territory

Island of Palmas Case (1928)

Netherlands v. United States

Arbitrator (Huber) appointed under a Special Agreement of 23 January 1925

Reports of International Arbitral Awards, vol. II, p. 829

31. The Netherlands and the United States both claimed sovereignty over the Island of Palmas, the claim of the United States being based on the Treaty of 1898 in which Spain had ceded her rights of sovereignty over the Philippines and the surrounding area, including the Island of Palmas, to the United States.

32. The Arbitrator agreed that the United States had succeeded to such title as Spain had possessed and could transfer, but held that the Spanish claim based on discovery gave rise only to an inchoate title, which could not prevail over the title founded on the continuous and peaceful display of sovereignty evidenced by the Netherlands.

Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand) Merits (1962)

Cambodia v. Thailand

International Court of Justice, I.C.J. Reports 1962, p. 6

33. This dispute between Cambodia and Thailand regarding sovereignty over the Temple of Preah Vihear turned largely on the interpretation to be given to the proceedings of two frontier commissions established in 1904 and 1907 under treaties between France, on behalf of Indo-China, including Cambodia, and Thailand. The Judgement of the International Court was founded on the succession by Cambodia to the rights granted to France under the treaties in question.

Case of the Free Zones of Upper Savoy and the District of Gex (1932)

France v. Switzerland

Permanent Court of International Justice, Series A/B No. 46.

34. By a Treaty of 1816 between Sardinia and Switzerland relating to the delimitation of the political frontier between the two countries, restrictions were placed on the imposition of customs dues by Sardinia in the District of St. Gingolph. The Treaty was followed in 1829 by a manifesto of the Sardinian Court of Accounts which further described the restrictions placed on the District. After 1860, when Sardinia transferred the Free Zone of Upper Savoy, including the District of St. Gingolph, to France, France continued to observe the restrictions. However, in 1919 France suggested to Switzerland that the régime established regarding the Zones should be revised and an indication to that effect incorporated in the Versailles settlement. Accordingly article 435 of the Treaty of Versailles contained a statement that France and Switzerland were to agree to an amendment to the status of the Zones. The question at issue between the parties was whether that status could be abolished, in the light of article 435, without the express consent of Switzerland.

35. The Court's Judgment upholding the need for Switzerland's consent was based on the clear recognition by France of the special status established during the period of Sardinian sovereignty in relation to the District of St. Gingolph and on the nature of the rights created by international agreement, which attached to the territory concerned.

"With particular regard to the zone of Saint-Gingolph, the Court being of opinion that the Treaty of Turin of March 16th, 1816, has not been abrogated by Article 435, paragraph 2, of the Treaty of Versailles, with its Annexes, the same is true as regards the Manifesto of the Royal Sardinian Court of Accounts of September 9th, 1829. This Manifesto, moreover, which was issued in pursuance of royal orders, following upon the favourable reception by H.M. the King of Sardinia of the request of the Canton of Valais based on Article 3 of the said Treaty of Turin, terminated an international dispute and settled, with binding effect as regards the Kingdom of Sardinia, what was henceforward to be the law between the parties. The concord of wills thus represented by the Manifesto confers on the delimitation of the zone of Saint-Gingolph the character of a treaty stipulation which France must respect as Sardinia's successor in the sovereignty over the territory in question."24

(C) Nature of Treaty Obligation

Case of British Interests in Spanish Morocco (1925)

Spain v. Great Britain

Arbitrator (Huber) appointed under a Special Agreement of 29 May 1925

Reports of International Arbitral Awards, vol. II, p. 614

36. Great Britain and Spain agreed to arbitrate a number of disputes involving damage to the interests of British nationals which had occurred in the Spanish Zone of Morocco. One of these disputes concerned the British Consul's house at Rio Martin. Under a Treaty concluded in 1783 between Great Britain and the Maghzen of Morocco, the latter undertook to provide a house for the British Consul at Rio Martin. The Consul subsequently occupied the house until 1914, although after 1895 only as a summer residence. In 1896 the British diplomatic agent entered into negotiations for the exchange of the house at Rio Martin for another in Tetuan. The Moroccan authorities agreed to this request, although no site was actually agreed upon by the British and Moroccan authorities until 1907.

37. Great Britain claimed that Spain, which had later obtained a Protectorate over part of Morocco, including Tetuan, had succeeded to the existing obligations of the Moroccan authorities in respect of the house. Spain contended that the agreement reached between

1896 and 1907 was no more than a declaration and was not binding upon the protecting State in the absence of a Sherifian decree. The Arbitrator held that the exchange of correspondence between the British and Moroccan authorities showed a sufficiently clear agreement between them and that there was no need to inquire into Moroccan constitutional law on the matter.

38. The Arbitrator held that Spain had succeeded, as protecting Power, to the obligations of the Maghzen in respect of the exchange of houses. The obligation had been perfected inasmuch as it constituted a pactum de contrahendo and its executory nature did not render it binding solely on the Maghzen, as Spain contended.

III. State succession in relation to private rights and concessions

(A) Principle of respect for private rights

Settlers of German origin in territory ceded by Germany to Poland (1923)

Germany, Poland

Permanent Court of International Justice, Series B, No. 6

39. The Council of the League of Nations requested the Permanent Court of International Justice to give an advisory opinion on the question whether or not the Polish Government had acted in conformity with its international obligations in seeking to cancel, or in refusing to recognize, certain contracts for the occupation of land held by settlers of German origin who had acquired Polish nationality in consequence of the transfer of territory from Germany to Poland.

40. The contracts, under which the settlers held land from the State, were of two kinds, both offering considerable security of tenure. The first, the Rentengutsverträge, were special amortization contracts between the Prussian Government and the tenant-purchaser which were concluded by an Auflassung, or formal declaration of the transfer of ownership. The Polish Government refused to recognize any Rentengutsverträge which had not been concluded by Auflassung before the Armistice with Germany on 11 November 1918.

41. Upon examination of the provisions of German law, the Court determined that the Rentengutsverträge gave rise to vested rights enforceable against the vendor even before the conclusion of an Auflassung. As regards the question of State succession, the Court rejected the view that the contracts were of a “personal” nature, binding only on the original parties, and that the Rentengutsverträge were curtailed by thecession of territory.

“Private rights acquired under existing law do not cease on a change of sovereignty. No one denies that the German Civil Law, both substantive and adjective, has continued without interruption to operate in the territory in question. It can hardly be maintained that, although the law survives, private rights acquired under it have perished. Such a contention is based on no principle and would be contrary to an almost universal opinion and practice.”

42. The Court stated firmly that the new territorial sovereign was bound to respect private rights.

“The Court is here dealing with private rights under specific provisions of law and of treaty, and it suffices for the purposes of the present opinion to say that even those who contest the existence in international law of a general principle of State succession do not go so far as to maintain that private rights including those acquired from the State as the owner of the property are invalid as against a successor in sovereignty.”

43. Upon examination of the pertinent provisions of the Minorities Treaty and of the Treaty of Versailles, the Court held that Poland’s actions were unjustified. Whilst the Peace Treaty did not “in terms formally announce the principle that, in the case of a change of sovereignty, private rights are to be respected... this principle is clearly recognized by the Treaty”. The position was not affected in the opinion of the Court by the political motive originally connected with the Rentengutsverträge; they remained contracts under civil law. As regards the formal transfer of ownership by Auflassung between 11 November 1918 and the entry into force of the Treaty of Peace under which the territory was ceded, the Court held as follows:

“The settlers were already in legal possession of the lands in which they had invested their money, and to which they had already acquired rights enforceable at law; and the Prussian State was not forbidden to perform the usual administrative acts under its pre-existing contracts with private individuals, especially where the delay in the performance of such acts had been due to the disturbed conditions arising from the war.”

44. The second class of contracts were leases (Pachtverträge) concluded prior to 11 November 1918 and converted before the entry into force of the Treaty of Versailles into Rentengutsverträge by the German Government. The Court held that this exchange of contracts “... was a reasonable and proper operation in the ordinary course of management of land”. Accordingly, the Court held that the refusal of the Polish Government to recognize the transfer by the Prussian State could not be justified:

“As the Prussian State retained and continued to exercise its administrative and proprietary rights in the ceded territory until this territory passed to Poland under the Treaty of Peace, the only ground on which the position of Poland could be justified is, in the opinion of the Court, the contention that the granting of the Rentengutsverträge was prohibited by the provision in the Spa Protocol, by which the German Government engaged, while the Armistice lasted, not to take any measure that could diminish the value of its domain, public or private, as a common pledge to the Allies for the recovery of reparations. The Court thinks that in view of the connexion which has been shown to exist between the Pachtverträge and the Rentengutsverträge, it would be an unreasonable straining of the prohibition in the Protocol to hold that it precluded the Prussian State from granting, prior to the passing of the territory to Poland, a Rentengutsvertrag to the holder of a Pachtvertrag granted prior to the Armistice.”

25 P.C.I.J., Series B, No. 6, at p. 36.
permanent court of international justice, series A, No. 7.

45. Germany presented a claim before the Permanent Court of International Justice regarding certain German interests in the part of Upper Silesia ceded to Poland by Germany after the First World War. The interests included a factory at Chorzow which had been operated by a German company under a contract concluded in 1915, under which the latter had retained ownership of the land, buildings and installations. In December 1919 the German Government sold its interests to a second, newly established company, the shares of which were held by a third company of which the German Reich was the creditor. The second company was entered as owner in the local land registry in January 1920. The territory having then been transferred to Poland, a Polish court held in July 1922, in reliance on article 256 of the Treaty of Versailles and the provisions of a Polish law passed in 1920 and extended to Polish Upper Silesia in 1922, that the registration was null and void. The property rights were then registered in the name of the Polish Treasury and an agent of the Polish Government took over the operation of the factory.

46. Germany contended that the relevant provisions of the 1920 Polish law, which declared void interests acquired from the German Government after the date of the Armistice, were contrary to the German-Polish Convention concerning Upper Silesia concluded at Geneva in 1922. The major part of the case was therefore concerned with determining the compatibility of these two instruments. Article 1 of the Geneva Convention stated that the law in force in Upper Silesia was to be maintained, subject to consequences arising out of the transfer of sovereignty and modifications thereby involved. Whilst Poland was accordingly permitted to make certain changes in existing legislation, a special procedure was laid down for settling disputes as to the suitability of a particular enactment. The Court held that:

"The reservation...in regard to consequences arising out of the transfer of sovereignty and modifications thereby involved, cannot, in the Court's opinion, relate to laws such as that of July 14th, 1920, but rather to constitution and public law provisions maintaining which would have been incompatible with the transfer of sovereignty."31

47. The first section of the Geneva Convention was divided into three headings of which the third, entitled "Expropriation" set out the express conditions under which Poland might expropriate German-owned "undertakings belonging to the category of major interests including mineral deposits and rural estates" (article 6). Regarding this section the Court held that:

"...there can be no doubt that the expropriation allowed under Head III of the Convention is a derogation from the rule generally applied in regard to the treatment of foreigners and the principle of respect for vested rights. As this derogation itself is strictly in the nature of an exception, it is permissible to conclude that no further derogation is allowed. Any measure affecting the property, rights and interests of German subjects covered by Head III of the Convention, which is not justified on special grounds taking precedence over the Convention, and which oversteps the limits set by the generally accepted principles of international law, is therefore incompatible with the régime established under the Convention...It follows from these same principles that the only measures prohibited are those which generally accepted international law does not sanction in respect of foreigners; expropriation for reasons of public utility, judicial liquidation and similar measures are not affected by the Convention."32

48. In the opinion of the Court the Treaty of Versailles had clearly recognized "the principle that, in the event of a change of sovereignty, private rights must be respected".33

49. As regards the sale of the interests of the German Reich in 1919, after the Armistice Agreement and the Treaty of Versailles, the Court held that:

"Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of its property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty."34

50. Having determined that the sale by Germany of her immediate interests in the factory was a genuine and bona fide transaction involving public property, the Court then held that the application to the German company set up in 1919 of article 256 of the Treaty of Versailles35 (as Poland contended)

"...must, in accordance with the principles governing State succession—principles maintained in the Treaty of Versailles and based on considerations of stability of legal rights—be construed in the light of the law in force at the time when the transfer of sovereignty took place."36

51. Since Germany had not owned the factory when sovereignty had been transferred, the company had therefore already acquired a right of ownership which Poland was bound to respect, in accordance with the principle of respect for vested rights—

"a principle which, as the Court has already had occasion to observe, forms part of generally accepted international law, [and] which, as regards this point, amongst others, constitutes the basis of the Geneva Convention"37

52. The Court also held that the operation of the factory by the Polish Government was contrary to the provisions of the Geneva Convention as regards the company which had previously run the factory.

(B) Private rights over land acquired from native rulers

G. R. Burt (Fijian Land Claims) (1923)

United States v. Great Britain

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910


32 Ibid.
33 Ibid., at p. 31.
34 Ibid., at p. 30.
35 This article provided for the transfer of public property to the successor State.
37 Ibid., at p. 42.
which had refused to recognize the claimant's title. The islands which formed the subject of the case, had gained a valid title from the local chief in accordance with the principles laid down in the Burt case. The Tribunal held that Burt had obtained a valid title to dispose of land as they chose and Great Britain was ineffective unless the express consent of a special class of "laukeis", defined as occupiers of the soil, was obtained.

56. Since the chiefs had certainly assumed the right to dispose of land as they chose and Great Britain herself, in accepting the deed of cession, had acted on the theory that they were competent to convey title, the Tribunal held that Burt had obtained a valid title which Great Britain, as the succeeding Power, was bound to recognize.

ISAAC M. BROWER (FIJIAN LAND CLAIMS) (1923)

United States v. Great Britain

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

57. The Tribunal held that although the claimant had gained a valid title from the local chief in accordance with the principles laid down in the Burt case, the islands which formed the subject of the claim had only a speculative value. Only nominal damages were awarded therefore against Great Britain, which had refused to recognize the claimant's title.

WEBSTER CLAIM (1925)

United States v. Great Britain

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

58. Between 1836 and 1839 William Webster, a United States citizen, purchased large tracts of land in New Zealand from native chiefs and tribes. In 1839 the British Government appointed a Lieutenant-Governor of New Zealand and directed him to proclaim that Great Britain would "not acknowledge as valid any title to land, which either has been or shall hereafter be acquired in that country", unless derived from and confirmed by the British Crown. Great Britain entered into a treaty of cession with the native chiefs and tribes in 1840.

59. Land commissions were appointed to examine titles derived from the natives and to recommend Crown grants in lieu thereof, up to a maximum of 2,500 acres, unless more was specially authorized. Webster submitted a claim and was allowed 42,000 acres. The contention before the British-American Arbitral Tribunal was that the various native grants should have been given effect as regards their entire extent, over and above the 42,000 acres granted by the Crown.

60. The Tribunal found that the system of native land tenure in New Zealand prior to 1840 had no clear concept regarding conveyance of title to land and was therefore to be distinguished from the situation in the Fiji Islands dealt with in the Burt case. No "specific customary law as to the manner or effect of... wholesale alienations of communal property" had grown up. Thus although the chiefs, representing the political organization of the natives, were capable of conveying sovereignty to Great Britain, something less than dominium, as understood in developed law, had been conveyed to Webster as regards his land. Having regard also to the indeterminate boundaries of the land forming part of the native grant and the exchange of Webster's title in respect of 42,000 acres, under native customary law, for a Crown grant, the Tribunal therefore rejected Webster's claim.

ADOLPH G. STUDER CLAIM (1925)

United States v. Great Britain

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

61. Between 1875 and 1877 Adolph G. Studer, a United States citizen, secured a cession of land from the Sultan of Muar in Malaya, under an instrument executed in accordance with the common law system of tenure. The Sultan died in 1877 and his dominions were annexed by the Sultan of Johore. In 1885 Great Britain assumed international responsibility for the Government of Johore.

62. The claim on behalf of Studer was that he had been deprived of the benefits of his concessions owing to its non-recognition by the Sultan of Johore. The Tribunal found that the evidence presented did not suffice to enable it to proceed to a decision and recommended that the case be referred to the local courts in Johore. Regarding the construction of the deed of cession, however, the Tribunal stated as follows:

39 See G. R. Burt (Fijian Land Claims), paras. 53-56 supra.
40 Loc. cit.
were of the opinion that: As regards this reorganization, the Arbitrators concluded that: article 320 of the Treaty of St. Germain, providing for the administrative and technical reorganization of railway lines situated in the territory of more than one State as a result of the dismemberment of the former Austro-Hungarian Monarchy. The situation in this respect offers serious complications. We are dealing with a transition period; and while it is plain that the native customary law, whatever it may have been, ultimately gave way to the white man's law, the point of time at which it can fairly be said that the process had advanced far enough to embrace the possibility of a grant of this form and character is, in our opinion, hardly susceptible of determination on the record before us. The evidence of actual practice at the period under consideration is fragmentary and inconclusive.42

(C) PRINCIPLE OF RESPECT FOR CONCESSIONS GRANTED BY PRECEDING STATE

CASE OF THE ZELTWEG-WOLFSBERG AND UNTERDRAUBURG-WOELLAN RAILWAY (1933, 1934, 1938)

Austria, Yugoslavia, Railway Company Zeltweg-Wolfsberg and Unterdrauburg-Woellan

Arbitrators (Guerrero, Mayer and Politi) appointed under resolutions of the Council of the League of Nations of 26 and 30 May 1933

Reports of International Arbitral Awards, vol. III, p. 1795

63. Arbitrators were appointed to settle a dispute between the Railway Company and the States territorially concerned in order that agreements could be entered into regarding the future operation of the railway, in accordance with the Treaty of St. Germain. The Company had been given a ninety-year concession in 1897 by the Austro-Hungarian Government; as a result of the territorial changes brought about by the Treaty of St. Germain and Trianon, the middle section of the railway passed through Austria and the two ends remained in Hungary.

64. The case turned chiefly on the application to the particular facts of the case of the provisions of article 320 of the Treaty of St. Germain, providing for the administrative and technical reorganization of railway lines situated in the territory of more than one State as a result of the dismemberment of the former Austro-Hungarian Monarchy, by means of an agreement between the owning company and the States concerned. As regards this reorganization, the Arbitrators were of the opinion that:

"L'article 320 se borne à confirmer, ainsi que l'a reconnu la jurisprudence antérieure, ce principe du droit public international que les droits tenus par une compagnie privée, d'un acte de concession, ne sauraient être mis à néant ou lésés du seul fait que le territoire sur lequel est assis le service public concédé a changé de nationalité . . . "43

CASE OF THE ZELTWEG-KÖSZEG RAILWAY (1929)

Sopron-Köszeg Railway Company v. Austria and Hungary

Arbitrators (Guerrero, Kalff and Mayer) appointed by decision of the Council of the League of Nations of 8 and 26 September 1928, under article 320 of the Treaty of St. Germain and article 304 of the Treaty of Trianon

Reports of International Arbitral Awards, vol. II, p. 961

65. In 1907 the Sopron-Köszeg Railway Company was granted a ninety-year railway concession by the Royal Hungarian Government. Under an agreement between the Government and the Company in 1909, the Government took over the operation of the railway, subject to paying to the Company an agreed share of the receipts. As a result of the territorial changes brought about by the Treaties of St. Germain and Trianon, the middle section of the railway passed through Austria and the two ends remained in Hungary.

66. Article 320 of the Treaty of St. Germain and article 304 of the Treaty of Trianon provided that the railways of the former Austro-Hungarian Monarchy which passed through several States were to be subject to administrative and technical reorganization by agreement between the Company owning the railway and the States concerned. Having reached agreement with Hungary but having failed to reach agreement with Austria, the Company brought the dispute before the Council of the League of Nations which appointed three Arbitrators to determine the case.

67. As regards the validity vis-à-vis Austria of the concession contract and the operating contract of 1909, the Arbitrators held that:

"... en principe, les droits tenus par une compagnie privée, d'un acte de concession, ne sauraient être mis à néant ou lésés du seul fait que le territoire sur lequel est assis le service public concédé a changé de nationalité; ... la majorité des auteurs et les solutions de la pratique internationale les plus conformes à la conception moderne du droit des gens sont en ce sens."44

68. However, in view of the events which had occurred since 1907 and 1909, and the provisions of the Treaties providing for reorganization of the Austro-Hungarian railways, the Arbitrators concluded that:

"... les dispositions contractuelles qui régissaient la Compagnie avant la guerre ne peuvent être déclarées ni totalement invalidées par l'effet des changements de souveraineté qui ont affecté les territoires siéges de son entreprise, ni davantage totalement valides et exécutoires dans leur lettre et teneur jusqu'à la fin de la concession."45

69. Under the wide powers granted to them the Arbitrators proceeded to lay down the details of the reorganization of the railway, including the purchase of the entire line by Austria.

See also "Barcs-Pakrac Railway Case", Reports of International Arbitral Awards, vol. III, p. 1569.

42 Ibid., at p. 152.
45 Ibid., at p. 969.
He also declared that article 181 contained:

forests, and that Greece could not therefore bring an
merely personal obligations, giving cutting rights in the
on behalf of Bulgaria that the concessionary rights were
became Greek nationals after the First World War.

by transfers of territory made in execution of the later
Treaties between Turkey and Bulgaria, Greece and
Serbia, respectively, in 1913-1914, should not be affected
regarding the application of the article to certain forests
situated in territory ceded to Bulgaria by Turkey in
1913.

Before the transfer, the Ottoman Government
had granted a concession for the exploitation of the
forests to a certain company, the owners of which
became Greek nationals after the First World War.
Bulgaria refused to recognize the concession, however,
and granted a fresh concession to another company.

During preliminary hearings to determine
whether article 181 was applicable to the dispute, the
Arbitrator stated that:

"Un principe général du droit commun interna-
tional, ceului du respect, sur un territoire annexé, des
droits privés régulièrement acquis sous le régime
antérieur, se trouve expressément sanctionné par le
Traité de Neuilly, suivant l'exemple des traités de
paix de 1913-1914." 47

He also declared that article 181 contained:

"... une conséquence expresse du principe bien
connu du respect des droits acquis dans des territoires
cédés, c'est-à-dire le renouvellement à la charge de
l'Etat cessionnaire, d'une obligation incombant à l'Etat
cédant." 48

During the hearings on the merits it was argued
on behalf of Bulgaria that the concessionary rights were
merely personal obligations, giving cutting rights in the
forests, and that Greece could not therefore bring an
international claim in respect of them. The Arbitrator
stated his opinion as follows:

"Dans le cas présent il est question de l'interpré-
tation de l'article 181 du Traité de Neuilly et de l'article
10 du Traité de Constantinople. Le premier
des deux articles parle de "droits privés" et le
second de "droits acquis". L'article 11 du Traité de
Constantinople énonce, en outre, une règle spéciale
concernant les "droits de propriété foncière". Il paraît
nécessaire, en raison du contexte, d'interpréter les
deux premières expressions comme n'étant pas
limitées aux droits réels. Or, si, après l'annexion du
territoire dont il s'agit, le Gouvernement bulgare
avait prononcé une loi annulant par exemple toutes
les créances acquises, avant l'annexion, sur les habi-
tants du territoire, cette loi serait dû être considérée
comme incompatible avec l'article 10 du Traité de
Constantinople.

"En ce qui concerne les droits de coupe, on peut
dire que ceux-ci ne sont pas entièrement annulés
puisque le droit subsidiaire à une indemnité, accordé
aux ayants droit par les cédants en vertu des contrats

48 Ibid., at p. 1401.

(D) SUBROGATION OF SUCCESSOR STATE TO CONCES-
SIONARY RIGHTS AND OBLIGATIONS OF PRECEDING
STATE

THE MAVROMMATIS PALESTINE CONCESSIONS (1924)

Greece v. Great Britain

Permanent Court of International Justice, Series A,
No. 2

Greece brought a claim against Great Britain
before the Permanent Court of International Justice
on the ground that the Government of Palestine, and
consequently the British Government, had wrongfully
refused to give full recognition to a number of conces-
sionary contracts entered into by Mavrommatis, a
Greek national, with the Ottoman authorities in Pale-
stine, before Great Britain became the Mandatory on
behalf of the League of Nations. Article 26 of the
Mandate provided that disputes between the Mandatory
and another Member of the League of Nations regard-
ing the "interpretation or the application" of the pro-
visions of the Mandate should be submitted to the
Permanent Court of International Justice if settlement
could not be reached by negotiation.

In determining whether or not it had jurisdiction
the Court considered the interpretation to be given to
article 11 of the Mandate, which provided that "subject
to any international obligations accepted by the Man-
datory", the Administration of Palestine should have
full powers to assume public ownership or control over
public works, services or utilities. The Court held that
the "international obligations accepted by the Manda-
tory" included in this instance those contained in
Protocol XII of the Treaty of Lausanne. This stated that concessions granted by the Turkish Government or by any Turkish local authority before 29 October 1914 were to be maintained by the Mandatory, subject to a right, within a limited period, to purchase the concessions or to permit their readaptation to the change in circumstances. The case (and the Court's subsequent Judgment, The Mavrommatis Jerusalem Concessions) was therefore largely concerned with the application of the provisions of Protocol XII to the group of concessions held by Mavrommatis which had been concluded before 29 October 1914 and the acts taken by the Mandatory which affected those concessions.

77. Another group of concessions held by Mavrommatis, however, were not duly signed by the Ottoman authorities until 1916 and were never confirmed by imperial Firman, as Ottoman law required. Before concluding that it lacked jurisdiction under article 26 of the Mandate to consider these concessions, since they did not satisfy the time limit specified in the Protocol, the Court stated that:

“It will suffice to observe that if on the one hand, Protocol XII being silent regarding concessions subsequent to October 29th, 1914, leaves intact the general principle of subrogation, it is, on the other hand, impossible to maintain that this principle falls within the international obligations contemplated in Article II of the Mandate as interpreted in this judgment. The Administration of Palestine would be bound to recognise the Jaffa concessions, not in consequence of an obligation undertaken by the Mandatory, but in virtue of a general principle of international law to the application of which the obligations entered into by the Mandatory created no exception.”

Lighthouses Concessions Case (1956)
France v. Greece

Arbitral Tribunal established under a Special Agreement of 15 July 1931
Award dated 24-27 July 1956

Claim No. 8

78. This claim concerned the seizure by the Greek Government of the lighthouse receipts collected by the concession holders, a French firm, and otherwise due to the Ottoman Treasury, when Greek forces seized Salonica in 1912. The initial measures of seizure were modified by a provisional modus vivendi under which the Greek Treasury received the proceeds subject to a deduction by the firm of its operating costs. This arrangement, which was to be followed by a final settlement, continued after Greece acquired sovereignty over Salonica. So far as concerned acts during the period of belligerent occupation, the Tribunal held that the claim on behalf of the firm succeeded on the ground that the lighthouse dues were not public enemy property but the property of the concessionnaires and therefore protected by the Hague Regulations of 1907. The position was different as regards the period after sovereignty had passed to Greece on 25 August 1913.

“...A partir de cette date, la Grèce fut subrogée, par l'effet rétroactif retenu de l'article 9 du Protocole XII du Traité de paix de Lausanne de 1923, à l'Empire ottoman dans tous les droits et charges de ce dernier par rapport à la concession.”

79. Greece was therefore held to be entitled to the share of the lighthouse receipts formerly payable to the Ottoman Government, subject, however, to a previous assignment of those revenues which had been made by the Ottoman Government to its creditors. This assignment operated to confer a private right which Greece was bound to respect.

Claim No. 26

80. The French firm Collas and Michel presented a claim on the ground that, between 1919 and 1929, they had only been able to collect dues expressed in drachmas, the value of which was falling, whilst the original concession granted by Turkey in 1860 had been based on gold values. The Tribunal held that the claim should succeed, at least to the extent that the Greek Government was bound by the principle of good faith to take the necessary steps to enable the firm to continue to operate the concessions on an equitable basis.

“...En effet, le principe de la bonne foi dans l'interprétation de la concession commandait qu'à raison de la dévaluation de la drachme et des perturbations qui en résultaient pour l'équilibre financier de la concession, l'Etat successeur procédait aux mesures nécessaires pour assurer la continuation de l'exploitation de la concession à des conditions équitables.”

Counterclaim No. 1

81. Greece submitted a counterclaim for its share of the lighthouse dues collected by Collas and Michel between 1913 and 1928. It was held that the plea must fail on the ground that, although Greece had succeeded to Turkey's position as the grantor State in respect of the lighthouse concession, her right to receive the share of the lighthouse receipts formerly going to Turkey was subject to the latter's prior assignment of that share to certain creditors, as guarantee for State loans raised in 1904, 1907 and 1913.

Counterclaims Nos. 3-6

82. These counterclaims covered the period from 1915 to 1929 when Collas and Michel had collected lighthouse dues although the Greek Government was actually operating the lighthouses. It was held that the counterclaim of the Greek Government should succeed to the extent that the firm had been relieved of operating costs.

Claim No. 27

83. The concession contracts entered into between Turkey and Collas and Michel provided that Turkey might take over the lighthouse administration, subject to the payment of compensation as agreed beforehand by the parties or as determined by arbitration. In 1929 the Greek Government seized the lighthouse administration, without however paying compensation to the firm.

84. The Tribunal held that the claim of Collas and Michel to compensation should succeed on the ground that Greece had been subrogated to the position of Turkey under the concession contracts and could there-
fore only take over the lighthouse administration under the same conditions.

"Par sa mainmise sur le service des phares de la Société à partir du ler janvier 1929 sans paiement — ou garantie de paiement — préalable d’une indemnité, arrêté dans des conditions qui en assurent l’équité, le Gouvernement hellénique, en tant que successeur dans la concession par subrogation, a accompli un acte d’autorité directement contraire à une de ses clauses essentielles." 54

IV. State succession in relation to responsibility for delicts and breach of contract

ROBERT E. BROWN CASE (1923)

UNITED STATES v. GREAT BRITAIN

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

Reports of International Arbitral Awards, vol. VI, p. 120

85. Robert E. Brown, a United States citizen, applied in 1895 for a number of licences to prospect on a Transvaal gold field which had been made available to the public by official proclamation. His application was refused on the opening day on the ground that the Government had withdrawn the proclamation in pursuance of a resolution of the Executive Council. Brown nevertheless pegged out 1,200 claims and began an action in the High Court of the Transvaal demanding the grant of a licence for the claims or, alternatively, £372,400 damages. The Court gave judgment in Brown’s favour on the ground that the original proclamation could not be withdrawn or set aside except by another duly published proclamation and ordered that Brown should be granted the licences. The licences then issued, however, were for one month only and were without the usual privilege of renewal. Brown therefore fell back on his claim for damages. His claim came before the High Court which had been reorganized by the Executive after the earlier judgment, in the course of a dispute between the Judiciary and the Executive which had culminated in the dismissal of the Chief Justice who had delivered the major opinion and in the curtailment of the Court’s powers to review the constitutionality of official acts. The New Court held that Brown’s claim for damages must be dismissed and that he should bring a fresh claim. Brown was thereupon advised that, as a result of the changes in the powers of the Judiciary, any fresh claim for relief before the Transvaal courts would be fruitless.

86. After the annexation of the South African Republic by Great Britain, Brown submitted his claim to the British authorities, which refused to acknowledge it on the ground that Brown had not exhausted all local remedies. The claim was subsequently presented before the British-American Arbitral Tribunal.

87. The Tribunal found that "Brown had substantial rights of a character entitling him to an interest in real property or to damages for the deprivation thereof," 55 and that he had been deprived of those rights by the Government of the South African Republic in a manner amounting to a denial of justice under international law.

88. Dealing with the question whether a claim for damages based on this denial of justice lay against the British Government, the Tribunal continued:

"...we are equally clear that this liability never passed to or was assumed by the British Government. Neither in the terms of peace granted at the time of the surrender of the Boer Forces, nor in the Proclamation of Annexation, can there be found any provision referring to the assumption of liabilities of this nature. It should be borne in mind that this was simply a pending claim for damages against certain officials and had never become a liquidated debt of the former State. Nor is there, properly speaking, any question of State succession here involved. The United States plants itself squarely on two propositions: first, that the British Government, by the acts of its own officials with respect to Brown’s case, had become liable to him; and, secondly, that in some way a liability was imposed upon the British Government by reason of the peculiar relation of suzerainty which is maintained with respect to the South African Republic." 56

89. Having examined these contentions, the Tribunal concluded:

"...We have searched the record for any indication that the British authorities did more than leave this matter exactly where it stood when annexation took place. They did not redress the wrong which had been committed nor did they place any obstacles in Brown’s path; they took no action one way or the other. No British official nor any British court undertook to deny Brown justice or perpetuate the wrong. The Attorney General of the Colony, in his opinion, declared that the courts were still open to the claimant. The contention of the American Agent amounts to an assertion that a succeeding State acquiring a territory by conquest without any undertaking to assume such liabilities is bound to take affirmative steps to right the wrongs done by the former State. We cannot endorse this doctrine." 57

90. The Tribunal also dismissed the claim based on the suzerainty of the British Government over the South African Republic prior to annexation, on the ground that the authority possessed by Great Britain at the time of the occurrences under consideration "fell far short of what would be required to make her responsible for the wrong inflicted upon Brown", 58 and did not entitle that country to interfere in the internal affairs of the Republic.

HAWAIIAN CLAIMS (1925)

Great Britain v. United States

Great Britain-United States Arbitral Tribunal established under a Special Agreement of 18 August 1910

Reports of International Arbitral Awards, vol. VI, p. 157

91. These claims were presented by Great Britain on behalf of a number of British subjects who had been wrongfully imprisoned or forced to leave Hawaii by the local authorities prior to the cession of the Hawaiian Republic to the United States in 1898. At-

54 Award dated 24-27 July 1956, at p. 133.
56 Ibid., at p. 130.
57 Ibid., at p. 129.
58 Ibid.
though Great Britain tried to distinguish the Robert E. Brown case, on the ground that in cases of cession, as opposed to conquest, the succeeding State was liable for its predecessor's international delicts, the Tribunal refused to accept the distinction and held that the claims failed in accordance with the Tribunal's ruling in the Robert E. Brown case:

"It is contended on behalf of Great Britain that the Brown Case is to be distinguished because in that case the South African Republic had come to an end through conquest, while in these cases there was a voluntary cession by the Hawaiian Republic as shown (so it is said) by the recitals of the Joint Resolution of Annexation. We are unable to accept the distinction contended for. In the first place, it assumes a general principle of succession to liability for delict, to which the case of succession of one State to another through conquest would be an exception. We think there is no such principle. It was denied in the Brown Case and has never been contended for to any such extent. The general statements of writers, with respect to succession to obligations, have reference to changes of form of government, where the identity of the legal unit remains, to liability to observe treaties of the extinct State, to contractual liabilities, or at most to quasi-contractual liabilities. Even here, there is much controversy. The analogy of universal succession in private law, which is much relied on by those who argue for a large measure of succession to liability for obligations of the extinct State, even if admitted (and the aptness of the analogy is disputed), would make against succession to liability for delicts. Nor do we see any valid reason for distinguishing termination of a legal unit of international law through conquest from termination by any other mode of merging in, or swallowing up by, some other legal unit. In either case the legal unit which did the wrong no longer exists, and legal liability for the wrong has been extinguished with it." 

Administrative Decision No. 1 (1927)
United States, Austria, Hungary
Claims Commissioner (Parker) appointed under Special Agreement of 26 November 1924
Reports of International Arbitral Awards, vol VI, p. 203

92. The course of this arbitration regarding the responsibility of Austria and Hungary for the acts of the former Austro-Hungarian Monarchy, the Commissioner stated that, having regard to the pertinent Treaties,

"It will not be profitable to examine the divergent views maintained by European continental writers on international law as compared with those of Great Britain and the United States with respect to liability of a successor State for the obligations either ex contractu or ex delicto of a dismembered State. It is, however, interesting to note in passing that while one group maintains that such obligations pass with succession and are apportioned between the successor States, and while the other group maintains that the obligations do not pass with succession, neither group maintains that a joint liability rests upon two or more successor States where the Territory of a dismembered State has been divided between them."

The Commissioner concluded that there was no obligation on Austria and Hungary to pay double compensation, nor were they jointly liable.

Lighthouses Concession Case (1956)
France v. Greece
Arbitral Tribunal established under a Special Agreement of 15 July 1931
Award dated 21-27 July 1956
Claim 12 a

93. In 1911 a local Turkish naval commandant removed, without prior notification, a buoy belonging to the French lighthouse concession holders. The Company protested to the Turkish Admiralty, which apparently admitted its responsibility but did not discharge the debt. The French Government claimed that Greece had succeeded to Turkey's obligations in the matter, relying in support of its contention on certain international precedents, including the conditions under which France ceded the territory of Chandernagore to India in 1951. Referring to this precedent, the Tribunal stated:

"On comprend que, dans un tel cas de cession gratuite et gracieuse d'un territoire à un autre État, l'État cédonne tient à être libéré des obligations qui peuvent encore lui incomber du chef de travaux de construction, d'amélioration, de réparation et autres ordonnés pour des objets d'utilité publique et qui ne profiteront dorénavant qu'à l'État concessionnaire."

94. The Tribunal continued that, in the case of this cession by France and in that of the cession of the Sulu Islands by Great Britain to the United States in 1930,

"... il s'agit... de situations toutes spéciales, régies par des stipulations conventionnelles particulières dont il n'est pas loisible de tirer des conclusions en faveur de l'existence d'un principe général de droit coutumier devant régir également d'autres hypothèses relevant d'une solution conventionnelle propre."

95. The Arbitrators therefore held the precedents inapplicable to the claim relating to the buoy. On the merits, they found that the removal of the buoy was a normal measure of national security taken by the Turkish authorities, whose duty to pay compensation depended on the terms of the concession in the light of international administrative law. The Arbitrators continued:

"... Même à supposer que ladite obligation fût hors de doute, elle comptait parmi les charges de la Turquie vis-à-vis «... des sociétés dans lesquelles les capitaux des autres Puissances contractantes sont prépondérants, visées à l'article 9 du Protocole XII du Traité de paix de Lausanne du 24 juillet 1923. Or la subrogation des Etats successeurs dans de telles charges stipulée pour les territoires détachés de la Turquie en vertu dudit traité de paix n'aurait effect, selon le même article 9, qu'à dater de la mise...

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90 See paras. 85-90 supra.
of Crete, were dealt with together, although the Tri-bunal recognized that they required separate juridical holding the concession should set up two new light-houses. Having obtained the approval of the Turkish Admiralty the Company undertook a number of sur-
veys. When the Ottoman Government finally agreed, after appreciable delay, to grant the necessary credits for the construction of the lighthouses, the Cretan Government had changed its attitude and requested the Company to substitute it for the Turkish Government and to pay to it the share of the lighthouse revenues otherwise going to the latter Government. The Com-
pany was unable to agree to these conditions, but failed to recover the cost of the expenditure it had under-
taken, either from the Cretan authorities or from Greece, after the latter had acquired sovereignty over Crete.

97. Claim No. 4 derived from a Cretan law of 1908, ratifying an agreement whereby the Cretan Gov-
ernment had granted a monopoly of cabotage to a Greek shipping company, with express exemption from payment of lighthouse dues under the concession. The Greek Government failed to stop this practice, and even continued it after Greece had itself succeeded to supreme power on the island.

98. In both cases the Tribunal found it necessary to consider the two Judgments given by the Interna-
tional Court of Justice in 1934 and 1937 respectively, in order to determine the extent to which those Judg-
ments dealt with the present claims and were binding on the Tribunal as res judicata. In the course of an elaborate decision, the Tribunal distinguished the two Judgments and held them not binding upon it. The Tribunal concluded as follows regarding the Judg-
ment given in 1937:

“Dans son exposé des motifs la Cour fait expres-
sement coïncider la date de la disparition des der-
niers liens politiques turco-crétois avec celle de l'at-
tribution de l'île à la Grèce, mais elle se refuse nette-
ment à entrer dans un examen de la portée du régime de large autonomie octroyé à l'île antérieurement à 1913, sauf au point de vue de son importance pour le problème spécifique de ‘détachement’ final. Par con-
sequent, les effets internationaux dudit régime de large autonomie à tous autres points de vue ont été écartés par la Cour en termes exprès, et c'est pré-
cisément ce régime d'autonomie qui joue un rôle important dans la solution des controverses sou-
vées par les réclamations Nos 11 et 4.”

99. The Tribunal then gave its decision on the merits of the two claims. As regards Claim No. 11, the Arbitrators held that responsibility was divided between the Firm, the Cretan Government and the Turkish Government, and continued:

“Partant de cette répartition de la responsabilité pour les événements de 1903 à 1908 entre les trois parties intéressées d'alors, le Tribunal ne voit aucun motif raisonnable pour charger après coup de cette responsabilité, entière ou même partielle, la Grèce, qui n'avait absolument rien à voir avec les agisse-
ments désignés par la Cour. Il s'agit ici d'une réclamation qui, par la suite, est devenue une question entre la Grèce et la seule Grèce la responsable de la concession de 1913/1924, ne fût-ce que pour le motif que lesdits événements se sont dé-
roulés en dehors du jeu de la concession, ni au point de vue plus général de sa succession à la souveraineté territoriale sur la Crète en 1913.

“Les rapports entre cette succession territoriale, d'une part, et l'ordre et le contre-ordre du Gouver-
nement crétois de 1903 et de 1908, de l'autre, sont trop éloignés pour justifier une décision qui fasse retomber sur la Grèce et sur la seule Grèce la responsabilité collective d'actes et d'omissions d'autrui qui lui sont complètement étrangers.

“Au surplus, il s'agit ici d'une réclamation qui n'était ni reconnue, ni acquise, a ra son d'y être entendue, par l'Empire ottoman ou par la Crète, ni fixée par une instance compétente quelconque, ni liquide ou aisément liquidable sur la base des faits ayant donné lieu à sa naissance.”

100. The Tribunal found that there were other con-
siderations present in the case of Claim No. 4. In the first place, the action of Crete in granting exemp-
tion from lighthouse dues was in direct violation of the concession which was binding on her, either as an autonomous State or as a territorial subdivision of the Ottoman Empire. Secondly, since the shipping company concerned was registered in Greece, which had close relations with Crete, the former must have been aware of what was being done. Lastly, the Greek

64 Ibid., at pp. 74-75.
65 See at paras. 8-9 and 10-11 supra.
67 Award of 24-27 July 1956, at p. 80.
68 Ibid., at p. 81.
Government had itself continued the practice after acquiring territorial sovereignty. The pertinent section of the Award, which has not yet been published in the Reports of International Arbitral Awards, is set out at length below.

"Les considérations ci-dessus exposées sont-elles également concluantes pour tenir la Grèce responsable de la violation de la convention marchande antérieurement à ladite date et dont l'une de ses compagnies de navigation a indûment profité?

"Pour les raisons indiquées ci-dessus, sub A, à propos de la réclamation No. 12 une telle responsabilité ne saurait se fonder sur la succession de la Grèce à la concession en vertu de la clause spéciale contenue dans l'article 9 du Protocole XII, annexé au Traité de paix de Lausanne. Elle ne pourrait résulter que d'une transmission de responsabilité en vertu des règles de droit coutumier ou des principes généraux de droit régissant la succession des États en général. Le fait que la stipulation spéciale dudit Protocole XII a défini l'étendue et le point de départ de la succession de la Grèce dans les droits et charges concessionnels de la Turquie n'empêche pas, par lui-même, que la Grèce puisse être considérée comme ayant succédé également, mais à un autre titre, aux droits et charges correspondants de l'État autonome de Crète.

"Éveillé à de ce point de vue, la question de la transmission de responsabilité en cas de changement territorial présente toutes les difficultés d'une matière qui n'a pas encore suffisamment mûri pour permettre des solutions certaines et également applicables à tous les cas possibles. Il n'est pas moins injustifié d'admettre le principe de la transmission comme une règle générale que de le dénier. C'est plus et essentiellement une question d'espece dont la solution dépend de multiples facteurs concrèts.

"S'agit-il d'obligations contractuelles ou délictuelles — de droit privé ou de droit public — reconnues ou non reconnues — liquides ou non liquides — actées ou non actées? S'agit-il d'un cas de démembrement total d'un État préexistant, de la sécession d'une colonie ou d'une partie d'un État, ou s'agit-il plutôt de la fusion de deux États précédemment indépendants, de l'incorporation d'un État dans un autre? Jusqu'à quel point y a-t-il lieu, dans cette dernière hypothèse, en vue de résoudre le problème, de tenir compte des relations plus ou moins étroites entre l'État incorporant et l'État incorporé, du caractère volontaire ou non volontaire de leur réunion?

"Il se peut qu'une solution parfaitement adéquate aux éléments essentiels d'une hypothèse déterminée se révèle tout à fait inadéquate à ceux d'une autre. Il est impossible de formuler une solution générale et identique pour toutes les hypothèses imaginables de succession territoriale et toute tentative de formuler une telle solution identique doit nécessairement échouer sur l'extrême diversité des cas d'espece. C'est pourquoi le Tribunal n'attache pas d'importance décisive aux rares précédents disparates de la jurisprudence internationale ou nationale et n'accepte comme concluants, en leur généralité, ni le jugement de la Cour hellénique pour les îles de la Mer Égée de 1924 (No 27) [Themis, vol. 35, p. 294], cité dans l'Annual Digest of Public International Law Cases 1923/1924, No 36, reconnaissant la transmission de responsabilité à la Grèce même en matière de dettes purement délictuelles, ni ceux de l'American and British Claims Arbitration Tribunal des 23 novembre 1923 et 10 novembre 1925, la déniant dans les cas comparables de l'annexion à la Grande-Bretagne par la force des armes de l'État du Transvaal et de l'incorporation aux États-Unis de l'archipel de Hawaï. La diversité des hypothèses possibles de succession territoriale, les considérations politiques qui souvent président à la solution des problèmes juridiques y relatifs et la rareté des décisions arbitrales ou judiciaires qui résolvent le problème d'une manière vraiment nette et sans équivoque à la suite d'une argumentation convaincante expliquent tant les flokements de la pratique internationale que l'état chaotique de la doctrine.

"Dans le cas d'espece, il s'agit de la violation d'une clause contractuelle par le pouvoir législatif d'un État insulaire autonome dont la population avait durant des dizaines d'années passionnement aspiré, même par la force des armes, à s'unir à la Grèce, considérée comme mère patrie, violation reconnue par ledit État lui-même comme constituant une infraction au contrat de concession, réalisée en faveur d'une compagnie de navigation ressortissant à ladite mère patrie, endossée par cette dernière comme si cette infraction était régulière et finalelement maintenue par elle, même après l'acquisition de la souveraineté territoriale sur l'île en question.

"Dans de telles conditions, le Tribunal ne peut arriver qu'à la conclusion que la Grèce, ayant fait siennes la conduite illégale de la Crète dans son passé récent d'État autonome, est tenue, en qualité d'État successeur, de prendre à la charge les conséquences financières de l'infraction au contrat de concession. Sinon, la violation avouée d'un contrat commise par l'un des deux États liés par un passé et un destin communs, de l'assentiment de l'autre, aurait, au cas de leur fusion, comme conséquence forcément injuste d'amener une responsabilité financière certaine et de sacrifier les droits incontestables d'une société privée concessionnaire à un sol-disant principe général de non-transmission de dettes en cas de succession territoriale, qui en réalité n'existe pas comme principe général et absolu. Dans ce cas-ci, le Gouvernement hellénique a à bon droit commencé par reconnaître lui-même sa responsabilité.

"Dans les développements qui précèdent, le Tribunal est parti de la prémisse que les actes des autorités crétoises de 1908 constituent la violation d'une clause contractuelle. Le Tribunal tient à ajouter à ces développements argumenti causa qui même si l'on considérait la dette ainsi créée par la violation d'une clause contractuelle comme une dette délictuelle ou quasi délictuelle à raison de son origine dans un acte illicite de l'État, la conclusion en serait pas différente. La thèse, plutôt doctrinale que jurisprudentielle, selon laquelle il ne saurait jamais être question de transmission — ou plus correctement: de transition, puisqu'il ne s'agit pas ici d'effets d'actes de volonté humaine, mais plutôt de conséquences automatiques et de plein droit de changements territoriaux — d'obligations délictuelles à l'État successeur n'est pas, dans sa généralité, bien fondée. Ici encore la solution devra dépendre des traits particuliers à chaque cas d'espece. Une obligation créée par un délit international proprement dit, commis en violation directe du droit des gens, tel que l'enlèvement d'un territoire neutre ou la destruction arbi-
traire d'un navire exempt du droit de prise, est de
toute autre nature qu'une obligation qui prend son
origine dans le domaine du droit privé ou du droit
administratif et qui ne donne naissance à une récla-
mation internationale qu'à la suite d'un déni de
justice. L'hypothèse de l'union volontaire de deux
Etats indépendants en un Etat unitaire ou fédéral
diffère essentiellement de celle de l'annexion d'un
Etat à un autre par la force des armes. Le démem-
brement d'un Etat unitaire en deux ou plusieurs
Etats nouveaux présente des traits caractéristiques
qui diffèrent de ceux inhérents à la sécession d'une
colonie de la mère patrie comme un nouvel Etat indé-
pendant. Toutes ces différences ne peuvent pas ne
pas exercer une influence décisive sur la solution
du problème de la succession d'Etats même en obli-
gations délictuelles. Quelle justice, ou même quelle
logique juridique y aurait-il, par exemple dans l'hyp-
thèse d'un délit international commis contre une
autre Puissance par un Etat qui ultérieurement se
scinde en deux Etats nouveaux indépendants, à con-
sidérer ces derniers comme détenteurs d'une obligation
internationale de réparation qui aurait sans aucun
doute possible pesé sur l'Etat ancien prédécesseur,
auteur du délit? Certaines tendances dans la doctrine
nécessitent donc clairement une reconsideration à
raison de la nature différente des obligations délic-
tuelles possibles et de la diversité des hypothèses
possibles de succession territoriale.

[L'argument doctrinal qui est quelquefois invoqué
t à l'appui de la théorie de la non-transmission de
dettes délictuelles ou quasi délictuelles par certains
auteurs de langue allemande, à savoir que ces dettes
présenteraient un caractère "au plus haut degre per-
sonnel" (hochstpersönlich) n'a aucune force convain-
cante. Si cet argument formulait en vérité un prin-
cipe général de droit, il devrait également jouer et
au même titre dans le droit civil, mais il est loin
d'en être ainsi. Bien au contraire, les dettes délic-
tuelles de personnes privées, qui présenteraient exact-
ements le même caractère "hautement personnel",
passem généralement aux héritiers. Ce n'est pas à
dire que les principes de droit privé soient applica-
tables comme tels en matière de succession d'Etats,
mais seulement que le seul argument qui soit quel-
quoi invoqué pour nier la transmission de dettes
délictuelles n'a pas de valeur.

"Le Tribunal estime par conséquent que, contrai-
rement à la réclamation No 11, la réclamation No 4,
qui au surplus n'a rien d'odieux pour la Grèce et est
susceptible de liquidation aisée, doit être admise."69

Claim No. 1

101. The Tribunal upheld this claim presented by
Collas and Michel in respect of the non-payment of
the lighthouse dues by ships which had been requis-
tioned by Greece during the occupation of Turkish
territory and which had continued not to pay even
after the territory concerned had passed to Greece.
Greece argued that no dues were required under the
concession. See also Lighthouses Concession Case,
Claim No. 27, paras 83-84, supra.

V. State succession in relation to public property
and public debts, including apportionment of
debts and revenue

(A) State succession in relation to public
property

APPEAL FROM A JUDGMENT OF THE HUNGARO-
CZECHOSLOVAK MIXED ARBITRAL TRIBUNAL (THE
PETER PÁZMÁNY UNIVERSITY v. THE STATE OF
CZECHOSLOVAKIA) (1933), HUNGARY v. CZECHO-
SLOVAKIA

Permanent Court of International Justice, Series A/B
No. 61

102. Czechoslovakia appealed to the Permanent
Court of International Justice against a judgment
given by the Hungaro-Czechoslovak Mixed Arbitral
Tribunal, in which it had been held that Czechoslo-
vakia should return certain landed property, situated
in territory transferred from the former Austro-
Hungarian Monarchy in Czechoslovakia, to the Peter
Pázmány University of Budapest.

103. The Government of Czechoslovakia argued
before the Permanent Court that the University of
Budapest lacked legal capacity to pursue its claim, its
personality having been merged with that of the Hun-
garian State; such property as it might own was there-
fore public in character and could be retained by Cze-
choslovakia as the successor State. The Permanent
Court, however, whilst stating that article 191, para-
graph 1, of the Treaty of Trianon,60 which provided
for the transfer of public property to the successor
State, "applies the principle of the generally accepted
law of State succession",61 found that the University
had a juridical personality independent of that of the
Hungarian State and accordingly upheld its claim for
the restoration of its properties as a private body.

CESSION OF VESSELS AND TUGS FOR NAVIGATION ON
THE DANUBE (1921)

Allied Powers (Czechoslovakia, Greece, Rumania,
Serb-Croat-Slovene Kingdom); Germany, Austria-
Hungary and Bulgaria.

Arbitrator (Hines) appointed under Treaty of Ver-
sailles, article 339; article 300 of Treaty of St.
Germain; article 284 of Treaty of Trianon and
article 228 of Treaty of Neuilly-sur-Seine

Reports of International Arbitral Awards, vol. I, p. 97

104. The above-mentioned articles provided for the
cession of vessels and tugs by Germany, Austria, Hun-
gary and Bulgaria to the Allied Powers, according to
the amounts and specifications determined by an Arbi-
trator designated by the United States. The Arbitrator
was also empowered to decide questions relating to
vessels whose ownership or nationality was in dispute.
The Award given dealt largely with the application of
the laws of war and of the particular articles of the
Peace Treaties relating to shipping seized by the Allied
Powers during October and November 1918.

105. In the course of the proceedings Czechoslovakia
presented a claim to a proportion of the property of

60 Ibid., at pp. 82-4.
61 "States to which territory of the former Austro-Hungarian
Monarchy is transferred and States arising from the dismem-
bérment of that Monarchy shall acquire all property and pos-
sessions situated within their territories belonging to the former
or existing Hungarian Government."
 certain shipping companies which the former Austrian Empire and Hungarian Monarchy had either owned, in whole or in part, or subsidized, on the ground that "these interests were bought with money obtained from all the countries forming parts of the former Austrian Empire and of the former Hungarian Monarchy, and that such countries contributed thereto in proportion to the taxes paid by them, and therefore, are to the same proportionate extent the owners of the property". Austria and Hungary argued that Czechoslovakia had no rights to succeed to property except those granted under the Treaties of St. Germain and Trianon, which confined Czechoslovakia's rights of succession to State property situated in Czechoslovakia. The Arbitrator held that he lacked jurisdiction under the treaty provisions to consider Czechoslovakia's claim.

CLAIM OF FINNISH SHIPOWNERS AGAINST GREAT BRITAIN IN RESPECT OF THE USE OF CERTAIN FINNISH VESSELS DURING THE WAR (1934)

Finland v. Great Britain

Arbitrator (Bagge) appointed under a Special Agreement of 30 September 1932

Reports of International Arbitral Awards, vol. III, p. 1479

106. During 1916 and 1917 thirteen ships belonging to Finnish shipowners were used by the British Government, having been handed over to the British authorities by the Russian Government under wartime agreements entered into between the two States. After the war, when Finland became independent, the shipowners claimed payment for the ships used, including compensation for three ships which had been sunk. The British Board set up to deal with such claims dismissed the application on the ground that the requisition had been carried out by Russia and not by Great Britain. The Finnish Government referred the matter to the Council of the League of Nations, which recommended that the preliminary question of whether or not the municipal remedies available under English law had been exhausted should be submitted to arbitration.

107. In the course of the arbitral proceedings it was argued that the Finnish Government had succeeded to the position of the Russian Government under the wartime agreements with Great Britain, under which Great Britain had agreed to pay Russia at official charter rates, as regards ships over which the Finnish State had become sovereign and which belonged to persons who had become Finnish nationals. This argument was apparently accepted by the Arbitrator, although he did not find it necessary to give an express ruling on this aspect in reaching the conclusion that the Finnish shipowners had in fact exhausted the means of recourse available to them under English law.

(B) STATE SUCCESSION IN RELATION TO THE PUBLIC DEBT

OTTOMAN PUBLIC DEBT ARBITRATION (1925)

Bulgaria, Iraq, Palestine, Transjordan, Greece, Italy and Turkey

Arbitrator (Borel) appointed under articles 46 and 47 of the Treaty of Lausanne, 1923, by the Council of the League of Nations

108. The Treaty of Lausanne of 1923 provided for the partition of the Ottoman public debt between Turkey, the newly created States which had formed part of the Ottoman Empire, and the States which had received territory, formerly within the Ottoman Empire, either after the Balkan Wars or after the First World War, according to the proportion of the total revenue of each of the ceded territories to the average total revenue of the Ottoman Empire during the financial years 1910-1912.

109. In the course of the arbitration regarding the application of the provisions of the Treaty, Iraq, Palestine and Transjordan argued that there was no principle of international law requiring States acquiring territory to take over a share of the public debt; the Treaty of Lausanne had therefore defined the proportion to be borne by such States as a treaty obligation, and any excess was to be met by Turkey. The Arbitrator stated his opinion as follows:

"... il n'est pas possible, malgré les précédents déjà existants, de dire que la Puissance cessionnaire d'un territoire est, de plein droit, tenue d'une part correspondante de la dette publique de l'Etat dont il faisait partie jusqu'alors. La solution du problème ici soulevé est à chercher dans le Traité même, et, à l'égard de la D.P.O., la situation juridique de la Turquie n'est nullement identique à celle des autres Etats intéressés. En droit international, la République turque doit être considérée comme continuant la personnalité de l'Empire ottoman. C'est à ce point de vue qu'évidemment le Traité se place, preuve en sont les articles 15, 16, 17, 18 et 20, qui n'auraient guère de sens si, aux yeux des Hautes Parties contractantes, la Turquie était un Etat nouveau, au même titre que l'Irak ou la Syrie. La raison d'être de l'article 99 du Traité n'est pas celle qu'a indiquée, lors des débats, le Représentant du Gouvernement turc. Elle réside dans le fait que la guerre a été considérée comme ayant mis fin, entre Puissances belligérantes, à toutes conventions autres que celles dont le trait particulier est de déployer leurs effets précisément au cours des hostilités; et la déclaration formelle faite à Lausanne par M. Bombard (Actes de la Conferences de Lausanne, 1ère série, Tome III, p. 221) prouve que le point de vue auquel se place la Turquie n'a pas été admis par les autres Puissances signataires du Traité. La D.P.O. est sa dette, dont elle n'est libérée que dans la mesure où le Traité l'en décharge pour en grever d'autres Etats (article 46, alinéa 2)."

LIGHTHOUSES CONCESSION CASE (1956)

France v. Greece

Arbitral Tribunal established under a Special Agreement of 15 July 1931

Award dated 24-27 July 1956

Counterclaim No. 174

110. Greece submitted a counterclaim for its share of the lighthouse dues collected by the French concession holders, Collas and Michel, between 1913 and 1931.

72 R.I.A.A., vol. I, at p. 120.

74 See also Lighthouses Concession Case, Counterclaim No. I, para. 81, supra.
1928. It was held that the plea must fail on the ground that, although Greece had succeeded to Turkey's position as the grantor State in respect of the lighthouse concession, her right to receive the share of the lighthouse receipts formerly going to Turkey was subject to the latter's prior assignment of that share to certain creditors, as guarantee for State loans raised in 1904, 1907 and 1913. The loans in question had been maintained by the Treaty of Lausanne, and Greece was amongst the successor States called upon to repay them.

"Le maintien des avances et leur répartition entre la Turquie et les Etats successeurs étaient en accord complet avec les principes généraux du droit international public commun, préservant le respect des droits patrimoniaux acquis en cas de changements territoriaux. La seule question douteuse dans ce domaine est celle de savoir si un droit patrimonial particulier compte parmi ces droits acquis. Le Tribunal n'hésite pas, toutefois, à considérer comme tels des droits découlant d'un contrat d'emprunt, tel que les contrats précités, conclus entre un Etat et une ou plusieurs personnes privées." 75

111. The Treaty of Lausanne had made certain changes in the method and rate of repayment of the loan, but in all other respects "les contrats continuent d'être révis par leur propre loi". 76 Default on the part of a successor State in making repayment in accordance with the Treaty provisions (as had occurred in the case of Greece) "...quelle qu'en puisse avoir été la raison, n'a eu d'autre effet que de maintenir les droits et obligations préexistants dans leur tonor primitive." 77

(C) Apportionment of the public debt and revenue

Lighthouses Concession Case (1956)

France v. Greece

Arbitral Tribunal established under a Special Agreement of 15 July 1931
Award dated 24-27 July 1956
Claim No. 878

112. During its decision relating to this Claim the Tribunal considered the question of the basis for the division of lighthouse receipts between Greece and Turkey, according either to the proportion of the former Ottoman coastline held by Greece, or according to the place of collection.

"...Le Tribunal adopte la dernière solution. Rien ne suggère en effet que l'article 9 du Protocole XII de Lausanne ait envisagé une méthode de répartition des droits et charges de la concession parmi les Etats successeurs autre que celle qui consiste à s'adapter à la division nouvelle des territoires turcs en unités géographiques nationales distinctes. On peut constater ainsi que les répartitions des droits et des charges découlant de la concession obéit à d'autres principes qu'à ceux qui ont été appliqués à la répartition des dettes." 79

113. In the course of this arbitration regarding the payment of compensation by Austria and Hungary for the damage caused to United States property by the former Austro-Hungarian Dual Monarchy during the First World War, the Commissioner held that compensation should be borne as to 63.6 per cent by Austria and as to 34.4 per cent by Hungary. It was upon this basis that the former Austrian Empire and the former Kingdom of Hungary had apportioned the joint expenditures of the Austro-Hungarian Dual Monarchy. This ratio of apportionment was also that provisionally adopted by the Reparations Commission set up under the Treaties of St. Germain and Trianon. See also Cession of Vessels and Tags for Navigation on the Danube, paras. 104-105 supra.

VI. State succession in relation to the legal system of the preceding State

Central Rhodope Forests Case (1931:1933)

Greece v. Bulgaria

Arbitrator (Unden) appointed by the Council of the League of Nations under article 181 of the Treaty of Neuilly

Reports of International Arbitral Awards, vol. III, p. 1389 and p. 1405

114. In the course of this arbitration Bulgaria contended that the official certificates issued by the Turkish authorities to Greek concession holders in 1913 were invalid as the Ottoman Empire no longer exercised authority over the territory in question at that date. The arbitrator held that:

"L'engagement assumé par la Bulgarie de respecter les titres officiels émanant des autorités ottomanes implique l'obligation de reconnaître les certificats de propriété dûment émis par l'autorité ottomane compétente sur la base du registre foncier turc dans lequel les immuebles étaient inscrits." 80

German interests in Polish Upper Silesia (1926)

Germany v. Poland

Permanent Court of International Justice, Series A, No. 7

115. In the course of this case between Germany and Poland the Permanent Court held that restrictions imposed by treaty on Poland's legislative authority in the ceded territory could not apply to "constitutional and public law provisions the maintenance of which would have been incompatible with the transfer of sovereignty." 81 See also Settlers of German Origin in Territory Ceded by Germany to Poland, paras. 39-44 supra.

75 Award dated 24-27 July 1956, at p. 122.
76 Ibid., at p. 123.
77 See also Lighthouses Concession Case, Claim No. 8, paras. 76-79, supra.
78 Award dated 24-27 July 1956, at p. 96.
79 See also para. 16, supra.
80 See also paras. 70-74, supra.
82 See also paras. 45-52, supra.
83 P.C.I.J., Series A, No. 7, at p. 22.
VII. State succession in relation to nationality

Acquisition of Polish Nationality Case (1924)

Germany v. Poland

Arbitrator (Kaeckenbeeck) appointed under a Protocol of 15 April 1934

Reports of International Arbitral Awards, vol. I, p. 401

116. The Treaty of 1919 between the Allied Powers and Poland and article 91 of the Treaty of Versailles provided for the acquisition of Polish nationality by German nationals “habitually resident” in Poland after the cession of territory which followed the First World War. After a dispute had arisen as to the interpretation of the term “habitually resident”, the Permanent Court of International Justice stated in an Advisory Opinion\(^8^6\) that the phrase “habitually resident” (or residence) was to be interpreted by reference to the habitual residence of the parents at the date of birth of the person concerned, and not by reference to the habitual residence of the parents at the date when the Treaty with Poland came into effect. Further difficulties arose, however, as to the practical application of the principle laid down by the Permanent Court and the Council of the League of Nations invited the parties to place their disputes as to questions of interpretation before the President of the Upper Silesian Arbitral Tribunal, to whom full arbitral powers were given.

117. Amongst the various points of detail raised for decision was whether the term “habitual residence” (domicile) was to be defined by reference to the whole of Poland or only by reference to the territory ceded by Germany to Poland. The Arbitrator found that, in the absence of any treaty stipulation based on the latter interpretation, the requirement was to be determined by reference to the full extent of Polish territory.

118. The Treaties concerned provided that persons who would otherwise have become Polish nationals might opt for another nationality. Germany contended that those who opted for German nationality might retain their residence in Poland.

“IL faut admettre... qu’un État cessionnaire a normalement le droit d’exiger l’émigration des habitants du territoire cédé qui ont opté en faveur du pays cédant. Ce principe, consacré par la pratique internationale, et expressément admis par les meilleurs auteurs; se trouve à la base même des dispositions concernant l’option inscrites dans les récents Traités de Paix.”\(^8^5\)

119. It was therefore held that the suppression of Poland’s right to require the emigration of those opting for another nationality would have been so exceptional as to require an express treaty provision. Since the Treaties concerned contained no strict stipulation but only, at most, a temporary suspension of Poland’s right to demand emigration, Poland was entitled to order the optants to leave at the end of the specified period.

The Mavrommatis Jerusalem Concessions (1925)

Greece v. Great Britain

Permanent Court of International Justice,
Series A, No. 5

120. After its decision in 1924\(^8^6\) regarding the concessions granted to Mavrommatis by the Ottoman authorities before Great Britain became the Mandatory in Palestine, the Permanent Court of International Justice was asked to consider an objection raised by Great Britain to the effect that, since Mavrommatis was described in the concession as an Ottoman subject, he could not claim the right to benefit by the terms of Article 9 of Protocol XII of the Treaty of Lausanne. This provided for the subrogation of the successor State to the rights and obligations of Turkey “towards the nationals of the other contracting Powers” under concessionary contracts concluded with Ottoman authorities before 29 October 1914. The Court held, however, that Article 9 of Protocol XII “contemplates the real nationality of the beneficiaries” and that it was:

“...on the nationality of the real beneficiaries and not on the mere legal national status of the concessionnaire that the question of subrogation depends.”\(^8^7\)

121. Since the real nationality of Mavrommatis was Greek, Great Britain was held to be under an obligation to respect his concession in accordance with the provisions of the Protocol.

\(^8^6\) P.C.I.J., Series A, No. 2; see paras. 75-77, supra.
\(^8^7\) P.C.I.J., Series A, No. 5, at p. 31.
CO-OPERATION WITH OTHER BODIES

[Agenda item 4]

DOCUMENT A/CN.4/146

Report on the fifth session of the Asian-African Legal Consultative Committee
(Rangoon, January 1962), by Radhabinod Pal, Observer for the Commission

Observer's Report

As desired by Dr. Grigory I. Tunkin, our revered Chairman of the thirteenth session, under the authority of the decision of the Commission taken in this respect during the last session at its 621st meeting, I attended the fifth session of the Asian-African Legal Consultative Committee held at Rangoon from 17 to 30 January 1962 as observer on behalf of the International Law Commission. The actual working meetings of the session covered the period from 17 to 26 January, both days inclusive. The period from the 27th to 30th was covered by a social programme outside Rangoon.

The session was attended by delegates from Burma, Ceylon, India, Indonesia, Japan, Pakistan, Thailand and the United Arab Republic. Besides these delegates there were observers from Ghana, Laos, the Philippines and the League of Arab States. There was also an observer on behalf of the United Nations Secretariat in the person of Mr. Oscar Schachter, Director of the General Legal Division of the Office of Legal Affairs, United Nations Secretariat.

Mr. M. C. Setalvad, Attorney-General of India, the leader of the Indian delegation, was unanimously elected President of the session and Mr. A. T. M. Mustafa, Barrister-at-Law, Standing Counsel, Government of Pakistan, leader of the Pakistan delegation, was unanimously elected Vice-President of the session.

During this session, a sub-committee was constituted with members from Burma, Ceylon, Indonesia, India, Japan, Pakistan, Thailand and the United Arab Republic to consider and report amongst other matters on “co-operation with other organizations”; and the sub-committee, with the member from India in the chair, recommended inter alia to amend article 3(a) of the Committee’s Statute extending the power of the Committee “to examine questions that are under consideration by the International Law Commission and to arrange for the views of the committee to be placed before the commission; to consider the reports of the commission and to make recommendations thereon to the Governments of the participant countries”.

This recommendation of the Sub-Committee was accepted by the Committee without any division.

The main subjects that were taken up for consideration by the Committee during the session were:

1. The question of dual nationality;
2. The question of legality of nuclear tests.

Besides these the Committee also considered draft articles on the immunities of the privileges of the Asian-African Legal Consultative Committee comprising seven articles.

As regards the question of “dual nationality”, the subject was referred to the Committee by the Government of Burma. It was felt that dual and multiple nationality was encountered amongst citizens of almost all countries as a result of conflict of laws in the various States. In introducing the subject for discussion it was observed:

“International Law recognizes that a State can by its own municipal laws determine as to who its nationals should be and most States have as criteria for their nationality, the place of a person’s birth or his descent. As a result of the various nationality laws it sometimes happens that one and the same person is regarded as a national by two or more States and thus occur the cases of dual or multiple nationality. Dual nationality results in conflicting obligations which the person may owe to each of the States of his nationality. It is not possible to eliminate cases of dual or multiple nationality altogether. Efforts have however been made in the past by the international bodies to minimize or reduce occurrence of such cases.”

The Committee considered this question with a view to formulating model rules on the subject for consideration of the member Governments. The Committee had before it certain draft rules on the subject prepared by the delegation of the United Arab Republic.

The Committee at its third session held in Colombo in January 1960 decided to take up for consideration the question of Legality of Nuclear Tests, a subject which had been suggested by the Government of India under article 3(c) of the Statutes of the Committee “being a matter of Common Concern to all the participating States in this Committee”. The Committee decided to take up this subject, being of opinion that “this matter had not been considered by any other Body from the legal point of view, nor had it been adequately dealt with by any of the authorities on International Law”. The Committee also took note of the fact that several nuclear tests had been carried out in parts of the Asian-African Continents or in areas adjacent thereto, and as such the problem was of great concern to the Asian-African countries. The Committee had directed its secretariat to collect the factual and scientific data that were available on the effects of the nuclear tests and also to prepare a list of topics for discussion on the legal aspects of the matter.

At its fourth session held in Tokyo in February, 1961, the secretariat of the Committee presented before
it what the secretariat considered to be relevant materials both from the scientific and legal point of view. These materials formed the basis of discussions at that session. The members for Burma, Ceylon, India, Indonesia, Iraq, Japan, Pakistan, Morocco and the United Arab Republic stated their respective viewpoints. The Committee also heard statements from the observer for Ghana and Mr. F. V. Garcia Amador, then a member of the International Law Commission, in his personal capacity as a recognized expert. The Committee, after a general discussion, decided to study the matter further and to take up the question for fuller consideration at its fifth session. The Committee, however, indicated the scope of its study and directed its secretariat to collect further materials on those lines. The Committee decided that it was not concerned with the controversial and debatable question regarding use of nuclear weapons in time of war but that it should confine itself to an examination of the problem of legality of nuclear tests in times of peace. In accordance with this decision taken by the Committee at its Tokyo session, the secretariat prepared a comprehensive brief which was placed before the present session and on the basis of which the questions were more fully considered.

During the present session, the President of the Committee introduced the subject and drew attention to the list of topics for discussion given in the brief of documents. Indicating the scope of discussion, the President again pointed out that the Committee was not concerned with the war-time use of nuclear weapons, but only with the question of nuclear tests carried out in times of peace. He observed that there were three heads under which the subject fell to be considered, namely:

1. Whether there were any known and accepted principles of international law which could be applied to the situation.
2. If no such rule of international law was directly applicable, could any principles of any international law be adapted or extended to the present case?
3. Whether the principles of civilized jurisprudence recognized in the municipal laws of the various States could be relied upon to evolve new principles of international law.

He wondered whether international law which had in the past met many new situations by evolving new principles would not in the present case similarly attempt to counter the grave threats to which the peoples of the world were exposed by these tests by formulating suitable doctrines based on the principles of civilized jurisprudence.

The deliberation which followed was on the basis of the following eight questions:

1. Is a State responsible or ought it to be so for direct damages, caused to the inhabitants of the area where the tests are carried out, due to deaths of human beings and destruction of their property resulting from explosions of atomic devices, under the law of tort or principles analogous thereto?
2. Can it be said that a State which carried out atomic tests in its own territory is endangering the safety and well-being of its neighbouring States and their inhabitants due to possibilities of radio-active fallout; and, if so, whether the use by a State of its own territory for such purpose is not contrary to the principles of international law?
3. If it is established that explosion of nuclear devices results in pollution of the air with radio-active substance and that such contaminated air is injurious to the health of the peoples of the world, would the State carrying out the tests be said to be responsible for an international tort in accordance with the principles laid down in the Trail Smelter Arbitration case?
4. In an action based on commission of an international tort, would it be necessary for the claimant State to prove actual damage, or is the general scientific and medical evidence on the effects of nuclear explosions sufficient to maintain the action?
5. Even if the harmful effect resulting from contamination of the air can be confined within the territories of the particular State, can it be said that the State has violated the human rights of the citizens and aliens living in its territory, and if so, whether the State is responsible for the harm caused to the aliens under the principles of international law relating to State responsibility?
6. Does the interference with the freedom of air or sea navigation resulting from declaration of danger zones over the areas where the tests may be carried out amount to violation of the principles of international law?
7. Is the destruction of living resources of the sea which results from nuclear tests on islands or areas of the high seas to be regarded as violative of the principles of international law?
8. Is it lawful for a trustee authority to use territories, which it holds on trust from the United Nations, for purposes of holding nuclear tests?

The deliberation which followed was on the basis of the following eight questions:

1. Is a State responsible or ought it to be so for direct damages, caused to the inhabitants of the area where the tests are carried out, due to deaths of human beings and destruction of their property resulting from explosions of atomic devices, under the law of tort or principles analogous thereto?
2. Can it be said that a State which carried out atomic tests in its own territory is endangering the safety and well-being of its neighbouring States and their inhabitants due to possibilities of radio-active fallout; and, if so, whether the use by a State of its own territory for such purpose is not contrary to the principles of international law?

Can it be said that the use by a State of its own territory for the purpose of carrying out nuclear tests by
Usually the norms of law are compromises between the rational moral ideals of what ought to be, and the possibilities of the situation as determined by given equilibria of vital forces.

The social harmony of living communities is to be achieved by an interaction between the normative conceptions of morality and law and the existing and developing forces and vitalities of the community.

The shape which any embodiment in historical law takes to express elements of ideals of justice is the consequence of pressures and counter-pressures in a living community. Such embodiments are indeed rationalizations of the interests of the dominant elements of a community.

In the course of this discussion, I was invited in my capacity as an observer on behalf of the International Law Commission, as also in my personal capacity, to take part in the deliberation of the Committee. I observed that the question really was one that should immediately exercise the minds of all men of good will. Indeed it raises, I said, a grave and anxious issue that I received at their hands. On behalf of the people and the Government of Burma, for the kind reception that I received at their hands. On behalf of the Commission, I extended an invitation to the Committee to continue its co-operation with the Commission and to send an observer to attend the next session of the Committee. I really was very much impressed with the height of deliberations that took place during the session and I frankly told the Committee that "I have seen in the conduct of its business a real conference where all the distinguished members came really to confer and not to differ in the name of conference. Indeed the entire deliberation amply indicated that the member nations are prompted by the urge to find a way to a new wholeness." I also expressed my hope that "all the Asian-African nations would join the organization and help building up this new wholeness, always remembering that our environment now is no longer the world about us but rather the world". In conclusion I told the Committee I shall leave the meeting with a new faith in the great principles that have actuated the organization.

I, however, drew the attention of the Committee to the typical justifying attempts appearing in the editorial note by Prof. Myres S. McDougal of the Editorial Board of the *American Journal of International Law* in 1955 which note was provoked by the condemnation of such tests by Earl Jowitt in the British House of Lords as also by a very comprehensive attack on the test by Dr. Emanuel Margolis in the *Yale Law Journal*.

Being invited by the President, Mr. Oscar Schachter, Personal Representative of the Secretary-General, expressed his views of the questions in some general terms. In doing so, he expressed forcefully a few words of caution against any hasty resolution in respect of the questions.

After discussion, the Committee did not declare any final opinion on the questions. It only decided that the delegations should, if they so wish, send to the secretariat of the Committee by the first day of May 1962 their comments on the draft report and the secretariat would thereafter send the draft report together with the comments so received to the member Governments for their consideration and that the matter should be placed before the next session of the Committee as a priority item on the agenda.

Before concluding this report, I must express my heartfelt gratitude to the Committee, as also to the people and the Government of Burma, for the kind reception that I received at their hands. On behalf of the Commission, I extended an invitation to the Committee to continue its co-operation with the Commission and to send an observer to attend the next session of the Commission. I really was very much impressed with the height of deliberations that took place during the session and I frankly told the Committee that "I have seen in the conduct of its business a real conference where all the distinguished members came really to confer and not to differ in the name of conference. Indeed the entire deliberation amply indicated that the member nations are prompted by the urge to find a way to a new wholeness." I also expressed my hope that "all the Asian-African nations would join the organization and help building up this new wholeness, always remembering that our environment now is no longer the world about us but rather the world". In conclusion I told the Committee I shall leave the meeting with a new faith in the great principles that have actuated the organization.

QUESTION OF SPECIAL MISSIONS (GENERAL ASSEMBLY RESOLUTION 1687 (XVI))

[Agenda item 3]

DOCUMENT A/CN.4/147

Working paper prepared by the Secretariat

1. At its tenth session in 1958, the International Law Commission considered the question of "Diplomatic intercourse and immunities" and prepared draft articles on the subject together with a commentary (A/3859, chapter III).

2. In its report, the Commission stated that, although the draft dealt only with permanent diplomatic missions, diplomatic relations also assumed other forms that might be placed under the heading of "ad hoc diplomacy", covering itinerant envoys, diplomatic conferences and special missions sent to a State for limited purposes. The Commission considered that these forms of diplomacy should also be studied, in order to bring out the rules of law governing them. It requested Mr. A. E. F. Sandström, the Special Rapporteur for the topic "diplomatic intercourse and immunities", to undertake that study and to submit his report at a future session (ibid., para. 51).

3. At its twelfth session in 1960, the Commission adopted three draft articles, which are reproduced below (A/4425, chapter III).1

"Article 1

"Definitions

"1. The expression 'special mission' means an official mission of State representatives sent by one State to another in order to carry out a special task. It also applies to an itinerant envoy who carries out special tasks in the States to which he proceeds.

"2. The expression '1958 draft' denotes the draft articles on diplomatic intercourse and immunities prepared by the International Law Commission in 1958.

"Article 2

"Applicability of section I of the 1958 draft

"Of the provisions of section I of the 1958 draft, only articles 8, 9 and 18 apply to special missions.

"Article 3

"Applicability of sections II, III and IV of the 1958 draft

"1. The provisions of sections II, III and IV apply to special missions also.

"2. In addition to the modes of termination referred to in article 41 of the 1958 draft, the functions of a special mission will come to an end when the tasks entrusted to it have been carried out.

4. In its report to the General Assembly covering the work of its twelfth session (ibid., para. 36), the Commission recommended that this draft should be referred to the United Nations Conference on Diplomatic Intercourse and Immunities scheduled to be held at Vienna in the spring of 1961, in order that these articles might be embodied in whatever convention the Conference might prepare. The Commission added that, owing to lack of time, it had not been able to give the topic the thorough study it would normally have done. The Commission explained that the three articles, together with their commentary, should therefore be regarded as constituting only a preliminary survey carried out mainly in order to put forward certain ideas and suggestions which could be taken into account at the Vienna Conference.

5. On the recommendation of the Sixth Committee, the General Assembly, by its resolution 1504 (XV) of 12 December 1960, decided that the draft articles on special missions should be referred to the Vienna Conference so that they might be considered together with the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission in 1958.

6. Pursuant to General Assembly resolution 1504 (XV), the Vienna Conference discussed the question and decided, at its second plenary meeting2 held on 3 March 1961, to refer it to the Committee of the Whole, together with the question of diplomatic intercourse and immunities. At its 23rd meeting, held on 21 March 1961, the Committee of the Whole set up a Sub-Committee, composed of the representatives of Ecuador, Iraq, Italy, Japan, Senegal, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America and Yugoslavia, to study the question of special missions and to submit a report thereon.3

7. In its report4 to the Committee of the Whole, the Sub-Committee on special missions stressed the im-

1 In the 1958 draft, sections I, II, III and IV refer respectively to (1) diplomatic intercourse in general; (2) diplomatic privileges and immunities; (3) conduct of the mission and of its members towards the receiving State, and (4) end of the function of a diplomatic agent. Articles 8, 9 and 18 concern persons declared persona non grata, notification of arrival and departure, and the use of flag and emblem.


3 Ibid., summary records of the 23rd meeting of the Committee of the Whole, para. 70.

portance of the subject referred to it. The Sub-Committee then took note of the International Law Commission's statement that the articles on special missions constituted only a preliminary survey. The Sub-Committee noted that, because of lack of time, the draft articles on special missions had, in contrast with the usual practice, not been submitted to Governments for their comments before being drafted in final form. The Sub-Committee further noted that the draft articles on special missions did little more than indicate which of the rules on permanent missions applied, and which did not apply, to special missions. The Sub-Committee considered that, while the basic rules might in fact be the same, it could not be assumed that such an approach necessarily covered the whole field of special missions.

8. In view of the foregoing considerations the Sub-Committee concluded that, while the draft articles on special missions provided an adequate basis for discussion, their elaboration into texts suitable for discussion in a convention or other instrument would require extensive and time-consuming study. Final study and recommendations on special missions would, furthermore, have to await the approval of a complete set of articles on permanent missions, at least by the Committee of the Whole. The question thus arose whether the Sub-Committee could find the time necessary for a proper and thorough study of the subject of special missions, and whether the Committee of the Whole and the Conference itself would have sufficient opportunity to discuss any detailed recommendations made by the Sub-Committee. The Sub-Committee was of the opinion that this question should be answered in the negative, having in mind the limited duration of the Conference, the heavy schedule of the Committee of the Whole and the plenary sessions of the Conference, and the limitations on concurrent meetings of the Sub-Committee and other organs of the Conference imposed by budgetary and staffing considerations. The Sub-Committee therefore unanimously recommended that the Committee of the Whole should report to the Conference that the subject of special missions should be referred back to the General Assembly, with the suggestion that the Assembly should entrust to the International Law Commission the task of the further study of the topic in the light of the Convention to be established by the Conference.

9. At its 39th meeting, held on 4 April 1961, the Committee of the Whole unanimously adopted the Sub-Committee's recommendation and requested the Drafting Committee to prepare, for submission to the Conference, a draft resolution along the lines of that recommendation. Accordingly, at its fourth plenary meeting on 10 April 1961, the Conference adopted a resolution recommending to the General Assembly of the United Nations that it refer the question back to the International Law Commission.

10. At its 1014th plenary meeting, held on 25 September 1961, the General Assembly included the "Question of Special Missions" in the agenda of its sixteenth session, and at its 1018th plenary meeting, held on 27 September, it decided to refer the items to the Sixth Committee, which discussed it at its 731st meeting held on 15 December 1961.

11. In its report to the General Assembly the Sixth Committee stated that it had approved the recommendation of the Vienna Conference and added that certain representatives had expressed the hope that the International Law Commission would take up the question as soon as possible.

12. At its 1081st plenary meeting, held on 18 December 1961, the General Assembly, acting on the recommendation of the Sixth Committee, adopted resolution 1687 (XVI), which is reproduced in full below:

**Question of special missions**

"The General Assembly,

"Recalling its resolution 1504 (XV) of 12 December 1960, whereby it referred to the United Nations Conference on Diplomatic Intercourse and Immunities the draft articles on special missions contained in chapter III of the report of the International Law Commission covering the work of its twelfth session,

"Noting the resolution on special missions adopted by the United Nations Conference on Diplomatic Intercourse and Immunities at its fourth plenary meeting, held on 10 April 1961, recommending that the subject be referred again to the International Law Commission,

"Requests the International Law Commission, as soon as it considers it advisable, to study further the subject of special missions and to report thereon to the General Assembly."

5 Ibid., vol. I, summary records of the 39th meeting of the Committee of the Whole, para. 63.
6 Ibid., vol. I, summary records of the fourth plenary meeting, para. 3; and vol. II, document A/CONF.20/10/Add.1, resolution I.
8 Ibid., para. 12.
REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

DOCUMENT A/5209*

Report of the International Law Commission covering the work of its fourteenth session,
24 April - 29 June 1962

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ANNEX

Registration and publication of treaties and international agreements: regulations to give effect to Article 102 of the Charter of the United Nations | 194

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 fourteenth session at the European Office of the United Nations, Geneva, from 24 April to 29 June 1962. The work of the Commission during the session is described in this report. Chapter II of the report contains twenty-nine provisional draft articles on the conclusion, entry into force and registration of treaties, with commentaries. Chapter III relates to the Commission’s future work in the field of the codification and progressive development of international law. Chapter IV concerns the organization of the work of the next session. Chapter V deals with a number of administrative and other questions.

I. Membership and attendance

2. By its resolution 1647 (XVI) of 6 November 1961, the General Assembly decided to increase the number of members of the Commission from 21 to 25. At its 1067th plenary meeting, on 28 November 1961, the Assembly elected the members listed below for a term of five years, pursuant to its resolution 985 (X) of 3 December 1955. The term of the present members began on 1 January 1962.

3. The Commission consists of the following members:

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<th>Name</th>
<th>Nationality</th>
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<tr>
<td>Mr. Roberto Ago</td>
<td>Italy</td>
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<td>Mr. Gilberto Amado</td>
<td>Brazil</td>
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<td>Mr. Milan Bartos</td>
<td>Yugoslavia</td>
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<td>Mr. Herbert W. Briggs</td>
<td>United States of America</td>
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<td>Mr. Marcel Cadieux</td>
<td>Canada</td>
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<tr>
<td>Mr. Erik Castrén</td>
<td>Finland</td>
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<tr>
<td>Mr. Abdullah El-Briant</td>
<td>United Arab Republic</td>
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<td>Mr. Taslim O. Elias</td>
<td>Nigeria</td>
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<td>Mr. André Gros</td>
<td>France</td>
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<tr>
<td>Mr. Eduardo Jiménez de Aréchaga</td>
<td>Uruguay</td>
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<tr>
<td>Mr. Victor Kanga</td>
<td>Cameroon</td>
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<tr>
<td>Mr. Manfred Lachs</td>
<td>Poland</td>
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<tr>
<td>Mr. Liu Chieh</td>
<td>China</td>
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<td>Mr. Antonio de Luna García</td>
<td>Spain</td>
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<td>Mr. Luis Padilla Nervo</td>
<td>Mexico</td>
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<td>Mr. Radhabinod Pal</td>
<td>India</td>
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<td>Mr. Angel M. Paredes</td>
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<td>Mr. Obed Pessou</td>
<td>Dahomey</td>
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<td>Mr. Shabtai Rosenne</td>
<td>Israel</td>
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<td>Mr. Abdul Hakim Tabiri</td>
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<td>Mr. Serjin Tsuruoka</td>
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<td>Austria</td>
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Mr. Mustafa Kamil Yasseen    | Iraq                      |
4. All the members, with the exception of Mr. Victor Kanga, attended the session of the Commission.

II. Officers

5. At its 628th meeting, held on 24 April 1962, the Commission elected the following officers: Chairman: Mr. Radhabinod Pal; First Vice-Chairman: Mr. André Gros; Second Vice-Chairman: Mr. Gilberto Amado; Rapporteur: Mr. Manfred Lachs.

6. At its 634th meeting, held on 2 May 1962, 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. André Gros, Chairman, Mr. Roberto Ago, Mr. Eduardo Jiménez de Aréchaga, Mr. Manfred Lachs, Mr. Grigory I. Tunkin, Sir Humphrey Waldock, Mr. Mustafa Kamil Yasseen.

7. The Legal Counsel, Mr. Constantin Stavropoulos, was present at the meetings of the Commission and represented the Secretary-General from 29 May to 1 June. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission. He also represented the Secretary-General in the absence of Mr. Stavropoulos.

III. Agenda

8. The Commission adopted an agenda for the fourteenth session consisting of the following items:

1. Law of treaties.
2. Future work in the field of codification and progressive development of international law (General Assembly resolution 1686 (XVI)).
3. Question of special missions (General Assembly resolution 1687 (XVI)).
4. Co-operation with other bodies.
5. Date and place of the fifteenth session.
6. Other business.

9. In the course of the session, the Commission held forty-five meetings. It considered all the items on its agenda except item 3 (Question of special missions).

10. At its twelfth session, in 1960, the Commission had, in pursuance of General Assembly resolution 1453 (XIV) of 7 December 1959, requested the Secretariat to undertake a study of the juridical régime of historic bays, prepared by the Secretariat in connexion with the first United Nations Conference on the Law of the Sea. This study (A/CN.4/143) was submitted to the present session, but as the question was not on the agenda, it was not considered by the Commission.

Chapter II

LAW OF TREATIES

I. Introduction

A. Summary of the Commission’s Proceedings

11. At its first session in 1949, the International Law Commission placed the "Law of treaties" amongst the topics listed in paragraphs 15 and 16 of its report for that year as being suitable for codification and appointed Mr. J. L. Brierly as Special Rapporteur for the subject.

12. At its second session in 1950, the Commission devoted its 49th to 53rd meetings to a preliminary discussion of Mr. J. L. Brierly's first report which like his other reports envisaged the Commission's work on the law of treaties taking the form of a draft convention, and also had available to it replies of Governments to a questionnaire addressed to them under article 19, paragraph 2, of its Statute. The Commission's report for that session contained inter alia the following observation:

"A majority of the Commission were also in favour of including in its study agreements to which international organizations are parties. There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration." (Paragraphs 161-162 of the report.)

13. At its third session in 1951, the Commission had before it two reports from Mr. Brierly, one a continuation of the Commission's general work on the law of treaties and the other a special report on "reservations to multilateral conventions" called for by the General Assembly at the same time as it had requested an advisory opinion from the International Court of Justice on the particular problem of reservations to the Genocide Convention. As to the Commission's opinions and recommendations on the special subject of reservations to multilateral conventions, there is no need to summarize them here, since this is done later in the present report in the commentary which follows articles 18, 19 and 20. At its third session of the Commission, Mr. Brierly presented a second report on the law of treaties which was discussed in the course of eight meetings. The Commission took a further decision at that session concerning the question of international organizations already mentioned in its report for 1950. It adopted "the suggestion put forward the previous year by Mr. Hudson, and supported by other members of the Commission, that it should leave aside, for the moment, the question of the capacity of international organizations to make treaties, that it should draft the articles with reference to States only and that it should examine later whether they could be applied to international organizations as they stand or whether they required modifications."9

14. At its fourth session in 1952, the Commission had before it a "third report on the law of treaties", prepared by Mr. Brierly, who, however, had meanwhile resigned his membership of the Commission. In the absence of its author the Commission did not think it expedient to discuss that report, and it confined itself to electing Mr. H. Lauterpacht to succeed Mr. Brierly as Special Rapporteur.

15. At its fifth session in 1953, the Commission received a report from Mr. Lauterpacht containing draft articles and commentaries on a number of topics in the law of treaties but, owing to its other commitments, was unable to take up the report at that session. It therefore instructed Mr. Lauterpacht to continue his work and present a further report. At its sixth session in 1954, the Commission duly received Mr. H. Lauterpacht's second report but was again unable to take up the subject. Meanwhile Mr. (by then Sir Hersch) Lauterpacht had resigned from the Commission on his election as judge of the International Court of Justice, and at its seventh session in 1955 the Commission elected Sir Gerald Fitzmaurice as Special Rapporteur in his place.

16. At the next five sessions of the Commission, from 1956 to 1960, Sir Gerald Fitzmaurice presented five separate and comprehensive reports on the law of treaties, covering respectively: (a) the framing, conclusion and entry into force of treaties, (b) the termination of treaties, (c) essential and substantial validity of treaties, (d) effects of treaties as between the parties (operation, execution and enforcement) and (e) treaties and third States. Although taking full account of the reports of his predecessors, Sir Gerald Fitzmaurice began preparing his drafts on the law of treaties de novo and framed them in the form of an expository code rather than of a convention. During this period the Commission's time was largely taken up with its work on the law of the sea and on diplomatic and consular intercourse and immunities, so that, apart from a brief discussion of certain general questions of treaty law at the 368th-370th meetings of its 1956 session, it

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13 Yearbook of the International Law Commission, 1955 (United Nations publication, Sales No.: 57.V.6), vol. II, pp. 1 and 70.
was only able to concentrate upon the law of treaties at its eleventh session in 1959. At that session it devoted some twenty-six meetings16 to a discussion of Sir Gerald Fitzmaurice’s first report on the framing, conclusion and entry into force of treaties, and provisionally adopted the text of fourteen articles, together with their commentaries. However, the time available was not sufficient to enable the Commission to complete its series of draft articles on this part of the law of treaties.17 In its report for 1959 the Commission stated that, without prejudice to any eventual decision to be taken by the Commission it had not so far envisaged its work on the law of treaties as taking the form of one or more international conventions but rather as “a code of a general character”. The arguments in favour of a “code” were stated to be two-fold:

“First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based.”18

Mention was also made of possible difficulties that might arise if the law of treaties were to be embodied in a multilateral convention and then some States did not become parties to it or, having become parties to it, subsequently denounced it. On the other hand, it recognized that these difficulties arise whenever a convention is drawn up embodying rules of customary law. Finally, it underlined that, if it were decided to cast the code in the form of a multilateral convention, considerable drafting changes, and possibly the omission of some material, would almost certainly be required.

17. The twelfth session, in 1960, was almost entirely taken up with consular intercourse and immunities and ad hoc diplomacy, so that no further progress was made with the law of treaties during that session. Sir Gerald Fitzmaurice then had himself to retire from the Commission on his election as judge of the International Court of Justice, and at the thirteenth session, in 1961, the Commission elected Sir Humphrey Waldock to succeed him as Special Rapporteur for the law of treaties.

At the same time the Commission took the following general decisions as to its work on the law of treaties:

“(i) That its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention;

“(ii) That the Special Rapporteur should be requested to re-examine the work previously done in this field by the Commission and its Special Rapporteurs;

“(iii) That the Special Rapporteur should begin with the question of the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the whole subject in two years.”19

By the first of these decisions the Commission changed the scheme of its work on the law of treaties from a mere expository statement of the law to the preparation of draft articles capable of serving as a basis for a multilateral convention. In doing so, it had two considerations principally in mind. First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new States have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new States the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations.

18. At the present session of the Commission the Special Rapporteur submitted a report (A/CN.4/144 and Add.1) on the conclusion, entry into force and registration of treaties which was considered by the Commission at its 636th-672nd meetings. The Commission adopted a provisional draft of articles upon these topics, which is reproduced in the present chapter together with commentaries upon the articles. Its plan is to prepare a draft of a further group of articles at its next session covering the validity and duration of treaties and a draft of a yet further group of articles at the subsequent session covering the application and effects of treaties. Whether all the drafts should be amalgamated to form a single draft convention or whether the codification of the law of treaties should be dealt with in a series of related conventions is a question which can be left over for decision when all the drafts are complete. Provisionally, and for the purpose of facilitating the work of drafting, the Commission is adopting the same method as in the case of the law of the sea—of preparing a series of self-contained though closely related groups of draft articles.

19. In accordance with articles 16 and 21 of its Statute, the Commission decided to transmit its draft concerning the conclusion, entry into force and registration of treaties, through the Secretary-General, to Governments for their observations.

B. THE SCOPE OF THE PRESENT GROUP OF DRAFT ARTICLES

20. The present group of draft articles covers the broad topic of the “conclusion” of treaties. “Entry into force” has been regarded as naturally associated with, if not actually part of, “conclusion”, while the subject of “registration of treaties” has been added as belonging essentially to the procedure of treaty-making and as being closely linked in point of time to entry into force.20 Articles providing for the correction of errors discovered in the texts of treaties after their authentication have been included, as well as articles concerning the appointment and functions of a depositary. The details...
pository State or international organization plays so essential a part in the working of the procedural clauses of a multilateral treaty that reference to the functions of a depositary is almost inevitable in articles codifying the law concerning the conclusion of treaties. The Commission notes, moreover, that the General Assembly itself, in its resolution 1452 B (XIV) of 7 December 1959 concerning reservations to multilateral conventions, emphasized the need for the practice of depositary States and organizations to be taken into account by the Commission in its work on the law of treaties. The articles (articles 28 and 29) prepared by the Commission concerning the functions of a depositary will, however, be re-examined since the information concerning the practice of depositary States and organizations called for in the above-mentioned resolution is not yet available.

21. The Commission again considered the question of including provisions concerning the treaties of international organizations in the draft articles on the conclusion of treaties. The Special Rapporteur had prepared, for submission to the Commission at a later stage in the session, a final chapter on treaty-making by international organizations. He suggested that this chapter should specify the extent to which the articles concerning States apply to international organizations and formulate the particular rules peculiar to organizations. The Commission, however, reaffirmed its decisions of 195121 and 195922 to defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by States. At the same time the Commission recognized that international organizations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the law of treaties. Accordingly, while confining the specific provisions of the present draft to the treaties of States, the Commission has made it plain in the commentaries attached to articles 1 and 3 of the present draft articles that it considers the international agreements to which organizations are parties to fall within the scope of the law of treaties.

22. The draft articles have provisionally been arranged in five sections covering: (i) general provisions, (ii) the conclusion of treaties by States, (iii) reservations, (iv) the entry into force and registration of treaties and (v) the correction of errors and the functions of depositaries. In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning the conclusion of treaties, and the articles formulated by the Commission contain elements of progressive development as well as of codification of the law.

23. The text of draft articles 1 to 29 and the commentaries, as adopted by the Commission on the proposal of the Special Rapporteur, are reproduced below:

II. Draft articles on the law of treaties

Part I

Conclusion, entry into force and registration of treaties

Section 1: General provisions

Article 1

Definitions

1. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

(a) “Treaty” means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, modus vivendi or any other appellation), concluded between two or more States or other subjects of international law and governed by international law.

(b) “Treaty in simplified form” means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement, joint declaration or other instrument concluded by any similar procedure.

(c) “General multilateral treaty” means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to States as a whole.

(d) “Signature”, “Ratification”, “Acceptance” and “Approval” mean in each case the act so named whereby a State establishes on the international plane its consent to be bound by a treaty. “Signature” however also means, according to the context, an act whereby a State authenticates the text of a treaty without establishing its consent to be bound.

(e) “Full powers” means a formal instrument issued by the competent authority of a State authorizing a given person to represent the State either for the purpose of carrying out all the acts necessary for concluding a treaty or for the particular purpose of negotiating or signing a treaty or of executing an instrument relating to a treaty.

(f) “Reservation” means a unilateral statement made by a State, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that State.

(g) “Depositary” means the State or international organization entrusted with the functions of custodian of the text of the treaty and of all instruments relating to the treaty.

2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any State.

Commentary

(1) The definitions, as the introductory words of the paragraph indicate, are intended only to state the meanings with which the terms in question are used in the draft articles.

(2) Treaty. The term “treaty” is used throughout the draft articles as a generic term covering all forms of international agreement in writing. Although the term “treaty” in one sense connotes only the single formal instrument, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument nor usually subject to ratification, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an “agreed minute” or a “memorandum of understanding,” could not appropriately be called formal instruments, but they are undoubtedly international agreements subject to the law.
of treaties. A general convention on the law of treaties must cover all such agreements, whether embodied in one document or in two or more related instruments, and whether the instrument is "formal" or "informal." The question whether, for the purpose of describing all such instruments and the law relating to them, the expression "treaties" and "law of treaties" should be employed, rather than "international agreements" and "law of international agreements" is a question of terminology rather than of substance. In the opinion of the Commission, a number of considerations point strongly in favour of using the term "treaty" for this purpose.

(3) In the first place, the treaty in simplified form, far from being at all exceptional, is very common. The number of such agreements, whether embodied in a single instrument or in two or more related instruments, is now very large and moreover their use is steadily increasing.23

(4) Secondly the juridical differences, in so far as they really exist at all, between formal treaties and treaties in simplified form lie almost exclusively in the field of form, and in the method of conclusion and entry into force. The law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements. In relation to these matters, there are admittedly some important differences of a juridical character between certain classes or categories of international agreements.24 But these differences spring neither from the form, nor from the appellation, nor from any other outward characteristic of the instrument in which they are embodied: they spring exclusively from the content of the agreement, whatever its form. It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of a convention on the law of treaties merely because, in the field of form pure and simple, and of the method of conclusion and entry into force, there may be certain differences between such agreements and formal agreements. At the most, such a situation might make it desirable, in that particular field and in the section of the convention dealing with it, to institute certain differences of treatment between different forms of international agreements.

(5) Thirdly, even in the case of single formal agreements, an extraordinarily rich and varied nomenclature has developed which serves to confuse the question of classifying international agreements. Thus, in addition to "treaty", "convention" and "protocol", one not infrequently finds titles such as "declaration", charter", "covenant", "act", "statute", "agreement", "concordat", whilst names like "declaration" and "agreement", and "modus vivendi" may well be found given to both formal and less formal types of agreement. As to the latter, their nomenclature is almost illimitable, even if some names such as "agreement", "exchange of notes", "exchange of letters", "memorandum of agreement", or "agreed minutes", may be more common than others.25 It is true that some types of instruments are used more frequently for some purposes rather than others; it is also true that some titles are more frequently attached to some types of transaction rather than to others. But there is no exclusive or systematic use of nomenclature for particular types of transaction.

(6) Fourthly, the use of the term "treaty" as a generic term embracing all kinds of international agreements in written form is accepted by the majority of jurists.26

(7) Even more important, the generic use of the term "treaty" is supported by two provisions of the Statute of the International Court of Justice. In Article 36, paragraph 2, amongst the matters in respect of which States parties to the Statute can accept the compulsory jurisdiction of the Court, there is listed "a. the interpretation of a treaty". But clearly, this cannot be intended to mean that States cannot accept the compulsory jurisdiction of the Courts for purposes of the interpretation of international agreements not actually called treaties, or embodied in instruments having another designation. Again, in Article 38, paragraph 1, the Court is directed to apply in reaching its decisions, "a. international conventions". But equally, this cannot be intended to mean that the Court is precluded from applying other kinds of instruments embodying international agreements, but not styled "conventions". On the contrary, the Court must and does apply them. The fact that in one of these two provisions dealing with the whole range of international agreements the term employed is "treaty" and in the other the even more formal term "convention" serves to confirm that the use of the term "treaty" generically in the present articles to embrace all international agreements is perfectly legitimate. Moreover, the only real alternative would be to use for the generic term the phrase "international agreement", which would not only make the drafting more cumbrous but would sound strangely today, when the "law of treaties" is the term almost universally employed to describe this branch of international law.

(8) The term "treaty", as used in the draft article covers only international agreements made between "two or more States or other subjects of international law". The phrase "other subjects of international law" is designed to provide for treaties concluded by: (a) international organizations, (b) the Holy See, which enters into treaties on the same basis as States, and (c) other international entities, such as insurers, which may in some circumstances enter into treaties. The phrase is not intended to include individuals or corporations created under national law, for they do not possess capacity to enter into treaties nor to enter into agreements governed by public international law.27

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24 See on this subject the commentaries to Sir Gerald Fitzmaurice's second report (Yearbook of the International Law Commission, 1957 (United Nations publication, Sales No.: 57.V.5), vol. II, p. 16, paras. 115, 120, 125-128 and 165-168); his third report (Yearbook of the International Law Commission, 1958 (United Nations publication, Sales No.: 58.V.1), vol. II, p. 20, paras. 90-93).

25 In his article "The Names and Scope of Treaties" (American Journal of International Law, 51 (1957), No. 3, p. 574), Mr. Denis P. Myers considers no less than thirty-eight different appellations; see also the list given in Sir Hersch Lauterpacht's first report (Yearbook 1953, vol. II, p. 101), paragraph 1 of the commentary to his article 2. Article 1 of the General Assembly regulation concerning registration speaks of "every treaty or international agreement whatever its form and descriptive name."

26 Lord McNair, Law of Treaties (1961) p. 22; Rousseau, Principes généraux du droit international public, p. 132 et seq. See also the opinion of Louis Renault as long ago as 1869: "... every agreement at that between . . . . States, in whatever way it is recorded (treaty, convention, protocol, mutual declaration, exchange of unilateral declaration)." (translation) Introduction à l'étude du droit international, pp. 33-34.

27 As to this point and the general question of the capacity of subjects of international law to enter into treaties, see further the commentary to article 3.
agreements in written form. On the other hand, although the Commission has therefore defined this form of treaty in the sphere of conclusion and entry into force some cated in paragraph 4 of the present commentary, the law all those embodied in a single instrument. More related instruments", brings these forms of inter-acceptance of reservations, entry into force and other nters that, in the interests of clarity and simplicity, its draft articles on the law of treaties must be confined to agreements in written form. On the other hand, although the classical form of treaty was a single formal instrument, in modern practice international agreements are frequently concluded not only by less formal instruments but also by means of two or more related instruments. The obvious examples are exchanges of notes and exchanges of letters. Another is the case of agreements concluded by means of "declarations" made separately but related to each other either directly or through a connecting instrument. The definition, by the phrase "whether embodied in a single instrument or two or more related instruments", brings these forms of international agreement within the term "treaty" as well as all those embodied in a single instrument.

(11) "Treaty in simplified form". As already indicated in paragraph 4 of the present commentary, the law of treaties for the most part applies in the same manner to formal treaties and to treaties in simplified form, but in the sphere of conclusion and entry into force some differences may be found to exist. In point of fact, formal and informal treaties are so often employed for precisely the same kind of transaction that the number of cases where it can be said with truth that different principles apply to formal and informal treaties are extremely few. Nevertheless, in one or two instances a distinction needs to be drawn between treaties in simplified form and other treaties (e.g., articles 4 and 10). The distinction is not altogether easy to express owing to the great variety in the use of treaty forms and the somewhat indiscernate nomenclature of treaties. In general, treaties in simplified form identify themselves by the absence of one or more of the characteristics of the formal treaty. But it would be difficult to base the distinction inapplicably upon the absence or presence of any one of these characteristics. Ratification, for example, though not usually required for treaties in simplified form is by no means unknown. Nevertheless, the treaty forms falling under the rubric "treaties in simplified form" do in most cases identify themselves by their simplified procedure. The Commission has, therefore, defined this form of treaty by reference to its simplified procedure and by mentioning typical examples.

(12) "General multilateral treaty." Multiplication of the number of States participating in the drawing up of a treaty may raise problems in regard to the procedure for the adoption, signing and authentication of the treaty and in regard to the admission of additional parties, the acceptance of reservations, entry into force and other matters. The problem is also posed whether different rules may, perhaps, apply to treaties drawn up by a limited number of States and those drawn up by a large number or between those to which only a limited group of States may become parties and those to which all or a very large number of States may become parties. The Commission, having given close attention to these problems, found that for most purposes the relevant distinction is between treaties drawn up at a conference convened by the States themselves and those drawn up in an international organization or at a conference convened by an international organization. But in one or two cases the Commission found it necessary to have regard also to other criteria. One of these cases was the procedure for admitting additional States to participation in a multilateral treaty. Here, the Commission found that the relevant distinction is between "general multilateral treaties" and other multilateral treaties. Accordingly, it became necessary to define a "general multilateral treaty" and the Commission took as the basis of its definition the general character of the treaty from the point of view of the provisions of the treaty being a matter of general concern to the international community as a whole.

(13) "Reservation." The need for this definition arises from the fact that States, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the State's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.

(14) The remaining definitions do not require comment, as they are sufficiently explained in the relevant articles and commentaries.

(15) Paragraph 2 is designed to safeguard the position of States in regard to their internal laws and usages, and more especially in connexion with the ratification of treaties. In many countries, the constitution requires that international agreements in a form considered under the internal law or usage of the State to be a "treaty" must be endorsed by the legislature or have their ratification authorized by it—perhaps by a specific majority—whereas other forms of international agreement are not subject to this requirement. Accordingly, it is quite essential that the definition given to the term "treaty" in the present articles should do nothing to disturb or affect in any way the existing domestic rules or usages which govern the classification of international agreements under national law.

Article 2

Scope of the present articles

1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in article 1, paragraph 1 (a).

2. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law.

Commentary

(1) Paragraph 1 of this article has to be read in conjunction with the definition of "treaty" in article 1, from which it appears that the draft articles apply to every international agreement in written form concluded between two or more subjects of international law and
governed by international law. The words “except to the extent that a particular context may otherwise require” preface the statement as to the scope of the present articles simply as a recognition of the fact that some of their provisions are, either by their express terms or by their inherent nature, only applicable to certain kinds of treaties.

(2) As already stated in paragraph 10 of the commentary to article 1, the restriction of the draft articles to agreements in written form does not mean that the Commission considers oral international agreements to be without legal force. Accordingly, in order to remove any possibility of misunderstanding, paragraph 2 of the present article, without entering further into the matter, expressly preserves such legal force as oral agreements possess under international law.

Article 3
Capacity to conclude treaties

1. Capacity to conclude treaties under international law is possessed by States and by other subjects of international law.

2. In a federal State, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution.

3. In the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned.

Commentary

(1) Some members of the Commission were doubtful about the need for an article on capacity in international law to conclude treaties. They pointed out that capacity to enter into diplomatic relations had not been dealt with in the Vienna Convention and suggested that, if it were to be dealt with in the law of treaties, the Commission might find itself codifying the whole law concerning the “subjects” of international law. Other members felt that the question of capacity is more prominent in the law of treaties than in the law of diplomatic intercourse and immunities and that the draft articles should contain at least some general provisions concerning capacity to conclude treaties. The Commission, while holding that it would not be appropriate to enter into all the detailed problems of capacity which may arise, decided to include the present article setting out three broad provisions concerning capacity to conclude treaties.

(2) Paragraph 1 lays down the general principle that treaty-making capacity is possessed by States and by other subjects of international law. The term “State” is used here with the same meaning as in the Charter of the United Nations, the Statute of the Court, the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations; i.e., it means a State for the purposes of international law. The phrase “other subjects of international law” is primarily intended to cover international organizations, to remove any doubt about the Holy See and to leave room for more special cases such as an insurgent community to which a measure of recognition has been accorded.

(3) Paragraph 2 deals with the case of federal States whose constitutions, in some instances, allow to their member States a measure of treaty-making capacity. It does not cover treaties made between two units of the federation. Agreements between two member States of a federal State have a certain similarity to international treaties and in some instances certain principles of treaty law have been applied to them by analogy. However, those agreements operate within the legal régime of the constitution of the State, and to bring them expressly within the terms of the present articles would be to risk a conflict between international and domestic law. Paragraph 2, therefore, is concerned only with treaties made by the federal Government itself, or by a unit of the federation, with an outside State. More frequently, the treaty-making capacity is vested exclusively in the federal Government, but there is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third States. A question may arise in some cases as to whether the component State concludes the treaty as an organ of the federal State or in its own right. But on this point also the solution has to be sought in the provisions of the federal constitution.

(4) Paragraph 3 states that the treaty-making capacity of an international organization depends on its constitution. The term “organization” has been chosen deliberately in preference to “constituent instrument.” For the treaty-making capacity of an international organization does not depend exclusively on the terms of the constituent instrument of the organization but also on the decisions and rules of its competent organs. Comparatively few constituent treaties of international organizations contain provisions concerning the conclusion of treaties by the organization; nevertheless, the great majority of organizations have considered themselves competent to enter into treaties for the purpose of furthering the aims of the organization. Even when, as in the case of the Charter, the constituent treaty has contained express provisions concerning the making of certain treaties, they have not been considered to exhaust the treaty-making powers of the organization. In this connexion, it is only necessary to recall the dictum of the International Court in its opinion on Reparation for Injuries Suffered in the Service of the United Nations: “Under international law, the organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.” Accordingly, important although the provisions of the constituent treaty of an organization may be in determining the proper limits of its treaty-making activity, it is the constitution as a whole—the constituent treaty together with the rules in force in the organization—that determine the capacity of an international organization to conclude treaties.

Section II: Conclusion of treaties by States

Article 4
Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty

1. Heads of State, Heads of Government and Foreign Ministers are not required to furnish any evidence of their authority to negotiate, draw up, authenticate or sign a treaty on behalf of their State.

2. Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty be-
between their State and the State to which they are accredited.

(b) The same rule applies in the case of the Heads of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization in question or between their State and the organization to which they are accredited.

3. Any other representative of a State shall be required to furnish evidence, in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his State.

4. (a) Subject to the provisions of paragraph 1 above, a representative of a State shall be required to furnish evidence of his authority to sign, whether in full or ad referendum, a treaty on behalf of his State by producing an instrument of full powers.

(b) However, in the case of treaties in simplified form, it shall not be necessary for a representative to produce an instrument of full powers, unless called for by the other negotiating State.

5. In the event of an instrument of ratification, accession, approval or acceptance being signed by a representative of the State other than the Head of State, Head of Government or Foreign Minister, that representative shall be required to furnish evidence of his authority.

6. (a) The instrument of full powers, where required, may either be one restricted to the performance of the particular act in question or a grant of full powers which covers the performance of that act.

(b) In case of delay in the transmission of the instrument of full powers, a letter or telegram evidencing the grant of full powers sent by the competent authority of the State concerned or by the head of its diplomatic mission in the country where the treaty is negotiated shall be provisionally accepted, subject to the production in due course of an instrument of full powers, executed in proper form.

(c) The same rule applies to a letter or telegram sent by the Head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 2 (b) above.

Commentary

(1) Authority to represent the State in doing any of the acts by which treaties are negotiated and concluded is a matter to be decided by each State in accordance with its own internal laws and usages. However, other States have a legitimate interest in the matter to the extent of being entitled to reassure themselves that a representative with whom they are dealing has authority from his State to carry out the transaction in question. In some cases, the very position of the representative in the State gives this assurance; where this is not so, there is normally a right to call for evidence of authority of the person concerned to act in the particular transaction on behalf of his State. The present article seeks to specify the cases in which, according to modern practice, no evidence of authority is required and those in which a representative either must produce evidence of his authority or is liable to do so if called upon.

(2) Heads of State, Heads of Government and Foreign Ministers are considered in virtue of their offices and functions to possess an authority to act for their States in negotiating, drawing up, authenticating or signing a treaty. In the case of Foreign Ministers this was expressly recognized by the Permanent Court of International Justice in the Eastern Greeneland Case39 in connexion with the "Ihlen Declaration." Accordingly, paragraph 1 lays down that no evidence is required of the authority of these officers of State for the purposes mentioned.

(3) Similarly, in accordance with accepted practice, paragraph 2 provides that the Head of a diplomatic mission is to be considered to have authority to negotiate, draw up and authenticate a treaty between his State and the State to which he is accredited. Thus, article 3, paragraph 1 (c), of the Vienna Convention on Diplomatic Relations provides that "the functions of a diplomatic mission consist, inter alia, in . . . negotiating with the Government of the receiving State". However, the assumption does not extend in the case of the Head of a diplomatic mission to signing a treaty with binding effect; in carrying out that act he is governed by the rule in paragraph 4 of the present article. The practice of establishing permanent missions at the headquarters of certain international organizations to represent the State and to invest the permanent representatives with powers similar to those of the Head of a diplomatic mission is now extremely common. The Commission therefore considers that the rule in paragraph 2 should also apply to such permanent representatives to international organizations.

(4) Paragraph 3 lays down the general rule that representatives other than those already mentioned are under an obligation to produce evidence, in the form of written credentials, of their authority to negotiate, draw up and authenticate a treaty, even if this requirement may sometimes be overlooked or waived.

(5) As already indicated in regard to the Head of a diplomatic mission, authority to negotiate, draw up and authenticate is distinct from authority to sign. While authority to sign, if possessed by the representative at the stage of negotiation, may reasonably be held to imply authority to negotiate, the reverse is not true; and in the case of treaties not in simplified form a further authority specifically empowering him to sign is necessary before signature can be affixed. The practice of Governments in regard to treaties of which the Secretary-General of the United Nations is depository indicates that no distinction is made for this purpose between signature and signature ad referendum, and the rule has accordingly been so stated in paragraph 4 (a) of the article.

(6) In the case of treaties in simplified form, the production of an instrument of full powers is not usually insisted upon in practice. As it is possible to imagine circumstances in which the other State might wish to assure itself of a representative's power to sign an exchange of notes or other treaty in simplified form, the Commission has proposed a rule in paragraph 4 (b) which dispenses with the production of full powers, "unless called for by the other negotiating State".

(7) Instruments of ratification, accession, acceptance and approval are normally signed by Heads of State, though in modern practice this is sometimes done by Heads of Government or by Foreign Ministers. In these cases, evidence of authority to sign the instrument is not required. However, in rare cases—usually because of special urgency to deposit the instrument—the Head of

a mission or a permanent representative to an organization may be instructed to sign and deposit such an instrument; in these cases, according to the practice of the Secretary-General, full powers are demanded and produced. It is these cases for which paragraph 5 seeks to provide.

(8) Paragraph 6 deals with the form of full powers and with cases where less formal evidence may provisionally be accepted in lieu of full powers. Normally, full powers are issued ad hoc for the execution of the particular act in question, but there does not appear to be any reason why full powers should not be couched in a wider form provided that they leave no doubt as to the scope of the powers which they confer. Some countries, it is understood, may adopt the practice of issuing to certain Ministers, as part of their normal commissions, wide full powers which, without mentioning any particular treaty, confer on the Minister authority to sign treaties or categories of treaties on behalf of the State. In addition, some permanent representatives at the headquarters of international organizations that are the depositaries of multilateral treaties are clothed by their States with such wide full powers, either included in their credentials or contained in a separate instrument. The Commission will be glad eventually to have information from Governments as to their practice in regard to these forms of full powers. In the meanwhile, it seems justifiable tentatively to insert in paragraph 6 (a) a provision allowing full powers framed to cover all treaties or specific categories of treaty.

(9) Paragraphs 6 (b) and (c) recognize a practice of comparatively recent development which is of considerable utility and should serve to render initialing and signature ad referendum unnecessary save in exceptional circumstances. A letter or telegram is, in case of urgency, accepted as provisional evidence of authority, subject to the production in due course of full powers executed in proper form.

Article 5

Negotiation and drawing up of a treaty

A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other agreed channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference or in some organ of the organization itself.

Commentary

The Commission, although it recognized the contents of this article to be more descriptive than normative, decided to include it, since the process of drawing up the text is an essential preliminary to the legal act of the adoption of the text dealt with in the next article. Article 5, in short, provides a logical connecting link between article 4 and article 6.

Article 6

Adoption of the text of a treaty

The adoption of the text of a treaty takes place:

(a) In the case of a treaty drawn up at an international conference convened by the States concerned or by an international organization, by the vote of two-thirds of the States participating in the conference, unless by the same majority they shall decide to adopt another voting rule;

(b) In the case of a treaty drawn up within an organization, by the voting rule applicable in the competent organ of the organization in question;

(c) In other cases, by the mutual agreement of the States participating in the negotiations.

Commentary

(1) This article deals with the voting rule by which the text of the treaty is "adopted", i.e. the voting rule by which the form and content of the proposed treaty are settled. At this stage, the negotiating States are concerned only with drawing up the text of the treaty as a document setting out the provisions of the proposed treaty; and their votes, when cast at the end of the negotiations in favour of adopting the text as a whole, relate solely to this process. A vote cast at this stage, therefore, is not in any sense an expression of the State's agreement to be bound by the provisions of the text, which can only become binding upon it by a further expression of its consent (signature, ratification, accession or acceptance).

(2) In former times, the adoption of the text of a treaty almost always took place by the agreement of all the States participating in the negotiations and unanimity could be said to be the general rule. The growth of the practice of drawing up treaties in large international conferences or within international organizations has, however, led to so normal a use of the procedure of majority vote that, in the opinion of the Commission, it would be unrealistic to lay down unanimity as the general rule for the adoption of the texts of treaties drawn up at conferences or within organizations. Unanimity remains the general rule for bilateral treaties and for treaties drawn up between very few States. But for other multilateral treaties a different rule must be specified, although, of course, it will always be open to the States concerned to apply the rule of unanimity in a particular case, if they should so decide.

(3) Sub-paragraph (a) of the present article deals with the case of treaties drawn up at international conferences and the main questions for the Commission were: (i) whether a distinction should be drawn between conferences convened by an international organization, and (ii) the principles upon which the voting rule should be determined.

(4) As to the first question, when the General Assembly convenes a conference, the practice of the Secretariat of the United Nations is, after consultation with the groups and interests mainly concerned, to prepare provisional or draft rules of procedure for the conference, including a suggested voting rule, for adoption by the conference itself. But it is left to the conference to decide whether to adopt the suggested rule or replace it by another. The Commission therefore concluded that, both in the case of a conference convened by the States themselves and of one convened by an organization, the voting rule for adopting the text is a matter for the States at the conference.

(5) As to the second question, the rule proposed in

31 Cf. General Assembly resolution 366 (IV) of 3 December 1949, "Rules for the calling of international conferences of States".
be necessary for the adoption of a text at any international conference, unless the States at the conference should by the same majority decide to apply a different voting rule. While the States at the conference must retain the ultimate power to decide the voting rule by which they will adopt the text of the treaty, it appears to the Commission to be extremely desirable to fix in the present articles the procedure by which a conference is to arrive at its decision concerning that voting rule. Otherwise there is some risk of the work of the conference being delayed by long procedural debates concerning the preliminary voting rule by which it is to decide upon its substantive voting rule for adopting the text of the treaty. Some members of the Commission considered that the procedural vote should be taken by simple majority. Others felt that such a rule might not afford sufficient protection to minority groups at the conference, for the other States would be able in every case to decide by a simple majority to adopt the text of the treaty by the vote of a simple majority and in that way override the views of what might be quite a substantial minority group of States at the conference. The rule in sub-paragraph (a) takes account of the interests of minorities to the extent of requiring at least two-thirds of the States to be in favour of proceeding by simple majorities before recourse can be had to simple majority votes for adopting the text of a treaty. It leaves the ultimate decision in the hands of the conference but at the same time establishes a basis upon which the procedural questions can be speedily and fairly resolved. The Commission felt all the more justified in proposing this rule, seeing that the use of a two-thirds majority for adopting the texts of multilateral treaties is now so frequent.

(6) Sub-paragraph (b) deals with the case of treaties, like the Convention on the Prevention and Punishment of the Crime of Genocide or the Convention on the Political Rights of Women, which are drawn up actually within an international organization. Here, the voting rule for adopting the text of the treaty must clearly be the voting rule applicable in the particular organ in which the treaty is adopted.

(7) There remain bilateral treaties and a residue of multilateral treaties concluded between a small group of States otherwise than at an international conference. For all these treaties unanimity remains the rule.

Article 7

Authentication of the text

1. Unless another procedure has been prescribed in the text or otherwise agreed upon by States participating in the adoption of the text of the treaty, authentication of the text may take place in any of the following ways:

(a) Initialling of the text by the representatives of the States concerned;

(b) Incorporation of the text in the final act of the conference in which it was adopted;

(c) Incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.

2. In addition, signature of the text, whether a full signature or signature ad referendum, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 above.

3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty.

Commentary

(1) Authentication of the text of a treaty is necessary in order that the negotiating States, before they are called upon to decide whether they will become parties to the treaty, may know finally and definitively what is the content of the treaty to which they will be subscribing. There must come a point, therefore, at which the draft which the parties have agreed upon is established as being the text of the proposed treaty. Whether the States concerned will eventually become bound by this treaty is of course another matter, and remains quite open. But they must have, as the basis for their decision on this question, a final text not susceptible of alteration. Authentication is the process by which this final text is established, and it consists in some act or procedure which certifies the text as the correct and authentic text.

(2) Previous drafts on the law of treaties have not recognized authentication as a distinct part of the treaty-making process. The reason appears to be that until comparatively recently signature was the normal method of authenticating a text, and that signature always has another and more important function. For it is also either a first step towards ratification, acceptance or approval of the treaty, or an expression of the State's consent to be bound by it. The authenticating function of signature is consequently masked by being merged in its other function. In recent years, however, other methods of authenticating texts of treaties on behalf of all or most of the negotiating parties have been devised. Examples are the incorporation of unsigned texts of projected treaties in final acts of diplomatic conferences, the procedure of the International Labour Organisation under which the signatures of the President of the International Labour Conference and of the Director-General of the International Labour Office authenticate the texts of labour conventions, and treaties whose texts are authenticated by being incorporated in a resolution of the international organization. It is these developments in treaty-making practice which render it desirable to deal separately in the draft articles with authentication as a distinct procedural step in the conclusion of a treaty.

(3) Paragraph 1 of the article sets out the methods of authentication other than signature, and paragraph 2 covers signature as an act of authentication. Signature has been dealt with separately because it only operates as an authenticating act if the treaty has not already been authenticated in one of the ways mentioned in paragraph 1.

(4) Paragraph 3 states the legal effect of authentication as an act which renders the text definitive. This means that, after authentication, any change in the wording of the text would have to be brought out by an agreed correction of the authenticated text (see articles 26 and 27).

Article 8

Participation in a treaty

1. In the case of a general multilateral treaty, every State may become a party to the treaty un-
less it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization.

2. In all other cases, every State may become a party to the treaty:
(a) Which took part in the adoption of its text, or
(b) To which the treaty is expressly made open by its terms, or
(c) Which although it did not participate in the adoption of the text was invited to attend the conference at which the treaty was drawn up, unless the treaty otherwise provides.

Article 9

The opening of a treaty to the participation of additional States

1. A multilateral treaty may be opened to the participation of States other than those to which it was originally open:

(a) In the case of a treaty drawn up at an international conference convened by the States concerned, by the subsequent consent of two-thirds of the States which drew up the treaty, provided that, if the treaty is already in force and . . . years have elapsed since the date of its adoption, the consent only of two-thirds of the parties to the treaty shall be necessary;

(b) In the case of a treaty drawn up either in an international organization or at an international conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ.

2. Participation in a treaty concluded between a small group of States may be opened to States other than those mentioned in article 8 by the subsequent agreement of all the States which adopted the treaty, provided that, if the treaty is already in force and . . . years have elapsed since the date of its adoption, the agreement only of the parties to the treaties shall be necessary.

3. (a) When the depositary of a treaty receives a formal request from a State desiring to be admitted to participation in the treaty under the provisions of paragraphs 1 and 2 above, the depositary:

(i) In a case falling under paragraph 1 (a) and paragraph 2, shall communicate the request to the States whose consent to such participation is specified in paragraph 1 (a) as being material;

(ii) In a case falling under paragraph 1 (b), shall bring the request, as soon as possible, before the competent organ of the organization in question.

(b) The consent of a State to which a request has been communicated under paragraph 3 (a) (i) above shall be presumed after the expiry of twelve months from the date of the communication, if it has not notified the depositary of its objection to the request.

4. When a State is admitted to participation in a treaty under the provisions of the present article notwithstanding the objection of one or more States, an objecting State may, if it thinks fit, notify the State in question that the treaty shall not come into force between the two States.

Commentary

(1) Articles 8 and 9 define the States to which it is open to become parties to a treaty. Article 8 covers what may be termed original participation in a treaty; that is, it defines the States which may become parties as from the date of the adoption of the text of the treaty. Article 9 lays down the conditions under which participation in treaties may be extended to additional States by decisions subsequent to the adoption of the text.

(2) The Commission gave particular attention to the problem of participation in general multilateral treaties which it considered to be of special importance in this connexion. It was unanimous in thinking that these treaties because of their special character should, in principle, be open to participation on as wide a basis as possible. Some members of the Commission considered that, as these treaties are intended to be universal in their application, they should be open to participation by every State. They took the view that it is for the general good that all States should become parties to such treaties, and that in a world community of States, no State should be excluded from participation in treaties of this character. They did not think that the principle of the freedom of States to determine for themselves the extent to which they are prepared to enter into treaty relations with other States was any obstacle to the Commission formulating a rule under which general multilateral treaties would be open to participation by every State. For it not infrequently happens already that States find themselves parties to the same treaties and members of the same international organization as States with which they have no diplomatic relations or which they do not even recognize.

(3) Other members of the Commission did not feel justified in setting aside, even in the case of general multilateral treaties, so fundamental a principle of treaty law as the freedom of the contracting States to determine, by the clause of the treaties itself, the States which may become parties to it. On the other hand, it was considered by many members that the special character of general multilateral treaties justifies, in those cases where the treaty does not specify the categories of States to which it is to be open, a presumption that every State may become a party to it. They recognized that the general multilateral treaties of recent years, such as the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations, had not been made open to all States but to specified, if very wide, categories of States. Nevertheless, they considered that on grounds of principle and as a measure of progressive development of international law, the Commission should propose to Governments the rule which appears in paragraph 1 of article 8. These members also expressed the view that the problem of participation in general multilateral treaties should be kept entirely distinct from the problem of recognition of States.

(4) Another group of members, while fully sharing the view that general multilateral treaties should, in principle, be open to all States, did not think that the Commission would be justified in including such a presumption as to the intention of the contracting States, having regard to the clear indication of a contrary intention on
the part of States in recent practice, and especially in United Nations practice. For it has become common form in general multilateral treaties drawn up under the auspices of the United Nations and the specialized agencies, as well as in a number of other treaties, to insert a clause opening them to all Members of the United Nations and of the specialized agencies, to all parties to the Statute of the International Court of Justice and to any other State invited by the General Assembly. This formula, they considered, opens the treaty to an exceedingly wide list of States and, in effect, only excludes controversial cases. These members did not think that the Commission's proposals ought to go beyond this practice, which hinges upon the decision in doubtful cases being taken by the General Assembly or by the competent organ of some other organization of world-wide membership. Accordingly, they advocated confining article 8 to the provisions of the General Assembly or by the competent organ of some other organization of world-wide membership. These members considered that a rule putting the large body of treaties concluded under the auspices of international organizations is to put the decision in the hands of the competent organ of the organization concerned, as under existing practice, and in other cases to make it subject to a two-thirds vote of the States concerned. These members considered that a rule putting the decision in doubtful cases in the hands of the General Assembly, or of the competent organ of some other organization or of a two-thirds majority of the interested States, was also extremely desirable from the point of view of the depositary. Otherwise the Secretary-General or any other depositary would have to choose between accepting every signature, accession, etc. from any group claiming to be a State and making delicate and perhaps controversial political appreciations more appropriate to the General Assembly or some other political organ.

(5) The view that, where a general multilateral treaty is silent concerning the States to which it is open every State must be presumed to have a right to become a party to the treaty, prevailed in the Commission, and the rule is so stated in article 8, paragraph 1.

(6) There still remains, however, the problem of general multilateral treaties which specify the categories of States to which they are open and thereby exclude the principle in article 8, paragraph 1. These treaties the Commission has sought to cover in article 9, paragraph 1, which provides for them to be made open to additional States, either by a two-thirds majority of the States which drew up the treaty, or by the decision of the competent organ of an international organization. The formula "by a two-thirds majority of the States which drew up the treaty" is, of course, based on the fact that, as mentioned in the commentary on article 6, the adoption of a treaty in modern practice takes place in the great majority of cases by a two-thirds majority. In other words, the proposal is that the treaty should be made open to additional States by the same majority as will normally have been applied in adopting the participation clause of the treaty. But, where the treaty has been drawn up either within an organization or at a conference convened by an organization, the proposal is that the decision should rest with its competent organ. The Commission considered that these provisions are suitable also for the case of multilateral treaties which, though not of a general character, have been concluded between a considerable number of States. Accordingly, article 9, paragraph 1, applies to these treaties as well as to general multilateral treaties.

(7) Paragraph 2 of article 9 is therefore limited to treaties concluded between a small group of States and for these treaties it is thought that the unanimity rule should be retained.

(8) Paragraph 3 indicates the procedures for dealing with requests for admission to treaties under the two preceding paragraphs.

(9) Paragraph 4 gives effect to the right of a State to decide whether or not it will enter into treaty relations with another State.

(10) Finally, the Commission gave particular 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. New States may very well wish to become parties to some of these treaties and, if so, it is clearly desirable that legally they should be in a position to do so. There are, however, certain difficulties in the way of achieving this result easily through the provisions of the present draft articles. One is that, in the nature of things, there is bound to be some delay before these draft articles, assuming that ultimately a convention results from them, could become effective. Another is that a convention only binds the parties to it, and unless all the surviving parties to the older multilateral treaties in question became actual parties to the new convention on the conclusion of treaties, there might be doubt about the effectiveness of the convention to create a right of accession to the old treaties. The Commission, therefore, suggests that consideration should be given to the possibility of solving this problem more expeditiously by other procedures. 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.

**Article 10**

**Signature and initialling of the treaty**

1. Where the treaty has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the States participating in the adoption of the text may provide either in the treaty itself or in a separate agreement:

(a) That signature shall take place on a subsequent occasion; or

(b) That the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (a) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the State concerned, in
which case the signature is subject to confirmation.

(b) Signature ad referendum, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

(c) Signature ad referendum, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature ad referendum was affixed to the treaty.

3. (a) The treaty, instead of being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the State concerned a signatory of the treaty.

(b) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not that of the initialling, shall be the date upon which the State concerned shall become a signatory of the treaty.

Commentary

(1) The antithesis in paragraph 1 of the present article is between the treaty that remains open for signature until a certain date—or else indefinitely—and the treaty that does not. Most treaties, in particular bilateral treaties and treaties negotiated between a small group of States, do not remain open for signature. They are signed either immediately on the conclusion of the negotiation, or on some later date especially appointed for the purpose. In either case, States intending to sign must do so on the occasion of the signature, and cannot do so thereafter. They may of course still be able to become parties to the treaty by some other means, e.g. accession or acceptance.

(2) In the case of treaties negotiated at international conferences, there is a growing tendency to include a clause leaving them open for signature until a certain date (usually six months after the conclusion of the conference). In theory, there is no reason why such treaties should not remain open for signature indefinitely, and cases of this are on record. However, the more general practice is to leave multilateral treaties open for signature for a specific period and this practice has considerable advantages. The closing stages of international conferences are apt to be hurried. Often the Governments are not in possession of the final text, which may only have been completed at the last moment. For that reason, many representatives do not sign the treaty in its final form. Yet, even if the treaty makes it possible to become a party by accession, many Governments would prefer to do so by signature and ratification. It is also desirable to take account of the fact that Governments which are not sure of being able eventually to ratify, accept or approve a treaty may nevertheless wish for an opportunity of giving that measure of support to the treaty which signature implies. These considerations may most easily be met by leaving the treaty open for signature at the seat of the "headquarters" Government or international organization.

3. Article 14 of the Convention on treaties, adopted at Havana on 18 February 1928, provides as follows: "The present Convention shall be ratified by the signatory States and shall remain open for signature and for ratification by the States represented at the Conference and which have not been able to sign it. This Convention, together with seven further Conventions adopted at the Sixth Conference of American States held at Havana, merely states that the Convention shall remain open for signature and ratification, without specifying any time limit.

33 Today, when a telegraphic authority, pending the arrival of written full powers, would usually be accepted (see article 4 above, and the commentary thereto), the need for recourse to initialling on this ground ought only to arise infrequently.

34 Article 14 of the Convention on treaties, adopted at Havana.

Article 11

Legal effects of a signature

1. In addition to authenticating the text of the treaty in the circumstances mentioned in article 7, paragraph 2, the signature of a treaty shall have the effects stated in the following paragraphs.

2. Where the treaty is subject to ratification, acceptance or approval, signature does not establish the consent of the signatory State to be bound by the treaty. However, the signature:

(a) Shall qualify the signatory State to proceed to the ratification, acceptance or approval of the treaty in conformity with its provisions; and

(b) Shall confirm or, as the case may be, bring into operation the obligation in article 17, paragraph 1.

3. Where the treaty is not subject to ratification, acceptance or approval, signature shall:

(a) Establish the consent of the signatory State to be bound by the treaty; and

(b) Establish the consent of the signatory State to be bound by the treaty; and
(b) If the treaty is not yet in force, shall bring into operation the obligation in article 17, paragraph 2.

**Commentary**

(1) Paragraph 1 recalls, for the sake of completeness, the rule that, if the text has not already been authenticated in one of the ways mentioned in article 7, paragraph 1, signature will automatically constitute an authentication of the text by the signatory State.

(2) Paragraph 2 deals with the cases where the signature does not constitute a final expression of the State's consent to be bound by the treaty but requires a further act of ratification, acceptance or approval to have that effect. This may happen either because the treaty itself provides for signature plus ratification (or acceptance or approval) or because the signature of the particular State is expressed to be subject to ratification (or acceptance or approval). The primary effect of the signature in these cases is to establish the right of the signatory State to become a party to the treaty by subsequently completing the necessary act of ratification or, as the case may be, acceptance or approval of the treaty; and paragraph 2 (a) so provides.

(3) Paragraph 2 (b) concerns the obligation which attaches to a State which has signed a treaty "subject to ratification, acceptance or approval" even though it has not yet established its consent to be bound by the treaty. This obligation is set out in article 17, paragraph 1, where it is provided that such a State is "under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force". In most cases, a signatory State will already be under this obligation by reason of having taken part in the negotiation, drawing up or adoption of the treaty; but, when a treaty is made open to signature by States which did not participate in the negotiation, drawing up or adoption of the treaty, they will come under the same obligation if they sign "subject to ratification, acceptance or approval".

(4) There is also some authority for the proposition that a State which signs a treaty "subject to ratification, acceptance or approval" comes under a certain, if somewhat intangible, obligation of good faith subsequently to give consideration to the ratification, acceptance or approval of the treaty. The precise extent of the supposed obligation is not clear. That there is no actual obligation to ratify under modern customary law is certain, but it has been suggested that signature "implies an obligation to be fulfilled in good faith to submit the instrument to the proper constitutional authorities for examination with the view to ratification or rejection". This formulation, logical and attractive though it may be, appears to go beyond any obligation that is recognized in State practice. For there are many examples of treaties that have been signed and never submitted to ratification, even though the text provided for it; and in many cases, without any suggestion being made that it involved thereby a breach of an international obligation. Governments, if political or economic difficulties present themselves, undoubtedly hold themselves free to refrain from submitting the treaty to parliament or to whatever other body is competent to authorize ratification. The Commission felt that the most that could be said on the point was that the Government of a signatory State might be under some kind of obligation to examine in good faith whether it should become a party to the treaty. The Commission hesitated to include such a rule in the draft articles. The position is, of course, different if the treaty itself, or the rules in force in an international organization, place signatory States under some form of obligation to submit the question of the ratification, acceptance or approval of the treaty to their respective constitutional authorities. In those cases, there is an express obligation flowing from the particular treaty or the particular rules of the organization in question (e.g. the International Labour Organisation).

(5) Paragraph 3 deals with cases where the treaty is not subject to ratification, acceptance or approval. Signature alone suffices by itself to establish the State's consent to be bound by the treaty and the rule is so formulated in sub-paragraph (a). If the treaty is already in force (or is brought into force by the signature) it goes without saying that the signatory State becomes subject to the provisions of the treaty. But even if the conditions for the entry into force of the treaty have not yet been fulfilled, the signatory State is subject a fortiori to an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty, and sub-paragraph (b) so provides.

**Article 12**

**Ratification**

1. Treaties in principle require ratification unless they fall within one of the exceptions provided for in paragraph 2 below.

2. A treaty shall be presumed not to be subject to ratification by a signatory State where:

   (a) The treaty itself provides that it shall come into force upon signature;

   (b) The credentials, full powers or other instrument issued to the representative of the State in question authorize him by his signature alone to establish the consent of the State to be bound by the treaty, without ratification;

   (c) The intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

   (d) The treaty is one in simplified form.

3. However, even in cases falling under paragraphs 2 (a) and 2 (d) above, ratification is necessary where:

   (a) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory States;

   (b) The intention that the treaty shall be subject to ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

   (c) The representative of the State in question has expressly signed "subject to ratification" or his credentials, full powers or other instrument duly exhibited by him to the representatives of the other negotiating States expressly limit the author-
ity conferred upon him to signing "subject to ratification".

Commentary

(1) This article sets out the rules determining the cases in which ratification is necessary in addition to signature in order to establish the State's consent to be bound by the treaty. The word "ratification", as the definition in article I indicates, is used here and throughout these draft articles exclusively in the sense of ratification on the international plane. Parliamentary "ratification" or "approval" of a treaty under municipal law is not, of course, unconnected with "ratification" on the international plane, since without it the necessary constitutional authority to perform the international act of ratification may be lacking. But it remains true that the international and constitutional ratifications of a treaty are entirely separate procedural acts carried out on two different planes.

(2) The modern institution of ratification in international law developed in the course of the nineteenth century. Earlier, ratification had been an essentially formal and limited act by which, after a treaty had been drawn up, a sovereign confirmed, or finally verified, the full powers previously issued to his representative to negotiate the treaty. It was then not an approval of the treaty itself but a confirmation that the representative had been invested with authority to negotiate it and, that being so, there was an obligation upon the sovereign to ratify his representative's full powers, if these had been in order. Ratification came, however, to be used in the majority of cases as the means of submitting the treaty-making power of the executive to parliamentary control, and ultimately the doctrine of ratification underwent a fundamental change. It was established that the treaty itself was subject to subsequent ratification by the State before it became binding. Furthermore, this development took place at a time when the great majority of international agreements were formal treaties. Not unnaturally, therefore, it came to be the opinion that the general rule is that ratification is necessary to render a treaty binding.37

(3) Meanwhile, however, the expansion of intercourse between States, especially in economic and technical fields, led to an ever-increasing use of less formal types of international agreements, amongst which were exchanges of notes, and these agreements are usually intended by the parties to become binding by signature alone. On the other hand, an exchange of notes or other informal agreement, though employed for its ease and convenience, has sometimes expressly been made subject to ratification because of constitutional requirements in one or the other of the contracting States.

(4) The general result of these developments has been to complicate the law concerning the conditions under which treaties need ratification in order to make them binding. The controversy which surrounds the subject is, however, largely theoretical, as previous rapporteurs on the law of treaties have pointed out.38 The more formal types of instrument include, almost without exception, express provisions on the subject of ratification, and occasionally this is so even in the case of exchanges of notes or other instruments in simplified form. Moreover, whether they are of a formal or informal type, treaties normally either provide that the instrument shall be ratified or, by laying down that it shall enter into force upon signature or upon a specified date or event, dispense with ratification. Total silence on the subject is exceptional, and the number of cases that remain to be covered by a general rule is very small. This does not necessarily mean that there is no need to formulate a rule for the small residuum of cases in which the parties have left the question open. For it is one of the purposes of codification to provide for such cases where the question is not regulated by the parties, and only if a clear presumptive rule is laid down will the parties themselves know in future whether or not an express provision is necessary to give effect to their intentions. But, if the general rule is taken to be that ratification is necessary unless it is expressly or impliedly excluded, large exceptions qualifying the rule must be inserted in order to bring it into accord with modern practice, with the result that the number of cases calling for the operation of the general rule is small. Indeed, the practical effect of choosing that version of the general rule or the opposite rule that ratification is unnecessary unless expressly agreed upon by the parties is not very substantial.

(5) The Commission considered whether it should refrain from formulating any general rule and simply state the law by reference to the intentions of the parties or whether it should formulate a general rule to apply in all cases where the treaty is silent upon the question of ratification. Some members were not in favour of stating that a treaty is to be presumed to be subject to ratification unless the contrary is indicated. They thought that in modern practice there is no specific rule concerning the need for ratification and that it is always a question of ascertaining what the parties intended. In favour of this view is the fact that in modern practice a great many treaties are concluded in simplified form and that a large percentage of the total number of treaties enter into force without ratification. The view which prevailed in the Commission, however, was that the numerical statistics may be a little misleading in that many treaties in simplified form deal with comparatively unimportant matters, and that weight should be given to the constitutional requirements for the exercise of the treaty-making power which exist in many States with respect to more important matters. The Commission felt that a general rule excluding the need for ratification unless a contrary intention was expressed would not be acceptable to these States, whereas the opposite rule would not cause the same difficulty to States without such constitutional requirements. On the other hand, there was general agreement that there is no presumption in favour of ratification being necessary in the case of treaties in simplified form.

(6) Taking account of the different considerations, the Commission decided that a general rule should be stated and that this should be a rule requiring ratification unless the case falls within one of a number of recognized exceptions; paragraph 1 of the article accordingly so provides.

(7) Paragraph 2 sets out four cases in which the general rule does not in principle apply. In the first three cases an intention to set aside the rule is to be found either in the treaty itself, the documents ex-
pressing the powers of the representatives or in the circumstances of the negotiations. In the fourth case, it is to be implied from the choice by the parties of an instrument in simplified form. This implication, as already indicated, is justified by the fact that the great majority of these forms of treaty in fact enter into force today without ratification.

(8) On the other hand, the intention to set aside the need for ratification which is found in paragraphs 2 (a) and 2 (d) is presumed from, in the one case, the fact that the treaty is expressed to come into force upon signature and, in the other, the use of a simplified form. These presumptions, strong though they are, must give way in face of a clear expression of contrary intention, and paragraph 3 accordingly makes provision for the cases where such a contrary intention appears. It may not be very often that a treaty expressed to come into force upon signature is made subject to ratification; but this does sometimes happen in practice when a treaty which is subject to ratification is expressed to come into force provisionally upon signature.

Article 13
Accession

A State may become a party to a treaty by accession in conformity with the provisions of articles 8 and 9 when:

(a) It has not signed the treaty and either the treaty specifies accession as the procedure to be used by such a State for becoming a party; or

(b) The treaty has become open to accession by the State in question under the provisions of article 9.

Commentary

(1) Accession is the traditional method by which a State, in certain circumstances, becomes a party to a treaty of which it is not a signatory. One type of accession is that where the treaty expressly provides that certain States or categories of States may accede to it. Another type is that where a State which was not entitled to become a party to a treaty under its terms is subsequently invited to become a party under the conditions set out in article 9.

(2) Divergent opinions have been expressed in the past as to whether it is legally possible to accede to a treaty which is not yet in force, and there is some support for the view that it is not possible. However, an examination of the most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty, either expressly by allowing accession to take place before the date fixed for the entry into force of the treaty, or impliedly by making the entry into force of the treaty conditional on the deposit, inter alia, of instruments of accession. The modern practice has gone so far in this direction that the Commission does not consider it appropriate to give any currency, even in the form of a residuary rule, to the doctrine that treaties are not open to accession until they are in force. In this connexion it recalls the following observation of a previous special rapporteur.


“Important considerations connected with the effectiveness of the procedure of conclusion of treaties seem to call for a contrary rule. Many treaties might never enter into force but for accession. Where the entire tendency in the field of conclusion of treaties is in the direction of elasticity and elimination of restrictive rules it seems undesirable to burden the subject of accession with a presumption which practice has shown to be in the nature of an exception rather than the rule.”

Accordingly, in the present article accession is not made dependent upon the treaty's having entered into force.

(3) Occasionally, a purported instrument of accession is expressed to be “subject to ratification” and the Commission considered whether anything should be said on the point either in the present article or in article 15 dealing with instruments of accession. The question arises whether it should be indicated in the present article that the deposit of an instrument of accession in this form is ineffective as an accession. The question was considered by the Assembly of the League of Nations in 1927 which, however, contented itself with emphasizing that an instrument of accession would be taken to be final, unless the contrary were expressly stated. At the same time it said that the procedure was one which “the League should neither discourage nor encourage”.

As to the actual practice today, the Secretary-General has stated that he takes a position similar to that taken by the Secretariat of the League of Nations. He considers the instrument “simply as a notification of the Government’s intention to become a party”, and he does not notify the other States of its receipt. Furthermore, he draws the attention of the Government to the fact that the instrument does not entitle it to become a party and underlines that “it is only when an instrument containing no reference to subsequent ratification is deposited that the State will be included among the parties to the agreement and the other Governments concerned notified to that effect.” The attitude adopted by the Secretary-General towards an instrument of accession expressed to be “subject to ratification” is considered by the Commission to be entirely correct. The procedure of accession subject to ratification is somewhat anomalous, but it is infrequent and does not appear to cause difficulty in practice. The Commission has, therefore, thought it necessary to deal with it specifically in those articles.

Article 14
Acceptance or approval

A State may become a party to a treaty by acceptance or by approval in conformity with the provisions of articles 8 and 9 when:

(a) The treaty provides that it shall be open to signature subject to acceptance or approval and the State in question has so signed the treaty; or

(b) The treaty provides that it shall be open to participation by simple acceptance or approval without prior signature.

Commentary

(1) Acceptance has become established in treaty practice during the past twenty years as a new proce-
dure for becoming a party to treaties. But it would probably be more correct to say that “acceptance” has become established as a name given to two new procedures, one analogous to ratification and the other to accession. For, on the international plane “acceptance” is an innovation which is more one of terminology than of method. If a treaty provides that it shall be open to signature “subject to acceptance”, the process on the international plane is very like “signature subject to ratification”. Similarly, if a treaty is made open to “acceptance” without prior signature, the process is very like accession. In either case the question whether the instrument is framed in the terms of “acceptance”, on the one hand, or of ratification or acceptance, on the other, simply depends on the phraseology used in the treaty.46 Accordingly, the same name is found in connection with two different procedures; but there can be no doubt that today “acceptance” takes two forms, the one an act establishing the State’s consent to be bound after a prior signature and the other without any prior signature. The first of these forms is covered in sub-paragraph (a) of article 14 and the second in sub-paragraph (b).

(2) To say that on the international plane the procedure of “acceptance”, on the one hand, and the procedures of ratification and accession, on the other, differ primarily in the terminology used in the treaty is not to deny the existence of any differences in the use of “acceptance” and the other two procedures. “Signature subject to acceptance” was introduced into treaty-practice principally in order to provide a simplified form of “ratification” or “accession” which would allow the Government a further opportunity to examine the treaty without necessarily involving it in a submission of the treaty to the State’s constitutional procedure for obtaining parliamentary sanction for concluding the treaty. Accordingly, the procedure of “signature subject to acceptance” is employed more particularly in the case of treaties whose form or subject matter is not such as would normally bring them under the constitutional requirements of parliamentary “ratification” in force in many States. In some cases, in order to make it as easy as possible for States with their varying constitutional requirements to enter into the treaty, its terms provide for either ratification or acceptance. Nevertheless, it remains broadly true that “acceptance” is generally used as a simplified procedure of “ratification” or “accession”.

(3) The observations in the preceding paragraph apply mutatis mutandis to “approval”, whose introduction into the terminology of treaty-making is even more recent than that of “acceptance”. “Approval”, perhaps, appears more often in the form of “signature subject to approval” than in the form of a treaty which is simply made open to “approval” without signature.44 But it appears in both forms. Its introduction into treaty-making practice seems, in fact, to have been inspired by the constitutional procedures or practices of approving treaties which exist in some countries.

Article 15

The procedure of ratification, accession, acceptance and approval

1. (a) Ratification, accession, acceptance or app-

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43 For examples, see Handbook of Final Clauses (ST/LEG/6, pp. 6-17).
44 The Handbook of Final Clauses (ST/LEG/6, p. 18) even gives an example of the formula “signature subject to approval followed by acceptance”.

proval shall be carried out by means of a written instrument.

(b) Unless the treaty itself expressly contemplates that the participating States may elect to become bound by a part or parts only of the treaty, the instrument must apply to the treaty as a whole.

(c) If a treaty offers to the participating States a choice between two differing texts, the instrument of ratification must indicate to which text it refers.

2. If the treaty itself lays down the procedure by which an instrument of ratification, accession, acceptance or approval is to be communicated, the instrument becomes operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory States, the instrument shall become operative:

(a) In the case of a treaty for which there is no depositary, upon the formal communication of the instrument to the other party or parties, and in the case of a bilateral treaty normally by means of an exchange of the instrument in question, duly certified by the representatives of the States carrying out the exchange;

(b) In other cases, upon deposit of the instrument with the depositary of the treaty.

3. When an instrument of ratification, accession, acceptance or approval is deposited with a depositary in accordance with paragraph 2 (b) above, the State in question shall be given an acknowledgement of the deposit of its instrument, and the other signatory States shall be notified promptly both of the fact of such deposit and the terms of the instrument.

Commentary

(1) Ratification, accession, acceptance and approval, being acts which commit the State to become a party to the treaty, must be carried out by a formal instrument. The actual form of the instrument is, however, a matter which is governed by the internal law and practice of each State and paragraph 1 (a) merely provides that it must be in writing.

(2) Occasionally, treaties are found which expressly authorize States to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, accession, acceptance or approval is admissible. But in the absence of such a provision, the established rule is that laid down in paragraph 1 (b): the ratification, accession etc. must relate to the treaty as a whole. Although it may be admissible to formulate reservations to selected provisions of the treaty under the rules stated in article 18, it is inadmissible to subscribe only to selected parts of the treaty.

(3) Paragraph 1 (c) takes account of a practice which is not very common but which is sometimes found in treaties concluded under the auspices of certain international organizations, e.g. the International Labour Organisation. The treaty offers to each State a choice between two different texts of the treaty.

(4) Paragraph 2 concerns the act by which an instrument of ratification, accession etc. is rendered legally effective on the international plane; namely, by its delivery—its communication—to the other States concerned. Normally, the procedure for accomplishing this is laid down in the treaty itself and paragraph 2 recognizes that fact. It goes on, however, to make provision for cases where the treaty is silent as to the procedure and
specifies for such cases the procedures most commonly found in modern practice. A query might be raised whether in cases where there is a depositary the date upon which the instrument becomes effective is the date of deposit or the date when notice of the instrument actually reaches the other States concerned. The Commission considered that, by using a depositary as their agent for accepting the deposit of instruments relating to the treaty, the States which drew up the treaty give their consent to the act of deposit being regarded as the act which renders the instrument effective. Accordingly, the date of deposit has to be regarded as the effective date, even if this means that in some cases there may be a small time-lag before the other States become aware that the treaty is in force between them and the State depositing the instrument. In this connexion reference may be made to the decision of the International Court of Justice, in the Right of Passage Case\textsuperscript{46} concerning the moment at which declarations under the optional clause take effect.

(5) Paragraph 3 does not call for any comment.

**Article 16**

**Legal effects of ratification, accession, acceptance and approval**

The communication of an instrument of ratification, accession, acceptance or approval in conformity with the provisions of article 15:

(a) Establishes the consent of the ratifying, acceding, accepting or approving State to be bound by the treaty; and

(b) If the treaty is not yet in force, brings into operation the applicable provisions of article 17, paragraph 2.

**Commentary**

(1) The essential legal effect of the exchange or deposit of instruments of ratification, accession, acceptance or approval is to establish the consent of the State concerned to be bound by the treaty. It commits the State to becoming a party to the treaty. Whether it also has the effect of bringing the treaty into force for the State exchanging or depositing the instrument depends upon the conditions under which the treaty is to enter into force, a matter which is dealt with in articles 23 and 24.

(2) A further effect, if the exchange or deposit of the instrument does not bring the treaty into force at once, is to place the State concerned under the obligation of good faith set out in article 17. This, in general terms, is an obligation, pending the entry into force of the treaty, to refrain from acts calculated to frustrate its objects.

(3) The Commission considered whether it should include in this article a provision expressly declaring that, unless the treaty otherwise states, ratification has no retroactive effects. Formerly, when ratification was regarded as a confirmation of the authority to sign, it was generally said to operate retrospectively and to make the treaty effective as from signature. This view continued to be echoed by writers and by some municipal courts, even after the institution of ratification had undergone the fundamental change which has already been described in the commentary to article 12 above. But the theory of the retroactive operation of ratification is now universally rejected and the Commission decided that it would be sufficient to mention the point in this commentary and to draw attention to article 23, paragraph 4. This paragraph, by providing that the rights and obligations of a treaty "become effective for each party from the date when the treaty comes into force with respect to that party", excludes the doctrine of the retroactive operation of ratification.

**Article 17**

**The rights and obligations of States prior to the entry into force of the treaty**

1. A State which takes part in the negotiation, drawing up or adoption of a treaty, or which has signed a treaty subject to ratification, acceptance or approval, is under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.

2. Pending the entry into force of a treaty and provided that such entry into force is not unduly delayed, the same obligation shall apply to the State which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty.

**Commentary**

(1) Reference has already been made to the provisions of this article in the commentaries to articles 11 and 16. That an obligation of good faith to refrain from acts calculated to frustrate objects of the treaty attaches to a State which has signed a treaty subject to ratification appears to be generally accepted. Certainly, in the Polish Upper Si/esia Case\textsuperscript{46} the Permanent Court of International Justice appears to have recognized that, if ratification takes place, a signatory State's misuse of its rights in the interval preceding ratification may amount to a violation of its obligations in respect of the treaty.\textsuperscript{47} The Commission considers that this obligation begins when a State takes part in the negotiation of a treaty or in the drawing up or adoption of its text. \textit{A fortiori}, it attaches to a State which actually ratifies, accedes to, accepts or approves a treaty if there is an interval before the treaty actually comes into force.

(2) Paragraph 1 of the article covers the cases where the State has not yet established its consent to be bound by the treaty. In those cases the obligation of good faith continues until either the State signifies that it does not intend to become a party or it establishes its consent to be bound by the treaty, when it falls under paragraph 2 of the article.

(3) Paragraph 2 deals with the cases where the State has committed itself to be bound by the treaty and then the obligation continues until either the treaty comes into force or its entry into force has been unduly delayed.

**Section III. Reservations**

**Article 18**

**Formulation of reservations**

1. A State may, when signing, ratifying, acced-
ing to, accepting or approving a treaty, formulate a reservation unless:

(a) The making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization; or

(b) The treaty expressly prohibits the making of reservations to specified provisions of the treaty and the reservation in question relates to one of the said provisions; or

(c) The treaty expressly authorizes the making of a specified category of reservations, in which case the formulation of reservations falling outside the authorized category is by implication excluded; or

(d) In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty.

2. (a) Reservations, which must be in writing, may be formulated:

(i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;

(ii) Upon signing the treaty at a subsequent date; or

(iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a procès-verbal or other instrument accompanying it.

(b) A reservation formulated upon the occasion of the adoption of the text of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving State, when carrying out the act establishing its own consent to be bound by the treaty, confirms formally its intention to maintain its reservation.

3. A reservation formulated subsequently to the adoption of the text of the treaty must be communicated:

(a) In the case of a treaty for which there is no depositary, to every other State party to the treaty or to which it is open to become a party to the treaty; and

(b) In other cases, to the depositary which shall transmit the text of the reservation to every such State.

**Article 19**

Acceptance of and objection to reservations

1. Acceptance of a reservation not provided for by the treaty itself may be expressed or implied.

2. A reservation may be accepted expressly:

(a) In any appropriate formal manner on the occasion of the adoption or signature of a treaty, or of the exchange or deposit of instruments of ratification, accession, acceptance or approval; or

(b) By a formal notification of the acceptance of the reservation addressed to the depositary of the treaty or, if there is no depositary, to the reserving State and every other State entitled to become a party to the treaty.

3. A reservation shall be regarded as having been accepted by a State if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

4. An objection by a State which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the treaty.

5. An objection to a reservation shall be formulated in writing and shall be notified:

(a) In the case of a treaty for which there is no depositary, to the reserving State and to every other State party to the treaty or to which it is open to become a party; and

(b) In other cases, to the depositary.

**Article 20**

The effect of reservations

(a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.

(b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.

2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides:

(a) Acceptance of a reservation by any State to which it is open to become a party to the treaty constitutes the reserving State a party to the treaty in relation to such State, as soon as the treaty is in force;

(b) An objection to a reservation by a State which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving State, unless a contrary intention shall have been expressed by the objecting State.

3. Except in a case falling under paragraph 4 below, the effect of a reservation to a treaty which has been concluded between a small group of States shall be conditional upon its acceptance by all the States concerned unless:

(a) The treaty otherwise provides; or

(b) The States are members of an international organization which applies a different rule to treaties concluded under its auspices.

4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides.

**Commentary**

Introduction

(1) Articles 18, 19 and 20 have to be read together because the legal effect of a reservation, when formulated, is dependent on its acceptance or rejection by the other States concerned. A reservation to a bilateral treaty

48 For the reasons given by him in the summary records of the 637th, 651st, 652nd, 656th and 667th meetings, Mr. Briggs does not accept the provisions of article 20.
presents no problem, because it amounts to a new proposal reopening the negotiations between the two States concerning the terms of the treaty. If they arrive at an agreement—either adopting or rejecting the reservation—the treaty will be concluded; if not, it will fall to the ground. But as soon as more than two States are involved problems arise, since one State may be disposed to accept the reservation while another objects to it; and, when large multilateral treaties are in question, these problems become decidedly complex.

(2) The subject of reservations to multilateral treaties has been much discussed during the past twelve years and has been considered by the General Assembly itself on more than one occasion, as well as by the International Court of Justice in its opinion concerning the Genocide Convention. Divergent views have been expressed both in the Court and in the General Assembly on the fundamental question of the extent to which the consent of other interested States is necessary to the effectiveness of a reservation to this type of treaty.

(3) In 1951, the doctrine under which a reservation, in order to be valid, must have the assent of all the other interested States was not accepted by the majority of the Court as applicable in the particular circumstances of the Genocide Convention; moreover, while they considered the “traditional” doctrine to be of “undisputed value”, they did not consider it to have been “transformed into a rule of law”. Four judges, on the other hand, dissented from this view and set out their reasons for holding that the traditional doctrine must be regarded as a generally accepted rule of customary law. The Court’s reply to the questions put to it by the General Assembly was as follows:

“On Question I:

“that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

“On Question II:

“(a) That if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

“(b) That if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

“On Question III:

“(a) That an objection to a reservation made by a signatory State which has not yet ratified the Convention can have legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

“(b) That an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect.”

In giving these replies to the General Assembly’s questions the Court emphasized that they were strictly limited to the Genocide Convention; and said that, in determining what kind of reservations might be made to the Genocide Convention and what kind of objections might be taken to such reservations, the solution must be found in the special characteristics of that Convention. Amongst these special characteristics it mentioned: (a) the fact that the principles underlying the Convention—the condemnation and punishment of genocide—are principles recognized by civilized nations as binding upon Governments even without a convention; (b) the consequently universal character of the Convention; and (c) its purely humanitarian and civilizing purpose without individual advantages or disadvantages for the contracting States.

(4) Although limiting its replies to the case of the Genocide Convention itself, the Court expressed itself more generally on certain points amongst which may be mentioned:

(a) In its treaty relations a State cannot be bound without its consent and, consequently, no reservation can be effective against any State without its agreement thereto.

(b) The traditional concept, that no reservation is valid unless it has been accepted by all the contracting parties without exception, as would have been required if it had been stated during the negotiations, is of undisputed value.

(c) Nevertheless, extensive participation in Conventions of the type of the Genocide Convention has already given rise to greater flexibility in the international practice concerning multilateral conventions, as manifested by the more general resort to reservations, the very great allowance made for tacit assent to reservations and the existence of practices which, despite the fact that a reservation has been rejected by certain States, go so far as to admit the reserving State as a party to the Convention vis-à-vis those States which have accepted it.

(d) In the present state of international practice it cannot be inferred from the mere absence of any article providing for reservations in a multilateral convention that the contracting States are prohibited from making certain reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

(e) The principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties, does not appear to have been transformed into a rule of law.

(5) Later in 1951, as had been requested by the General Assembly, the Commission presented a general report on reservations to multilateral conventions. It expressed the view that the Court’s criterion—“compatibility with the object and purpose of the convention”—was open to objection as a criterion of general application, because it considered the question of “compatibility with the object and purpose of the convention” to be too subjective for application to multilateral conventions generally. Noting that the Court’s opinion was specifically confined to the Genocide Convention and recognizing that no single rule uniformly applied could be wholly

49 Notably in 1951 in connexion with reservations to the Genocide Convention and in 1959 concerning the Indian “reservation” to the Convention of the Inter-Governmental Maritime Consultative Organization.


51 Ibid., p. 24.

52 Ibid., pp. 29 and 30.

satisfactory to cover all cases, the Commission recommended the adoption of the doctrine requiring unanimous consent for the admission of a State as a party to a treaty subject to a reservation. At the same time, it proposed certain minor modifications in the application of the rule.

(6) The Court's opinion and the Commission's report were considered together at the sixth session of the General Assembly, which adopted resolution 598 (VI) dealing with the particular question of reservations to the Genocide Convention separately from that of reservations to other multilateral conventions. With regard to the Genocide Convention it requested the Secretary-General to continue his practice to the Court's Advisory Opinion and recommended to States that they should be guided by it. With regard to all other future multilateral conventions concluded under the auspices of the United Nations of which he is the depositary, it requested the Secretary-General:

“(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

“(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.”

The resolution, being confined to future conventions, was limited to conventions concluded after 12 January 1952, the date of the adoption of the resolution, so that the former practice still applied to conventions concluded before that date. As to future conventions, the General Assembly did not endorse the Commission's proposal to retain the former practice subject to minor modifications. Instead, it directed the Secretary-General, in effect, to act simply as an agent for receiving and circulating instruments containing reservations or objections to reservations, without drawing any legal consequences from them.

(7) In the General Assembly, as already mentioned, opinion was divided in the debates on this question in 1951. One group of States favoured the unanimity doctrine, though there was some support in this group for replacing the need for unanimous consent by one of acceptance by a two-thirds majority of the States concerned. Another group of States, however, was definitely opposed to the unanimity doctrine and favoured a flexible system making the acceptance and rejection of reservations a matter for each State individually. They argued that such a system would safeguard the position of outvoted minorities and make possible a wider acceptance of conventions. The opposing group maintained, on the other hand, that a flexible system of this kind, although it might be suitable for a homogeneous community like the Pan-American Union, was not suitable for universal application. Opinion being divided in the United Nations, the only concrete result was the directives given to the Secretary-General for the performance of his depositary functions with respect to reservations.

(8) The situation with regard to this whole question has changed in certain respects since 1951. First, the international community has undergone rapid expansion since 1951, so that the very number of potential participants in multilateral treaties now seems to make the unanimity principle less appropriate and less practicable. Secondly, since 12 January 1952, i.e. during the past ten years, the system which has been in operation de facto for all new multilateral treaties of which the Secretary-General is the depositary has approximated to the “flexible” system. For the Secretariat's practice with regard to all treaties concluded after the General Assembly's resolution of 12 January 1952 has been officially stated to be as follows:

“In the absence of any clause on reservations in agreements concluded after the General Assembly resolution on reservations to multilateral conventions, the Secretary-General adheres to the provisions of that resolution and communicates to the States concerned the text of the reservation accompanying an instrument of ratification or accession without passing on the legal effect of such documents, and ‘leaving it to each State to draw legal consequences from such communications’. He transmits the observations received on reservations to the States concerned, also without comment. A general table is kept up to date for each convention, showing the reservations made and the observations transmitted thereon by the States concerned.

A State which has deposited an instrument accompanied by reservations is counted among the parties required for the entry into force of the agreement.”

It is true that the Secretary-General, in compliance with the General Assembly's resolution, does not “pass upon” the legal effect either of reservations or of objections to reservations, and each State is free to draw its own conclusions regarding their legal effects. But, having regard to the opposition of many States to the unanimity principle and to the Court's refusal to consider that principle as having been "transformed into a rule of law", a State making a reservation is now in practice considered a party to the convention by the majority of those States which do not give notice of their objection to the reservation.

(9) A further point is that in 1959 the question of reservations to multilateral conventions again came before the General Assembly in the particular context of a convention which was the constituent instrument of an international organization—namely, the Inter-Governmental Maritime Consultative Organization. The actual issue raised by India's declaraction in accepting that Convention was remitted to I.M.C.O. and settled without legal questions having been resolved. But the General Assembly reaffirmed its previous directive to the Secretary-General concerning his depositary functions and extended it to cover all conventions concluded under the auspices of the United Nations (unless they contain contrary provisions), not merely those concluded after 12 January 1952.

(10) At the present session, the Commission was agreed that, where the treaty itself deals with the question of reservations, the matter is concluded by the terms of the treaty. Reservations expressly or impliedly prohibited by the terms of the treaty are excluded, while those expressly or impliedly authorized are ipso facto effective. The problem concerns only the cases where the treaty is silent in regard to reservations, and here the Commission was agreed that the Court's principle of "compatibility with the object and purpose of the treaty" is one suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties and of objections to them. The difficulty lies in the process by which that principle is to be applied, and especially where there is no tribunal or other organ invested with standing competence to interpret the treaty. Where the treaty is a constituent instrument of an international organization, the Commission was agreed that the question is one for determination by its competent organ. It was

54 Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7, para. 80).
also agreed that where the treaty is one concluded between a small group of States, unanimous agreement to the acceptance of a reservation must be presumed to be necessary in the absence of any contrary indication. Accordingly the problem essentially concerns multilateral treaties which are not constituent instruments of international organizations and which contain no provisions in regard to reservations. On this problem, opinion in the Commission, as in the Court and the General Assembly, was divided.

(11) Some members of the Commission considered it essential that the effectiveness of a reservation to a multilateral treaty should be dependent on at least some measure of common acceptance of it by the other States concerned. They thought it inadmissible that a State, having formulated a reservation incompatible with the objects of a multilateral treaty, should be entitled to regard itself as a party to the treaty, on the basis of the acceptance of the reservation by a single State or by few States. The reservation might be one which other States considered to undermine the basis of the treaty or a clause embodying a compromise which the States concerned had all sacrificed part of their interests to obtain. As tacit consent, derived from a failure to object to a reservation, plays a large role in the practice concerning multilateral treaties and is provided for in the draft articles, such a rule would mean in practice that a reserving State, however objectionable its reservation, could always be sure of being able to consider itself a party to the treaty vis-à-vis a certain number of States. Accordingly, these members advocated a rule under which, if more than a certain proportion of the interested States objected to a reservation, the reserving State would be barred altogether from considering itself a party to the treaty unless it withdrew the reservation.

(12) The other members of the Commission, however, did not share this view, especially with respect to general multilateral treaties. These members, while giving full weight to the arguments in favour of maintaining the integrity of the convention as adopted to the greatest extent possible, felt that the detrimental effect of reservations upon the integrity of the treaty could easily be exaggerated. The treaty itself contains the sole authentic statement of the common agreement between the participating States. The majority of reservations relate to a particular point which a particular State for one reason or another finds difficult to accept, and the effect of the reservation on the general integrity of the treaty is minimal; the same is true even if the reservation in question relates to a comparatively important provision of the treaty, so long as the reservation is not made by more than a few States. In short, the integrity of the treaty would only be materially affected if a reservation of a somewhat substantial kind were to be formulated by a number of States. This might, no doubt, happen; but even then the treaty itself would remain the master agreement between the other participating States. What is essential to ensure both the effectiveness and the integrity of the treaty is that a sufficient number of States should become parties to it, accepting the great bulk of its provisions. The Commission in 1951 said that the history of the conventions adopted by the Conference of American States had failed to convince it "that an approach to universality is necessarily assured or promoted by permitting a State which offers a reservation to which objection is taken to become a party vis-à-vis non-objecting States". Nevertheless, a power to formulate reservations must in the nature of things tend to make it easier for some States to execute the act necessary to bind themselves finally to participating in the treaty and therefore tend to promote a greater degree of universality to the application of the treaty. Moreover, in the case of general multilateral treaties, it appears that not infrequently a number of States have, to all appearances, only found it possible to participate in the treaty subject to one or more reservations. Whether these States, if objection had been taken to their reservations, would have preferred to remain outside the treaty rather than to withdraw their reservation is a matter which is not known. But when today the number of the negotiating States may not be far short of one hundred States with very diverse cultural, economic and political conditions, it seems legitimate to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few States may be a factor in promoting a more general acceptance of multilateral treaties. It may not unreasonably be thought that the failure of negotiating States to take the necessary steps to become parties to multilateral treaties at all is a greater obstacle to the development of international law through the medium of treaties than the possibility that the integrity of such treaties may be unduly weakened by the free admission of reserving States as parties to them. There may also perhaps be some justification for the view that, in the present era of change and of challenge to traditional concepts, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved and expressed in a multilateral treaty may be the one most suited to the immediate needs of the international community.

(13) Another consideration which influenced these members of the Commission is that, in any event, the essential interests of individual States are in large measure safeguard by the two well-established rules:

(a) That a State which within a reasonable time signifies its objection to a reservation is entitled to regard the treaty as not in force between itself and the reserving State;

(b) That a State which asserts to another State's reservation is not entitled to object to any attempt by the reserving State to invoke against it the obligations of the treaty from which the reserving State has exempted itself by its reservation.

It has, it is true, been suggested that the equality between a reserving and non-reserving State, which is the aim of the above-mentioned rules, may in practice be less than complete. For a non-reserving State, by reason of its obligations towards other non-reserving States, may feel bound to comply with the whole of the treaty, including the provisions from which the reserving State has exempted itself by its reservation. Accordingly, the reserving State may be in the position of being exempt itself from certain of the provisions of the treaty, while having the assurance that the non-reserving States will observe those provisions. Normally, however, a State wishing to make a reservation would equally have the assurance that the non-reserving State would be obliged to comply with the provisions of the treaty by reason of its obligations to other States, even if the reserving State remained completely outside the treaty. By entering into the treaty subject to its reservation, the reserving State at least submits itself in some measure to the régime of the treaty. The position of the non-reserving State is not therefore made more onerous if the reserving State becomes a party to the treaty on a limited basis by reason of its reserva-

tion. Even in those cases where there is such a close connection between the provisions to which the reservation relates and other parts of the treaty that the non-reserving State is not prepared to become a party to the treaty at all ex-d-i-vis the reserving State on the limited basis which, the latter proposes, the non-reserving State can prevent the treaty from coming into force between itself and the reserving State by objecting to the reservation. Thus, the point only applies to have significance in cases where the non-reserving State would never itself have consented to become a party to the treaty, if it had known that the other State would do so subject to the reservation in question. And it may not be unreasonable to suggest that, if a State attaches so much importance to maintaining the absolute integrity of particular provisions, its appropriate course is to protect itself during the drafting of the treaty by obtaining the insertion of an express clause prohibiting the making of the reservations which it considers to be so objectionable.

(14) The Commission concluded that, in the case of general multilateral treaties, the considerations in favour of a flexible system, under which it is for each State individually to decide whether to accept a reservation and to regard the reserving State as a party to the treaty for the purpose of the relations between the two States, outweigh the arguments advanced in favour of retaining a “collegiate” system under which the reserving State would only become a party if the reservation were accepted by a given proportion of the other States concerned. Having arrived at this decision, the Commission also decided that there were insufficient reasons for making a distinction between multilateral treaties not of a general character between a considerable number of States and general multilateral treaties. The rules proposed by the Commission therefore cover all multilateral treaties, except those concluded between a small number of States, for which the unanimity rule is retained.

Commentary to article 18

(15) This article deals with the conditions under which a State may formulate a reservation. Paragraph 1 sets out the general principle that the formulation of reservations is permitted except in four cases. The first three are cases in which the reservation is expressly or impliedly prohibited by the treaty itself. The fourth case, mentioned under (d), is that where the treaty is silent in regard to reservation but the particular reservation is incompatible with the object and purpose of the treaty. Paragraph 1 (d), in short, adopts the Court's criterion as a general rule governing the formulation of reservations not provided for in the treaty. Paragraph 1 (d) has to be read in conjunction with article 20 which deals with the effect of a reservation formulated in cases where the treaty contains no provisions concerning reservations.

(16) Paragraph 2 deals with the modalities of formulating reservations and only requires two comments. The first relates to paragraph 2 (a) (i) which concerns reservations formulated at the time of the adoption of the text of the treaty, that is, at the conclusion of the negotiations. A statement of reservation is sometimes made during the negotiation and duly recorded in the procès-verbaux. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the State concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear. Accordingly, a statement during the negotiations expressing a reservation has not been included in paragraph 2 as one of the methods of formulating a reservation. The second comment relates to an analogous point in paragraph 2 (b), where it is expressly provided that a reservation formulated upon the adoption of the text or upon a signature, subject to ratification, acceptance or approval must, if it is to be effective, be formally maintained when the State establishes its consent to be bound.

(17) Paragraph 3 provides for the communication of the reservation to the other interested States.

Commentary to article 19

(18) Paragraphs 1, 2 and 5 of this article do not appear to require comment.

(19) Paragraph 3 deals with implied consent to a reservation. That the principle of implying consent to a reservation from absence of objection has been admitted into State practice cannot be doubted; for the Court itself in the Reservations to the Genocide Convention case spoke of “very great allowance” being made in international practice for “tacit assent to reservations”. Moreover, a rule specifically stating that consent will be presumed after a period of three, or in some cases six, months is to be found in some modern conventions, while other conventions achieve the same result by limiting the right of objection to a period of three months. Again, in 1959, the Inter-American Council of Jurists recommended that, if no reply had been received from a State to which a reservation had been communicated, it should be presumed after one year that the State concerned had no objection to the reservation.

(20) It has to be admitted that there may be a certain degree of rigidity in a rule under which tacit consent will be presumed after the lapse of a fixed period. Nevertheless, it seems undesirable that a State, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving State under a multilateral treaty. The risk would be that a State which had kept silent in regard to another State's reservation would only take a clear position in the matter after a dispute had arisen between it and the reserving State. Seeing that in a number of treaties States had found it possible to accept periods as short as three or six months, the question may be asked why it has not been considered necessary to propose a period of twelve months in the present draft. But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, another to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point.

(21) Paragraph 4 proposes, de lege ferenda, a rule under which an objection to a reservation will lapse if the objecting State does not, within two years after lodging its objection, establish its own consent to be bound. The application of the rule would be of particular importance in connexion with treaties concluded between a small group of States where the objection of one State suffices to exclude a reserving State from becoming a party to the treaty. But it is thought that, in general, an objection should lapse if the objecting State does not itself...
be bound within a reasonable period. The Commission hesitated as to the length of the period and has proposed two years, pending the comments by Governments upon the point.

Commentary to article 20

(22) Paragraph 1 requires no comment. Paragraph 2, in conjunction with article 18, paragraph 1 (d), contains the essence of the Commission's proposals concerning reservations to multilateral treaties which are silent upon the question of reservations. Article 18, paragraph 1 (d), it may be recalled, permits the formulation of reservations in such cases provided that they are not incompatible with the object and purpose of the treaty. The criterion of "compatibility with the object and purpose of the treaty", as pointed out in the introduction to these three articles, is to some extent a matter of subjective appreciation and yet, in the absence of a tribunal or organ with standing competence, the only means of applying it in most cases will be through the individual State's acceptance or rejection of the reservation. This necessarily means that there may be divergent interpretations of the compatibility of a particular reservation with the object and purpose of a given treaty. But such a result seems to the Commission to be almost inevitable in the circumstances and the only question is what are to be the effects of the determinations made by individual States.

(23) Paragraph 2 (a) provides that acceptance of a reservation is conclusive as to the effectiveness of the reservation as between the accepting and the reserving State. Paragraph 2 (b) equally provides that an objection operates only as between the objecting and the reserving State and precludes the treaty from coming into force between them, unless the objecting State should express a contrary intention. These are the two basic rules of the "flexible" system. They may certainly have the result that a reserving State may be a party to the treaty with regard to State X, but not with regard to State Y, although States X and Y are mutually bound by the treaty. But in the case of a general multilateral treaty or of a treaty concluded between a considerable number of States, this result appears to the Commission not to be as unsatisfactory as allowing State Y, by its objection, to prevent the treaty from coming into force between the reserving State and State X, which has accepted the reservation.

(24) Paragraph 3, as foreshadowed in the introduction to the commentary of these three articles, excludes treaties between a small group of States from the operation of the "flexible" system and applies the rule of unanimity. In treaties between small groups, consultation is easier concerning the acceptability of a reservation, while the considerations in favour of maintaining the integrity of the convention may be more compelling than in the case of general multilateral treaties or other treaties between large groups of States. The Commission appreciated that the expression "a small group of States" lacks precision, but felt that it was a sufficient general description by which it would be possible to distinguish most treaties falling outside the "flexible" system.

(25) Paragraph 4 states the rule, also foreshadowed in the introduction to the commentary of these three articles, whereby an objection to a reservation to the constituent instrument of an international organization is to be determined by the competent organ of the organization in question. The question has arisen a number of times and the Secretary-General's report in 1959 in regard to his handling of an alleged "reservation" to the IMCO Convention stated that it had "invariably been treated as one for reference to the body having authority to interpret the Convention in question". The Commission considers that in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable.

Article 21

The application of reservations

1. A reservation established in accordance with the provisions of article 20 operates:

(a) To modify for the reserving State the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Reciprocally to entitle any other State party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving State.

2. A reservation operates only in the relations between the other parties to the treaty which have accepted the reservation and the reserving State; it does not affect in any way the rights or obligations of the other parties to the treaty inter se.

Commentary

This article sets out the rules concerning the legal effects of a reservation which has been established under the provisions of articles 18, 19 and 20, assuming that the treaty is in force. These rules, which appear not to be questioned, follow directly from the consensual basis of the relations between parties to a treaty. A reservation operates reciprocally between the reserving State and any other party, so that it modifies the application of the treaty for both of them in their mutual relations to the extent of the reserved provisions, but has no effect on the application of the treaty to the other parties to the treaty, inter se, since they have not accepted it as a term of the treaty in their mutual relations.

Article 22

The withdrawal of reservations

1. A reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other States concerned.

2. Upon withdrawal of a reservation the provisions of article 21 cease to apply.

Commentary

(1) It has sometimes been contended that when a reservation has been accepted by another State it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a régime between the two States which cannot be changed without the agreement of both. The Commission, however, con-

considered that the preferable rule is that the reserving State should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted.

(2) Another point in this article perhaps calling for comment is the provision concerning the time at which the withdrawal of a reservation is to take effect. Since a reservation is a modification of the treaty made at the instance of the reserving State, the Commission considers that the onus should lie upon that State to bring the withdrawal to the notice of the other States; and that the latter could not be held responsible for a breach of a term of the treaty to which the reservation relates committed in ignorance of the withdrawal of the reservation.

SECTION IV. ENTRY INTO FORCE AND REGISTRATION

Article 23

Entry into force of treaties

1. A treaty enters into force in such manner and on such date as the treaty itself may prescribe.

2. (a) Where a treaty, without specifying the date upon which it is to come into force, fixes a date by which ratification, acceptance, or approval is to take place, it shall come into force upon that date if the instruments in question shall have taken place.

(b) The same rule applies mutatis mutandis where a treaty which is not subject to ratification, acceptance or approval fixes a date by which signature is to take place.

(c) However, where the treaty specifies that its entry into force is conditional upon a given number, or a given category, of States having signed, ratified, acceded to, accepted or approved the treaty and this has not yet occurred, the treaty shall not come into force until the condition shall have been fulfilled.

3. In other cases, where a treaty does not specify the date of its entry into force, the date shall be determined by agreement between the States which took part in the adoption of the text.

4. The rights and obligations contained in a treaty become effective for each party as from the date when the treaty enters into force with respect to that party, unless the treaty expressly provides otherwise.

Commentary

(1) Paragraph 1 concerns the case where the treaty itself provides for the manner and date of its entry into force. Paragraph 2 covers the case where the treaty does not do this specifically, but does fix a date by which the acts establishing consent to be bound are to take place. In that case, it seems to be accepted that the treaty is to be presumed to have been intended to come into force upon that date, provided that the necessary instruments of ratification, acceptance etc. have been exchanged or deposited or the necessary signatures have been affixed to the treaty. On the other hand, if the treaty also specifies that a certain number of States must have signed, ratified etc. before it enters into force, this condition must of course also have been fulfilled.

(2) The Commission considered whether other provisions in a treaty might be said to raise presumptions as to the date of its entry into force, but it concluded that it should not try to fill in all the gaps which the drafting of treaties might leave in regard to its entry into force. To do this would be to go too far into the interpretation of the intention of the parties in particular treaties. Moreover, it considered that in the event of a treaty failing to give a clear indication as to the date, it was a matter for agreement between the parties, and paragraph 3 so provides.

(3) Paragraph 4 lays down what is believed to be an undisputed rule of modern treaty law, namely, that a treaty becomes effective for each party on the date when it enters into force with respect to that party. The rule in this paragraph therefore excludes the idea that ratification may have retroactive effect to the date of signature. It requires a clear provision in the treaty itself to give the treaty retroactive effect, as it does also to suspend its effectiveness until a future date.

Article 24

Provisional entry into force

A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the States concerned shall have agreed to terminate the provisional application of the treaty.

Commentary

(1) This article recognizes a practice which occurs with some frequency today and requires notice in the draft articles. Owing to the urgency of the matters dealt with in the treaty or for other reasons the States concerned may provide in a treaty, which it is necessary for them to bring before their constitutional authorities for ratification or approval, that it shall come into force provisionally. Whether in these cases the treaty is to be considered as entering into force in virtue of the treaty or of a subsidiary agreement concluded between the States concerned in adopting the text may be a question. But there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis.

(2) Clearly, the “provisional” application of the treaty will terminate upon the treaty being duly ratified or approved in accordance with the terms of the treaty or upon it becoming clear that the treaty is not going to be ratified or approved by one of the parties. It may sometimes happen that the event is delayed and that the States concerned agree to put an end to the provisional application of the treaty, if not to annul the treaty itself.

Article 25

The registration and publication of treaties

1. The registration and publication of treaties entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

2. Treaties entered into by any party to the present articles, not a Member of the United Na-
The procedure for the registration and publication of treaties shall be governed by the regulations in force for the application of Article 102 of the Charter.

**Commentary**

1. This article recalls, in paragraph 1, the obligation of Members of the United Nations under Article 102 of the Charter to register treaties entered into by them.

2. Paragraph 2 also places an obligation on States, not Members of the United Nations, to register treaties entered into by them. Although the Charter obligation is limited to Member States, many non-member States have in practice "registered" their treaties habitually with the Secretariat of the United Nations. Under Article 102 of the General Assembly's regulations governing the registration of treaties (see next paragraph), the term given to such "registration" by non-members is "filing and recording", but in substance it is a form of voluntary registration. The Commission considers that it would be appropriate that States becoming a party to a convention on the conclusion of treaties should undertake a positive obligation to register their treaties. Whether this should then continue to be termed "filing" rather than registration in United Nations regulations of the General Assembly would be a matter for the General Assembly and the Secretary-General to decide. The Commission hesitated to propose that the sanction applicable under Article 102 of the Charter should also be applied to non-members; since it is a matter which touches the procedures of organs of the United Nations, it also thought that breach of such an obligation accepted by non-members in a general convention could logically be regarded in practice as attracting that sanction.

3. The Commission also considered whether it should incorporate in the draft articles the provisions of the General Assembly's regulations adopted in its resolution 97 (I) of 14 December 1946 (as amended by its resolutions 364 B (IV) of 1 December 1949 and 482 (V) of 12 December 1950). These regulations are important as they define the conditions for the application of Article 102 of the Charter. However, having regard to the administrative character of these regulations and to the fact that they are subject to amendment by the General Assembly, the Commission concluded that it should limit itself to incorporating the regulations in article 25 by reference to them in general terms. For convenience of reference, the regulations are attached as an annex to the present report.

**SECTION V. CORRECTION OF ERRORS AND THE FUNCTIONS OF DEPOSITARIES**

**Article 26**

*The correction of errors in the texts of treaties for which there is no depositary*

1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interested States shall by mutual agreement correct the error either:

   (a) By having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

   (b) By executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

   (c) By executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

2. The provisions of paragraph 1 above shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to correct the wording of one of the texts.

3. Whenever the text of a treaty has been corrected under paragraphs 1 and 2 above, the corrected text shall replace the original text as from the date the latter was adopted, unless the parties shall otherwise determine.

4. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

**Commentary**

1. Errors and inconsistencies are not uncommonly found in the text of treaties and it seems desirable to include provisions in the draft articles concerning methods of rectifying them. The present article deals with the situation where an error is discovered in a treaty for which there is no depositary, and also with the situation where there are two or more authentic texts of such a treaty and they are discovered not to be concordant. In these cases the correction of the error or inconsistencies would seem to be essentially a matter for agreement between the signatories to the treaty. There is a certain amount of evidence in the matter and the provisions of the present article are based on that evidence and on information available to members of the Commission.

2. The correction of errors in the text is dealt with in paragraph 1. The errors in question may be due to typographical mistakes or to a misdescription or mis-statement due to a misunderstanding and the correction may affect the substantive meaning of the text as authenticated. If the States concerned are not agreed as to the text being erroneous, there cannot, of course, be any question of a unilateral correction of the text. In that case, there is a dispute and it becomes a problem of "mistake" which belongs to another branch of the law of treaties. It is only when the States are agreed as to the existence of the error that the matter is one simply of correction of errors falling under the present article. The normal techniques used for correcting error appear to be those in paragraphs 1 (a) and 1 (b). Only in the extreme case of a whole series of errors would there be any occasion for starting afresh with a new text as contemplated in paragraph 1 (c); since, however, one such instance is given in Hackworth, the United States-Liberia Extradition Treaty of 1937, the Commission has included a provision allowing for the substitution of a completely new text.

3. The same techniques appear to be appropriate for the rectification of discordant texts where there are two or more authentic texts in different languages. Thus, a number of precedents concern the rectification...
of discordant passages in one of two authentic texts.\(^61\)

(4) Since what is involved is merely the correction or rectification of an already accepted text, it seems clear that, unless the parties otherwise agree, the corrected or rectified text should be deemed to operate from the date when the original text came into force. Whether such a correction or rectification falls under the terms of article 2 of the General Assembly's regulations concerning the registration and publication of treaties and international agreements, when it takes the form merely of an alteration made to the text itself, is perhaps open to question.\(^62\) But it would clearly be in accordance with the spirit of that article that a correction to a treaty should be registered with the Secretary-General and this has therefore been provided for in paragraph 4 of the present article.

(5) The procedure for correction of errors is also applicable to the correction of a lack of concordance in different language versions of the authentic text, where such lack of concordance is merely the result of errors made before the adoption of the authentic text. The Commission noted that the question may also arise of correcting not the authentic text itself but versions of it prepared in other languages; in other words, of correcting errors of translation. As, however, this is not a matter of altering an authentic text of the treaty, the Commission did not think it necessary that the article should cover the point. In these cases, it would be open to the States concerned to modify the translation by mutual agreement without any special formality. Accordingly, the Commission thought it sufficient to mention the point in the present commentary.

**Article 27**

The correction of errors in the texts of treaties for which there is a depositary

1. (a) Where an error is discovered in the text of a treaty for which there is a depositary, after the text has been authenticated, the depositary shall bring the error to the attention of all the States which participated in the adoption of the text and to the attention of any other States which may subsequently have signed or accepted the treaty, and shall inform them that it is proposed to correct the error if within a specified time limit no objection shall have been raised to the making of the correction.

(b) If on the expiry of the specified time limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialing the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to all the States which are or may become parties to the treaty.

2. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to all the States mentioned in paragraph 1 (b) above.

3. The provisions of paragraph 1 above shall likewise apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of the one of the texts should be corrected.

4. If an objection is raised to a proposal to correct a text under the provisions of paragraphs 1 or 3 above, the depositary shall notify the objection to all the States concerned, together with any other replies received in response to the notifications mentioned in paragraphs 1 and 3. However, if the treaty is one drawn up either within an international organization or at a conference convened by an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

5. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace the faulty text as from the date on which the latter text was adopted, unless the States concerned shall otherwise decide.

6. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

**Commentary**

(1) This article covers the same problems as article 26, but in cases where the treaty is a multilateral treaty for which there is a depositary. Here the process of obtaining the agreement of the interested States to the correction or rectification of the text is affected by the number of the States and it is only natural that the techniques used should hinge upon the depositary. In formulating the provisions set out in the article, the Commission has based itself upon the information contained in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*.\(^63\)

(2) The technique employed is for the depositary to notify all the States that took part in the adoption of the treaty or have subsequently signed or accepted it of the error or inconsistency and of the proposal to correct the text, while at the same time specifying an appropriate time limit within which any objection must be raised. Then, if no objection is raised, the depositary, as agent for the interested States, proceeds to make the correction, draw up a *procès-verbal* recording the fact and circulate a copy of the *procès-verbal* to the States concerned. The precedent on page 9 of the *Summary of Practice* perhaps suggests that the Secretary-General considers it enough, in the case of a typographical error, to obtain the consent of those States which have already signed the offending text. In laying down a general rule, however, it seems safer to say that notifications should be sent to all the interested States, since it is conceivable that arguments might arise as to whether the text did or did not contain a typographical error, e.g. in the case of punctuation that may affect the meaning.

(3) A further point that may call for comment is, perhaps, the mention in paragraph 4 of the reference of a difference concerning the correction of a text to the

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\(^61\) See, for example, the Commercial Treaty of 1938 between the United States and Norway and the Naturalisation Convention of 1907 between the United States and Peru, in Hackworth, op. cit., pp. 93 and 96.

\(^62\) Article 2 reads: "When a treaty or international agreement has been registered with the Secretariat, a certified statement regarding any subsequent change which affects a change in the parties thereto, or the terms, scope or application thereof, shall also be registered with the Secretariat".

\(^63\) See pp. 8-10, 12, 19-20, 39 (footnote), and annexes 1 and 2.
The depositary of multilateral treaties

1. Where a multilateral treaty fails to designate a depositary of the treaty, and unless the States which adopted it shall have otherwise determined, the depositary shall be:

(a) In the case of a treaty drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;

(b) In the case of a treaty drawn up at a conference convened by the States concerned, the State on whose territory the conference is convened.

2. In the event of a depositary declining, failing or ceasing to take up its functions, the negotiating States shall consult together concerning the nomination of another depositary.

Commentary

(1) A multilateral treaty normally designates a particular State or international organization as depositary. However, if the States concerned should fail to nominate a depositary in the treaty itself, paragraph 1 of this article provides either for an international organization or for the "host" State of the conference at which the treaty was drawn up to act as depositary. The actual provisions of paragraph 1 reflect existing practice in the designation of depositaries in multilateral treaties.

(2) Cases may possibly occur where a depositary declines, fails or ceases to act, and cases of the last type are known to have occurred. Accordingly, the Commission thought it prudent to cover this possibility in paragraph 2 of the present article.

Article 29

The functions of a depositary

1. A depositary exercises the functions of custodian of the authentic text and of all instruments relating to the treaty on behalf of all States parties to the treaty or to which it is open to become parties. A depositary is therefore under an obligation to act impartially in the performance of these functions.

2. In addition to any functions expressly provided for in the treaty, and unless the treaty otherwise provides, a depositary has the functions set out in paragraphs 3 to 8 below.

3. The depositary shall have the duty:

(a) To prepare any further texts in such additional language as may be required either under the terms of the treaty or the rules in force in an international organization;

(b) To prepare certified copies of the original text or texts and transmit such copies to the States mentioned in paragraph 1 above;

(c) To receive in deposit all instruments and notifications relating to the treaty and to execute a procès-verbal of any signature of the treaty or of the deposit of any instrument relating to the treaty;

(d) To furnish to the State concerned an acknowledgment in writing of the receipt of any instrument or notification relating to the treaty and promptly to inform the other States mentioned in paragraph 1 of the receipt of such instrument or notification.

4. On a signature of the treaty or on the deposit of an instrument of ratification, accession, acceptance or approval, the depositary shall have the duty of examining whether the signature or instrument is in conformity with the provisions of the treaty in question, as well as with the provisions of the present articles relating to signature and to the execution and deposit of such instruments.

5. On a reservation having been formulated, the depositary shall have the duty:

(a) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the State which formulated the reservations;

(b) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested States as prescribed in articles 18 and 19.

6. On receiving a request from a State desiring to accede to a treaty under the provisions of article 9, the depositary shall as soon as possible carry out the duties mentioned in paragraph 3 of that article.

7. Where a treaty is to come into force upon its signature by a specified number of States or upon the deposit of a specified number of instruments of ratification, acceptance or accession or upon some uncertain event, the depositary shall have the duty:

(a) Promptly to inform all the States mentioned in paragraph 1 above when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled;

(b) To draw up a procès-verbal of the entry into force of the treaty, if the provisions of the treaty so require.

8. In the event of any difference arising between a State and the depositary as to the performance of these functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if the State concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested States or of the competent organ of the organization concerned.

Commentary

(1) The depositary of a treaty plays a significant role in what is really the administration of the procedural clauses of the treaty, and a number of the func-
tions of a depositary have already been mentioned in connexion with preceding provisions of the present articles. It is thought convenient, however, to collect together in a single article the main functions of a depositary relating to the conclusion and entry into force of treaties and that is the purpose of article 29. In drafting its provisions the Commission has naturally paid particular attention to the Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements.

(2) Paragraph 1 states the general principle that a depositary, whether a State or an international organization, acts on behalf of all the parties to the treaty as their delegate to hold the authentic text of the treaty and to receive and communicate all instruments and notifications relating to the treaty. In this capacity, the depositary must be impartial and perform its functions with objectivity. On the other hand, the fact that a State is a depositary does not disqualify it from exercising the normal rights of a State which is a party to a treaty, or took part in the adoption of its text, in regard to the procedural clauses of the treaty. In that capacity it may express its own policies, but it must carry out its duties as depositary with impartiality and objectivity.

(3) Paragraph 2 of the article requires no comment. Paragraph 3 deals with the functions of the depositary in relation to the original text of the treaty, and as to all instruments and notifications relating to the treaty. Paragraph 4 makes it clear that the depositary has a certain duty to examine whether any signatures or instruments are in due form.

(4) Paragraph 5 recalls the duties placed upon a depositary in the event of a State applying to become a party to a treaty under article 9.

(6) Paragraph 7 deals with the depositary's duty to notify the interested States of the coming into force of the treaty, when the conditions for its entry into force have been fulfilled. The question whether the required number of signatures or of instruments of ratification, accession, etc. has been reached may sometimes pose a problem, as when questionable reservations have been made. In this connexion, as in others, although the depositary has the function of making a preliminary examination of the matter, it is not invested with competence to make a final determination of the entry into force of the treaty binding upon the other States concerned. However normal it may be for States to accept the depositary's appreciation of the date of the entry into force of a treaty, it seems clear that this appreciation may be challenged by another State and that then it would be the duty of the depositary to consult all the other interested States as provided in paragraph 8 of the present article. Accordingly, paragraph 7 does not go beyond requiring the depositary to inform the interested States of the date when, in its opinion, the conditions for the entry into force of the treaty have been fulfilled.

(7) Paragraph 8 lays down the general principle that, in the event of any difference arising between the depositary and another State, the duty of the depositary is to consult all the other interested States. Since the depositary is not invested with competence to make final determinations on matters arising out of the performance of its functions, the matter must be referred to all the States interested in the treaty. If the State concerned or the depositary itself deems it necessary, they may bring the question to the attention of the other interested States. The rule has been formulated in that way because there might be cases where the State having a difference with a depositary might prefer not to insist upon the matter being referred to the other States.
Chapter III

FUTURE WORK IN THE FIELD OF THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

24. In its resolution 1505 (XV) of 12 December 1960, the General Assembly decided to place on the provisional agenda of its sixteenth session the item “Future work in the field of the codification and progressive development of international law”, “in order to study and survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification and for the progressive development of international law”.

25. The resolution also invited Member States to submit in writing to the Secretary-General, before 1 July 1961, any views or suggestions they might have on this question for consideration by the General Assembly.

26. In reply to a circular letter dated 25 January 1961, the Secretary received the observations of seventeen Governments, which were communicated to Member States. An analysis of these observations, prepared by the Secretariat, has been published.

27. The International Law Commission devoted its 614th-616th meetings to this question at its sixteenth session, in 1961.

28. In accordance with resolution 1505 (XV), the General Assembly placed the question on the agenda of its sixteenth session and referred it, for study and report, to the Sixth Committee, which considered it at its 713th-730th meetings, from 14 November to 13 December 1961.

29. On the recommendation of the Sixth Committee, the General Assembly, on 18 December 1961, adopted resolution 1686 (XVI), reading as follows:

“The General Assembly,

“Recalling its resolution 1505 (XV) of 12 December 1960,

“Considering that the conditions prevailing in the world today give increased importance to the role of international law in relations among nations,

“Emphasizing the important role of codification and progressive development of international law with a view to making international law a more effective means of furthering the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations,

“Mindful of its responsibilities under Article 13, paragraph 1 a, of the Charter to encourage the progressive development of international law and its codification,

“Having surveyed the present state of international law with particular regard to the preparation of a new list of topics for codification and progressive development of international law,

“1. Expresses its appreciation to the International Law Commission for the valuable work it has already accomplished in the codification and progressive development of international law;

“2. Takes note of chapter III of the report of the International Law Commission covering the work of its thirteenth session;

“3. Recommends the International Law Commission:

“(a) To continue its work in the field of the law of treaties and of State responsibility and to include on its priority list the topic of succession of States and Governments;

“(b) To consider at its fourteenth session its future programme of work, on the basis of sub-paragraph (a) above and in the light of the discussion in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and of the observations of Member States submitted pursuant to resolution 1505 (XV), and to report to the Assembly at its seventeenth session on the conclusions it has reached;

“4. Decides to place on the provisional agenda of its seventeenth session the question entitled ‘Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations’.

30. The question of future work in the field of the codification and progressive development of international law was placed on the agenda of the fourteenth session of the Commission, which discussed it at its 629th-637th meetings, from 25 April to 7 May 1962, and at its 688th meeting, on 26 June 1962.

31. The Commission held a general debate on its whole programme of future work, including the topics mentioned in paragraph 3 (a) of resolution 1686 (XVI). It had before it a working paper prepared by the Secretariat (A/CN.4/145). The introduction to the working paper enumerates the topics referred to the Commission by the General Assembly. Parts I and II of the document set out the topics proposed for codification by Governments in their replies, which were transmitted in accordance with General Assembly resolution 1505 (XV) (see above, para. 26). Some of these topics are included either among those whose codification the Commission had considered in 1949, or in the provisional list of fourteen topics selected by the Commission for codification. The other topics proposed by Governments are new, in the sense that the Commission has never considered their codification.

66 Ibid., Sixteenth Session, Supplement No. 9 (A/4843), paras. 40 and 41.
I. Topics referred to in paragraph 3 (a) of General Assembly resolution 1686 (XVI)

LAW OF TREATIES

32. It was agreed that the Commission should continue the study of the law of treaties, which was on the agenda of the present session and which it had discussed at several earlier sessions. It was also agreed that this topic would receive priority at both the present and future sessions. The Commission considered that no change should be made in the plan of work which it had followed up to the present in its consideration of the topic. It will therefore continue its consideration of the topic on the basis of the reports prepared by the Special Rapporteur (see chapters II and IV of this report).

STATE RESPONSIBILITY

33. The idea that the topic of State responsibility should be one of those which are to receive priority in the Commission's work met with the approval of all the members. There were divergent views at the outset, however, concerning the best approach to the study of the question and the issues which the study should cover.

34. Some members pointed out that it would not be a question, as the General Assembly recommended, of merely continuing work already begun on State responsibility; the reports of the preceding Special Rapporteur, who is no longer a member of the Commission, could not now serve as a basis for the Commission's work, as it had not accepted them in principle; the study of the topic would therefore have to start from the beginning, and the first thing to determine was how the study should be approached.

35. Other members pointed out that State responsibility was an extremely complex subject and covered such a large part of international law that the Commission should first enumerate certain general principles. They considered that it would be possible to prepare such a draft, but they were doubtful whether an acceptable draft concerning responsibility for damage caused to aliens could be produced within a reasonable period of time.

36. Other members considered that if the Commission intended to examine only one particular aspect of the question of State responsibility it could not choose a more appropriate aspect than the responsibility for damage caused to aliens.

37. When studying the problem one could not but be impressed by the great number of cases in which international tribunals had ruled on the question of responsibility for damage caused to aliens. The violation of rules of international law in this respect had given rise to numerous international claims in which the responsibility of States was involved. These problems were of particular importance today in connexion with the treatment of foreign property and foreign investments, which played so important a part.

38. While it was true that the responsibility for damage caused to aliens was not the only aspect of international responsibility, it had to be admitted that, if the Commission prepared a draft on international responsibility in which this aspect were ignored, its work would be incomplete.

39. The opinion was also expressed that, in defining the subject, the Commission should not allow itself to be led astray by historical considerations. While admittedly the theory of the responsibility of the State had evolved from a body of case-law concerned particularly with violations of rights of aliens, nevertheless the distinction between the two questions should be stressed. Those two questions were, firstly, the international responsibility of the State in general, and, secondly, the State's treatment of aliens. It was necessary first to establish what were the basic rules and what were the obligations of States with regard to aliens. By contrast, the State's international responsibility as such arose in circumstances in which a subject of international law infringed a rule of international law—any rule whatever. Still other members, while agreeing that certain problems which are usually dealt with under the heading of 'responsibility of States'—such as the responsibility of a State for damage caused to aliens—would fall under the heading of 'treatment of aliens', considered however that as such they ought to be dealt with by the Commission.

40. Some members pointed out that it was the Commission's duty to examine all aspects of the question in the light of recent developments in international life. In the past, the theory of State responsibility had been centred on the treatment of aliens. Under modern international law, State responsibility arose less in connexion with the treatment of aliens than as a result of acts which endangered or might endanger international peace, such as aggression, denial of national independence, or of exchange of friendly relations with States, and violations of provisions of the United Nations Charter. In the traditional international law concerning State responsibility, attention had been focused on such problems as denial of justice, the rule on the exhaustion of local remedies and indemnification. Those problems had not become obsolete but their relative importance had greatly diminished in modern international law. The Commission would of course be doing useful work by studying those problems but it should not stop there; it should go further and study particularly the problems arising in practice. Some other members expressed the view that the Commission should not confine its study to more theoretical and less controversial subjects such as general principles governing the responsibility of States. By doing so it would unduly limit the problem which the General Assembly requested it to study. Finally it was suggested that the Commission should first engage in a study of the general principles of responsibility and then proceed to a more detailed analysis within which the problems of responsibility for damage caused to aliens and its redress would find their proper place.

41. Different opinions were also expressed concerning the method of work which should be adopted for the consideration of the question of State responsibility.

42. In the view of some members, the Commission should follow its usual method of work and appoint a special rapporteur for the study of the topic. Other members considered that, owing to the particular difficulty involved in the study of State responsibility, the Commission should vary its practice and appoint a subcommittee composed of a small number of its members, which would be asked to submit a report not on the substance of the matter but on purely preliminary questions, the approach to the subject and the aspects which should be considered.

43. Some of the members who favoured the appointment of a special rapporteur believed that he should be appointed at the present session. The immediate ap-
pointment of a special rapporteur should not prevent the adoption of constructive suggestions to improve the Commission’s methods of work. For example, the special rapporteur would find it useful to draw on the knowledge and experience of his colleagues on the Commission. Possibly, it was said, the members interested in the question of international responsibility might meet a few days before the beginning of the fifteenth session to discuss the results of the special rapporteur’s work with him before the session actually opened.

44. In another view, it would be unwise to set up a sub-committee before appointing a special rapporteur. If the Commission should decide to set up such a sub-committee, it should logically first appoint a special rapporteur, who might be assisted by an advisory sub-committee. The sub-committee would hold a few meetings during the present session in order to consider, jointly with the special rapporteur, the scope of the study to be undertaken. At the next session the special rapporteur would submit a preliminary report after having consulted the sub-committee. As soon as the report was submitted, the sub-committee would cease to exist.

45. Some members had doubts on the advisability of appointing a special rapporteur on State responsibility forthwith. The topic was so complex and so ill-defined, they said, that the Commission could not embark on a study without the necessary preparatory work. It was lack of preparation which, in their opinion, had led to the present situation, after years of work and a succession of reports. Accordingly, they considered that the Commission should set up a small sub-committee to define the scope of the subject and deal with other preliminary matters. The sub-committee should be set up at the present session and be allowed sufficient time to give a considered opinion on the various preliminary aspects of the question. It should not be a standing body, but should cease to exist as soon as it had reported to the Commission. After discussing the sub-committee’s report, the Commission would decide on the best method of dealing with the subject.

46. Article 19, paragraph 1, of the Commission’s Statute, which provides that the Commission should “adopt a plan of work appropriate to each case”, was quoted in support of the proposal to set up such a sub-committee. Supporters of the proposal also claimed that it was desirable for the Commission to revise its method of work in respect of State responsibility and not to appoint a special rapporteur until preliminary research carried out by an adequately representative sub-committee was available.

47. As a result of the discussion, the Commission agreed that it would be necessary to undertake preparatory work before a special rapporteur was appointed. Accordingly, at its 637th meeting on 7 May 1962, the Commission decided to set up a Sub-Committee with the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Arechaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen. The task of the Sub-Committee was to submit to the Commission at its next session a preliminary report containing suggestions concerning the scope and approach of the future study. The Sub-Committee met on 21 June 1962 and made a number of suggestions which were submitted to the Commission at its 668th meeting on 26 June 1962.

48. The Commission approved a suggestion that the Sub-Committee should confine its debates to the general aspects of State responsibility. It also adopted a number of other suggestions concerning the organization of the Sub-Committee’s work (see para. 68 below).

Succession of States and Governments

49. In principle, all members were in favour of including the topic of succession of States and Governments in the list of priorities for the Commission’s work.

50. Some members, however, indicated that they were not entirely convinced that general principles governing the subject existed in international law, though they were prepared to admit that it would be possible to derive certain rules from practice and from the provisions of existing treaties. They considered the subject extremely important, especially at the present time, and since the last war, when the independence of a large number of States had given rise to so many problems concerning the succession of States. Many examples were quoted to illustrate the variety of succession problems which these new States had to face and for which a general solution was necessary. It was stressed that the subject was of practical even more than theoretical importance and that the Commission should therefore not relegate it to second place and should not postpone its investigation.

51. Other members, while in favour of the study, pointed out that the Commission must first obtain the necessary documentation. To obtain the relevant information, it was proposed that a questionnaire should be sent to Governments and that the Secretariat should be requested to prepare some documents on the subject.

52. Some members considered that the succession of States and of Governments comprised two distinct questions and that at the present juncture the Commission should take up the question of succession of States, leaving the question of succession of Governments until later. Others, on the contrary, considered that the succession of States should, at least in the preliminary stage, be studied at the same time as the succession of Governments, since international practice proved that it was not always easy to draw a distinction between the two. The Commission has not yet taken a decision on this issue.

53. With that consideration in mind, some members drew the Commission’s attention to the complexity of the subject and proposed that a start should be made by defining its scope. They believed that the Commission would be wise to draw up at the current session a list of items to be covered by the future study, to facilitate the task of the special rapporteur and serve as a basis for his report. Suggestions for a new method of work concerning the succession of States and Governments were similar to those made in connexion with the method of work on State responsibility (see paras. 41-46 above).

54. In the light of these observations, the Commission, at its 637th meeting on 7 May 1962, decided to set up a Sub-Committee composed of the following ten of its members: Mr. Lachs (Chairman), Mr. Bartos, Mr. Briggs, Mr. Castren, Mr. El-Erian, Mr. Elías, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The task of the Sub-Committee was to submit to the Commission a preliminary report containing suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation.

55. The Sub-Committee held two meetings, on 16 May and 21 June 1962, and drew up a number of sug-
gestions, which were submitted to the Commission at its 668th meeting on 26 June 1962.

56. At that meeting the Commission took certain decisions concerning the organization of the Sub-Committee's work (see para. 72 below).

II. The Commission's future programme of work (General Assembly resolution 1686 (XVI), paragraph 3(b))

57. In the course of the discussion, some members referred to General Assembly resolution 1686 (XVI) on the Commission's future programme of work and said that that programme did not need to be enlarged. Others argued that, in view of recent developments in international law and of the need for promoting friendly relations and co-operation among States, the Commission's programme should be reviewed and amended so as to include additional topics of definite current interest.

58. Various comments were also made on the possible choice of additional topics. Some members thought that the Commission might consider studying certain topics on which opinions were divided, though not topics of a markedly political nature. Other members pointed out, on the other hand, that, as its task comprised both the codification and the progressive development of international law, the Commission should not rule out complex topics, even though they had political overtones. The Commission would be the most appropriate body to formulate principles of international law capable of serving the cause of international co-operation.

59. At its 634th meeting held on 2 May 1962, the Commission set up a Committee of eight members to consider the future programme of work in accordance with General Assembly resolution 1686 (XVI), paragraph 3(b). The Committee, which was composed of Mr. Amado (Chairman), Mr. Ago, Mr. Bartoš, Mr. Cadieux, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Pessou and Mr. Tunkin, met on 21 June 1962 when it considered the question on the basis of the working paper prepared by the Secretariat (see para. 31 above). The Committee formulated a number of suggestions which were submitted to the plenary Commission at its 668th meeting on 26 June 1962.

60. The Commission, on the recommendation of the Committee, agreed to limit the future programme of work for the time being to the three main topics under study or to be studied pursuant to General Assembly resolution 1686 (XVI), paragraph 3(a), namely, the law of treaties, State responsibility, and succession of States and Governments. It further decided to include in the programme four additional topics of more limited scope which had been referred to it by earlier General Assembly resolutions, namely, the question of special missions (resolution 1687 (XVI)), the question of relations between States and inter-governmental organizations (resolution 1289 (XIII)), the right of asylum (resolution 1400 (XIV)), and the juridical régime of historic waters, including historic bays (resolution 1453 (XIV)).

61. The Commission considered that many of the topics proposed by Governments deserved study with a view to codification. In drawing up its future programme of work, however, it is obliged to take account of its resources. The law of treaties, State responsibility and succession of States and Governments are such broad topics that they alone are likely to keep it occupied for several sessions. The Commission accordingly considers it inadvisable for the time being to add anything further to the already long list of topics on its agenda.

62. The Commission established two Sub-Committees, which are to meet between this session and the next for the purpose of undertaking the necessary preparatory work on the topics of State responsibility and the succession of States and Governments.
Chapter IV

PLANNING OF THE WORK OF THE COMMISSION FOR THE NEXT SESSION

63. As stated in paragraph 60 above, the Commission decided to include the following seven subjects in the programme for its future work: (1) Law of treaties; (2) State responsibility; (3) Succession of States and Governments; (4) Special missions; (5) Relations between States and inter-governmental organizations; (6) Principles and rules of international law relating to the right of asylum; (7) Juridical régime of historic waters, including historic bays.

64. The Commission adopted a number of decisions relating to the planning of its work on the law of treaties, on State responsibility, on the succession of States and Governments, on the relations between States and inter-governmental organizations and on special missions. To facilitate its work on the responsibility of States and the succession of States and Governments, the Commission established two Sub-Committees to undertake the necessary preparatory work (see paras. 47, 54 and 62 above).

I. Law of treaties

65. The Commission, having studied at the present session the report of the Special Rapporteur, Sir Humphrey Waldock, on the conclusion, entry into force and registration of treaties, will proceed to the consideration of his second report dealing with the validity and duration of treaties.

66. In connexion with its future work on the law of treaties, the Commission requested the Secretariat to present to its next session a memorandum reproducing various decisions taken by the General Assembly on the law of treaties and pertinent extracts from the reports of the Sixth Committee to the plenary Assembly, which constituted an explanation of the Assembly's decisions.

II. State responsibility

67. The Sub-Committee on State Responsibility held one private meeting on 21 June 1962. It had two working papers before it, one entitled "The duty to compensate for the nationalization of foreign property", submitted by Mr. Jiménez de Aréchaga, the other entitled "An approach to State responsibility", submitted by Mr. Paredes.

68. During that meeting, views were expressed on the organization of the Sub-Committee's work. The Sub-Committee formulated a number of suggestions which were submitted to the Commission at its 668th meeting on 26 June 1962. In the light of these suggestions, the Commission adopted the following decisions: (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.

69. At its 669th meeting on 27 June 1962, the Commission decided to include an item entitled "Report of the Sub-Committee on State Responsibility" in the agenda of its next session.

III. Succession of States and Governments

70. The Sub-Committee on the Succession of States and Governments held two private meetings, on 16 May and 21 June 1962 respectively.

71. At its first meeting, the Sub-Committee held an exchange of views on the question. A certain number of problems had been suggested which might constitute elements of a future report by the Sub-Committee. At the second meeting, after a further exchange of views, it was decided that more thought must be given to the scope of and approach to the subject. Accordingly, the Sub-Committee confined itself to considerations regarding the preparatory work that would be required. At the same meeting, the Chairman drew attention to a working paper submitted by Mr. Elias, entitled "Delimitation of the scope of succession of States and Governments".

72. In the light of the Sub-Committee's suggestions, the Commission took the following decisions at its 668th meeting on 26 June 1962: (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-General'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 the 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; (3) the Chairman of the Sub-Committee will prepare a report on the results achieved for submission to the next session of the Commission.

73. The Secretary-General has sent a circular note to Governments inviting them to submit the texts of any treaties, laws, decrees, regulations, diplomatic correspondence, etc. concerning the procedure of succession relating to the States which have achieved independence after the Second World War.

74. At its 669th meeting on 27 June 1962, the Commission decided to place on the agenda of its next session the item entitled “Report of the Sub-Committee on Succession of States and Governments”.

IV. Relations between States and inter-governmental organizations

75. At its 669th meeting on 27 June 1962, the Commission appointed Mr. El-Erian Special Rapporteur on relations between States and inter-governmental organizations. The Special Rapporteur will submit a report on this subject to the next session of the Commission. The Commission decided to place the question on the agenda of its next session.

V. Special missions

76. The Commission decided, at its 669th meeting on 27 June 1962, to place the question of special missions on the agenda of its next session. The Secretariat will prepare a working paper on this subject.
Chapter V
OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION

I. Co-operation with other bodies

77. At its 656th meeting the Commission considered the item concerning co-operation with other bodies.

78. It noted the report of Mr. Radhabinod Pal (A/CN.4/146) on the fifth session of the Asian-African Legal Consultative Committee held at Rangoon from 17 to 30 January, which Mr. Pal had attended as an observer for the Commission.

79. The Secretary brought to the Commission’s attention the two letters which had been received from the Secretary of the Asian-African Legal Consultative Committee. In the first of those letters, the Secretary of the Committee stated that the Committee had been unable to be represented by an observer at the Commission’s session. By the second letter the Commission was invited to send an observer to the sixth session of the Committee in 1963, the agenda for which was to include the topic of State responsibility and possibly the law of treaties and the question of the legality of atomic tests.

80. The Inter-American Juridical Committee was represented at the session by Mr. Hugo Juan Gobbi, who addressed the Commission on the Committee’s behalf. The Secretary informed the Commission that the next session of the Inter-American Council of Jurists was to be held in El Salvador on a date which had not yet been fixed.

81. The Commission decided to be represented by observers at the next sessions of the Asian-African Legal Consultative Committee and of the Inter-American Council of Jurists. It authorized the Chairman to appoint the observers as soon as the place and date of the sessions of these bodies were known.

II. Date and place of the next session

82. The Commission noted that, owing to the decision of the General Assembly to convene a conference of plenipotentiaries on consular intercourse at Vienna early in March 1963, difficulties of a practical nature might arise if the Commission’s session was scheduled to open on a date close to the end of the Vienna conference. In the first place, several members of the Commission would have to attend the conference as representatives of their countries; in the second place, it was not impossible that the conference might continue beyond the expected date of its closure. Consequently, in order to allow for a reasonable interval between the end of the Vienna conference and the beginning of the Commission’s next session, it was decided, after consultation with the Secretary-General, that the fifteenth session of the Commission would be held at Geneva from 6 May to 12 July 1963.

83. Under the terms of the five-year “pattern of conferences” established by resolution 1202 (XII) adopted by the General Assembly on 13 December 1957, the Commission may meet at Geneva only if there is no overlapping with the summer session of the Economic and Social Council. Since this pattern of conferences is to be discussed at the General Assembly’s next session, the Commission held an exchange of views on the subject. During the discussion, many members drew attention to the difficulties to which the present arrangements give rise for those of them who are university professors. In the circumstances, the first Monday in May was decided on as the most convenient opening date for the session, since it would reduce to the minimum both the duration of overlapping with the session of the Council and the period during which several members of the Commission have difficulty in securing release from their professional duties and hence in taking part in the Commission’s work.

III. Production of documents, summary records and translation facilities

84. In connexion with its future work the Commission is bound to draw the attention of the competent organs of the United Nations to the inadequate facilities relating to the production of documents, summary records and translations put at its disposal. The Commission wishes to emphasize that technical inadequacies and delays in the production of documents, summary records and draft texts in the working languages of the Commission created serious inconvenience and considerably delayed its work.

85. The Commission wishes to put on record its hope that proper arrangements will be made to avoid the repetition of these inadequacies and that in future it will have proper services at its disposal.

IV. Representation at the seventeenth session of the General Assembly

86. The Commission decided that it should be represented at the seventeenth session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Radhabinod Pal.
ANNEX

Registration and publication of treaties and international agreements: regulations to give effect to Article 102 of the Charter of the United Nations

PART ONE
Registration

Article 1
1. Every treaty or international agreement, whatever its form and descriptive name, entered into by one or more Members of the United Nations after 24 October 1945, the date of the coming into force of the Charter, shall as soon as possible be registered with the Secretariat in accordance with these regulations.
2. Registration shall not take place until the treaty or international agreement has come into force between two or more of the parties thereto.
3. Such registration may be effected by any party or in accordance with article 4 of these regulations.
4. The Secretariat shall record the treaties and international agreements so registered in a Register established for that purpose.

Article 2
1. When a treaty or international agreement has been registered with the Secretariat, a certified statement regarding any subsequent action which effects a change in the parties thereto, or the terms, scope or application thereof, shall also be registered with the Secretariat.
2. The Secretariat shall record the certified statement so registered in the register established under article 1 of these regulations.

Article 3
1. Registration by a party, in accordance with article 1 of these regulations, relieves all other parties of the obligation to register.
2. Registration effected in accordance with article 4 of these regulations relieves all parties of the obligation to register.

Article 4
1. Every treaty or international agreement subject to article 1 of these regulations shall be registered ex officio by the United Nations in the following cases:
   (a) Where the United Nations is a party to the treaty or agreement;
   (b) Where the United Nations has been authorized by the treaty or agreement to effect registration;
   (c) Where the United Nations is the Depositary of a multilateral treaty or agreement;
2. A treaty or international agreement subject to article 1 of these regulations may be registered with the Secretariat by a specialized agency in the following cases:
   (a) Where the constituent instrument of the specialized agency provides for such registration;
   (b) Where the treaty or agreement has been registered with the specialized agency pursuant to the terms of its constituent instrument;
   (c) Where the specialized agency has been authorized by the treaty or agreement to effect registration.

Article 5
1. A party or specialized agency, registering a treaty or international agreement under article 1 or 4 of these regulations, shall certify that the text is a true and complete copy thereof and includes all reservations made by parties thereto.
2. The certified copy shall reproduce the text in all the languages in which the treaty or agreement was concluded and shall be accompanied by two additional copies and by a statement setting forth, in respect of each party:
   (a) The date on which the treaty or agreement has come into force;
   (b) The method whereby it has come into force (for example: by signature, by ratification or acceptance, by accession, etcetera).

Article 6
The date of receipt by the Secretariat of the United Nations of the treaty or international agreement registered shall be deemed to be the date of registration, provided that the date of registration of a treaty or agreement registered ex officio by the United Nations shall be the date on which the treaty or agreement first came into force between two or more of the parties thereto.

Article 7
A certificate of registration signed by the Secretary-General or his representative shall be issued to the registering party or agency and also, upon request, to any party to the treaty or international agreement registered.

Article 8
1. The register shall be kept in the English and French languages. The register shall comprise, in respect of each treaty or international agreement, a record of:
   (a) The serial number given in the order of registration;
   (b) The title given to the instrument by the parties;
   (c) The names of the parties between whom it was concluded;
   (d) The dates of signature, ratification or acceptance, exchange of ratification, accession, and entry into force;
   (e) The duration;
   (f) The language or languages in which it was drawn up;
   (g) The name of the party or specialized agency which registers the instrument and the date of such registration;
   (h) Particulars of publication in the treaty series of the United Nations.
2. Such information shall also be included in the register in regard to the statements registered under article 2 of these regulations.
3. The texts registered shall be marked "ne varietur" by the Secretary-General or his representative, and shall remain in the custody of the Secretariat.

Article 9
The Secretary-General, or his representative, shall issue certified extracts from the register at the request of any Member of the United Nations or any party to the treaty or international agreement concerned. In other cases he may issue such extracts at his discretion.

a Adopted by General Assembly resolution 97 (I) of 14 December 1946 and amended by General Assembly resolutions 364 B (IV) of 1 December 1949 and 482 (V) of 12 December 1950.
The Secretariat shall file and record treaties and international agreements, other than those subject to registration under article 1 of these regulations, if they fall in the following categories:

(a) Treaties or international agreements entered into by the United Nations or by one or more of the specialized agencies;

(b) Treaties or international agreements transmitted by a Member of the United Nations which were entered into before the coming into force of the Charter, but which were not included in the treaty series of the League of Nations;

(c) Treaties or international agreements transmitted by a party not a Member of the United Nations which were entered into before or after the coming into force of the Charter which were not included in the treaty series of the League of Nations, provided, however, that this paragraph shall be applied with full regard to the provisions of the resolution of the General Assembly of 10 February 1946 set forth in the Annex to these regulations.

The provisions of articles 2, 5, and 8 of these regulations shall apply, mutatis mutandis, to all treaties and international agreements filed and recorded under article 10 of these regulations.

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1. The Secretariat shall publish as soon as possible in a single series every treaty or international agreement which is registered, or filed and recorded, in the original language or languages, followed by a translation in English and in French. The certified statements referred to in article 2 of these regulations shall be published in the same manner.

2. The Secretariat shall, when publishing a treaty or agreement under paragraph 1 of this article, include the following information: the serial number in order of registration or recording; the date of registration or recording; the name of the party or specialized agency which registered it or transmitted it for filing; and in respect of each party the date on which it has come into force and the method whereby it has come into force.

The Secretariat shall publish every month a statement of the treaties and international agreements registered, or filed and recorded, during the preceding month, giving the dates and numbers of registration and recording.
## CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

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**Note:** For the summary records of the Commission's meetings referred to in this volume, see:

- Yearbook of the International Law Commission, 1949, vol. I, 1st to 38th meetings
- Yearbook of the International Law Commission, 1951, vol. I, 82nd to 134th meetings
- Yearbook of the International Law Commission, 1957, vol. I, 382nd to 430th meetings
- Yearbook of the International Law Commission, 1962, vol. I, 628th to 672nd meetings