

YEARBOOK  
OF THE  
INTERNATIONAL  
LAW COMMISSION  
1963

*Volume II*

*Documents of the fifteenth session  
including the report of the Commission  
to the General Assembly*

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UNITED NATIONS





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UNITED NATIONS  
New York, 1964



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# LAW OF TREATIES

[Agenda item 1]

DOCUMENT A/CN.4/154

## RESOLUTIONS OF THE GENERAL ASSEMBLY CONCERNING THE LAW OF TREATIES: Memorandum prepared by the Secretariat

[Original, French]  
[14 February 1963]

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### Introduction

1. In connexion with its work on the law of treaties, the International Law Commission requested the Secretariat to present to its fifteenth 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."<sup>1</sup>

2. In compliance with this request, the Secretariat has prepared this memorandum, which reproduces the provisions of the General Assembly resolutions dealing with the law of treaties adopted on recommendations submitted by the Sixth Committee. The memorandum also covers resolution 24 (I) on the transfer of certain functions, activities and assets of the League of Nations, which was adopted by the General Assembly on the recommendation not of the Sixth Committee but of the League of Nations Committee. This resolution is particularly important, especially for its enumeration of the depositary functions. It is accordingly the basic document in the transfer to the United Nations of the functions and powers previously exercised by the League of Nations under international instruments; the transfer was accomplished by means of protocols adopted by the General Assembly pursuant to resolutions noted in this memorandum. A list of all the resolutions covered by this memorandum is given below.

3. The memorandum also refers to the reports of the Sixth Committee and to other documents which explain

or facilitate understanding of the General Assembly resolutions and reproduces the texts of the resolutions, preceded where necessary by background notes giving all relevant information concerning their adoption.

4. As the table of contents indicates, the Assembly resolutions are presented according to subject, either under their own titles or under different headings intended to facilitate reference to them in connexion with the work on the law of treaties. Some sections of the memorandum are devoted to the provisions relating to the law of treaties in the multilateral treaties adopted by the General Assembly.

### List of General Assembly Resolutions covered by the Present Memorandum

Resolution 22 (I) of 13 February 1946: Privileges and Immunities of the United Nations.

Resolution 23 (I) of 10 February 1946: Registration of Treaties and International Agreements.

Resolution 24 (I) of 12 February 1946: Transfer of Certain Functions, Activities and Assets of the League of Nations.

Resolution 90 (I) of 11 December 1946: Privileges and Immunities of Members of the International Court of Justice, the Registrar, Officials of the Registry, Assessors, the Agents and Counsel of the Parties and of Witnesses and Experts.

Resolution 93 (I) of 11 December 1946: Accessions to the Convention on the Privileges and Immunities of the United Nations.

Resolution 97 (I) of 14 December 1946: Registration and Publication of Treaties and International Agreements: Regulations to give effect to Article 102 of the Charter of the United Nations.

<sup>1</sup> Report of the International Law Commission covering the work of its fourteenth session, *Official Records of the General Assembly: Seventeenth session, Supplement No. 9 (A/5209)*, para. 66.

Resolution 98 (I) of 14 December 1946: Interim Arrangement on the Privileges and Immunities of the United Nations concluded with the Swiss Federal Council, and Agreement concerning the Ariana Site.

Resolution 99 (I) of 14 December 1946: Arrangements required as a result of the establishment of the Permanent Headquarters of the United Nations in the United States of America.

Resolution 169 (II) of 31 October 1947: Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations.

Resolution 172 (II) of 14 November 1947: Registration and publication of treaties and international agreements.

Resolution 179 (II) of 21 November 1947: Co-ordination of the privileges and immunities of the United Nations and of the specialized agencies.

Resolution 254 (III) of 3 November 1948: Registration and publication of treaties and international agreements.

Resolution 255 (III) of 18 November 1948: Transfer to the United Nations of functions and powers previously exercised by the League of Nations under the International Convention relating to Economic Statistics, signed at Geneva on 14 December 1928.

Resolution 256 (III) of 3 December 1948: Transfer to the United Nations of the functions exercised by the French Government under the International Agreement of 18 May 1904 and the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, and the Agreement of 4 May 1910 for the Suppression of the Circulation of Obscene Publications.

Resolution 259 (III) of 8 December 1948: Privileges and immunities of the United Nations.

Resolution 260 (III) of 9 December 1948: Prevention and punishment of the crime of genocide.

Resolution 364 (IV) of 1 December 1949: Registration and publication of treaties and international agreements.

Resolution 366 (IV) of 3 December 1949: Rules for the calling of international conferences of States.

Resolution 368 (IV) of 3 December 1949: Invitations to be addressed to non-member States to become parties to the Convention on the Prevention and Punishment of the Crime of Genocide.

Resolution 369 (IV) of 3 December 1949: Draft Convention on the Declaration of Death of Missing Persons.

Resolution 478 (V) of 16 November 1950: Reservations to multilateral conventions.

Resolution 482 (V) of 12 December 1950: Registration and publication of treaties and international agreements.

Resolution 598 (VI) of 12 January 1952: Reservations to multilateral conventions.

Resolution 605 (VI) of 1 February 1952: Request of the Government of China for revision of the Chinese text of the Convention on the Prevention and Punishment of the Crime of Genocide.

Resolution 691 (VII) of 21 December 1952: Correction of the Chinese text of the Convention on the

Prevention and Punishment of the Crime of Genocide.

Resolution 794 (VIII) of 23 October 1953: Transfer to the United Nations of the functions exercised by the League of Nations under the Slavery Convention of 25 September 1926.

Resolution 795 (VIII) of 3 November 1953: Appeal to States to accelerate their ratifications of, or accessions to, the Convention on the Prevention and Punishment of the Crime of Genocide, and measures designed to ensure the widest possible diffusion of the nature, contents and purposes of the Convention.

Resolution 896 (IX) of 4 December 1954: Elimination or reduction of future statelessness.

Resolution 1105 (XI) of 21 February 1957: International conference of plenipotentiaries to examine the law of the sea.

Resolution 1450 (XIV) of 7 December 1959: International conference of plenipotentiaries on diplomatic intercourse and immunities.

Resolution 1452 (XIV) of 7 December 1959: Reservations to multilateral conventions: the Convention on the Inter-Governmental Maritime Consultative Organization.

Resolution 1685 (XVI) of 18 December 1961: International conference of plenipotentiaries on consular relations.

Resolution 1766 (XVII) of 20 November 1962: Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations.

### I. Adoption of Treaties by the General Assembly

5. Under some of the resolutions considered in the preparation of this memorandum, the General Assembly adopted several conventions and protocols which it opened for signature, accession or acceptance by States eligible to become parties to them. It also adopted some bilateral agreements to which the United Nations is a party. In this section a brief historical review will be given of the adoption of these conventions, protocols and agreements, and the methods used in negotiating and drafting them will be indicated.

#### A. CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS

6. This Convention is based on a draft Convention annexed to a study on privileges and immunities included in chapter VII of the report of the Preparatory Commission of the United Nations,<sup>2</sup> which was submitted to the General Assembly at its first session.

7. At its sixteenth plenary meeting held on 19 January 1946, the General Assembly referred to the Sixth Committee for consideration chapter VII of the report of the Preparatory Commission. In fulfilment of this task, the Sixth Committee submitted to the General Assembly a report<sup>3</sup> including, *inter alia*, a draft Convention on the privileges and immunities of the United Nations, which it recommended for adoption.

<sup>2</sup> Report of the Preparatory Commission of the United Nations, document PC/20, page 61.

<sup>3</sup> Document A/43/Rev.1.

8. At its thirty-first plenary meeting held on 13 February 1946, the General Assembly adopted resolution 22 (I) A in which it approved the draft Convention in the following terms :

"The General Assembly approves the annexed convention on the privileges and immunities of the United Nations and proposes it for accession by each Member of the United Nations."

#### B. CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE SPECIALIZED AGENCIES

9. In its resolution 22 (II) D of 13 February 1946, the General Assembly, on the recommendation of the Sixth Committee<sup>4</sup> based on the views expressed by the Preparatory Commission,<sup>5</sup> noted "that there are many advantages in the unification as far as possible of the privileges and immunities enjoyed by the United Nations and the various specialized agencies". It therefore instructed the Secretary-General to open negotiations with a view to the reconsideration of the provisions under which the specialized agencies enjoyed privileges and immunities.

10. In pursuance of this resolution, the Secretary-General submitted a report<sup>6</sup> to the General Assembly at its second session on the outcome of his consultations.

11. The question of the co-ordination of the privileges and immunities of the United Nations and of the specialized agencies was referred to the Sixth Committee and submitted by the latter to its Sub-Committee on Privileges and Immunities for study.

12. The Sub-Committee drew up a draft Convention, which the Sixth Committee approved and recommended to the General Assembly for adoption. In its report to the Assembly<sup>7</sup> submitting the draft Convention, the Sixth Committee made the following observations :

The two parts of the draft convention — standard clauses and annexes — form a complete body of provisions defining the privileges and immunities of each of the specialized agencies. But whereas the first part of the draft convention constitutes a definitive text submitted for final adoption by the General Assembly, the annexes contained in the second part are merely recommendations addressed to each of the specialized agencies.

It should be pointed out in this connexion that one of the questions which arose with respect to the choice of the method to be followed in order to give effect to the resolution of 13 February 1946 was whether, once the principle of a single convention had been approved, the definitive text of such a convention ought to be drafted in final form by the General Assembly of the United Nations or by a special conference at which all the States members of each of the specialized agencies would be represented, and to which the specialized agencies themselves would be invited.

The Committee thought it preferable to avoid the calling of a special conference; but, taking into account

the desirability of associating the specialized agencies and those of their members who are not Members of the United Nations with the drafting of the texts defining the privileges and immunities of these agencies, the Committee decided that the text of the annexes adjusting the standard clauses to each of the specialized agencies should be finally established in discussions conducted in conferences or assemblies of the specialized agencies themselves.

The method whereby the convention becomes applicable to the specialized agencies, and the procedure for the accession of States, are laid down in articles X and XI of the convention. These articles stipulate that the convention shall become applicable to a specialized agency only after the final text of the relevant annex has been adopted by the agency in question in accordance with its constitutional procedure, and has been transmitted to the Secretary-General of the United Nations (section 37).

States can then accede to the convention by depositing their instrument of accession with the Secretary-General of the United Nations (section 41).

Each State shall indicate in its instrument of accession the specialized agencies in respect of which it undertakes to apply the provisions of the convention. It can extend its accession to other specialized agencies by subsequent notification (section 43).

It should be pointed out that the benefits of the convention are not confined to the nine specialized agencies now in relationship with the United Nations. As indicated in article I (ii) (j), the convention applies equally to any other agency brought into relationship with the United Nations in accordance with Article 63 of the Charter.

As regards the annexes adapting the standard clauses of the convention to such new agencies, it is provided that the drafting of texts to be recommended to the specialized agencies concerned for adoption shall be entrusted to the Economic and Social Council, and that the definitive text of these annexes shall be adopted in accordance with the procedure indicated above.

13. At its 123rd plenary meeting held on 21 November 1947, the General Assembly adopted resolution 179 (II), which reads as follows :

#### A

##### *The General Assembly*

*Approves* the following Convention on the Privileges and Immunities of the specialized agencies and proposes it for acceptance by the specialized agencies and for accession by all Members of the United Nations and by any other State member of a specialized agency.

#### B

...

##### *The General Assembly*

*Recommends* that the constitutional instrument of any specialized agency which may hereafter be established should not contain detailed provisions relating to the privileges and immunities to be accorded to, or in connexion with, that specialized agency, but should provide that such privileges and immunities shall be governed by the said General Convention modified as may be required;

*Recommends* that any international conference at which the establishment of a specialized agency is considered should prepare a draft of the annex relating to the proposed agency contemplated in section 36 of the said General Convention

<sup>4</sup> Report of the Sixth Committee, document A/43/Rev.1.

<sup>5</sup> Report of the Preparatory Commission of the United Nations, document PC/20, page 60.

<sup>6</sup> Document A/339.

<sup>7</sup> Official Records of the General Assembly, Second Session, Annex 22 c, document A/503.

and that, if the agency is established, it should send such draft annex to the Secretary-General of the United Nations with a view to assisting the Economic and Social Council in preparing the draft annex which it will recommend, pursuant to section 35 of the said General Convention, after the agency has been brought into relationship with the United Nations, in conformity with the Charter and any recommendation of the General Assembly;

*Directs* the Secretary-General to transmit a copy of this resolution to the appropriate officer of any conference at which the establishment of a specialized agency is to be considered.

## C

...  
The General Assembly

*Recommends* that the States Members of the United Nations, pending their formal accession to the General Convention concerning the privileges and immunities of specialized agencies, including the annexes relating to each agency, should immediately accord as far as possible to, or in connexion with, the specialized agencies, the benefit of the privileges and immunities provided in the said General Convention and its annexes, it being understood that the specialized agencies will take any necessary parallel action in regard to those of their members which are not members of the United Nations.

C. CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

14. This Convention was originally drawn up, on the basis of a draft Convention prepared by the Secretariat, by an *ad hoc* Committee established by the Economic and Social Council. The Economic and Social Council, by resolution 47 (IV) of 28 March 1947, instructed the Secretary-General to prepare, with the assistance of experts, a draft Convention on the crime of genocide. In accordance with this resolution, the Secretary-General prepared a draft Convention which was transmitted to Member Governments for their comments and which, together with the comments received, was submitted to the second session of the General Assembly. By resolution 180 (II) adopted on 21 November 1947, the General Assembly requested the Economic and Social Council to continue its work concerning the suppression of this crime, including the study of the draft Convention prepared by the Secretariat. The Council, at its sixth session, established an *ad hoc* Committee to draw up a draft Convention on genocide. At its seventh session, the Economic and Social Council, by resolution 153 (VII) of 26 August 1948, transmitted to the third session of the General Assembly the draft Convention prepared by the *ad hoc* Committee.<sup>8</sup> The General Assembly, at its 142nd plenary meeting held on 24 September 1948, referred the draft Convention to the Sixth Committee, which devoted several meetings to preparing a final draft.<sup>9</sup>

15. The General Assembly, at its 179th meeting held on 9 December 1948, adopted resolution 260 (III) A, whereby it

*Approves* the annexed Convention on the Prevention and Punishment of the Crime of Genocide and proposes it for signature and ratification or accession in accordance with its article XI.

D. PROTOCOLS RELATING TO THE TRANSFER TO THE UNITED NATIONS OF FUNCTIONS AND POWERS EXERCISED UNDER INTERNATIONAL AGREEMENTS BY THE LEAGUE OF NATIONS OR BY CERTAIN GOVERNMENTS

16. The General Assembly adopted several protocols on this subject. Before indicating the procedure by which they were adopted, we should mention the General Assembly resolution on the transfer of certain functions, activities and assets of the League of Nations.

(a) *Transfer of certain functions, activities and assets of the League of Nations*

17. At its eighteenth plenary meeting held on 26 January 1946, the General Assembly referred to the League of Nations Committee the question of the transfer of certain functions, activities and assets of the League of Nations. After having considered the question on the basis of chapter XI of the report of the Preparatory Commission of the United Nations<sup>10</sup> and of the report of the Committee set up by the Preparatory Commission to discuss and establish with the Supervisory Commission of the League of Nations a common plan for the transfer of the assets of the League of Nations,<sup>11</sup> the League of Nations Committee transmitted to the General Assembly its recommendations concerning the transfer of certain functions, activities and assets of the League of Nations.<sup>12</sup>

18. At its twenty-ninth plenary meeting held on 12 February 1946, the General Assembly adopted resolution 24 (I), which in its entirety reads as follows :

I. FUNCTIONS AND POWERS BELONGING TO THE LEAGUE OF NATIONS UNDER INTERNATIONAL AGREEMENTS

Under various treaties and international conventions, agreements and other instruments, the League of Nations and its organs exercise, or may be requested to exercise, numerous functions or powers for the continuance of which, after the dissolution of the League, it is, or may be, desirable that the United Nations should provide.

Certain Members of the United Nations, which are parties to some of these instruments and are Members of the League of Nations, have informed the General Assembly that, at the forthcoming session of the Assembly of the League, they intend to move a resolution whereby the Members of the League would, so far as this is necessary, assent and give effect to the steps contemplated below.

*Therefore:*

1. *The General Assembly* reserves the right to decide, after due examination, not to assume any particular function or power, and to determine which organ of the United Nations or which specialized agency brought into relationship with the United Nations should exercise each particular function or power assumed.

2. *The General Assembly* records that those Members of the United Nations which are parties to the instruments referred to above assent by this resolution to the steps contemplated below and express their resolve to use their good offices to secure the co-operation of the other parties to the instruments so far as this may be necessary.

3. *The General Assembly* declares that the United Nations is willing in principle, and subject to the provisions of this resolution and of the Charter of the United Nations, to assume

<sup>8</sup> Document E/794.

<sup>9</sup> See Report of the Sixth Committee, *Official Records of the General Assembly, Third Session, Annexes*, agenda item 32, document A/760 and Corr. 2.

<sup>10</sup> *Report of the Preparatory Commission of the United Nations*, document PC/20, page 116.

<sup>11</sup> See documents A/18 and Add.1 and 2.

<sup>12</sup> *Report of the League of Nations Committee to the General Assembly*, document A/28.

the exercise of certain functions and powers previously entrusted to the League of Nations, and adopts the following decisions, set forth in A, B, and C below.

#### A. Functions pertaining to a Secretariat

Under certain of the instruments referred to at the beginning of this resolution, the League of Nations has, for the general convenience of the parties, undertaken to act as a custodian of the original signed texts of the instruments, and to perform certain functions, pertaining to a secretariat, which do not affect the operation of the instruments and do not relate to the substantive rights and obligations of the parties. These functions include: The receipt of additional signatures and of instruments of ratification, accession and denunciation; receipt of notice of extension of the instruments to colonies or possessions of a party or to protectorates or territories for which it holds a mandate; notification of such acts to other parties and other interested States; the issue of certified copies; and the circulation of information or documents which the parties have undertaken to communicate to each other. Any interruption in the performance of these functions would be contrary to the interests of all the parties. It would be convenient for the United Nations to have the custody of those instruments which are connected with activities of the League of Nations and which the United Nations is likely to continue.

#### Therefore:

The General Assembly declares that the United Nations is willing to accept the custody of the instruments and to charge the Secretariat of the United Nations with the task of performing for the parties the functions, pertaining to a secretariat, formerly entrusted to the League of Nations.

#### B. Functions and Powers of a Technical and Non-Political Character

Among the instruments referred to at the beginning of this resolution are some of a technical and non-political character which contain provisions, relating to the substance of the instruments, whose due execution is dependent on the exercise, by the League of Nations or particular organs of the League, of functions or powers conferred by the instruments. Certain of these instruments are intimately connected with activities which the United Nations will or may continue.

It is necessary, however, to examine carefully which of the organs of the United Nations or which of the specialized agencies brought into relationship with the United Nations should, in the future, exercise the functions and powers in question, in so far as they are maintained.

#### Therefore:

The General Assembly is willing, subject to these reservations, to take the necessary measures to ensure the continued exercise of these functions and powers, and refers the matter to the Economic and Social Council.

#### C. Functions and Powers under Treaties, International Conventions, Agreements and Other Instruments having a Political Character

The General Assembly will itself examine, or will submit to the appropriate organ of the United Nations, any request from the parties that the United Nations should assume the exercise of functions or powers entrusted to the League of Nations by treaties, international conventions, agreements and other instruments having a political character.

### II. NON-POLITICAL FUNCTIONS AND ACTIVITIES OF THE LEAGUE OF NATIONS OTHER THAN THOSE MENTIONED IN SECTION I

1. The General Assembly requests the Economic and Social Council to survey the functions and activities of a non-political character which have hitherto been performed by the League of Nations in order to determine which of them should, with such modifications as are desirable, be assumed by organs of the United Nations or be entrusted to specialized agencies which have been brought into relationship with the United Nations. Pending the adoption of the measures decided upon as the result of this examination, the Council should, on or before the dissolution of the League, assume and continue provisionally the work hitherto done by the following League departments: the Economic, Financial and Transit Department,

particularly the research and statistical work; the Health Section, particularly the epidemiological service; the Opium Section and the secretariats of the Permanent Central Opium Board and Supervisory Body.

2. The General Assembly requests the Secretary-General to make provision for taking over and maintaining in operation the Library and Archives and for completing the League of Nations treaty series.

3. The General Assembly considers that it would also be desirable for the Secretary-General to engage for the work referred to in paragraphs 1 and 2 above, on appropriate terms, such members of the experienced personnel by whom it is at present being performed as the Secretary-General may select.

### III. TRANSFER OF THE ASSETS OF THE LEAGUE OF NATIONS TO THE UNITED NATIONS

The General Assembly, having considered the report of the Committee set up by the Preparatory Commission to discuss and establish with the Supervisory Commission of the League of Nations a common plan for the transfer of the assets of the League of Nations, approves of both the report of the Committee set up by the Preparatory Commission and of the common plan submitted by it (document A/18 and Corr.1, Add.1 and 2).

### IV. APPOINTMENT OF A NEGOTIATING COMMITTEE

The General Assembly approves of the setting up of a small negotiating committee to assist the Secretary-General in negotiating further agreements in connexion with the transfer of certain assets in Geneva, and in connexion with the premises in the Peace Palace in The Hague. This committee shall consist of one representative designated by the delegations, if they so desire, of each of the same eight Members as previously constituted the Committee created by the Preparatory Commission: Chile, China, France, Poland, Union of South Africa, Union of Soviet Socialist Republics, United Kingdom and United States of America.

#### (b) Protocol amending the International Convention relating to Economic Statistics, signed at Geneva on 14 December 1928

19. As indicated above, the General Assembly, by resolution 24 (I), decided that the necessary steps should be taken to ensure the uninterrupted exercise of the functions and powers of a technical and non-political nature vested in the League of Nations by virtue of international conventions.

20. At its sixth session, the Economic and Social Council recommended, by resolution 114 (VI) of 2 March 1948, that the General Assembly should approve a draft resolution and protocol with an annex which would enable the United Nations to assume the functions and powers previously exercised by the League of Nations under the Convention of 14 December 1928 relating to economic statistics.

21. At its 142nd plenary meeting on 24 September 1948, the General Assembly referred this question to the Sixth Committee, which considered it at its 88th to 91st meetings, held on 30 October and from 2 to 4 November 1948.

22. On the recommendation of the Sixth Committee,<sup>13</sup> the General Assembly on 18 November 1948 adopted resolution 255 (III), in which it adopted a Protocol amending the International Convention relating to Economic Statistics, signed at Geneva on 14 December 1928.

<sup>13</sup> Report of the Sixth Committee to the General Assembly, *Official Records of the General Assembly, Third Session, Annexes*, agenda item 57, document A/713.

23. It may be useful to quote the following passages from this resolution and from the Protocol :

*The General Assembly*

...

*Approves* the Protocol which accompanies this resolution;  
*Urges* that it shall be signed without delay by all the States which are Parties to the International Convention relating to Economic Statistics, signed at Geneva on 14 December 1928;<sup>14</sup>

*Recommends* that, pending the entry into force of the aforementioned protocol, effect be given to its provisions by the Parties to the Convention;

*Instructs* the Secretary-General to perform the functions conferred upon him by the Protocol upon its entry into force.

**PROTOCOL AMENDING THE INTERNATIONAL CONVENTION RELATING TO ECONOMIC STATISTICS, SIGNED AT GENEVA ON 14 DECEMBER 1928**

The Parties to the present Protocol, considering that, under the International Convention relating to Economic Statistics, signed at Geneva on 14 December 1928, the League of Nations was invested with certain duties and functions for the continued performance of which it is necessary to make provision in consequence of the dissolution of the League of Nations, and considering that it is expedient that these duties and functions should be performed henceforth by the United Nations, hereby agree as follows:

**ARTICLE I**

The Parties to the present Protocol undertake that, as between themselves, they will, in accordance with the provisions of the present Protocol, attribute full legal force and effect to, and duly apply, the amendments to that instrument as they are set forth in the annex to the present Protocol.

**ARTICLE II**

The Secretary-General shall prepare a text of the Convention as revised in accordance with the present Protocol, and shall send copies for their information to the Governments of every Member of the United Nations and every State non-member of the United Nations to which this Protocol is open for signature and acceptance. He shall also invite Parties to the aforesaid Convention to apply the amended text of that instrument as soon as the amendments are in force, even if they have not yet been able to become Parties to the present Protocol.

**ARTICLE III**

The present Protocol shall be open for signature or acceptance by any of the Parties to the Convention of 14 December 1928 relating to Economic Statistics, to which the Secretary-General has communicated for this purpose a copy of this Protocol.

...

**ARTICLE VI**

In accordance with paragraph 1 of Article 102 of the Charter of the United Nations and the regulations pursuant thereto adopted by the General Assembly, the Secretary-General of the United Nations is authorized to effect registration of this Protocol and of the amendments made in the Convention by the present Protocol on the respective dates of their entry into force, and to publish the Protocol and the revised text to the Convention of 14 December 1928 relating to Economic Statistics as soon as possible after registration.

**ARTICLE VII**

The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations Secretariat. The Convention to be amended in accordance with the annex being in the English and French languages only, the English and French texts of the annex shall equally be the authentic texts and the Chinese, Russian and Spanish texts shall be translations.

A certified copy of the Protocol, including the annex, shall be sent by the Secretary-General to each of the States Parties to the Convention of 14 December 1928 relating to Economic Statistics, as well as to all States Members of the United Nations.

IN FAITH WHEREOF the undersigned, being duly authorized thereto by their respective Governments, signed the present Protocol on the date appearing opposite their respective signatures.

DONE at Paris this ninth day of December 1948.

**ANNEX TO THE PROTOCOL AMENDING**

In *article 2, section III (A)*: "Food and Agriculture Organization of the United Nations" shall be substituted for "International Institute of Agriculture".

*Article 8* shall read:

"In addition to the particular functions which are entrusted to the Economic and Social Council under the provisions of the present Convention and the instruments annexed thereto, the Council may make any suggestions which appear to be useful, for the purpose of improving or amplifying the principles and arrangements laid down in the Convention concerning the classes of statistics dealt with therein. It may also make suggestions in regard to other classes of statistics of a similar character in respect of which it appears desirable and practicable to secure international uniformity. It shall examine all suggestions to the same end which may be submitted to it by the Governments of any of the High Contracting Parties.

"The Economic and Social Council is requested, if at any time a desire to that effect is expressed by not less than half of the Parties to the present Convention, to convoke a conference for the revision and, if it seems desirable, the amplification of the present Convention."

*Article 10*: In its first paragraph, "Economic and Social Council" shall be substituted for "Committee of Experts referred to in article 8".

In its second paragraph, "Council" shall be substituted for "Committee".

*Article 11*: shall read:

"Any High Contracting Party may, at the time of signature, ratification or accession, declare that, in accepting the present Convention, he does not assume any obligations in respect of all or any of his colonies, protectorates, overseas territories, or all Trust Territories for which he acts as Administering Authority; and the present Convention shall not apply to any territories named in such declaration.

"Any High Contracting Party may give notice to the Secretary-General of the United Nations at any time subsequently that he desires that the Convention shall apply to all or any of his territories which have been made the subject of a declaration under the preceding paragraph, and the Convention shall apply to all the territories named in such notice one year after its receipt by the Secretary-General of the United Nations.

"Any High Contracting Party may, at any time after the expiration of the five-year period mentioned in article 16, declare that he desires that the present Convention shall cease to apply to all or any of his colonies, protectorates, overseas territories or all Trust Territories for which he acts as Administering Authority, and the Convention shall cease to apply to the territories named in such declaration six months after its receipt by the Secretary-General of the United Nations.

"The Secretary-General of the United Nations shall communicate to all Members of the United Nations and to non-member States to which he has communicated a copy of this Convention all declarations and notices received in virtue of this article."

*Article 12*: Its second paragraph shall read:

"The present Convention shall be ratified. As from the date of entry into force of the Protocol signed at Paris to amend this Convention, the instruments of ratification shall be transmitted to the Secretary-General of the United Nations, who shall notify their receipt to all Members of the United Nations and to non-member States to which he has communicated a copy of this Convention."

*Article 13* shall read:

"From the date of entry into force of the Protocol signed at Paris to amend this Convention, the present Convention may be acceded to on behalf of any Member of the United Nations or any non-member State to which the Economic and Social

<sup>14</sup> See *League of Nations Treaty Series*, volume CX 1930-1931, Nos. 1, 2, 3 and 4, page 172.

Council may decide officially to communicate the present Convention.

"The instruments of accession shall be transmitted to the Secretary-General of the United Nations, who shall notify their receipt to all Members of the United Nations and to non-member States to which he has communicated a copy of this Convention."

In its third paragraph, "Members of the United Nations" shall be substituted for "Secretary-General of the League of Nations".

*Article 16:* In its first paragraph, "Secretary-General of the United Nations" shall be substituted for "Secretary-General of the League of Nations" and "Member of the United Nations" shall be substituted for "Member of the League".

Its second paragraph shall read:

"The Secretary-General shall notify all Members of the United Nations and non-member States to which he has communicated a copy of this Convention of any denunciations received."

In its third paragraph, "Members of the United Nations" shall be substituted for "Members of the League".

*Article 17:* Its second paragraph shall read:

"The Governments of countries which are ready to accede to the Convention under article 13 but desire to be allowed to make any reservations with regard to the application of the Convention may inform the Secretary-General of the United Nations to this effect, who shall forthwith communicate such reservations to all Parties to the present Convention and inquire whether they have any objection thereto. If within six months of the date of the communication of the Secretary-General no objections have been received, the reservation shall be deemed to have been accepted."

(c) *Protocols 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, as well as the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris, on 4 May 1910.*

24. At the 99th meeting of the Economic and Social Council held on 29 July 1947, the representative of France proposed the transfer to the United Nations of the functions exercised by the French Government under the instruments which these Protocols sought to amend.

25. At its seventh session, on 13 August 1948, the Economic and Social Council adopted resolution 155 (VII) D, recommending that the General Assembly approve the transfer of functions and directing the Secretary-General, in consultation with the French Government, to prepare a protocol for the purpose of effecting the transfer and to submit the draft protocol to the General Assembly for its approval.

26. In conformity with that resolution, the Secretary-General submitted to the General Assembly at its third session a note (A/639/Rev.1) and the text of two draft protocols prepared in consultation with the French Government.

27. The question was referred to the Sixth Committee, which considered it at its 111th meeting held on 19 November 1948.

28. On the recommendation of the Sixth Committee,<sup>15</sup>

the General Assembly, on 3 December 1948, adopted resolution 256 (III), the text of which is as follows:

*The General Assembly*

Noting that the French Government exercises certain functions under article 7 of the International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic,<sup>16</sup> under articles 4, 8, 10 and 11 of the International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, and under articles 1, 4, 5 and 7 of the Agreement of 4 May 1910 for the Suppression of the Circulation of Obscene Publications,

Taking note of the French Government's offer to transfer to the United Nations the functions exercised by it in virtue of these instruments,

Considering that, by resolution 126 (II) adopted on 20 October 1947, the General Assembly decided to assume the powers and functions previously exercised by the League of Nations under the International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children,<sup>17</sup> the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age,<sup>18</sup> and of the International Convention of 12 September 1923 for the Suppression of the Circulation of and Traffic in Obscene Publications.<sup>19</sup>

Approves the transfer to the United Nations of the functions exercised by the French Government in virtue of the above-mentioned instrument;

Approves the Protocol which accompany this resolution;

Asks that each of these Protocols be signed without delay:

(a) By the States Members of the United Nations which are Parties to the Agreements or to the Convention which the Protocols seek to amend;

(b) By those States which are not Members of the United Nations and which are Parties to the Agreements or the Conventions which the Protocols seek to amend, and to which the Secretary-General shall have communicated a copy of the Protocols in conformity with international agreements in force and the recommendations contained in the resolutions of the General Assembly;

Recommends that, pending the entry into force of the aforesaid Protocols, effect be given to their provisions by the aforementioned States, each in respect of the instruments to which it is a Party;

Instructs the Secretary-General to perform the functions conferred upon him by the aforesaid Protocols upon their entry into force.

29. The provisions of the Protocols accompanying this resolution are identical, *mutatis mutandis*, with those of the Protocol amending the International Convention relating to Economic Statistics mentioned above.

(d) *Protocol amending the International Slavery Convention signed at Geneva on 25 September 1926*

30. By resolution 475 (XV) of 27 April 1953, the Economic and Social Council recommended that the General Assembly invite the States Parties, or which might become Parties, to the International Slavery Convention of 25 September 1926 to agree to the transfer to the United Nations of the functions undertaken by the League of Nations under the said Convention, and requested the Secretary-General to prepare a draft protocol to that end.

31. In conformity with that resolution, the Secretary-General prepared a draft protocol which he submitted to the General Assembly as an annex to his memoran-

<sup>16</sup> For the text of these instruments see document A/639/Rev.1.

<sup>17</sup> See *League of Nations Treaty Series*, volume IX, page 415.

<sup>18</sup> *Ibid.*, volume CL, page 431.

<sup>19</sup> *Ibid.*, volume XXVII, page 213.

<sup>15</sup> Report of the Sixth Committee to the General Assembly, *Official Records of the General Assembly, Third Session, Annexes*, agenda item 61, document A/741.

dum A/2435,<sup>20</sup> in which he also referred to the history of the question.

32. In his notes A/2435/Add.1, 2 and 3, the Secretary-General transmitted to the General Assembly the observations he had received from Governments on the draft protocol which he had transmitted to the States Parties to the International Slavery Convention in accordance with the request in Economic and Social Council resolution 475 (XV).

33. At its 435th plenary meeting held on 17 September 1953, the General Assembly referred the draft protocol prepared by the Secretary-General to the Sixth Committee, which considered it at its 369th and 470th meetings, held on 12 and 15 October 1953.

34. It may be useful to reproduce the following passages from the report of the Sixth Committee to the General Assembly :<sup>21</sup>

8. During the discussions in the Sixth Committee the question was raised, in connexion with the broader problem of the adaptation of League of Nations Conventions to the United Nations, whether a protocol was necessary for the transfer to the Organization of the functions and powers exercised by the League of Nations under the Slavery Convention. In that connexion, the Committee's attention was drawn to General Assembly resolution 24 (I) on the transfer to the United Nations of certain functions and activities of the League of Nations and to the resolution of the League of Nations Assembly of 18 April 1946. The United Nations General Assembly stated in section I of resolution 24 (I) that the Organization was prepared to accept the custody of international instruments formerly entrusted to the League of Nations and to charge the Secretariat of the United Nations with the task of performing for the parties the functions, pertaining to a secretariat, formerly entrusted to the League of Nations and set forth in part A of that resolution. There was therefore no need for a protocol for the transfer of such functions. An analysis of the Slavery Convention moreover showed that only article 7, which laid upon parties the obligation to inform the Secretary-General of the League of Nations of, *inter alia*, the laws and regulations enacted by them for the purpose of applying the Convention, might perhaps require a protocol before it could be sanctioned. But it was pointed out in that connexion that, even if that were the case, some practical remedy for the deficiency might easily be found. Finally, with regard to the invitation addressed to certain Member or non-member States which could not at the present stage accede to the Convention, it would be enough for the General Assembly to adopt a resolution to that effect (370th meeting)

9. Some delegations expressed the opinion that a protocol was desirable for the purpose of transferring to the United Nations the functions and powers exercised by the League of Nations under the International Slavery Convention so that non-member States which were Parties to the Convention might give their assent to such a transfer. The same

delegations also pointed out that there were several precedents.

10. The Secretary-General's representative said that the Secretary-General considered himself bound by the terms of part A of section I of General Assembly resolution 24 (I) of 12 February 1946. In accordance with the provisions of that resolution, the Secretary-General had always confined himself to the exercise of purely administrative functions and there had never been any objections. Thus, he had accepted, and notified the States concerned of, the depositing with him of instruments relating to Conventions which entrusted the Secretary-General of the League of Nations with the functions of depositary and which had never been the subject of a protocol of transfer. The adoption of a protocol, which the General Assembly had frequently thought desirable, would nevertheless not reflect upon the status of States which, by depositing an instrument of accession or ratification with the Secretary-General, had become Parties to such Conventions.

35. At its 453rd plenary meeting held on 23 October 1953, the General Assembly adopted resolution 794 (VIII), reading as follows :

*The General Assembly,*

*Considering Economic and Social Council resolution 475 (XV) adopted on 27 April 1953, concerning the transfer to the United Nations of the functions exercised by the League of Nations under the Slavery Convention of 25 September 1926,*

...

1. *Approves* the Protocol which accompanies the present resolution;
2. *Urges* all States Parties to the Slavery Convention to sign or accept this Protocol;
3. *Recommends* all other States to accede at their earliest opportunity to the Slavery Convention as amended by the present Protocol.

36. The text of the Protocol accompanying this resolution will not be reproduced here since its provisions are essentially the same as those of the Protocol amending the International Convention relating to Economic Statistics, the text of which has already been reproduced.

#### E. AGREEMENTS BETWEEN THE UNITED NATIONS AND CERTAIN GOVERNMENTS

(a) *Agreements relating to the privileges and immunities of Members of the International Court of Justice, the Registrar, Officials of the Registry, Assessors, the Agents and Counsel of the Parties and of Witnesses and Experts*

37. By resolution 22 (I) C of 13 February 1946, the General Assembly, with a view to ensuring that the International Court of Justice should enjoy the privileges, immunities and facilities necessary for the exercise of its functions, invited the Court to consider the question and to inform the Secretary-General of its recommendations.

38. As regards Netherlands territory, negotiations took place between representatives of the Netherlands Foreign Ministry and representatives of the Court, with a view to giving effect in the most satisfactory way possible to the above-mentioned resolution. These conversations led to an agreement set out in an exchange of letters

<sup>20</sup> *Official Records of the General Assembly, Eighth Session, Annexes, agenda item 30.*

<sup>21</sup> *Ibid.*, document A/2517.

dated 26 June 1946 between the President of the Court and the Minister for Foreign Affairs of the Netherlands.

39. At its 46th plenary meeting, held on 31 October 1946, the General Assembly referred the question to the Sixth Committee, which considered it on the basis of recommendations transmitted by the Court.<sup>22</sup>

40. At its 55th plenary meeting, held on 11 December 1946, the General Assembly adopted resolution 90 (I) whereby it approved "the agreements concluded between the International Court of Justice and the Netherlands Government, as recorded in the exchange of letters between the President of the Court and the Minister for Foreign Affairs of the Netherlands (Annex)."<sup>23</sup>

(b) *Interim Arrangement on the Privileges and Immunities of the United Nations concluded with the Swiss Federal Council, and Agreement concerning the Ariana Site*

41. These agreements were prepared by the Negotiating Committee set up under General Assembly resolution 24 (I) of 12 February 1946, in consultation with the Swiss Federal Council, to assist the Secretary-General in negotiating the agreements concerning the transfer to the United Nations of certain assets situated at Geneva and certain premises of the Palais de la Paix at The Hague.

42. In his report on the negotiations with the Swiss Federal Council<sup>24</sup> which contained the text of these agreements in its annexes I and II, the Secretary-General observed that these agreements "were initialled by representatives of the Swiss Federal Council and, on behalf of the Secretary-General, by the Negotiating Committee. These two agreements were signed first on behalf of the Swiss Federal Council, and on 1 July (1946) by the Secretary-General, on which date they duly entered into force."

43. At its 46th plenary meeting held on 31 October 1946, the General Assembly referred to the Sixth Committee the report by the Secretary-General containing, in addition, a letter dated 22 October 1946 from the Head of the Swiss Federal Political Department relating to the interpretation of the interim arrangement on privileges and immunities.

44. On the recommendation of the Sixth Committee,<sup>25</sup> the General Assembly, on 14 December 1946, adopted resolution 98 (I) reading as follows :

*The General Assembly*

*Has taken note* with satisfaction of the report<sup>26</sup> by the Secretary-General on the negotiations with the Swiss Federal Council;

*Considers* that the documents set out in that report, including the letter of 22 October 1946 from the Head of the Swiss Federal Political Department relating to the use of the United Nations buildings in Geneva, constitute a satis-

factory basis for the activities of the United Nations in Switzerland;

*Approves, therefore,* the arrangements concluded with the Swiss Federal Council.<sup>27</sup>

(c) *Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations*

45. By resolution 22 (I) B of 13 February 1946, the General Assembly authorized the Secretary-General, with the assistance of a Negotiating Committee, to negotiate with the competent authorities of the United States of America the arrangements required as a result of the establishment of the seat of the United Nations in the United States of America. This resolution provided that any agreement with the competent authorities of the United States resulting from these negotiations should be subject to approval by the General Assembly before being signed on behalf of the United Nations. Annexed to the resolution was a draft Convention between the United Nations and the Government of the United States of America intended for use by the Secretary-General as a basis for discussion during the negotiations. This draft Convention had been drawn up by the Sixth Committee<sup>28</sup> on the basis of a "draft treaty" prepared for the purpose by the Preparatory Commission of the United Nations.<sup>29</sup>

46. The Secretary-General and the Negotiating Committee submitted to the General Assembly at its first session a joint report<sup>30</sup> on the negotiations carried out with the authorities of the United States of America. This report contained an annexed draft agreement which had been reached in the course of the negotiations.

47. The General Assembly referred the report to the Sixth Committee. On that Committee's recommendation,<sup>31</sup> the General Assembly, on 14 December 1946, adopted resolution 99 (I) whereby it recognized that, having decided that the permanent headquarters of the United Nations should be located in the City of New York, the draft agreement resulting from the negotiations between the Secretary-General and Negotiating Committee and the competent authorities of the United States of America would need to be adapted to the circumstances of that site. In this resolution, the General Assembly also adopted the following decisions :

*The General Assembly,*

...

*Resolves, therefore :*

1. That the Secretary-General be authorized to negotiate and conclude with the appropriate authorities of the United States of America an agreement concerning the arrangements required as a result of the establishment of the permanent headquarters of the United Nations in the City of New York;

2. That in negotiating this agreement the Secretary-

<sup>22</sup> Report of the Sixth Committee to the General Assembly, document A/202.

<sup>23</sup> For the text of this exchange of letters which came into force on 11 December 1946, the date of its approval by the General Assembly, see *United Nations Treaty Series*, vol. 8, page 63.

<sup>24</sup> Document A/175, page 1.

<sup>25</sup> Report of the Sixth Committee to the General Assembly, document A/257.

<sup>26</sup> Document A/175.

<sup>27</sup> For the text of these Agreements, which entered into force by signature on 1 July 1946, see *United Nations Treaty Series*, vol. 1, pages 154 and 165.

<sup>28</sup> Report of the Sixth Committee to the General Assembly, document A/43/Rev.1.

<sup>29</sup> Report of the Preparatory Commission of the United Nations, document PC/20, page 75.

<sup>30</sup> Document A/67/Add.1.

<sup>31</sup> Report of the Sixth Committee to the General Assembly, document A/271.

General shall be guided by the provisions of the draft agreement set forth in document A/67;

3. That the agreement referred to in paragraph 1 shall not come into force until approved by the General Assembly;

4. That, pending the coming into force of the agreement referred to in paragraph 1, the Secretary-General be authorized to negotiate and conclude arrangements with the appropriate authorities of the United States of America to determine on a provisional basis the privileges, immunities and facilities needed in connexion with the permanent headquarters of the United Nations. In negotiating these arrangements, the Secretary-General shall be guided by the provisions of the draft agreement set forth in document A/67;

5. That the Government of the United States of America be requested to take the necessary steps as soon as possible to put into effect the Convention on the Privileges and Immunities of the United Nations, and to give effect to such arrangements as may be reached in accordance with paragraph 4 of this resolution.

48. In the report<sup>32</sup> submitted by the Secretary-General to the General Assembly at its second session, it was stated that in "pursuance of the resolution of 14 December, the Secretary-General resumed his negotiations with the competent United States authorities and on 26 June 1947 signed, with the Secretary of State of the United States of America, the 'Agreement between the United Nations and the United States of America regarding the headquarters of the United Nations'". An annex to this report contained the text of the agreement, section 28 of which, in conformity with paragraph 3 of the above-mentioned General Assembly resolution, stipulated that it:

. . . shall be brought into effect by an exchange of notes between the Secretary-General, duly authorized pursuant to a resolution of the General Assembly of the United Nations, and the appropriate executive officer of the United States, duly authorized pursuant to appropriate action of the Congress.

49. Section 20 of the Agreement also stipulated that:

The Secretary-General and the appropriate American authorities shall settle by agreement the channels through which they will communicate regarding the application of the provisions of this agreement and other questions affecting the headquarters district, and may enter into such supplemental agreements as may be necessary to fulfil the purposes of this agreement. In making supplemental agreements with the Secretary-General, the United States shall consult with the appropriate state and local authorities. If the Secretary-General so requests, the Secretary of State of the United States shall appoint a special representative for the purpose of liaison with the Secretary-General.

50. The text of the agreement was referred to the Sixth Committee, which requested its Sub-Committee on Privileges and Immunities to study it. The Sub-Committee, in its report to the Sixth Committee,<sup>33</sup>

expressed the following views with regard to sections 20 and 28 of the agreement:

(f) Section 20 provides for the conclusion between the Secretary-General and appropriate United States authorities of any supplemental agreements that may be necessary to fulfil the purposes of the Headquarters Agreement. The Sub-Committee was of the opinion that the Secretary-General should have authority to conclude such supplemental agreements and that the General Assembly should in all cases be informed of their contents. However, wherever, in the judgment of the Secretary-General, the proposed supplemental agreement involved any question of importance for which he had not already received authority, the Secretary-General should obtain the approval of the General Assembly before the supplemental agreement could become operative;

(g) With regard to section 28, the Sub-Committee was of the opinion that the notes exchanged for the purpose of bringing the Headquarters Agreement into force should be limited to effecting this purpose.

51. At its 101st plenary meeting held on 31 October 1947, the General Assembly adopted resolution 169 (II), reading as follows:

#### A

##### *The General Assembly,*

*Whereas* the Secretary-General pursuant to resolution 99 (I) of 14 December 1946 signed with the Secretary of State of the United States of America on 26 June 1947 an Agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, and

*Whereas* the Secretary-General in accordance with the said resolution has submitted the said Agreement to the General Assembly;

*Having studied* the report prepared on this matter by the Sixth Committee,

*Endorses* the opinions expressed therein;

*Approves* the Agreement signed on 26 June 1947, and

*Authorizes* the Secretary-General to bring that Agreement into force in the manner provided in section 28 thereof, and to perform on behalf of the United Nations such acts or functions as may be required by that Agreement.<sup>34</sup>

## II. The Calling of International Conferences to adopt Treaties

52. Before enumerating the General Assembly resolutions calling such conferences, we should refer to resolution 366 (IV) of 3 December 1949, in which the General Assembly established rules for the calling of international conferences of States by the Economic and Social Council.

### A. RULES ESTABLISHED BY THE GENERAL ASSEMBLY FOR THE CALLING OF INTERNATIONAL CONFERENCES OF STATES BY THE ECONOMIC AND SOCIAL COUNCIL

53. By resolution 173 (II) of 17 November 1947, the General Assembly invited the Secretary-General to prepare, in consultation with the Economic and Social Council, draft rules for the calling of international conferences, as provided in paragraph 4 of Article 62

<sup>32</sup> Document A/371.

<sup>33</sup> Report of the Sixth Committee to the General Assembly, *Official Records of the General Assembly, Second Session, Annex 9 b*, document A/427.

<sup>34</sup> For the text of this Agreement which came into force on 21 November 1947 by an exchange of notes, in accordance with section 28, see: *United Nations Treaty Series*, vol. 11, page 11.

of the Charter, for consideration at the third session of the General Assembly.

54. Pursuant to this resolution, the Secretary-General prepared draft rules and submitted them to the Economic and Social Council. At its eighth session the Council discussed these draft rules and suggested certain modifications to which the Secretary-General agreed. In its resolution 220 (VIII) of 2 March 1949, the Council approved these draft rules and submitted them to the General Assembly. The Assembly referred them to the Sixth Committee, which considered them at its 187th meeting on 9 November 1949.

55. The Sixth Committee made a number of modifications in the draft rules<sup>35</sup> which were adopted in their amended form by the General Assembly in its resolution 366 (IV) of 3 December 1949. This resolution reads as follows :

*The General Assembly,*

*Recalling* its resolution 173 (II) of 17 November 1947 inviting the Secretary-General to prepare, in consultation with the Economic and Social Council, draft rules for the calling of international conferences,

*Having considered* the draft rules for the calling of international conferences prepared by the Secretary-General and approved by the Economic and Social Council on 2 March 1949 (resolution 220 (VIII)),<sup>36</sup>

*Approves* the following rules for the calling of international conferences of States:

*Rule 1*

The Economic and Social Council may at any time decide to call an international conference of States on any matter within its competence, provided that, after consultation with the Secretary-General and the appropriate specialized agencies, it is satisfied that the work to be done by the conference cannot be done satisfactorily by any organ of the United Nations or by any specialized agency.

*Rule 2*

When the Council has decided to call an international conference, it shall prescribe the terms of reference and prepare the provisional agenda of the conference.

*Rule 3*

The Council shall decide what States shall be invited to the conference.

The Secretary-General shall send out as soon as possible the invitation, accompanied by copies of the provisional agenda, and shall give notice, accompanied by copies of the provisional agenda, to every Member of the United Nations not invited. Such Member may send observers to the conference.

Non-member States whose interests are directly affected by the matters to be considered at the conference may be invited to it and shall have full rights as members thereof.

*Rule 4*

With the approval of the responsible State, the Council may decide to invite to a conference of States a territory which is self-governing in the fields covered by the terms of reference of the conference but which is not responsible for the conduct of its foreign relations. The Council shall decide the extent of the participation in the conference of any territory so invited.

<sup>35</sup>Report of the Sixth Committee to the General Assembly, *Official Records of the General Assembly, Fourth Session, Annexes*, Agenda item 52, document A/1165.

<sup>36</sup>*Official Records of the eighth session of the Economic and Social Council, Resolutions*, page 41.

*Rule 5*

The Council shall, after consultation with the Secretary-General, fix the date and place of the conference or request the Secretary-General to do so.

*Rule 6*

The Council shall make arrangements for financing the conference, except that any arrangements involving the expenditure of funds of the United Nations shall be subject to the applicable regulations, rules and resolutions of the General Assembly.

*Rule 7*

The Council:

(a) Shall prepare, or request the Secretary-General to prepare, provisional rules of procedure for the conference;

(b) May establish a preparatory committee to carry out such functions in preparation for the conference as the Council shall indicate;

(c) May request the Secretary-General to perform such functions in preparation for the conference as the Council shall indicate.

*Rule 8*

The Council may invite specialized agencies in relationship with the United Nations and non-governmental organizations having consultative status with the Council to take part in conferences called under these rules. The representatives of such agencies or organizations shall be entitled to the same rights and privileges as at sessions of the Council itself, unless the Council decides otherwise.

*Rule 9*

Subject to any decisions and directions of the Council, the Secretary-General shall appoint an executive secretary for the conference, provide the secretariat and services required and make such other administrative arrangements as may be necessary.

**B. SOME INTERNATIONAL CONFERENCES CALLED BY THE GENERAL ASSEMBLY**

56. Of the General Assembly resolutions consulted in the preparation of this memorandum we shall here refer to those in which the Assembly called the following conferences : Conference on Declaration of Death of Missing Persons (Resolution 369 (IV) of 3 December 1949), Conference on Elimination or Reduction of Future Statelessness (Resolution 896 (IX) of 4 December 1954), Conference on the Law of the Sea (Resolution 1105 (XI) of 21 February 1957), Conference on Diplomatic Intercourse and Immunities (Resolution 1450 (XIV) of 7 December 1959), Conference on Consular Relations (Resolution 1685 (XVI) of 18 December 1961).

57. It will be noted that in all these resolutions the method adopted for calling international conferences is identical. Under these resolutions, the General Assembly itself determines which States are to be invited to attend the conferences, refers to the conferences draft articles or conventions which have already been prepared in the United Nations, and requests the Secretary-General to submit to the conferences the necessary preparatory documents and appropriate recommendations concerning their method of work and procedures.

(a) *United Nations Conference on Declaration of Death of Missing Persons*

58. Resolution 369 (IV) of 3 December 1949 reads as follows :

*The General Assembly,*

...

Considering that the Economic and Social Council was not able to examine the draft Convention on the Declaration of Death of Missing Persons<sup>37</sup> prepared by the *Ad Hoc* Committee established to prepare the draft,

Considering that the General Assembly should undertake a detailed study of conventions prepared by small groups only if one of its main Committees disposes of the necessary time; that, when the contrary is the case, it can call a conference of plenipotentiaries for the purposes of studying and drafting the convention,

...

1. *Decides* that an international conference of Government representatives be convened not later than 1 April 1950 with a view to concluding a multilateral convention on the subject;

2. *Instructs* the Secretary-General:

(a) To issue invitations to the Governments of Member States to such a conference, asking all Governments interested to inform him as soon as possible of their acceptance;

(b) To take all other measures necessary for the convening of the conference;

3. *Refers* also the draft Convention on the Declaration of Death of Missing Persons to Member States to enable them to examine it and consider the possibility of adopting, if necessary, legislative measures on the legal status of persons missing as a result of events of war or other disturbances of peace during the post-war years until the present time;

4. *Requests* the Member States to transmit their comments to the Secretary-General so that he may report on them to the General Assembly at its next regular session.

(b) *Conference on Elimination or Reduction of Future Statelessness*

59. Resolution 896 (IX) of 4 December 1954 provides as follows:

*The General Assembly,*

...

Noting that the International Law Commission, at its fifth session in 1953, proposed<sup>38</sup> a draft Convention on the Elimination of Future Statelessness and a draft Convention on the Reduction of Future Statelessness, and invited Governments to submit their comments thereon,

Considering that comments were received from fifteen Governments, which comments were published in an annex to the report of the International Law Commission on the work of its sixth session,

Considering that the Economic and Social Council has approved<sup>39</sup> the principles of the two draft Conventions,

Considering that the International Law Commission revised, in the light of the comments received from Governments, the above-mentioned draft Conventions and submitted<sup>40</sup> the revised drafts to the General Assembly,

Recognizing the importance of reducing and, if possible, eliminating future statelessness by international agreement,

...

2. *Expresses its desire* that an international conference of plenipotentiaries be convened to conclude a convention for the reduction or elimination of future statelessness as soon as at least twenty States have communicated to the Secretary-General their willingness to co-operate in such a conference;

3. *Requests* the Secretary-General:

(a) To communicate, together with the present resolution, the revised draft Conventions to Member States and to each non-member State which is or hereafter becomes a member of one or more of the specialized agencies of the United Nations or which is or hereafter becomes a Party to the Statute of the International Court of Justice;

(b) To fix the exact time and place for the conference, to issue invitations to those States to which the revised draft Conventions have been communicated and to take all other measures for the convening of the conference and for its operation in case the condition stated in paragraph 2 above is met;

(c) To report on the matter to the General Assembly at its eleventh session;

4. *Requests* Governments of States to which reference is made in paragraph 3, sub-paragraph (a) above, to give early consideration to the merits of a multilateral convention on the elimination or reduction of future statelessness.

(c) *United Nations Conference on the Law of the Sea*

60. Resolution 1105 (XI) of 21 February 1957 reads as follows:

*The General Assembly,*

Having received the report of the International Law Commission covering the work of its eighth session,<sup>41</sup> which contains draft articles and commentaries on the law of the sea,

...

2. *Decides*, in accordance with the recommendation contained in paragraph 28 of the report of the International Law Commission covering the work of its eighth session, that an international conference of plenipotentiaries should be convened to examine the law of the sea, taking account not only of the legal but also of the technical, biological, economic and political aspects of the problem, and to embody the results of its work in one or more international conventions or such other instruments as it may deem appropriate;

...

4. *Requests* the Secretary-General to convoke the conference early in March 1958;

5. *Invites* all States Members of the United Nations and States members of the specialized agencies to participate in the conference and to include among their representatives experts competent in the fields to be considered;

6. *Invites* the interested specialized agencies and inter-governmental bodies to send observers to the conference;

7. *Requests* the Secretary-General to invite appropriate experts to advise and assist the Secretariat in preparing the conference, with the following terms of reference:

(a) To obtain, in the manner which they think most appropriate from the Governments invited to the conference any further provisional comments the Governments may wish to make on the Commission's report and related matters, and to present to the conference in systematic form any comments made by the Governments, as well as the relevant statements made in the Sixth Committee at the eleventh and previous sessions of the General Assembly;

(b) To present to the conference recommendations concerning its method of work and procedures, and other questions of an administrative nature;

(c) To prepare, or arrange for the preparation of, working documents of a legal, technical, scientific or economic nature in order to facilitate the work of the conference;

8. *Requests* the Secretary-General to arrange also for the necessary staff and facilities which would be required for the conference, it being understood that the technical services of such experts as are needed will be utilized;

9. *Refers* to the conference the report of the International Law Commission as the basis for its consideration of the various problems involved in the development and codification of the law of the sea, and also the verbatim records of the relevant debates in the General Assembly, for consideration by the conference in conjunction with the Commission's report;

10. *Requests* the Secretary-General to transmit to the conference all such records of world-wide or regional international meetings as may serve as official background material for its work.

11. *Calls* upon the Governments invited to the conference and groups thereof to utilize the time remaining before the

<sup>37</sup> Document E/1368.

<sup>38</sup> *Official Records of the General Assembly, Eighth Session, Supplement No. 9*, chapter IV.

<sup>39</sup> Economic and Social Council, resolution 526 B (XVII).

<sup>40</sup> *Official Records of the General Assembly, Ninth Session, Supplement No. 9*.

<sup>41</sup> *Official Records of the General Assembly, Eleventh Session, Supplement No. 9 (A/3159)*.

opening of the conference for exchanges of views on the controversial questions relative to the law of the sea;

12. *Expresses the hope* that the conference will be fully attended.

61. Before its adoption, operative paragraph 5 of this resolution was the subject of a discussion in the Sixth Committee, a record of which may be found in the following passages from the Sixth Committee's report to the General Assembly: <sup>42</sup>

. . . several representatives stressed the need for inviting to any future conference on the law of the sea all States desirous of attending, irrespective of whether they were as yet Members of the United Nations or of the specialized agencies.

. . . As regards the amendment submitted by Ceylon, India and Indonesia (A/C.6/L.389),<sup>43</sup> some representatives said that any conference on the law of the sea should be as universal as possible, and that it would not be right to draw up conventions which were intended to lay down rules of law for all States unless all States could have an opportunity to participate in the formulation of these rules. Other representatives, however, said that the amendment had political implications falling outside the scope of the Sixth Committee, and that it would raise difficulties of a practical nature. It was also pointed out that the formula contained in paragraph . . . [5 of the resolution] was a standard formula which had been used in regard to a number of recent international conferences.

#### (d) *United Nations Conference on Diplomatic Intercourse and Immunities*

62. Resolution 1450 (XIV) of 7 December 1959 reads as follows:

*The General Assembly,*

1. *Decides* that an international conference of plenipotentiaries shall be convoked to consider the question of diplomatic intercourse and immunities and to embody the results of its work in an international convention, together with such ancillary instruments as may be necessary;

2. *Requests* the Secretary-General to convoke the conference at Vienna not later than the spring of 1961;

3. *Invites* all States Members of the United Nations, States members of the specialized agencies and States parties to the Statute of the International Court of Justice to participate in the conference and to include among their representatives experts competent in the field to be considered;

4. *Invites* the specialized agencies and the interested inter-governmental organizations to send observers to the conference.

5. *Requests* the Secretary-General to present to the conference all relevant documentation, and recommendations relating to its methods of work and procedures and to other questions of an administrative nature;

6. *Requests* the Secretary-General to arrange also for the necessary staff and facilities which would be required for the conference;

7. *Refers* to the conference chapter III of the report of the International Law Commission covering the work of its tenth

session,<sup>44</sup> as the basis for its consideration of the question of diplomatic intercourse and immunities;

8. *Expresses the hope* that the conference will be fully attended.

63. The question of the States to be invited to participate in the Conference — a question dealt with in operative paragraph 3 of the aforesaid resolution — gave rise to a divergence of views<sup>45</sup> in the Sixth Committee, which was in general similar to that which had emerged during the consideration of the draft resolution on the calling of the International Conference on the Law of the Sea.

#### (e) *United Nations Conference on Consular Relations*

64. Resolution 1685 (XVI) of 18 December 1961 is worded as follows:

*The General Assembly,*

*Having considered* chapter II of the report of the International Law Commission covering the work of its thirteenth session,<sup>46</sup> which contains draft articles and commentaries on consular relations.

*Recalling* that, according to paragraph 27 of that report, the International Law Commission decided to recommend that the General Assembly should convene an international conference of plenipotentiaries to study the Commission's draft on constitute a good basis for the preparation of a convention on the subject,

*Noting with satisfaction* that the draft articles on consular relations prepared by the International Law Commission constitute a good basis for the preparation of a convention on that subject.

*Desiring* to provide an opportunity for completing the preparatory work by further expressions and exchanges of views concerning the draft articles at the seventeenth session of the General Assembly,

2. *Requests* Member States to submit to the Secretary-General written comments concerning the draft articles by 1 July 1962, in order that they may be circulated to Governments prior to the beginning of the seventeenth session of the General Assembly;

3. *Decides* that an international conference of plenipotentiaries be convened to consider the question of consular relations and to embody the results of its work in an international convention and such other instruments as it may deem appropriate;

4. *Requests* the Secretary-General to convoke the conference at Vienna at the beginning of March 1963;

5. *Invites* States Members of the United Nations, States members of the specialized agencies and States parties to the Statute of the International Court of Justice to participate in the conference and to include among their representatives experts competent in the field to be considered;

6. *Invites* the specialized agencies and the interested inter-governmental organizations to send observers to the conference;

7. *Requests* the Secretary-General to present to the conference documentation and recommendations concerning its methods of work and procedures;

8. *Requests* the Secretary-General to arrange for the necessary staff and facilities which will be required for the conference;

9. *Refers* to the conference chapter II of the report of the International Law Commission covering the work of its thirteenth session, together with the records of the relevant debates

<sup>42</sup> *Official Records of the General Assembly, Eleventh Session, Annexes, Agenda item 53, document A/3520, paras. 70 and 74.*

<sup>43</sup> An amendment which would delete the words: "Members of the United Nations and States Members of the specialized agencies".

<sup>44</sup> *Official Records of the General Assembly, Thirteenth Session, Supplement No. 9 (A/3859 and Corr.1).*

<sup>45</sup> *Report of the Sixth Committee to the General Assembly, Official Records of the General Assembly, Fourteenth Session, Annexes, Agenda item 56, document A/4305, para. 18.*

<sup>46</sup> *Official Records of the General Assembly, Sixteenth Session, Supplement No. 9 (A/4843).*

in the General Assembly, as the basis for its consideration of the question of consular relations;

65. The report of the Sixth Committee to the General Assembly<sup>47</sup> notes the divergent opinions expressed in that Committee on the question of which States should be invited to the Conference — a question dealt with in operative paragraph 5 of this resolution. This question gave rise to the same divergence of views as had emerged during consideration of the two draft resolutions calling the Conference on the Law of the Sea and the Conference on Diplomatic Intercourse and Immunities.

### III. Procedures laid down in the Treaties adopted by the General Assembly by which interested States may become parties to them

66. In this section we indicate the various procedures provided for the accession of States to the multilateral treaties adopted by the General Assembly, and at the same time give the categories of States which, under the terms of those treaties, may become parties to them.

#### A. ACCESSION

67. In some treaties, only one method is followed: accession.

68. For instance, in resolution 22 (I) A, approving the Convention on the Privileges and Immunities of the United Nations, the General Assembly "proposes it for accession by each Member of the United Nations". In line with this, section 31 of the Convention provides as follows:

*Section 31.* This convention is submitted to every Member of the United Nations for accession.

69. It may be of interest to note here that in resolution 93 (I) of 11 December 1946, the General Assembly invited Members of the United Nations to accede at as early a date as possible to the Convention on the Privileges and Immunities of the United Nations. It also recommended that Members, pending their accession to the Convention, should follow, so far as possible, the provisions of the Convention in their relations with the United Nations, its officials, the representatives of its Members and experts on missions for the Organization. In resolution 259 (III) of 8 December 1948, the General Assembly again invited those States Members which had not yet acceded to the Convention on the Privileges and Immunities of the United Nations to deposit their instruments of accession to the said Convention with the Secretary-General at the earliest possible moment.

70. In resolution 179 (II), by which it approved the Convention on the Privileges and Immunities of the Specialized Agencies, the General Assembly also proposed the Convention "for accession by all Members of the United Nations and by any other State member of a specialized agency". The procedure by which a State can become a party to this Convention and assume its obligations in respect of the different specialized agencies is laid down in article XI, sections 41, 42, and 43 of which provide as follows:

*Section 41.* Accession to this Convention by a Member of the United Nations and (subject to section 42) by any State member of a specialized agency shall be effected by deposit with the Secretary-General of the United Nations of an instrument of accession which shall take effect on the date of its deposit.

*Section 42.* Each specialized agency concerned shall communicate the text of this Convention together with the relevant annexes to those of its members which are not Members of the United Nations and shall invite them to accede thereto in respect to that agency by depositing an instrument of accession to this Convention in respect thereof either with the Secretary-General of the United Nations or with the executive head of the specialized agency.

*Section 43.* Each State party to this Convention shall indicate in its instrument of accession the specialized agency or agencies in respect of which it undertakes to apply the provisions of this Convention. Each State party to this Convention may by a subsequent written notification to the Secretary-General of the United Nations undertake to apply the provisions of this Convention to one or more further specialized agencies. This notification shall take effect on the date of its receipt by the Secretary-General.

#### B. SIGNATURE FOLLOWED BY RATIFICATION OR ACCESSION

71. The Convention on the Prevention and Punishment of the Crime of Genocide provides both for signature up to a certain date, followed by ratification, and for accession. In resolution 260 (III) approving this Convention, the General Assembly "proposes it for signature and ratification or accession in accordance with its article XI", which provides as follows:

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950, the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-Member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

72. It is to be noted that on 3 December 1949, the General Assembly adopted resolution 368 (IV) concerning the invitations to be addressed to non-member States to become parties to the Convention on the Prevention and Punishment of the Crime of Genocide. The resolution reads as follows:

*The General Assembly,*

*Considering* that article XI of the Convention on the Prevention and Punishment of the Crime of Genocide, approved by General Assembly resolution 260 A (III) of 9 December 1948, provides, *inter alia*, that the Convention shall be open to signature and ratification or to accession on behalf of any non-member State to which an invitation has been addressed by the General Assembly.

<sup>47</sup> *Ibid.*, Sixteenth Session, Annexes, Agenda item 69, document A/5013, para. 25.

Considering that it is desirable to send invitations to those non-Member States which, by their participation in activities related to the United Nations, have expressed a desire to advance international co-operation.

1. *Decides* to request the Secretary-General to dispatch the invitations above-mentioned to each non-member State which is or hereafter becomes an active member of one or more of the specialized agencies of the United Nations, or which is or hereafter becomes a Party to the Statute of the International Court of Justice;

2. *Remains convinced* of the necessity of inviting Members of the United Nations which have not yet done so to sign or ratify the Convention on the Prevention and Punishment of the Crime of Genocide as soon as possible.

73. In resolution 795 (VIII) of 3 November 1953, the General Assembly reiterated its appeal to States to ratify or accede to this Convention as soon as possible.

#### C. SIGNATURE OR ACCEPTANCE

74. The Protocols relating to the transfer to the United Nations of functions and powers exercised under international agreements by the League of Nations or by certain Governments leave interested States free to accede to them either by signature only, or by signature followed by acceptance, or by acceptance only.

75. Thus articles III and IV of the Protocol amending the International Convention relating to Economic Statistics signed at Geneva on 14 December 1928 provide as follows :

#### ARTICLE III

The present Protocol shall be open for signature or acceptance by any of the Parties to the Convention of 14 December 1928 relating to Economic Statistics, to which the Secretary-General has communicated for this purpose a copy of this Protocol.

#### ARTICLE IV

States may become Parties to the present Protocol by :

- (a) Signature without reservation as to acceptance;
- (b) Signature with reservation as to acceptance, followed by acceptance;
- (c) Acceptance.

Acceptance shall be effected by the deposit of a formal instrument with the Secretary-General of the United Nations.

76. Identical provisions are included in the corresponding articles of the following Protocols:<sup>48</sup> Protocol 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; Protocol amending the Agreement for the Suppression of the Circulation of Obscene Publications, signed at Paris on 4 May 1910; Protocol amending the Slavery Convention signed at Geneva on 25 September 1926.

#### IV. Procedures for entry into force laid down in the Treaties adopted by the General Assembly

77. Some treaties provide for their entry into force in respect of each State on the date of that State's accession to them.

78. Section 32 of the Convention on the Privileges and Immunities of the United Nations provides that the Convention.

. . . shall come into force as regards each Member on the date of deposit of each instrument of accession.

79. The Convention on the Privileges and Immunities of the Specialized Agencies contains a similar clause. Under section 41 of that Convention, accession

. . . shall be effected by deposit with the Secretary-General of the United Nations of an instrument of accession which shall take effect on the date of its deposit.

80. Section 44 of this Convention also contains the following special provisions regarding its entry into force for a State party to the Convention in respect of a specialized agency :

This Convention shall enter into force for each State party to this Convention in respect of a specialized agency when it has become applicable to that agency in accordance with section 37 and the State party has undertaken to apply the provisions of the Convention to that agency in accordance with section 43.

81. Article XIII of the Convention on the Prevention and Punishment of the Crime of Genocide prescribes the following procedure for entry into force :

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a *procès-verbal* and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

82. Article V of the Protocol amending the International Convention relating to Economic Statistics signed at Geneva on 14 December 1928 makes the following provision for its entry into force :

The present Protocol shall come into force on the date on which two or more States shall have become Parties thereto.

The amendments set forth in the annex to the present Protocol shall come into force when fifteen States have become Parties to the present Protocol, and consequently any State becoming a Party to the Convention, after the amendments thereto have come into force, shall become a Party to the Convention as so amended.

83. Similar provisions are to be found in the other Protocols mentioned above (section I D). They all provide for their entry into force on the date on which a specified number of States have become Parties to them. The date specified for the entry into force of the amendments in the annexes to these Protocols is also that on which a specified number of States have become Parties to the Protocols.

<sup>48</sup> See above, Section I D.

**V. Other matters relating to the Law of Treaties specified in the Treaties adopted by the General Assembly**

**A. TEMPORAL VALIDITY OF TREATIES**

84. The following Conventions adopted by the General Assembly contain provisions regarding the duration of their validity.

85. Section 35 of the Convention on the Privileges and Immunities of the United Nations reads as follows :

This convention shall continue in force as between the United Nations and every Member which has deposited an instrument of accession for so long as that Member remains a Member of the United Nations, or until a revised general convention has been approved by the General Assembly and that Member has become a party to this revised convention.

86. Section 47 of the Convention on the Privileges and Immunities of the Specialized Agencies provides as follows :

1. Subject to the provisions of paragraphs 2 and 3 of this section, each State party to this Convention undertakes to apply this Convention in respect of each specialized agency covered by its accession or subsequent notification, until such time as a revised convention or annex shall have become applicable to that agency and the said State shall have accepted the revised convention or annex. In the case of a revised annex, the acceptance of States shall be by a notification addressed to the Secretary-General of the United Nations, which shall take effect on the date of its receipt by the Secretary-General.

2. Each State party to this Convention, however, which is not, or has ceased to be, a member of a specialized agency, may address a written notification to the Secretary-General of the United Nations and the executive head of the agency concerned to the effect that it intends to withhold from that agency the benefits of this Convention as from a specified date, which shall not be earlier than three months from the date of receipt of the notification.

3. Each State party to this Convention may withhold the benefit of this Convention from any specialized agency which ceases to be in relationship with the United Nations.

4. The Secretary-General of the United Nations shall inform all member States parties to this Convention of any notification transmitted to him under the provision of this section.

87. Article XIV of the Convention on the Prevention and Punishment of the Crime of Genocide provides as follows:

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

**B. APPLICATION OF TREATIES UNDER DOMESTIC LAW**

88. The above-mentioned Conventions (section V A) also contain provisions regarding their application under the domestic law of the States which become parties to them.

89. Thus, section 34 of the Convention on the Privileges and Immunities of the United Nations provides as follows:

It is understood that, when an instrument of accession is deposited on behalf of any Member, the Member will be in a position under its own law to give effect to the terms of this convention.

90. Similar provisions are to be found in section 46 of the Convention on the Privileges and Immunities of the Specialized Agencies.

91. Article V of the Convention on the Prevention and Punishment of the Crime of Genocide provides as follows:

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

92. Article 1 of the Protocol amending the International Convention relating to Economic Statistics signed at Geneva on 14 December 1928, provides as follows:

The Parties to the present Protocol undertake that, as between themselves, they will, in accordance with the provisions of the present Protocol, attribute full legal force and effect to, and duly apply, the amendments to that instrument as they are set forth in the annex to the present Protocol.

93. Similar provisions are to be found in the other Protocols mentioned above (section I D).

**C. TERRITORIAL APPLICATION**

94. Article XII of the Convention on the Prevention and Punishment of the Crime of Genocide provides:

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

**D. SETTLEMENT OF DISPUTES**

95. Section 30 of the Convention on the Privileges and Immunities of the United Nations contains the following provisions regarding the settlement of disputes:

All differences arising out of the interpretation or application of the present convention shall be referred to the International Court of Justice, unless in any case it is agreed by the Parties to have recourse to another mode of settlement. If a difference arises between the United Nations on the one hand and a Member on the other, a request shall be made for an advisory opinion on any legal question involved in accordance with Article 96 of the Charter and Article 65 of the Statute of the Court. The opinion given by the Court shall be accepted as decisive by the parties.

96. Identical provisions are to be found in section 32 of the Convention on the Privileges and Immunities of the Specialized Agencies.

97. Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide contains the following provisions:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

#### E. REVISION

98. Under section 48 of the Convention on the Privileges and Immunities of the Specialized Agencies,

At the request of one-third of the States parties to this Convention, the Secretary-General of the United Nations will convene a conference with a view to its revision.

99. In accordance with article XVI of the Convention on the Prevention and Punishment of the Crime of Genocide,

a request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

#### F. DEPOSIT AND DEPOSITARY FUNCTIONS

100. The text of resolution 24 (I) of 12 February 1946 on the transfer of certain functions, activities and assets of the League of Nations has been reproduced earlier in this memorandum. This resolution enumerates the depositary functions, the exercise of which, previously entrusted to the Secretary-General of the League of Nations, has devolved upon the Secretary-General of the United Nations.

101. We give below the provisions concerning deposit and notification by the depositary which are contained in the Conventions and Protocols adopted by the General Assembly.

102. The Convention on the Privileges and Immunities of the United Nations contains the following provisions on this point:

*Section 32.* Accession shall be effected by deposit of an instrument with the Secretary-General of the United Nations . . .

*Section 33.* The Secretary-General shall inform all Members of the United Nations of the deposit of each accession.

103. The Convention on the Privileges and Immunities of the Specialized Agencies provides as follows:

*Section 45.* The Secretary-General of the United Nations shall inform all Members of the United Nations, as well as all members of the specialized agencies, and executive heads of the specialized agencies, of the deposit of each instrument of accession received under section 41 and of subsequent notifications received under section 43. The executive head of a specialized agency shall inform the

Secretary-General of the United Nations and the members of the agency concerned of the deposit of any instrument of accession deposited with him under section 42.

*Section 49.* The Secretary-General of the United Nations shall transmit copies of this Convention to each specialized agency and to the Government of each Member of the United Nations.

104. Similarly, the Convention on the Prevention and Punishment of the Crime of Genocide contains the following provisions:

#### ARTICLE XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all Members of the United Nations and to the non-member States contemplated in article XI.

105. Similar provisions are to be found in the transfer Protocols mentioned in section I D of this memorandum. For instance, the Protocol amending the International Convention relating to Economic Statistics signed at Geneva on 14 December 1928 provides as follows:

#### ARTICLE VII

The present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations Secretariat. . . . A certified copy of the Protocol, including the annex, shall be sent by the Secretary-General to each of the States Parties to the Convention of 14 December 1928 relating to Economic Statistics, as well as to all States Members of the United Nations.

#### VI. Reservations to multilateral conventions

106. The General Assembly has adopted the following resolutions on the subject of reservations to multilateral conventions: resolution 478 (V) of 16 November 1950, the chief object of which was to request the International Court of Justice to give an advisory opinion on certain questions connected with reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and objections to those reservations; resolution 598 (VI) of 12 February 1952, principally giving effect to the advisory opinion of the Court; and resolution 1452 (XIV) of 7 December 1959, entitled "Reservations to multilateral conventions: the Convention on the Inter-Governmental Maritime Consultative Organization". Before reproducing the text of these resolutions *in extenso*, we shall describe the circumstances in which they were adopted and the discussions which preceded their adoption.

##### A. RESOLUTION 478 (V) OF 16 NOVEMBER 1950

107. It was at the suggestion of the Secretary-General that the Assembly considered the question of reservations to multilateral conventions. As depositary of conventions which have been adopted by the General Assembly, as well as of many other multilateral agreements which have been concluded under the auspices of the United Nations, the Secretary-General had requested the General Assembly, at its fifth session in 1950, for guidance concerning the procedure to be fol-

lowed regarding reservations made by States as conditional to their accession to such conventions.

108. At the time the Secretary-General put this question before the General Assembly, the subject had a certain practical urgency because of the Convention on the Prevention and Punishment of the Crime of Genocide. A number of States had made reservations as to various articles of the Convention, to the substance of which some States had objected. The Secretary-General had therefore had to decide whether States making reservations to which objection had been raised were to be counted among those necessary to permit the entry into force of the Convention.

109. At its 285th plenary meeting held on 26 September 1950, the General Assembly referred the question to the Sixth Committee, which considered it at its 217th to 225th meetings, from 6 to 20 October 1950. The Sixth Committee had before it a report of the Secretary-General,<sup>49</sup> in which he gave an account of the practice followed by the Secretariat of the United Nations, showing how this compared with the practice of the League of Nations, and reviewed the opinions of numerous international jurists and the actions of Governments in this respect.

110. The practice followed by the Secretary-General in the absence of specific provisions in a convention governing reservation procedures was summarized as follows in the report:<sup>50</sup>

A state may make 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 theretofore ratified or acceded.

111. At the same time, the report of the Secretary-General drew attention to the system followed by the Pan American Union as to multilateral conventions concluded among the American States for which it serves as depositary. The essence of this rule has been established as follows:<sup>51</sup>

1. The treaty shall be in force, in the form in which it was signed, as between those countries which ratify it without reservations, in the terms in which it was originally drafted and signed.

2. It shall be in force as between the governments which ratify it with reservations and the signatory States which accept the reservations in the form in which the treaty may be modified by said reservations.

3. It shall not be in force between a government which may have ratified with reservations and another which may have already ratified, and which does not accept such reservations.

112. The main questions raised in the course of the debates were the following: competence of the Committee to make any determination governing the larger aspects of the problem; to what organ of the United Nations it might be appropriate for the question to be referred; the relative need for interim guidance to be given to the Secretary-General by the General Assembly pending the

results of any such referral; what rule it would be preferable for the Secretary-General to follow in the event of such a provisional instruction; and, finally, what general recommendations to States might serve to eliminate the occurrence of the difficulties previously encountered in connexion with reservation?

113. The relevant passages of the report of the Sixth Committee<sup>52</sup> are reproduced below:

8. On the question of competence a number of delegations were of the opinion that, since the question before the Committee concerned only the procedure to be followed by the Secretary-General as depositary of multilateral conventions, the General Assembly was competent to give him instructions on the manner in which he should administer that function. A large majority of the Committee, however, believed that it was not appropriate, in the time now available, for the General Assembly to establish, without further examination, rules which would have the effect of determining legal relations among States under United Nations conventions.

9. Accordingly, the Committee gave detailed consideration to the problem of referring the question to a qualified organ. Opinion was divided as to whether the International Law Commission or the International Court of Justice was more suitable in the circumstances. Many delegations favoured the International Law Commission because it already had under preparation a report on the law of treaties, and had in fact, at its second session, briefly discussed the subject of reservations. Moreover, it was considered that the International Law Commission, unlike the Court, would not be restricted to existing principles of international law in a field in which there had been insufficient development of general principles and in which the main legal systems of the world in fact differed. It was felt by many that on the present problem the Court would be confined to an interpretation of the law, whereas what was involved, in part at least, was not strictly a question of law but the development of appropriate procedures for which the Commission was well suited. It was especially felt that in so far as concerned a general solution broadly applicable to a variety of cases, what the General Assembly required was a study to serve as a basis for future discussion.

10. The contrary position, favouring a request by the General Assembly for an advisory opinion of the International Court of Justice, was based upon the view that it was not the function of the International Law Commission to solve controversial questions; its function was to codify law, whereas it was the duty of the International Court of Justice to settle just such conflicts in matters of law and to state the law when it was doubtful. On the level of immediate practical considerations, it was also noted that the Court would be in a position to render an earlier decision, the more so in view of the heavy burden of work, on a variety of major subjects, which already weighed upon the programme of the International Law Commission. In fact, it was suggested by France (A/C.6/L.118) that a prompt submission to the Court of a precisely formulated question might permit the Secretary-General to give effect to the opinion before the end of the ninety-day period which would bring the Convention on Genocide into force. Further-

<sup>49</sup> *Official Records of the General Assembly, Fifth Session, Annex, agenda item 56, document A/1372.*

<sup>50</sup> *Ibid.*, para. 46.

<sup>51</sup> *Ibid.*, para. 26.

<sup>52</sup> *Ibid.*, document A/1494, paras. 8-27.

more, it was noted by other delegations that if a difference were to arise between given States on any of the matters now under debate, these very questions would eventually be referred to the Court in accordance with article IX of the Convention on Genocide — from which it seemed logical to make the submission immediately.

11. In either case, a majority of the representatives considered that the General Assembly would wish to discuss the content of an advisory opinion of the Court, or of the study made by the International Law Commission, before the recommendation of either body could be put into practice by the Secretary-General, in so far as depositary procedures were affected.

12. Because the Convention on Genocide, which had caused the Secretary-General to submit the problem to the General Assembly, was in prospect of entering into force, a substantial number of delegations felt that some instructions to the Secretary-General were warranted pending the outcome of the reference of the matter to the International Law Commission or the International Court of Justice. For this purpose three leading proposals were made. Although a few delegations would have inclined toward the position that the depositary was competent to proceed without interim instructions, the main debate centred upon these three proposals. The United States of America submitted a draft resolution (A/C.6/L.114/Rev.1) designed to avoid delay in the entry into force of a convention by permitting the Secretary-General to follow his previous procedure, for the purposes of entry into force, in any case where reservations were submitted. But this was to be without prejudice to the legal status of the parties, of ratifications or accessions, or of acceptances or rejections of reservations.

13. The United Kingdom, on the other hand, placed before the Committee an amendment (A/C.6/L.115) designed, in its first three paragraphs, to continue the League of Nations rule as applied by the Secretary-General of the United Nations, pending the formulation of a final policy. As noted in paragraph 5 above,<sup>53</sup> this rule would treat an adherence subject to a reservation as valid and acceptable by the depositary only if it first received the consent, tacit or implied, of all the other States concerned.

14. At the same time, Uruguay proposed an amendment (A/C.6/L.116) to the United States draft, instructing the Secretary-General to follow a rule modelled after that of the Pan American Union, pending the final decision. As noted in paragraph 6 above,<sup>54</sup> this rule enables a convention to be in force between a State proposing a reservation and any other party accepting that reservation, while not in force as between the reserving State and any party expressing its disagreement with the reservation.

15. Numerous delegations favoured the United States proposal because it facilitated the entry into force of conventions and still sought not to compromise the question of the legal position of States as parties. Some delegations, however, argued against the United States proposal on the ground that it was preferable to adopt one or the other traditional rules.

16. The principal reasons adduced in favour of the United Kingdom amendment were that it maintained a

convention in the form of one integral text applicable to the legal relations among all parties, and prevented an alteration by means of a reservation of any of the terms of that text against the will of the States concerned. On the other hand, many of the delegations opposing the League of Nations practice considered that it would now constitute an extension of the rule of unanimity with its corollary, the veto. It would enable one State arbitrarily to exclude the participation of another even though the reservation might be proposed only on some reasonable adjustment of the framework of the convention to the internal legal system of the reserving State. Such a result would derogate from the sovereignty of the reserving State.

17. The practice of the Pan American Union was strongly advocated by many delegations. They argued that by facilitating reservations the system enabled the maximum number of States to accede to conventions, thus speeding their entry into force, and so favouring the progressive development of international law while nevertheless respecting the national sovereignty of each State. Although opposing this system, those delegations which favoured the practice thus far followed by the League of Nations and the Secretary-General of the United Nations acknowledged the advantages of the Pan American method and emphasized its applicability to a regional organization. They also stressed that any rule adopted by the United Nations would not prejudice the right of other organizations to follow a system of their own choosing. Their objection to the Uruguayan proposal, as a provisional measure, was that it would upset the procedures and the relations among States thus far prevailing, for what might prove to be only an interim period. As regards long-term legal considerations, it was objected that this system, although it facilitated adherences to conventions, did so only, in effect, by breaking down a uniform multilateral text into a composite of bilateral agreements between some pairs of adhering States but not between other pairs. To those delegations emphasizing the law-making character of United Nations conventions, it seemed undesirable to turn to a system which would theoretically permit the obligations of States under broad rules of international conduct to obtain between some States adhering to the convention but not between others. It was for this reason that the representative of Chile offered an amendment (A/C.6/L.120) to the Uruguayan proposal in order that it might not apply where the text of the convention had been adopted by the General Assembly. He urged that a minority ought not to be able to make its views, outvoted on the floor of the Assembly, prevail by the device of reservations.

18. A number of subsidiary questions were raised in connexion with the problem of interim instructions. If the League of Nations rule requiring consent to reservations were to be followed, it would be necessary to decide what groups of States should have the power to exclude, by objecting to a reservation, the participation of a State ready to take part subject to the conditions presented. One element of the United Kingdom draft (A/C.6/L.115) was that signatory States, having an interest to protect in the text of a convention in the form in which it was signed, should — up to the date of entry into force — be able to prevent reservations from altering that text against their will. Carrying this

<sup>53</sup> See para. 110 of this memorandum.

<sup>54</sup> See para. 111 of this memorandum.

view one step further, Sweden entered an amendment (A/C.6/L.121) permitting such an objection, by a signatory to a convention which prescribes a time-limit for signature, up to the date of the expiry of that time-limit. The report of the Secretary-General, on the other hand, had presumed that only ratifying or acceding States would be in a position to exercise this power to exclude. Each position received support in the course of the debates. The Netherlands, however, raised the possibility of a compromise system whereby signatories might be permitted to make so important an objection only on declaring their intention to ratify within a specified period of time.

19. So also, Iran submitted a draft, by way of amendment (A/C.6/L.119), which would have recommended to States Members of the United Nations the insertion, in all conventions to be concluded by them in the future, of a clause defining the procedure to be adopted by the depositary when a reservation is entered by a State and the legal effect of an objection to such a reservation put forward by another State. The French draft already referred to (A/C.6/L.118), while making the same point, included a recommendation that Member States dispense as far as possible with the use of reservations to conventions adopted under the auspices of the United Nations.

20. As the debates carried forward the analysis of these various positions on the whole subject of reservations, a general feeling developed that any questions to be referred to another organ would require very exact formulation. With this in mind, Egypt, France, Greece, Iran and the United Kingdom presented a joint draft resolution (A/C.6/L.123) requesting an advisory opinion from the International Court of Justice on precise questions affecting the validity of any adherence subject to a contested reservation, as well as the classes of States having the power to make an effective objection. A joint amendment to this draft, offered by Belgium, Denmark, Netherlands, Norway and Sweden (A/C.6/L.124), proposed that these questions be determined solely in respect of those multilateral conventions which had been listed by the Secretary-General as yet to come into force.

21. Meanwhile, the importance of permitting reservations was stressed by numerous delegations, the representative of Poland traced the origin of the use of reservations to the development of the majority vote in the drafting of conventions, as opposed to the earlier use of unanimity even in the preparation of the text. Since the drafting conference itself no longer required the full agreement of all prospective parties before the final text could be adopted, he noted that reservations were the counterpart device which permitted the minority nevertheless to continue as parties. He therefore urged the Committee not to adopt a rule which would permit the majority not only to impose its will in the choice of the text but also as to the conditions under which the minority might adhere — a possibility which he could not justify by considerations either of theory or of practice.

22. The representatives of the Union of Soviet Socialist Republics and the Byelorussian Soviet Socialist Republic stated that the theory of the inability of the Secretary-General to receive an instrument of ratification in definitive deposit if even one of the States

parties to a convention objected to a reservation was incompatible with the principle of State sovereignty and contrary to the fundamental principles of international law. In fact, in their view, the recommendations of the Secretary-General would have the effect of prohibiting the submission of reservations, since a State in the minority when the text of a convention was drafted could not hope that there would be no State objecting to a reservation; for a reservation was usually made because corresponding provisions had been rejected during the drafting of the text of the convention. The attitude of the Secretary-General, they contended, was contrary both to the principles of international law and to its practice in the conclusion of multilateral treaties; the indisputable right of a State to make reservations had been recognized during the signing of many treaties. As to the Convention on Genocide, the representative of the USSR was of the opinion that the Secretary-General should be strictly guided by its text, which did not contain any special procedure for the deposit of ratifications with reservations; neither did it contain any limitations of the right to submit reservations. The legal implications of a reservation at the signing of a convention, in the opinion of the USSR representative, would be that those provisions of a convention which were the subject of the reservation would not apply to relations between the State which made the reservation and all other parties to the convention. He believed that the General Assembly was not competent to give instructions to the Secretary-General, which would in effect be complementary to the text of the Convention on Genocide, since it would lead to the creation of new legal relations, not contemplated by the Convention, between States parties to the Convention. Reinforcing this stand, the representative of Czechoslovakia observed that the rule of unanimity would convert the State disagreeing with a reservation into a judge of the State which put in forward.

23. In the view of most delegations, the character of the problem before the Committee altered when, on 16 October 1950, the Assistant Secretary-General in charge of the Legal Department was able to announce that the Convention on the Prevention and Punishment of the Crime of Genocide had received a number of ratifications and accessions on 14 October, so that the twenty instruments necessary for its entry into force were now at hand, irrespective of the theory used in determining the validity of those containing reservations. In the minds of a majority of the representatives in the Committee this fact removed much of the urgency of any answer from the International Law Commission or the International Court of Justice, and significantly affected the formulation of the questions which had thus far been proposed for submission to either body. Moreover, from a list of other multilateral agreements of which the Secretary-General is the depositary, submitted to the Committee by the Secretary-General (A/C.6/L.122), together with their provisions concerning reservations (A/C.6/L.122/Add.1), it appeared that there was no urgency, in so far as these other conventions were concerned, for the Secretary-General to receive particular directives.

24. At this point the thirteen delegations which had previously submitted drafts bearing on any aspect of the problem withdrew all prior drafts and offered in

their place a joint proposal, which they submitted to the Committee at its 224th meeting (A/C.6/L.125). This draft formulated specific questions arising under the Convention on Genocide, to be referred to the Court with a request for an advisory opinion. At the same time, it invited the International Law Commission, in the course of its work on the codification of the law of treaties, to study the question of reservations to multilateral conventions, giving priority to the subject in order to report to the General Assembly at its sixth session.

25. It was also pointed out that, as a result of the entry into force of the Convention, it no longer seemed necessary, in view of the little likelihood of a similar situation arising in the near future, for the Sixth Committee to attempt to elaborate any interim procedure for the Secretary-General to follow until the substantive question could be settled. It would be sufficient for the depositary to continue to handle the deposit of instruments in the same manner as heretofore so long as he avoided any legal interpretation being made as to the effect of contested reservations upon the status of the parties, pending the adoption of a final solution. This would also prevent any possible prejudgement of the eventual outcome.

26. Likewise, for the reason that the joint proposal was designed to obtain not only an advisory opinion under a specific convention but also a study which might choose between distinctly different theories as to the effect of reservations, it was generally concluded that it would be premature for the General Assembly at this session to make any recommendations to States on the broader question of eliminating the difficulties which have been encountered in connexion with reservations. It was felt that it would be better to await the taking of a more definitive position at the sixth session of the General Assembly before including recommendations on the over-all subject of reservations and related procedures, since the nature of any recommendation might vary according to the type of system adopted.

27. Although approving the text of the request submitted to the International Law Commission by the joint proposal, a number of delegations were nevertheless still unable to agree to the request for an advisory opinion from the International Court of Justice on a subject of this nature. A number also believed that it was contradictory to submit the problem to two different bodies at once. The Philippine representative felt that it should be left to the contracting parties themselves to submit to the International Court of Justice any dispute as to the interpretation or application of the Convention on Genocide, as provided in its article IX; and that it was not for the General Assembly but for the parties directly involved to formulate the issues to be submitted to the judgement of the Court. For that reason the USSR proposed an amendment (A/C.6/L.127) to the joint proposal, deleting the request to the Court for an advisory opinion. When, however, it was asked that the parts of the joint draft resolution concerning the two submissions should be voted upon separately, it was agreed that it would be unnecessary to vote upon the USSR amendment.

114. At its 305th plenary meeting, held on 16 November 1950, the General Assembly adopted resolution 478 (V), which reads as follows:

*The General Assembly,*

*Having examined* the report<sup>55</sup> of the Secretary-General regarding reservations to multilateral conventions,

*Considering* that certain reservations to the Convention<sup>56</sup> on the Prevention and Punishment of the Crime of Genocide have been objected to by some States,

*Considering* that the International Law Commission is studying the whole subject of the law of treaties, including the question of reservations,<sup>57</sup>

*Considering* that different views regarding reservations have been expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee,<sup>58</sup>

1. *Requests* the International Court of Justice to give an advisory opinion on the following questions:

“ In so far as concerns the Convention on the Prevention and Punishment of the Crime of Genocide in the event of a State ratifying or acceding to the Convention subject to a reservation made either on ratification or on accession, or on signature followed by ratification:

“ I. Can the reserving State be regarded as being a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others?

“ II. If the answer to question I is in the affirmative, what is the effect of the reservation as between the reserving State and:

“ (a) The parties which object to the reservation?

“ (b) Those which accept it?

“ III. What would be the legal effect as regards the answer to question I if an objection to a reservation is made:

“ (a) By a signatory which has not yet ratified?

“ (b) By a State entitled to sign or accede but which has not yet done so? ”;

2. *Invites* the International Law Commission:

(a) 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; to give priority to this study and to report thereon, especially as regards multilateral conventions of which the Secretary-General is the depositary, this report to be considered by the General Assembly at its sixth session;

(b) In connexion with this study, to take account of all the views expressed during the fifth session of the General Assembly, and particularly in the Sixth Committee;

3. *Instructs* the Secretary-General, pending the rendering of the advisory opinion by the International Court of Justice, the receipt of a report from the International Law Commission and further action by the General Assembly, to follow his prior practice with

<sup>55</sup> *Official Records of the General Assembly, Fifth Session, Sixth Committee, Annexes, agenda item 56, document A/1372.*

<sup>56</sup> Resolution 260 A (III).

<sup>57</sup> *Official Records of the General Assembly, Fifth Session, Supplement No. 12, paras. 160-164.*

<sup>58</sup> *Ibid.*, Sixth Committee, 217th-225th meetings.

respect to the receipt of reservations to conventions and with respect to the notification and solicitation of approvals thereof, all without prejudice to the legal effect of objections to reservations to conventions as it may be recommended by the General Assembly at its sixth session.

#### B. RESOLUTION 598 (VI) OF 12 FEBRUARY 1952

115. On 28 May 1951, the International Court of Justice gave its advisory opinion on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>59</sup> The International Law Commission devoted chapter II of its report on the work of its third session to the general subject of reservations to multilateral conventions.<sup>60</sup>

116. On 13 November 1951, the General Assembly decided to include the advisory opinion of the Court and the International Law Commission's report in the agenda of its sixth session.

117. The opinion of the Court and chapter II of the report of the International Law Commission were referred to the Sixth Committee, which considered them at its 264th to 278th meetings, from 5 December 1951 to 5 January 1952, under the general heading of "Reservations to multilateral conventions".

118. The debates in the Sixth Committee concerned three principal problems. The first was the effect of objections to reservations in the case of the Convention on Genocide; the second was the practice to be followed concerning reservations to conventions to be drafted in the future; and the third concerned the practice to be followed with respect to reservations and objections to them in the case of existing conventions other than the Convention on Genocide.

119. These debates are summarized as follows in the report of the Sixth Committee to the General Assembly:<sup>61</sup>

26. As to the first problem, most delegations thought that reservations to the Convention on Genocide should be governed by the principles of the advisory opinion of the International Court of Justice, under which the test of compatibility with the object and purpose of the Convention would be applied to reservations. Others, however, took the view that States had an absolute right to make whatever reservations they chose to that Convention. Still others expressed the opinion that such reservations required the unanimous consent of the parties, or that no reservations whatever were admissible in that case.

27. Many delegations thought that the second problem, that relating to conventions in general, could be largely solved by recommending, in accordance with the suggestion of the International Law Commission (A/1858, paragraph 33), that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the

admissibility or non-admissibility of reservations and to the effect to be attributed to them. Some thought that such a provision should be included in all cases, while others preferred to leave it open to negotiators to determine the advisability of inserting such a clause. Others, however, opposed the inclusion of clauses on reservations unless such clauses had been adopted by unanimous vote of the drafting conference.

28. Apart from wide agreement on the question of the Convention on Genocide and on the insertion of reservations clauses in future conventions, there was a marked divergence of opinion in the Sixth Committee.

29. Some delegations supported in general the system proposed by the International Law Commission, under which the unanimous consent of States which had ratified or acceded to a convention and, within certain limitations, of signatories thereto, would be necessary for a State to become a party subject to a reservation.

30. Others advocated that, at least for the time being, the Secretary-General should continue his prior practice, under which only States which had ratified or acceded to a Convention had the right to object to reservations so as to prevent the reserving State from becoming a party.

31. Some of the delegations which in general supported the principle of unanimous acceptance of reservations thought that it might operate inequitably if a single State, by objecting to a reservation, could exclude a reserving State from a convention and thereby frustrate the desires of a large majority of the parties, who might wish the reserving State to be a party and be willing to accept the reservation. To obviate this difficulty, it was suggested that the requirement of unanimous acceptance might be replaced by one of acceptance by three-fourths, two-thirds, or a simple majority of the States concerned.

32. A large number favoured more liberal systems on reservations in order to make it easy for States to become parties to multilateral conventions. Some of these advocated the practice adopted by the Organization of American States, whereby a reservation is first circulated to the signatory States for comments; if it is maintained by the State making it, that State becomes a party with respect to the States which accept the reservation, but the convention does not enter into force between the reserving State and a State which does not accept the reservation.

33. Others, while recognizing that the nature of some multilateral conventions made reservations to them impossible without unanimous consent, nonetheless were of the opinion that the principles of the advisory opinion of the International Court of Justice should be applied either to all conventions of a humanitarian character or to an even wider group of conventions. Under these principles, a State making a reservation which had been objected to by a party to the convention could nevertheless be regarded as being a party if the reservation was compatible with the object and purpose of the convention. The question of the compatibility of a reservation with that object and purpose would be left, at least in the first instance, to the appreciation of each individual party. These delegations insisted that the effect of a reservation or of an objection thereto should in no event be passed on by the Secretary-

<sup>59</sup> International Court of Justice, *Reports of Judgements, Advisory Opinions and Orders*, 1951, p. 15.

<sup>60</sup> *Official Records of the General Assembly, Sixth Session, Supplement No. 9, A/1858*.

<sup>61</sup> *Ibid.*, *Sixth Session, Annexes*, agenda item 49, document A/2047, paras. 26-41.

General, but should be left to be settled by the States concerned by any of the methods available for the settlement of international disputes. Some of those which declared in favour of the generalization of the advisory opinion, however, also maintained the right of a party, in so far as its own relations with a reserving State were concerned, to refuse to accept a reservation whether or not it was compatible with the object and purpose of a convention, and further argued that an objection to a reservation might affect only the article or section of the convention to which the reservation had been made.

34. Other delegations believed that the right to make reservations was a necessary consequence of the sovereignty of States and of the system of majority votes in adopting the texts of multilateral conventions. They advanced the view that this was existing law. In their opinion, a State could always make whatever reservations it wished, and the convention would enter into force between the reserving State and all the other parties, subject to the reservation. An objection to a reservation would be without legal effect, and would be an attempt to interfere in matters which were exclusively within the competence of the reserving State.

35. Some declared it was impossible to apply a single rule on reservations to all multilateral conventions, and thought that a careful study should be made with the object of defining categories of such conventions and establishing the rules applicable to each.

36. Others doubted that any of the proposed rules constituted in all its details an existing rule of international law, and referred to the great diversity of opinions which had been expressed. They were of opinion that there were no pressing problems of objections to reservations at present and probably none would arise in the future which would make a rule necessary, and consequently were not in favour of the Assembly's attempting to lay down such a rule.

37. Other delegations thought it inopportune to take a final decision on the matter, perhaps by a narrow majority, at the sixth session of the General Assembly. In their opinion, further study might make it possible to arrive at a rule which would combine the best features of all those advocated so far, and which could obtain very wide agreement. For this reason, these delegations favoured referring the matter back to the International Law Commission to be dealt with in the course of the Commission's work on the codification of the law of treaties.

38. On the other hand, it was pointed out that even without a new formal request by the General Assembly, the International Law Commission would take up this subject and make recommendations *de lege ferenda* in the normal course of its work on the law of treaties.

39. Further, many desired that the subject should be disposed of by a final decision at the current session. They thought that a postponement would not contribute toward reaching a solution acceptable to them, or feared that it might mean a repetition next year of the debates of the last and current sessions.

40. Several delegations insisted that any rule on reservations laid down by the General Assembly for the guidance of the Secretary-General could not be retroactive and could not apply to existing multilateral

conventions. Such a rule, they argued, would involve a determination of the law. A declaration of the present law or the establishment of new law by the Assembly could in no case be binding on the parties to existing conventions, and would be beyond the Assembly's competence.

41. Others, however, thought that the General Assembly was fully competent to give instructions to the Secretary-General relating to reservations to existing conventions.

120. At its 360th plenary meeting, held on 12 January 1952, the General Assembly adopted resolution 598 (VI), which reads as follows:

*The General Assembly,*

*Bearing in mind* the provisions of its resolution 478 (V) of 16 November 1950, which (1) requested the International Court of Justice to give an advisory opinion regarding reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and (2) invited the International Law Commission to study the question of reservations to multilateral conventions,

*Noting* the Court's advisory opinion<sup>62</sup> of 28 May 1951 and the Commission's report,<sup>63</sup> both rendered pursuant to the said resolution,

1. *Recommends* that organs of the United Nations, specialized agencies and States should, in the course of preparing multilateral conventions, consider the insertion therein of provisions relating to the admissibility or non-admissibility or reservations and to the effect to be attributed to them;

2. *Recommends* to all States that they be guided in regard to the Convention on the Prevention and Punishment of the Crime of Genocide by the advisory opinion of the International Court of Justice of 28 May 1951;

3. *Requests* the Secretary-General:

(a) In relation to reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, to conform his practice to the advisory opinion of the Court of 28 May 1951;

(b) In respect of future conventions concluded under the auspices of the United Nations of which he is the depositary:

(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.

C. RESOLUTION 1452 (XIV) OF 7 DECEMBER 1959

121. In a letter dated 16 August 1959,<sup>64</sup> addressed to the Secretary-General, the Permanent Representative of India proposed for inclusion in the provisional agenda of the fourteenth session of the General Assembly an item entitled "Reservations to multilateral conventions:

<sup>62</sup> See document A/1874.

<sup>63</sup> *Official Records of the General Assembly, Sixth Session, Supplement No. 9.*

<sup>64</sup> A/4188.

the Convention on the Inter-Governmental Maritime Consultative Organization ”.

122. On 22 September 1959, at its 803rd plenary meeting, the General Assembly placed the item on the agenda of the fourteenth session and referred it to the Sixth Committee, which considered it at its 614th to 629th meetings held between 19 October and 9 November 1959, having before it a report on the question submitted by the Secretary-General.<sup>65</sup> The Committee took up successively the particular question of the Indian acceptance of the Convention on the Inter-Governmental Maritime Consultative Organization and, thereafter, the general question of reservations to multi-lateral conventions. The debates on these two questions are to be found in the report of the Sixth Committee to the General Assembly.<sup>66</sup> With regard to the first question, the report states:

5. Introducing the item, the representative of India reviewed the history of his Government's association with IMCO. India had participated in the United Nations Conference, convened under a resolution of the Economic and Social Council in 1948, which concluded the Convention; and on the date on which it was opened for signature, India had signed the Convention. The Convention having entered into force in 1958, an instrument of acceptance by India was then deposited with the Secretary-General, as depositary of the Convention, on 6 January 1959, the date on which the first session of the Assembly of IMCO was convened. The terms of the instrument stipulated that the acceptance was subject to a number of stated conditions concerning the consistency with the purposes of IMCO, as defined by its Convention, of any measures of the Government for assisting its national shipping. The Secretary-General informed the IMCO Assembly of his receipt of the instrument and of the text of the conditions. That Assembly adopted a resolution requesting the Secretary-General of the United Nations to circulate the Indian document to States members of IMCO; it resolved that, until the member States had had an opportunity of expressing their views, India should be free to take part without vote in the IMCO Assembly proceedings. The Secretary-General thereupon advised the Indian Mission to the United Nations that the practice as to the circulation of reservations or declarations, applicable to conventions adopted prior to General Assembly resolution 598 (VI) of 12 January 1952 on reservations, would be followed. Both in IMCO and in correspondence with the Secretary-General, the Government of India took the position that these actions amounted to an application of the “unanimity rule”, whereas India considered itself automatically a full member of IMCO, there being no question of another State party raising any objection. Two States members of IMCO, however, transmitted formal objections to the Indian condition.

6. The representative of India submitted, as the principal matter before the Committee, the question whether the stipulation in the instrument of acceptance constituted a reservation. He explained that the Indian Government had merely made a declaration of policy, not amounting to a reservation, and intended only to

restate the purposes, and the advisory and consultative functions, of IMCO, with which any measure adopted by the Government would be consistent.

7. It was therefore the position of India that the Secretary-General should have accepted the instrument without further question, that it was *ultra vires* and contrary to the Charter for him to act under the instructions of IMCO in circulating the declaration, and that his procedure violated General Assembly resolution 598 (VI).

8. A number of representatives raised the preliminary question of the competence or the propriety of the General Assembly's taking jurisdiction of a question affecting membership in IMCO or the interpretation of its Convention. They noted that that Convention expressly conferred upon IMCO organs the authority to settle any dispute concerning the interpretation of its provisions, which necessarily included those relating to membership. They also pointed out that two members of IMCO were not represented in the General Assembly, while many United Nations Members were not members of IMCO. The Secretary-General, these representatives held, derived his depositary authority in this connexion from the final articles of the IMCO Convention and from the request in the IMCO Assembly resolution. They therefore considered that for the General Assembly to give other instructions either to the Secretary-General or to IMCO would amount to exercising a supervisory authority over a separate international organization over which the United Nations General Assembly did not have jurisdiction. According to this school of thought, therefore, IMCO alone had the responsibility for settling any question having to do with the determination of its own membership. A contrary body of opinion, however, held to the view that it was normal for the General Assembly to take up any question of the exercise by the Secretary-General of his functions and to make suitable recommendations to specialized agencies in fulfilment of the co-ordinative function of the United Nations under the Charter. Moreover, it was felt that other international organizations, in availing themselves of the depositary services of the Secretary-General, impliedly consented to the General Assembly's authority to give guidance to the common depositary, who in any case acted in the name of the United Nations as a whole.

9. Those representatives who considered that it was basically an IMCO responsibility to determine any question affecting the membership of that organization also adhered to the view that the Secretary-General had acted correctly in referring the matter to IMCO and then seeking to ascertain the attitude of its member States towards the Indian conditions in accordance with the IMCO Assembly resolution. These representatives felt that the nature of the Indian declaration raised sufficient doubt that its submission to the membership concerned was requisite, and compliance with the request to circulate it was a normal depositary function. Those who held to the contrary proposition did so either on the grounds that the depositary should have turned to India to resolve any ambiguity in the instrument or on the grounds that in any case he should always accept an instrument in deposit and give due notice to the parties without any other action, whether or not the instrument contained a reservation.

<sup>65</sup> *Official Records of the General Assembly, Fourteenth Session, Annexes*, agenda item 65, document A/4235.

<sup>66</sup> *Ibid.*, document A/4311, paras. 5-11 and 14-19.

10. The Committee paid considerable attention to the Indian argument that the actions of the Secretary-General in this case had not been in conformity with resolution 598 (VI) of the General Assembly. Many representatives were satisfied by the fact that the practice established by that resolution regarding reservations related to "future" conventions only, while the IMCO Convention had been concluded some years before. Others emphasized that the whole purpose of the resolution had been to reject the theory of the rule of unanimity, while the procedures followed in the present situation at least admitted of the impression that such a rule had been applied to India. A similar difference of approach was shown regarding the advisory opinion of the International Court of Justice on the reservations to the Genocide Convention: many representatives noted that the conclusions of the Court were expressly limited to that particular Convention, but others stressed the clear denial by the Court that the principle of unanimity had been transformed into a rule of international law.

11. The Committee was virtually unanimous in welcoming the statement by the representative of India that his Government had merely made a declaration of policy intended to be consistent with the Convention and not amounting to a reservation; the Committee was also unanimous in acknowledging the great importance of the full participation of India in the work of IMCO. It therefore welcomed the proposal of the representative of India that a practical solution could be found for the whole question . . . .

123. On the subject of reservations to multilateral conventions in general, the report of the Sixth Committee states:

14. The representatives who supported a seven-Power draft resolution (A/C.6/L.449 and Add.1 and 2),<sup>67</sup> providing that the Secretary-General should be requested to apply the procedure of resolution 598 (VI), paragraph 3 (b), to all conventions which did not contain a provision to the contrary, stressed the practical advantage of the uniformity to be obtained from authorizing the Secretary-General to apply the same depositary procedures to reservations to all conventions regardless of whether they had been concluded before or after General Assembly resolution 598 (VI). In general, they opposed the study of other possible systems, at least until the International Law Commission had completed its work on the codification of the whole law of treaties. A number of representatives particularly emphasized the desirability of continuing and extending the application of resolution 598 (VI) as constituting in itself the best means of furthering international co-operation by affording to multilateral conventions the widest possible application among the greatest possible number of States; these representatives saw little practical significance in any request to the International Law Commission to report on the subject, since its report on the law of treaties would, in any case, be submitted in due course and in its whole context. A number

<sup>67</sup> The text read as follows:

"The General Assembly,

...

"Decides to amend paragraph 3 (b) of resolution 598 (VI) by requesting the Secretary-General to apply the aforesaid paragraph 3 (b) in respect of all conventions of which he is the depositary and which do not contain provisions to the contrary."

of representatives considered the entire question too complex to justify haste, but felt that the extension of the compromise they found in resolution 598 (VI) provided the best administrative practice in the interim.

15. The supporters of a ten-Power draft resolution (A/C.6/L.450 and Add.1)<sup>68</sup> calling for reports by the Secretary-General and the International Law Commission and for further consideration by the General Assembly at its sixteenth session, analysed the extreme complexity of the reservations question and its bearing on the depositary function. They argued that the system instituted by resolution 598 (VI) could not be extended to all conventions without exception unless a thorough technical study of all aspects of the problem were made. They pointed to the number of different systems that might be established to govern the legal effect of reservations and objections. Among the difficulties found in the seven-Power draft resolution (A/C.6/L.449 and Add.1 and 2) were its retroactivity and the fact that it did not precisely conform to the terms of the resolution it was extending, as resolution 598 (VI) had been confined to conventions concluded under United Nations auspices. In addition, they felt that neither resolution 598 (VI) nor its proposed extension would provide a clear rule or a lasting solution. They especially noted that that resolution had been adopted on the basis of several reports or opinions presented to two sessions of the General Assembly, whereas delegations to the present session had not come prepared to dispose of the question of reservations, nor had they ever received a study of depositary practices as such.

16. A substantial body of opinion in the Sixth Committee adhered to the view that the two draft resolutions were in reality more complementary than inconsistent. They urged the sponsors of both to seek means of merging the two in a single text.

17. The sponsors of both draft resolutions thereafter withdrew the two previous versions and introduced a single new draft resolution (A/C.6/L.451 and Add.1), representing an agreed minimum text acceptable to both groups. The Secretary-General was to be asked, as far as concerned the deposit of documents containing reservations with regard to the conventions concluded prior to the adoption of resolution 598 (VI), to adhere to the same practice which he was requested to follow in respect of the conventions concluded after the

<sup>68</sup> The text read as follows:

"The General Assembly,

...

"1. Requests the Secretary-General to circulate to Member States, prior to the sixteenth session, a report on his current practice in respect of reservations to multilateral conventions for which he is the depositary authority, and objections to such reservations, together with any other directly related matters;

"2. Invites States and international organizations acting as depositaries of multilateral conventions to furnish appropriate information to the Secretary-General on their practice in respect of the matters set out in paragraph 1 above;

"3. Invites the International Law Commission to expedite as much as possible that part of its work on the codification and development of the law of treaties as relates to the question of reservations to multilateral conventions and the functions of depositary authorities, with a view to reporting thereon to the General Assembly at its sixteenth session;

"4. Decides to place on the provisional agenda of its sixteenth session the question of reservations to multilateral conventions and of the functions of the Secretary-General as depositary authority."

adoption of that resolution. Resolution 598 (VI) should, it was provided, now also apply to all conventions concluded under the auspices of the United Nations prior to its adoption, provided these conventions do not contain provisions to the contrary. The combined sponsors agreed that the provision that the Secretary-General should act in this manner "until such time as the General Assembly may give further instructions" did not alter the nature of the instructions already given in resolution 598 (VI); nor did it imply that the General Assembly would necessarily give further instructions at some future date: the phrase was merely designed to leave the door open for whatever action the General Assembly might deem appropriate in the light of additional studies. The new draft neither asked the International Law Commission to separate the question of reservations from its regular place in the context of the Commission's consideration of the law of treaties nor required that the item be placed on the agenda of any particular session of the General Assembly; it was thought that this compromise would satisfy those who had cautioned against haste as well as those who desired to ensure further consideration of the matter.

18. Some representatives felt that the phrase extending the application of resolution 598 (VI) "until such time as the General Assembly may give further instructions" was redundant, since the General Assembly could always revise a previous decision and the International Law Commission would in any case be reporting on the subject in due course. Some also objected to the limitation to conventions concluded under the auspices of the United Nations.

19. The Legal Counsel was asked to clarify the practice which would be followed by the depositary pursuant to the adoption of the compromise draft. He stated that when the Secretariat had to apply a General Assembly resolution which requested Secretariat action, it had only one rule — to be as loyal as possible to the spirit and to the letter of the resolution. That was not always easy, as there might be some discrepancy between the spirit and the letter. The present draft resolution would amend paragraph 3 (b) of resolution 598 (VI) by requesting the Secretary-General to apply this paragraph to his depositary practice until such time as the General Assembly may give further instructions in respect of all conventions concluded under the auspices of the United Nations which do not contain provisions to the contrary. Resolution 598 (VI) was very definite in a matter of concern to the Secretary-General — namely, that he should 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. Its paragraph 3 (b) requested the Secretary-General to communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw the legal consequences from such communications. He considered it obvious that in no case would the Secretariat have to pass upon the legal effect of such reservations or objections, as it would leave to each State the function of drawing legal consequences therefrom. He stated that this procedure was quite clear and that the Secretariat would continue to adhere to it. If an instrument of ratification was received with a reservation (no question arising if there were no reservation), the Secre-

tariat would circulate to the States parties to the Convention a notice of the receipt of the instrument and of the reservation. This being the main Secretariat function, it would not draw the attention of States to any aspect but would merely communicate the facts as to the instrument, together with the terms of the reservation. If the Secretariat received objections, it would circulate the objections to the States concerned. Once the Secretariat had accepted an instrument of ratification or accession, it would include the country concerned in all the processes of the operation of the Convention as regards the Secretary-General's functions with respect to the Convention. That might, for instance, include the circulation in every case, to the State which made the reservations objected to, of all documents just as if there were, for the purposes of the Secretariat, no objections. He believed that the foregoing statement, while somewhat condensed, indicated exactly what the situation would be, and established a system which could operate to the satisfaction of all parties concerned. Nevertheless, he wished to refer to the remote possibility that, in the operation of this system, the Secretariat might find itself confronted with a real legal problem which could not be anticipated at the present moment. Supposing that such a case arose, there would be only one possibility for the Secretariat, since it was not to exercise any powers of appreciation, particularly of a legal character. The sole possibility would be for the Secretary-General to request the General Assembly for an advisory opinion of the International Court of Justice. While he trusted that this could occur only in an extreme situation, he thought it clear that such an authority was required to settle a specific legal question, as it would not be within the competence of the Secretariat.

124. On 7 December 1959, at its 847th plenary meeting, the General Assembly adopted resolution 1452 (XIV), which reads as follows:

#### A

##### *The General Assembly,*

*Having considered* the item entitled "Reservations to multilateral conventions: the Convention on the Inter-Governmental Maritime Consultative Organization", as well as India's instrument of acceptance of the Convention on the Inter-Governmental Maritime Consultative Organization and the report of the Secretary-General,

*Noting* that the Secretary-General of the United Nations acts as the depositary authority in respect of that Convention,

*Noting* the statement made on behalf of India at the 614th meeting of the Sixth Committee on 19 October 1959, explaining that the Indian declaration was a declaration of policy and that it does not constitute a reservation,

1. *Expresses its appreciation* of the information and materials made available to the General Assembly;
2. *Expresses the hope* that, in the light of the above-mentioned statement of India, an appropriate solution may be reached in the Inter-Governmental Maritime Consultative Organization at an early date to regularize the position of India;
3. *Requests* the Secretary-General to transmit to

the Inter-Governmental Maritime Consultative Organization the present resolution together with the relevant records and documentation.

## B

### *The General Assembly,*

Recalling its resolution 598 (VI) of 12 January 1952,

1. *Decides* to amend paragraph 3 (b) of that resolution by requesting the Secretary-General to apply the aforesaid paragraph to his depositary practice, until such time as the General Assembly may give further instructions, in respect of all conventions concluded under the auspices of the United Nations which do not contain provisions to the contrary;

2. *Requests* the Secretary-General to obtain information from all depositary States and international organizations with respect to depositary practice in relation to reservations, and to prepare a summary of such practices, including his own, for use by the International Law Commission in preparing its reports on the law of treaties and by the General Assembly in considering these reports.

## VII. Registration and publication of treaties

125. On the subject of the registration and publication of treaties and international agreements, the General Assembly has adopted several resolutions, which will be mentioned in this section. In one of these resolutions, the General Assembly adopted regulations to give effect to Article 102 of the Charter. In two other resolutions, the Assembly amended these regulations.

### A. RESOLUTION 23 (I) OF 10 FEBRUARY 1946

126. At its first session, the General Assembly submitted the question of the registration of treaties and international agreements to the Sixth Committee for consideration. The Sixth Committee, which considered the question at meetings held on 28 January and 4 February 1946, made the following observations in its report to the General Assembly:<sup>69</sup>

Article 102 of the Charter imposes an obligation upon all Members to register all treaties and international agreements entered into after the coming into force of the Charter; provides for publication by the Secretariat; and bars any party to any such treaty or international agreement which has not been registered from invoking it before any organ of the United Nations.

These provisions make it possible to establish a system of registration and treaty series which will take the place of registration and publication by the League of Nations. The reason for establishing a system of registration and publication is one of practical convenience to the nations of the world, rather than of according any particular recognition or approval to any of the nations whose treaties or agreements are accepted for publication. It has been pointed out that publicity is a source of moral strength in the administration of laws and agreements which exist between nations; it permits public control, awakens public interest and removes some causes for distrust and conflict; it contributes to the formation of a clear and indisputable system of international law.

<sup>69</sup> Document A/31.

127. On 10 February 1946, at its 28th plenary meeting, the General Assembly adopted resolution 23 (I), on the recommendation of the Sixth Committee, which states *inter alia*:

The Executive Secretary sent a circular letter to the Members of the United Nations on 8 November 1945 informing them that, from the date of the entry into force of the Charter, treaties and international agreements would be received and filed on a provisional basis until the adoption of detailed regulations prescribing the procedure to be followed in the registration and publication of treaties and international agreements under the provisions of Article 102 of the Charter. The Executive Secretary also invited the Governments of Members to transmit to the Secretariat for filing and publication treaties and international agreements not included in the treaty series of the League of Nations and entered into in recent years before the date of the entry into force of the Charter.

It is desirable, as a matter of practical convenience, that arrangements should be made for the publication of any treaties or international agreements which non-member States may voluntarily transmit . . .

*Therefore, the General Assembly instructs the Secretary-General:*

1. To submit to the General Assembly proposals for detailed regulations and other measures designed to give effect to the provisions of Article 102 of the Charter;

2. To invite the Governments of Members of the United Nations to transmit to the Secretary-General for filing and publication, treaties and international agreements entered into in recent years, but before the date of entry into force of the Charter, which had not been included in the League of Nations treaty series, and to transmit for registration and publication treaties and international agreements entered into after the date of entry into force of the Charter.

3. To receive from the Governments of non-member States, treaties and international agreements entered into both before and after the date of entry into force of the Charter, which have not been included in the League of Nations treaty series and which they may voluntarily transmit for filing and publication; and to dispose of them in accordance with the foregoing provisions, and subject to such detailed regulations and other measures as may hereafter be adopted.

### B. RESOLUTION 97 (I) OF 14 DECEMBER 1946

128. In accordance with General Assembly resolution 23 (I), the Secretary-General prepared draft regulations<sup>70</sup> which were submitted to the Sixth Committee for consideration. The Sixth Committee referred the draft regulations to a Sub-Committee, delegations not represented on the Sub-Committee being invited to submit proposals for the improvement of the regulations.

129. In its report to the General Assembly,<sup>71</sup> the Sixth Committee mentioned the following observations made by the Sub-Committee:

4. The Sub-Committee, in framing the draft regula-

<sup>70</sup> Document A/138.

<sup>71</sup> Document A/266.

tions, carefully considered the written proposals submitted by the . . . delegations, which were not represented on the Sub-Committee . . .

Two of the proposals submitted were regarded as beyond the competence of the Sub-Committee, namely, a proposal that an effort should be made to interpret the meaning of paragraph 2 of Article 102 of the Charter . . .

5. In settling the terms of the regulations, the Sub-Committee had regard to the following considerations:

(a) The importance of the orderly registration (or filing) and publication of treaties and international agreements and of the maintenance of precise records;

(b) The desirability of adhering closely both to the Charter and to the General Assembly's resolution of 10 February 1946, in particular, the distinction drawn in the resolution between *registration* (applicable only to treaties and international agreements subject to Article 102) and *filing* (applicable to other treaties and international agreements covered by the regulations) . . .

(c) The undesirability of attempting at this time to define in detail the kinds of treaty or agreement requiring registration under the Charter, it being recognized that experience and practice will in themselves aid in giving definition to the terms of the Charter.

6. The Sixth Committee, at its thirty-third meeting on 13 December 1946, considered the report of the Sub-Committee, presented by its Rapporteur, Mr. E. R. Hopkins (Canada), and adopted the substance of the report.

7. The Sixth Committee also considered a memorandum prepared by the Secretariat upon the request of the Sub-Committee summarizing the discussions in the latter with respect to the preamble and each of the articles of the regulations.

In this connexion, the Committee desires to mention the following points:

(a) It was agreed that registration is effected by the act of one of the parties (or pursuant to article 4 of the regulations) and not by any action taken by the Secretariat;

(b) It was recognized that, for the purposes of article 1 of the regulations, a treaty comes into force when, by agreement, it is applied provisionally by two or more of the parties thereto;

(c) Article 10 of the proposed regulations is intended to carry out the recommendations made by the General Assembly in its resolution of 10 February 1946 on the filing of treaties and international agreements not subject to Article 102 of the Charter. This provision does not apply to any treaty or agreement concluded by one or more Members of the United Nations after 24 October 1945, the date on which the Charter came into force; ”.

130. At its 65th plenary meeting held on 14 December 1946, the General Assembly adopted resolution 97 (I) containing regulations to give effect to Article 102 of the Charter of the United Nations. The text of this resolution was as follows:

*The General Assembly,*

*Considering* it desirable to establish rules for the application of Article 102 of the Charter of the United Nations which provides as follows:

“ 1. Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

“ 2. No party to any such treaty or international agreement which has not been registered in accordance with the provisions of paragraph 1 of this Article may invoke that treaty or agreement before any organ of the United Nations.”

*Recognizing*, in making provision therefor, the importance of orderly registration and publication of such treaties and international agreements and the maintenance of precise records:

*Adopts* accordingly, having given consideration to the proposals of the Secretary-General submitted pursuant to the resolution of the General Assembly of 10 February 1946, the following regulations:

## 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.

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, et cetera).

## 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 to all signatories and parties to the treaty or international agreement registered.

## Article 8

1. The Register shall be kept in the five official languages of the United Nations. 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.

## PART TWO

## FILING AND RECORDING

## Article 10

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.

## Article 11

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.

## PART THREE

## PUBLICATION

## Article 12

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.

## Article 13

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.

## Article 14

The Secretariat shall send to all Members of the United Nations the series referred to in article 12 and the monthly statement referred to in article 13 of these regulations.

## C. RESOLUTION 172 (II) OF 14 NOVEMBER 1947

131. In a report<sup>72</sup> submitted to the General Assembly at its second session, the Secretary-General reported to the Assembly the progress made in the matter of the registration and publication of treaties and international agreements. On 23 September 1947, the General Assembly referred this report to the Sixth Committee, which began its consideration of the report at its 54th meeting on 29 October 1947.

132. In its report<sup>73</sup> to the General Assembly, the Sixth Committee recorded as follows certain passages of the Secretary-General's report, which the Secretary of the Committee had supplemented by a number of oral explanations and observations:

The Secretariat also drew attention to the difficulties which had been encountered whenever it had been sought to define in detail the scope of the term "international agreement" contained in Article 102 of the Charter. Nevertheless, on the strength of the interpretation given to that term in the report of Committee IV/2, at San Francisco, the Secretariat had considered it was bound to register *ex officio* the instruments of accession presented

<sup>72</sup> Document A/380.

<sup>73</sup> Document A/457.

by new States Members of the United Nations and statements recognizing as compulsory the jurisdiction of the International Court of Justice in accordance with Article 36, paragraph 2, of the Statute of the Court. The Secretariat considers that the practice of *ex officio* registration will have to be given a somewhat wider extension.

As regards the technique of registration, the Secretariat suggested that it would be desirable when a multilateral agreement was in question that this should be presented for registration by the Government or the authority having the custody of the original document, and that these should also register all subsequent actions in accordance with article 2<sup>74</sup> of the regulations adopted by the General Assembly on 14 December 1946.

The Secretariat pointed out in conclusion, as regards the registration of subsequent actions, that whereas the registration of an ordinary statement would be sufficient when there is a change in the parties to a registered treaty, nevertheless, when the scope or application of the agreement was modified, the document to be registered should not be an ordinary statement but the actual instrument — for example, the exchange of notes or additional protocol, etc. — which had brought about the modification in question.

On the basis of the report and of the additional oral explanations given by the Secretariat, the Committee proceeded to a general discussion which it was agreed would be recorded fairly fully in the summary record. . . .

133. At its 113th plenary meeting held on 14 November 1947, the General Assembly adopted resolution 172 (II) in which it took note of the report of the Secretary-General (document A/380) and drew the attention of Member States to the obligations imposed by Article 102 of the Charter.

#### D. RESOLUTION 254 (III) OF 3 NOVEMBER 1948

134. The Secretary-General submitted to the General Assembly at its third session a report<sup>75</sup> in which he recounted the progress achieved and the material and technical difficulties encountered in the actual process of registration and publication of treaties and international agreements during the year.

135. On 24 September 1948, the General Assembly decided to refer the question to the Sixth Committee, which considered it at meetings held on 20 and 21 October 1948.

136. On 3 November 1948, at its 155th plenary meeting, the General Assembly, on the recommendation of the Sixth Committee,<sup>76</sup> adopted resolution 254 (III), which reads as follows:

#### A

##### *The General Assembly,*

*Considering* that the United Nations Charter requires that treaties and international agreements be not only registered but also published as soon as possible; and

*Considering* that the practical value, for Governments, scientific institutions and all the circles concerned, of publishing treaties and international agreements also depends in large

measure upon the degree of accuracy and precision of the published translations,

*Instructs* the Secretary-General to take all the necessary steps to ensure that registered treaties or agreements shall be published with the least possible delay and that translations shall reach the highest possible level of accuracy and precision.

#### B

##### *The General Assembly,*

*Having considered* the report of the Secretary-General on the registration and publication of treaties and international agreements (A/613),

*Having noted* that relatively few treaties and other international agreements have been registered to date, and that less than half of the number of States Members of the United Nations have registered any treaties or other international agreements,

*Considering* that all Member States have by Article 102 of the Charter, assumed the obligation to register with the Secretariat every treaty and every international agreement entered into by them after the coming into force of the Charter,

*Having noted* that resolution 172 (II) of 14 November 1947 drew the attention of Member States to this obligation,

*Therefore requests* that each of the Member States take cognizance of its obligation under Article 102 and take immediate steps to fulfil this obligation.

#### E. RESOLUTION 364 (IV) OF 1 DECEMBER 1949

137. The Secretary-General submitted to the General Assembly at its fourth session a report<sup>77</sup> on the registration and publication of treaties and international agreements. This report stated the following:<sup>78</sup>

The Secretary-General has, on various occasions, stressed that it is desirable, in the case of multilateral agreements, that the depositary should submit them for registration. This point was taken up in the Sixth Committee's report<sup>79</sup> on the registration and publication of treaties and international agreements, during the second regular session of the General Assembly. However, when the United Nations is the depositary of a multilateral agreement to which it is not a party, that agreement cannot be registered *ex officio* unless the agreement expressly provides for such registration, since article 4 of the regulations to give effect to Article 102 of the Charter of the United Nations does not contain any provision to this effect. Difficulties have arisen in practice in this connexion, and it might therefore be well to supplement the regulations by adding to the first paragraph of article 4 a sub-paragraph (c) permitting registration *ex officio* in all cases in which the United Nations is the depositary of a multilateral treaty.

138. At its 224th plenary meeting held on 22 September 1949, the General Assembly referred to the Sixth Committee for study the question: "Registration and publication of treaties and international agreements: report of the Secretary-General". The Sixth Committee considered the question at its 174th meeting on 26 October 1949 and heard "various opinions . . . regarding the legal position of the depositary of a treaty in relation to the power to register it and regarding the right and duty which may be implied in Article 102 of the Charter".<sup>80</sup>

<sup>74</sup> See *Resolutions adopted by the General Assembly during the second part of its first session*, page 190.

<sup>75</sup> *Official Records of the General Assembly, Third Session, Annexes*, agenda item 30, document A/613.

<sup>76</sup> Report of the Sixth Committee to the General Assembly, *ibid.*, document A/698.

<sup>77</sup> *Official Records of the General Assembly, Fourth Session, Annexes*, document A/958.

<sup>78</sup> *Ibid.*, para. 5.

<sup>79</sup> Document A/457.

<sup>80</sup> Report of the Sixth Committee to the General Assembly, *Official Records of the General Assembly, Fourth Session, Annexes*, agenda item 53, document A/1100.

139. At its 262nd plenary meeting held on 1 December 1949, the General Assembly adopted resolution 364 (IV) amending the regulations to give effect to Article 102 of the Charter, which it had previously adopted. This resolution reads as follows:

## A

*The General Assembly,*

Having considered the report<sup>81</sup> of the Secretary-General on the registration and publication of treaties and international agreements,

1. Notes with satisfaction the progress achieved in regard to the registration and publication of treaties;
2. Notes, moreover, that the number of treaties registered during the past twelve months has considerably increased;
3. Requests the Secretary-General to take all necessary measures to bring about the earliest possible publication of all registered agreements and treaties.

## B

*The General Assembly,*

Approves the addition of the following sub-paragraph (c) to paragraph 1 of article 4 of the regulations to give effect to Article 102 of the Charter of the United Nations adopted by the General Assembly on 14 December 1946 (résolution 97 (1)):

“(c) Where the United Nations is the depositary of a multilateral treaty or agreement.”

## F. RESOLUTION 482 (V) OF 12 DECEMBER 1950

140. The question of the registration and publication of treaties was again put on the agenda of the fifth session of the General Assembly. The General Assembly referred it to the Sixth Committee, which considered it at its 246th meeting held on 29 November 1950.

141. The Sixth Committee had before it a report of the Secretary-General<sup>82</sup> on the progress made in the registration and publication of treaties and international agreements and the economies which might be effected in that respect.

142. The discussion centred mainly on the question of the publication of annexes to treaties. The report of the Sixth Committee to the General Assembly notes the following opinions expressed on this subject during the discussion:<sup>83</sup>

7. It was pointed out in this connexion that an annex was normally an integral part of a treaty or agreement and often constituted the most important part of the whole text, that the omission from publication of annexes would defeat the underlying purpose of Article 102 of the Charter, that such procedure, if adopted, might provide a loophole which would enable States to withhold vital details of a treaty from publication, and that it was clear from the provisions both of Article 102 of the Charter and article 5 of the regulations, that what should be published was a “true and complete” copy of the agreement. Attention was also drawn to certain difficulties which might face the Secretary-General should a procedure be adopted whereby, with the consent of a registering party, he could refrain from publishing an annex to a treaty. Similar fears were also expressed in connexion with the amendment which would authorize the Secretary-

General to refrain from publishing in its entirety a treaty or agreement, the text of which was almost identical with the text of one which had already been published, especially in view of the imprecise meaning of the words “almost identical”.

143. At its 320th plenary meeting held on 12 December 1950, the General Assembly adopted resolution 482 (V) amending the regulations on the subject which it had adopted. The text of this resolution is given below:

*The General Assembly,*

Having considered the report of the Secretary-General on the registration and publication of treaties and international agreements and the observations in this regard of the Advisory Committee on Administration and Budgetary Questions,

1. Notes with satisfaction the progress achieved in regard to the registration and publication of treaties;
2. Invites Member and non-member States parties to treaties or international agreements subject to publication under article 12 of the regulations to give effect to Article 102 of the Charter of the United Nations, to provide the Secretary-General, where feasible, with translations in English or French or both as may be needed for the purposes of such publication;
3. Amends article 7 of the regulations to give effect to Article 102 of the Charter of the United Nations to read:

“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. Amends the first sentence of paragraph 1 of article 8 of the regulations to give effect to Article 102 of the Charter of the United Nations to read:

“1. The register shall be kept in the English and French languages”;

5. Requests the Secretary-General, when acting under article 12 of the regulations, to give effect to Article 102 of the Charter of the United Nations, to continue, as economically as practicable, without undue delay and without sacrifice of uniformity in style and record permanence, to publish all treaties and international agreements in their full and unabridged form, including all annexes, provided however that, in the reproduction of annexes, he may in his discretion employ less expensive methods of reproduction;

6. Requests the Secretary-General regularly to review the free mailing list with a view to its possible reduction.

### VIII. Correction of errors in the texts of Treaties for which a Depositary exists

144. We shall refer here to a case involving the correction of a lack of concordance between the original versions of a multilateral treaty approved by the General Assembly, for which the Secretary-General is depositary. The correction involved concerned the Chinese text of the Convention on the Prevention and Punishment of the Crime of Genocide.

145. The General Assembly, by resolution 260 (III) of 9 December 1948, approved this Convention which, in accordance with article XIII thereof, came into force on 12 January 1951.

146. Articles X and XVI of the Convention provide:

## ARTICLE X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of 9 December 1948.

## ARTICLE XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by

<sup>81</sup> *Ibid.*, document A/958.

<sup>82</sup> *Ibid.*, Fifth Session, Annexes, agenda item 54, document A/1408.

<sup>83</sup> *Ibid.*, document A/1626.

means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such a request.

147. The Permanent Representative of China to the United Nations signed the Convention on 20 July 1949 and, on 19 July 1951, he duly deposited with the Secretary-General the formal instrument of ratification by his Government of the Convention. Concurrently with his deposit of the instrument of acceptance by China of the Convention, the Permanent Representative of China transmitted to the Secretary-General a letter in which he requested the latter to take steps to revise the Chinese text of the Convention. He submitted a new Chinese text incorporating the amendments proposed by his Government with a view to bringing the Chinese text into greater uniformity with the other authentic texts of the Convention. The Secretary-General formally acknowledged receipt of the proposed revised text but noted that, in view of the provisions of article X of the Convention and of the fact that the Convention had been adopted and had entered into force, he was without authority to undertake the revision.

148. The permanent representative of China thereupon confirmed that his letter transmitting the proposed revised text should be deemed to constitute the notification envisaged in the first paragraph of article XVI of the Convention, by which any Contracting Party might at any time request revision. The Secretary-General accordingly placed that request of China on the provisional agenda of the sixth session of the General Assembly, in order that the General Assembly might, in conformity with the second paragraph of article XVI of the Convention, "decide upon the steps, if any, to be taken in respect of such request".

149. On 13 November 1951, the General Assembly included the item in that session's agenda and referred it to the Sixth Committee, which considered it at its 303rd meeting held on 29 January 1952.

150. On the recommendation of the Sixth Committee,<sup>84</sup> the General Assembly, at its 369th plenary meeting held on 1 February 1952, adopted resolution 605 (VI) whereby, considering that the elements necessary for the discussion of the question were not yet at its disposal, it decided to defer consideration of the question until its seventh session.

151. The item was included in that session's agenda and was first considered by the General Assembly in plenary meeting without reference to a committee. The Assembly had before it a memorandum by the Secretary-General<sup>85</sup> in which it was stated that the Language Services Division of the Secretariat had made a comparative study of the original Chinese text of the Convention and the revised Chinese text submitted by the Government of China (annex IV of the memorandum). It appeared that "the revised Chinese text submitted by the permanent representative of China introduces only revisions which are in the main of a linguistic

nature and does not in any sense alter the substance or meaning of the Convention as expressed in the other four official texts". Alternative methods were set forth, for the information of the General Assembly, by which effect could be given to such alterations in the Chinese text of the Convention in the event that the General Assembly should decide to do so. Those were (1) the drawing up of a protocol listing the alterations agreed upon and (2) the adoption by resolution of the General Assembly of such alterations. Precedents for the latter method were explained in annexes I and II to the memorandum. The revised Chinese text of the Convention submitted by China was reproduced in annex III to the same document.

152. The item was considered at the 400th plenary meeting on 4 December 1952. Following that discussion, the General Assembly decided to refer the item to the Sixth Committee, which considered it at its 354th to 357th meetings, inclusive, held on 18 and 19 December 1952.

153. The Sixth Committee, in its report to the General Assembly,<sup>86</sup> summarizes its debates on the item as follows:

13. During the consideration of the second revised text,<sup>87</sup> the representative of China accepted an oral amendment proposed by the representative of France to replace, in the first paragraph of the preamble, the expression "official Chinese text" by "authentic Chinese text" and that of "the other official texts" by "the other authentic texts". With regard to the second paragraph of the preamble, the representative of China accepted a suggestion of the Chairman to amend the paragraph so as to read: "Considering the memorandum (A/2221) submitted to the General Assembly by the Secretary-General". The representative of China further accepted another oral amendment, proposed by the representative of France, to delete the words "to the corrected Chinese text" in the operative paragraph (which had been paragraph 3 of the operative part of the original draft resolution).

14. In opening the debate on the item, the representative of China stated that the sole purpose of his Government's request for revision of the existing

<sup>86</sup> *Ibid.*, document A/2351.

<sup>87</sup> This document was a draft resolution worded as follows (*Ibid.*, document A/C.6/L.283/Rev.2):

"The General Assembly,

"Considering that the Government of China has made a request for correction of the official Chinese text of the Convention on the Prevention and Punishment of the Crime of Genocide, with a view to bringing the Chinese text into greater harmony with the other official texts of the Convention, and had for this purpose submitted a corrected text (A/2221, annex III),

"Considering that it is stated in the memorandum (A/2221), submitted to the General Assembly by the Secretary-General, that the Chinese text submitted by the Government of China introduces only corrections "which are in the main of a linguistic nature and does not in any sense alter the substance or meaning of the Convention as expressed in the other four official texts" of the Convention.

"Requests the Secretary-General to transmit a certified copy of the corrected Chinese text of the Convention, as well as a copy of the present resolution, to all Members of the United Nations and to the non-member States contemplated in article XI of the Convention, and to request States signatories of or parties to the Convention to notify him of their acceptance of or objection to the corrected Chinese text."

<sup>84</sup> Report of the Sixth Committee to the General Assembly, *Official Records of the General Assembly, Sixth Session, Annexes*, agenda item 56, document A/2092.

<sup>85</sup> *Official Records of the General Assembly, Seventh Session, Annexes*, agenda item 56, document A/2221.

Chinese text of the Convention on the Prevention and Punishment of the Crime of Genocide was to bring that text into greater conformity with the other authentic texts of the Convention. He pointed out that the existing Chinese text was defective, and he gave several examples to substantiate his contention. The Chinese text<sup>88</sup> submitted by his Government would, in the opinion of experts in China, remove such defects.

15. Some representatives expressed themselves in favour of accepting the request of China in principle. It was emphasized that the Convention on the Prevention and Punishment of the Crime of Genocide did not grant any rights but only imposed obligations on parties to it. In requesting revision of the Chinese text, the Government of China could not be suspected of seeking advantage from the Convention. It was motivated solely by a desire to rectify some inaccuracies in the Chinese text, and its good faith was beyond question. On the other hand, refusal by the General Assembly of the request of the Government of China could not fail to do harm to the Convention, since that Convention would suffer from the inability of that Government to enforce it. The text submitted by China had been studied by the Language Services Division of the Secretariat, and the Secretary-General had stated that it introduced changes of a linguistic nature only and that it did not alter the substance or meaning of the Convention as expressed in the other four authentic texts. In the circumstances, it would be inadmissible to maintain a text that was defective in language.

16. It was pointed out also that, in the light of the advisory opinion of 28 May 1951 of the International Court of Justice on Reservations to the Convention on Genocide, the General Assembly was undoubtedly competent to deal with such a question as that raised in the request of China, even if that request were not in the nature of a request for revision within the meaning of article XVI of the Convention. That was so for the reason that it was the General Assembly that had prepared and approved the Convention and had proposed it for signature and ratification or accession. It was, therefore, appropriate for the Secretary-General to transmit the Chinese text submitted by China to all the parties to the Convention, which would be free to accept or reject the text. Such a procedure was in conformity with international law.

...

19. As to the substance of the draft resolution submitted by China, various legal objections were raised. It was said that the Convention on the Prevention and Punishment of the Crime of Genocide had entered into force among forty States, of which eleven were not members of the United Nations. The General Assembly should, therefore, use great care in taking measures that might affect those non-member States. Moreover, in the likely event that some States parties to the Convention accepted the new Chinese text while others did not, confusion might result in the relations among such States. Some representatives questioned whether the request of China under consideration constituted a request for revision within the meaning of article XVI of the Convention. In the law of treaties, it was urged, revision was usually construed to mean modification of

substance or such modifications of language as were substantive in nature. Accordingly, it was suggested that the Chinese draft resolution should refer to "correction" instead of "revision", and any reference therein to article XVI of the Convention should be omitted. The last-mentioned suggestion was accepted by the representative of China.

20. It was also contended by some representatives that, as most of the members were not well versed in the Chinese language and hence could not be in a position to appraise the Chinese text of the Convention submitted by China, the Committee could not recommend that the General Assembly should "approve" that text, as provided in operative paragraph 1 of the Chinese draft resolution.<sup>89</sup> For the same reason the Committee could not ask the General Assembly to recommend that States signatories of or parties to the Convention should accept the new text, as called for in paragraph 2 of the operative part of the draft resolution. Nor could the Committee make the assertion that the Chinese text submitted by China was in closer harmony with the other authentic texts of the Convention than the existing Chinese text, as was the purport of the fourth paragraph of the preamble to the Chinese

<sup>89</sup> This was a draft resolution submitted to the plenary Assembly as document A/L.116 and to the Sixth Committee as document A/C.6/L.283. The text was as follows (*ibid.*):

"The General Assembly,

"Considering that the Government of China, in accordance with article XVI, paragraph 1, of the Convention on the Prevention and Punishment of the Crime of Genocide, has made a request for the revision of the official Chinese text of the Convention, with a view to bringing the Chinese text into greater harmony with the other official texts of the Convention, and had for this purpose submitted a revised text (A/2221, annex III),

"Considering that, as stated in the memorandum (A/2221) submitted to the General Assembly by the Secretary-General, the revised Chinese text submitted by the Government of China 'introduces only revisions which are in the main of a linguistic nature and does not in any sense alter the substance or meaning of the Convention as expressed in the other four official texts' of the Convention,

"Considering that the official texts in different languages of a convention should be in as close harmony as possible,

"Considering that the revised Chinese text of Convention submitted by the Government of China satisfies the foregoing requirement better than the existing text,

"Having regard to article XVI, paragraph 2, of the Convention, under which the General Assembly is empowered to decide upon the steps, if any, to be taken in respect of any request for the revision of the Convention,

"1. Approves the revised Chinese text of the Convention on the Prevention and Punishment of the Crime of Genocide submitted by the Government of China and annexed to the present resolution;

"2. Recommends that States signatories of or parties to the Convention accept the revised Chinese text as the official Chinese text of the Convention, in lieu of the existing Chinese text of the Convention;

"3. Requests the Secretary-General to transmit, in accordance with article XVIII of the Convention, a certified copy of the revised Chinese text of the Convention, as well as a copy of the present resolution, to all Members of the United Nations and to the non-member States contemplated in article XI of the Convention, and to request States already signatories of or parties to the Convention to notify him, within the period of ninety days from the date of the transmission of the revised Chinese text of the Convention of their acceptance of or objection to the revised Chinese text, it being understood that States which fail to signify their objection within the said period shall be deemed to have accepted the revised Chinese text."

<sup>88</sup> *Ibid.*, document A/2221, annex III.

draft resolution. As to the third paragraph of the preamble, stating that the official texts in different languages of a convention should be in as close harmony as possible, that was said to be a truism which it was superfluous to affirm. It was in view of those objections that the representative of China withdrew all those paragraphs. The fifth paragraph of the draft resolution, which made reference to article XVI, paragraph 2, of the Convention, was similarly withdrawn by the representative of China, since he had agreed with the construction that the request of China constituted a request not for revision but rather for correction of the Chinese text.

21. There was also objection to the latter part of operative paragraph 3, which provided for a presumption of consent where a State signatory of or party to the Convention failed to signify its objection within the period of ninety days. It was said that, since the General Assembly had only the power of recommendation, it was doubtful whether it could make such a binding rule. The time-limit of ninety days, provided in the same paragraph, within which States signatories of or parties to the Convention were to be requested to signify their acceptance of or objection to the new Chinese text was criticized as being too rigid. Replies from governments in a treaty matter often required a longer delay. Furthermore, it was also suggested that such replies, called for under the draft resolution, should not be so restricted as to relate only to "the revised Chinese text", which phrase should be omitted. All those passages to which objections had been raised were withdrawn by the representative of China.

154. On the recommendation of the Sixth Committee, the General Assembly, at its 411th plenary meeting held on 21 December 1952, adopted resolution 691 (VII), which reads as follows:

*The General Assembly,*

*Considering* that the Government of China has made a request for correction of the authentic Chinese text of the Convention on the Prevention and Punishment of the Crime of Genocide, with a view to bringing the Chinese text into greater harmony with the other authentic texts of the Convention, and had for this purpose submitted a corrected text,

*Considering* the memorandum submitted to the General Assembly by the Secretary-General,

*Requests* the Secretary-General to transmit a certified copy of the corrected Chinese text of the Convention on the Prevention and Punishment of the Crime of Genocide, as well as a copy of the present resolution, to all Members of the United Nations and to the non-member States contemplated in article XI of the Convention, and to request States signatories of or parties to the Convention to notify him of their acceptance or objection.

**IX. Question of extended participation in general multilateral Treaties concluded under the auspices of the League of Nations**

155. The question of extended participation in multilateral treaties concluded in the past and open to the participation of only certain categories of States was raised in the Sixth Committee at the seventeenth session of the General Assembly. The Sixth Committee began to study this question during its debate on the draft articles on the conclusion, entry into force and registration of treaties submitted by the International Law

Commission,<sup>90</sup> draft article 9 of which deals with the "opening of a treaty to the participation of additional States".

156. The different views expressed and proposals made in connexion with this question are to be found in the following passages of the report of the Sixth Committee to the General Assembly:<sup>91</sup>

30. In accordance with the suggestion made by the International Law Commission in paragraph 10 of the Commentary on draft articles 8 and 9, it was agreed that since the sole purpose of the draft articles is to establish a general system for the future, it would be desirable to study separately the problems arising from treaties concluded in the past, and more particularly those concluded under the auspices of the League of Nations, since they constitute an important part of the contemporary international law of treaties.

31. A number of representatives submitted a draft resolution (A/C.6/L.504) which was not discussed in its original form, since a revised text (A/C.6/L.504/Rev.1) was submitted before the debate on the question had started. This latter text proposed that the General Assembly should adopt, at its present session, a resolution authorizing certain measures so that the Secretary-General of the United Nations could receive in deposit such instruments of acceptance to the conventions still in force and concluded under the auspices of the League of Nations as might be handed to him by any State Member of the United Nations or member of a specialized agency.

32. The draft resolution authorized the Secretary-General to receive in deposit the instruments of acceptance of new States Members of the United Nations or members of a specialized agency, if the majority of the States Parties to those conventions had not objected, within a period of twelve months, to opening the conventions in question to accession.

33. The representatives who presented the proposal pointed out that the question was of interest to more than half of the States Members of the United Nations. Many representatives recognized the practical and immediate importance of the question, but expressed doubts regarding the proposed procedure as well as concerning some of the rules contained in it.

34. It was pointed out, for example, that the drafting of a formal protocol on the opening to accession of the aforementioned conventions, which would enter into effect when it had been accepted by the number of parties regarded as necessary by the protocol itself, would be more in accordance with international practice and the domestic constitutional laws of many States.

35. It was also pointed out that the consent of the Parties should be expressed and not, as proposed, in the form of a mere assumed tacit acquiescence. That suggestion was taken up by the sponsors of the proposal in a further revised version (A/C.6/L.504/Rev.2), in the part relating to the legal effects of the instruments of acceptance deposited. They explained that this was

<sup>90</sup> Report of the International Law Commission covering the work of its fourteenth session, *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209)*, para. 23.

<sup>91</sup> *Official Records of the General Assembly, Seventeenth Session, Annexes, agenda item 76*, document A/5287 and Corr.1, paras. 30-39.

their intention in the part of the original proposal relating to the legal effects of the instruments of acceptance deposited.

36. Several representatives were against any restriction of the principle of universality by reserving the procedure to be followed to specific categories of States, while excluding others. It was pointed out that the use of the term "all States" in the subsequent revision of the draft resolution [A/C.6/L.504/Rev.2] would affirm the principle of universality and would raise no difficulties for anyone—the draft providing for the express consent of the parties to the convention—in the matter of the legal effects of the instruments of acceptance deposited. Every contracting State would thus be completely free to establish, or not to establish, treaty relations with any State wishing to accede to the convention or conventions in question. This interpretation was, however, rejected by one of the co-sponsors of the draft resolution.

37. The relationship between this proposal [A/C.6/L.504/Rev.2] and the question of the succession of States aroused the concern of a number of representatives. In their view, the determination of the States now parties to the conventions in question involves a problem of the succession of States, since new States have been able to accede to old conventions under agreements made on their behalf by the States which formerly represented them in the international field. It was also pointed out that the proposal was meant to apply to situations in which there were no problems of succession of States.

38. With regard to the nature of the acceptance, some representatives felt that it should be made clear that such acceptances could not be accompanied by "reservations", since that was a practice which had been introduced since the conclusion of conventions under the auspices of the League of Nations.

39. Finally, most representatives considered that a more thorough study was needed of the possible implica-

tions of the question. A number of representatives submitted a draft resolution (A/C.6/L.508), which was subsequently revised (A/C.6/L.508/Rev.1), requesting the International Law Commission to study the problem further—with special reference to the debate in the General Assembly—and to inform the General Assembly of the result of its studies in the report on the work of its fifteenth session, and requesting the inclusion of the question on the agenda of the next session of the General Assembly. Although some representatives considered that the problem involved in the participation of new States in treaties concluded under the auspices of the League of Nations would be more appropriately resolved by the General Assembly and had doubts regarding the suitability of referring the question to the International Law Commission, the Sixth Committee adopted the proposal contained in the draft resolution (A/C.6/L.508/Rev.1).

157. On the recommendation of the Sixth Committee, the General Assembly adopted, at its 1171st meeting, held on 20 November 1962, resolution 1766 (XVII) on the question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations. The text of this resolution is reproduced below:

*The General Assembly,*

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

*Desiring to give further consideration to this question,*

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

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

## DOCUMENT A/CN.4/156 and Add.1-3

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

[Original: English]  
[20 March, 10 April,  
30 April and 5 June 1963]

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## Introduction

### A. *The basis of the present report*

1. At its fourteenth session the Commission provisionally adopted part I of its draft articles on the law of treaties, consisting of twenty-nine articles on the conclusion, entry into force and registration of treaties (A/5209, chapter II, paragraph 23). At the same time the Commission decided, in accordance with articles 16 and 21 of its Statute, to transmit this draft, through the Secretary-General, to Governments for their observations (*ibid.*, paragraph 19). The Commission further decided to continue its study of the law of treaties at its next session, to give the topic priority and to take up at that session the questions of the validity and duration of treaties (*ibid.*, chapter III, paragraph 32 and chapter IV, paragraph 65). The Special Rapporteur accordingly now submits to the Commission his second report, covering these two aspects of the law of treaties.

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

### B. *The scope and arrangement of the present group of draft articles*

3. The present group of draft articles covers the broad topics of (a) "essential validity" and (b) "duration".

"Essential validity" has been interpreted as extending to all questions of the possible invalidity of treaties, including the effect of constitutional limitations upon the powers of State agents, but not to limitations upon the treaty-making capacity of States themselves. The latter question has contacts with the other grounds of invalidity, and is noticed in one or two places in the report, but capacity of parties has not been regarded as within the scope of the present articles. "Capacity to conclude treaties" was dealt with by the Commission at its fourteenth session in drafting article 3 of part I of the draft articles in the law of treaties; and, having regard to the position taken by the Commission concerning "capacity" in article 3, the Special Rapporteur has excluded the question of the possible "invalidity" of treaties for lack of capacity in one of the parties from the present group of articles. Nor has "impossibility of performance" been dealt with as a distinct ground of "invalidity", because impossibility of performance as a ground of invalidity *ab initio*, as distinct from supervening impossibility as a ground of termination of treaties, is really covered by error vitiating consent.

"Duration" has been interpreted as extending to the duration, termination, suspension and obsolescence of treaties, but not to their revision. The topic of revision,

though related in some ways to those of the termination and obsolescence of treaties, relates to a different legal process raising complicated problems of its own, and must therefore be left for separate treatment. State succession is another topic which has points of contact with termination and obsolescence of treaties; but here again, State succession is really a special process which the Commission has for that reason already decided to take up as a separate topic.

4. The present group of articles deals with a number of grounds upon which a State may claim that a treaty into which it has entered is not binding upon it. Some of these grounds, like the effect of constitutional limitations, conflict with prior treaties and the doctrine of *rebus sic stantibus*, are controversial and in addition give scope for subjective determinations by the interested States. These and other grounds (e.g. the right to terminate a treaty which arises from a breach by the other party), because they involve the risk of unilateral determinations by the interested States, represent a certain threat to the security of treaties. That being so, the procedural aspects of avoiding or denouncing a treaty assume particular importance and are dealt with in a separate section of the draft.

5. At its fourteenth session the Commission decided, provisionally and for the purpose of facilitating the work of drafting, to follow the method adopted for the law of the sea and to prepare a "series of self-contained though closely related groups of draft articles" (A/5209, chapter II, paragraph 18). Accordingly the present group of articles on the "essential validity, duration and termination of treaties" has been constructed in the form of a separate draft convention, with the title "Part II". The articles comprised in it have been arranged in five sections: (i) general provisions, (ii) principles governing the essential validity of treaties, (iii) principles governing the duration, termination, suspension and obsolescence of treaties, (iv) procedural requirements in regard to the avoidance, denunciation or suspension of a treaty; and (v) legal consequences of avoidance, denunciation or suspension of a treaty. In this part, as in part I, the Special Rapporteur has sought to codify the modern rules of international law on the topics with which the report deals. On some questions, however, the articles formulated in the report contain elements of progressive development as well as of codification of the law.

## The Essential Validity, Duration and Termination of Treaties

### SECTION I — GENERAL PROVISIONS

#### *Article 1 — Definitions*

1. The expression "part I" as used in the present articles means part I of the draft articles on the law of treaties.

2. The expressions defined in article 1 of part I shall have the same meanings in the present part as are assigned to them in that article.

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

(a) “*Enter into*” a treaty means to establish on the international plane the State’s consent to be bound by a treaty by one of the procedures provided for in part I.

(b) “*Denounce*” a treaty means to declare that a State will no longer consider itself bound by the treaty either as from the date of the declaration or from some other date.

(c) “*Jus cogens*” means a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law.

#### Commentary

1. The question whether the various parts of the law of treaties are to be amalgamated in a single draft convention or are to remain separate, self-contained parts is for decision at a later date. But in any event it will be desirable that the use of technical terms should be uniform in the different parts. It may be that ultimately it will be found more convenient to place all the definitions for the law of treaties in a single article. Meanwhile, however, it seems appropriate to provide for the application in the present part of the definitions contained in part I. This is done in paragraph 2 of the article, while paragraph 1, for convenience of drafting, specifies that the term part I will always be used to designate the articles on the “Conclusion, entry into force and registration of treaties” dealt with by the Commission at its fourteenth session.

2. Paragraph 3 adds three new definitions for the purposes of the present part. Those in sub-paragraphs (a) and (b) do not appear to require comment; the definition of the two terms in question is thought useful in order to avoid circumlocution in other articles. The term “*jus cogens*” is defined in sub-paragraph (c) for the purposes of article 13. It is a term which is well enough understood, but it is not so easily defined with precision. The essence of the concept, it is thought, is that a *jus cogens* rule is a rule embodying a norm of general international law from which no derogation is permitted and which can only be modified or set aside by the creation of a further norm of general international law. On the other hand, it seems advisable to qualify the phrase “from which no derogation is permitted” by reference to grounds “specifically sanctioned by international law”, in order to allow for such possible grounds as legitimate self-defence.

#### Article 2 — *The presumption in favour of the validity of a treaty*

Every treaty entered into and brought into force in accordance with the provisions of part I shall be presumed to be valid and binding upon the parties unless it —

- (a) lacks essential validity under the rules set out in section II of this part; or
- (b) has ceased to be in force under the rules set out in section III of this part.

#### Commentary

This part of the draft articles contains a series of provisions which formulate grounds upon which a treaty may either be set aside as lacking essential validity or

denounced as no longer retaining its former validity. Accordingly, it seems desirable to emphasize in section I that the *primary rule* is that any treaty concluded and brought into force in accordance with the rules set out in part I of the draft articles is presumed to be valid and binding. In other words, the onus is upon a party which asserts that a regularly concluded treaty is not binding upon it. Unilateral assertions of a right to avoid or denounce treaties on one or other of the grounds covered in this part, simply as a pretext to escape from inconvenient obligations, have always been a source of insecurity to treaties; and one of the most difficult problems in this part is to formulate the grounds of invalidity in terms which do not open the door too wide to unilateral avoidance or denunciation of treaties. It is therefore thought important to underline in the present article that the presumption is always in favour of the validity of a treaty concluded and brought into force under the procedures and rules laid down in part I.

#### Article 3 — *Procedural restrictions on the exercise of a right to avoid or denounce a treaty*

A right to avoid or denounce a treaty arising under any of the provisions of sections II and III of this part shall be exercisable only in conformity with procedures laid down in section IV.

#### Commentary

The purpose of this article, as of article 2, is to underline that the grounds for invalidating or terminating a treaty set out in this part may not be lightly asserted and may not be employed simply as a pretext for escaping from an inconvenient treaty. These grounds for invalidating or terminating a treaty, legitimate in themselves, do involve certain risks to the security of treaties owing to the possibility of a State’s arbitrarily asserting the existence of such a ground and constituting itself the judge of the validity of its own assertion. Commentators upon this branch of the law of treaties have therefore nearly all sought to make the right to avoid or denounce a treaty dependent to some extent upon the fulfilment of procedural requirements. Delicate although the task is of formulating procedural requirements for the avoidance or denunciation of treaties which have any prospect of being accepted at a diplomatic conference, this approach to the problem seems correct and necessary. Section IV contains the Special Rapporteur’s proposals for these requirements; it seems desirable in the present section to draw attention at once to the fact that the rights of avoidance and denunciation contained in this part are linked to the procedural requirements in section IV.

#### Article 4 — *Loss of a right to avoid or denounce a treaty through waiver or preclusion*

A right to avoid or denounce a treaty arising under any of the provisions of sections II and III of this part shall not be exercisable if, after becoming aware of the fact creating such right, the State concerned —

- (a) shall have waived the right;
- (b) shall have accepted benefits or enforced obligations under the treaty; or
- (c) shall otherwise, by its own acts or omissions, have precluded itself from asserting, as against any other

party or parties, that the treaty lacks essential validity or, as the case may be, that it is not still in force.

#### Commentary

1. The principle of *préclusion* (estoppel) is a general principle of law whose relevance in international law is generally admitted and has been expressly recognized by the International Court of Justice itself in two recent cases.<sup>1</sup> Under this principle a party is not permitted to take up a legal position that is in contradiction with its own previous representations or conduct, when another party has been led to assume obligations towards, or attribute rights to, the former party in reliance upon such representations or conduct.<sup>2</sup> If in some legal systems, such as the common law systems, the application of the principle may to some extent be dependent upon technical rules,<sup>3</sup> the foundation of the principle is essentially good faith and fair dealing, which demand that a party shall not be able to gain advantage from its own inconsistencies (*allegans contraria non audiendus est*).

2. *Préclusion* (estoppel) is a principle of general application, which is not confined to the law of treaties, still less to this part of it.<sup>4</sup> Nevertheless, it does have a particular importance in this branch of international law. As already mentioned in the two previous commentaries, the grounds upon which treaties may be invalidated under section II or terminated under section III involve certain risks of arbitrary avoidance or denunciation of treaties. Another risk is that a State, after becoming aware of an essential error in the conclusion of the treaty, of an excess of authority committed by its representative, of a breach by the other party etc., may continue with the treaty as if nothing had happened and only raise the matter at a much later date when it desires for quite other reasons to put an end to its obligations under the treaty. Indeed, it may seek in this way to resuscitate an alleged ground of invalidity or of termination long after the event upon the basis of arbitrary or controversial assertions of fact. The principle of *préclusion*, although it may not be able altogether to prevent the arbitrary assertion of claims to avoid or denounce treaties, does place a valuable limit upon the cases in which such claims can be asserted with any appearance of legitimacy. Such indeed was the role played by the principle in the *Temple* case and in the case of the *Arbitral Award of the King of Spain*. Accordingly, while appreciating the general character of the principle, the Special Rapporteur suggests that its particular operation in the sphere of the validity and termination of treaties should be given express recognition in this part. Moreover, although logically a case could be made out for placing this article in a later

section, there seems to be some advantage in including it amongst the "general provisions".

3. "Waiver" has been included in this article because, although not identical with *préclusion*, it is closely connected with it; indeed, many cases of *préclusion* can also be viewed as cases of implied waiver. Sub-paragraph (a), therefore, covers cases of express waiver of a right to avoid a treaty for lack of essential validity or to terminate a treaty by denunciation for breach, etc.

4. It has not been thought necessary or appropriate to attempt an exhaustive definition of cases of *préclusion* in the present article, since the principle is a general one also applicable outside the law of treaties. The most obvious and common case in the law of treaties is likely to be that where a State, notwithstanding its knowledge of a ground of invalidity or of termination, invokes the treaty either for the purpose of claiming rights or of enforcing obligations. Accordingly this is specially mentioned in sub-paragraph (b), while the general principle of *préclusion* is covered in sub-paragraph (c).

5. Sub-paragraphs (b) and (c) are based upon the pronouncements of the Court in the *Temple* case and in the case of the *Arbitral Award made by the King of Spain*, which make it clear that *préclusion* may arise both from acts and omissions. In the *Temple* case, which involved a claim to set aside an agreement on the ground of error, the Court said:

"Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it."<sup>5</sup>

In the *Arbitral Award* case Nicaragua sought to set aside the Award on three grounds, one of which was that the arbitration treaty providing for the setting up of the Tribunal had expired before the designation of the King of Spain as Arbitrator. The Court, however, said:

"Nicaragua, by express declaration and by conduct, recognized the Award as valid and it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award. Nicaragua's failure to raise any question with regard to the validity of the Award for several years after the full terms of the Award had become known to it further confirms the conclusion at which the Court has arrived."<sup>6</sup>

While the formulation of sub-paragraphs (b) and (c) is derived from the Court's jurisprudence in these two cases, the two sub-paragraphs are intended, in combination, to embrace the whole principle of *préclusion*.

<sup>1</sup> *The Arbitral Award made by the King of Spain, I.C.J. Reports, 1960*, pp. 213-214; *The Temple of Preah Vihear, I.C.J. Reports, 1962*, pp. 23-32.

<sup>2</sup> In Spanish systems of law the doctrine is known as "*la doctrina de los actos propios*".

<sup>3</sup> See generally *Canadian and Dominion Sugar Co. v. Canadian National (West Indies) Steamships Ltd.* [1947] Law Reports Appeal Cases, at p. 55.

<sup>4</sup> See generally D. W. Bowett, *British Yearbook of International Law, 1957*, pp. 176-202; Bin Cheng, *General Principles of Law*, pp. 141-149; Judges Alfaro and Fitzmaurice in *The Temple of Preah Vihear, I.C.J. Reports, 1962*, pp. 39-51, 61-65.

<sup>5</sup> *The Temple of Preah Vihear, I.C.J. Reports, 1962*, p. 32.

<sup>6</sup> *The Arbitral Award made by the King of Spain, I.C.J. Reports, 1960*, p. 213.

SECTION II — PRINCIPLES GOVERNING THE ESSENTIAL  
VALIDITY OF TREATIES

Article 5 — Constitutional limitations on the treaty-  
making power

1. Whenever the constitution of a State —

(a) prescribes that treaties, or particular classes of treaties, shall not be entered into without their first having been submitted to a particular organ of the State for confirmation or approval, or that they shall not be binding upon the State or shall not have effect within the State's internal law unless previously ratified or approved by a particular organ of the State, or

(b) contains any other provisions limiting either the exercise of the treaty-making power or the validity of treaties under internal law, the effect of such provisions on the essential validity of treaties shall be determined by reference to the rules contained in the subsequent paragraphs of this article.

2. Subject to paragraph 4, a State shall not be entitled to deny the validity in international law of the act of one of its representatives by which, in disregard of relevant provisions of the constitution, the representative has purported to enter into a treaty on its behalf, when —

(a) in the case of a treaty binding upon signature under articles 11 and 12 of part I, the treaty has been signed by a representative competent under the rules laid down in article 4 of part I to bind the State by his signature;

(b) in other cases, an instrument of ratification, acceptance, approval or accession has been exchanged or deposited in accordance with the treaty and the instrument appears on its face to have been executed in proper form by a representative of the State competent for that purpose under the rules laid down in article 4 of part I.

3. In cases falling under paragraph 2 —

(a) if the treaty is already in force or is brought into force by the unconstitutional signature or other unconstitutional act of its organ, the State concerned may only retract its consent to be bound by the treaty with the agreement of the other party or parties to the treaty;

(b) if the treaty is not yet in force, the State concerned may nevertheless retract the unconstitutional signature or other unconstitutional act of its organ at any time before the treaty shall have come into force, upon giving notice to the depositary or to the other party or parties to the treaty.

4. (a) Paragraphs 2 and 3 shall not apply if the other interested State or States or the depositary were in fact aware at the time that the representative lacked constitutional authority to establish his State's consent to be bound by the treaty, or if his lack of constitutional authority to bind his State was in the particular circumstances manifest to any representative of a foreign State dealing with the matter in good faith.

(b) In the cases mentioned in sub-paragraph (a), the State concerned shall be free to annul the signature of its representative or to retract the instrument of ratification, acceptance, approval or accession exchanged or deposited in its name at any time, provided that it has not —

(i) subsequently ratified the unauthorized act of its representative;

(ii) so conducted itself as to bring the case within the provisions of article 4 of this part.

Commentary

1. Constitutional limitations affecting the exercise of the treaty-making power take various forms.<sup>7</sup> Some constitutions seek to preclude the executive from entering into treaties, or particular kinds of treaties, except with the previous consent of a legislative organ; some provide that treaties shall not be effective as law within the State unless "approved" or confirmed in some manner by a legislative organ; others contain fundamental laws which are not susceptible of alteration except by a special procedure of constitutional amendment and which in that way indirectly impose restrictions upon the power of the executive to conclude treaties. Legally, a distinction can be drawn under internal law between those types of provision which place constitutional limits upon the power of a government to enter into treaties and those which merely limit the power of a government to enforce a treaty within the State's internal law without some form of endorsement of the treaty by the legislature. The former can be said to affect the actual power of the executive to conclude a treaty, the latter merely the power to implement a treaty when concluded. Politically, however, the effect of the two types of provision upon the exercise of the treaty-making power may not be very different, since a responsible government will not knowingly commit the State to be bound by a treaty unless reasonably assured of being able to carry through the legislature any modifications of its municipal law necessary to enable it to perform its obligations under the treaty. The question which arises under articles 4 and 5 is how far, if at all, any of these constitutional limitations may affect the validity under international law of a consent to a treaty given by a State agent ostensibly authorized to declare that consent; and on this question opinion has been sharply divided.

2. One group of writers<sup>8</sup> maintains that international law leaves it to the internal law of each State to determine the organs and procedures by which the will of a State to be bound by a treaty shall be formed and expressed; and that constitutional laws governing the formation and expression of a State's consent to a treaty have always to be taken into account in considering whether an international act of signature, ratification, acceptance, approval or accession is effective to bind the State. According to this doctrine, internal laws limiting the power of State organs to enter into treaties are to be considered part of international law so as to avoid, or at least render voidable, any consent to a treaty given on the international plane in disregard of a constitutional limitation; the agent purporting to bind the State in breach of the constitution is totally incompetent in international as well as national law to express its consent to the treaty. If this doctrine is accepted, it follows that other States are not entitled to rely on the ostensible authority to commit the State possessed by a Head of State, Prime Minister, Foreign Minister, etc., under article 4 of part I; they are required to satisfy

<sup>7</sup> See *United Nations Legislative Series, Laws and Practices concerning the Conclusion of Treaties* (ST/LEG/SER.B/3).

<sup>8</sup> E.g. M. W. Schücking, *Annuaire de l'Institut de Droit International*, 1930, p. 225; P. Chailley, *La Nature Juridique des Traités Internationaux selon le Droit Contemporain*, pp. 175 and 215; S. B. Crandall, *Treaties, their Making and Enforcement*, pp. 13-14; C. De Visscher, *Bibliotheca Visseriana*, vol. 2 (1924), p. 98.

themselves in each case that the provisions of the State's constitution are not infringed or take the risk of subsequently finding the treaty void. The weakening of the security of treaties which this doctrine entails is said by those who advocate it to be outweighed by the need to give the support of international law to democratic principles in treaty-making.

3. The Commission's first Special Rapporteur on the law of treaties, Professor Brierly, took this view, and in 1951 the Commission itself adopted an article based upon it.<sup>9</sup> Some members, however, were strongly critical of the doctrine that constitutional limitations are incorporated into international law, while Mr. Kerno, the Assistant Secretary-General, expressed misgivings as to the difficulties with which it might confront depositaries. During the discussion the Rapporteur said that the Commission's decision had been based more on the practical consideration that States would not accept any other rule than on legal principles.

4. A second group of writers,<sup>10</sup> while basing themselves on the incorporation of constitutional limitations into international law, recognize that some qualification of that doctrine is essential if it is not to undermine the security of treaties. According to this group, good faith requires that only notorious constitutional limitations with which other States can reasonably be expected to acquaint themselves should be taken into account. On this view, a State contesting the validity of a treaty on constitutional grounds can only invoke those provisions of the constitution which are notorious or could easily have been ascertained by inquiry. Moreover, some writers in this group further maintain that a State which invokes the provisions of its constitution to annul its signature, ratification, etc., of a treaty, is liable to compensate the other party which "relied in good faith and without any fault of its own on the ostensible authority of the regular constitutional organs of the State".<sup>11</sup> They also hold that, by allowing an undue period of time to elapse before invoking the invalidity of a treaty or by asserting rights under the treaty, a State may preclude itself from contesting the binding force of its signature, ratification, etc.

5. The Commission's second Special Rapporteur on the law of treaties, Sir H. Lauterpacht, belonged to this group, and in article 11 of his first report<sup>12</sup> proposed the following set of rules to cover the question of constitutional limitations:

"1. A treaty is voidable, at the option of the party concerned, if it has been entered in disregard of the limitations of its constitutional law and practice.

<sup>9</sup> Article 2: "A treaty becomes binding in relation to a State by signature, ratification, accession or any other means of expressing the will of the State, in accordance with its constitutional law and practice through an organ competent for that purpose." (*Yearbook of the International Law Commission, 1951*, vol. II, p. 73).

<sup>10</sup> E. G. Lord McNair, *Law of Treaties* (1961), chapter III; Paul De Visscher, *De la conclusion des traités internationaux* (1943), p. 275; P. Guggenheim, *Recueil des Cours de l'Académie de droit international*, vol. 74 (1949), p. 236; J. Mervyn Jones, *Full Powers and Ratification* (1946); pp. 154-155; Sir H. Lauterpacht, First Report on the Law of Treaties, *Yearbook of the International Law Commission, 1953*, vol. II, pp. 141-146.

<sup>11</sup> Sir H. Lauterpacht, *op. cit.*, p. 143; see also Lord McNair, *op. cit.*, p. 77; *Research in International Law, Harvard Law School*, part III, Law of Treaties, art. 21.

<sup>12</sup> Sir H. Lauterpacht, *op. cit.*, p. 141.

"2. A contracting party may be deemed, according to the circumstances of the case, to have waived its right to assert the invalidity of a treaty concluded in disregard of constitutional limitations if for a prolonged period it has failed to invoke the invalidity of the treaty or if it has acted upon or obtained an advantage from it.

"3. In cases in which a treaty is held to be invalid on account of disregard of the constitutional limitations imposed by the law or practice of a contracting party that party is responsible for any resulting damage to the other contracting party which cannot properly be held to have been affected with knowledge of the constitutional limitation in question.

"4. A party cannot invoke the invalidity of a treaty on the ground that it has been entered into in disregard of the constitutional limitations of the other contracting party.

"5. A party asserting the invalidity of a treaty on account of any failure to comply with constitutional limitations is bound, in case of disagreement, to submit the substance of the dispute or the question of damage to the International Court of Justice or to any other international tribunal agreed upon by the parties."

In putting forward these proposals Sir H. Lauterpacht maintained that the practice of States and the bulk of modern writers support such a compromise between the fundamental principle of the nullity of acts done by State agents in excess of their constitutional authority and the requirements of good faith and of the security of treaties. The Commission itself did not have an opportunity to discuss his proposals.

6. A compromise solution based upon the initial hypothesis of the invalidity in international law of an unconstitutional signature, ratification, etc., of a treaty presents certain logical and practical difficulties. If a constitutional limitation laid down in the internal law of a State is to be regarded as effective in international law to curtail the authority of a Head of State or other State agent to declare the State's consent to a treaty, it may be asked upon what principle a "notorious" limitation is effective for that purpose but a "non-notorious" one is not. Under the State's internal law both kinds of limitation are legally effective to curtail the agent's authority to enter into the treaty. Similarly, if the constitutional limitation is effective in international law to deprive the State agent of any authority to commit the State with respect to the treaty, it may not be easy to see upon what principle the State can be held internationally responsible in damages in respect of its agent's unauthorized signature, ratification, etc., of the treaty. If the initial signature, ratification, etc., of the treaty is not attributable to the State by reason of the lack of authority, all subsequent acts of the State agents with respect to the same treaty would also logically seem not to be attributable to the State. It may be added that, if internal constitutional provisions are to be regarded as incorporated in international law, it is not obvious why the unconstitutionality of a treaty should be a matter which can only be invoked by the State whose constitution is the cause of its invalidity, and not by the other parties to the treaty.

7. The practical difficulties are even more formidable, because the notion that a distinction can readily be made between notorious and non-notorious constitu-

tional limitations is to a large extent an illusion. Admittedly, there now exist collections of the texts of State constitutions and the United Nations has issued a volume of "Laws and Practices concerning the conclusion of Treaties"<sup>13</sup> based on information, supplied by a considerable number of States. Unfortunately, however, neither the texts of constitutions nor the information made available by the United Nations are by any means sufficient to enable foreign States to appreciate with any degree of certainty whether or not a particular treaty falls within a constitutional provision. Some provisions are capable of subjective interpretation, such as a requirement that "political" treaties or treaties of "special importance" should be submitted to the legislature; some constitutions do not make it clear on their face whether the limitation refers to the power to conclude the treaty or to its effectiveness within domestic law. But even when the constitutional provisions are apparently uncomplicated and precise, the superficial clarity and notoriety of the limitations may be quite deceptive, as in the case of the United States Constitution. In the majority of cases where the constitution itself contains apparently strict and precise limitations, it has nevertheless been found necessary to admit a wide freedom for the executive to conclude treaties in simplified form without following the strict procedures prescribed in the constitution; and this use of the treaty-making power is only reconciled with the letter of the constitution either by a process of interpretation or by the development of political understandings. Furthermore, the constitutional practice in regard to treaties in simplified form tends to be somewhat flexible; and the question whether or not to deal with a particular treaty under the procedures laid down in the constitution then becomes to some extent a matter of the political judgement of the executive, whose decision may afterwards be challenged in the legislature or in the courts.

8. No doubt, it remains true that in a number of cases it will be possible to say that a particular constitutional provision is notorious and clear and that a given treaty falls within it. But it is equally true that in many cases neither a foreign State nor the national government itself can judge in advance with any certainty whether, if contested, a given treaty would be held under national law to fall within a constitutional limitation, or whether an international tribunal would hold the constitutional provision to be one that is "notorious" and "clear" for the purposes of international law. In consequence, the compromise solution advocated by Sir H. Lauterpacht and a number of other authorities appears only to go a small part of the way towards removing the risks to the security of treaties which arise, if constitutional limitations are treated as effective in international law to curtail the authority to act for the State ostensibly possessed by certain State agents under customary law.

9. A third group of writers<sup>14</sup> considers that, not only

does international law leave to each State the determination of the organs and procedures by which its will to conclude treaties is formed, but it concerns itself exclusively with the external manifestations of this will on the international plane. According to this group, international law determines the procedures and conditions under which States express their consent to treaties on the international plane; it regulates not only the procedures for expressing consent to be bound by a treaty but the conditions under which the various categories of State agents will be recognized as competent to carry out such procedures on behalf of their State. This being so, if an agent, competent under international law to commit the State and apparently authorized by the government of the State to do so, expresses the consent of the State to a treaty through one of the established procedures, the State is held bound by the treaty in international law. Under this doctrine, failure to comply with constitutional requirements may entail the nullity of the treaty as domestic law, and may also render the agent or the government liable to legal proceedings under domestic law; but it does not affect the essential validity of the treaty in international law so long as the agent acted within the scope of his ostensible authority under international law. Some members of this group<sup>15</sup> modify the stringency of the rule in cases where the other State is actually aware of the failure to comply with constitutional requirements or where the lack of constitutional authority is so manifest that the other State must be deemed to have been aware of it. This compromise solution, which takes as its starting point the supremacy of the international rules concerning the conclusion of treaties, does not seem to present the same logical difficulties as the compromise put forward by the previous group. As the basic principle, according to the third group, is that a State is entitled to assume the regularity of what is done within the ostensible authority of an agent competent under international law, it is logical enough that the State should not be able to do so when it knows, or must in law be assumed to know, that in the particular case the authority does not exist.

10. The Commission's third Special Rapporteur, Sir G. Fitzmaurice, belonged to the third group, and in his third report on the law of treaties (A/CN.4/115) proposed an article (article 10) which excluded constitutional provisions from having any effect upon the essential validity of a treaty in any circumstances. He considered this to be the "internationally correct" rule and the doctrines recognizing the effectiveness of constitutional limitations in international law to be difficult to reconcile with the principle of the supremacy of international over domestic law.

11. The majority of writers adopting the constitutional approach to the problem appear to have arrived at their conclusion rather upon the basis of theory than upon a close examination of international jurisprudence and State practice. If the evidence from these sources is not entirely decisive, the weight of it seems to point to a

<sup>13</sup> *United Nations Legislative Series, Laws and Practices concerning the conclusion of Treaties* (ST/LEG/SER. B/3).

<sup>14</sup> E. G. Anzilotti, *Cours de droit international (translation Gidel)* vol. 1 (1929), pp. 366-367; G. Scelle, *Précis du droit de gens*, vol. 2 (1934), p. 455; Sir G. Fitzmaurice, *British Yearbook of International Law*, vol. 15 (1934) pp. 129-137; 1. Seidl-Hohenveldern, *International and Comparative Law Quarterly*, vol. 12 (1963), pp. 102-103; Blix, *Treaty-Making Power* (1960) chapter 24; and see UNESCO, *Survey of the Ways in which States interpret their International Obligations*, pp. 7-8.

<sup>15</sup> J. Basdevant, for example, while holding that States must in general be able to rely on the ostensible authority of a State agent and to disregard constitutional limitations upon his authority, considered that this should not be so in the case of a "violation manifeste de la constitution d'un Etat"; *Recueil des Cours de l'Académie de droit international*, 1926, vol. V, p. 581; see also the UNESCO "Survey on the Ways in which States Interpret their International Obligations" (P. Guggenheim), p. 8.

solution based upon the position taken by the third group. The international jurisprudence is admittedly neither extensive nor very conclusive. The *Cleveland Award*<sup>16</sup> (1888) and the *George Pinson* case<sup>17</sup> (1928), although not involving actual decisions on the point, contain observations favouring the relevance of constitutional provisions to the international validity of treaties. On the other hand, the *Franco-Swiss Custom* case<sup>18</sup> (1912) and the *Rio Martin* case<sup>19</sup> (1924) contain definite decisions by arbitrators declining to take account of alleged breaches of constitutional limitations when upholding the validity respectively of a protocol and an exchange of notes, while the *Metzger* case<sup>20</sup> contains an observation in the same sense. Furthermore, pronouncements in the *Eastern Greenland*<sup>21</sup> and *Free Zones*<sup>22</sup> cases, while not directly in point, seem to indicate that the International Court will not readily go behind the ostensible authority under international law of a State agent — a Foreign Minister and an agent in international proceedings in the cases mentioned — to commit his State.

12. As to State practice, a substantial number of diplomatic incidents has been closely examined in a recent work.<sup>23</sup> These incidents certainly contain examples of claims that treaties were invalid on constitutional grounds, but in none of them was that claim admitted by the other party to the dispute. Moreover, in three instances — the admission of Luxembourg to the League, the Politis incident and the membership of Argentina — the League of Nations seems to have acted upon the principle that a consent given on the international plane by an ostensibly competent State agent is not invalidated by the subsequent disclosure that the agent lacked constitutional authority to commit his State. Again, depositaries of treaties, while concerning themselves with the ostensible authority of State agents under international law and with the regularity of the form of full powers and instruments of ratification, acceptance, etc., have never concerned themselves with the constitutional authority of the agent signing a treaty or depositing an instrument of ratification, acceptance, etc. In one instance, the United States Government, as depositary, seems to have assumed that an ostensibly regular notice of adherence to an agreement could not be withdrawn on a plea of lack of constitutional authority except with the consent of the other parties.<sup>24</sup> Nor is it the practice of State agents, when concluding treaties, to cross-examine each other as to their constitutional authority to affix their signatures to a treaty or to deposit an instrument of ratification, acceptance, etc. It is true that in the *Eastern Greenland* case Denmark conceded the relevance in principle of Norway's constitutional provisions in appreciating the effect of the Ihlen declaration, while contesting their relevance in the particular circumstances of the case. It is also true that at the seventeenth session of the General Assembly the Italian representative to the Sixth

Committee expressed concern that certain passages in the International Law Commission's report (A/5209) seemed to imply a view unfavourable to the relevance of constitutional provisions in determining the question of a State's consent in international law. But other States, such as Switzerland, the United States and Luxembourg, have expressed themselves very clearly in an opposite sense and the weight of State practice seems to be the other way.

13. The present Special Rapporteur has based his proposals upon the principle that the declaration of a State's consent to a treaty is binding upon that State, if made by an agent ostensibly possessing authority under international law to make the particular declaration on behalf of his State. In doing so, he has been guided primarily by the indications contained in international jurisprudence and State practice and also by the rules concerning the conclusion of treaties already provisionally adopted by the Commission in part I. Nor could he fail to take account of the fact that, in dealing with the authority of agents to sign, ratify, etc., a treaty under article 4 of part I and with the questions of signature, ratification and acceptance under articles 11, 12 and 14 of that part, the Commission itself showed a marked reluctance to introduce into the provisions of those articles, by any form of reference, the differing constitutional rules and practices of individual States.

14. Other more general considerations also appear to justify the Commission's reluctance to incorporate into international law the constitutional provisions of individual States. International law has devised a number of treaty-making procedures — ratification, acceptance and approval — specifically for the purpose of enabling Governments to reflect fully upon the treaty before deciding whether or not the State should become a party to it, and also of enabling them to take account of any domestic constitutional requirements. When a treaty has been made subject to ratification, acceptance or approval, the negotiating States would seem to have done all that can reasonably be demanded of them in the way of giving effect to democratic principles of treaty-making. It would scarcely be reasonable to expect each Government subsequently to follow the internal handling of the treaty by each of the other Governments, while any questioning on constitutional grounds of the internal handling of the treaty by another Government would certainly be regarded as an inadmissible interference in its affairs. The same considerations apply in cases of accession where the Government has the fullest opportunity to study the treaty and give effect to constitutional requirements before taking any action on the international plane to declare the State's accession to the treaty. Again, in the case of a treaty binding upon signature it is the Government which authorizes the use of this procedure; the Government is aware of the object of the treaty before the negotiations begin and, with modern methods of communication, it normally has knowledge of the exact contents of the treaty before its representative proceeds to the act of signature; moreover, if necessary, its representative can be instructed to sign "ad referendum". Admittedly, in the case of treaties binding upon signature, and more especially those in simplified form, there may be a slightly greater risk of a constitutional provision being overlooked; but even in these cases the

<sup>16</sup> Moore, *International Arbitrations*, vol. 2, p. 1946.

<sup>17</sup> *United Nations Reports of International Arbitral Awards*, vol. V, p. 327.

<sup>18</sup> *Ibid.*, vol. XI, p. 411.

<sup>19</sup> *Ibid.*, vol. II, p. 724.

<sup>20</sup> *Foreign Relations of the United States*, 1901, p. 262.

<sup>21</sup> *P.C.I.J.*, Series A/B, No. 53, pp. 56-71 and p. 91.

<sup>22</sup> *P.C.I.J.*, Series A/B, No. 46, p. 170.

<sup>23</sup> H. Blix, *op. cit.*, chapter 20.

<sup>24</sup> H. Blix, *op. cit.*, p. 267.

Government has all the necessary means of controlling the acts of its representative and of giving effect to any constitutional requirements. In other words, in every case any failure to comply with constitutional provisions in entering into a treaty will be the clear responsibility of the Government of the State concerned.

15. The majority of the diplomatic incidents in which States have invoked their constitutional requirements as a ground of invalidity have been cases in which for quite other reasons they have desired to escape from their obligations under the treaty. Furthermore, in most of these cases the other party to the dispute has contested the view that non-compliance with constitutional provisions could afterwards be made a ground for invalidating a treaty which had been concluded by representatives ostensibly possessing the authority of the State to conclude it. Where a Government has genuinely found itself in constitutional difficulties after concluding a treaty and has raised the matter promptly, it appears normally to be able to get the constitutional obstacle removed by internal action and to obtain any necessary indulgence in the meanwhile from the other parties. In such cases the difficulty seems often to show itself not from the matter being raised in the legislative body whose consent was by-passed but rather in the courts when the validity of the treaty as internal law is challenged on constitutional grounds.<sup>25</sup> National courts have sometimes appeared to assume that a treaty, constitutionally invalid as domestic law, will also be automatically invalid on the international plane. More often, however, they have either treated the international aspects of the matter as outside their province or have recognized that to hold the treaty constitutionally invalid may leave the State in default in its international obligations. Confronted with a decision in the courts impugning the constitutional validity of a treaty, a Government will normally seek to regularize its position under the treaty by taking appropriate action in the domestic or international sphere.

16. The Special Rapporteur does not underestimate the importance of constitutional limitations on the treaty-making power. On balance, however, he considers that greater importance should be attached by the Commission to the need to safeguard the security of international agreements. The complexity of constitutional provisions and the uncertain application even of apparently clear provisions appear to create too substantial a risk to the security of treaties, if constitutional provisions are accepted as governing the scope of the international authority of a State's agents to enter into treaties on its behalf. In drafting the present article, therefore, he has taken as his starting point the principle that a State is bound by the acts of its agents done within the scope of their ostensible authority under international law.

17. Paragraph 1 defines the conditions for the application of the present article by setting out the kinds of constitutional limitation on the treaty-making power which brings it into operation. As already mentioned in paragraph 1 of this Commentary, it can be contended that constitutional provisions which are only directed towards the validity of treaties in internal law have no bearing on their international validity. Nevertheless

they do in practice affect the treaty-making powers of State agents and may sometimes be invoked, even if wrongly, as depriving State agents of constitutional authority to commit the State. Accordingly, it seems desirable to cover this kind of limitation in the article; and if "ostensible authority" is accepted as the relevant criterion, there is no occasion for drawing a distinction, however correct juridically, between a limitation upon the power to bind the State externally and a limitation upon the power to do so internally. If, however, the Commission were to adopt the doctrine that constitutional limitations are to be regarded as part of international law, it would be necessary to distinguish between the two kinds of limitation.

18. Paragraph 2 sets out the general rule that States are bound internationally by acts of their agents done within the scope of the authority ostensibly possessed by them under international law. Sub-paragraph (a) covers the case of treaties binding upon signature, while sub-paragraph (b) covers that of treaties subject to ratification, acceptance or approval. In both cases the criteria for determining "ostensible authority" are the rules set out in article 4 of Part I, which have already been provisionally adopted by the Commission.

19. Paragraph 3 sets out the legal position which results from the application of the "ostensible authority" doctrine. Sub-paragraph (a) draws the logical conclusion from that doctrine that, if the treaty is already in force or is brought into force by the signature or instrument of the State in question, it may only withdraw from the treaty with the agreement of the other parties. If the State subsequently seeks to impeach the validity of the act of its own agents, it is disturbing rights already acquired by the other parties; and, having been committed on the international plane by the act of its agent done within the scope of his ostensible authority, it can only withdraw from the treaty with the consent of the other parties.

20. Logically, it would be possible to contend that a similar rule should apply even if the treaty is not yet in force; in other words, that the unconstitutional signature or instrument may even in that case be withdrawn only with the consent of the other interested States. On the other hand, it seems reasonable that, if the treaty is not yet in force, the State should be allowed a *locus poenitentiae* within which to retract the unconstitutional act of its representative. In these cases there would be no question of the State's evading its obligations by a specious reliance on constitutional limitations; while the disturbance to the interests of other States would be minimal. Accordingly, sub-paragraph (b) proposes *de lege ferenda* that there should be a unilateral right of withdrawal at any time up to the entry into force of the treaty.

21. Paragraph 4, sub-paragraph (a), qualifies the "ostensible authority" doctrine to the extent of recognizing that actual knowledge of a representative's lack of constitutional authority negatives the right to regard him as ostensibly possessing authority to bind his State. Good faith precludes another State from claiming to have relied upon an authority which it knew was not in fact possessed by the representative who purported to commit his State. A number of authorities<sup>23</sup> also

<sup>25</sup> E.g. *Prosecution for Misdemeanours (Germanv)* case, (*International Law Reports*, 1955, pp. 560-1); *Belgian State v. Leroy* (*ibid.*, pp. 614-6).

<sup>26</sup> E.g. J. Basdevant, *Recueil des Cours*, 1926, Vol. V, p. 581; P. De Visscher, *op. cit.*, pp. 272-3.

admit as an exception to the "ostensible authority" doctrine cases where the lack of the agent's authority is "manifest". It is certainly possible to imagine cases where the very question of constitutional authority has been ventilated in Parliament or the Press and the lack of authority can be said to be "manifest"; or where the treaty is of such a kind as to render the need for special constitutional authority self-evident. In these cases again, it can be said, it would be inconsistent with good faith to claim to have relied on the existence of an authority which any reasonable person would have known did not exist. On the other hand, the chief merit of the "ostensible authority" doctrine is to exclude the need for negotiating States to investigate each other's internal constitutional situation, and it is essential to avoid any qualification of the doctrine that would reintroduce the need for such investigations. From this point of view there may be a little hesitation in admitting the exception of "manifest" lack of constitutional authority; but the Special Rapporteur has included it in paragraph 4 for the Commission's consideration.

22. Paragraph 4, sub-paragraph (b) provides that where the lack of constitutional authority was known by or manifest to other States at the time, it can be invoked to annul the unauthorized act of the agent, unless the State has claimed benefits or asserted obligations arising under the treaty or has otherwise precluded itself by its conduct from denying its consent to be bound by the treaty. These provisos are important, since the danger is that a State may refrain from raising the constitutional objection to its participation in the treaty until the day comes when, having long acted as if the treaty was valid, it suddenly finds that it is inconvenient to carry out its obligations. The article 4 referred to in sub-paragraph (b) (ii) is the general article recognizing the relevance of the principle of *préclusion* (estoppel) in cases where a State claims to annul or denounce a treaty for lack of essential validity.

*Article 6 — Particular restrictions upon the authority of representatives*

1. If a representative, who neither possesses ostensible authority under article 4 of part I to bind the State nor specific authority to do so with regard to the particular treaty, purports to bind the State by an unauthorized signature or by an unauthorized exchange or deposit of an instrument, the State concerned may repudiate the act of its representative, provided that it has not —

(a) subsequently ratified the unauthorized act of its representative;

(b) so conducted itself as to bring the case within the provisions of article 4 of this part.

2. (a) When a representative, possessing ostensible authority under article 4 of part I to bind his State, is given instructions by his State which restrict that authority in particular respects, the instructions shall only be effective to limit his authority if they are made known to the other interested States before the State in question enters into the treaty.

(b) In such a case, if the representative disregards the restrictions imposed upon him by his instructions, the State may repudiate his unauthorized act, subject to the same provisos as those set out in paragraph 1 of this article.

*Commentary*

1. Article 6 seeks to cover cases where a representative may purport by his act to bind the State but in fact lacks authority to do so. This may happen because, not possessing ostensible authority under international law to bind the State in accordance with the provisions of article 4 of part I, he also lacks any specific authority from his Government to enter into the treaty on its behalf; or it may happen because, while possessing ostensible authority under international law, he is subject to express instructions from his Government which limit his authority in the particular instance. Neither type of case is common but both types have occasionally occurred in practice.<sup>27</sup>

2. Where a treaty is not to become binding without subsequent ratification, acceptance or approval, any excess of authority committed by a representative in establishing the text of the treaty will automatically be ironed out at the subsequent stage of ratification, acceptance or approval. The State in question will then have the clear choice either of repudiating the text established by its representative or of ratifying, accepting or approving the treaty; and if it does the latter, it will necessarily be held to have endorsed the unauthorized act of its representative and, by doing so, to have cured the original defect of authority. Accordingly, the present article is confined to cases in which the defect of authority relates to the execution of an act by which a representative purports finally to establish his State's consent to be bound. These cases may arise either upon the unauthorized signing of a treaty, which is to become binding upon signature, or when a representative, authorized to exchange or deposit a binding instrument under certain conditions or subject to certain reservations, exceeds his authority by failing to comply with the conditions, or to specify the reservations, when exchanging or depositing the instrument.

3. Paragraph 1 of the article deals with cases where the representative lacks any authority to enter into the treaty. In 1908, for example, the United States Minister to Romania signed two conventions without having any authority to do so.<sup>28</sup> With regard to one of these conventions his Government had given him no authority at all, while he had obtained full powers for the other by leading his Government to understand that he was to sign a quite different treaty. More recently — in 1951 — a convention concerning the naming of cheeses concluded at Stresa was signed by a delegate on behalf both of Norway and Sweden, whereas it appears that he had authority to do so only from the former country. In both these instances the treaty was, in fact, subject to ratification but they serve to illustrate the kind of cases that may arise.<sup>29</sup> Another case, in which the same situation may arise, and one more likely to occur in practice, is that where an agent has authority to enter into a particular treaty, but goes beyond his full powers by accepting unauthorized extensions or modifications of it. An instance of such a case was Persia's attempt,

<sup>27</sup> See generally H. Blix, *op. cit.*, pp. 5-12 and 76-82.

<sup>28</sup> Hackworth, *Digest of International Law*, Vol. IV, p. 467.

<sup>29</sup> Cf. also the well-known historical incident of the British Government's disavowal of an agreement between a British Political Agent in the Persian Gulf and a Persian Minister which the British Government afterwards said had been concluded without any authority whatever; Adamiyat, *Bahrain Islands*, p. 106.

in discussions in the Council of the League, to disavow the Treaty of Erzerum of 1847 on the ground that the Persian representative had gone beyond his authority in accepting a certain explanatory note when exchanging ratifications.<sup>30</sup>

4. Where there is no ostensible or express authority to enter into a treaty, it seems clear, on principle, that the State must be entitled to repudiate the act of its representative and paragraph 1 so provides. On the other hand, it seems equally clear that, notwithstanding the representative's original lack of authority, the State may afterwards endorse and validate his act, and will be held to have done so by implication if it invokes the provisions of the treaty or otherwise acts in such a way as to lead the other parties to assume that it regards itself as bound by the act of its representative. In other words, it will not be entitled to invoke its representative's lack of authority in cases where it has disabled itself from doing so under the principle of *préclusion* (estoppel) set out in article 4.

5. Paragraph 2 of the article deals with the other type of case where ostensible authority exists but has been curtailed by specific instructions. In principle, and in order to safeguard the security of international transactions, the rule, it is suggested, must be that specific instructions given by a State to its representative are only effective to limit his authority vis-à-vis other States, if they are made known to the other States in some appropriate manner before the State in question enters into the treaty. That this is the rule acted on by States is perhaps suggested by the rarity of cases in which a State has sought to disavow the act of its representative by reference to secret limitations upon his authority. In the incident in 1923 of the Hungarian representative's signature of a resolution of the Council of the League, the Hungarian Government sought to disavow his act by interpreting the scope of his full powers, rather than by contending that he had specific instructions limiting their exercise. The Council of the League seems clearly to have held the view that a State may not disavow the act of an agent done within the scope of the apparent authority conferred upon him by his full powers.

6. Paragraph 2 of the article therefore provides that specific instructions are only to be taken into account if disclosed to the other parties before the State in question enters into the treaty.

#### Article 7 — Fraud inducing consent to a treaty

1. Where one party to a treaty has been induced to enter into it by the fraud of another, the former shall be entitled after discovering the fraud —

(a) to declare that the fraud nullifies its consent to be bound by the treaty *ab initio*; or

(b) to denounce the treaty, subject to the reservation of its rights with respect to any loss or damage resulting from the fraud; or

(c) to affirm the treaty, subject to the same reservation.

2. Fraud inducing entry into a treaty comprises —

(a) the making of false statements or representations of fact either in the knowledge that they are false or without regard to whether they are true or false, for the

purpose of procuring the consent of a State to be bound by the terms of a treaty; or

(b) the concealment or non-disclosure of a material fact for such a purpose where the information relating to the fact in question is in the exclusive possession or control of one party only and the circumstances of the treaty are such that good faith requires the disclosure of all material facts.

3. Paragraph 1 of this article shall not, however, apply where —

(a) the adoption of the text of a treaty, which is subject to ratification, acceptance or approval, has been procured by fraud but, after discovering the fraud, the State nevertheless proceeds to ratify, accept or approve the treaty; or

(b) the defrauded State has so conducted itself as to bring the case within the provisions of article 4 of this part.

#### Commentary

1. There does not appear to be any recorded instance of a State claiming to annul or denounce a treaty on the ground that it had been induced to enter into the treaty by the fraud of the other party. The only instance mentioned in the books as one where the matter was discussed at all is the Webster-Ashburton Treaty of 1842 relating to the North-Eastern boundary between the United States and Canada.<sup>31</sup> That, however, was a case of non-disclosure of a material map by the United States in circumstances in which it was difficult to say that there was any legal duty to disclose it, and Great Britain did not assert that the non-disclosure amounted to fraud.

2. Clearly, cases in which Governments resort to deliberate fraud in order to obtain the conclusion of a treaty are not very likely to occur, while cases of fraudulent misrepresentation of material facts would in any event be largely covered by the provisions of the next article concerning the effects of error. The question may therefore be asked whether there is any need to include an article dealing specifically with fraud. The drafts of Sir H. Lauterpacht and Sir G. Fitzmaurice contain such an article, as did also the Harvard Research Draft; and, on balance, the present Special Rapporteur feels that the draft articles should include provisions concerning fraud, even although their application may be rare. Fraud, when it does occur, strikes at the root of a treaty, as of a contract, in a rather different way from innocent misrepresentation and error; it destroys the basis of mutual confidence between the parties as well as nullifying the consent of the defrauded party.

3. Sir H. Lauterpacht's draft was somewhat laconic, speaking simply of "a treaty procured by fraud"; that of Sir G. Fitzmaurice was a good deal more elaborate, reproducing in some detail provisions of municipal law concerning fraud. While not disputing the relevance of municipal law concepts in appreciating the implications of fraud in the law of treaties, the present Special Rapporteur does not consider that all the points made by Sir G. Fitzmaurice need be expressed in the present article.

4. Paragraph 1 sets out suggested rules for determining the effects of fraud on the validity of treaties. Fraud, it is commonly said, undermines the reality of the consent

<sup>30</sup> For further cases, see H. Blix, *op. cit.*, pp. 77-81.

<sup>31</sup> See Moore, *Digest of International Law*, vol. 5, p. 719.

and, as in the case of a contract, renders the treaty voidable. Treaties are employed for very diverse legal purposes — legislative, dispositive, contractual, etc., — and a State induced to enter into a treaty by fraud should, it is thought, have the option of avoiding the treaty *ab initio*, avoiding it as from the date of the discovery of the fraud, or affirming it, according as its interests and the circumstances of the case require.

5. Paragraph 2 defines fraud as comprising wilful or reckless mis-statements or misrepresentations of fact and, in addition, non-disclosure, where good faith requires full disclosure of material facts. Just as municipal law knows of classes of contract — e.g., insurance contracts — which are regarded as "*uberrimae fidei*" so there may, it is thought, be treaties where good faith requires the mutual disclosure of material facts. The Webster-Ashburton Treaty of 1842 was a boundary treaty and in such a case it may be there was no legal obligation to disclose the existence of a map, when access to the map could have been obtained by the other party. But it is easy to imagine treaties of mutual co-operation, e.g., treaties for the mutual exploitation and use of water resources, where non-disclosure of a material fact, e.g., the existence of an underground stream, would not be consistent with good faith. Accordingly, without attempting to give detailed classifications of such cases, it seemed desirable to provide for their possible occurrence. This seems also to have been the view of the previous Special Rapporteur.

6. Paragraph 3 excepts from the rule in paragraph 1 cases where a treaty is subject to ratification, acceptance or approval and fraud used to procure its adoption has been discovered before the act of ratification, acceptance or approval takes place. In such a case, the State is completely free to refuse to enter into the treaty. But if, knowing of the fraud used in the drawing up of the treaty, it nevertheless elects to enter into the treaty, with or without reservations, it clearly cannot afterwards invoke the fraud to disavow its act of ratification, acceptance or approval. Paragraph 3 also excepts from paragraph 1 cases where the State has disabled itself from invoking the fraud under the principle of *préclusion* (estoppel) set out in article 4.

*Article 8 — Mutual error respecting the substance of a treaty*

1. Where a treaty has been entered into by the parties under a mutual error respecting the substance of the treaty, any party shall be entitled to invoke the error as invalidating its consent to be bound by the treaty, provided that:

(a) the error was one of fact and not of law;

(b) the error related to a fact or state of facts assumed by the parties to exist at the time that the treaty was entered into;

(c) the assumed existence of such fact or state of facts was material in inducing the consent of the States concerned to be bound by the terms of the treaty.

2. In any such case the party in question may —

(a) regard the error as nullifying *ab initio* its consent to be bound by the treaty; or

(b) by mutual agreement with the other party or parties concerned, either (i) denounce the treaty as from such date as may be decided, or

(ii) affirm the treaty subject to any modifications that may be decided upon in order to take account of the error.

3. However, a party shall not be entitled to invoke an error as invalidating its consent to be bound where —

(a) the party in question contributed by its own conduct to the error, or could by the exercise of due diligence have avoided it, or if the circumstances were such as to put that party on notice of the possibility of the error; or

(b) the party in question has so conducted itself as to bring the case within the provisions of article 4 of this part.

*Article 9 — Error by one party only respecting the substance of a treaty*

1. Where only one or some of the parties to a treaty has or have entered into it under an error answering to the conditions set out in article 8, paragraph 1, such party or parties shall only be entitled to invoke the error as invalidating its or their consent to be bound by the treaty, if the error was induced by the innocent misrepresentation, negligence or fraud of the other party or parties.

2. In any such case the party or parties in question shall be entitled after discovering the error:

(a) to declare that the error nullifies its consent to be bound by the treaty *ab initio*; or

(b) to denounce the treaty, subject to the reservation of its rights with respect to any loss or damage resulting from the error; or

(c) to affirm the treaty, subject to the same reservation.

3. However, in the case of a State acceding to a treaty in the conclusion of which it did not take part, it may invoke an error as invalidating its consent to be bound by the treaty under the same conditions as those laid down for mutual error in article 8.

*Commentary (articles 8 and 9)*

1. These articles cover error in the formation of consent to a treaty, while the next article deals with error in the expression of a consent which was itself arrived at without any error. In municipal law error occupies a comparatively large place as a factor which may nullify the reality of consent to a contract. Some types of error found in municipal law, however, can hardly be imagined as operating in the field of treaties, e.g., error *in persona*. Similarly, some types of treaty, more especially law-making treaties, appear to afford little scope for error *in substantia* to affect the formation of consent, even if that may not be impossible. Moreover, treaty-making processes are such as to reduce to a minimum the risk of errors on material points of substance. In consequence, the instances in which errors of substance have been invoked as affecting the essential validity of a treaty have not been frequent.

2. Almost all the recorded instances concern geographical errors,<sup>32</sup> and most of them concern errors in

<sup>32</sup> See Harvard Law School: *Research in International Law*, III, Law of Treaties, pp. 1127-8; Hyde, *A.J.I.L.* 1933, p. 311; and *Répertoire français de droit international public*, Vol. I, pp. 55-6.

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

3. The effect of error on treaties was, however, discussed in the *Eastern Greenland* case<sup>33</sup> before the Permanent Court of International Justice, and again in the *Temple* case<sup>34</sup> before the present Court. In the former case Norway contended that, when asked by the Danish Ambassador to say that Norway would not object to the Danish Government's extending its political and economic interests over the whole of Greenland, her Foreign Minister had not realized that this covered the extension of the Danish monopoly regime to the whole of Greenland; and that accordingly his acquiescence in the Danish request had been vitiated by error. The Court contented itself with saying that the Foreign Minister's reply had been definitive and unconditional and appears not to have considered that there was any relevant error in the case. Judge Anzilotti, while also considering that there was no error, went on to say: "But even accepting, for a moment, the supposition that M. Ihlen was mistaken as to the results which might ensue from an extension of Danish sovereignty, it must be admitted that this mistake was not such as to entail the nullity of the agreement. If a mistake is pleaded it must be of an excusable character; and one can scarcely believe that a Government could be ignorant of the legitimate consequences following upon an extension of sovereignty . . ." <sup>35</sup> In other words, he seems to have regarded the error as essentially one of law and not, therefore, "excusable". In the recent *Temple* case the error, which was geographical, arose in somewhat special circumstances. There was no error in the conclusion of the original treaty, in which the parties were agreed that the boundary in a particular area should be the line of a certain watershed; the error concerned what the Court held to be a subsequent, implied, agreement to vary the terms of the treaty. Siam had accepted a map prepared *bona fide* for the purpose of delimiting the boundary in the area in question, but showing a line which did not follow the watershed. Rejecting Siam's plea that her acceptance of the map was vitiated by error, the Court said: "It is an established rule of law that the plea of error cannot be allowed as an element vitiating consent, if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error." <sup>36</sup>

4. The *Eastern Greenland* and *Temple* cases throw light on the conditions under which error will not nullify the reality of the consent rather than on those under which it will do so. The only further guidance which can perhaps be obtained from the Court's decisions is in the *Mavrommatis Concessions* case<sup>37</sup> which, however, con-

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

#### *Commentary to article 8*

5. This article deals with cases where both or all the parties are in error as to the substance of the treaty. Paragraph 1 states the conditions under which such an error may be invoked as invalidating consent. Sub-paragraphs (a), (b) and (c) reproduce the classical requirements for establishing error in the law of contract, which are also applicable in the law of treaties. These requirements were elaborated somewhat in Sir G. Fitzmaurice's draft in his third report (A/CN.4/115) so as to distinguish further between errors of fact and errors of judgement or of motive, and to emphasize the distinction between errors of fact and errors of expectation. However, these distinctions appear to be implied in the requirements set out in sub-paragraphs (a), (b) and (c); while the distinction between an error of fact and of opinion may sometimes call for nice judgement in the light of the particular circumstances of the case. Accordingly, it seems preferable to state the requirements in simple form, leaving their application to any given case to be appreciated in the light of its circumstances.

6. Paragraph 2 sets out the position of the parties in cases of mutual error. Clearly, where the error relates to an essential point of substance, any one of the parties is entitled to regard it as nullifying *ab initio* its consent to be bound by the treaty. This is a decision which each party has the right to take unilaterally, and sub-paragraph (a) so provides. On the other hand, treaties are of very different kinds, fulfilling very varied functions; and it may be that in some cases it may not be desirable or even practicable for the parties, on discovering the error, to regard the treaty as void *ab initio*. Accordingly, sub-paragraph (b) provides for the possibility that the parties may prefer to avoid the treaty as from a given date or to affirm it with modifications. These courses, it seems evident, could only be adopted by agreement between the interested States.

7. Paragraph 3 (a) lays down, as an exception to the rule contained in paragraph 1, that a party may not invoke an error as invalidating its consent to be bound where the error is not "excusable". The formulation of the exception is in substantially the same terms as those used by the Court in the *Temple* case (see paragraph 3 above).

8. Paragraph 3 (b) also reserves from the rule in paragraph 1 cases where a party has precluded (stopped) itself from relying on a plea of error under the principles set out in article 4.

#### *Commentary to article 9*

9. Article 9 deals with cases of unilateral error, and the general view seems to be that unilateral error cannot be invoked to invalidate a treaty unless it was induced by the innocent misrepresentation, negligence or fraud of the other party, and paragraph 1 so provides.

10. The position of a party which has been led into error by the fault of the other party would seem to be

<sup>33</sup> P.C.I.J., Series A/B, No. 53, pp. 71 and 91.

<sup>34</sup> I.C.J. Reports, 1962, p. 26; see also the individual opinion of Judge Fitzmaurice, p. 57.

<sup>35</sup> P.C.I.J., Series A/B, No. 53, p. 92.

<sup>36</sup> I.C.J. Reports, 1962, p. 26.

<sup>37</sup> P.C.I.J., Series A, No. 11.

similar to that of a party induced to enter into a treaty by fraud. The party concerned should have the right either to avoid the treaty *ab initio*, to denounce it or to affirm it while reserving its rights with respect to any resulting loss. The position is so stated in paragraph 2.

11. Paragraph 3 deals with the special case of a State led to accede to a treaty through error. Although the error may be of a unilateral character, the position of an acceding State is rather different from that of an original party led to enter into the treaty through error. The draft follows that of the previous Rapporteur in assimilating the case of error on the part of an acceding State to one of mutual error.

*Article 10 — Errors in expression of the agreement*

1. Where a treaty has been entered into with respect to whose substance the parties were mutually agreed, but the text of which contains an error in the expression of their agreement, the error may not be invoked by any party as invalidating its consent to be bound by the treaty.

2. In any such case articles 26 and 27 of part I shall apply.

*Commentary*

1. An error, which does not relate to the substance of what was agreed but merely to the expression of it in the text of the treaty, clearly does not detract from the essential validity of the treaty; and paragraph 1 of this article so provides.

2. Errors of expression, on the other hand, may lead to difficulties and divergent interpretations, and it is desirable that they should, if possible, be corrected. Paragraph 2 therefore draws attention to articles 26 and 27 of part I, which deal with the procedures for correcting errors.

3. As pointed out in the Commentary to article 26 of part I, the correction of errors by these procedures is only possible where the parties are agreed as to the existence of the error in the expression of their agreement. Where the error is not agreed, the problem is one of "mistake", which falls under articles 8 and 9 of the present part. In cases where there is no agreement as to an alleged error in expression and the alleged error does not affect the essential validity of the treaty under articles 8 and 9, the question becomes one of interpretation. The treaty stands and the difficulty as to its content has to be resolved by the application of the normal rules for the interpretation of treaties.

*Article 11 — Personal coercion of representatives of States or of members of State organs*

1. If coercion, actual or threatened, physical or mental, with respect to their persons or to matters of personal concern, has been employed against individual representatives of a State or against members of an organ of the State in order to induce such representative or organ to sign, ratify, accept, approve or accede to a treaty, the State in question shall be entitled after discovering the fact —

(a) to declare that the coercion nullifies the act of its representative *ab initio*; or

(b) to denounce the treaty, subject to the reservation of its rights with respect to any loss or damage resulting from the coercion; or

(c) to approve the treaty, subject to the same reservation.

2. Paragraph 1 does not apply, however, where —

(a) a treaty, which is subject to ratification, acceptance or approval, has been signed by a representative under coercion but, after discovering the coercion, the State proceeds to ratify, accept or approve the treaty; or

(b) the State has so conducted itself as to bring the case within the provisions of article 4 of this part.

*Commentary*

There appears to be general agreement that acts of coercion or threats applied to individuals with respect to their own persons or personal affairs in order to procure the signature, ratification, acceptance or approval of a treaty will necessarily justify the State in repudiating the treaty.<sup>38</sup> History provides a number of alleged instances of the employment of coercion against not only negotiators but members of legislatures in order to procure the signature or ratification of a treaty. Amongst these instances the Harvard Research Draft lists:<sup>39</sup> the surrounding of the Diet of Poland in 1773 to coerce its members into accepting the treaty of partition; the coercion of the Emperor of Korea and his ministers in 1905 to obtain their acceptance of a treaty of protection; the surrounding of the national assembly of Haiti by United States forces in 1915 to coerce its members into ratifying a convention. Another instance from more recent history was the third-degree methods employed in 1939 by the Hitler regime to obtain the signatures of the President and Foreign Minister of Czechoslovakia to a treaty creating a German protectorate over Bohemia and Moravia, although in that instance the coercion was a mixture of personal pressure on the individuals and threats against their people.<sup>40</sup>

2. The question how far coercion of the State itself, whether by acts or threats, may afford a ground for repudiating a treaty is more controversial. Moreover, although it may not always be possible to distinguish completely between pressure upon the State and personal pressure upon individual ministers or representatives of the State, the two kinds of coercion are essentially different. The Special Rapporteur has accordingly dealt with them in separate articles, and the effect upon the validity of a treaty of its having been procured by the coercion of the State itself is considered in the next article.

3. Paragraph 1, therefore, refers to coercion of individual representatives of the State or members of State organs "with respect to their persons or to matters of personal concern". This phrase is intended to confine the coercion covered by this article to coercion of the individual as distinct from the State, and yet to be broad enough to include such forms of coercion of the individual as threats directed against his family or dependents. The explicit reference to "physical or mental" coercion is also designed to underline that coercion is not confined to acts or threats of physical force.

4. The position of a State confronted by the fact that coercion was used against its representatives or members of its administration to obtain the conclusion of a treaty

<sup>38</sup> McNair, *op. cit.*, pp. 207-209.

<sup>39</sup> Pages 1155-9.

<sup>40</sup> See *Répertoire français de droit international public*, vol. 1, pp. 52-54.

would seem to be similar to that of one confronted with a case of fraud. The provisions of paragraph 1 of this article therefore conform closely to those of paragraph 1 of article 7.

5. In the same way, the provisions of paragraph 2 of this article correspond to those of paragraph 3 of article 7, since on these points also the position seems to be the same in cases of coercion as in fraud.

*Article 12 — Consent to a treaty procured by the illegal use or threat of force*

1. If a State is coerced into entering into a treaty through an act of force, or threat of force, employed against it in violation of the principles of the Charter of the United Nations, the State in question shall be entitled —

(a) to declare that the coercion nullifies its consent to be bound by the treaty *ab initio*; or

(b) to denounce the treaty, subject to the reservation of its rights with respect to any loss or damage resulting to it from having been coerced into the treaty; or

(c) to affirm the treaty, subject to the same reservation, provided always that no such affirmation shall be considered binding unless made after the coercion has ceased.

2. Paragraph 1 does not apply, however, where after the coercion has ceased the State has so conducted itself as to bring the case within the provisions of article 4 of this part.

*Commentary*

1. The traditional doctrine prior to the Covenant of the League was that the validity of a treaty was not affected by the fact that it had been brought about by the threat or use of force. However, this doctrine was simply a reflection of the general attitude of international law during that era towards the legality of the use of armed force for the settlement of international disputes; and with the Covenant and the General Treaty for the Renunciation of War, 1927 (Pact of Paris) there began to develop a strong body of opinion which advocated that the validity of such treaties ought no longer to be admitted. The declaration of the criminality of aggressive war in the Nuremberg and Tokyo Charters, the clear-cut prohibition of the threat or use of force in Article 2, paragraph 4, of the Charter of the United Nations and the practice of the United Nations itself has reinforced and crystallized this opinion. If the use or threat of armed force in pursuit of national policies is now in certain circumstances to be considered criminal under international law, it is natural to question the possibility of regarding treaties procured by or resulting from such criminal acts as valid treaties binding upon the victims of the aggression.

2. Sir H. Lauterpacht, in his first report (A/CN.4/63, *ad* article 12), submitted a strongly reasoned argument to the Commission urging it to hold that a change has come about in international law on this point. In doing so, he said, the Commission would be "codifying not developing, the law of nations in one of its most essential aspects". He conceded that to allow States too easily to denounce treaties by making unilateral assertions of coercion might open the door to the evasion of treaties; but he proposed to meet the difficulty by providing that

a treaty was only to be invalid on the ground of coercion, if so declared by the International Court of Justice.

3. Sir G. Fitzmaurice, on the other hand, while recognizing the strength of present-day opinion on the point, considered that the practical difficulties in the way of admitting coercion of the State as a ground for the invalidity of a treaty are too great. These difficulties he summarized as follows:

"The case must evidently be confined to the use or threat of *physical* force, since there are all too numerous ways in which a State might allege that it had been induced to enter into a treaty by pressure of some kind (for example, economic). On this latter basis a dangerously wide door to the invalidation of treaties, and hence a threat to the stability of the treaty-making process, would be opened. If, however, the case is confined (as it obviously must be) to the use or threat of physical force, what follows? Either the demand for the treaty in question is acceded to, or it is not. If it is not, then *cadit quaestio*. If, *per contra*, it is, then the same compulsion or threat that procured the conclusion of the treaty will ensure its execution; and by the time, if ever, that circumstances permit of its repudiation, it will have been carried out, and many steps taken under it will be irreversible, or reversible, if at all, only by further acts of violence. It is this type of consideration, and not indifference to the moral aspects of the question, which has led almost every authority thus far to take the view that it is not practicable to postulate the invalidity of this type of treaty, and that if peace is a permanent consideration, it must follow logically that peace may, in certain circumstances, have to take precedence for the time being over abstract justice." (A/CN.4/115, para. 62).

These objections led him to the conclusion that the subject is only part of the wider problem of what exactly, in the light of modern conditions and juristic ideas, should be the consequences of the illegitimate use or threat of force; and that it is both inappropriate and undesirable to attempt to deal with the treaty aspect of the problem in isolation.

4. The practical difficulties which led the previous Special Rapporteur to omit forcible coercion of the State itself from his draft articles on the essential validity of treaties are, of course, those which are generally recognized to constitute an obstacle to the effectiveness of the principle of the non-recognition of situations brought about by illegal uses of force. Important though it may be to recognize the existence of these difficulties, they do not appear to be of such a kind as to call for the omission from the present articles of any mention of a principle which derives from the most fundamental provisions of the Charter and the general relevance of which to the validity of treaties cannot today be regarded as open to question. The facts, that sometimes it may not be possible to restore a treaty situation as it was before an aggression took place, and that sometimes the lapse of time may ultimately render an illegal treaty situation permanent, do not seem sufficient arguments for not proclaiming the invalidity in law of a treaty brought about by an illegal use or threat of force and the legal right of the coerced State to set it aside. Even if a State should initially be successful in achieving its objects by an aggressive use of force, it cannot be assumed that the

right to set aside a treaty resulting from aggression will never prove to be relevant in the subsequent evolution of world politics; the very existence of the United Nations gives a certain guarantee that that right may prove meaningful, if subsequent events should furnish an opportunity for its legitimate exercise. In the same way, the existence of the United Nations also provides machinery through which the international community can have a voice in the way in which the right is exercised, so as to minimize the risks to international peace mentioned by Sir G. Fitzmaurice.

5. Nor is it thought that to allow coercion of the State as a ground for contesting the validity of a treaty would involve any undue risks to the general security of international treaties, unless "coercion" is extended to cover other acts than the use or threat of force. Such risk as there may be does not seem to be materially greater in the case of "coercion" than in the case of some other grounds of invalidity, such as fraud and error. The risk lies in unilateral and *mala fide* assertions of "coercion" as a mere pretext for denouncing a treaty that is now thought to be disadvantageous. But if invalidity of treaties on the ground of coercion is confined to treaties procured by the use or threat of force, the possibilities of a plausible abuse of this ground of invalidity do not appear to be any more substantial than in cases of fraud or error or than in cases of termination of treaties on the ground of an alleged breach of the treaty or of a fundamental change in the circumstances (*rebus sic stantibus*).

6. On the other hand, if "coercion" were to be regarded as extending to other forms of pressure upon a State, to political or economic pressure, the door to the evasion of treaty obligations might be opened very wide; for these forms of "coercion" are much less capable of definition and much more liable to subjective appreciations. Moreover, the operation of political and economic pressures is part of the normal working of the relations between States, and international law does not yet seem to contain the criteria necessary for formulating distinctions between the legitimate and illegitimate uses of such forms of pressure as a means of securing consent to treaties. Accordingly, while accepting the view that some forms of "unequal" treaty brought about by coercion of the State must be regarded as lacking essential validity, the Special Rapporteur feels that it would be unsafe in the present state of international law to extend the notion of "coercion" beyond the illegal use or threat of force.

7. It is, indeed, important to stress that only treaties resulting from an illegal use or threat of force are lacking in essential validity; for otherwise the security of armistice agreements and peace settlements, whether legitimate or illegitimate, would be endangered and the difficulty of terminating hostilities increased. Clearly, there is all the difference in the world between coercion used by an aggressor to consolidate the fruits of his aggression in a treaty and coercion used to impose a peace settlement upon an aggressor. As one writer has pointed out,<sup>41</sup> the validity of the peace settlements of the First World War was never questioned in the numerous cases in which they came under discussion before the Permanent Court or in the innumerable proceedings arising out of them before arbitral tribunals. Again,

while the treaty of 1939 between Nazi Germany and Czechoslovakia is generally regarded as invalid by reason of the coercion both of the delegates and the State,<sup>42</sup> the validity of the Italian Peace Treaty, a treaty certainly not negotiated but imposed, has not been regarded as open to challenge.<sup>43</sup>

#### Article 13 — Treaties void for illegality

1. A treaty is contrary to international law and void if its object or its execution involves the infringement of a general rule or principle of international law having the character of *jus cogens*.

2. In particular, a treaty is contrary to international law and void if its object or execution involves —

(a) the use or threat of force in contravention of the principles of the Charter of the United Nations;

(b) any act or omission characterized by international law as an international crime; or

(c) any act or omission in the suppression or punishment of which every State is required by international law to co-operate.

3. If a provision, the object or execution of which infringes a general rule or principle of international law having the character of *jus cogens*, is not essentially connected with the principal objects of the treaty and is clearly severable from the remainder of the treaty, only that provision shall be void.

4. The provisions of this article do not apply, however, to a general multilateral treaty which abrogates or modifies a rule having the character of *jus cogens*.

#### Commentary

1. The question how far international law recognizes the existence within its legal order of rules having the character of *jus cogens* is controversial. Some writers, considering that the operation even of the most general rules of international law still falls short of being universal, deny that any rule can properly be regarded as a *jus cogens*, from which individual States are not competent to derogate by treaties between themselves.<sup>44</sup> Imperfect though the international legal order may be, the view that in the last analysis there is no international public order — no rule from which States cannot at their own free will contract out — has become increasingly difficult to sustain. The law of the Charter concerning the use of force and the development — however tentative — of international criminal law presupposes the existence of an international public order containing rules having the character of *jus cogens*. The Commission will therefore, it is believed, be fully justified in taking the position in the present articles that there are certain rules and principles from which States cannot derogate by merely bilateral or regional treaty arrangements.<sup>45</sup>

2. The formulation of the rule, however, is not free from difficulty, since there is not as yet any generally accepted criterion by which to identify a general rule of international law as having the character of *jus cogens*.

<sup>42</sup> Ratz-Lienert and Klein v. Nederlands Beheers-Instituut (*International Law Reports*, 1957, p. 536).

<sup>43</sup> Cf. *Re Rizzo and Others* (*International Law Reports*, 1952, p. 478).

<sup>44</sup> See for example G. Schwarzenberger, *International Law* (3rd edition), vol. I, pp. 426-427.

<sup>45</sup> See McNair, *op. cit.*, pp. 213-4.

<sup>41</sup> McNair, *op. cit.*, p. 209.

Moreover, it is undeniable that the majority of the general rules of international law do not have that character and that States may contract out of them by treaty. Sir H. Lauterpacht, although emphasizing that States are largely free to modify by treaty the application of customary law as between themselves, proposed a somewhat broad criterion. A treaty would be void under his draft if its performance involved an act "illegal under international law" (A/CN.4/63, article 15). Unless the concept of what is "illegal under international law" is narrowed by reference to the concept of *jus cogens*, it may be too wide. The general law of diplomatic immunities makes it illegal to do certain acts with regard to diplomats; but this does not preclude individual States from agreeing between themselves to curtail the immunities of their own diplomats. The phrase "illegal under international law" would also seem open to the interpretation that any treaty infringing the prior rights of another State is *ipso facto* void. This does, indeed, appear to have been the view of Sir H. Lauterpacht; but the evidence hardly seems to bear it out, especially in regard to treaties which conflict with the rights of other States under prior treaties.

3. Sir G. Fitzmaurice, on the other hand, expressed the rule in terms limiting the cases of illegality to infringements of rules of the nature of *jus cogens*. The present Special Rapporteur in paragraph 1 of the article has done likewise, even although he appreciates that this may leave some room for argument as to exactly what rules of international law institute *jus cogens*. In many national systems of law there are well-established categories of unlawful contracts. In international law, however, the time does not seem ripe for trying to codify the possible categories of "unlawful" treaties. The appearance of the concept of *jus cogens*, as already indicated, is comparatively recent, while international law is at a stage of rapid development. Accordingly, the prudent course seems to be to state in general terms the rule that a treaty is void if it conflicts with a rule of *jus cogens* and to leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals. At the same time, a general definition of a *jus cogens* rule has been included in article 1.

4. On the other hand, there may be advantage in indicating, by way of example, some of the more conspicuous instances of treaties that are void by reason of their inconsistency with a *jus cogens* rule. Paragraph 2, therefore, sets out three such instances. The first, the illegal use of force, hardly needs explanation; the principles stated in the Charter are generally accepted as expressing not merely the obligations of Members of the United Nations but the general rules of international law of today concerning the use of force. The second also speaks for itself; if a treaty contemplates the performance of an act criminal under international law, its object is clearly illegal. The third instance would also seem to be self-evident. Where international law, as in

the cases of the slave-trade, piracy and genocide,<sup>46</sup> places a general obligation upon every State to co-operate in the suppression and punishment of certain acts, a treaty contemplating or conniving at their commission must clearly be tainted with illegality. These instances are not exhaustive; the words "In particular" at the beginning of the paragraph indicate that they are merely particular applications of the principle that infringements of a *jus cogens* rule render a treaty void.

5. One point of view might be that any treaty having an illegal object should be totally void and lack all validity until reformed by the parties themselves in a way to cure it of the illegality. Having regard, however, to the relationships created by treaty and to the prejudice that might result from holding a treaty to be totally void by reason of a minor inconsistency with a *jus cogens* rule, it seems preferable to allow the severance of illegal provisions from a treaty in cases where they do not form part of the principal objects of the treaty and are clearly severable from the rest of its provisions.

6. Finally, it is to be emphasized that conflict with a rule of *jus cogens* is a ground of invalidity quite independent of any principle governing the legal effect of treaties which conflict with prior treaties. True, the *jus cogens* rule may be one that has been embodied in a prior general multilateral treaty. Under the present article, however, the relevant point is not the conflict with the prior general treaty, but the conflict with a rule having the character of *jus cogens*. The problem of resolving conflicts between successive treaties dealing with the same matters may sometimes overlap with the question of conflict with a *jus cogens* rule; but the rule in the present article is an overriding one of international public order, which invalidates the later treaty independently of any conclusion that may be reached concerning the relative priority to be given to treaties whose provisions conflict. On the other hand, it would clearly be wrong to consider rules now accepted as rules of *jus cogens* as immutable and incapable of abrogation or amendment in future. Accordingly, paragraph 4 provides that the article does not apply to a general multilateral treaty which expressly abrogates or modifies a rule having the character of *jus cogens*.

#### Article 14 — Conflict with a prior treaty

1. (a) Where the parties to two treaties are the same or where the parties to a later treaty include all the States parties to an earlier treaty, the later treaty is not invalidated by the fact that some or all of its provisions are in conflict with those of the earlier treaty.

(b) In any such case the conflict between the two treaties shall be resolved on the basis of the general principles governing the interpretation and application of treaties, their amendment or termination.

2. (a) Where one or a group of the parties to a treaty, either alone or in conjunction with third States, enters into a later treaty, the later treaty is not invalidated by the fact that some or all of its provisions are in conflict with those of the earlier treaty.

(b) In any such case the conflict between the two treaties shall be resolved —

(i) if the effectiveness of the second treaty is contested by a State party to the earlier treaty which is not

<sup>46</sup> See articles 13 and 14 of the Geneva Convention on the High Seas, 1958, text in *United Nations Conference on the Law of the Sea, Official Records*, vol. II (A/CONF. 13/38), United Nations publication, Sales No. 58.V.4, vol. II, annexes, doc. A/CONF. 13/L.53, and articles 5 and 7 of the Convention for the Prevention and Punishment of the Crime of Genocide 1948, adopted by General Assembly resolution 260 (III). Text in *United Nations Treaty Series*, vol. 78.

a party to the later treaty, upon the basis that the earlier treaty prevails;

- (ii) if the effectiveness of the second treaty is contested by a State which is a party to the second treaty, upon the basis of the principles governing the interpretation and application of treaties, their amendment or termination.

3. (a) Paragraphs 1 and 2 are without prejudice to any question of invalidity that may arise when the earlier treaty is the constituent instrument of an international organization which contains provisions limiting the treaty-making powers of its members with respect to the amendment of the constituent treaty or with respect to any particular matters.

(b) In the event of a conflict between the obligations of the Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter shall prevail.

4. Paragraphs 1 and 2 shall not be applicable if the provision of an earlier treaty with which a later treaty conflicts is a provision embodying a rule having the character of *jus cogens*, in which case article 13 shall apply.

#### Commentary

1. The legal effect of a conflict with a prior treaty, as already emphasized in the commentary to the previous article, is a question which is quite distinct from that of conflict with a *jus cogens* rule, even although they may overlap when the *jus cogens* rule is embodied in a general multilateral treaty such as the Genocide Convention. The present article, therefore, is concerned exclusively with the question how far the essential validity of a treaty may be affected by the fact that its provisions conflict with those of a prior treaty.

2. It is evident that, where the parties to both treaties are identical, no question of essential validity can normally arise. The States concluding the second treaty are then fully competent to amend or annul the prior treaty and the problem whether, by reason of the conflict, the second treaty modifies or terminates the earlier treaty is simply one of interpreting the provisions of the second treaty. The conflict may raise a question of the amendment or termination of treaties, but not of essential validity. The position is also broadly the same where the parties to the two treaties are not identical but the parties to the later treaty include all the parties to the earlier one; since the parties to the earlier treaty are together competent to amend or annul it, they may also do so in conjunction with other States.

3. There are, nevertheless, two classes of case in which it is conceivable that a question of essential validity may arise, even although the parties to the two treaties are identical. One is the case where the earlier treaty is the constituent instrument of an international organization and provides that any amendment to it must be effected exclusively by action taken through organs of the organization. In this type of case it seems that the parties to the treaty transfer, in part at least, their treaty-making capacity with respect to the modification of the constituent treaty to the organization as such. For example, Articles 108 and 109 of the Charter appear to establish special constitutional processes for its amendment which are intended to exclude the normal diplomatic procedure

for amending treaties. In these special processes, two organs of the United Nations, the General Assembly and the Security Council, are given particular roles; at the same time the classic procedure of ratification by individual States is retained, but with the difference that any amendment comes into force for all Members even if ratified only by two-thirds. The possibility that all the Members of the United Nations might together conclude a new diplomatic treaty outside the Organization modifying provisions of the Charter is so remote as to make the question of the validity of the later treaty somewhat academic. But the question is by no means so academic in the case of a more limited organization, and has in fact been actively debated in connexion with the European Community Treaties.<sup>47</sup> The Franco-German Agreement of 1956 concerning the territory of the Saar resulted in a fundamental change of circumstance necessitating some revision of the European Coal and Steel Community Treaty, 1951, whereas articles 95 and 96 of the Treaty did not contemplate any amendment of its provisions during the "Transitional Period", which would only terminate in 1958. Although the problem was solved by the conclusion of a diplomatic treaty directly between the member States, it was made plain, at least in the Netherlands, that this was to be regarded as only justified by the exceptional and unforeseen circumstance of the transfer of the Saar to Germany; and the Netherlands Chamber adopted a resolution expressly declaring that after the end of the transitional period revision of the treaty, as also of the other Community Treaties, could only take place through the procedures laid down in the treaties themselves.

4. The other possible case which might arise would be that where an earlier treaty, a constituent instrument of an organization, had conferred exclusive treaty-making powers with respect to particular matters upon the organization. In such a case it could be said that the States concerned had deliberately transferred to the organization, or to certain of its organs, their treaty-making capacity with respect to the matters in question. Certainly, it seems to have been the view of all the judges of the Permanent Court, both majority and minority, in the *Austro-German Customs Union* case<sup>48</sup> that a State which by treaty not merely accepts restrictions upon the exercise of powers, but places itself under the authority of another State or group of States with respect to those powers, limits to that extent its own sovereignty and treaty-making capacity.

5. The two cases discussed in the preceding paragraphs really concern limitations upon capacity rather than treaties invalid by reason of inconsistency with a prior treaty. In the first case, the members of the organization have limited their capacity to amend the constitution of the organization by subjecting it to particular procedures within the organization; in the second case they have actually transferred a portion of their treaty-making capacity to the organization. The precise effect of such limitations upon treaty-making capacity may be controversial, and to introduce these questions of capacity into the present article may only complicate an already

<sup>47</sup> See Van der Goes van Naters, "La Révision des traités supranationaux", *Nederlands Tijdschrift voor Internationaal Recht* (Liber Amicorum J. P. A. François), July 1959, pp. 120-131.

<sup>48</sup> *P.C.I.J.*, 1931, Series A/B 41, p. 37.

difficult subject.<sup>49</sup> This being so, it is thought sufficient to reserve the point in the present article, without prescribing any definite rule. Accordingly, paragraph 1 of the article sets out, in sub-paragraphs (a) and (b), the general rules governing this class of case, while paragraph 3 (a) reserves the position in regard to limitations contained in the constituent instruments of international organizations.

6. The main difficulty, however, arises where the parties to the later treaty do not include all the States which were parties to the earlier one. This may come about in two ways: (1) some, but not all, of the parties to a treaty may enter into a second treaty modifying the application of the earlier treaty as between each other but without consulting the remaining parties to the earlier treaty; or (2) the situation is similar but one or more outside States, not parties to the earlier treaty, participate in the second treaty. In either of these cases the second treaty may encroach upon the vested rights of other States under the earlier treaty and the question is how far this fact may affect the essential validity of the second treaty.

7. Sir H. Lauterpacht's draft (A/CN.4/63 and 87, article 16) provided as the general rule that a treaty should automatically be void "if its performance involves a breach of a treaty obligation previously undertaken by one or more of the contracting parties". He qualified this provision by saying that it should only apply "if the departure from the terms of the prior treaty is such as to interfere seriously with the interests of the other parties to that treaty or substantially to impair an essential aspect of its original purpose". He also excepted general multilateral treaties altogether from the provision; and in his second report he extended this exception to treaties revising multilateral conventions when concluded by "a substantial majority of the parties to the revised convention". He justified this addition by pointing out in some detail the complications that might otherwise arise in the revision of multilateral conventions and especially those of a law-making type, where successive treaties on the same subject with varying parties are a common enough phenomenon. In support of his proposed general rule, Sir H. Lauterpacht cited the dissenting opinions of Judges Van Eysinga and Schücking in the *Oscar Chinn* case,<sup>50</sup> and of Judges Nyholm and Negulesco in the *European Commission of the Danube* case.<sup>51</sup> He further explained that this rule proceeded on the assumption that "if parties to a treaty bind themselves to act in a manner which is a violation of the rights of a party under a pre-existing treaty, they commit a legal wrong which taints the subsequent treaty with illegality" (A/CN.4/63, article 16, comment. para. 2). This assumption he considered to follow from "general principles of law", "requirements of international public policy" and "the principle of good faith which must be presumed to govern international relations". "In the international sphere", he said, "the reasons for regarding later inconsistent treaties as void and unenforceable are even more cogent than in private law". Although a number of older writers, including Oppenheim, provide support for these views, the majority of writers today do not consider

that a treaty which infringes the rights of other States under prior treaties is necessarily invalid. They hold that a question of invalidity may arise in particular cases, but that in general the question is rather one of the priority to be given to conflicting legal provisions.<sup>52</sup>

8. Sir G. Fitzmaurice's draft (A/CN.4/115, articles 18 and 19) was based on the view that in general the question is one of reconciling conflicting legal provisions and that only in certain types of case may the later treaty be invalid. His proposals concerning conflicts with prior treaties were somewhat elaborate, and in dealing with the main problem he drew a distinction between (1) cases where the parties to the second treaty include some only of the parties to the earlier treaty and some additional parties, and (2) cases where the parties to the second treaty include some only of the parties to the earlier treaty but no additional parties.

9. In the first class of case, where the parties to the later treaty comprise some new parties, he considered that the later treaty is not invalidated by the conflict and governs the relations between the parties to it; on the other hand, the earlier treaty prevails over the later treaty in the relations between any States which are parties to both treaties and States which are parties only to the earlier one. States which are parties to both treaties may therefore find themselves liable to make reparation to the remaining parties of the earlier treaty, if they do not carry it out; but, if they do carry it out, they may equally be liable to make reparation to the remaining parties of the second treaty, if the latter were unaware of the conflict when they entered into the second treaty. In other words, the conflict raises questions of priority and of legal liability, but not of validity.

10. Sir G. Fitzmaurice justified his rejection of the line taken by the previous Special Rapporteur by citations from certain writers<sup>53</sup> and also by the terms of Article 103 of the Charter. He pointed out that Article 103 does not pronounce the invalidity of treaties between Member States conflicting with the Charter, but only that in the event of a conflict between the obligations of Members of the United Nations under the Charter and their obligations under any other international agreement, their obligations under the Charter are to prevail. The rationale of Article 103 clearly is that priority is to be given to the Charter, not that invalidity is to attach to a treaty which conflicts with it. The conflicting treaty may be unenforceable, if to enforce it involves a violation of the Charter; but it is not void. Although this is clearly the effect of Article 103, reference to the *travaux préparatoires* shows that the Article was drafted primarily with prior treaties in mind and that Committee IV/2 looked rather to Article 2, paragraph 2 (the duty of each Member to fulfil in good faith its obligations under the Charter) to cover the case of a Member entering into a subsequent treaty inconsistent with the Charter. The report of that Committee stated:<sup>54</sup> "Concerning the second rule of

<sup>49</sup> Previous drafts on the law of treaties have not dealt with these questions.

<sup>50</sup> *P.C.I.J.* Series A/B, No. 63, pp. 132-136 and 148-150.

<sup>51</sup> *P.C.I.J.* Series B/14, pp. 73 and 129.

<sup>52</sup> e.g. C. Rousseau, *Principes généraux du droit international public*, p. 341; Lord McNair, *op. cit.*, p. 222; *Harvard Law School, Research in International Law*, III, Law of Treaties, p. 1024.

<sup>53</sup> C. Rousseau and the *Harvard Research in International Law*.

<sup>54</sup> U.N.C.I.O., Vol. 13, p. 708.

Article 20 of the Covenant, under which Members undertook not to enter thereafter into any engagement inconsistent with the terms thereof, the Committee has thought it to be so evident that it would not be necessary to express it in the Charter, all the more since it would repeat in a negative form the rule expressed in paragraph 2 of Chapter II<sup>55</sup> of the Charter". Nevertheless, it remains true that Article 103, which is entirely general in its terms and therefore appears to cover both prior and future agreements, lays down the principle of the priority of the Charter, not that of the invalidity of inconsistent treaties.<sup>56</sup>

11. The particular question of the effect of the Charter upon a subsequent treaty entered into by a Member of the United Nations may require further consideration. It suffices here to say that the present Special Rapporteur is in agreement with the position taken by Sir G. Fitzmaurice that, where the parties to the second treaty include States not parties to the earlier one, the fact that there is a conflict between the two treaties does not render the later one invalid.

12. In the second class of case, where some, but not all, of the parties to a multilateral treaty conclude a later treaty modifying its application as between themselves, Sir G. Fitzmaurice again adopted as the fundamental rule the principle that the conflict with the earlier treaty does not render the later treaty invalid. He conceded that some weighty authorities have taken the view that it is not permissible for a restricted number of the parties to a treaty to conclude a new treaty on the same subject, if to do so would impair the obligation created by the earlier treaty or be "so inconsistent with the general purpose of the earlier treaty as to be likely to frustrate that purpose" (A/CN.4/115, para. 88). He also noted the view of Judges Van Eysinga and Schücking that in the case of a treaty having a quasi-statutory effect and status, providing a constitution, system or régime for an area or in respect of a given subject, it is not open to any of the parties to enter into such a later treaty without the consent of all the parties to the earlier one. Nevertheless, he considered that there are strong reasons for a more flexible rule. The second treaty is only binding upon the parties to it and does not in law diminish or affect the rights of the other States parties to the earlier treaty. It may do so in fact by undermining the régime of the earlier treaty and this may in some cases raise the question of the validity of the second treaty. But there is, in his view, another important consideration pointing the other way:

"The right of some of the parties to a treaty to modify or supersede it in their relations *inter se* is one of the chief instruments, increasingly in use today, whereby a given treaty situation can be changed in a desirable and perhaps necessary manner, in circumstances in which it would not be possible or would be very difficult to obtain — initially at any rate — the consent of all the States concerned. To forbid this process — or render it unduly difficult — would be in practice to place a veto in the hands of what might often be a small minority of parties opposing change. In the case of many important groups of treaties involving a 'chain' series, such as the postal

conventions, the telecommunications conventions, the industrial property and copyright conventions, the civil aviation conventions, and many maritime and other technical conventions, it is precisely by such means that new conventions are floated. In some cases the basic instruments of the constitutions of the organizations concerned may make provision for changes by a majority rule, but in many cases not, so that any new or modifying system can only be put into force initially as between such parties as subscribe to it." (*ibid.*, para. 89).

He also insisted that in cases of this kind it is often quite possible for the second treaty to be applied as between its parties without disturbing the application of the earlier treaty as between them and the other States parties to that treaty.

13. On the basis of the above reasoning, the previous Special Rapporteur was disinclined ever to regard a later treaty as invalidated by reason of a conflict with a previous treaty whose obligations are of a reciprocal kind. However, and with some hesitation, he specified two cases where the later treaty would be invalidated:

(1) where the earlier treaty expressly prohibits, as between any of the parties to it, the conclusion of any treaty inconsistent with its provisions;

(2) where the later treaty necessarily involves for the parties to it action in direct breach of their obligations under the earlier treaty.

At the same time, he considered that the position is quite different where the obligations of the earlier treaty are not of a "reciprocating" kind but are of an "interdependent" or objective kind. In these cases he provided that invalidity should be the general rule and dealt with them in a separate article, which will be examined later in paragraphs 22-30 of this Commentary.

14. The complexity of the proposals of the previous Special Rapporteur testify to the difficulty of the problem with which the present article deals. Sir H. Lauterpacht only arrived at his comparatively simple set of rules by applying in the law of treaties what he considered to be a general principle of law rendering void "contracts to break a contract". But treaties today serve many different purposes, legislation, conveyance of territory, administrative arrangement, constitution of an international organization, etc., as well as purely reciprocal contracts; and, even if it be accepted that the illegality of a contract to break a contract is a general principle of law — a point open to question — it does not at all follow that the principle should be applied to treaties infringing prior treaties. The imperfect state of international organization and the manifold uses to which treaties are put seem to make it necessary for the Commission to be cautious in laying down rules which brand treaties as illegal and void. This is not to say that to enter into treaty obligations which infringe the rights of another State under an earlier treaty does not involve a breach of international law involving legal liability to make redress to the State whose rights have been infringed. But it is another thing to say that the second treaty is void for illegality and a complete nullity as between the parties to it.

15. The attitude adopted by the Permanent Court in the *Oscar Chinn* and *European Commission of the Danube* cases hardly seems consistent with the existence

<sup>55</sup> The original designation of Article 2 (2) at the San Francisco Conference.

<sup>56</sup> See further paragraphs 33-4 of this Commentary.

in international law of a general doctrine invalidating treaties entered into in violation of the provisions of a prior treaty. In the *Oscar Chinn* case<sup>57</sup> the earlier treaty was the General Act of Berlin of 1885, which established an international régime for the Congo Basin. That treaty contained no provision authorizing the conclusion of bilateral arrangements between particular parties; on the contrary it contained a provision expressly contemplating that any modification or improvement of the Congo régime should be introduced by "common accord" of the signatory States. Nevertheless, in 1919 certain of the parties to the Berlin Act, without consulting the others, concluded the Convention of St. Germain whereby, as between themselves, they abrogated a number of the provisions of the Berlin Act, replacing them with a new régime of the Congo. The Court contented itself with observing that, no matter what interest the Berlin Act might have in other respects, the Convention of St. Germain had been relied on by both the litigating States as the source of their obligations and must be regarded by the Court as the treaty which it was asked to apply. Admittedly, the question of the legality of the Convention of St. Germain had not been raised by either party. But the question was dealt with at length by Judges Van Eysinga and Schücking in dissenting judgements and had, therefore, evidently been debated within the Court. Moreover, these Judges had expressly taken the position that the question of the validity or invalidity of the treaty was not one which could depend on whether any Government had challenged its legality, but was a question of public order which the Court was bound itself to examine *ex officio*. In these circumstances, it is difficult to interpret the Court's acceptance of the Convention of St. Germain as the treaty which it must apply, as anything other than a rejection of the doctrine of the absolute invalidity of a treaty which infringes the rights of third States under a prior treaty.

16. The line taken by the Court in its advisory opinion on the *European Commission of the Danube*<sup>58</sup> was much the same. The Versailles Treaty contained certain provisions concerning the international régime for the Danube, including provisions concerning the composition and powers of the European Commission for that river; at the same time it looked forward to the early conclusion of a further Convention establishing a definitive statute for the Danube. A further Convention was duly concluded, the parties to which did not comprise all the parties to the Treaty of Versailles but did include all the States which were concerned in the dispute giving rise to the request for the advisory opinion. In this case the question of the capacity of the States at the later conference to conclude a treaty modifying provisions of the Treaty of Versailles was raised in the arguments presented to the Court, which pronounced as follows:

"In the course of the present dispute, there has been much discussion as to whether the Conference which framed the Definitive Statute had authority to make any provisions modifying either the composition or the powers and functions of the European Commission, as laid down in the Treaty of Versailles, and as to whether the meaning and the scope of the

relevant provisions of both the Treaty of Versailles and the Definitive Statute are the same or not. *But in the opinion of the Court, as all the Governments concerned in the present dispute have signed and ratified both the Treaty of Versailles and the Definitive Statute, they cannot, as between themselves, contend that some of its provisions are void as being outside the mandate given to the Danube Conference under Article 349 of the Treaty of Versailles.*"<sup>59</sup>

Here again, it is difficult not to see in the Court's pronouncement a rejection of the doctrine of the absolute invalidity of a later treaty which infringes the rights of third States under a prior treaty.<sup>60</sup> The *Mavrommatis Palestine Concessions* case<sup>61</sup> was, it is true, a somewhat different type of case, but it also appears to proceed on a basis quite inconsistent with the idea that a later treaty will be void to the extent that it conflicts with an earlier multilateral treaty.

17. In its advisory opinion on the *Austro-German Customs Union*<sup>62</sup> the Court was only called upon to consider the compatibility of the Protocol of Vienna with the Treaty of St. Germain; it was not asked to pronounce upon the legal consequences in the event of its being found incompatible with the earlier treaty. In two cases concerning Nicaragua's alleged violation of the prior treaty rights of Costa Rica and Salvador by concluding the Bryan-Chamorro Treaty with the United States, the Central American Court of Justice considered itself debarred from pronouncing upon the validity of the later treaty in the absence of the United States over which it had no jurisdiction. It therefore limited itself to holding that Nicaragua had violated its treaty obligations to the other two States by concluding a later inconsistent treaty with the United States.<sup>63</sup>

18. International jurisprudence is not perhaps entirely conclusive on the question whether and, if so, in what circumstances a treaty may be rendered void by reason of its conflict with an earlier treaty. Nevertheless, it seems to the present Special Rapporteur strongly to discourage any large notions of a general doctrine of the nullity of treaties infringing the provisions of earlier treaties;<sup>64</sup> and it accordingly also lends point to the hesitations of Sir G. Fitzmaurice in admitting any cases of nullity where the conflict is with an earlier treaty of a "mutual reciprocating type".

19. The two cases of nullity tentatively suggested by him (see paragraph 13 above), although they are supported by the Harvard Research Draft, hardly seem consistent with the attitude of the Court in the *Oscar Chinn* and *European Commission of the Danube* cases. In the former case there was an express stipulation that

<sup>59</sup> *P.C.I.J.*, Series B, No. 14, p. 23.

<sup>60</sup> The more so as two Judges, Nyholm and Negulesco, took a different line from the Court, holding that any provision of the Statute which conflicted with the Treaty of Versailles would be "null"; *P.C.I.J.*, Series B, No. 14, pp. 73 and 129.

<sup>61</sup> *P.C.I.J.*, Series A, No. 2.

<sup>62</sup> *Ibid.*, Series A/B, No. 41.

<sup>63</sup> *American Journal of International Law*, vol. II (1917), pp. 228 and 729.

<sup>64</sup> See G. Schwarzenberger, *op. cit.*, pp. 482-7; and see also article 18 of the Havana Convention of 1928 on Treaties (*Harvard Research in International Law*, p. 1207) which provided: "Two or more States may agree that their relations are to be governed by rules other than those established in general conventions concluded by them with other States."

<sup>57</sup> *P.C.I.J.*, Series A/B, No. 63.

<sup>58</sup> *P.C.I.J.*, Series B, No. 14.

any modifications of the Berlin Act should be by "common accord"; yet the Court considered it sufficient that no State had challenged the Convention of St. Germain. It does not seem that the Court would have adopted any different view, if the stipulation had taken the form of an express prohibition against contracting out of the treaty otherwise than by "common accord". It is also arguable that there is implied in every multilateral treaty an undertaking not to violate its provisions by entering into inconsistent bilateral agreements. Accordingly, it hardly seems justifiable to provide, as a special case, that a later treaty shall be void if it conflicts with a prior treaty which contains an express prohibition against inconsistent bilateral agreements. An undertaking in a treaty not to enter into a conflicting treaty does not, it is thought, normally affect the treaty-making capacity of the States concerned, but merely places them under a contractual obligation not to exercise their treaty-making powers in a particular way. A breach of this obligation engages their responsibility; but the later treaty which they conclude is not a nullity. Similarly, if the general view be adopted — as it was by the previous Special Rapporteur — that a later treaty concluded between a limited group of the parties to a multilateral treaty is not normally rendered void by the fact that it conflicts with the earlier treaty, his second tentative exception to the rule does not appear to justify itself. This exception concerned cases where the later treaty "necessarily involves for the parties to it action in direct breach of their obligations under the earlier treaty". The question of nullity does not arise at all unless the later treaty materially conflicts with the obligations of the parties under the earlier treaty. Can it make any difference whether the infringement of those obligations is direct or indirect, if it is the logical effect of the later treaty? Of course, if the later treaty is susceptible of different interpretations or is capable of performance in different ways, it may not be possible to know whether there is any conflict with the earlier treaty until the later treaty has been interpreted and applied by the States concerned. But if it is in fact interpreted and applied in a manner which violates the earlier treaty, can it reasonably be differentiated from a treaty whose terms unambiguously violate the earlier treaty?

20. On balance, and especially because of the considerations advanced by Sir G. Fitzmaurice with regard to "chain" multilateral treaties, the present Special Rapporteur suggests that the safest course for the Commission to adopt is not to prescribe nullity in any case where the earlier treaty is of a type involving reciprocal obligations. In other words, it should recognize the priority of the earlier treaty but no more. A party to it which enters into a later inconsistent treaty cannot "oppose" the later treaty to any party to the earlier treaty which is not also a party to the later one. A State party to both treaties may find its international responsibility engaged by the mere conclusion of the later treaty or by its application in a manner violating the earlier treaty; but the inconsistency does not make the later treaty null and void in law.

21. Accordingly, paragraph 2 of the present article does not make provision for the two cases of invalidity formulated — with much hesitation — by the previous Special Rapporteur. It states without qualification in sub-

paragraph (a) that in general a later treaty is not invalidated by the fact of its inconsistency with a prior treaty; and in sub-paragraph (b) it lays down that in the relations between any State which is a party to both treaties and a State which is a party to the first treaty only it is the provisions of the first treaty which prevail.

22. Finally, it is necessary to consider the cases in which the previous Special Rapporteur proposed (A/CN.4/115, article 19) that the general rule should be the nullity of the later treaty. These are cases where the earlier treaty is a multilateral treaty creating rights and obligations which are not of a "mutually reciprocating type" but are either —

(a) of an "interdependent type where a fundamental breach of an obligation by one party will justify a corresponding non-performance generally by the other parties and not merely in their relations with the defaulting parties"; or

(b) of an "integral type where the force of the obligation is self-existent, absolute and inherent for each party, and not dependent on a corresponding performance by the others".

In either of these cases the rule proposed in the draft was that "any subsequent treaty concluded by any two or more of the parties, either alone or in conjunction with third countries, which conflicts directly in a material particular with the earlier treaty will, to the extent of the conflict, be null and void". This exception, therefore, was to apply not only to the class of case where a group of the parties to the earlier treaty conclude a later, inconsistent, treaty but also to the other class of case where some of the parties to the earlier treaty plus some outside States conclude a later, inconsistent treaty.

23. Sir G. Fitzmaurice's division of treaties into three distinct types requires further explanation. Treaties of a "mutually reciprocal" type, as might be supposed, are "*do ut des*" treaties in which each party owes to each other party certain obligations and obtains in return corresponding rights from that party; in other words, the treaty, although multilateral, sets up what are essentially bilateral relationships. The Vienna Convention on Diplomatic Relations<sup>65</sup> is an example of this type of treaty, which has already been discussed in the preceding paragraphs; a later treaty is not to be considered void by the fact that it conflicts with such a treaty. An "interdependent type", on the other hand, is one where the obligations and rights of each party are only meaningful in the context of the corresponding obligations and rights of every other party; so that the violation of its obligations by one party prejudices the treaty régime applicable between them all and not merely the relations between the defaulting State and the other parties. Examples given by the previous Special Rapporteur were treaties of disarmament, treaties prohibiting the use of particular weapons, treaties requiring abstention from fishing in certain areas or during certain seasons, etc. The Antarctic Treaty<sup>66</sup> declaring that Antarctica is to be

<sup>65</sup> United Nations Conference on Diplomatic Intercourse and Immunities, Vienna, 2 March-14 April 1961, *Official Records*, vol. II (A/CONF. 20/14/Add.1), United Nations publication, Sales No. 62.XI.1, p. 82, document A/CONF. 20/13 and Corr. 1.

<sup>66</sup> Signed in Washington on 1 December 1959; text in *United Nations Treaty Series*, vol. 402, p. 71.

“ used for peaceful purposes only ” and prohibiting “ any measures of a military nature ” would presumably be another example of the same kind. The third, “ integral ”, type was defined by the previous Special Rapporteur as comprising treaties where the force of the obligation is “ self-existent, absolute and inherent for each party and not dependent on a corresponding performance by the others ”. The examples given by him were the Genocide Convention, Human Rights Conventions, the Geneva Conventions of 1949 on prisoners of war,<sup>67</sup> etc., International Labour Conventions and treaties imposing an obligation to maintain a certain régime or system in a given area, such as the régime of the Sounds and the Belts at the entrance to the Baltic Sea.

24. The reason which led the previous Special Rapporteur to distinguish “ interdependent ” and “ integral ” types of treaty from “ mutually reciprocating ” types and to propose the avoidance of later treaties conflicting with the two former types of treaty are easily understood. The conclusion of a conflicting treaty in the two former cases undermines the treaty régime between all the parties, whereas in the case of mutually reciprocating types it does not. The same reason led him to differentiate in a similar way between these types of treaty in his treatment of the termination of treaties on the ground of fundamental breach. Nevertheless, the proposal to avoid later treaties which conflict with “ interdependent ” or “ integral ” types of treaty requires very careful examination. As already stressed in paragraph 14, it is necessary for the Commission to be very cautious in prescribing the nullity of treaties concluded between sovereign States.

25. The first point for consideration is the relation between the proposed rule avoiding treaties for inconsistency with an “ interdependent ” or “ integral ” type of treaty and the rule avoiding treaties for conflict with a *jus cogens* rule. For example, the Genocide Convention and the Geneva Conventions of 1949 would clearly seem to fall under the article avoiding treaties for conflict with a *jus cogens* rule. Moreover, in the case of the Geneva Conventions of 1949, there is a certain awkwardness in holding the later treaty void simply on the ground of its conflict with the Conventions, “ integral type ” though they may be. For each one of these major humanitarian Conventions contains an express provision<sup>68</sup> stating that each one of the High Contracting Parties shall be at liberty to denounce the Convention, the denunciation to take effect one year after its notification. True, there is also a proviso that a denunciation made at a time when the party concerned is engaged in a conflict shall not take effect until after the application of the Conventions with respect to that conflict is ended. But otherwise the liberty to denounce the Conventions in complete, and this, to say the least, seriously weakens the case for holding a later bilateral treaty void simply on the ground of inconsistency with a prior “ integral type ” treaty. On the other hand, the fundamental principles which are enshrined in the Conventions are principles of a *jus cogens* character,

from which a State cannot release itself even by denouncing the treaties, as is indeed expressly pointed out in the articles providing for denunciation. Paragraph 4 of these articles states: “ The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience ”. In other words, it seems to the present Special Rapporteur that it is the *jus cogens* nature of the subject-matter of these Conventions, rather than the “ integral ” character of the obligations created by the Conventions upon which the nullity of an inconsistent later treaty has to rest. It may be added that a large number of these so-called “ integral ” type treaties have withdrawal or denunciation clauses.<sup>69</sup> Even the Genocide Convention (article 14) provides for the possibility of unilateral denunciation at regular intervals every five years; but here again denunciation of the Convention would not absolve a State from observing its fundamental principles.

26. Another point is that “ interdependent ” and “ integral ” type obligations may vary widely in their character and importance. Some, although important or useful enough in their own sphere, may be essentially technical; while others deal with matters vital to the well-being of peoples, such as the maintenance of peace or the suppression of the traffic in women or narcotics. If the question of the nullity of inconsistent treaties is put — as it is by the previous Special Rapporteur — upon the illegality of the object of any treaty which conflicts with an “ integral ” or “ interdependent ” type obligation, the effect is almost to convert these obligations into *jus cogens* rules — at any rate so long as the treaty has not been denounced. It may be that international law will come to recognize “ interdependent ” or “ integral ” type obligations contained in multilateral treaties as having the force of *jus cogens* for the parties; but so long as such a wide freedom of denunciation, and indeed of reservation, exists in regard to many of these treaties, it scarcely seems possible to regard them in that way. Nor is it clear that a treaty derogating from an “ interdependent ” type obligation will necessarily tend to disrupt the whole régime. If two States were to agree to suspend as between themselves a treaty forbidding the discharge of oil into the sea, the agreement would, no doubt, violate an “ integral type ” obligation, but for geographical reasons it might well be that they themselves would be the only parties materially affected by the violation, or at worst they and a third neighbouring State. Again, some treaties which establish a general régime for a given area involve a recognition of rights and not merely an abstention from certain acts; and then, although the treaties are in principle of an “ integral ” type, denial of the right to one State may not materially weaken the general régime.

27. Some treaties which establish “ interdependent ” or “ integral ” type obligations also contain “ mutually reciprocating ” obligations. The Antarctic Treaty indeed

<sup>67</sup> International Committee of the Red Cross, *The Geneva Conventions of 12 August 1949*, Geneva.

<sup>68</sup> E.g. article 63 of the Geneva Convention for the Amelioration of the condition of the wounded and sick in Armed Forces in the Field.

<sup>69</sup> See the United Nations “ *Handbook of Final Clauses* ” (ST/LEG/6), pp. 59-73.

contains obligations of all three types: Articles 1 and 5, which prohibit respectively measures of a military nature and nuclear explosions, are of an "interdependent" type; article 2, which provides for "freedom of scientific investigation", is of an "integral" type, though it may involve some element of "reciprocating" obligation; article 3, which provides for free exchange of information, is of a "mutually reciprocating" type, while article 4, which reserves the existing legal positions of States with regard to territorial claims and forbids the treaty, is of a "mutually reciprocating" type, while the treaty is in force, is perhaps a mixture of "interdependent" and "mutually reciprocating" obligations; article 7, which concerns the right to appoint observers, inspect stations etc., is purely of a "reciprocating" type, yet it is vital to the effectiveness of some of the "interdependent" obligations; article 8 is again, perhaps, a mixture of "interdependent" and "mutually reciprocating" obligations. The Antarctic Treaty thus illustrates very clearly how mixed may be the types of obligation in a single treaty; and a similar mixture can be seen in other treaties, for example treaties for the regulation of fisheries. It may also be noted that some international régimes created by treaty are regional in character, others universal.

28. The Permanent Court, it has been pointed out above (*supra*, paragraphs 15-16), refused in the *Oscar Chinn* case and again in the *European Commission for the Danube* case to discard as a nullity a treaty derogating from a prior treaty, despite the powerful argument in favour of the contrary view adduced by a small minority of dissenting judges. In both these cases the prior treaty was a multilateral treaty establishing for a particular region an international régime which contained obligations of an "integral" or "interdependent" type. In both cases the special character of the treaty was emphasized by the dissenting judges, yet the Court would not look beyond the fact that the disputing States were themselves parties to the later treaty and had not challenged its validity. In the *Mavrommatis Palestine Concessions* case the position was somewhat different in that the later treaty, a Protocol, extended, rather than derogated from, the earlier treaty and it was Great Britain, a party to both treaties, that challenged the application of the Protocol. Nevertheless, in that case also the earlier treaty was one establishing an international régime — a Mandate — and the Court was emphatic that, in case of conflict, the provisions of the later treaty should prevail.

29. The jurisprudence of the Permanent Court therefore, so far as it goes, seems to be opposed to the idea that a treaty is automatically void if it conflicts with an earlier multilateral treaty establishing an international régime. Where the States before the Court were all parties to the later treaty, the Court applied the later treaty. This does not, of course, mean that the Permanent Court would not, in an appropriate case, have considered a later treaty which derogated from an earlier multilateral treaty to be a violation of the rights of the States parties to the earlier treaty who were not also parties to the second treaty. But it does seem to mean that the Permanent Court acted on the principle that conflicts between treaties are to be resolved on the basis of the relative priority of conflicting legal norms, not on the basis of the nullity of the later treaty; and

acted on that principle even when the prior treaty was an international "statute" creating an international régime. Admittedly, the law of treaties has undergone considerable development during the past thirty years, and there is a greater disposition to recognize the objective effects of certain kinds of treaties. But it may be doubted whether this development has gone so far as to recognize that a treaty will be void to the extent that it conflicts with any earlier multilateral treaty establishing "interdependent" or "integral" obligations. Indeed, the important consideration to which the previous Special Rapporteur drew attention in regard to "chain" treaties is enough to induce hesitation on this question. Multilateral treaties creating "interdependent" obligations or international régimes are the very classes of treaty in which a "chain" series of instruments may be found;<sup>70</sup> and it will more often than not be the case that some parties to the earlier treaties fail for one reason or another to become parties to the later treaties. No doubt, it might be possible to try and cover this difficulty by a complicated formula excepting "chain" treaties from the penalty of invalidity. But it seems safer for the Commission, in the present state of the development of international law, to hold to the general line taken by the Permanent Court on this question.

30. Accordingly, while recognizing the general significance of the distinctions made by Sir G. Fitzmaurice, the present Special Rapporteur considers it preferable that the nullity of a treaty by reason of its inconsistency with an earlier multilateral treaty should not be predicated by the Commission as the general rule even when the earlier treaty is of an "interdependent" or "integral" type. Article 14 does not, therefore, make any distinction between treaties of an "interdependent" or "integral" type and other treaties, but places all types under the same rule in paragraph 2 (a), which goes upon the principle that conflict with an earlier treaty is not normally a ground of nullity.

31. Paragraph 2 (b) sets out the general rules for resolving conflicts between two treaties, when the parties to the later treaty do not include all the parties to the earlier one. It specifies two different rules according to whether the interests of a State which is a party to the first treaty but not to the second are involved. If so, since the parties to the second treaty are incompetent to deprive it of its rights under the first treaty, the earlier treaty prevails. If not, the question is one of the interpretation and application of treaties, and of their amendment or termination by subsequent agreement; and, as the jurisprudence of the Permanent Court indicates, the later treaty is likely to prevail in most cases.

32. Paragraph 3 (a) of the article, as previously indicated in paragraph 5 of this Commentary, draws attention to the case of the constituent instrument of international organizations which may contain provisions arguably affecting the capacity of members to enter into certain kinds of treaty. This being a question of capacity, not invalidity, which belongs to the law of international organizations, article 14 merely notes and reserves the point.

<sup>70</sup> Sir H. Lauterpacht also modified paragraph 4 of his draft article on this very ground (A/CN.4/87, article 16).

33. Paragraph 3 (b) repeats the provision contained in Article 103 of the Charter. This provision has already been mentioned in paragraph 10 of this Commentary, where it was pointed out that Article 103 appears to be based upon the principle of the priority of the Charter rather than upon that of the invalidity of inconsistent treaties. At the same time it was noted that the Article had been phrased primarily with pre-existing inconsistent treaties in mind and that it seems to have been considered at San Francisco that the conclusion of a subsequent inconsistent treaty would be a violation of Article 2, paragraph 2, by which Members undertake to fulfil in good faith the obligations assumed by them in the Charter. Within the United Nations the application of Article 103 has been discussed principally in connexion with the work of the Collective Measures Committee and with the relation between the Charter and the San Francisco Statement on Voting Procedure in the Security Council, though Article 103 has also been raised in connexion with one or two particular disputes. None of the discussions throw much light, however, on the question whether a later inconsistent treaty concluded by Members is to be regarded as void or merely a violation of their obligations under the Charter.<sup>71</sup> Despite the fact that Article 103 itself only provides that the obligations of the Charter shall "prevail", one eminent authority<sup>72</sup> has expressed the view "that those of its provisions which purport to create legal rights and duties possess a constitutive or semi-legislative character, with the result that Member States cannot 'contract out' of them or derogate from them by treaties made between them, and that any treaty whereby they attempted to produce this effect would be void". The same authority further explained<sup>73</sup> that, in his view, Members of the United Nations "by acceptance of the Charter, a constitutive instrument, have accepted a limitation of their treaty-making capacity".

34. The Special Rapporteur does not think that the Commission need or ought to take a position upon the general question of the effect of Article 103, which concerns the effect of a constituent treaty upon the treaty-making capacity of members of an organization *vis-à-vis* the organization. It is a question which is essentially one of the interpretation of the Charter and of the law of international organizations, and which therefore falls under the reservation of this question contained in paragraph 3 (a) of this article. Moreover, it is not the function of the Commission to render interpretations of the Charter. On the other hand, Article 103 lays down a rule which is of fundamental importance in regard to conflicts between treaties and, therefore, requires to be incorporated in some form in the article. The appropriate course, for the reasons just given, seems to be to reproduce, as has been done in paragraph 3 (b), the actual provision contained in Article 103.

35. Paragraph 4, simply for formal reasons of drafting, excepts from the operation of paragraphs 1 and 2 treaties which conflict with a *jus cogens* rule that is embodied in a prior treaty and makes them subject to article 13.

### SECTION III — THE DURATION, TERMINATION AND OBSOLESCENCE OF TREATIES

#### *Article 15 — Treaties containing provisions regarding their duration or termination*

1. Subject to articles 18-22, the duration of a treaty which contains provisions either regarding its duration or termination shall be governed by the rules laid down in this article.

2. In the case of a treaty whose duration is expressed to be limited by reference to a specified period, date or event, the treaty shall continue in force until the expiry of the period, passing of the date or occurrence of the event prescribed in the treaty.

3. In the case of a bilateral treaty which is expressed to be subject to denunciation or termination upon notice, whether a notice taking effect immediately or after a stated period, the treaty shall continue in force until a notice of denunciation or termination has been given by one of the parties in conformity with the terms of the treaty and has taken effect.

4. (a) In the case of a multilateral treaty which is expressed to be subject to denunciation or withdrawal upon notice, whether a notice taking effect immediately or after a stated period, the treaty shall continue in force with respect to each party until that party has given a notice of denunciation or withdrawal in conformity with the terms of the treaty and that notice has taken effect.

(b) The treaty itself shall terminate in accordance with paragraph 2 if the number of the parties should at any time fall below a minimum number laid down in the treaty as necessary for its continuance in force.

(c) The treaty shall not, however come to an end by reason only of the fact that the number of the parties shall have fallen below the minimum number of parties originally specified in the treaty for its entry into force, unless the States still parties to the treaty shall so decide.

5. (a) In the case of a treaty which both expressly limits its duration and provides for a right to denounce or withdraw from it upon notice, the treaty shall continue in force with respect to each party until either the treaty shall have expired under paragraph 2, or the party in question shall have denounced or withdrawn from the treaty under paragraph 3 or 4, whichever event shall first occur.

(b) If a treaty, whose duration is expressed to be limited by reference to a specified period, date or event, provides that, unless denounced before the expiry of the period, passing of the date or arrival of the event, the treaty shall automatically be prolonged for a further period or periods, it shall continue in force until the expiry of the further period or periods, except with regard to any party which has denounced it in accordance with the terms of the treaty. If the length of the further period should not have been specified in the treaty, it shall be the same as that of the period prescribed for the initial duration of the treaty.

6. The rules stated in the preceding paragraphs shall also apply where the conditions of the duration or termination of a treaty have been fixed not in the treaty itself but in a separate related instrument.

<sup>71</sup> *Repertory of Practice of United Nations Organs*, Vol. V, pp. 315-20.

<sup>72</sup> Lord McNair, *op. cit.*, p. 217.

<sup>73</sup> *Ibid.*, p. 218.

### Commentary

1. A great many modern treaties contain clauses either fixing their duration or providing for a right to denounce or withdraw from the treaty. When this is so, the duration and termination of the treaty are regulated by the treaty itself and the question is simply one of the interpretation and application of its terms. Nevertheless, the treaty clauses take a variety of forms,<sup>74</sup> and it seems desirable that the draft articles should set out the main rules by which the duration of treaties is determined under these clauses. As paragraph 1 states, these rules are set out in paragraphs 2-6 of this article, the case of treaties which contain no provisions on the question being left to the next article.

2. Most treaties today provide that they are to remain in force for a specified period of years or until a particular date or event. Clearly in such cases the treaty will, in principle, cease automatically upon the expiry of the period, the passing<sup>75</sup> of the date, or the occurrence of the event prescribed in the treaty; and this is so stated in paragraph 2 (a). The periods fixed by individual treaties vary enormously, periods between one and twelve years being the commonest but longer periods of up to twenty, fifty and even ninety-nine years being sometimes found. As to terminating events, one of the types most frequently found in practice is a provision that the treaty shall cease to have effect if the parties fall below a prescribed number.<sup>76</sup>

3. Some bilateral treaties fix no specific limit to their duration but provide for a right to denounce or terminate the treaty either with or without notice. For example, article 5 of a recent Agreement<sup>77</sup> between the United Kingdom and Portugal for the avoidance of double taxation provides: "This Agreement shall continue in force indefinitely but may be terminated by either Contracting Party by giving six months' notice to the other Contracting Party". When the treaty does fix a specific period for its duration, such as five or ten years, it may at the same time provide for a right of denunciation upon six or twelve months' notice during the period, though this is unusual. Far more frequent is a provision continuing sometimes found. As to terminating events, one of the initial period, subject to a right in either party to denounce the treaty immediately or after some specified period of notice. The exercise of a right of termination or denunciation by one of the parties in the case of a bilateral treaty necessarily puts an end to the whole treaty. Paragraph 3 of the article is accordingly so worded as to make the treaty itself come to an end when a valid notice given by either of the parties has taken effect.

4. Similarly, multilateral treaties, which fix no specific limit to their duration, may provide for a right to denounce or withdraw from the treaty. That is the case, for example, with the Geneva "Red Cross" Conventions of 1949. Indeed, it is almost common form today for multilateral treaties to be made terminable either

upon denunciation of, or withdrawal from, the treaty. In many cases, even when the treaty is expressed to be entered into for a specific period, it is made to continue thereafter, subject to a right in each party to denounce or withdraw from the treaty. This is done either by stating that it shall continue in force indefinitely, subject to the right of denunciation or withdrawal, or by stating that it shall be perpetually renewable for further successive periods of years, with a right in each party to denounce or withdraw from it shortly before the end of each successive period. The two types of provision are not very different in their results, the main difference being that in the latter type the exercise of the right of denunciation or withdrawal is exercisable only at regular intervals. Nevertheless, it is thought more convenient to deal with the "renewable" type of treaty under paragraph 5, and paragraph 4 is intended to cover only those multilateral treaties which, either from the outset or after an initial specific period, are expressed to continue indefinitely, unless terminated by denunciation or withdrawal (see further paragraph 8 below).

5. Paragraph 4 (a) lays down the general rule for multilateral treaties. Here, denunciation or withdrawal by one party does not normally terminate the treaty itself, but only its application to that particular party. Accordingly the general rule is expressed to be that the treaty subject to denunciation or withdrawal, does provide for denunciation or withdrawal given by it has taken effect.

6. Sometimes, however, a multilateral treaty, which is subject to denunciation or withdrawal, does provide for the termination of the treaty itself, if denunciations or withdrawals should reduce the number of parties below a certain figure. For example, the Convention on the Political Rights of Women<sup>78</sup> provides that it "shall cease to be in force as from the date when the denunciation which reduces the number of parties to less than six becomes effective". In some cases the minimum number of surviving parties required by the treaty to keep it alive is even smaller, e.g., five in the case of the Customs Convention on the Temporary Importation of Commercial Road Vehicles<sup>79</sup> and three in the case of the Convention Regarding the Measurement and Registration of Vessels Employed in Inland Navigation.<sup>80</sup> These cases are covered in paragraph 4 (b).

7. In this connexion, the further point arises whether a multilateral treaty, the entry into force of which was made dependent upon its ratification, acceptance, etc., by a given minimum number of States, automatically ceases to be in force, should the parties afterwards fall below that number as a result of denunciations or withdrawals. The better opinion,<sup>81</sup> it is believed, is that this is not a necessary effect of a drop in the number of the parties below that fixed for the treaty's entry into force. The treaty provisions in question relate exclusively to the conditions for the entry into force of the treaty and, if the negotiating States had intended the minimum number of parties fixed for that purpose to be a continuing condition of the validity of the treaty, it would have

<sup>74</sup> See United Nations *Handbook of Final Clauses* (ST/LEG. 6), pp. 55-73.

<sup>75</sup> It is the passing rather than the arrival of the date which is relevant since the treaty will expire at midnight on the date fixed by the treaty.

<sup>76</sup> See United Nations *Handbook of Final Clauses*, pp. 57, 58, 72 and 73.

<sup>77</sup> (1961) H.M. Stationery Office, Cmnd. 1873.

<sup>78</sup> United Nations *Treaty Series*, vol. 193, p. 135, art. 8.

<sup>79</sup> United Nations *Handbook of Final Clauses*, p. 58.

<sup>80</sup> *Ibid.*, pp. 72-3.

<sup>81</sup> See E. Giraud, "Modification et terminaison des traités collectifs" *Annuaire de l'Institut de droit international*, tome I, 1961, p. 62.

been both easy and natural for them so to provide. In some cases, it is true, a treaty which fixes a low minimum number of parties for entry into force prescribes the same number for the cessation of the treaty. But there is no general practice to that effect, and the fact that this has not been a regular practice in cases where a larger minimum number, such as ten or twenty, has been fixed for entry into force seems significant. At any rate, when the number for entry into force is of that order of magnitude, it does not seem desirable that the application of the treaty should be dependent on the number of parties not falling below that number. Moreover, the remaining parties, if unwilling to continue to operate the treaty with the reduced number, may themselves either join together to terminate it or separately exercise their own right of denunciation or withdrawal. Accordingly, paragraph 4 (c) lays down that the validity is not affected by the mere fact that the number of its parties falls below that prescribed for its original entry into force.

8. Paragraph 5 (a) covers the possible, if unusual, case where a treaty lays down a specific period for its duration but nevertheless allows denunciation during the currency of the period. It also covers the case discussed in the previous paragraph where the treaty provides that each party shall have the right to denounce it and that it shall terminate upon the number of parties being reduced below a certain number. The application of the treaty may then terminate for an individual party either because it has itself exercised its right of denunciation or because the terminating event has occurred through the acts of other parties.

9. Paragraph 5 (b) covers the case of renewable treaties, which are today extremely common. When a treaty, especially a multilateral treaty, lays down a comparatively short period of years for its duration, it very frequently provides for its own renewal for a further period or periods of years; indeed, in most cases it provides for its indefinite continuance in succeeding periods of years. At the same time, however, it confers on each party a right to denounce or withdraw from the treaty on giving reasonable notice prior to the commencement of each new period. A typical example of this type of clause is article 14 of the Genocide Convention,<sup>82</sup> which reads:

“The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

“It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.”

One authority<sup>83</sup> has observed that this type of formula does not really convert the treaty into one for a limited term; for the treaty will continue indefinitely for successive periods of years. Thus, from the point of view of substance, the formula is rather a method of regulating the exercise of the right of denunciation than of providing for the renewal of the treaty for successive terms. This is, of course, true, and it could be argued that this

type of treaty really falls under paragraphs 3 and 4, which deal with treaties reserving a right of denunciation. But since the parties have chosen to express the duration of the treaty as one of successive terms of years and have linked the power of denunciation specifically to the dates of the expiry of each successive term, it seems perhaps to be more in accordance with their intentions to deal with this type of treaty under paragraph 5 as a special case of a time-limit combined with a denunciation clause. Paragraph 5 (b) accordingly covers this type of case by providing that the treaty is to continue in force for each party until the expiry of the further period or periods, except with regard to any party that may have exercised its right of denunciation.

10. Paragraph 6 is a formal article the reason for which is that in some cases it may happen that the provisions concerning the duration or termination of a treaty are not contained in the treaty itself but in a contemporaneous or collateral protocol or other such instrument.

#### *Article 16 — Treaties expressed to be of perpetual duration*

1. Subject to articles 18-22, and more particularly to articles 18 and 19, a treaty shall continue in force perpetually, if —

(a) the treaty expressly states that it is to remain in force indefinitely and does not provide for any right of denunciation or withdrawal; or

(b) the treaty expressly states that it is not to be subject to denunciation or withdrawal and does not prescribe any limit to its duration.

#### *Commentary*

1. The following article deals with cases where the treaty is totally silent both as to its duration and as to the right to denounce or withdraw from the treaty. The present article concerns the comparatively small number of cases where the treaty appears expressly on its face to contemplate that it shall remain in force “perpetually”. This intention may be manifested in two ways: either by expressly providing for the treaty to remain in force indefinitely without providing for any right to denounce or withdraw from it, or by expressly excluding any right of denunciation or withdrawal without fixing any term to the treaty. Cases of these types are not very common, because a treaty which is expressed to be of indefinite duration normally does provide for a right of denunciation or withdrawal, while a treaty which expressly excludes such a right is normally one for a fixed term of years. Express declarations of the “perpetual” duration of a treaty are most likely to be found in those types of treaty which are inherently of a “permanent character” mentioned in article 17, paragraph 4, and especially those establishing a permanent international régime for a river or area. A recent instance is the Indus Waters Treaty of 1960,<sup>84</sup> which provides that it is to remain in force until terminated by a further treaty between the two Governments concerned. This treaty, since it merely makes its termination dependent upon the mutual agreement of the two interested States, is probably to be regarded as a true example of a “perpetual” treaty.

<sup>82</sup> United Nations *Treaty Series*, vol. 78, p. 277; cf. also article 36 of the Convention of 1955 establishing an International Organization of Legal Metrology.

<sup>83</sup> E. Giraud, *op. cit.*, pp. 42-43.

<sup>84</sup> *American Journal of International Law*, 1961, pp. 797-822.

Another recent treaty, the Antarctic Treaty<sup>85</sup> expressly proclaims in its Preamble the intention of the Parties to set up a permanent régime for Antarctica. But article 12 does provide for a right of withdrawal after thirty years in very special circumstances connected with the possibility of a revision of the treaty. In consequence, the Antarctic Treaty seems to fall under paragraph 4 of article 15 rather than under the present article.

2. A treaty can in any event never be "perpetual" except in a qualified sense, since every treaty is liable to be terminated by a subsequent treaty concluded between the Parties; and in the case of a multilateral treaty the application of the treaty may even be terminated between individual parties by a new agreement *inter se*. The Indus Waters Treaty, as already mentioned, actually provides that it shall "continue in force until terminated by a duly ratified treaty concluded for that purpose between the two Governments". In order to avoid any misunderstanding as to what is involved in a "perpetual" treaty the opening words of the present article emphasize that it is subject to the provisions of articles 18 and 19, which deal with the power to terminate treaties by subsequent agreement.

*Article 17 — Treaties containing no provisions regarding their duration or termination*

1. Subject to Articles 18-22, the duration of a treaty which contains no provisions regarding its duration or termination shall be governed by the rules laid down in this article.

2. In the case of a treaty whose purposes are by their nature limited in duration, the treaty shall not be subject to denunciation or withdrawal by notice, but shall continue in force until devoid of purpose.

3. (a) In cases not falling under paragraph 2, a party shall have the right to denounce or withdraw from a treaty by giving twelve months' notice to that effect to the depositary, or to the other party or parties, when the treaty is —

- (i) a commercial or trading treaty, other than one establishing an international régime for a particular area, river or waterway;
- (ii) a treaty of alliance or of military co-operation, other than special agreements concluded under article 43 of the Charter;
- (iii) a treaty for technical co-operation in economic, social, cultural, scientific, communications or any other such matters, unless the treaty is one falling under sub-paragraph (b);
- (iv) a treaty of arbitration, conciliation or judicial settlement.

(b) In the case of a treaty which is the constituent instrument of an international organization, unless the usage of the organization otherwise prescribes, a party shall have the right to withdraw from the treaty and from the organization by giving such notice as the competent organ of the organization, in accordance with its applicable voting procedure, shall decide to be appropriate.

(c) When a treaty is terminable upon notice under sub-paragraph (a) or (b), its duration shall be determined by article 15, paragraphs 3 and 4.

4. A treaty shall continue in force indefinitely with respect to each party where the treaty —

(a) is one establishing a boundary between two States, or effecting a cession of territory or a grant of rights in or over territory;

(b) is one establishing a special international régime for a particular area, territory, river, waterway, or air-space;

(c) is a treaty of peace, a treaty of disarmament, or for the maintenance of peace;

(d) is one effecting a final settlement of an international dispute;

(e) is a general multilateral treaty providing for the codification or progressive development of general international law;

provided always that the treaty does not lack essential validity under any of the provisions of section II of this part, and is not one entered into merely for the purpose of establishing a *modus vivendi*.

5. In the case of any other treaty not covered by paragraphs 2-4, the duration of the treaty shall be governed by the rule in paragraph 4, unless it clearly appears from the nature of the treaty or the circumstances of its conclusion that it was intended to have only a temporary application.

6. Notwithstanding anything contained in the foregoing paragraphs, a treaty which is silent as to its duration or termination but supplements or modifies another treaty shall be of the same duration as the treaty to which it relates.

*Commentary*

1. Article 17 covers the case of a treaty which neither contains any provision regarding its duration nor regarding the right of the parties to denounce or withdraw from it. This type of treaty is not uncommon, recent examples being the Charter of the United Nations, the four Geneva Conventions on the Law of the Sea, 1958, and the Vienna Convention on Diplomatic Relations, 1961. According to the traditional view, the general rule was that stated in the Declaration of London of 1871:

"[Les Puissances] reconnaissent que c'est un principe essentiel du droit des gens qu'aucune Puissance ne peut se délier des engagements d'un Traité, ni en modifier les stipulations, qu'à la suite de l'assentiment des Parties Contractantes, au moyen d'une entente amicale."

That famous Declaration, which concerned a unilateral denunciation of certain clauses of the peace settlement after the Crimean War, was as much a reassertion of the principle of the unanimity of the Great Powers in European treaty-making as of the principle *pacta sunt servanda*.<sup>86</sup> Moreover, the treaty which was the subject of the Declaration was of a kind where the intention of the Parties normally is to create a stable settlement not subject to denunciation. Nevertheless, the Declaration was commonly represented as stating the general rule for treaties which are not expressed to have any fixed duration and do not contain any power of denunciation.

2. A large proportion of modern treaties, however, especially multilateral treaties, do contain provisions fixing their duration or providing for a right of denuncia-

<sup>85</sup> United Nations Treaty Series, vol. 402, p. 71.

<sup>86</sup> E. C. Hoyt, *The Unanimity Rule in the Revision of Treaties: A Re-examination*, p. 89.

tion or withdrawal; many indeed contain both kinds of provision. As multilateral treaty-making grew in the second half of the nineteenth century, the practice developed of inserting denunciation clauses in treaties dealing with technical matters.<sup>87</sup> During the present century the insertion of such clauses has become standard practice in multilateral treaties dealing with particular technical, economic, social or cultural matters, one of the few exceptions being the treaty establishing the World Health Organization.<sup>88</sup> The practice has also spread into bilateral treaties, and it is now almost common form for bilateral treaties dealing with these matters to be made terminable by some form of notice when they are not entered into for a fixed term. Indeed, the majority of the modern treaties which are neither expressed to be for a fixed term nor terminable upon notice are either treaties which establish international régimes for particular areas, rivers, etc., or treaties which have specific objects of limited duration, and are therefore by their very nature finite.

3. Admittedly, the treaty clauses take very varied forms. Some make the treaty terminable immediately upon giving notice; others require six or twelve months' notice; some make the right of termination exercisable from the very outset of the treaty; others make it exercisable only after the expiry of an initial fixed period; others make the treaty automatically renewable for fixed periods and link the right of termination to the expiry of the successive periods; yet others connect the right of termination with the revision of the treaty by majority vote. But, despite the variety of the clauses, it is clearly possible on the basis of the treaty practice to make out a case for the view that a treaty which does not fix its own duration and whose life is not inherently finite by reason of the nature of its objects is regarded by States as one that should in most cases be terminable in some manner and at some stage by unilateral denunciation or withdrawal. The treaty practice, in fact, furnishes a possible basis for implying in certain classes of treaty an intention to allow a right of denunciation or withdrawal, even although the treaty itself is altogether silent upon the point. There is, however, some difference of opinion as to exactly how far international law does or should imply an intention to allow denunciation or withdrawal in treaties which make no provision for it. Clearly, the question only arises where the treaty does not fix a specific period for its duration, because by fixing a period — even a long period — for the duration of the treaty, the parties have impliedly excluded any right to denounce or withdraw from it in the meanwhile. But where no period has been fixed, the question of the right of denunciation or withdrawal is both important and controversial.<sup>89</sup>

<sup>87</sup> E. C. Hoyt, *op. cit.*, pp. 18-19.

<sup>88</sup> Universality of membership was regarded as so important in this organization that the normal denunciation clause was omitted. It was, however, conceded in an interpretative "declaration" that if an amendment is made to the WHO Constitution by a majority vote, States in the minority have the right to withdraw. The original ILO Constitution contained no right of withdrawal, but the amended constitution of 1945 now provides for it.

<sup>89</sup> See, for example, the United Nations Conference on the Law of the Sea, *Official Records*, United Nations publication, Sales No. 58.V.4, vol. II, document A/CONF. 13/38, pp. 19, 56 and 58.

4. The Harvard Research Draft insisted<sup>90</sup> that "a treaty may be denounced by a party only when such denunciation is provided for in the treaty or consented to by all other parties". It recognized that there was reputable authority for the view that a right of denunciation may sometimes be implied in a treaty and that an increasing number of treaties, both bilateral and multilateral, contained denunciation clauses. Nevertheless, it maintained that the only safe solution was to lay down as the general rule for all treaties that "no State which has bound itself by a treaty may denounce it and withdraw without the consent of the other party or parties, given either in advance in the treaty itself or later in the form of a special agreement". It considered that, unless such consent were necessary, "the rule of *pacta sunt servanda* would have little or no meaning". Support for the view that the principle enunciated in the Declaration of London is still the general rule of international law on the question can certainly be found in State practice; for States in protesting against what they conceived to be illegal denunciations of treaty obligations have not infrequently couched their protests in much the same language as the Declaration of London. On the basis of this practice Rousseau also took the position that denunciation of a treaty is only legitimate when effected under a power conferred by the treaty or with the consent of the other parties. The State practice in question, however, very largely relates to treaties intended to establish permanent settlements, and as often as not to peace treaties. The denouncing State was usually claiming to release itself from the treaty in these cases on such grounds as *rebus sic stantibus* breaches by the other parties, or the fact that the treaty had been imposed upon it. It was not claiming an implied right derived from the nature of the treaty and the general practice in regard to such treaties.

5. A number of other authorities,<sup>91</sup> while upholding as the general rule the traditional doctrine that denunciation is only permissible if the right has been expressly granted in the treaty, recognize that the right may reasonably be implied in certain types of treaty. One well-known textbook,<sup>92</sup> indeed, seems almost to hold that the general rule is that all treaties may be dissolved by withdrawal after notice by one of the parties, "provided that they are not such as are concluded for ever"; and the same book maintains that "all such treaties as are either not expressly concluded for ever, or are apparently not intended to set up an ever-lasting condition of things" may be dissolved after notice, even although they do not expressly provide for the possibility of withdrawal. It also lists, as examples of such treaties, "commercial treaties" and "treaties of alliance not concluded for fixed periods", while excluding, on the other hand, from this class "treaties of peace" and "boundary treaties". The most recent textbook on the law of treaties,<sup>93</sup> on the other hand, maintains that "there is a general presumption against the existence of any right of unilateral termination of a treaty", and appears only to admit "commercial treaties" as an exception to that presumption.

<sup>90</sup> Article 34, pp. 1173-1183.

<sup>91</sup> See Hall, *International Law*, 8th edition, p. 405; Oppenheim, *International Law*, 8th edition, Vol. 1, p. 938; McNair, *Law of Treaties*, pp. 501-5.

<sup>92</sup> Oppenheim, *loc. cit.*

<sup>93</sup> McNair, *op. cit.*, pp. 493 and 504.

6. The previous Special Rapporteur (A/CN.4/107, article 4, case A (ii)) considered that, in the absence of any provision in the treaty, it is to be assumed that the treaty is intended to be of indefinite duration and only terminable by mutual agreement of all the parties. But he also conceded that there are some exceptions which he formulated as follows.

“ This assumption, however, may be negated in any case (a) by necessary inference to be derived from the terms of the treaty generally, indicating its expiry in certain events, or an intention to permit unilateral termination or withdrawal; (b) should the treaty belong to a class in respect of which, *ex natura*, a faculty of unilateral termination or withdrawal must be deemed to exist for the parties if the contrary is not indicated . . . such as treaties of alliance, or treaties of a commercial character.”

In his commentary he explained that his exception (a) covered cases where some general inference as to duration may be drawn from the treaty as a whole by considering the nature of the obligation; e.g., the parties agree to take certain action “ during the following year ”, or so long as certain conditions continue, etc. As to the exceptions under (b), he said: “ It is generally thought that there are certain sorts of treaties which, unless entered into for a fixed and stated period or expressed to be in perpetuity, are by their nature such that any of the parties to them must have an implied right to bring them to an end or to withdraw from them ”. Citing “ treaties of alliance ” and “ commercial or trading agreements ” as instances of treaties where a right of termination may be implied, he insisted that this exception only extends to “ treaties whose very nature imposes such an implication as a necessary characteristic of the type of obligation involved.” He did not, in this connexion, make any distinction between bilateral and general multilateral treaties, or make any special mention of technical conventions.

7. A recent study<sup>94</sup> of the revision and termination of “ traités collectifs ” examines the special case of general multilateral treaties which do not provide for their duration or termination. The author of this study advances the view that, in the absence of a provision regarding denunciation, any general multilateral treaty may be denounced at any moment. “ Cette opinion ”, he explains, “ est fondée sur la considération du caractère de ces conventions qui sont législatives par la nature de leur contenu et contractuelles par leur mode de formation. Refuser aux parties le droit de dénoncer les conventions générales pour lesquelles la convention elle-même n’a pas fixé un terme, ce serait reconnaître à la convention un caractère de perpétuité à laquelle raisonnablement elle ne saurait prétendre.” He then draws a distinction between “ perpetual treaties ” and treaties of unlimited or indefinite duration, and emphasizes that “ un régime de droit n’est jamais perpétuel ”. This argument does not seem by itself to be convincing, since even a so-called “ permanent ” treaty is terminable by subsequent agreement, and the real point is whether the process for terminating obligations under a “ legislative ” treaty should be a unilateral act or a collective decision, whether unanimous or by majority.

8. On this point the same writer advances considerations of policy in favour of a general right to denounce multilateral treaties which raise large issues:

“ La participation aux conventions générales, est essentiellement volontaire. Nul Etat n’est obligé d’y devenir partie. Logiquement, si les Etats ne sont pas obligés d’entrer, ils ne doivent pas être empêchés de sortir.

“ Pratiquement, il n’y a aucun avantage à faire des conventions générales qui sont fondamentalement volontaires et libres des sortes de prison dans lesquelles une fois entré il ne serait plus possible de sortir. Les Etats sachant qu’ils peuvent régulièrement se dégager au bout d’un temps relativement bref hésiteront beaucoup moins à s’engager. En fait, les dénonciations ne sont pas très fréquentes, l’inertie jouant en faveur des situations existantes, mais la faculté de dénonciation qu’on pourrait utiliser, quoiqu’on n’utilise généralement pas, apaise les inquiétudes.”

He went on to argue that a State which finds itself thwarted by a general convention is unlikely to apply it loyally and that it is preferable that it should be able to release itself from the convention. Violations of international law only weaken its authority, while if one State does denounce a general convention, the convention normally goes on being applied as if the State in question had never been a party. He concludes by suggesting that the best way of achieving stability in treaty relations is to include a denunciation clause in every general multilateral treaty and always to imply one in cases where it has been omitted; for a denunciation clause serves to some extent to control States in denouncing treaties and to check them from doing so too precipitately.

9. The insertion of denunciation clauses in general multilateral treaties was discussed at the Geneva Conference on the Law of the Sea in the context both of codifying conventions and of conventions making new law.<sup>95</sup> As already mentioned, none of the four Conventions prepared by that conference contains a denunciation clause. They only provide that after five years from the date of their entry into force any party may at any time request the revision of the Convention, and that it will be for the General Assembly to decide upon the steps, if any, to be taken in respect of the request. The Drafting Committee, in putting forward this revision clause, observed that its inclusion “ made unnecessary any clause on denunciation ”. Proposals had previously been made for the inclusion of a denunciation clause and these were renewed in the plenary meeting, notwithstanding the view of the Drafting Committee. Some representatives thought it wholly inconsistent with the nature of a codifying convention to allow denunciation; some thought that a right of denunciation existed anyhow under customary law; others considered it desirable to provide expressly for denunciation in order to take account of possible changes of circumstances. The proposal to include the clause in the “ codifying ” convention was rejected by 32 votes to 12, with 23 abstentions. A similar proposal was also made with reference to the Fishing and Conservation Convention which formulated entirely new law. Here, opponents of the clause argued

<sup>94</sup> E. Giraud, *op. cit.*, pp. 66-77.

<sup>95</sup> See United Nations Conference on the Law of the Sea, *Official Records*, vol. II, pp. 19, 56 and 58.

that a right of denunciation would be out of place in a Convention which created new law and was the result of negotiation. Advocates of the clause, on the other hand, regarded the very fact that the Convention created new law as justifying and indeed requiring the inclusion of a right of denunciation. Again, the proposal was rejected, the vote being 25 in favour and 6 against, with no fewer than 35 abstentions. If the record of the discussions shows some uncertainty and difference of opinion as to the general legal position in regard to the right to denounce general multilateral treaties, the fact remains that this Conference considered and rejected a proposal to include a denunciation clause in these four Conventions. Moreover, the Vienna Conference of 1961 seems to have omitted the clause from the Convention on Diplomatic Relations almost without discussion; and the Vienna Convention, it may be added, is one which does not contain a revision clause.

10. Confronted with the conflicting opinions of jurists and with the large volume of State practice in which certain types of treaty are made terminable upon notice, the Special Rapporteur thinks it doubtful how far it can be said today to be a general rule or presumption that a treaty which contains no provision on the matter is terminable only by mutual agreement of all the parties. In principle, the question is one of the intention of the parties in each case, for the parties are certainly free, as and when they wish, to make their treaty terminable upon notice. There is, however, some tendency to confuse the question of the right of a party to denounce a treaty, under the treaty itself, with the question of the observance of the fundamental rule of *pacta sunt servanda*. No doubt, the questions are not unconnected, but the application of the *pacta sunt servanda* rule is dependent upon the terms of the "*pactum*" under consideration, and the question whether or not the parties intended the treaty to be terminable upon notice is one which necessarily arises prior to, and independently of, the application of the *pacta sunt servanda* rule. If the proper conclusion is that, by reason of the nature and circumstances of the treaty, the parties must be assumed to have intended it to be subject to denunciation upon reasonable notice, a denunciation so effected is in conformity, not in contradiction, with the *pacta sunt servanda* rule. There is also some tendency to confuse the right to denounce a treaty under the treaty itself with the right of a State to claim release from its treaty obligations by reason of a fundamental change in the circumstances. Here again there is a connexion between the two questions, because where there is a right of denunciation upon reasonable notice, the exercise of that right would be the natural way for a State to effect its release from a treaty which it considers to have become outdated by changes in the circumstances. But there is a material difference between a right implied in a treaty to terminate it at will upon reasonable notice without showing cause and a right to claim release from it by establishing such a change in the circumstances as brings the case under the provisions of article 22. It is only the former right which is in issue in the present article.

11. If it be accepted that the question is essentially one of the intention of the parties, the problem still remains as to the principles upon which that intention is to be determined. Clearly, one possible view might

be that, whenever the parties do not make the treaty terminable on notice as they are free to do, they must be presumed not to have intended that it should be so terminable. In other words, failure to include a denunciation clause would raise a presumption in every case that the treaty is intended to be terminable only by mutual agreement. There would then be a general rule — derived not from the rule *pacta sunt servanda*, but from the apparent intention of the parties — that in the absence of any provision making it terminable on notice, a treaty is only terminable by mutual agreement. That presumption undoubtedly operates in certain classes of case. It may even, perhaps, be the ultimate general rule.<sup>96</sup> But, in the opinion of the Special Rapporteur, it is today, at most, a residuary rule; for there are very large and important classes of treaty where States so usually include a right of denunciation that the presumption must be the other way. The true position today seems to be that there are certain classes of treaty where by reason of the nature of the treaty the presumption is against a right of denunciation and also certain classes where by reason of the nature of the treaty it is in favour of such a right. If any treaty falls outside these classes, it may be that the residuary rule applies. But the real difficulty is to define the different categories of treaty where the presumption in favour of a right of denunciation does or does not apply.

12. Paragraph 1, like paragraph 1 of article 15, is of an introductory character, to define the cases with which the article is concerned.

13. Paragraph 2 covers treaties which are inherently finite by reason of the nature of their purposes. As already mentioned in paragraph 2 of this Commentary, the majority of treaties concluded today which contain no provision either for their duration or termination are treaties whose purposes are of a transient character and whose duration is therefore limited by their purposes. These treaties do not normally contain denunciation clauses for the reason that they are intended to continue in force only until their purposes are discharged, when the treaty will die a natural death. Accordingly, in these cases the limited duration of the purposes, like a provision fixing a specific term to the treaty, raises a presumption against the parties' having intended to allow denunciation upon notice. Obvious examples would be an agreement to arbitrate a particular dispute or to co-operate on a particular occasion or in the performance of a particular task. The text of the paragraph states that the treaty will continue in force until "devoid of purpose", because it may come to an end through the failure as well as through the fulfilment of its purposes.

14. Paragraph 3 (a) sets out four classes of case in which the nature of the treaty appears to raise a presumption that it is to be regarded as essentially of a limited duration; and it proposes that these treaties should be considered to be terminable upon giving twelve month's notice. No distinction has been made in these cases between bilateral, multilateral or general multilateral treaties; for State practice does not appear to support the theory that all multilateral treaties are to be regarded as terminable upon notice (see

<sup>96</sup> Such clearly is the view of the previous Special Rapporteur and of Lord McNair.

paragraph 8 above). If the great majority of multilateral conventions on technical matters contain an express provision rendering them terminable upon notice, the reason seems to be rather the nature of the matters with which they deal than the fact that they are "*traités collectifs*". Precisely the same type of provision is very often to be found in bilateral treaties dealing with the same matters, while the deliberate omission of a denunciation clause from the Geneva and Vienna Conventions is scarcely consistent with the existence of a presumption that such a clause is to be read into every multilateral treaty. Moreover, some multilateral treaties establishing permanent international régimes (see paragraph 22 below) are clearly not inherently terminable upon notice.

15. Commercial or trading treaties are listed in sub-paragraph 3 (a) (i) as the first category of the cases which are impliedly terminable by notice when the treaty is silent upon the question. A number of authorities<sup>97</sup> support the view that these treaties are by their nature of limited duration and that, in consequence, they are to be regarded as terminable upon giving reasonable notice, if the parties have failed to fix their duration in the treaty itself. On the other hand, a treaty which is intended to establish an international régime of an economic kind for a particular area, river system, or waterway is quite a different matter. There the intention is normally to set up a continuing — "permanent" — régime, and the presumption is against the parties' having intended the régime to be terminable by unilateral denunciation.<sup>98</sup> These cases fall under paragraph 5.

16. Treaties of alliance or military co-operation, which are covered in sub-paragraph 3 (a) (ii), are another category where the treaty is commonly considered by its nature to be terminable<sup>99</sup> unless the contrary is expressly provided. Although the point may appear somewhat academic at the present moment, it seems proper to exclude from this category "special agreements" concluded between Members of the United Nations and the Security Council under Article 43 of the Charter, should any such come into existence.

17. Sub-paragraph 3 (a) (iii) brings under the same rule treaties of technical co-operation, as being treaties which, under the existing practice, are habitually entered into for limited terms or made subject to denunciation. In most cases these treaties are entered into for recurring periods of three, five or ten years, with a right to denounce at the end of each period, or they are entered into for a fixed period, with a provision that they shall continue in force thereafter unless twelve (or six) months' notice of denunciation is given. Again, in some cases they are entered into "indefinitely" subject to denunciation at any time upon giving a specified period of notice. The same is largely true of the constituent instruments of international organizations which deal with matters of technical co-operation; but for the reason given in paragraph 20 it seems advisable to make a separate category of treaties which

are the constituent instruments of international organizations.

18. In sub-paragraph 3 (a) (iv) the Special Rapporteur has thought it right also to bring under this rule, however reluctantly, treaties of arbitration, conciliation or judicial settlement. It is only necessary to look at the texts of the large number of such treaties collected in the United Nations publication "*Systematic Survey of Treaties for the Pacific Settlement of International Disputes, 1928-48*"<sup>100</sup> to see how almost invariably they are concluded either for a fixed term or for renewable terms subject to a right of denunciation, or are made terminable upon notice. One of the very few exceptions out of over 200 treaties is the Treaty of Peace, Friendship and Arbitration of 1929 between Haiti and the Dominican Republic, which contains no provision regarding its duration or termination.<sup>101</sup> If the proportion of instruments containing no provision regarding their duration or termination is somewhat greater among declarations under the "optional clause" of the Statute of the International Court of Justice (or of the Permanent Court), the general picture is the same. Out of the thirty-seven declarations listed in the Court's Yearbook for 1961-2, eight contain no statement as to their duration or termination, and all the others are made for a limited period or made terminable upon notice. It is true that in 1938, when Paraguay, which then had a declaration of this kind, denounced it in a letter to the Secretary-General, six States<sup>102</sup> made reservations with regard to the denunciation; and that the Paraguayan declaration was retained in the list of optional clause acceptances in the Yearbook of the Court until the year 1959-60, though with an explanatory footnote mentioning the reservations. But the declaration has now been removed from the list, while Liberia proceeded in 1952 to replace her previously unlimited declaration with a new declaration for a fixed term, without meeting with any objection from any State. Moreover, even before the Paraguayan denunciation, Colombia had "corrected" in 1937 an unlimited and unconditional declaration of 1932 by restricting it to disputes arising out of facts subsequent to 6 January 1932. Taken as a whole, State practice under the optional clause, and especially the modern trend towards Declarations terminable upon notice, seem only to reinforce the clear conclusion to be drawn from treaties of arbitration, conciliation and judicial settlement, that these treaties are regarded as essentially of a terminable character. Regrettable though this conclusion may be, it seems that this type of treaty ought, in principle, to be included in paragraph 3.

19. The period of notice suggested in sub-paragraph 3 (a) is twelve months. An alternative would be to say simply "reasonable" notice; but as the whole purpose of paragraph 3 is to clarify the position where the parties have failed to deal with the duration of the treaty, it seems better to propose a definite period of notice. A period of six months' notice is sometimes found in termination clauses, but this is usually where

<sup>97</sup> e.g. Hall, *op. cit.*, p. 405; Oppenheim, *op. cit.*, vol. I, p. 938; McNair, *op. cit.*, p. 504; Sir G. Fitzmaurice, second report (A/CN.4/107), *loc. cit.*

<sup>98</sup> See McNair, *op. cit.*, p. 505.

<sup>99</sup> See, for example, Oppenheim, *loc. cit.*, and Sir G. Fitzmaurice, *loc. cit.*

<sup>100</sup> United Nations publication, Sales No. 1949.V.3; see pp. 331-1175; and for an analysis of the termination clauses, see pp. 316-327.

<sup>101</sup> *Ibid.*, p. 530.

<sup>102</sup> All these States had themselves Declarations which were for limited terms.

the treaty is of the renewable type and is open to denunciation by a notice given before or at the time of renewal. Where the treaty is to continue indefinitely subject to a right of denunciation, the period of notice is more usually twelve months, though in some cases the denunciation takes effect at once. In formulating a general rule, it seems preferable to lay down a longer rather than a shorter period in order to protect the interests of the other parties to the treaty and to give a reasonable stability to the relations set up by the varying kinds of treaty.

20. Constituent instruments of international organizations are listed in sub-paragraph 3 (b) as a third category of treaties impliedly terminable upon notice. Nearly all treaties of this kind deal expressly with the right to denounce the treaty or to withdraw from the organization, and in various ways seek to regulate the exercise of the right. Amongst the exceptions are the well-known cases of the United Nations and the World Health Organization; but these cases serve to confirm rather than to negative the existence of a general presumption in favour of a right of withdrawal in this class of treaty. At San Francisco, although differing views were expressed during the discussion, the Conference ultimately agreed that a Member of the United Nations must be free in the last resort to withdraw from the Organization. While omitting any denunciation or withdrawal clause from the Charter for psychological reasons, the Conference adopted an "interpretative declaration" which included the following passage:<sup>103</sup>

"The Committee adopts the view that the Charter should not make express provision either to permit or to prohibit withdrawal from the Organization. The Committee deems that the highest duty of the nations which will become Members is to continue their co-operation within the Organization for the preservation of international peace and security. If, however, a Member because of exceptional circumstances feels constrained to withdraw, and leave the burden of maintaining international peace and security on the other Members, it is not the purpose of the Organization to compel that Member to continue its co-operation in the Organization."

The draftsmen of the Constitution of WHO, by reason of the world-wide character of the struggle against disease, placed great emphasis on the need for the organization to be completely universal and, as in the case of the Charter, deliberately omitted any withdrawal clause. However, when a majority procedure was introduced into the Constitution for adopting amendments to it, it was agreed that States which felt unable to accept amendments so adopted ought to be free to withdraw. Accordingly, the WHO Conference also drew up an interpretative declaration in the following terms:<sup>104</sup>

"A member is not bound to remain in the Organization if its rights and obligations as such were changed by an amendment of the Constitution in which it has not concurred and which it finds itself unable to accept."

One State<sup>105</sup> was allowed to make a reservation arrogating to itself a general right of withdrawal outside the terms of the declaration; but when another State<sup>106</sup> withdrew from the organization for a period, it was treated as a suspension rather than as a withdrawal of membership. The general understanding in the usage of WHO seems to be that withdrawal is not admissible except under the conditions specified in the declaration. But the position is exceptional, and based upon the particular need of universality in the work of the organization. Sub-paragraph 3 (b) seeks to cover such an exceptional position by excluding cases where there is a contrary usage in a particular organization. As to the period of notice in these cases, the treaties which contain denunciation or withdrawal clauses not infrequently specify twelve months. But it seemed better — in order to avoid any suggestion of amending the Charter or the constitution of any other organization — simply to specify such notice as the competent organ of the organization, in accordance with its applicable voting procedure, shall decide to be reasonable. It is for this reason that the constituent treaties of international organizations have been separated from the treaties in sub-paragraph 3 (c) (iii).

21. Sub-paragraph 3 (c) merely states that when a treaty is, by implication, terminable by notice under sub-paragraphs (a) and (b), its duration will be determined on the same principles as those set out in article 15, paragraphs 3 and 4, for treaties which the parties have expressly made terminable by notice.

22. Paragraph 4 lists five types of treaty in which the intention of the parties must be presumed to be to establish a permanent treaty régime, in the sense of a régime which will continue indefinitely until revised or terminated by subsequent agreement. It is with regard to these types of treaty that most of the major controversies have arisen in the past concerning the unilateral denunciation of treaties. In these controversies the denouncing State has almost invariably invoked some alleged legal ground for setting aside the treaty — error, coercion, or fundamental change of circumstances; and by doing so has implicitly acknowledged the intrinsically "permanent" character of the treaty. Since it is in connexion with these types of treaty that the question of essential validity is most often raised, it has been thought appropriate to reserve the question of essential validity explicitly in a proviso to the present paragraph. The question of a fundamental change of circumstances — the doctrine of *rebus sic stantibus* — is already reserved by the opening words of paragraph 1 of this article. Mention is also made in the proviso of an exception in the case of a *modus vivendi*, because it is quite possible for a boundary or an "international regime" to be the subject of a *modus vivendi*; but the provisional character of the instrument will then normally be apparent from the terms of the treaty.

23. Paragraph 5 provides a residuary rule to catch treaties that do not fall within paragraphs 2-4. More from respect for the authorities than from any deep conviction, the Special Rapporteur has taken as the basic residuary rule the presumption that in other cases a

<sup>103</sup> UNCIO, *Documents*, vol. VII, pp. 262-267; 327-329; Vol. VI, pp. 163-6; Vol. I, pp. 616-620.

<sup>104</sup> WHO *Official Records* (1946), No. 2, p. 74.

<sup>105</sup> O. Schachter, "The Development of International Law through the Legal Opinions of the United Nations Secretariat", *British Yearbook of International Law*, 1948, p. 125.

<sup>106</sup> WHO *Official Records* (1949), No. 17, p. 52.

treaty is terminable only by subsequent agreement of the parties. Outside the "permanent" types of treaty dealt with in paragraph 4, modern treaty practice does not furnish much evidence of a general intention on the part of States to enter into treaties which are to continue in force indefinitely unless terminated by agreement. On the contrary, in a rapidly changing world the tendency, as already mentioned, seems rather to be to fix a definite period for the duration of the treaty or, by various types of clause, to provide for its indefinite continuance subject to a right of denunciation under conditions fixed in the treaty.<sup>107</sup> Accordingly, a case can equally well be made out for formulating the residuary rule in the reverse way. If the rule is stated in the traditional way, it seems essential to qualify it by excepting cases where a contrary intention appears from the nature of the treaty, e.g. a *modus vivendi*, or from the circumstances of the conclusion of the treaty.

24. Finally, paragraph 6 seeks to cover the quite common case of a protocol, exchange of notes or other such treaty which adds to or varies an existing treaty. These instruments usually make no mention of their own duration, and the intention clearly is that they should simply be regarded as an annex to the original treaty.

*Article 18 — Termination of a treaty by subsequent agreement*

1. Notwithstanding articles 15-17, a treaty may be terminated at any time —

(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 agreement of not less than two-thirds of the States which drew up the treaty, including all those which have become parties to the treaty, provided that, if X years have elapsed since the date of the adoption of the treaty, only the agreement of the States parties to the treaty shall be necessary;

(b) in the case of a treaty drawn up within 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;

(c) in other cases, by the mutual agreement of the parties.

2. However, where a treaty prescribes a specific procedure for its amendment or revision, such procedure shall, so far as is appropriate, also be applied for the purpose of effecting its termination.

3. An agreement terminating a treaty under sub-paragraphs (a) or (c) of paragraph 1 may be embodied —

(a) in a new treaty drawn up in whatever form the parties may decide;

(b) in communications made by the parties to the depositary of the treaty or to each other;

(c) in a tacit agreement, where one party has proposed the termination of the treaty or purported to denounce it, and it clearly appears from the circumstances that the other party or parties assented to such termination or denunciation of the treaty.

4. (a) If a depositary receives from a party to the treaty either a proposal for its termination or a request to withdraw from it, the depositary —

(i) in a case falling under sub-paragraphs 1 (a) and 1 (c), shall communicate such proposal to the States whose agreement is specified in those sub-paragraphs as being material;

(ii) in a case falling under sub-paragraph 1 (b), shall bring such proposal or request, as soon as possible, before the competent organ of the organization in question.

(b) The agreement of a State to which a proposal or request has been communicated under sub-paragraph 3 (a) (i) 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 proposal or request.

5. The provisions of the foregoing paragraphs regarding the termination of treaties by subsequent agreement shall also apply, *mutatis mutandis*, to their suspension by subsequent agreement.

*Commentary*

1. Where the treaty itself provides for an express right of denunciation, or where such a right is to be implied under article 17, the termination of the treaty is unlikely to give rise to any problem. Where, however, there is no such right, serious difficulties may arise. In the past, the termination of treaty obligations has too often taken the form of a unilateral and disputed assertion of a right to denounce the treaty. Particular importance attaches therefore to providing orderly procedures by which, when there are good reasons for doing so, States may seek to secure the termination or suspension of their treaty obligations by some form of agreement. Even when a party conceives itself to have a right to terminate the treaty on some specific ground, it is extremely desirable that it should seek if possible to bring about the termination of the treaty by consent rather than by a unilateral assertion of its supposed right.

2. The process of terminating has some analogy with that of creating a treaty régime. But the legal situation is more complex in that the parties to a treaty have vested rights in the treaty itself of which they will be deprived by its termination; and it is a strongly entrenched principle of international law that a treaty cannot by itself deprive third States of their rights under a prior treaty. Admittedly, it is possible to question whether the application of this principle to general multilateral treaties is entirely desirable, since it may impede the replacement of an out-of-date treaty by a new treaty. But there is always the danger that, from sheer inertia, some parties to an older treaty may fail to become parties to a more recent one; and the principle precluding even general multilateral treaties from affecting the position of non-parties under earlier treaties serves to keep alive some treaty obligations which might otherwise lapse. Accordingly, although the result may be to complicate treaty relationships and to impede the replacement of out-of-date treaties, it is necessary to be cautious in proposing, even *de lege ferenda*, rules permitting the termination of treaties by any form of majority decision, such as the Commission has proposed in article 6 of part I for the adoption of a treaty text.

<sup>107</sup> Consular Conventions, for example, are frequently made terminable upon notice.

Paragraph 1 therefore sets out the main rules for the termination of treaties in three sub-paragraphs, on the same pattern as the rules proposed by the Commission in article 6 of part I for the adoption of the text, but making the consent of all the parties to the treaty the general rule except in the case of a treaty actually drawn up within an international organization.

3. Sub-paragraph 1 (a) covers multilateral treaties drawn up at international conferences convened either by the States themselves or by an international organization. For the reason already given, it seems necessary to lay down that the termination of a multilateral treaty, in principle, requires the consent of all the States parties to the treaty. But in the case of multilateral treaties, and especially general multilateral treaties, it also seems necessary to take account of the interests of States which participated in the adoption of the text but have not yet become parties to the treaty owing to a delay in signing, ratifying, accepting, approving or acceding to the treaty. These States, by the terms of the treaty itself, are entitled to become parties to the treaty by performing the required act; and for at least some reasonable period of time it ought not to be open to the States which have already become parties — perhaps only two or a very few States — to deprive them of this right.<sup>108</sup> Accordingly, without attempting to fix the exact period, sub-paragraph 1 (a) provides that for a period of X years the termination of the treaty requires the consent of two-thirds of all the States which drew up the treaty, including all those which are actual parties. In formulating analogous provisions in part I, the Commission preferred to leave the length of the period undefined, until the views of Governments have been obtained. A period of the order of ten years is what the Special Rapporteur envisages.

4. Sub-paragraph 1 (b) covers the case of treaties, like the Genocide Convention and the Convention on the Political Rights of Women, which are drawn up actually within an international organization. Admittedly, treaties of this type, when drawn up, are opened to signature, ratification, acceptance, etc., and States become parties to them in the normal way. It is therefore arguable that they should be dealt with in the same way as treaties drawn up at a conference. Nevertheless, when a treaty has been drafted within an organization and then adopted by a resolution of one of its organs, there is a case for saying that the organization has an interest in the treaty and that its termination should be a matter for the organization. Accordingly, although it may involve some derogation from the normal principle that a State cannot be deprived of its rights under a treaty without its consent, it seems justifiable to propose that the termination of the treaty should be a matter for the organization. The genesis of the treaty in a decision of the organization is known to States when they become parties, and it seems reasonable to assume that they recognize the association of the organization with the treaty.

5. Sub-paragraph 1 (c) states the general rule for bilateral treaties and for other treaties not falling under sub-paragraphs 1 (a) and (b); the termination of the treaty requires the unanimous consent of the parties.

6. Paragraph 2 proposes, *de lege ferenda*, that where a treaty lays down a specific procedure for the amendment or revision of a treaty, the same procedure shall, so far as is appropriate, be applied for effecting its termination. It seems only logical that, where the parties have selected a particular means of bringing about the alteration of the treaty, they should be assumed to intend the same means to be employed for the even more fundamental step of terminating it.

7. Paragraph 3 provides that a subsequent agreement to terminate a treaty may take the form either of a new treaty or of notifications to the depositary of the treaty which is to be terminated. It is sometimes said that the subsequent agreement must be cast in the same form as the treaty which is to be terminated, or at least be a treaty form of "equal weight". This view has, for example, been expressed by the United States,<sup>109</sup> but it reflects the constitutional practice of individual States, not a general rule of treaty law. It is always for the States concerned themselves to select the appropriate instrument or procedure for bringing a treaty to an end and, in doing so, they will no doubt have in mind their own constitutional requirements. Paragraph 3 further records that the termination of a treaty may also come about through a tacit agreement. Whether in any given case the process is that of "estoppel" or "subsequent agreement" may not always be clear. But the general view seems to be that tacit agreement may be enough to terminate a treaty.<sup>110</sup>

8. Paragraph 4 (a) is essentially procedural, indicating the action to be taken by a depositary on receiving a notification from a party proposing the termination of the treaty. Then, in order that the procedure for terminating treaties by consent through the machinery of a depositary should not be frustrated through the mere inertia of individual States in responding to a proposal, paragraph 4 (b) proposes that the assent of a State should be presumed after the expiry of twelve months (a similar presumption was adopted by the Commission in article 19 of part I in connexion with the acceptance of reservations).

9. Where the reasons which cause the parties to want to release themselves from the obligations of a treaty are of a temporary character, it may happen that they prefer to suspend rather than terminate the treaty. In that event the same principles would seem to be applicable, and paragraph 5 so provides.

#### *Article 19 — Implied termination by entering into a subsequent treaty*

1. Where all the parties to a treaty, either with or without third States, enter into a new treaty relating to the same subject-matter, without expressly abrogating the earlier treaty, the earlier treaty shall nevertheless be considered to be impliedly terminated —

(a) when the parties to the later treaty have manifested an intention that the whole matter should thereafter be governed by the later treaty; or

(b) when the provisions of the later treaty (a) are so far

<sup>108</sup> Quite a number of multilateral conventions come into force upon only two or a very small number of signatures, ratifications, etc.

<sup>109</sup> See an observation of the United States delegate at the 49th meeting of the Social Committee of the Economic and Social Council (E/AC.7/SR.49, p. 8), to which Sir G. Fitzmaurice drew attention.

<sup>110</sup> See Sir G. Fitzmaurice's second report (A/CN.4/107), articles 12 and 14.

incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time;

unless in either case it appears from the circumstances that the later treaty was intended only to suspend the operation of the earlier treaty for a limited period of time.

2. (a) If two parties or a number of the parties to a treaty, either with or without third States, enter into a new treaty relating to the same subject-matter, without expressly abrogating the earlier treaty, the application of the earlier treaty shall nevertheless be considered to be impliedly terminated as between the States which are parties to both treaties in the same circumstances as those set out in paragraph 1.

(b) However, the fact that the application of the earlier treaty is so terminated as between those of its parties which are also parties to the later treaty shall not affect its application either as between the States which are parties only to the earlier treaty or as between any such State and a State which is a party to both treaties.

3. When the termination of a treaty takes place by implication under the preceding paragraphs, the date of its termination shall be the date upon which the later treaty comes into force, unless the later treaty shall otherwise provide.

#### Commentary

1. This article covers, from the different standpoint of the termination of treaties, the cases of conflict between treaties which are the subject of article 14. It was pointed out in the Commentary to that article that, where there are two successive treaties on the same subject, the parties to which are identical, the States concerned, when they conclude the second treaty, are fully competent to amend or annul the prior treaty; and that the effect of the second treaty upon the prior treaty is essentially a question of what the contracting States intend when they conclude the second treaty. They may intend simply to supplement the earlier treaty or to revise it, or they may intend that the second treaty should replace it completely.

2. Paragraph 1 of the present article seeks to define the conditions under which the parties to a treaty are to be understood as having intended to terminate it by concluding a later treaty the parties to which are identical. The wording of the two clauses in paragraph 1 is based upon the treatment of the matter in the separate opinion of Judge Anzilotti in the *Electricity Company of Sofia* case,<sup>111</sup> where he said:

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

The Court in that case differed from Judge Anzilotti in thinking that there was no incompatibility between the two instruments by which the parties had accepted compulsory jurisdiction. Nevertheless, the passage cited from Judge Anzilotti's opinion provides what is thought to be a useful formulation of the criteria for determining

whether or not a second instrument abrogates a prior instrument dealing with the same subject-matter.

3. In the same opinion Judge Anzilotti held that the Belgian and Bulgarian declarations under the optional clause, although in his view incompatible with an earlier Belgo-Bulgarian Treaty of Conciliation, had not abrogated it because the Treaty was of indefinite duration, whereas the declarations were for limited terms of years. Without in any way questioning the correctness of that finding in the particular context of the treaty and the two declarations in that case, it may be doubted whether it can be said to be a general principle that a later treaty for a fixed term can never abrogate an earlier treaty expressed to have a longer or indefinite duration. It depends entirely upon the intention of the States in concluding the second treaty. If their intention apparently was that the whole matter should afterwards be governed by the new treaty, it seems unwarranted to assume that they intended the earlier treaty to revive, on the expiry of the new treaty. It seems more likely that what they had in mind was a need to review the situation after the end of the second treaty. Paragraph 1 merely provides, therefore, that abrogation shall not occur if it is clear from the circumstances that the later treaty was intended to replace the earlier one only temporarily.

4. Paragraph 2 deals with the same general problem, but in cases where the parties to the second treaty do not include all the parties to the first treaty. Here the principle that a treaty cannot by itself deprive non-parties of their rights, whether under general international law or under a prior treaty, comes into play; and, as pointed out in the Commentary to article 14, some authorities for that reason call in question the very validity of the second treaty. The rule proposed in article 14 accepts the validity of the second treaty, despite its conflict with the prior treaty; and on that basis the second treaty is effective in the relations between the States which are parties to it. Accordingly the problem arises as to whether in this type of case also the second treaty terminates the earlier one. As between the States which are parties to both treaties, the question is again essentially one of their intention when concluding the second treaty, and the rules laid down in paragraph 1 would seem to be equally applicable. Sub-paragraph (a) so provides. But these rules are only relevant for determining the position of the States which are parties to both treaties, because they are only competent to terminate the application of the earlier treaty as between themselves, and cannot dispose of the rights of the other parties to the earlier treaty. Accordingly, sub-paragraph (b) preserves the earlier treaty in being (1) as between the States which are parties only to the earlier treaty and (2) as between any of those States and a State party to both treaties.

5. Paragraph 3 simply provides that the date on which the implied termination of the earlier treaty takes place is the date on which the second treaty comes into force, unless the second treaty otherwise provides.

#### *Article 20 — Termination or suspension of a treaty following upon its breach*

1. (a) The breach of a treaty by one party does not of itself have the effect of terminating the treaty or of suspending its operation.

<sup>111</sup> P.C.I.J. Series A/B, No. 77, p. 92.

(b) Under the conditions set out in the following paragraphs of this article, however, a material breach of a treaty by one party entitles the other party or parties to denounce or withdraw from the treaty or to suspend, in whole or in part, its operation.

2. A material breach of a treaty results from —

(a) a repudiation of the treaty by a representative or organ of the State competent to express the will of the State to denounce the treaty;

(b) a breach so substantial as to be tantamount to setting aside any provision —

(i) with regard to which the making of reservations is expressly prohibited or impliedly excluded under article 18, paragraph 1 (a), (b) and (c) of part I; or

(ii) the failure to perform which is not compatible with the effective fulfilment of the object and purpose of the treaty;

(c) a refusal to implement a provision of the treaty binding upon all the parties and requiring the submission of any dispute arising out of the interpretation or application of the treaty to arbitration or judicial settlement, or a refusal to accept an award or judgement rendered under such a provision.

3. In the case of a bilateral treaty, a material breach by one party constitutes a ground upon which the other party may either —

(a) denounce the treaty or suspend its operation, subject to the reservation of its rights with respect to any loss or damage resulting from the breach; or

(b) denounce only the provision of the treaty which has been broken or suspend its operation, subject to the same reservation.

4. In the case of a multilateral treaty other than one falling under paragraph 5, a material breach by one party constitutes a ground upon which —

(a) any other party may, in the relations between itself and the defaulting State, either —

(i) terminate or suspend the application of the treaty, subject to the reservation of its rights mentioned in paragraph 3; or

(ii) terminate or suspend the application only of the provision of the treaty which has been broken, subject to the same reservation;

(b) the other parties to the treaty, by an agreement arrived at in accordance with the provisions of article 18 of this part, may collectively either —

(i) terminate the treaty or suspend its application; or

(ii) terminate or suspend the application only of the particular provision which has been broken.

Provided that, if a material breach of a treaty by one or more parties is of such a kind as to frustrate the object and purpose of the treaty also in the relations between the other parties not involved in the breach, any such other party may, if it thinks fit, withdraw from the treaty.

5. In the case of a material breach of a treaty which is the constituent instrument of an international organization, or which has been concluded within an international organization, any question of the termination or suspension of the rights or obligations of any party to the treaty shall be determined by decision of the competent organ of the organization concerned, in accordance with its applicable voting rules.

### Commentary

1. The great majority of writers<sup>112</sup> recognize that the violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty. Nor is it easy to see how the rule could be otherwise, since good sense and equity rebel at the idea of a State being held to the performance of its obligations under a treaty which the other contracting party is refusing to respect. Moreover, on general principles, a violation of a treaty right, as of any other right, may give rise to a right to take non-forcible reprisals and, clearly, these reprisals may properly relate to the defaulting party's rights under the treaty. Opinion differs, however, as to the extent of this right and the conditions under which it may be exercised. Some writers,<sup>113</sup> in the absence of effective international machinery for securing the observance of treaties, are more impressed with the innocent party's need to have this right as a sanction for the violation of the treaty. These writers tend to formulate the right in unqualified terms, giving the innocent party a general right to abrogate the treaty in the event of a breach.<sup>114</sup> Other writers are more impressed with the risk that a State may allege a trivial or even fictitious breach simply to furnish a pretext for denouncing a treaty which it now finds embarrassing.<sup>115</sup> These writers tend to restrict the right of denunciation to "material" or "fundamental" breaches and also to subject the exercise of the right to procedural conditions.<sup>116</sup>

2. State practice, although not lacking,<sup>117</sup> does not give much assistance in determining the true extent of this right or the proper conditions for its exercise. In most cases, the denouncing State has been determined, for quite other reasons, to put an end to the treaty and, having alleged the violation primarily to provide a respectable pretext for its action, has not been prepared to enter into a serious discussion of the legal principles governing the denunciation of treaties on the basis of violations by the other party. Moreover, the other party has usually contested the denunciation primarily on the basis of the facts; and, if it has sometimes used language appearing to deny that unilateral denunciation is ever

<sup>112</sup> See Harvard Law School, *Research in International Law, III, Law of treaties*, pp. 1081-3; McNair, *op. cit.*, p. 553. C. Rousseau seems to have doubted whether customary law recognizes a right to denounce a treaty on the ground of the other party's non-performance, because claims to do so have usually been objected to. But for the reasons given in paragraph 2 this can hardly be regarded as sufficient evidence of the non-existence of any such customary rights.

<sup>113</sup> e.g. Hall, *op. cit.*, p. 408; S. B. Crandall, *Treaties, their Making and Enforcement*, p. 456; Ch. Dupuis, "Liberté des voies de communication, Relations internationales", *Recueil des cours de l'Académie de droit international*, 1924-I, vol. 2, p. 340; A. Cavaglieri, "Règles générales du droit de la paix", *Recueil des cours de l'Académie de droit international* (1929-I), vol. 26, p. 535.

<sup>114</sup> See Oppenheim, *op. cit.*, p. 947.

<sup>115</sup> e.g., McNair, *op. cit.*, p. 571; C. C. Hyde, *International Law*, vol. 2, p. 1543; E. Giraud, *op. cit.*, p. 28.

<sup>116</sup> See Harvard Law School, *Research in International Law, III, Law of treaties* (article 27), p. 1077 and pp. 1091-1092.

<sup>117</sup> Hackworth, *Digest of International Law*, vol. 5, pp. 342-348; Harvard Law School, *Research in International Law, III, Law of treaties*, pp. 1083-1090; McNair, *op. cit.*, pp. 553-569; A. C. Kiss, *Répertoire français de droit international*, Vol. 5, pp. 102-121; *Fontes Juris Gentium*, Series B, Section 1, tomus I, part I (2), pp. 791-792.

justified by any breach, this has usually appeared rather to be a protest against the one-sided and arbitrary pronouncements of the denouncing State than a rejection of the right to denounce when serious violations are established. Thus, States which have on one occasion seemed to assert that denunciation is always illegitimate in the absence of agreement have on others themselves claimed the right to denounce a treaty on the basis of breaches alleged to have been committed by the other party.

3. Municipal courts have not infrequently made pronouncements recognizing the principle that the violation of a treaty may entitle the innocent party to denounce it. But they have nearly always done so in cases where their Government had not in point of fact elected to denounce the treaty and they have not found it necessary to examine the conditions for the application of the principle at all closely.<sup>118</sup>

4. International jurisprudence has contributed comparatively little on this subject. In the case of the *Diversion of Water from the River Meuse*,<sup>119</sup> the question of the effect of a violation of a treaty upon the obligation of the other party to perform the treaty was raised, but in a somewhat different way. Belgium there contended that, by constructing certain works contrary to the terms of the Treaty of 1863, Holland had forfeited the right to invoke the treaty against Belgium. While it did not claim to denounce the treaty, Belgium did in effect assert a right, as a defence to Holland's claim, to suspend the operation of one of the provisions of the treaty on the basis of Holland's alleged breach of that provision, although pleading the claim rather as an application of the principle *inadimplenti non est adimplendum*. The Court, having found that Holland had not violated the treaty, did not pronounce upon the Belgian contention. In a dissenting opinion, however, Judge Anzilotti expressed the view<sup>120</sup> that the principle underlying the Belgian contention is "so just, so equitable, so universally recognized that it must be applied in international relations also". That case did not therefore carry the question very far, and the only other case that seems to be of any significance is the *Tacna-Arica Arbitration*.<sup>121</sup> Here Peru contended that by preventing the performance of article 3 of the Treaty of Ancon, which provided for the holding of a plebiscite under certain conditions in the disputed area, Chile had discharged Peru from its obligations under that article. The Arbitrator,<sup>122</sup> after examining the evidence, rejected the Peruvian contention, saying:

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

<sup>118</sup> e.g. *Ware v. Hylton* (1796), 3 Dallas 261; *Charlton v. Kelly*, 229 U.S. 447; *Lepeschkin v. Gosweiler et Cie.*, *Journal du droit international* (1924) vol. 51, p. 1136; *In re Tataro*, *Annual Digest and Reports of Public International Law Cases*, 1949, No. 110, p. 314.

<sup>119</sup> *P.C.I.J.*, Series A/B, No. 70.

<sup>120</sup> *Ibid.*, p. 50; cf. Judge Hudson, pp. 76-77.

<sup>121</sup> *Reports of International Arbitral Awards*, Vol. II, pp. 929 and 943-4.

<sup>122</sup> President Coolidge of the United States.

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

5. The previous Special Rapporteur (A/CN.4/107, articles 18-20 and commentary) leaned strongly to the side of those who are more impressed with the risk that this ground of denunciation may be abused than with its value as a sanction for securing the observance of treaties. His proposals therefore showed a marked concern to circumscribe and regulate the right to denounce a treaty on the ground of a breach by the other party. This concern manifested itself in a number of ways in his proposed rules.

6. In the first place, his draft limited the right of denunciation to cases of "fundamental breach", which he defined as "a breach of the treaty in an essential respect, going to the root or foundation of the treaty relationship between the parties, and calling in question the continued value or possibility of that relationship in the particular field covered by the treaty". The draft further provided (article 19, paragraph 2 (i) and (ii)) that the breach "must be tantamount to a denial or repudiation of the treaty obligation, and such as either to (a) destroy the value of the treaty for the other party; (b) justify the conclusion that no further confidence can be placed in the due execution of the treaty by the party committing the breach; or (c) render abortive the purposes of the treaty". By another provision (article 18, paragraph 2) the draft distinguished cases of fundamental breach from "cases where a breach by one party of some obligation of a treaty may justify an exactly corresponding non-observance by the other, or, as a retaliatory measure, non-performance of some other provision of the treaty". He considered that "in such cases there is no question of the treaty, or of its obligations, as such, being at an end; but merely of particular breaches and counter-breaches, or non-observances, that may or may not be justified according to circumstances, but do not affect the continued existence of the treaty itself".

7. Secondly, the previous Special Rapporteur considered "fundamental breach" as a ground for termination to apply in principle only in the case of bilateral, not multilateral, treaties (article 19, paragraph 1 (i) of his draft) and he recognized a right to terminate a multilateral treaty only in one instance (*ibid.*, article 19, paragraph 1 (ii)). He separated multilateral treaties into two broad categories. One covered treaties where the obligations are of a "reciprocal", or "interdependent", type, and with regard to these treaties his draft stated (*ibid.*) that a fundamental breach will justify the other parties —

(a) in their relations with the defaulting party, in refusing performance for the benefit of that party of any obligations of the treaty which consist in a reciprocal grant or interchange of rights, benefits, etc.;

(b) in ceasing to perform any obligations of the treaty which have been the subject of the breach and which are of such a kind that their performance by any party is necessarily dependent on an equal or corresponding performance by all the other parties.

His draft further stated (article 19, paragraph 1 (iii)) that in the case of this type of treaty, "if . . . . [one] party commits a general breach of the entire treaty in such a

way as to constitute a repudiation of it, or a breach in so essential a particular as to be tantamount to a repudiation, the other parties may treat it as being at an end or any one of them may withdraw". With regard to the second category of treaties, on the other hand, he did not consider that a breach can ever justify either termination of or withdrawal from the treaty, or even non-performance by the other party of its obligations in respect of the defaulting State. The treaties which he placed in this category were (a) law-making treaties, (b) treaties either creating international régimes for a particular area, region, etc., or involving undertakings to conform to certain standards and conditions, and (c) "any other treaty where the juridical force of the obligation is inherent, and not dependent on a corresponding performance by the other parties to the treaty . . . so that the obligation is of a self-existent character, requiring an absolute and integral application and performance under all conditions".

8. Thirdly, the previous Special Rapporteur's draft (article 19, paragraph 3) negatived the right to terminate a treaty on the basis of a fundamental breach if —

(a) the treaty is due to expire in any event within a reasonable period;

(b) the claim to terminate is not made within a reasonable time of the breach;

(c) the other party has condoned or waived the breach; or

(d) the party claiming to terminate itself caused or contributed to the breach.

The last three paragraphs are of course expressions of well-recognized general principles, (c) being covered in article 4 of the present draft articles.

9. Finally, the previous Special Rapporteur (in article 20 of his draft) laid down certain procedural conditions, the observance of which would be a *sine qua non* for the legitimate exercise of a right to terminate a treaty on the ground of its alleged breach by the other party. These conditions would require a State claiming to terminate a treaty on the ground of another party's breach (a) to present a reasoned statement of its case to the other party in question; (b) to give a reasonable time for the other to reply; (c) if the other party contested the case, to offer to refer the matter to an independent tribunal for decision; and (d) not to denounce the treaty unless the other party either failed to make any reply to the statement of the case or declined the offer to refer the matter to a tribunal. The question of the procedural requirements for denouncing a treaty also arises in other connexions, not only in regard to other grounds of termination but also in regard to cases under section II of the present draft. Accordingly, in the present draft they will be found dealt with in a general article in section IV.

10. The present Special Rapporteur, while having the same general approach to this question as his predecessor, believes that in some points his predecessor's draft may go a little further in limiting the right to terminate or suspend treaty relations with a covenant-breaking State than is altogether acceptable. These points will emerge and be discussed later in the present Commentary. Fortunately, the area in which the rôle of this article is likely to be important is somewhat narrowed by the modern practice of giving to many classes of treaties

comparatively short periods of duration or of making them terminable by notice. In these cases the injured party will usually have a simple and uncontroversial means of bringing the treaty to an end. It is primarily when treaties have been entered into either for longer fixed terms or indefinitely that the article may have a significant part to play.

11. Paragraph 1 (a) states what appears to be the universally accepted principle that the violation of a treaty, however serious, does not of itself put an end to the treaty.<sup>123</sup> This principle has frequently been insisted upon by judges in municipal courts, when private parties have claimed that a treaty ought to be disregarded by reason of its violation by the other High Contracting Party.<sup>124</sup> Paragraph 1 (b) merely states that under the conditions laid down in the article a "material" breach may give rise to a right in the other party or parties to the treaty to terminate or withdraw from the treaty or suspend its operation. The present Special Rapporteur believes that the word "material" used by some authorities is to be preferred to the word "fundamental" to express the kind of breach which may entitle the other party to terminate the relationship established by the treaty. The word "fundamental" might be understood as meaning that only the violation of a provision directly touching the central purposes of the treaty can ever justify the other party in terminating the treaty. But other provisions considered by a party to be essential to the effective execution of the treaty may have been very material in inducing it to enter into the treaty at all, even although these provisions may be of an entirely ancillary character. For example, a clause providing for compulsory arbitration in the event of a dispute as to the interpretation or application of the treaty is purely ancillary to the main purposes of the treaty, but it may well be regarded by some parties as an essential condition for agreeing to be bound by the treaty. In that case a refusal to arbitrate would go to the root of the other party's consent to be in treaty relations with the defaulting State.

12. Paragraph 2 seeks to define, so far as it is possible to do so, what may constitute a "material breach" giving rise to a right to terminate or suspend the treaty. The difficulties of this task were admirably stated by a nineteenth-century writer:<sup>125</sup>

"Some authorities hold that the stipulations of a treaty are inseparable, and consequently that they stand and fall together; others distinguish between principal and secondary Articles, regarding infractions of the principal Articles only as destructive of the binding force of a treaty. Both views are open to objection. It may be urged against the former that there are many treaties of which slight infractions may take place without any essential part being touched, that some of their stipulations, which were originally important, may cease to be so owing to an alteration in circumstances, and that to allow states to repudiate the entirety of a contract upon the ground of such

<sup>123</sup> Harvard Law School, *Research in International Law, III, Law of Treaties* p. 1078; Fauchille, *Traité de droit international public*, 8th edition, vol. 1, par. III, para. 854; J. Spiropoulos, *Traité de droit international public*, p. 257.

<sup>124</sup> e.g. *Ware v. Hylton* (1796) 3 Dallas 261; *Charlton v. Kelly* (1913) 229 U.S. 447; *In re Tatarko*, *Annual Digest of International Law Cases* 1949, No. 110.

<sup>125</sup> W. E. Hall, *op. cit.*, pp. 408-9.

infringements is to give an advantage to those which may be inclined to play fast and loose with their serious engagements. On the other hand, it is true that every promise made by one party in a treaty may go to make up the consideration in return for which essential parts of the agreement are conceded or undertaken, and that it is not for one contracting party to determine what is or is not essential in the eyes of the other. It is impossible to escape altogether from these difficulties. It is useless to endeavour to tie the hands of dishonest states beyond power of escape. All that can be done is to try to find a test which shall enable a candid mind to judge whether the right of repudiating a treaty has arisen in a given case. Such a test may be found in the main object of a treaty. There can be no question that the breach of a stipulation which is material to the main object, or if there are several, to one of the main objects, liberates the party other than that committing the breach from the obligations of the contract; but it would be seldom that the infraction of an article which is either disconnected from the main object, or is unimportant, whether originally or by change of circumstances, with respect to it, could in fairness absolve the other party from performance of his share of the rest of the agreement. . . ."

The previous Special Rapporteur, as mentioned in paragraph 5 above, defined a "fundamental" breach as one "going to the root or foundation of the treaty relationship between the parties and calling in question the continued value or possibility of that relationship in the particular field covered by the treaty". This definition and the further qualifications put upon it by the previous Special Rapporteur seem perhaps to put the concept of a "fundamental" breach rather high. The present draft, though inspired by the same general considerations, seeks to define a "material" breach of a treaty by reference to the attitude adopted by the parties with regard to reservations at the time when they concluded the treaty; and, if they said nothing about reservations at that time, then by reference to the "object and purpose" of the treaty — the criterion used for determining the power to make reservations in such a case.<sup>126</sup> The reason, of course, is that, although the two questions are not identical, there is a certain connexion between the views of the contracting States concerning the making of reservations and their views concerning what are to be regarded as material breaches of the treaty. It therefore seemed logical, in formulating the present article, to take into account the rules regarding the making of reservations provisionally adopted by the Commission in article 18 of part I.

13. The definition of "material" breach in paragraph 2 has three clauses. Sub-paragraph (a) gives the repudiation of the treaty as the first and most obvious form of material breach. Although the point is obvious, it needs to be stated, if only to underline that the repudiation of a treaty by one party does not of itself terminate its obligations under the treaty. If that were true, as was pointed out by Vattel,<sup>127</sup> "engagements could readily be set aside and treaties would be reduced to empty formalities". The main definition is in sub-paragraph (b),

and under it the concept of a "material" breach contains two restrictive elements: the breach must be "substantial", so as to amount to a setting aside of the particular provision by the defaulting party; and the provision must be one apparently regarded by the parties as a necessary condition of their entering into the treaty. The latter point, however, is stated in as objective terms as possible by linking it, for the reasons explained in the previous paragraph, to the conditions under which the treaty permits reservations to be made. Where the treaty is silent as to the power to make reservations then the test, as in article 18 of the present Special Rapporteur's first report (A/AC.4/144), is compatibility with the object and purpose of the treaty. Sub-paragraph (c), in order to remove any doubts of the kind mentioned in paragraph 11 of the present Commentary, specifies that, where the treaty expressly provides for compulsory reference of disputes arising out of it to arbitration or judicial settlement, disregard of that provision will constitute a material breach.

14. Paragraph 3 sets out the rights of the innocent party in case of a material breach of a bilateral treaty. These are to abrogate the whole treaty or suspend its whole operation or, alternatively, to terminate or suspend the operation only of the provision which has been broken by the defaulting party. The latter right, like the former, is an application of the principle *inadimplenti non est adimplendum*, endorsed by Judge Anzilotti in the *Diversion of Water from the River Meuse* case.<sup>128</sup> Admittedly, it may also be put upon the basis of a right to take non-forcible reprisals and upon that basis it is arguable that the innocent party may suspend the operation not necessarily of the provision which has been broken of but some other provision of special concern to the defaulting party. The terms of paragraph 2 are not intended to exclude whatever other rights may accrue to the innocent party by way of reprisal; but it is thought better not to introduce the law of reprisals, as such, into the present article. Naturally, any abrogation or suspension of the whole or part of the treaty under paragraph 3 will be without prejudice to the innocent party's right to claim compensation for any loss or damage resulting from the breach.

15. Paragraph 4 sets out in a parallel manner the rights of the other parties in the case of a material breach of a multilateral treaty, with the difference that normally an individual innocent party is not in a position to terminate the treaty, or suspend its operation, generally as between all the parties. Its right is normally limited to terminating or suspending the treaty or one of its provisions as between itself and the defaulting State. The present draft does not take as its basis the division of multilateral treaties into different categories by reference to the nature of their obligations, which was a central feature of the previous Special Rapporteur's proposals (see paragraph 6 above). While not in any way wishing to minimize the general significance of the distinctions which he draws between the different kinds of obligation that may be contained in multilateral treaties, the present Special Rapporteur doubts whether, as the law stands today, they can be said to be of decisive importance in the present connexion. However true it may be that law-making treaties, treaties creating international régimes for particular areas and certain other types of

<sup>126</sup> See generally the Commentary to article 18 of the present Special Rapporteur's first report (A/CN.4/144).

<sup>127</sup> *The Law of Nations*, Book IV, chapter IV, Section 54.

<sup>128</sup> See paragraph 4 of this Commentary.

treaty may establish obligations of an objective character, there remains a contractual element in the legal relation created by the treaty between any two parties. No doubt, if one party violates the treaty, another innocent party cannot, as a rule, individually release itself on that account from its obligations under the treaty because of its undertakings to the remaining contracting parties. But it is quite another thing to say that it is bound, however substantial and persistent the violation, to continue in treaty-relations with the defaulting State and remain liable to the latter for any non-performance affecting its interests. Quite apart from the essentially bilateral character of many of the rights and obligations created by law-making treaties and by international régimes, such a rule hardly seems possible until the remedies for breaches of international law are more highly organized and certain. The mere fact that many such treaties expressly contemplate their own denunciation, while others contemplate the expulsion of a covenant-breaking State,<sup>129</sup> makes it doubtful whether such a rule would be in harmony with existing principles, however desirable it may be that international law should one day be in a position to adopt such a rule. In the cases distinguished by the previous Special Rapporteur, an innocent party may well be less inclined to terminate the treaty-relation in consequence of the breach, but to forbid it to do so is almost to protect the covenant-breaking State in its wrong-doing.

16. The primary distinction made in the present draft is between a multilateral treaty pure and simple and a multilateral treaty which is the constituent instrument of an international organization or that has been concluded — like international labour conventions — within an international organization. Paragraph 4 deals with ordinary multilateral treaties and paragraph 5 with constituent treaties and treaties concluded within an organization.

17. Paragraph 4 (a) provides that in the case of a material breach an individual party may break off or suspend the treaty relation as between itself and the defaulting State or do the same with regard only to the provision which is the subject of the breach; in other words, it provides in the bilateral relationships between parties to a multilateral treaty for rights corresponding to those which exist in the case of a bilateral treaty. If individual States react against a material breach by terminating the treaty link between them and the defaulting State, the treaty remains in force as between the latter and the other parties to the treaty. It is conceivable, however, that, because of the key position held by the defaulting State in the whole régime of the treaty, or because of the number of parties implicated in the breach, the general body of the parties to the treaty might wish to terminate or suspend the whole treaty. In that event, their natural course would seem to be to proceed to terminate or suspend the treaty by subsequent agreement under article 18, and this course is accordingly indicated in paragraph 4 (b). But in cases such as these, where the defaults of a key State or of a number of States go far to undermine the whole treaty

régime, it seems desirable that individual parties should also have the right not merely of terminating their treaty-relation with the defaulting State but of withdrawing altogether from the treaty. A proviso has accordingly been added to paragraph 4 recognizing such a right in cases where the breach has the effect of frustrating the object and purpose of the treaty also in the relations between the States not involved in the breach.

18. A plausible case could, perhaps, be made out in favour or recognizing a right in the other parties to the treaty collectively, by a two-thirds majority, to declare the defaulting State to be no longer a party — of expelling it from the régime of the treaty, just as in some international organizations the members may expel a State which persistently violates the obligations incumbent upon a member. The position is different, however, in the case of an international organization, because normally the members cannot by their individual action terminate their relations with the defaulting State within the organization. They can only do so by a collective decision. The fact that any party to a multilateral treaty can individually put an end to the treaty relation between itself and the defaulting State removes the need to legislate for the possibility of a collective expulsion of the treaty-breaking State.

19. Paragraph 5 provides that in the case of the material breach of a constituent treaty of an international organization the termination or suspension of the rights or obligations of the parties under the treaty shall in principle be matter for decision by the competent organ in accordance with the applicable rules of the constitution of the organization in question. The constitutions of many of the larger organizations contain provisions relating to the suspension or termination of membership or to the suspension of voting rights in the event of a member's being in default in its obligations and as mentioned in paragraph 20 of the Commentary to article 17, many of them provide for a right to denounce or withdraw from the treaty. In these cases, it seems clear that any question of terminating or suspending the membership of the defaulting party or of suspending generally the operation of a provision of the treaty must be one for the competent organ of the Organization and not for the individual parties to the treaty. Similarly, in the case of treaties, such as international labour conventions, concluded within an organization, the reaction of the parties to a material breach is essentially a matter to be settled within the organization. Admittedly, some of the more loosely knit organizations contain no provisions concerning termination or suspension of membership, or concerning withdrawal from the organization; and in some cases the only form of common organ they envisage is the occasional calling of a conference of the members. Even in such cases, however, it would seem that the expulsion of a party from the treaty régime or the termination or suspension of the treaty should, in principle, be questions for some form of "collegiate" decision within the organization.

*Article 21 — Dissolution of a treaty in consequence of a supervening impossibility or illegality of performance*

1. (a) Subject to the rules governing State succession in the matter of treaties, if the international personality of one of the parties to a treaty is extinguished, any other party may invoke the extinction of such party —

<sup>129</sup> Even a treaty like the European Convention of Human Rights, designed for the protection of the individual, is subject to denunciation, while a party which ceases to be a member of the Council of Europe automatically ceases to be a party to the treaty.

- (i) in the case of a bilateral treaty, as having dissolved the treaty;
- (ii) in other cases as having rendered the treaty inapplicable with respect to the extinguished State;

provided always that the extinction of such party was not brought about by means contrary to the provisions of the Charter of the United Nations.

(b) In a case falling under sub-paragraph (a) (ii), if the extinction of the party in question materially affects the fulfilment of the object and purpose of the treaty as between the remaining parties, it may be invoked by any such party as a ground for withdrawing from the treaty.

2. It shall be open to any party to call for the termination of a treaty if after its entry into force its performance shall have become impossible owing to —

(a) the complete and permanent disappearance or destruction of the physical subject-matter of the rights and obligations contained in the treaty; provided always that it was not the purpose of the treaty to ensure the maintenance of the subject-matter;

(b) the complete and permanent disappearance of a legal arrangement or régime to which the rights and obligations established by the treaty directly relate.

3. If in a case falling under paragraph 2 there is substantial doubt as to whether the cause of the impossibility of performance will be permanent, the treaty may only be suspended, not terminated. In that event, the operation of the treaty shall remain in suspense until the impossibility of performance has ceased or, as the case may be, has to all appearances become permanent.

4. It shall also be open to any party to call for the termination of a treaty, if after its entry into force the establishment of a new rule of international law having the character of *jus cogens* shall have rendered the performance of the treaty illegal under international law.

#### Commentary

1. This article and article 22 cover the dissolution or suspension of treaties by reason of events or developments subsequent to their conclusion. Under the previous articles of the present section, the termination of a treaty comes about either by its own terms or through the exercise by one of the parties of a right expressly or impliedly contained in it or through the exercise of a right arising out of the breach of the treaty. Under this and the next article it comes about through events or developments which occur outside the treaty, and it is often spoken of as happening by operation of law independently of the will of the parties. Some authorities, it is true, put these cases upon the ground of an implied resolutive condition, saying that every treaty is to be understood as subject to a condition as to the continued possibility and legality of its performance and as to the continued existence, without essential change, of the circumstances upon which the treaty was based. But under that theory also the termination of the treaty will, in principle, be automatic and come about independently of the will of the parties by the happening of events resulting in an impossibility or illegality of performance or a fundamental change in the circumstances.

2. It is true that in the cases dealt with in articles 21 and 22 the termination of the treaty might be regarded as taking place by operation of law, independent-

ly of any expression of will by the parties, when the terminating events or developments have occurred. But disputes may arise as to whether these events or developments have in fact occurred, just as in cases of "essential validity" disputes may arise as to the existence of the alleged ground of invalidity. As in section III, so also in these articles the absence of any general system of compulsory adjudication makes it difficult to adopt the principle of automatic annulment of the treaty by operation of law without any qualification. Otherwise, and especially with regard to the doctrine of *rebus sic stantibus*, there is a danger of a legitimate and relevant principle of law being used as a mere pretext for repudiating treaty obligations. It is for this reason that the present article and article 22 have been formulated in terms of the right of a party to denounce the treaty, rather than in terms of the automatic extinction of the treaty by operation of law; and for the same reason the right to claim that the treaty has been dissolved on one or other of the grounds mentioned in these articles is brought by article 4 under the procedural requirements of section IV. The upshot is that the cases arising under these articles are dealt with on the same lines as cases of essential validity and cases of termination following upon breach.

3. Supervening impossibility or illegality of performance are necessarily cases where there is a fundamental change in the circumstances on the basis of which the parties entered into the treaty; and they could accordingly be regarded as falling within the general scope of the doctrine of *rebus sic stantibus*. The special Rapporteur, however, agrees with his predecessor<sup>130</sup> in thinking that supervening impossibility and illegality of performance are distinct grounds for the dissolution of treaties having a juridical basis that is independent of the doctrine of *rebus sic stantibus*. Moreover, they are grounds for regarding a treaty as dissolved which are both more specific and leave much less room for subjective appreciation than the *rebus sic stantibus* doctrine. It therefore seems advisable to keep them apart from that doctrine, which is, in consequence, dealt with separately in article 22.

4. Paragraph 1 considers the special case of impossibility of performance brought about by the disappearance of one of the parties. This case is treated by most of the authorities as one of the instances of impossibility of performance, and it was so treated by the previous Special Rapporteur, although he recognized that it must be subject to the law governing State succession in the matter of treaties. His draft article 17, paragraph I A (i), read:

"Total extinction of one of the parties to a bilateral treaty, as a separate international personality, or loss or complete change of identity, subject however to the rules of State succession in the matter of bilateral treaties where these rules provide for the devolution of treaty obligations."

Owing to the links between this question and the question of State succession, which is being taken up separately by the Commission, the present Special Rapporteur felt some hesitation in including paragraph 1 of the present article. However, where succession does not

<sup>130</sup> Sir G. Fitzmaurice's second report (A/CN.4/107), article 17, and commentary, paragraphs 100-102.

take place, the extinction of a party is a ground for the automatic dissolution of a treaty or, in the case of a multilateral treaty, for the application of the treaty to cease with respect to the extinguished State.<sup>131</sup> Accordingly, paragraph 1 has been included in order that the point may be considered by the Commission. If paragraph 1 is included, it seems appropriate to reserve from it the case of a State extinguished by means contrary to the Charter. Sub-paragraph (b) has been added to cover the possible case of the extinction of a party to a treaty concluded amongst a small group of States, in which event the disappearance of one party might largely impair the usefulness of the treaty.

5. Paragraph 2 covers cases where the treaty is literally impossible to perform by reason of the disappearance of its subject-matter. This may happen in two ways, either through the disappearance of the physical subject of the rights and obligations of the treaty or through the disappearance of a legal state of affairs which was the *raison d'être* of those rights and obligations. The former type is defined in sub-paragraph 2 (a), and examples of it are easier to imagine than to find in practice. Amongst the theoretical possibilities suggested by the previous Special Rapporteur were: the submergence of an island, the drying up of a river bed, the destruction of a railway by an earthquake, the destruction of plant, installations, a canal, lighthouse, etc.<sup>132</sup> No doubt, any of these things may happen, but none of them has so far given rise to a leading case or diplomatic incident concerning the dissolution of treaties. As the previous Special Rapporteur pointed out, it is necessary to distinguish cases where the maintenance of the particular subject-matter was the express object of the treaty, e.g. a treaty concerning the maintenance of a lighthouse or other navigational aid, where there may be a duty to replace the lost or destroyed object.

6. The second type of case, which is defined in sub-paragraph 2 (b), is where a treaty relates to a legal arrangement or régime which is afterwards abolished, when the treaty necessarily ceases to be capable of performance and devoid of object. Examples are treaties relating to the operations of capitulations, which necessarily fell to the ground as each system of capitulations was finally and, to all appearances, permanently abolished. Other examples given by the previous Special Rapporteur (A/CN.4/107, paragraph 101) were treaties relating to a customs union or condominium which would also necessarily become incapable of performance if the customs union or condominium disappeared altogether. These examples appear to be genuine cases of impossibility of performance by reason of the disappearance of the subject-matter of the treaty similar to the disappearance of an island, river, etc. The previous Special Rapporteur formulated his rule rather more broadly as covering any case of "Supervening literal inapplicability owing to disappearance of the treaty field of action"; and he included under this head such cases as Great Britain's declaration in 1921 that she regarded her bilateral treaties for combatting the slave trade as terminated since there was no longer any slave trade

to combat. This seems to be more a case of desuetude than of impossibility of performance, and the present Special Rapporteur prefers to confine the present article to what are strictly cases of physical or legal impossibility of performance. Otherwise it may be difficult to separate the cases falling under the present article from those falling under the doctrine of *rebus sic stantibus*.

7. Paragraph 3 provides that where there is an impossibility of performance the permanence of which is doubtful, the treaty may only be suspended, not terminated. These cases, it is true, might simply be treated as cases where *force majeure* could be pleaded as a defence exonerating a party from liability for non-performance. But where there is a continuing impossibility of performance of continuing obligations it seems better to recognize that the treaty may be suspended. It should, perhaps, be added that one obvious case of impossibility, namely impossibility resulting from the outbreak of hostilities, does not fall under either paragraphs 2 or 3, and is not covered by the present article. The effect of war on treaties raises special issues and is not covered by the present report.

8. Paragraph 4 covers cases of impossibility arising from changes in the law itself and in the nature of things these are not likely to be very common in international law. A new inconsistent treaty may dissolve an earlier one between the same parties, but the process is properly to be regarded as one of implied abrogation by the parties, rather than of dissolution by operation of law; accordingly, such a case falls not under the present article but under article 14. The present article deals rather with an illegality arising from the emergence of a new rule of *jus cogens*. Then it is not simply a question of the priority to be given to two equally valid norms; for the emergence of the new rule of *jus cogens* renders the earlier treaty illegal and incapable of performance within the law. An example would be former treaties not to combat but to regulate the slave trade, some of which were concluded even in the nineteenth century.<sup>133</sup> The subsequent condemnation of all forms of slavery by general international law ultimately rendered such treaties incapable of application. Another illustration often given in the books is treaties concerning facilities for privateers concluded before the abolition of privateering.<sup>134</sup>

#### Article 22 — The doctrine of *rebus sic stantibus*

1. (a) A change in the circumstances which existed at the time when a treaty was entered into does not, as such, affect the continued validity of the treaty.

(b) Under the conditions set out in the following paragraphs of this article, however, the validity of a treaty may be affected by an essential change in the circumstances forming the basis of a treaty.

2. An essential change in the circumstances forming the basis of a treaty occurs when:

(a) a change has taken place with respect to a fact or state of facts which existed when the treaty was entered into;

(b) it appears from the object and purpose of the

<sup>131</sup> See Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1165-1168; F. I. Kozhevnikov, *International Law* (Academy of Sciences of the USSR), p. 281.

<sup>132</sup> Second report (A/CN.4/107, paragraph 97). See also McNair, *op. cit.*, p. 685.

<sup>133</sup> e.g., article 4 of the Anglo-Portuguese Treaty of 22 January 1815; see McNair, *op. cit.*, p. 685.

<sup>134</sup> See Oppenheim, *op. cit.*, p. 946.

treaty and from the circumstances in which it was entered into, that the parties must both, or all, have assumed the continued existence of that fact or state of facts to be an essential foundation of the obligations accepted by them in the treaty; and

(c) the effect of the change in that fact or state of facts is such as —

(i) in substance to frustrate the further realization of the object and purpose of the treaty; or

(ii) to render the performance of the obligations contained in the treaty something essentially different from what was originally undertaken.

3. A change in the policies of the State claiming to terminate the treaty, or in its motives or attitude with respect to the treaty, does not constitute an essential change in the circumstances forming the basis of the treaty within the meaning of paragraph 2.

4. An essential change in the circumstances forming the basis of a treaty may not be invoked for the purpose of denouncing or withdrawing from a treaty if —

(a) it was caused, or substantially contributed to, by the acts or omissions of the party invoking it;

(b) the State concerned has failed to invoke it within a reasonable time after it first became perceptible, or has otherwise precluded itself from invoking the change of circumstances under the provisions of article 4 of this part;

(c) such change of circumstances has been expressly or impliedly provided for in the treaty itself or in a subsequent agreement concluded between the parties in question.

5. An essential change in the circumstances forming the basis of a treaty may not be invoked for the purpose of terminating —

(a) stipulations of a treaty which effect a transfer of territory, the settlement of a boundary, or a grant of territorial rights;

(b) stipulations which accompany a transfer of territory or boundary settlement and are expressed to be an essential condition of such transfer or settlement;

(c) a treaty which is the constituent instrument of an international organization.

6. A party shall only be entitled to terminate or withdraw from a treaty on the ground of an essential change in the circumstances forming the basis of the treaty —

(a) by agreement under the provisions of articles 18 and 19; or

(b) under the procedure laid down in article 25.

#### Commentary

1. Almost all modern writers,<sup>135</sup> however reluctantly, admit the existence in international law of the principle with which this article is concerned and which is commonly spoken of as the doctrine of *rebus sic stantibus*. Just as many systems of municipal law recognize that, quite apart from any actual impossibility of performance, contracts may become inapplicable through a fundamental change of circumstances, so also, it is held,

international law recognizes that treaties may cease to be binding upon the parties for the same reason. Most writers, however, at the same time enter a strong *caveat* as to the need to confine the scope of the doctrine within narrow limits and to regulate strictly the conditions under which it may be invoked; for the risks to the general security of treaties which this doctrine presents in the absence of any general system of compulsory jurisdiction are even more serious than in the case of denunciation on the ground of an alleged breach of the treaty or in the case of any other ground either of invalidity or of termination. As was said by the previous Special Rapporteur in his second report (A/CN.4/107, paragraph 142):

“It is all too easy to find grounds for alleging a change of circumstances, since in fact in international life circumstances are constantly changing. But these changes are not, generally speaking, of a kind that can or should affect the continued operation of treaties. As a rule, they do not render the execution of the treaty either impossible or materially difficult, or its objects impossible of realization, or destroy its value or *raison d'être*. What they may tend to influence is the willingness of one or other of the parties, on ideological or political grounds — often of an internal character — to continue to carry it out.”

In short, this ground for obtaining release from treaty obligations is susceptible of being used even more flexibly and more subjectively than any of the others.

2. Despite the almost universal distrust of the doctrine and despite the differences of opinion which exist in regard to some aspects of it, there is a good deal of evidence of its recognition in customary law. The International Court, it is true, has not yet committed itself on the point. In the *Free Zones* case,<sup>136</sup> having held that the facts did not in any event justify the application of the doctrine, the Permanent Court expressly reserved its position. It observed that it became unnecessary for it to consider “any of the questions of principle which arise in connexion with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the methods by which effect can be given to the theory, if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816”. On the other hand, it can equally be said that the Court has never on any occasion<sup>137</sup> rejected the doctrine and that in the passage just quoted it even seems to have assumed that the doctrine is to some extent admitted in international law. Sir H. Lauterpacht<sup>138</sup> thought it to be clear from this passage that the Court was “prepared to recognize the principle, although it refused to say to what extent”. This statement seems, however, to go rather far, since the Court in dealing with the facts underlined that it

<sup>136</sup> P.C.I.J. Series A/B No. 46, pp. 156-8.

<sup>137</sup> e.g., in the *Nationality Decrees* Opinion (P.C.I.J., Series B, No. 4, p. 29), where it merely observed that it would be impossible to pronounce upon the point raised by France regarding the “principle known as the *clausula rebus sic stantibus*” without recourse to the principles of international law concerning the duration of treaties.

<sup>138</sup> *The Development of International Law by the International Court*, p. 85.

<sup>135</sup> e.g., Oppenheim, *op. cit.*, Vol. I, pp. 938-944; McNair, *op. cit.*, pp. 681-691; F. I. Koshevnikov, *op. cit.*, p. 281; C. Rousseau, *Principes généraux du droit international public*, tome I, pp. 580-615; Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1096-1126; Chesney Hill, *The Doctrine of Rebus Sic Stantibus*, University of Missouri Studies (1934).

was confining itself to the case as it had been argued by France, without taking any position as to how far that case might or might not be well founded in law.

3. Municipal courts, on the other hand, have not infrequently recognized the relevance of the *rebus sic stantibus* doctrine in international law, though for one reason or another they have always ended by rejecting the application of the doctrine in the particular circumstances of the case before them.<sup>139</sup> These cases emphasize that the doctrine is limited to changes in circumstances the continuance of which, having regard to the evident intention of the parties at the time, was regarded as a tacit condition of the agreement;<sup>140</sup> that the treaty is not dissolved automatically by law upon the occurrence of the change but only if the doctrine is invoked by one of the parties,<sup>141</sup> and that the doctrine must be invoked within a reasonable time after the change in the circumstances was first perceived.<sup>142</sup> Moreover, in *Bremen v. Prussia*<sup>143</sup> the German Reichsgericht, while not disputing the general relevance of the doctrine, considered it altogether inapplicable to a case where one party was seeking to release itself not from the whole treaty but only from certain restrictive clauses which had formed an essential part of an agreement for an exchange of territory.

4. The doctrine of *rebus sic stantibus* has not infrequently been invoked in State practice either *eo nomine* or in the form of a reference to a general principle claimed to justify the termination or modification of treaty obligations by reason of changed circumstances. Detailed examination of this State practice is not possible in the present report.<sup>144</sup> Broadly speaking, it shows a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground. The most significant indications as to the attitude of States regarding the doctrine are perhaps to be found in statements submitted to the Court in the cases where the doctrine has been invoked. In the *Nationality Decrees* case the French Government contended that "perpetual" treaties were always subject to termination in virtue of the *rebus sic stantibus* clause and claimed that the establishment of the French protectorate over Morocco had for that reason had the effect of extinguishing certain Anglo-French Treaties.<sup>145</sup>

The British Government, while contesting the French Government's view of the facts, observed that the most forceful argument advanced by France was that of *rebus sic stantibus*.<sup>146</sup> In the case concerning *The Denunciation of the Sino-Belgian Treaty of 1865*, China invoked, in general terms, changes of circumstances as a justification of her denunciation of a sixty-year-old treaty, and supported her contention with a reference to Article 19 of the Covenant.<sup>147</sup> This Article, however, provided that the Assembly of the League should "from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable", and the Belgian Government was not slow to reply that neither Article 19 nor the doctrine of *rebus sic stantibus* contemplated the unilateral denunciation of treaties. It further maintained that there could be no question of China's denouncing the treaty because of a change of circumstances unless she had at least tried to obtain its revision through Article 19; that where both parties were subject to the Court's jurisdiction, the natural course for China, in case of dispute, was to obtain a ruling from the Court; and that if she did not, she could not denounce the treaty without Belgium's consent.<sup>148</sup> Even more striking, in the *Free Zones* case,<sup>149</sup> the French Government, the Government invoking the *rebus sic stantibus* doctrine, itself emphasized that the doctrine did not allow unilateral denunciation of a treaty claimed to be out of date. It argued that the doctrine would cause a treaty to lapse only "lorsque le changement de circonstances aura été reconnu par un acte faisant droit entre les deux Etats intéressés"; and it further said: "cet acte faisant droit entre les deux Etats intéressés peut être soit un accord, lequel accord sera une reconnaissance du changement des circonstances et de son effet sur le traité, soit une sentence du juge international compétent s'il y en a un".<sup>150</sup> Switzerland, emphasizing the differences of opinion amongst writers in regard to the doctrine, disputed the existence in international law of any such right to the termination of a treaty because of changed circumstances enforceable through the decision of a competent tribunal. But she rested her case primarily on three contentions: (a) the circumstances alleged to have changed were not circumstances on the basis of whose continuance the parties could be said to have entered into the treaty; (b) in any event, the doctrine does not apply to treaties creating territorial rights; and (c) France had delayed unreasonably long after the alleged changes of circumstances had manifested themselves.<sup>151</sup> France does not appear to have disputed that the doctrine is inapplicable to territorial rights; instead, she drew a distinction between territorial rights and "personal" rights created on the occasion of a territorial settlement.<sup>152</sup> The Court upheld the Swiss Government's contentions on points (a) and (c), but did not pronounce on the application of the *rebus sic stantibus* doctrine to treaties creating territorial rights.

<sup>139</sup> e.g., *Hooper v. United States*, Hudson, *Cases on International Law*, second edition, p. 930; *Lucerne v. Aargau* (1888), *Arrêts du Tribunal Fédéral Suisse*, Vol. 8, p. 57; *In re Lepeschkin*, *Annual Digest of Public International Law Cases*, 1923-1924, Case No. 189; *Bremen v. Prussia*, *Ibid.*, 1925-1926, Case No. 266; *Rothschild and Sons v. Egyptian Government*, *Ibid.*, 1925-1926, Case No. 14; *Canton of Thurgau v. Canton of St. Gallen*, *Ibid.*, 1927-1928; Case No. 289; *Bertaco v. Bancel*, *Ibid.*, 1935-1937, Case No. 201; *Stransky v. Zivnostenska Bank*, *International Law Reports*, 1955, pp. 424-427.

<sup>140</sup> *Lucerne v. Aargau*; *Canton of Thurgau v. Canton of St. Gallen*; *Hooper v. United States*.

<sup>141</sup> *In re Lepeschkin*; *Stransky v. Zivnostenska Bank*.

<sup>142</sup> *Canton of Thurgau v. Canton of St. Gallen*.

<sup>143</sup> *Annual Digest of Public International Law Cases*, 1925-1926, Case No. 266.

<sup>144</sup> See the accounts of State practice in Chesney Hill, *op. cit.*, pp. 27-74; C. Kiss, *op. cit.*, pp. 381-393; C. Rousseau, *op. cit.*, pp. 594-615; Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1113-1124; H. W. Briggs, *A.J.I.L.* 1942, pp. 89-96, and 1949, pp. 762-769.

<sup>145</sup> P.C.I.J. Series C, No. 2, pp. 187-188.

<sup>146</sup> *Ibid.*, pp. 208-209.

<sup>147</sup> *Ibid.*, No. 16, I, p. 52.

<sup>148</sup> *Ibid.*, pp. 22-23; the case was ultimately settled by the conclusion of a new treaty.

<sup>149</sup> *Ibid.*, Series A/B, No. 46.

<sup>150</sup> *Ibid.*, Series C, No. 58, pp. 578-579, 109-146, and 405-415; see also Series C, No. 17, I, pp. 89, 250, 256, 283-284.

<sup>151</sup> *Ibid.*, Series C, No. 58, pp. 463-476.

<sup>152</sup> *Ibid.*, pp. 136-143.

5. Brief reference may also be made to two instances in which the *rebus sic stantibus* doctrine has been raised in political organs of the United Nations. In 1947 Egypt referred to the Security Council the question of the continued validity of the Anglo-Egyptian Treaty of 1936,<sup>153</sup> using arguments which, without mentioning it *eo nomine*, were based upon the *rebus sic stantibus* doctrine. No resolution was adopted; but several representatives expressed objection to an interpretation of the *rebus sic stantibus* doctrine which would allow a purely unilateral denunciation of a treaty without some form of adjudication upon the merits of a claim to invoke that doctrine. The second instance concerns a study, prepared by the Secretary-General at the request of the Economic and Social Council, of the present legal validity of the undertakings relating to the protection of minorities placed under the guarantee of the League of Nations. The Secretary-General, while emphasizing its limited character, assumed the *rebus sic stantibus* doctrine to be applicable in international law (E/CN.4/367, p. 37):

“International law recognizes that in some cases an important change of the factual circumstances from those under which a treaty was concluded may cause that treaty to lapse. In such cases the clause *rebus sic stantibus* applies if invoked by the Governments.

“But if international law recognizes the clause *rebus sic stantibus*, it only gives it a very limited scope and surrounds it with restrictive conditions, so much so that the application of the clause acquires an exceptional character.”

Having mentioned the differences of opinion concerning the conditions for the application of the doctrine, the Secretary-General said that for the purposes of the study he would be guided by a restrictive definition of the doctrine, without suggesting that it was necessarily the one which should be adopted by international tribunals. On this basis, he stated that the doctrine requires that (1) certain factual conditions, which existed at the moment of the conclusion of the treaty and in the absence of which the parties would not have concluded the treaty, should have disappeared; (2) the new circumstances should differ substantially from those which existed at the time when the treaty was concluded, so as to render its application morally and physically impossible; and (3) the State invoking the clause should obtain the consent of the other contracting parties and, in the absence of such consent, should secure recognition of the validity of its claim by a competent international organ, such as one of the executive organs of the United Nations or the International Court of Justice. The general conclusion of the study was that the particular changes of circumstances with respect to each country concerned did not warrant the application of the doctrine; but that between 1939 and 1947 circumstances as a whole had changed to such an extent with regard to the system of protection of minorities that the undertakings given by States during the League period should be considered as having ceased to exist. This study was, of course, an objective, non-contentious, examination of the particular problem, and no doubt it was for that reason that the question of the

consent of the interested parties was not taken into consideration by the Secretary-General in arriving at his general conclusions.

6. The controversy that surrounds the doctrine and the dangers that it causes for the security of treaties justify some hesitation on the part of the Commission in including it in the draft articles on the law of treaties. Nevertheless, on balance, the Special Rapporteur agrees with his predecessor (A/CN.4/107, paragraph 144) in thinking that, carefully delimited and regulated, it should be included. A treaty may remain in force for generations and its stipulations come to place an undue burden on one of the parties. Then, if the other party is obdurate in opposing any change, the fact that international law recognized no legal means of terminating or modifying the treaty otherwise than through a further agreement between the same parties may impose a serious strain on the relations between the States concerned. It may be better to try and fill this gap in the law even by a legal institution so imperfect as the *rebus sic stantibus* doctrine, rather than to leave that dissatisfied State ultimately to release itself from the treaty by means outside the law. It is true that the number of such cases is likely to be comparatively small. As pointed out in the Commentary to article 15, the majority of modern treaties are expressed to be of short duration, or are entered into for recurrent terms of years with a right to break the treaty at the end of each term, or are expressly or implicitly terminable upon notice. In all these cases either the treaty expires automatically or each party, having the power to terminate the treaty, has the power also to apply pressure upon the other party to revise its provisions. Further, even when a treaty is not subject to early termination in any of these ways, the parties may be ready to agree upon the termination or revision of an out-of-date treaty. Nevertheless, there remains a residue of cases in which, failing any agreement, one party may be left powerless under the treaty to obtain any relief from outmoded and burdensome provisions. It is in these cases that the *rebus sic stantibus* doctrine may be required, not necessarily to effect the termination of the treaty, but as a lever to induce a spirit of compromise in the other party. Moreover, despite the strong reservations often expressed with regard to it, the evidence of the acceptance of the doctrine in international law is so considerable that it seems to indicate a general belief in the need for a safety-valve of this kind in the law of treaties.

7. Various theories have been advanced concerning the juridical basis of the doctrine,<sup>154</sup> three of which were isolated by the previous Special Rapporteur for detailed examination (A/CN.4/107, paragraphs 146-148):

- (i) Under this theory the parties are presumed to have had in mind the continuance of certain circumstances as the basis of their agreement and to have intended the treaty to be subject to an implied condition by which it is to come to an end if there is an essential change in those circumstances.
- (ii) Under the second theory, international law is considered to impose upon the parties to a treaty an objective rule of law prescribing that an essential

<sup>153</sup> Treaty of Friendship and Alliance, London, 26 August 1936, *United Kingdom Treaty Series* No. 6 (1937).

<sup>154</sup> See Chesney Hill, *op. cit.*, pp. 7-16; C. Rousseau, *op. cit.*, pp. 580-586.

change of circumstances entitles any of the parties to require the termination of the treaty.

- (iii) Under the third theory, which is a mixture of the first two, the doctrine is considered to be an objective rule of law the operation of which is to import into the treaty, regardless of the intention of the parties, an implied condition that it will come to an end if there is an essential change of circumstances.

The previous Special Rapporteur thought there is to be a crucial point of difference between the second and third theories. If the rule of law is considered to operate by inserting an implied condition in the treaty, the termination of the treaty will occur automatically when an essential change of circumstances takes place, whereas under the second theory the rule operates only to confer a right to call for the termination of the treaty. The difference between the two theories may not be so great in practice, since under either theory the really critical point is whether one party may unilaterally determine whether or not an essential change has occurred. If a purely unilateral power of determination is not admitted, the practical effect of the two theories is not very different. However, the present Special Rapporteur agrees with his predecessor in thinking that the third theory is not an improvement on the second and should be left aside.

8. The Special Rapporteur likewise agrees with his predecessor in recommending that the Commission should base itself upon the second rather than the first theory; that is, upon the view that the *rebus sic stantibus* doctrine is an objective rule of law rather than a presumption as to the original intention of the parties to make the treaty subject to an implied condition. True, the theory of an implied *clausula rebus sic stantibus* has a long history going back, according to one writer,<sup>155</sup> to St. Thomas Aquinas, and the great majority of writers have presented the doctrine in the form of a term implied in every perpetual treaty. But, as was pointed out by the previous Special Rapporteur, the tendency today is to regard the implied term as only a fiction by which it is attempted to reconcile the dissolution of treaties in consequence of a fundamental change of circumstances with the rule *pacta sunt servanda*. In most cases the parties have given no thought to the possibility of a change of circumstances and, if they had done so, would probably have provided for it in a different manner. Furthermore, the fiction is considered an undesirable one since, by making the doctrine dependent upon the intentions of the parties, it invites subjective interpretations and adds to the risk of abuse. For these reasons a number of modern authorities,<sup>156</sup> including the previous Special Rapporteur (A/CN.4/107, paragraph 149) reject the theory of an implied term and formulate the doctrine as an objective rule of law by which, on grounds of equity and justice, an essential change of circumstances radically affecting

the basis of a treaty will entitle a party to call for its termination. The Havana Convention on Treaties of 1928<sup>157</sup> seems also to state the doctrine in the form of an objective rule of law; and the present draft has been prepared upon this basis.

9. Many of the authorities (as also article 15 of the Havana Convention) limit the application of the doctrine to "perpetual treaties" and the previous Special Rapporteur's draft limited it to "treaties not subject to any provision, express or implied, as to duration". In paragraph 159 of his second report (Commentary to his article 21) he said:

"There is a general consensus of opinion that the principle *rebus* is only relevant to the case of what are sometimes called 'perpetual treaties' — indeed it can be said that the principle has no *raison d'être* in the case of other treaties, for it is precisely to remedy the hardship that might result from perpetuation, if an essential change of the order contemplated by the *rebus* principle occurs, that the principle exists. If the treaty is not of this kind, either the question does not arise, for the treaty can be terminated by other means . . . or else the treaty will expire in due course under its own terms; and this event can reasonably be awaited, for, short of supervening literal impossibility of performance (which would terminate the treaty in any case), a change of circumstances can hardly be of such a character that termination cannot await the natural advent of the treaty term. Indeed, it is a legitimate inference, as a matter of interpretation, that, if the parties provided a term, they meant to exclude earlier termination on any basis other than further special agreement, fundamental breach, or literal impossibility of performance."

10. The present Special Rapporteur does not find this reasoning altogether persuasive. When a treaty is for a brief term or is terminable upon notice, the application of the doctrine is clearly without any utility. But when a treaty is expressly given a duration of ten, twenty, fifty or ninety-nine years, it cannot be excluded that a fundamental change of circumstances may occur which radically affects the basis of the treaty obligations. The cataclysmic events of the present century show how radically circumstances may change within a period of only ten or twenty years. If the doctrine is put, as it was put by the previous Special Rapporteur, on the general ground of equity and justice, it is not evident why a distinction should be made between "perpetual" and "long term" treaties. The inference which he draws as to the intention of the parties to exclude earlier termination is perfectly legitimate, if the doctrine is regarded from the point of view of the "implied condition" theory; but it does not seem to be so, if the doctrine is regarded as an objective rule of law founded upon the equity and justice of the matter. Moreover, as one modern text book points out,<sup>158</sup> practice does not altogether support the view that the doctrine is confined to "perpetual" treaties. Some treaties of limited duration actually contain what are equivalent to *rebus sic stantibus* provisions.<sup>159</sup> The doctrine has also been invoked

<sup>155</sup> Baron de Taube, *L'inviolabilité des Traités, Recueil des Cours, 1930, Vol. II*, p. 361.

<sup>156</sup> C. Rousseau, *op. cit.*, p. 584; Sir J. Fischer Williams, *A.J.I.L.*, 1928, pp. 93-94; C. De Visscher, *Théories et Réalités en droit international public*, p. 391; J. Basdevant, "Règles générales du Droit de la Paix", *Recueil des Cours 1936, Vol. IV*, pp. 653-654; Lord McNair, however, so far as he admits the doctrine at all, seems to consider it to be based on an implied condition.

<sup>157</sup> Article 15; see: Harvard Law School, *Research in International Law, III, Law of Treaties*, p. 1206.

<sup>158</sup> C. Rousseau, *op. cit.*, p. 586.

<sup>159</sup> e.g., art. 21 of the Treaty on Limitation of Naval Armament, signed at Washington, 6 February 1922 (Hudson,

sometimes in regard to limited treaties as, for instance, in the Resolution of the French Chamber of Deputies of 14 December 1932, expressly invoking the doctrine of *rebus sic stantibus* with reference to the Franco-American war debts agreement of 1926.<sup>160</sup> Desirable though it may be to limit the scope of the doctrine as narrowly as possible, the present Special Rapporteur considers that, if the doctrine is accepted as an objective rule of law, no distinction should be made between "perpetual" and limited treaties. The rule has accordingly been framed in the present articles as one of general application, though for purely practical reasons it may seldom or never have relevance for treaties of limited duration or which are terminable upon notice.

11. Paragraph 1 (a), in order to emphasize the narrow scope of the doctrine, begins with the negative proposition that a change of circumstances does not, as such, affect the validity of a treaty. Paragraph 1 (b) then formulates the general rule that an essential change in the circumstances forming the basis of the treaty may be considered to affect its validity, and at the same time expressly limits the application of this principle to cases fulfilling the requirements stated in the further paragraphs of the article.

12. Paragraph 2 seeks to define the changes of circumstances which may give rise to a right to invoke the *rebus sic stantibus* doctrine. Although the basic concept is clear, a definition that is completely adequate is not easy to find. Many Common Law judges have similarly tried to formulate the corresponding definition of the changes of circumstances which justify an appeal to the analogous doctrine of frustration of contract, without finding any combination of words that satisfied all minds.<sup>161</sup> Although the doctrine is properly to be regarded as an objective rule of law, its application in any given case cannot be divorced from the intentions of the parties at the time of entering into the treaty; for the rationale of the rule is that the change of circumstances makes the treaty obligations today something essentially different from the obligations originally undertaken. The problem is to define the relation which the change of circumstances must have to the original intentions of the parties and the extent to which that change must have affected the fulfilment of those intentions.

13. The previous Special Rapporteur made an exhaustive study of this problem in his second report (paragraphs 150-154, and 169-174), and it is not necessary to restate all the various considerations here. The definition which he proposed was contained in the following provision of article 22, paragraph 2, of his draft:

"(ii) The change must relate to a situation of fact, or state of affairs, existing at the time of the conclusion of the treaty, with reference to which both the parties contracted, and the continued exist-

tence of which, without essential change, was envisaged by both of them as a determining factor moving them jointly to enter into the treaty, or into the particular obligation to which the changed circumstances are said to relate.

"(iii) The change must have the effect either (a) of rendering impossible the realization, or further realization, of the objects and purposes of the treaty itself, or of those to which the particular obligation relates; or (b) of destroying or completely altering the foundation of the obligation based on the situation of fact or state of affairs referred to in sub-paragraph (ii)."

Paragraph 2 of the present draft incorporates the main elements of the above provisions, but is worded a little differently. The criterion laid down in sub-paragraph (ii) of the previous Special Rapporteur's draft "the continued existence of which, without essential change, was envisaged by both of them as a determining factor moving them jointly to enter into the treaty" seems, perhaps, to be framed in terms which are too subjective. They come near to reintroducing the fiction of the implied condition and, if literally interpreted, might almost exclude any operation of the *rebus sic stantibus* doctrine. In the great majority of cases the parties will have given no conscious thought at all to the circumstance, which has subsequently changed, as "a determining factor" in moving them to conclude the treaty, but will have simply taken it for granted as part of the then existing international order of things. Accordingly, difficult although it may be to find the right combination of words, it seems desirable to try and express the criterion in terms of an objective interpretation of the treaty and of the circumstances which surrounded its conclusion.

14. The definition in paragraph 2 contains the main elements. First, the change must relate to a fact or factual situation which existed at the time when the treaty was concluded. Secondly, it must appear from the object and purpose of the treaty and the circumstances surrounding its conclusion that the parties assumed the existence and continued existence of that fact or situation to be a necessary foundation of the obligations accepted by them. In other words, it must appear from an objective interpretation of the treaty and the circumstances surrounding its conclusion that the parties contracted on the assumption that the fact or situation in question was a necessary basis for the operation of the treaty. Thirdly, the effect of the change must be such as either (i) in substance to frustrate the further realization of the object and purpose of the treaty or (ii) to render performance of the treaty obligations something essentially different from what was undertaken. The previous Special Rapporteur expressed alternative (ii) in terms of the destruction or alteration of the foundation of the treaty obligations. It is thought, however, that in determining the relation which the change of circumstances must have to the original treaty, the relevant consideration is rather the nature and extent of the effect upon the performance of the treaty obligations.

15. Paragraph 3 underlines what is already clearly implied in paragraph 2, namely, that a subjective change in the views adopted by a State with regard to a treaty can never furnish a basis for invoking the *rebus*

*International Legislation*, vol. II, p. 820); art. 26 of the Treaty for the Limitation of Naval Armament, signed at London, 25 March 1936 (*Ibid.*, vol. VII, p. 280); and Convention regarding the régime of the Straits, signed at Montreux, 20 July 1936 (*League of Nations Treaty Series*, vol. 173, p. 229).

<sup>160</sup> For the text of the resolution, see C. Kiss, *op. cit.*, pp. 384-385.

<sup>161</sup> See, for example, *Bank Line Ltd. v. Capel and Co.*, 1919 A.C., p. 457-460; *Denny Mott and Dickson v. Fraser*, 1944 A.C., p. 274-281; *Davis Contractors Ltd. v. Fareham Urban District Council*, 1956 A.C., p. 719 and 727.

*sic stantibus* doctrine. The reason for underlining the point in a separate paragraph is that appeals to the *rebus sic stantibus* doctrine are so often due in practice not to essential changes of circumstances, but to a change in a State's policy or attitude towards the treaty.

16. Paragraph 4 sets out three cases in which, although an essential change of circumstances forming the basis of the treaty has occurred, it may not be invoked for the purpose of denouncing or withdrawing from the treaty. Sub-paragraph (a) covers the case where the party invoking the *rebus sic stantibus* doctrine has itself been largely responsible for bringing about the change of circumstances. Sub-paragraph (b) covers the case where, after the change of circumstances has taken place and become perceptible, the State invoking it has not raised the question of its effect upon the treaty, but has continued to act as if the treaty was still in force. The previous Special Rapporteur in article 22, paragraph 3 (iii), of his draft put this exception on the basis that a failure to invoke the change of circumstances with reasonable promptness raises a presumption that the change was not a fundamental one. This is very much how the Court dealt with the question of France's delay in raising the alleged change of circumstances in the *Free Zones* case,<sup>162</sup> and how the Swiss Federal Court dealt with a similar question of delay in the case of the *Canton of Thurgau v. The Canton of St. Gallen*.<sup>163</sup> In other words, the previous Special Rapporteur and the two Courts in the cases just mentioned seem to have regarded an unreasonable delay in invoking the change of circumstances as raising a case of *préclusion* (estoppel) covered by the general provision in article 4 of the present draft. This seems correct, and sub-paragraph (b) has therefore been framed in terms bringing cases of undue delay under the exception in that article. Sub-paragraph (c) covers the contingency that the parties might themselves have foreseen the possibility of a particular change of circumstances and provided for it expressly or impliedly in the treaty; for in that case the treaty would govern the case and the *rebus sic stantibus* doctrine could not be invoked to set aside the treaty.

17. Paragraph 5 excepts two classes of treaty provision from the *rebus sic stantibus* doctrine. Sub-paragraph (a) covers a provision actually effecting a transfer of territory, boundary settlement, or grant of territorial rights, such as rights of passage. The contention of the Swiss Government in the *Free Zones* case, that the doctrine does not apply to provisions establishing territorial rights, seems to be correct, as does also the distinction made by the French Government between provisions establishing territorial rights and provisions merely accompanying a transfer of territory.<sup>164</sup> Sub-paragraph (a) is therefore limited to actual transfers of territory, boundary settlements, or grants of territorial rights. Sub-paragraph (b), however, adds one case where a stipulation not creating a territorial right but merely accompanying transfer of territory is excluded from the doctrine, namely, the type of stipulation found in *Bremen v. Prussia*, where it was clear that the restriction upon the use of the territory as a fishing port had been an

essential condition of Prussia's willingness to transfer the territory.<sup>165</sup> The decision of the German court in that case would seem to have been entirely correct, and sub-paragraph (b) accordingly incorporates the point in the present article. Sub-paragraph (c) excepts from the rule treaties which are constituent instruments of international organizations, since the dissolution of an organization and the withdrawal of a member from it are matters to be settled by the organization itself.

18. Paragraph 6 in effect provides that a State may only terminate or withdraw from a treaty on the basis of the *rebus sic stantibus* doctrine either by agreement or by following a procedure which offers an objecting party the possibility of some form of independent determination of the claim to invoke the doctrine. Although there are certainly examples of purely unilateral denunciation on this ground, the weight of the opinion both amongst jurists and in State practice is strongly in favour of the view that unilateral termination or withdrawal without at least attempting first to secure the agreement of the other parties is inadmissible. The precise nature of the action required to be taken before termination or withdrawal is permissible on the ground of a change of circumstances raises delicate problems, however, that are similar to those which arise in connexion with certain other grounds of termination and invalidity. It must therefore be left to be covered in a general provision in article 25 of section IV.

#### SECTION IV—PROCEDURE FOR ANNULLING, DENOUNCING, TERMINATING, WITHDRAWING FROM OR SUSPENDING A TREATY AND THE SEVERANCE OF TREATY PROVISIONS

##### *Article 23 — Authority to annul, denounce, terminate, withdraw from or suspend a treaty*

The rules laid down in article 4 of part I with regard to the authority of a representative to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty on behalf of his State shall also apply, *mutatis mutandis*, to the authority of a representative —

(a) to annul, denounce, terminate, withdraw from or suspend a treaty; or

(b) to consent to the act of another State annulling, denouncing, terminating, withdrawing from or suspending a treaty.

##### *Commentary*

The power to annul, terminate, withdraw from or suspend treaties, no less than the power to conclude treaties, forms part of the treaty-making power of the State. If that power is normally exercised through the medium of a simple notification in writing, it is nevertheless important that other States should be able to satisfy themselves as to the regularity and binding character of an instrument of termination, withdrawal or suspension. The present article accordingly provides that the rules concerning the authority of representatives to negotiate and enter into treaties on behalf of their State, which have been provisionally adopted by the Commission in article 4 of part I (A/5209, chapter II) shall also apply, *mutatis mutandis*, to the authority of representatives to terminate, withdraw from or suspend treaties.

<sup>162</sup> P.C.I.J., Series A/B, No. 46, p. 157.

<sup>163</sup> *Annual Digest of Public International Law Cases*, 1927-8, Case No. 289.

<sup>164</sup> See paragraph 4 above.

<sup>165</sup> See paragraph 3 above.

*Article 24 — Termination, withdrawal or suspension under a right expressed or implied in the treaty*

1. Where a treaty expressly provides for a right to terminate, withdraw from or suspend it, or where such a right is to be implied in the treaty under article 17, paragraph 3, of this part, a notice to terminate, withdraw from or suspend the treaty, in order to be effective, must —

(a) be in writing and signed by a representative competent for that purpose as prescribed in article 23;

(b) comply with any conditions laid down in the treaty with regard to the circumstances, period of time or manner in which such notice may be given;

(c) specify the provision of the treaty under which such notice is given or, failing any such provision, indicate the ground upon which a right to give such notice is claimed under article 17, paragraph 3;

(d) specify the date of the notice and the date upon which it is to take effect.

2. Unless the treaty otherwise provides, any such notice must be formally communicated through the diplomatic or other official channel —

(a) in the case of a treaty for which there is no depositary, to every other party to the treaty;

(b) in other cases, to the depositary, which shall transmit a copy of the notice to every other party to the treaty.

3. Unless the notice is one that takes effect immediately or the treaty otherwise provides, a notice of termination, withdrawal or suspension may be revoked at any time —

(a) before the date specified in the treaty for the notice to take effect; or

(b) failing any such specific provision, before the expiry of the period of time prescribed in the treaty or in article 17, paragraph 3, of this part for the giving of the notice.

*Commentary*

1. This article concerns the procedure for exercising a power of termination, withdrawal or suspension conferred either by the terms of the treaty or by operation of law under article 17, paragraph 3. The procedural act required, as mentioned in the previous Commentary, is a notification in writing. But, if difficulties are to be avoided, it is essential that the notice should be in due form, emanate from an authority competent for the purpose, and be regularly communicated to the other interested States.

2. Paragraph 1 sets out the requirements to be met in giving notice or termination or withdrawal. Sub-paragraph (a) provides that the notice must be in writing and signed by an authority competent for the purpose. Sub-paragraph (b) underlines that it must conform to any conditions laid down in the treaty itself; e.g. the condition frequently found in treaties for recurrent periods of years that notice must be given not less than six months before the end of one of the periods. Sub-paragraph (c) provides that the notice should indicate the legal basis upon which the State claims to have a right to terminate, withdraw from or suspend the treaty — either an express provision or the legal ground for implying such a right. If such an indication may not be strictly necessary in the case of an express treaty right, it may nevertheless serve to minimise the risk of an irregular notice by focus-

ing attention on the terms of the treaty provision. In other cases, it seems desirable to insist upon the legal ground for implying a right of termination being stated in the notice, since the implication of the right may be controversial. In general it is thought better, in the interests of regularity and certainty in treaty relations, to require the legal basis of the notice to be stated in every case. Again, in the interests of regularity and certainty, it is thought desirable to require that the date of the notice and the date when it is considered to take effect should be specified in the instrument; and sub-paragraph (d) so provides.

3. Paragraph 2 insists that a notice of termination etc. should be formally communicated to the other parties either directly or through the depositary. It sometimes happens that in moments of stress the termination of a treaty or a threat of its termination may be made the subject of a public statement either in parliament or in the Press. But it is considered essential that such statements, at whatever level they are made, should not be regarded as a sufficient substitute for the formal legal act which both diplomatic propriety and the needs of regularity and certainty in treaty relations so clearly require.

4. Paragraph 3, following a similar provision in the draft of the previous Special Rapporteur (A/CN.4/107, article 26, paragraph 9), provides that a notice of termination, withdrawal or suspension may be revoked at any time before it takes effect. This happens either upon a specific date indicated in the treaty, e. g. at the end of a particular "recurrent" period, or by the expiry of a period of notice specified in the treaty or in article 17, paragraph 3. The previous Special Rapporteur's draft had a proviso requiring the assent to the revocation of any other party "which, in consequence of the original notification of termination or withdrawal, has itself given such a notification or has otherwise changed its position". While the idea behind this proviso is clearly sound, it seems doubtful whether the proviso is really necessary; for any other State, which had followed the example of the first State in giving notice of termination or withdrawal, would equally have a right to revoke the notice.

5. The previous Special Rapporteur's draft also had a provision (*ibid.*, article 26, paragraph 6) laying down that, unless the treaty specifically allows it, a notice of termination or withdrawal may not be made conditional. But, as long as a notice is framed as a firm and unambiguous notice of termination or withdrawal, there does not seem to be great objection to allowing it to be expressed to be subject to a condition. If it is permissible to revoke a notice before it becomes effective, it would seem equally permissible to revoke it in advance upon the happening of a particular contingency. Similarly, if a condition were to be expressed as a condition precedent, it might well affect the date upon which the notice could be said to have been effectively given; but if the intention to give notice and the form of the condition were both unambiguous, the existence of the condition would hardly seem sufficient to vitiate the notice as a notice.

*Article 25 — Annulment, denunciation, termination or suspension of treaty obligations under a right arising by operation of law*

1. If a party to a treaty claims to have a right to annul, denounce, terminate, withdraw from or suspend a treaty

under any of the provisions of articles 5 to 9, 11 to 14, or 19 to 22 of the present articles, it shall be bound first to give notice of such claim to the other party or parties to the treaty. The said notice must —

(a) be in writing and signed by a representative competent for that purpose as prescribed in article 23;

(b) contain a full statement of the grounds upon which the claim is based and of the provision of the present articles by which it is said to be justified;

(c) specify the precise action proposed to be taken with respect to the treaty;

(d) specify a reasonable period within which the other party is requested to state whether or not it contests the right of the party in question to take the action proposed; provided that, except in cases of special urgency, the period mentioned in sub-paragraph (d) shall not be less than three months.

2. Any such notice must be formally communicated through the diplomatic or other official channel —

(a) in the case of a treaty for which there is no depositary, to every other party to the treaty;

(b) in other cases, to the depositary, which shall transmit a copy of the notice to every other party to the treaty.

3. If no party makes any objection, or if no reply is received before the expiry of the period specified in the notice, the claimant party shall be free to carry out the action proposed in its previous notice. In that event, it shall address a further communication to the other party or parties in the manner laid down in paragraph 2, stating that, in accordance with its previous notice, it annuls or, as the case may be, denounces, terminates, withdraws from or suspends the treaty.

4. If, however, objection has been raised by any party, the claimant party shall not be free to carry out the action specified in the notice referred to in paragraph 1, but must first —

(a) seek to arrive at an agreement with the other party or parties by negotiation;

(b) failing any such agreement, offer to refer the dispute to inquiry, mediation, conciliation, arbitration or judicial settlement by an impartial tribunal, organ or authority agreed upon by the States concerned.

5. If the other party rejects the offer provided for in paragraph 4 (b), or fails within a period of three months to make any reply to such offer, it shall be considered to have waived its objection; and paragraph 3 shall then apply.

6. If, on the other hand, the offer provided for in paragraph 4 (b) is accepted, the treaty shall continue in force, pending the outcome of the mediation, conciliation, arbitration or judicial settlement of the dispute; provided always, however, that the performance of the obligations of the treaty may be suspended provisionally —

(a) by agreement of the parties; or

(b) in pursuance of a decision or recommendation of the tribunal, organ or authority to which the mediation, conciliation, arbitration or judicial settlement of the dispute has been entrusted.

7. Where the treaty itself provides that any dispute arising out of its interpretation or application shall be referred to arbitration or to the International Court of

Justice, such provision, to the extent that there may be any conflict, shall prevail over the provisions of the present article.

#### Commentary

1. Article 25, although essentially concerned with procedure, is in many ways the key article for all those cases where a claim is made to set aside or put an end to a treaty on a ground not expressly or impliedly provided for in the treaty. As already emphasized in the Commentary to article 3, some of the grounds for invalidating or terminating a treaty, although legitimate in themselves, carry definite risks to the security of treaties, if they may be arbitrarily asserted and acted upon in face of the objections of other parties. These risks are particularly serious with regard to claims to denounce a treaty on the ground of an alleged breach or on the basis of the doctrine of *rebus sic stantibus*, because it is these grounds which offer the largest scope for unilateral assertion and subjective judgment of the facts. But the possibility also exists of unilateral and arbitrary denunciation of a treaty on other grounds, such as error, limited authority of the representative in concluding the treaty, or impossibility of performance. The only means of avoiding or reducing these risks is, first, by giving as much precision as possible to the definition of the several grounds in sections II and III, secondly, by procedural provisions limiting the opportunities for arbitrary action. However precise the definitions of these grounds may be made, the justification of any claim to annul, denounce, etc., a treaty in any particular case will often turn upon facts, the determination of which is controversial. Accordingly, it is upon the procedural provisions regulating the exercise of the right to invoke these grounds that the effectiveness of this branch of the law of treaties will ultimately depend.

2. If State practice provides instances of claims to denounce treaties unilaterally, it also shows that the other parties have normally expressed strong opposition to such claims and have insisted that the treaty could not legally be abrogated without their agreement.<sup>166</sup> In the *Free Zones* case even the claimant State took the position that either the agreement of the other party or a decision of a competent tribunal was necessary to bring about the termination of a treaty on the basis of the *rebus sic stantibus* doctrine. The Havana Convention on Treaties<sup>167</sup> also provided that, failing the agreement of the other party, a State invoking the *rebus sic stantibus* doctrine should appeal to arbitration and that the treaty was to remain in force pending the outcome of the arbitration. The Harvard Research Draft, not only in its articles on violation of treaty obligations and *rebus sic stantibus*, but also in those on fraud and mutual error, required the party claiming the termination of the treaty to seek a declaration to that effect from a "competent international tribunal or authority".<sup>168</sup> It contemplated that the claimant party should have the right, at its own risk, to suspend performance of its obligations pending the decision of the tribunal or authority; but it said nothing as to what should happen if the other party declined to co-operate in obtaining a decision.

<sup>166</sup> See the Commentaries to articles 20 and 22 above.

<sup>167</sup> Article 15; see: Harvard Law School, *Research in International Law, III, Law of Treaties*, p. 1206.

<sup>168</sup> *Ibid.*, pp. 1126 and 1144.

3. Sir H. Lauterpacht, in the articles of his first report dealing with essential validity (A/CN.4/63, articles 11 to 15) provided for reference to the International Court of Justice in the case of treaties imposed by force and illegality of object; and for reference to "the International Court of Justice or any other tribunal agreed upon by the parties" in cases of disregard of constitutional limitations, fraud or error. He explained these provisions in the following comment upon his article concerning error: "The principle of compulsory jurisdiction of international tribunals to determine the existence of error as a cause of invalidity of a treaty must, upon analysis, be regarded as a principle *de lege lata*. This is so for the reason that any acknowledgment of the right of a party to terminate unilaterally a treaty on the ground of error — or, generally, of any other allegation of absence of reality of consent — would be tantamount to a denial of the binding force of the treaty."

4. The previous Special Rapporteur covered the question in articles 20 (cases of breach) and 23 (cases of *rebus sic stantibus*) of his second report (A/CN.4/107) and article 23 (all cases of essential validity) of his third report (A/CN.4/115). Leaving aside a small difference in his treatment of *rebus sic stantibus* cases,<sup>169</sup> his proposals may be summarized as follows:

The claimant party must first communicate to the other party or parties a reasoned statement of the alleged ground on which annulment, termination or withdrawal is claimed. If the claim is rejected or not accepted within a reasonable period, the claimant party may "offer to submit the matter to an appropriate tribunal to be agreed between the parties (or, failing such agreement, to the International Court of Justice)". If that offer is not accepted within a reasonable period, the claimant party may "declare the suspension of any further performance of the treaty"; and, if the offer still remains unaccepted after six months, the claimant party may declare the actual invalidity of the treaty. Should the claimant party not offer reference to a tribunal, the treaty continues in force. If, on the other hand, the offer is made and accepted, it lies with the tribunal to decide what temporary measures of suspension or otherwise may be taken pending its decision. Finally, if the treaty itself provides for reference of disputes concerning it to arbitration or judicial settlement, the treaty provision is to apply and, in cases of conflict, to prevail over the general provisions.

When explaining these proposals in the context of the doctrine of *rebus sic stantibus*, the previous Special Rapporteur justified them on the basis that "the main weight of opinion undoubtedly is that a party which considers that, by reason of an essential change of circumstances, a treaty should be revised or terminated, should begin by addressing a request (or at least a reasoned statement) to that effect to the other party or parties, and that there is no automatic or immediate right of unilateral denunciation (A/CN.4/107, paragraph 155). He further said that to admit a right of unilateral denunciation would be inconsistent with the Declaration of London of 1871, which denies the right of a State to release itself from the provisions of a treaty, or to modify them in any way, except with the consent of

the other contracting parties; and that Declaration he considered to be still "part of the corpus of written international public law" (*ibid.*, paragraph 156).

5. There is, perhaps, some element of *petitio principii* in the previous Special Rapporteur's contention that to admit a right of unilateral denunciation would be inconsistent with the principle that a State may not release itself from its treaty obligations or modify them without the consent of the other parties, as there is also in his predecessor's statement that to do so would be tantamount to a denial of the binding force of the treaty. The very question at issue in these cases is whether under the general law any binding treaty ever existed or whether, if it did come into existence, it has, by operation of law, been dissolved and ceased to exist. These are questions which, in principle, precede the application of the rule *pacta sunt servanda*; for, if in either case the correct answer is that in law no treaty obligation existed at the time of the denunciation, neither is there any room for the application of the rule *pacta sunt servanda* nor is it justifiable in law for the other party to invoke the rule. In other words, the objection to admitting a right of unilateral denunciation is not that unilateral denunciation of a treaty, as such, violates the rule *pacta sunt servanda*; it is the risk, evidenced by historical instances, that, unless subject to procedural controls, unjustified claims to annul or denounce treaties on legal grounds may be asserted and the *pacta sunt servanda* rule be violated under the pretence of asserting a legal right. This objection is a very real one, and a strong body of opinion supports the general position taken by the two previous Special Rapporteurs in regard to the need for procedural controls to regulate recourse to alleged legal grounds for asserting the invalidity, dissolution or suspension of treaties.

6. The question then is as to the nature of the procedural requirements upon which it may be legitimate to insist in framing the present articles. Some authorities and some States have almost seemed to maintain that in all cases annulment, denunciation or withdrawal from a treaty are inadmissible without the consent of the other parties. This presentation of the matter, understandable although it is in the absence of compulsory jurisdiction, subordinates the legal principles governing invalidity and termination of treaties entirely to the rule *pacta sunt servanda* and goes near to depriving them of legal significance. Sir H. Lauterpacht, as already noted, sought to solve the problem by making all cases of invalidity subject either to the compulsory jurisdiction of the International Court or to compulsory arbitration. This would certainly be the ideal solution and the simplest way of guaranteeing the effectiveness of the rule *pacta sunt servanda*. But, having regard to the difficulties which proposals for compulsory jurisdiction encountered at the Geneva Conference of 1958 on the Law of the Sea, it does not seem possible for the Commission to adopt this solution.

7. Sir G. Fitzmaurice's draft, without subjecting questions of invalidity or termination generally to compulsory jurisdiction, sought to make willingness to submit the matter to the Court or to arbitration a means of testing the legitimacy of a claim to annul, repudiate, denounce or suspend a treaty. If the claim were disputed, and no offer were made to submit the matter to the Court or to arbitration, the treaty would continue in force and

<sup>169</sup> The *rebus sic stantibus* draft contemplated only suspension of the treaty, not its termination.

unilateral annulment, repudiation, etc., of the treaty would then be illegitimate and a violation of the rule *pacta sunt servanda*. On the other hand, if the offer were made and were either not accepted or met with no response, the claimant party would be free to act unilaterally, first by suspending performance of its obligations and then, after a further interval of six months, by terminating the treaty. Should the offer be made and accepted, the matter would pass into the hands of the tribunal, whose decision the claimant party would be bound to await.

8. In this system also there is an element of compulsion; but it is given expression in the form of a condition which a party to a treaty must comply with before it may lawfully tear up or suspend the treaty under an alleged but contested claim of right. The claimant State is not bound to accept compulsory adjudication or arbitration of the dispute at the instance of the other party, simply because there is an unresolved difference between them with regard to the treaty. Thus, it cannot be taken to Court at the instance of the other party when the latter finds that the negotiations have reached deadlock. But it may not lawfully proceed to destroy or suspend the treaty unilaterally on its own *ipse dixit* as to the legal merits of its claim; it must first offer arbitration or judicial settlement. Article 25 of the present draft adopts the same general system as that proposed by the previous Special Rapporteur, but modifies it in certain aspects.

9. First, paragraph 4 provides that a claimant party may offer to refer the dispute to "inquiry", "mediation" or "conciliation", as well as to "arbitration" or "judicial settlement", and that the authority to which the dispute is offered to be referred may be any "impartial tribunal, organ or authority agreed upon by the States concerned". Since arbitration and judicial settlement are not acceptable to all States as a means of resolving disputes, it seems necessary to widen the range both of the procedures and the organs the use of which may be offered by the claimant State. This modification, it may be added, brings the system more into line with article 33 of the Charter of the United Nations. It also serves to emphasise that the basis of the procedural provisions laid down in article 25 is not that of imposing a system of compulsory jurisdiction but of framing a procedural requirement compliance with which is to be a condition of a lawful denunciation or suspension of treaty obligations without the consent of the other party.

10. The other main modification of the previous Special Rapporteur's system is in paragraph 3 of article 25, which contemplates that the claimant State shall be free to act unilaterally at once, if the other parties either reply making no objection or make no reply at all within the period specified in the notice. The previous Special Rapporteur prescribed a further waiting period of six months, during which it would be permissible to suspend the performance of obligations under the treaty, but not to denounce the treaty. The utility of such a provision in giving the maximum security against unilateral termination of treaties is not doubted. But, if the primary object of the procedural requirements is to provide protection against unilateral denunciation of treaties, account also has to be taken of the interests of a party which has legitimate cause to invoke one of the grounds of invalidity or termination contained in sec-

tion II or III. Accordingly, the present Special Rapporteur has not thought it right to go beyond requiring the claimant party to state its case to the other party and to allow a reasonable period for the other party to comment upon that case. The other party, even if not able immediately to take up a definitive position with regard to the claim, should be able within a reasonable period to indicate whether it finds anything to contest in the claimant's statement of its case. A notice to that effect will then set in motion the further procedure of negotiation, etc., prescribed in paragraph 4, during which the respondent party can develop its objections to the claimant's case.

11. Paragraph 1 provides that any party claiming to annul, denounce, terminate, withdraw from or suspend a treaty must furnish the other party or parties with a full statement of its case in writing and specify, first, the precise action which it proposes to take and, secondly, a reasonable period within which the other party is to say whether or not it contests the claimant's right to take that action. The paragraph also provides that the "reasonable period" is not to be less than three months, except in cases of special urgency. Whether three months is adequate for the general rule is a matter for the Commission to consider. On the other hand, it is possible to imagine some cases, such as a case of a grave breach of the treaty, where there might be special reasons for a shorter period of notice.

12. Paragraph 2 merely provides for the regular communication of the notice to the other parties either directly or through the depositary.

13. Paragraph 3, for reasons already explained in paragraph 10 above, lays down that, if other party either replies making no objection or makes no reply at all within the period specified, the claimant is to be free to act upon its previous notice and to annul, denounce, etc., the treaty.

14. Paragraph 4 lays down that, if any party contests the claimant's right to take the action specified in its notice, the claimant must in the first instance seek to settle the matter by negotiation. The negotiations might, no doubt, end in the acceptance or withdrawal of the claimant's contention or in an agreement to revise the treaty. If, however, they end in a deadlock, the procedural check upon unilateral denunciation, already described in paragraphs 8 and 9 above, comes into play. The claimant party, if it wishes to press its point of view with regard to the termination or suspension of the treaty, cannot proceed unilaterally, but must offer to refer the dispute to "enquiry, mediation, conciliation, arbitration or judicial settlement by an impartial tribunal, organ or authority agreed upon by the States concerned".

15. Paragraph 5 provides that, if the offer is rejected or no reply is forthcoming from the other party within a period of three months, the check upon unilateral action is removed and the claimant is free to carry out the action specified in his original notice.

16. Paragraph 6 covers the case where the offer is made and accepted and provides that the treaty shall remain in force pending the outcome of the mediation, conciliation, arbitration or judicial settlement of the dispute agreed upon by the parties. At the same time it recognizes the possibility of the performance of the obligations of the treaty being suspended provisionally

either by agreement or under a decision or recommendation of the tribunal or body to whom the dispute has been referred. The Special Rapporteur is not unaware that difficulties may arise in practice in reaching agreement concerning the method of peaceful settlement to be employed or concerning the nomination of the persons or body to whom the mediation, conciliation or arbitration of a dispute should be entrusted. But it would hardly seem appropriate to try to resolve all such difficulties in the present article. If the parties failed to arrive at any agreement on these matters, the question might arise whether one or other of the parties was applying the procedure of the present article in good faith.

17. Paragraph 7 merely safeguards the operation of "disputes" clauses in treaties which expressly provide for the reference of disputes either to the International Court of Justice or to arbitration.

#### *Article 26 — Severance of treaties*

1. Unless the treaty itself otherwise provides, a notice framed under article 24 for the purpose of terminating, withdrawing from or suspending the provisions of a treaty shall apply to the treaty as a whole.

2. Except as provided in paragraphs 3 and 4, and unless the treaty itself otherwise provides, a notice framed under article 25 for the purpose of annulling, denouncing, terminating, withdrawing from or suspending the provisions of a treaty shall apply to the treaty as a whole.

3. (a) A notice framed under article 25 and invoking a ground which relates exclusively to one part of a treaty shall be limited so as to apply only to such part, if —

- (i) the provisions of that part are, in their operation, self-contained and wholly independent of the remainder of the treaty (general provisions and final clauses excepted); and
- (ii) acceptance of that part was not made an express condition of the acceptance of other parts either by a term in the treaty itself or during the negotiations.

(b) Subject to paragraph 4, the notice shall apply to the whole of such part and not be limited to particular provisions.

4. A notice framed under article 25 and invoking a ground relating exclusively to one provision of a treaty shall be limited so as to apply exclusively to that provision, if —

(a) the provision in question is, in its operation, wholly independent of the other provisions of the treaty (general provisions and final clauses excepted); and

(b) the provision is one with regard to which it is permissible to make reservations under article 18, paragraph 1, of part I.

#### *Commentary*

1. Most writers have examined the severance of treaty provisions only in discussing how far a breach of a treaty confers upon the injured party a right to terminate the treaty. Earlier writers tended to regard the provisions of a treaty as indivisible, so that the breach of any provision would entitle the injured party to termi-

nate the whole treaty.<sup>170</sup> Later writers came to distinguish between breaches of essential and non-essential conditions and to that extent can be said to have recognized that treaty provisions are in a certain degree separable. In point of fact, two questions of severance arise in connexion with cases of breach: (1) the question of severing inessential from essential provisions for the purpose of determining what is a material breach; and (2) the question of the injured party's right to denounce the whole treaty or only those provisions to which the breach relates. In the present draft these questions are covered in article 20, paragraphs 2, 3 and 4. It has, however, to be emphasized that the case of breach is a somewhat special one, since the violation of its rights under the treaty may entitle the injured party to invoke the principle *inadimplenti non est adimplendum* and the doctrine of reprisals. In other words, in cases of breach there may be a right to terminate or suspend only part of the treaty on grounds which are independent of any general concept of the severance of treaty obligations which may be applicable in other connexions. The problem in cases of breach is not so much whether the injured party may be entitled to limit its act of denunciation or suspension to parts only of the treaty, but whether, despite the material character of the breach, the injured party may in any circumstances be bound to limit its act of denunciation or suspension to those provisions, or to that part, of the treaty to which the breach relates. This problem will be considered below.

2. Outside the special case of "breach", there is the general question whether in invoking other grounds of termination or of invalidity, a party to a treaty is in any circumstances entitled or bound to limit its claim to the provisions, or to the part, of the treaty to which the ground of termination or invalidity itself relates. This question is not dealt with in the reports of the previous Special Rapporteur, but was made the subject of an article in the Harvard Research Draft. This article,<sup>171</sup> entitled "Separable Provisions", stated that the provisions of the articles relating to cases of severance of diplomatic relations, violation of treaty obligations, *rebus sic stantibus* and mutual error "may be applied to a separate provision of a treaty if such provision is clearly independent of other provisions in the treaty".

3. The existence of a general doctrine of the separability of treaty provisions was thought by the authors of the Harvard Research Draft to be supported by a number of considerations. First, it was noted that in 1912 the Institute of International Law in its "Règlement concernant les effets de la guerre sur les traités"<sup>172</sup> had accepted the principle of separability in the case of treaties containing provisions of more than one kind. Then it was emphasized that many multilateral treaties

<sup>170</sup> For a useful historical summary, see Harvard Law School, *Research in International Law, III, Law of Treaties*, pp. 1135-1139.

<sup>171</sup> Article 30; see Harvard Law School, *Research in International Law, III, Law of Treaties*, p. 1134.

<sup>172</sup> Article 3; see: L'Institut de droit international, *Tableau général des résolutions, 1873-1956*, pp. 174-175. Curiously enough, the Harvard Research Draft, having cited the view of the Institute with evident approval, did not itself make provision for the principle of separability in its article 35 dealing with the effect of war on treaties.

today contain large numbers of articles dealing with a variety of disconnected subjects and that the provisions relating to one subject may be quite independent of those relating to another. In such cases, it was urged, "one provision may be terminated or suspended without necessarily disturbing the balance of rights and obligations established by the other provisions of the treaty and others to remain in force would produce an inequality with respect to the rights and obligations of the treaty".<sup>173</sup> It was recognized that some multilateral treaties must be regarded as an indivisible whole because to allow some provisions to be terminated or suspended and others to remain in force would produce an inequality with respect to the rights and obligations of the parties under the treaty. It was not thought possible to lay down any generally applicable criterion for determining the treaties which fall within the class of indivisible treaties, but disarmament treaties and treaties of mutual assistance against aggression, alliance and guarantee were given as examples; and treaties in which the obligations of the parties differ were also considered to belong to this class. As to the class of divisible treaties, it was said that even bilateral treaties, for example treaties of commerce, may be found which contain very diverse provisions, some of which are not necessarily dependent upon the others. But the main emphasis was placed on the growing number of voluminous multilateral treaties, such as the Treaty of Versailles, with its 440 articles, the Sanitary Convention of 1928, with its 172 articles, and other treaties of the same character, which not infrequently deal with a multitude of different and often unrelated matters. It was also pointed out that in a number of instances particular provisions of the peace treaties of the First World War had been revised or terminated while the rest of the treaty continued in force; and that some treaties, like the Treaty of Neuilly, actually provided for a power to terminate or suspend particular provisions, while leaving the rest of the treaty in force.

4. The Harvard Research Draft further relied on the fact that the Permanent Court had recognized that "certain articles or parts of a treaty may be quite independent of others either because of their arrangement or because of the different subject-matter with which they deal".<sup>174</sup> In this connexion it cited pronouncements of the Court in the *Free Zones* case,<sup>175</sup> in two advisory opinions relating to the International Labour Organisation<sup>176</sup> and in the *Wimbledon* case,<sup>177</sup> all of which concerned the interpretation of the Treaty of Versailles. They do not seem to carry the matter much beyond a recognition by the Court that some treaties may deal with one or more subjects in separate series of provisions establishing self-contained régimes for each subject; and that this may affect the way in which the interpretation of the various provisions should be approached.<sup>178</sup> Although these pronouncements of the Permanent Court

have also been cited by other authorities<sup>179</sup> as evidence of a general concept in international law of the separability of treaty provisions, it seems necessary to be careful not to read too much into them. The considerations which may make it legitimate to interpret particular provisions of a treaty as a self-contained code of rules are not necessarily identical with those which may make it legitimate to annul, terminate or suspend a particular part, whilst leaving the rest of the treaty in force. A rule which, as in the Harvard Research Draft, would allow the severance of any "separate provision of a treaty if such provision is clearly independent of other provisions in the treaty" may for that reason be too broadly stated.

5. The most recent text-book on the law of treaties,<sup>180</sup> while taking the same general line on the separability of treaty provisions, is more cautious in proposing a general rule. Thus it rightly insists that in cases where denunciation takes place under a power conferred by the treaty, severance is not permissible unless the treaty expressly contemplates the separate denunciation of particular articles. On the other hand, it supports the distinction between essential and non-essential provisions in cases of breach, but does not express a view as to the conditions under which the injured party may limit its denunciation to parts of the treaty. It further gives firm support to the principle of severance in determining the effect of war on treaties, citing a number of decisions of municipal courts which distinguish between different kinds of provisions for this purpose. Finally, without formulating a precise rule, it suggests that the principle of the separate treatment of treaty provisions has now gone so far in international law that the principle of severance should be regarded as applicable to cases of invalidity, whether original or supervening; and it appears to consider that severance may operate either to save a particular provision by eliminating from it a part which is invalid or to prevent the invalidity of a particular provision from striking down the whole treaty.

6. Neither the Permanent Court nor the present Court has made any pronouncement upon the separability of treaty provisions in the context of essential validity or of termination of treaties. The question was raised, however, in both the *Norwegian Loans*<sup>181</sup> and *Interhandel*<sup>182</sup> cases in connexion with the so-called "automatic" reservation to declarations under the optional clause and was dealt with in the opinions of some individual judges. The fullest treatment of the matter is that of Judge Lauterpacht in the *Norwegian Loans*<sup>183</sup> case, who admitted the principle of severance in the law of treaties but declined to apply it to the "automatic" reservation. Having noted that early writers considered every single provision of a treaty to be indissolubly linked with each other, he said that this is not the modern view. Having referred to the pronouncements of the Permanent Court mentioned in paragraph 4 of this Commentary, he observed that the Opinion of the International Court of Justice in the *Reservations to the*

<sup>173</sup> Harvard Law School, *Research in International Law*, III, *Law of Treaties*, pp. 1138-1139.

<sup>174</sup> Harvard Law School, *Research in International Law*, III, *Law of Treaties*, p. 1144.

<sup>175</sup> P.C.I.J. Series A/B, No. 46, p. 140.

<sup>176</sup> *Ibid.*, Series B, No. 2, pp. 23 and 25; Series B, No. 13, p. 18.

<sup>177</sup> *Ibid.*, Series A, No. 1, p. 24.

<sup>178</sup> See generally Hudson, *Permanent Court of International Justice*, p. 647.

<sup>179</sup> e.g. Lord McNair, *Law of Treaties* (1961), chapter 28; and see Judge Lauterpacht's Individual Opinion in the *Norwegian Loans* case, I.C.J. Reports, 1956, at p. 56.

<sup>180</sup> Lord McNair, *op. cit.*, chapter 28.

<sup>181</sup> I.C.J. Reports, 1957, p. 9.

<sup>182</sup> *Ibid.*, 1959, p. 6.

<sup>183</sup> *Ibid.*, 1957, pp. 55-59.

*Genocide Convention* case<sup>181</sup> also showed that "there may be reasonable limits to the notion of the indivisibility of a treaty and that some of its provisions may not be of a nature essential to the treaty as a whole". He then continued:<sup>185</sup>

"International practice on the subject is not sufficiently abundant to permit a confident attempt at generalization and some help may justifiably be sought in applicable general principles of law as developed in municipal law. That general principle of law is that it is legitimate — and perhaps obligatory — to sever an invalid condition from the rest of the instrument and to treat the latter as valid provided that, having regard to the intention of the parties and the nature of the instrument, the condition in question does not constitute an essential part of the instrument. *Utile non debet per inutile vitiari*. The same applies also to provisions and reservations relating to the jurisdiction of the Court . . . However, I consider that it is not open to the Court in the present case to sever the invalid condition from the Acceptance as a whole. For the principle of severance applies only to provisions and conditions which are not of the essence of the undertaking."

He considered that the automatic reservation had been an essential condition of the State's Acceptance as a whole, and was not therefore severable from it.

7. In the *Interhandel* case Judge Lauterpacht<sup>186</sup> reiterated the above views and in this case Judge Spender<sup>187</sup> also took the same general position, holding that the automatic reservation was not severable from the declaration because it was "not a mere term but an essential condition of the United States Acceptance". "The reservation", he said, "could be described as a critical reservation without which the Declaration of Acceptance would never have been made." Judge Klaestad,<sup>188</sup> on the other hand, was prepared to apply the principle of separability to the automatic reservation in the particular case. He had formed the view that the United States had intended to issue a real and effective declaration accepting compulsory jurisdiction, even if with far-reaching exceptions. That being so, he was of the opinion that the circumstance that part of the reservation conflicted with the Statute of the Court did "not necessarily imply that it is impossible for the Court to give effect to the other parts of the Declaration of Acceptance which are in conformity with the Statute". This view was shared by Judge Armand-Ugon. The latter, however, also arrived at the conclusion that the reservation had not been a "determining factor" at the time of the formulation and submission of the United States declaration, and was only an "accessory stipulation".

8. The opinions discussed in the two previous paragraphs related to a question of "essential validity" arising out of the conflict of the automatic reservation with the Statute of the Court. Although the Judges concerned differed as to whether severance should or should not be applied in the particular instance, they all started from the basis that treaty provisions are,

in principle, severable in cases of essential validity under certain conditions. They differed primarily in their findings as to whether in the particular case severance would or would not defeat the original intentions of the contracting State in making its Declaration of Acceptance. Clearly, the opinions of these Judges provide strong endorsement of the view that the principle of separability is applicable to cases of essential validity, and this for the purpose of severing a particular provision from the rest of the instrument. It is necessary, however, when considering their pronouncements concerning the conditions for the application of the principle, to remember that the case concerned a unilateral declaration where the intentions of one party only were involved.

9. One other judicial pronouncement needs to be mentioned, that of Judge Lauterpacht in the Advisory Opinion on *Admissibility of Hearings of Petitioners by the Committee for South-West Africa*. Dealing with the gap created in the régime of the Mandate by the refusal of the Mandatory State to co-operate with the Commission, that Judge emphasized that a Mandate constitutes an international status "transcending a mere contractual relation". He then continued:<sup>189</sup>

"The unity and the operation of the régime created by them cannot be allowed to fail because of a breakdown or gap which may arise in consequence of an act of a party or otherwise. Thus viewed, the issue before the Court is potentially of wider import than the problem which has provided the occasion for the present Advisory Opinion. It is just because the régime established by them constitutes a unity that, in relation to instruments of this nature, the law — the existing law as judicially interpreted — finds means for removing a clog or filling a lacuna or adopting an alternative device in order to prevent a standstill of the entire system on account of a failure in any particular link or part. This is unlike the case of a breach of the provisions of an ordinary treaty — which breach creates, as a rule, a right for the injured party to denounce it and to claim damages. It is instructive in this connexion that with regard to general texts of a law-making character or those providing for an international régime or administration the principle of separability of their provisions with a view to ensuring the continuous operation of the treaty as a whole has been increasingly recognized by international practice. The treaty as a whole does not terminate as the result of a breach of an individual clause. Neither is it necessarily rendered impotent and inoperative as the result of the action or inaction of one of the parties. It continues in being subject to adaptation to circumstances which have arisen."

The case of "separability" discussed in the above pronouncement was, of course, a very special one, and the other Members of the Court adopted a somewhat different approach to the case. Moreover, although the Court's three Opinions concerning the South-West Africa Mandate may be said to involve a question of the impossibility of performing particular stipulations of the Mandate, the question has not really been treated by the Court as one of separating the impossible stipulation from the remainder of the Mandate.

<sup>184</sup> *Ibid.*, 1951, p. 15.

<sup>185</sup> *Ibid.*, 1957, pp. 56-57.

<sup>186</sup> *I.C.J. Reports*, 1959, pp. 116-117.

<sup>187</sup> *Ibid.*, p. 57.

<sup>188</sup> *Ibid.*, pp. 77-78.

<sup>189</sup> *Ibid.*, 1956, p. 23, at pp. 48-9.

10. The broad conclusions at which the Special Rapporteur has arrived in the light of the available evidence are reflected in the provisions of article 26. That the principle of separability applies in some measure both to cases of invalidity and to cases of termination or suspension must, it is thought, be accepted. Clearly it is undesirable that treaties between sovereign States should be annulled or brought to an end in their entirety upon grounds of invalidity or of termination or suspension which relate to quite inessential points in the treaty. There is also much force in the point made by certain of the authorities that some treaties, more especially peace treaties, contain what is really a series of separate treaties combined in the same instrument. Nor is it to be doubted that in multilateral treaties laying down objective norms it may not infrequently be possible to eliminate certain provisions without materially upsetting the balance of the parties' interests under the treaty. On the other hand, the consensual element in all treaties, whether contractual or law-making, requires that the principle of the separability of treaty provisions should not be applied in such a way as materially to alter the basis of obligation upon which the consents to the treaty were given. The problem, therefore, is to find a solution which will keep the original basis of the treaty intact but at the same time prevent the treaty from being brought to nothing because of grounds of original or supervening invalidity which relate to inessential matters.

11. Paragraph 1 covers the case where a party denounces or suspends treaty provisions in the exercise of a power expressly or impliedly contained in the treaty. If cases can be found where a treaty authorizes denunciation or suspension of particular provisions only, it is very clear that the parties to a treaty cannot be supposed to have intended to authorize such partial denunciation or suspension of its provisions unless they have done so expressly in the treaty.

12. Paragraph 2 states what is conceived still to be the primary rule, notwithstanding the wide acceptance today of the principle of severability. The presumption still is that if any part of a treaty is vitiated either by some original or by some supervening cause of invalidity, the whole treaty will fall to the ground, unless the parties agree to continue it in force in a modified form. The reason is that, whether the treaty be essentially of a contractual or law-making character, there is a process of give and take in its conclusion and the elimination of any one provision from the treaty alters the basis on which the consents were given. Accordingly, it is only when the provision in question can fairly be shown not to have been material in inducing the consents to the treaty, or not to have been a material factor in inducing the consents to other parts of the treaty, that the primary rule is displaced in favour of the principle of separability.

13. The next two paragraphs deal with cases where annulment, termination or suspension is claimed on legal grounds outside the treaty. Paragraph 3 is designed to cover the case, to which attention has already been drawn, where there is within the treaty one or more series of provisions establishing a separate, self-contained régime for a particular matter or matters. In other words, the instrument contains within itself what are really two or more separate treaties linked together

in their negotiation and conclusion and by the general provisions and final clauses of the instrument, but in other respects quite independent of each other. The logical solution here seems to be to regard each part as a separate treaty for the purpose of applying the rules of essential validity and termination laid down in sections II and III, provided always that the parts really are independent of each other and that the contracting States did not regard acceptance of one part as an essential condition of the acceptance of the other part.

14. Paragraph 4 concerns the type of problem illustrated by the treatment of the "automatic" reservation by some of the Judges in the *Norwegian Loans* and *Interhandel* cases, which is discussed in paragraphs 6-8 above. It seems to the Special Rapporteur that the principle of severability ought only to be applied to particular provisions within comparatively narrow limits; and that it is inadmissible to permit the principle to be so applied as to alter in any essential point the basis upon which the consents of the parties were given to the treaty. The drafting of the paragraph takes account of the opinions expressed by the various Judges in the cases before the International Court of Justice. It also seemed appropriate here, as in the definition of material breach in article 20, to relate the question of the inessential character of the stipulation to the question whether or not it is permissible to make it the subject of a reservation.

#### SECTION V — LEGAL EFFECTS OF THE NULLITY, AVOIDANCE OR TERMINATION OF A TREATY

##### *Article 27 — Legal effects of the nullity or avoidance of a treaty*

1. In the case of a treaty void *ab initio*, any acts done in reliance upon the void instrument shall have no legal force of effect, and the States concerned shall be restored as far as possible to their previous positions.

2. In the case of a treaty avoided as from a date subsequent to its entry into force, the rights and obligations of the parties shall cease to have any force or effect after that date. Any acts performed and any rights acquired pursuant to the treaty prior to its avoidance shall retain their full force and effect, unless —

(a) the parties otherwise agree, or

(b) the avoidance of the treaty has been occasioned by the fraudulent acts of one of the parties, in which case it may be required to restore the other party as far as possible to its previous position.

3. Paragraphs 1 and 2 shall also apply, *mutatis mutandis* where a particular State's consent to a multilateral treaty is void *ab initio* or is avoided upon a date subsequent to the entry into force of the treaty with respect to that State.

##### *Commentary*

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

scope of the present part, which is concerned only with the nullity or avoidance of the treaty.

2. Paragraph 1 provides that when a treaty is void *ab initio* any acts done under it are without any legal force or effect; and that the States concerned are as far as possible to be restored to their previous positions. It could perhaps be urged that in the case of a treaty void *ab initio* for conflict with a rule of *jus cogens*, the private law principle *in pari delicto potior est conditio defendentis* should be applied. But it is believed that a rule requiring the parties to be restored as far as possible to their previous positions would be more suitable for treaties between States and more conducive to the general international interest.

3. Paragraph 2 provides that, in the case of a treaty subsequently avoided as from a particular date, its provisions cease to apply after that date, but that acts done or rights acquired prior to its avoidance remain valid. This is the normal consequence of the avoidance of a treaty which is merely voidable. On the other hand, it would seem right to provide for a right to *restitutio in integrum* in cases where the ground of the avoidance of the treaty was the use of fraud by one of the parties in procuring the other's consent to the treaty.

4. Paragraph 3 adds that the same rules apply *mutatis mutandis*, where a particular State's consent to a multilateral treaty is void *ab initio* or is subsequently avoided, without the general validity of the treaty being affected. Such cases are likely to be rare; but if one should occur, it seems logical that it should be governed by the same principles.

#### Article 28 — Legal effect of the termination of a treaty

1. Unless the treaty otherwise provides or the parties otherwise agree, the lawful termination of a treaty under any of the provisions of section III —

(a) shall automatically release the parties from any further application of the provisions of the treaty; but

(b) shall not affect the validity of any act performed or of any right acquired under the provisions of the treaty prior to its termination.

2. Paragraph 1 also applies *mutatis mutandis* in cases where a particular State lawfully denounces, or withdraws, from a multilateral treaty.

3. The fact that under paragraph 1 or 2 of this article a State has been released from the further execution of the provisions of a treaty shall in no way impair its duty to fulfil any obligations embodied in the treaty which are binding upon it also under international law independently of the treaty.

#### Commentary

1. Article 28, like the previous article, does not deal with any question of responsibility or redress that may arise from acts which are the cause of the termination of a treaty, such as breaches of the treaty by one of the parties; it is limited to the legal effects of a treaty's termination.

2. Paragraph 1 provides that the termination of a treaty releases the parties from any further execution of the treaty, but does not affect the validity of acts performed or rights acquired under the treaty prior to its termination. These provisions are, of course, subject to variation either by the terms of the treaty itself or by agreement of the parties at the time of termination. Article XIX of the Convention on the Liability of Operators of Nuclear Ships,<sup>190</sup> for example, expressly provides that even after the termination of the Convention liability for a nuclear incident is to continue for a certain period with respect to ships the operation of which was licensed during the currency of the Convention.

3. The provisions of paragraph 1 are largely self-evident and their main importance is to underline that the termination of a treaty does not in principle have any retroactive effects on the validity of the acts of the parties during the currency of the treaty nor dissolve rights previously acquired under the treaty. The application of the treaty during the period when it was in force and the legal consequences flowing therefrom are not in any way affected by the treaty's termination.

4. Paragraph 2 provides that the position of an individual State which denounces or withdraws from a multilateral treaty is governed by the same principles. Occasionally, a multilateral treaty expressly provides that the denunciation of the treaty by an individual State does not release it from its obligations with respect to acts done during the currency of the Convention; e.g. the European Convention on Human Rights and Fundamental Freedoms<sup>191</sup> (article 65). But in the great majority of cases the treaty is silent upon the point and simply assumes that the principles contained in the present article will apply.

5. Paragraph 3 provides — *ex abundanti cautela* — that release from the execution of the provisions of a treaty does not affect the liability of the parties to perform obligations embodied in the treaty which are also binding upon them under general international law or under another treaty. The point, although self-evident, is perhaps worth including in the draft articles, seeing that a number of major Conventions embodying rules of general international law and even rules of *jus cogens* contain denunciation clauses. A few Conventions, such as the Geneva Convention of 1949 for the humanising of warfare, expressly lay down that denunciation does not impair the obligations of the parties under general international law. But the majority of treaties do not, and even the Genocide Convention<sup>192</sup> provides for its own denunciation without indicating that the denouncing State will remain bound by its obligations under general international law with respect to genocide.

<sup>190</sup> Signed at Brussels on 25 May 1962.

<sup>191</sup> United Nations *Treaty Series*, vol. 213, p. 252.

<sup>192</sup> *Ibid.*, vol. 78, p. 277.

# SUCCESSION OF STATES AND GOVERNMENTS

[Agenda item 4]

DOCUMENT A/CN.4/157

## DIGEST OF DECISIONS OF NATIONAL COURTS RELATING TO SUCCESSION OF STATES AND GOVERNMENTS: Study prepared by the Secretariat

[Original: English]  
[18 April 1963]

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### Introduction

(i) The present document, prepared by the Secretariat, contains a digest of decisions of national courts relating to succession of States and Governments. As indicated in paragraph 73 of the report of the International Law Commission covering the work of its fourteenth session,<sup>1</sup> the Secretary-General, by *notes verbales* of 21 June and 27 July 1962, has invited Member Governments to transmit to him, among other things, the texts of all pertinent domestic judicial decisions by 15 July 1963, a time limit which has not yet expired. At the time of the preparation of the present documents, no information on decisions of municipal courts had been received by the Secretariat. On receipt of the material thus requested and taking into account also other additional information which might be brought to its attention, the Secretariat will issue an addendum to the present document.

(ii) In compiling this digest an effort has been made to cover all the available relevant material since the end of the First World War. More extensive treatment has been given to decisions of the post-World War II period and, in particular, to the available case law of the Courts of the countries which have acceded to independence after 1945. Decisions relating to former colonies, including the former German colonies, have also been dealt with because they might be of particular interest.

(iii) The material has been arranged according to subject-matter as indicated in the headings of the various sections of the study. Within each section an attempt has been made to present the cases in a logical order, taking into account the substance of the problems discussed or decided and the trends discernible in various groups of decisions. Arrangements based on the "principal legal systems of the world", on considerations of geography or on chronology have been adopted only where more relevant criteria did not appear to be available.

(iv) The present digest is based on information given in the various legal publications available, particularly in the "International Law Reports" and its predecessor, the "Annual Digest of International Law Cases".

### Part A: Succession of States

#### CHAPTER I. GENERAL PROBLEMS OF STATE SUCCESSION

##### (A) *Date of transfer of sovereignty*

*The Bathori (1933)*

*England, Judicial Committee of the Privy Council*  
*47 Lloyd's List Law Reports, 123*  
*Annual Digest, 1931-1932, Case 51*

1. A claim for compensation for the illegal sinking of a Hungarian merchantman by the British Navy during World War I depended on the answer to the question whether the claim was barred by Article 232 of the Peace Treaty of Trianon, by which Hungary had renounced all claims which might be made by Hungarian

subjects arising out of injuries done to them by the Allies. At the date of the signature of the Treaty of Trianon (4 June 1920), Fiume, the home port of the sunk steamer, was under the control of Gabriele d'Annunzio. From 1921 to 1924 it became a "Free State", but in 1924 it was annexed to Italy by the Treaty of Rapallo,<sup>2</sup> and by the terms of the Treaty the claimant Company acquired Italian nationality. The Company had been domiciled in Fiume since April 1920.

2. The Court did not think it necessary to decide what was the status of Fiume at the date of the Treaty. In its view, the Treaty bound the people of Fiume irrespective of any future changes in the status of the city. Whether the plaintiffs were or were not Hungarian nationals at the effective date of the Treaty, the Court had come to the conclusion that the clause in question plainly was intended to cover them. It appeared reasonably clear that the intention of the parties was that for acts or omissions done to the property of Hungarian belligerents there should be no redress, whether the persons who had suffered damage did or did not continue to be Hungarian nationals up to the date of the Treaty.

3. Whether for acts done before the acquisition of a new nationality the new State can or will exercise protection or whether the former State can exercise protection, may be debatable the Court said; but in the circumstances attending a peace treaty it appears very natural that the former State should be required to renounce protection for its ex-nationals, and in the Treaty of Trianon it seems clear that Hungary did so act. If the Treaty operated by international law only, the tribunal in Prize might well have had to determine how far Hungary's attempt to affect the rights of ex-nationals could be treated as effective. But for an English court, whether in Prize or not, this question was precluded by the terms of the Treaty of Peace Act.

*Change of Sovereignty (Taxation) Case (1921)*  
*German Reichsfinanzhof (Reich Tribunal in Revenue Matters)*

*Juristische Wochenschrift, 1921, p. 1619*  
*Annual Digest, 1919-1922, Case 57*

4. The German Capital Levy Act of 1919 applied to persons who, on 30 June 1919, were of German nationality. The appellant had resided from 1906 in the province of Posen and moved to Germany after Polish troops occupied the province after the Armistice of 11 November 1918. In 1920 he was asked to make a declaration for the assessment of the Capital Levy Act. He contended that he was a Polish national and not, therefore, subject to the levy.

5. The *Reichsfinanzhof* held that the appellant was subject to the tax. Although he lost his German nationality by virtue of the Peace Treaty of Versailles, the change of nationality did not take place before 10 January 1920, on which day the Treaty entered into force. The mere signature of the Treaty did not impose on Germany the international obligation to treat the inhabitants of the ceded territories as aliens.

<sup>1</sup> *Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209).*

<sup>2</sup> Before and during World War I Fiume was under Hungarian sovereignty. After World War II Fiume, now Rijeka, was ceded by Italy to Yugoslavia (Peace Treaty with Italy of 10 February 1947).

*Case of the application of Weimar Constitution to Danzig (1931)*  
*High Court of Danzig*  
*Danziger Juristische Monatschrift, Vol. 10 (1931),*  
 p. 124  
*Annual Digest, 1931-1932, p. 86*

6. The Court held that the German Constitution of 1919 had legal force in Danzig (now Gdansk), although Danzig was at the time about to be separated from Germany and created a Free City by virtue of the Peace Treaty of Versailles. It is not permissible to argue, the Court said, that in view of the impending separation of Danzig from the mother-country, the German Constitution had only a provisional effect in the territory of Danzig. This follows from the principle of the continuity of the legal order according to which there is a presumption in favour of the continued validity of legal provisions which were previously in force.

*Application of German Law in Alsace-Lorraine Case (1924).*  
*German Reichsgericht (Supreme Court of the German Reich)*  
*Fontes Juris Gentium, A, II (1879-1929), No. 309*

7. The Court held that the law applicable to a contract to transport goods from a city in Alsace-Lorraine, made in October 1919, was German commercial and currency law. The fact that under Art. 51 of the Peace Treaty of Versailles Alsace-Lorraine became part of France with effect from 11 November 1918 (the date of the Armistice) had no influence on private law relations entered into before the coming into effect of the Treaty (10 January 1920).<sup>3</sup>

*L. and J. J. v. Polish State Railways (1948)*  
*Supreme Court of Poland*  
*Panstwo i Prawo, 3 (1948), Nos. 9-10, p. 144*  
*International Law Reports, 1957, p. 77*

8. The former Free City of Danzig and the part of the 1937 German territory east of the Oder and Neisse which was placed under Polish administration by the Potsdam Conference decision of 2 August 1945 are referred to in Polish legislation as "the Recovered Territories". A Polish Decree of 13 November 1945, effective as from 27 November 1945, provided that the whole body of law binding in the circuit of the District Court in Poznan should take effect in the Recovered Territories.

9. A special bench of the Supreme Court of Poland delivered the reply to the question "What were the provisions of civil law binding in the Recovered Territories, and particularly in the circuit of the Court of Appeal of Wroclaw, after the taking of those Territories by the Polish State but before the entry into effect of the Decree of 13 November 1945?" The Decree did not decide this question.

10. The Supreme Court held that after surrender the German State lost its sovereignty while the Recovered

Territories were submitted to the sovereign possession and authority of the Polish State on the basis of the agreement concluded among the victorious Powers.

11. The whole German population of the Territories was subject to transfer in so far as it had not already left of its own accord. The Court stated that in exercising its rights the Polish State introduced in the Recovered Territories its own public administration and its own administration of justice without delay, and very rapidly re-settled the region leaving on the spot only the indigenous population of Polish origin. The German population, for all practical purposes, no longer played the role of a subject of law as it had lost any organizational bonds whatsoever. The Recovered Territories became united with the rest of the Polish State on a basis of complete equality. All provisions of law issued for all the Polish State also had binding force in the Recovered Territories, while all provisions contrary to the legal order recognized by the Polish State ceased to be binding. This principle, the Supreme Court said, follows from the very notion of State sovereignty.

12. For that part of the judgment which decided upon the legal system to be applied during the transitional period before 27 November 1945, see paragraphs 185 *et seq* below.

*Germans beyond the Oder-Neisse Line (Nationality) Case (1951)*  
*Oberlandesgericht (Court of Appeal) Celle, Federal Republic of Germany*  
*Neue Juristische Wochenschrift 1952, p. 475*  
*(81) Journal du droit international (Clunet) (1954), p. 840*

13. The jurisdiction of a Court of First Instance in the Federal Republic of Germany to entertain a petition for divorce was dependent on the question whether the petitioner was of German nationality. The respondent objected to the jurisdiction and contended that in 1946 or 1947, while resident in that part of Upper-Silesia which had remained German after 1922, the petitioner had applied for, and after the so-called verification procedure had been granted, Polish nationality.

14. The Court of Appeal held that it was irrelevant whether, during his stay in Upper-Silesia, the petitioner had acquired Polish nationality. The trial court would have jurisdiction even if the petitioner were a "Doppelstaater" (a *sujet mixte*; a person having dual nationality). The relevant question was whether the petitioner had lost his German nationality which he had acquired at birth. The Court answered this question in the negative because the petitioner would not have lost his German nationality even if he should have acquired Polish nationality at his own request.

15. According to the German Nationality Act of 1913, the Court said, a German loses his German nationality by acquiring, at his own request, a foreign nationality only if he has neither his domicile nor his residence in Germany (orig.: "im Inland"). This requirement was not met in the present case. The territory to the East of the Oder-Neisse line continued to be German from the point of view of both Constitutional and International Law. The granting to Poland of the provisional administration (orig.: *vorläufige Verwaltung*) did not make it foreign territory.

<sup>3</sup> See the decisions in *Chemin de fer d'Alsace-Lorraine v. Levy & Co.* and in *Espagne v. Chemin de fer d'Alsace-Lorraine*, paragraphs 136 and 137 below, concerning the effect of the cession of Alsace-Lorraine as from 11 November 1918 on the applicability and non-applicability, respectively, of the Berne Convention relating to the international transport of goods.

16. The rules of International Law relating to nationality in the case of State succession were not applicable. The granting to Poland of the provisional administration, being an interim arrangement (orig.: "Provisorium"), was not comparable to State succession.

*In re Société Ultrabois (1958)*

*French Conseil d'Etat*

*Recueil, 1958, p. 39*

*Annuaire français de droit international (1959), p. 871*

17. It was held that the cession of Tende and la Brigue by Italy to France took effect only when the Peace Treaty with Italy of 10 February 1947 entered into force, i.e., on 15 September 1947. The decision of the *Directeur des industries mécaniques et électriques au Ministère de la production industrielle*, taken on 21 July 1947, to transfer certain parts of a cable mountain railway was therefore illegal as the transferred goods were at the relevant time situated in foreign territory. In taking the decision to transfer the material, the *Directeur* had committed a *faute* for which the State was responsible.

*Debendra Nath Bhattacharjee v. Amarendra Nath Bhattacharjee (1954)*

*High Court of Calcutta*

*Indian Law Reports, Calcutta Series 1956 — Vol. II, p. 270*

18. By the Chandernagore (Application of Laws) Order, 1950, promulgated by the Government of India on 1 May 1950, the Civil Procedure Code [of India] had been made applicable to the Chandernagore Courts from 2 May 1950. In a partition suit instituted in the Indian Court of Alipore on 1 June 1951 which related, *inter alia*, to property situated in Chandernagore, the jurisdiction of the Court to adjudicate upon real property in the town of Chandernagore was objected to on the ground that Chandernagore was not on 1 June 1951 comprised within the territory of India.

19. On appeal the High Court of Calcutta noted that by a Treaty signed at Paris on 2 February 1951, France had transferred to India, in full sovereignty, the territory of the Free Town of Chandernagore. The Treaty provided that it should come into force on ratification. The instruments of ratification had been exchanged on 9 June 1952. In law, therefore, Chandernagore was foreign territory to India up to 8 June 1952.

20. The recognized rule of international law which the courts of India, in common with those of other countries, observed was that they did not exercise jurisdiction in suits directly involving the question of rights to real property situated in foreign countries. Consequently the Subordinate Judge's Court could not exercise jurisdiction, as regards the Chandernagore properties, on the date the suit had been instituted. The Chandernagore (Application of Laws) Order, 1950 (paragraph 18 *supra*), did not in the Court's opinion change this position. The Order did not make the ordinary rule of international law (para. 20 *supra*) inapplicable.

21. As Chandernagore had, in the meantime, become Indian territory, the Court thought it would be hyper-technical to insist on the plaintiff going through the formal procedure of amending the plaint to include the Chandernagore properties, and held that now the court below had jurisdiction and should proceed with the suit.

(B) *Transitional problems and arrangements.*

(i) *Problems of transition relating to nationality*  
*Nationality of residents of Israel cases*<sup>4</sup>  
*International Law Reports, 1950, Case No. 27*

22. The question of the effect of the termination of the Palestine Mandate upon the nationality status of former Palestine citizens who became resident in Israel gave rise, during the period between the establishment of the State in 1948 and the enactment of the Israel Nationality Law in 1952, to a conflict of judicial opinion.

23. In *re Goods of Shiphris*, decided by one judge of the Tel Aviv District Court on 13 August 1950, it was held, in an undefended probate action, that such persons were stateless (Pesakim Mehoziim, vol. 3 (1950-1951), p. 222).

24. In *Oseri v. Oseri*, decided by the Tel Aviv District Court on 7 August 1952, the Court stated that it was difficult to reach a deduction that the bond of loyalty between the Mandatory Government and its inhabitants could automatically devolve into a bond of loyalty between the State of Israel and its inhabitants. It held therefore that, in the period between the establishment of the State and the entry into force of the Nationality Law, the inhabitants of Israel were not Israel nationals within the legal meaning of the term national (Pesakim Mehoziim, vol. 8 (1953), p. 76).

25. The Supreme Court of Israel, in a decision of 6 November 1952, expressed the view that Palestinian citizenship no longer existed, and had not existed, after the establishment of the State of Israel (*Hussein v. Governor of Acre Prison, Piskei-Din*, vol. 6 (1952) p. 897).

26. However, in *A. B. v. M. B.*, decided on 6 April 1951 by a judge other than the judge who had decided *In re Goods of Shiphris* (paragraph 23 *supra*), it was held that the point of view according to which there were no Israel nationals was not compatible with public international law. It was, the judge stated, the prevailing view that in the case of transfer of a portion of the territory from one State to another, every inhabitant of the ceded State becomes automatically a national of the receiving State. So long as no law had been enacted providing otherwise; every individual who, on the date of the establishment of the State, was resident in the territory which today constitutes Israel was also a national of Israel. Any other view would lead to the absurd result of a State without nationals — a phenomenon the existence of which had not yet been observed (Pesakim Mehoziim, vol. 3 (1950-1951) p. 263, at p. 272).

(ii) *Problems of transition relating to criminal law and procedure*

*Nazar Mohammad and others v. The Crown (1948)*

*High Court of Lahore*

*Pakistan Law Reports, Lahore, Vol. I, 1948, pp. 19 et seq.*

*Annual Digest, 1948, Case 28*

27. The following events took place before 15 August 1947, the day two independent Dominions, India and

<sup>4</sup> The digest contained in the text is based on the presentation in "International Law Reports, 1950", 1. c.

Pakistan, were set up. Five persons were convicted<sup>5</sup> by the Court at Karnal (now in India); three were sentenced to death, two to transportation for life. By warrant of the judge of Karnal they were transferred to the Central Jail, Lahore, then capital of the Punjab province in undivided India (now in Pakistan). The proceedings for confirmation of the death sentences were received by the Lahore High Court on 22 May 1947.

28. After the partition of India a petition was filed with the High Court of Lahore (now in Pakistan) urging that since Karnal was not a part of Pakistan, the detention of the accused in Pakistan was illegal.

29. The Court decided that the warrant did not lapse when Karnal ceased to be a part of Pakistan. Its decision was to a large extent based on an interpretation of the relevant provisions of municipal law. However, the Court also gave rulings on questions of International Law raised by the defence. The principle invoked by the petitioners that the penal laws and judgments of one State cannot be enforced in another State does not apply, the Court said, in a case where, at the time of the conviction and transfer to a jail, the seat of the court of first instance and the location of the jail were in one, still undivided country.

30. Commenting on the argument advanced on behalf of the petitioners that in the absence of an extradition agreement between the two Dominions they cannot be extradited to India, the Court said that if this contention had any force it might have afforded a further ground for holding that the appeals, the murder references and the revision must all be heard and decided by the Court at Lahore itself on their merits rather than that the accused should be, although guilty, set at liberty or kept infinitely in jail.<sup>6</sup>

*Katz-Cohen v. Attorney-General of Israel (1949)*  
*Supreme Court of Israel*  
*Pesakim Elyonim, Vol. 2 (1949) 216*  
*Annual Digest, 1949, Case 26*

31. The appellant had killed his wife in Tel-Aviv in April 1948, i.e., before the establishment of the State of Israel on 15 May 1948. In his appeal against the conviction of manslaughter in September 1948 by the District Court of Tel-Aviv, then a Court of the State of Israel, the appellant argued that the Court was without competence to try his case since State of Israel was not competent to deal with crimes committed before it came into existence.

32. The Supreme Court held that after a change of sovereignty the new authorities were entitled to bring to trial criminal acts committed in their territory before the

<sup>5</sup> Neither the report in *Annual Digest* nor that in the *Pakistan Law Reports* states expressly where the crime had been committed. From the pleadings of the petitioners (*Pakistan Law Reports*, l.c., at pp. 21 and 23) it appears that the *locus delicti commissi* was outside the Dominion of Pakistan, i.e., in the present territory of India.

<sup>6</sup> See also two decisions by an Italian occupation court in Ethiopia reported in *Annual Digest, 1935-1937*, Cases 46 and 47 of 1937, and decisions of other Italian Courts referred to in *Annual Digest, 1935-1937*, p. 147. See also the decision of the Supreme Court of Israel in *Katz-Cohen v. Attorney-General* (paragraph 31 *et seq* of this paper).

change of sovereignty. There was no principle of international law denying continuity of the power to punish in these circumstances, the Court said. It would be surprising if a man accused of murder or manslaughter in April 1948 should escape punishment because in May 1948 the State of Israel had come into existence. It was difficult to say that this war a reasonable argument or that a sense of justice and equity required such a conclusion. On the contrary, the sense of justice rose in revolt against a conclusion such as this, implying a gap in the criminal law caused by the transition from sovereign to sovereign.

33. While it was correct that it was not the individual but the injured community who demanded the punishment of the offender, that was no reason why the same community against whom the offence had been committed should not demand its punishment merely because in relation to that community the Government of Israel had replaced the Mandatory Government. The question was not one of the jurisprudential characteristics of criminal law as against those of civil law. The real question was whether in the event of a change of sovereignty the former sovereign's power of punishment disappeared and was not replaced by the new sovereign's power of punishment.

34. There was no need to decide whether the rules of State succession applied to the State of Israel, or to deal with the problem of what would pass by way of succession to the new sovereign. The question was what powers of government passed to him.

35. The Court accepted "the golden rule of continuity of the law despite a change of sovereignty".<sup>7</sup> The exception was in the case of laws which were incompatible with the constitution and laws of the new sovereign. Murder and manslaughter, as well as most other criminal offences, were such that continuity of law and continuity of power to punish from sovereign to sovereign were axiomatic. Public welfare demanded this result; the change of sovereignty did not prevent it. International law provided no authority against continuity after a change of sovereignty.

36. In *Wahib Saleh Kalil v. Attorney-General*, decided in 1950, the Supreme Court of Israel applied the principle of the *Katz-Cohen* case (paragraphs 31 to 35 *supra*) also in a case of murder committed in March 1948 at a place which did not become part of the territory of Israel on 15 May 1948, but which came into Israel's possession subsequently (*Piskei-Din*, vol. 4 (1950), p. 75, *Pesakim Elyonim*, vol. 3 (1950-1951), p. 41). It extended the principle in 1952 to violations of the customs legislation of Palestine (*Piskei-Din*, vol. 6 (1952), p. 412; *Pesakim Elyonim*, vol. 8 (1952), p. 106). It said that goods smuggled Palestine remained smuggled goods even in relation to Israel; the offence of smuggling did not cease to be an offence, and the possession of the smuggled goods continued to be criminal. The Palestine Customs Ordinance could not be regarded as "foreign" law in Israel, but was part of the law of Israel, and therefore the question of giving effect to a fiscal law of a foreign State (Palestine under the Mandate) did not

<sup>7</sup> The Court quoted from Hyde, *International Law*, 2nd edition, Vol. I, pp. 394, 397.

arise. (Piskei-Din, vol. 6 (1952), p. 412; Pesakim Elyonim, vol. 8 (1952), p. 106).<sup>8</sup>

*Attorney-General v. Eichmann (1961)*  
Israel, District Court of Jerusalem  
Criminal Case No. 40/61

37. The question whether a new State may try crimes that were committed before it was established was among the many problems which were considered in the criminal proceedings against *Adolf Eichmann* in 1961. The trial court found the reply to this question in the decision of the Supreme Court of Israel in *Katz-Cohen v. Attorney-General* (paragraphs 31 to 35 supra) wherein it was decided that the Israeli Courts have full jurisdiction to try offences committed before the establishment of the State and that in spite of the changes in sovereignty there subsisted a continuity of law. The case of *Katz-Cohen v. Attorney-General* related to a crime committed in the country, but there is no reason, the District Court said, to assume that the law would be different with respect to foreign offences.<sup>9</sup> Eichmann's appeal against his conviction was dismissed and the judgement of the District Court affirmed by the Supreme Court of Israel in 1962.<sup>10</sup>

*Arar. v. Governor of Tel Mond Prison (1952)*  
Supreme Court of Israel  
*Piskei Din 6 (1952), p. 368*  
*International Law Reports, 1952, Case 30*

38. At the time of the British mandate over Palestine the applicant was found guilty of murder committed in an Arab village which did not subsequently fall within the territory of the State of Israel and sentenced to death by the Court of Criminal Assizes of Palestine, sitting at Nablus. His appeal was rejected by the Court of Criminal Appeals, but the sentence had not been carried out by the time the Mandate came to an end. The applicant escaped from Acre prison in which he had been confined and was recaptured by the Israel police. The President of Israel commuted the death sentence to one of fifteen years' imprisonment.

39. In an application for an order of *habeas corpus*, the applicant argued that the State of Israel could not continue to act according to the judicial sentence relating to an act committed outside the present frontiers of Israel. The Court held, on the basis of the relevant legislation of the State of Israel, that the continued imprisonment of the applicant was lawful.

*In re Schwend (1949)*  
Italy, Court of Cassation  
*Foro Italiano 72 (1950) Part I, p. 74*  
*Giurisprudenza Italiana 102 (1950), Part II, p. 36*  
*Annual Digest, 1949, Case 30*

40. When Abbazia (ceded by the Peace Treaty of 10 February 1947 to Yugoslavia) was part of Italy the appellant was indicted for having committed a crime

there. While the criminal proceedings were pending, the Peace Treaty went into effect and Abbazia (Opatija) became part of Yugoslavia. The Court of First Instance in Trent nevertheless convicted him.

41. On appeal, the Court of Cassation did not accept the argument by the Public Prosecutor that where Italian territory had been ceded to another country, jurisdiction to try and punish crimes committed within that territory prior to the act of cession remained with the Italian courts. It held that the territorial jurisdiction of the Italian courts had ceased in respect of acts committed in Abbazia. A criminal act committed there had assumed the character of a crime committed abroad. The Court of Cassation upheld the conviction on a ground not material for the present study, because in its opinion jurisdiction had been correctly assumed in virtue of a special provision of the Italian Criminal Code. (The victim was an Italian national resident in Italy and the accused was arrested in Italy).

42. On the question which is pertinent to the present paper, the Court stated that in international law the principle was generally recognized that a cession of territory in virtue of a treaty operated as an immediate transfer of sovereignty, including all rights appertaining to the ceded territories. With the sovereignty passed jurisdiction, which was an attribute of sovereignty and could only belong to the State which succeeded to the territory. Territory, sovereignty and jurisdiction were interdependent and indivisible. Territory constituted the objective element in space. Within its frontiers sovereignty reigned. From sovereignty derived jurisdiction as one of its principal attributes. If the area of the territory was curtailed, sovereignty over the last part ceased *ipso jure*, and thus jurisdiction could not be exercised any longer.

43. An exception could be created by treaty, when the State to whom territory was ceded agreed to delegate or re-assign the exercise of jurisdiction, normally for a period of transition only.

44. The Court of Cassation mentioned as an example of such a delegation the Treaty between Italy and the Holy See of 1929, when Italy was requested to try crimes committed in Vatican territory. Other examples, not necessarily in the field of criminal procedure, will be found in later decisions of the Italian Court of Cassation summarized in paragraph 57 *et seq* below.

(iii) *Problems of transition relating to jurisdiction and procedure in non-criminal matters*

*In re Alslys (1930)*  
Supreme Court of Lithuania  
*Annual Digest 1929-1930, Case 42*

45. On an application for the renewal of proceedings in an inheritance action brought before World War I before the Russian courts and interrupted as the result of the outbreak of war, the Court said that Lithuania was a sovereign State which did not derive its sovereignty from Russia. The Lithuanian courts were not successors to the Russian courts. Only a law enacted by the Lithuanian Government could enable the courts to continue the proceedings instituted before Russian courts. No such law had been passed.

<sup>8</sup> The information in paragraph 36 of the text is based on a note in *Annual Digest, 1949, pp. 70 to 72*.

<sup>9</sup> This summary is based on an unofficial English translation of the judgment of the District Court of 12 December 1961 (mimeographed version, p. 34).

<sup>10</sup> *Eichmann v. Attorney-General*. Judgment of the Supreme Court of 29 May 1962, Criminal Appeal No. 336/61; unofficial English translation (mimeographed).

*Salonica Appeals Case (1923)*  
*Greece, Areopagus, 1923 (No. 501)*  
*Thémis, vol. 34, p. 501*  
*Annual Digest, 1923-1924, Case 45*

46. Before the annexation by Greece of the district where the land in litigation lay, the Court of Appeal of Salonica handed down a decision, and an appeal against that decision to the Ottoman Court of Cassation was entered. After the annexation the case was brought before the Areopagus at Athens which ruled that it had been substituted for the Ottoman Court of Cassation. In deciding the appeal, the Areopagus stated it must be guided by the Turkish law in force when the judgment of the Court of Appeal of Salonica was given.

*A. v. Prussian Treasury (1923)*  
*Reichsgericht (Supreme Court of the German Reich)*  
*Entscheidungen des Reichsgerichts in Zivilsachen,*  
*Vol. 107, p. 382*  
*Fontes Juris Gentium, A. II, Vol. I (1879-1929) No. 306*  
*Annual Digest, 1923-1924, Case 30*

47. In 1913 the Court of First Instance (*Landgericht*) in Danzig, now Gdansk awarded to the plaintiff part of a sum she claimed from the Prussian State for damage caused to her in consequence of some irrigation works undertaken by Prussia. Both parties appealed to the Court of Appeal (*Oberlandesgericht*) which had its seat in Marienwerder, a city which under the Treaty of Versailles remained with Germany. The Court of Appeal in Marienwerder dismissed the appeals of both parties by judgment of 22 June 1920. On further appeal to the *Reichsgericht* (Supreme Court of the German Reich), Prussia contended that, as Danzig, the seat of the court of first instance, was no longer in Prussia, the Prussian Court of Appeal in Marienwerder had no longer jurisdiction to deal with the matter. Prussia also contended that as the land in question was now situated in Poland, Poland was responsible for the amount claimed, and that German Courts could not assume jurisdiction in an action which was, in fact, an action against a foreign State.

48. The *Reichsgericht* held that as the action had already been pending before the Court of Appeal in Marienwerder when Danzig ceased to be part of Germany (10 January 1920), the jurisdiction of the Court of Appeal was not extinguished by the mere fact that the city where the court of first instance had its seat had become a Free City, no longer part of Germany.

49. From the fact that Poland had acquired all the property of Germany and of German States in the ceded territories, it did not follow that Poland, in the absence of a special agreement, was responsible for the payment of the sum claimed. The contention that a foreign State could not, without its consent, be sued before a German court was therefore not relevant for the case under consideration.

*Case of the sale of real property in Wischwill (Memel Territory) (1924)*  
*Reichsgericht (Supreme Court of the German Reich)*  
*Decision V/76/23*  
*Fontes Juris Gentium, A II, Vol. I (1879-1929),*  
*No. 308*

50. In July 1919 the purchaser of a property and smithy in a village which subsequently, on 10 January 1920, became by virtue of the Peace Treaty of Versailles

part of the Memel Territory ceded by Germany to Lithuania, sued the defendant who had sold the property to him earlier, for the document required to effect the formal transfer of ownership ("*Auflassung*").<sup>11</sup> The Court of First Instance in the case was the *Landgericht* in Tilsit; the Court of Second Instance to whom one of the parties appealed was the *Oberlandesgericht* (Court of Appeal) in Königsberg. Both Tilsit and Königsberg remained under the Peace Treaty of Versailles on German territory. On further appeal to the Supreme Court of Germany (*Reichsgericht*), the question was raised whether the Court of Appeal in Königsberg had jurisdiction as the sold property was no longer on German territory.

51. The Supreme Court held that although the Memel area had been separated from Germany with the coming in force of the Peace Treaty, that did not prevent residents of that territory from continuing previously instituted suits before the German Courts, provided that exclusive jurisdiction in the particular suit was not vested in the courts of the ceded territory. The Court found that this was not the case, as the issue in litigation was not an existing right in real property, but the signing of a legal instrument and the validity of a contract of sale.

*X. v. German Reich (1922)*  
*Reichsgericht (Supreme Court of the German Reich)*  
*Decision VI 805/21*  
*Fontes Juris Gentium, A II, Vol. I (1879-1929),*  
*No. 268*

52. In a suit against the German Reich for breach of (a commercial) contract, the decision of the Court of First Instance (*Landgericht*) was rendered on 22 December 1919, when Danzig still belonged to Prussia and Germany. The appeal to the Court of Appeal (*Oberlandesgericht*) in Marienwerder was lodged on 2 February 1920, i.e., after 10 January 1920, when Danzig was already separated from the German Reich.

53. On further appeal, the *Reichsgericht* (Supreme Court of the German Reich) stated that if a private person and not the Reich had been the defendant in the case, the jurisdiction of a German Court would no longer exist. As according to the principles of international law — apart from cases of exclusive jurisdiction — no State could be compelled to accept the adjudication of, and be sued in, the courts of a foreign country, the case could be decided only by a German court of appeal.<sup>12</sup>

*Haifa Leases Case (1925)*  
*Court of Cassation of the Lebanon*  
*Gazette des Tribunaux Libano-Syriens, December 1925,*  
*p. 187*  
*Annual Digest, 1925-1926, Case 70*

54. A judgment of the Court of First Instance in Haifa concerning land near Haifa, rendered in a law suit

<sup>11</sup> See, with regard to this instrument, the Advisory Opinion concerning *Settlers of German Origin in Territory Ceded by Germany to Poland* (1923) P.C.I.J., Series B, No. 6, summarized in A/CN.4/151, paragraphs 39 to 44.

<sup>12</sup> Considerations similar to those summarized in paragraph 53 had also been the basis of an earlier decision of the *Reichsgericht* in a suit against the German Reich (Decision of 1 July 1921 (VII 591/20) *Entscheidungen des Reichsgerichts in Zivilsachen*, 102, p. 304. *Fontes Juris Gentium, op. cit.*, No. 231).

initiated before World War I, was quashed by the Court of Cassation at Constantinople. The case was re-heard by the trial court and an appeal was taken to the Court of Appeal in Beyrouth, which gave its decision in December 1917. A further application for cassation was referred to a Special High Court in Beyrouth, established by the Allied Powers, on which the jurisdiction of the Court of Cassation in Constantinople had been conferred. Before the proceedings in cassation were completed, the Treaty of Lausanne (1923) fixed the frontier between Turkey and Syria, and Palestine was placed under the Mandate of Great Britain. On demurrer to the jurisdiction of the Court of Beyrouth, the Court of Cassation at Beyrouth held that in view of the transfer of the territory of Palestine from Turkey to Great Britain and the separation of Palestine from Syria (and the Lebanon), the Court at Beyrouth could no longer exercise jurisdiction in a case pending before it which concerned immovable property in Palestine.

*Banin v. Laviani and Ellena (1949)*  
*Court of First Instance, Milan*  
*Foro Italiano 73 (1950) Part I, p. 227*  
*Foro Padano (1949) Part I, p. 984*  
*Annual Digest, 1949, Case 27*

55. This case was decided on 10 October 1949, i.e., after the coming into force of the Italian Peace Treaty of 10 February 1947, but before the final disposal of the former Italian colonies envisaged in article 23 (3) of the Peace Treaty had taken place.

56. The Court held that the judgment of the Court of Asmara (Eritrea) given subsequent to the ratification of the Peace Treaty, by which the plaintiff was declared bankrupt and the defendants appointed receivers, was not the judgment of a foreign court.<sup>13</sup> Italy had renounced the sovereignty but this was not a case of dereliction of territory. The effects of this renunciation were those laid down by customary international law. While Italy had lost her sovereignty over these territories, she might, to a certain extent, continue to maintain her organs of government there. This, the Court said, is the position according to customary international law and implicitly confirmed by the Peace Treaty. It was irrelevant, for the purpose of the judgment under review, that neither this judgment nor any other judgment pronounced in Asmara could, as the Court assumed, be made the object of an appeal to the Court of Cassation in Rome.<sup>14</sup>

*Sorkis v. Ahmed (1950)*  
*Italy, Court of Cassation*  
*Foro Italiano 72 (1950) I, 985*  
*International Law Reports, 1950, Case 24*

57. Differing from the view of the Court of Milan,<sup>15</sup> the Italian Court of Cassation held that it had jurisdiction to entertain an appeal from a decision of the Court of Appeal of Asmara (Eritrea) given on 10 April 1948

[after the entry into force of the Peace Treaty with Italy, but before the final disposal envisaged in Article 23 (3)].

58. The Court stated that the exercise of jurisdiction over a particular territory was not insolubly connected with the exercise of sovereignty over that territory. The possibility was not excluded that, having regard to the complexities and peculiarities of the situation, special provisions tempered or modified the general application of the severance of the territories concerned from the legal system of the State which had suffered the loss. The loss of rights on the part of Italy had not been accompanied by the immediate acquisition of title by another entity. The letter and the spirit of the Peace Treaty led to the conclusion that a unilateral renunciation and *derelictio*, not a cession in the true sense of the word in favour of a particular body, had been effected. The Peace Treaty (Art. 23 (3)) conferred upon the Big Four, in the first place, and then upon the United Nations, a mere power of decision. The renunciation established in law that Italy had lost her rights. The power which the Great Powers had reserved for themselves was comparable to that of an arbitrator in municipal law. An arbitrator did not base himself upon ownership in the thing which formed the object of his award. The Treaty did not envisage the immediate assumption of sovereignty on the part of some other subject of international law [i.e., other than Italy]. Instead it provided for a period of transition of short duration pending a final decision. The Court explained that there had been good reasons for not modifying the existing legal system and for not disturbing the ordinary development of private life and legal relations by successive changes at brief intervals.

59. As the previous legal order had remained during the period of transition, it was impossible to deny that the bodies which exercised jurisdiction in Eritrea were organs of the Italian Government and that they derived their powers from Italian law. The Italian authorities no longer exercised their jurisdiction in virtue of the sovereignty of Italy, but in virtue of the powers which were delegated to Italy implicitly by the Treaty of Peace. The Court concluded by stating that it followed that the Italian Court of Cassation, which formed the apex in the hierarchy of Italian courts, retained its jurisdiction in respect of decisions pronounced by the Courts in Eritrea, seeing that this jurisdiction was recognized by the Courts there.

*Farrugia v. Nuova Compagna Generale Autolinee (1951)*  
*Italy, Court of Cassation*  
*Giurisprudenza Compl. Cass. Civile, 1951, No. 2792*  
*International Law Reports, 1951, Case 32*  
*American Journal of International Law (1955) p. 269*

60. In this case, which was decided on 17 February 1951, i.e., after the entry into force of the Peace Treaty with Italy but before the establishment of the United Kingdom of Libya (24 December 1951), the Court of Cassation followed its decision in *Sorkis v. Ahmed* concerning appeals from the courts in Eritrea,<sup>16</sup> and

<sup>13</sup> See also the decision of a Netherlands Court holding that bankruptcy ordered by a Netherlands Court retained its force in Indonesia after transfer of sovereignty (paragraph 90 below).

<sup>14</sup> See, however, the decisions of the Court of Cassation in paragraphs 57 *et seq.* below.

<sup>15</sup> See paragraph 56 *supra*.

<sup>16</sup> See paragraphs 57 *et seq. supra*.

resolved to entertain an appeal from a decision of the Court of Appeals in Tripoli.

61. After recalling its reasoning in the earlier case, the Court added that it was quite consistent with the principles of international law whereunder a State may, pursuant to treaty stipulations, continue to exercise sovereign functions in territory it has ceded, as historical examples show. In consequence, the decision of the Court of Appeals of Tripoli was to be regarded as an Italian decision.

*Nicolo v. Creni (1952)*  
Italy, Court of Cassation  
7 *Foro Padano* 278

*American Journal of International Law (1954)*, p. 160

62. The judgment of the Court of Cassation in this case is dated 29 January 1952, i.e. about five weeks after the establishment of the United Kingdom of Libya (24 December 1951). It is clear that the Court of Cassation must have been seized of the case before that date.

63. The Court held that the loss of these territories imposed upon the Italian state by the Treaty of Peace did not prevent the previously established Italian judicial organs from continuing to exercise, even if temporarily, their jurisdiction. Their decisions had retained the character of Italian judicial actions and as such were subject to review by the Court of Cassation. For purposes of the power of a higher court to review, the important thing was not the fate which the territory had suffered in which a decision had been rendered, but the nationality of this decision.

*Marzola v. Società Teavibra (1949)*  
Italy, Court of Cassation  
*Foro Italiano* 72 (1949), Part I, p. 914  
*Giurisprudenza Italiana* 102 (1950), Part I, pp. 1, 513  
*Annual Digest, 1949, Case 24*

64. It was held that the Italian Court of Cassation retained jurisdiction to hear appeals from decisions of the Court of Appeal of Trieste pronounced before the Treaty of Peace of 10 February 1947 came into force (16 September 1947). The Court of Appeal of Trieste was undoubtedly an organ of the Italian judicial authorities having regard to the rule that military occupation does not change the legal status of the occupied territory. By the Armistice of September 1943 the Allied occupation of Trieste was transformed from belligerent occupation into occupation on the basis of an armistice. The jurisdiction of the Italian judicial authorities was not affected thereby.

*Pre-Trusteeship Decisions of Somaliland Courts Case (1954)*  
Italy, Court of Cassation  
38 *Rivista di Diritto internazionale*, 76  
*American Journal of International Law (1955)*, p. 584

65. The administration of the former Italian colony of Somaliland was transferred to Italy as Administering Power on 1 April 1950. The Court held that the Ordinance of the Trusteeship Administration providing for appeals to the Court of Cassation from decisions of the Courts of the Trust Territory was applicable also to decisions rendered prior to 1 April 1950.

*Romano v. Trusteeship Administration of Somaliland under Italian Trusteeship (1957)*

Italy, Council of State

*Il Consiglio di Stato* 1957, I, 343

(89) *Journal du Droit International (Clunet) (1962)*, p. 222

66. In 1956 an Ordinance of the Italian Administrator of Somaliland created a Court of Justice for Somalia, with jurisdiction, *inter alia*, over appeals on the grounds of incompetence, illegality or *ultra vires*, against final administrative acts of the public authorities. The Italian Council of State held that its competence over such appeals had come to an end with the institution of this Court for Somalia. The Council stated that the old rules, vesting jurisdiction in it, provisionally kept alive in 1950, were expressly designed to expire on the promulgation "of the autonomous rules of the new State", separate and distinct from that of Italy.

*Passi v. Sonzogno (1953)*  
Italy, Court of Cassation  
37 *Rivista di Diritto internazionale*, 579  
*American Journal of International Law (1955)*, p. 584

67. The Court held that the jurisdiction of Italian Courts in Eritrea terminated as of 15 September 1952.<sup>17</sup>

*Forer v. Guterman (1948)*  
Israel, District Court of Tel-Aviv  
*Hamishpat, Vol. IV, 1949*, p. 55  
*Annual Digest, 1948, Case 21*

68. An Order of the Judicial Committee of the Privy Council on appeal from the judgment of a Court of Palestine under British Mandate was made before 15 May 1948 (the date of the end of the Mandate and the establishment of the State of Israel), but reached the parties after that date. The Court found that the decision of the Judicial Committee was binding on the parties to the litigation. It was immaterial that the Order only reached Israel after that date. The essential fact was that on 15 May 1948 the rights of the parties had been regularly determined in a manner binding on all courts in Palestine.

(iv) *Problems of transition relating to the recognition and execution of judgments and equivalent titles*

(a) Cases where the title originates in territory which was under foreign sovereignty and has become national territory

*Pre-Annexation Judgment Case (1929)*  
Greece, Court of Athens  
*Thémis*, 41, p. 342  
*Annual Digest, 1929-1930*, p. 72

69. The Court treated as a Greek decision a judgment rendered by the authorities of the ceded province prior to its annexation by Greece.

*Janina Mortgages Case (1931)*  
Greece, Areopagus  
*Thémis*, vol. 42, p. 643  
*Annual Digest, 1931-1932, Case 36*

70. A decision ordering the execution of a mortgage given during the Turkish régime, at Janina, which had

<sup>17</sup> The Constitution of Eritrea entered into force upon its ratification by the Emperor of Ethiopia on 11 September 1952. *Yearbook on Human Rights* for 1952, p. 62.

since become part of Greece, was to be regarded as a foreign title. According to a generally recognized principle of international law, whenever the execution of decisions emanating from an authority in annexed territory prior to annexation was requested in the territory of the annexing State, the title was regarded as a foreign one. This followed from the principle of non-retroactivity of annexation.

*Clements v. Texas Company (1925)*  
*United States of America, Court of Civil Appeals of Texas (Galveston)*  
 273 *South Western Reporter* 993 (1925)  
*Annual Digest, 1925-1926, Case 73*

71. In a province of Mexico a judgment relating to land was rendered in a court of competent jurisdiction. Subsequently, the province became a part of the State of Texas which, through revolution, became independent of Mexico in 1836. The Court held that the judgment was not affected as a valid obligation. In the event of conquest or revolution, the Court said, the people change their allegiance. Their relation to the ancient sovereign is dissolved, but their relations to each other and their rights of property remain undisturbed.

72. The Court added that when a change of government took place, the judgment was not of itself enforceable as a judgment under the rule of the succeeding sovereignty and in its courts, but had to be recognized by the new sovereignty.

*Chunilal Kasturchand Marwadi and another v. Dundappa Damappa Navalgi (1950)*  
*India, High Court of Bombay*  
 1950, *Indian Law Reports, Bombay* 640  
*International Law Reports, 1950, Case 23*

73. In 1927 the appellants procured in a court in the Indian Province of Bombay a judgment for certain moneys owing against Damappa and a partnership to which he belonged. Damappa was a resident of the then independent State of Jamkhandi and did not submit to the jurisdiction of the Indian Court. Under the applicable provisions the Bombay Court did not have jurisdiction in the case against Damappa and neither he, nor his heir, entered any appearance at the trial.

74. In 1948 the judge of the Court in Jamkhandi dismissed the request for execution of the judgment of 1927 as the judgment of a foreign court which did not have jurisdiction and was not capable of enforcement in the Courts of Jamkhandi State.

75. On appeal it was held that the judgment could now be enforced because, in the meantime, the Jamkhandi State had acceded to India so that the Indian Court was no longer a foreign Court. The contention of the judgment debtor was that to plead a bar to the execution of the decree of a foreign Court was a substantive right which could not be retrospectively taken away. This contention was rejected by the Court which said that there had been no alteration of the law, but an alteration in the status of the judgment debtor and the character and authority of the Court. What had been a foreign Court had ceased by reason of the exercise of the sovereign authority of the Indian Dominion to be a foreign Court and the judgment debtor

had ceased to be a foreigner in relation to the Court which had rendered the judgment.

*Bhagwan Shankar v. Rajarum Babu*  
*India, High Court of Bombay*  
*Indian Law Reports (1952) Bombay, 65*  
*International Law Reports, 1951, Case 30*

76. In the case of *Chunilal Kasturchand v. Dundappa*, summarized in paragraphs 73 to 75 above, the Court ordered the execution of a judgment of a Court of British India which had not had jurisdiction in the case against a judgment debtor who had been a resident of an independent princely State which eventually acceded to the Dominion of India. Now we are dealing with a case where it was sought to enforce against a defendant formerly resident in one princely State the judgment rendered by the Court of another princely State after both States had acceded to the Dominion of India. The full bench of the High Court of Bombay found that the case of *Chunilal Kasturchand v. Dundappa* had been rightly decided and applied the principle on which it was based.

77. Plaintiff had obtained an *ex parte* money decree in a court in the State of Sholapur in 1937. The Court did not have jurisdiction because the defendant was a resident and citizen of the State of Akalkot. The two lower courts of Akalkot refused the application for execution because of the lack of jurisdiction of the trial court. During the appeals proceedings the Akalkot State merged in the Province of Bombay. The High Court allowed the execution because the Court of Sholapur was no longer a foreign court and the defendant no longer a foreigner vis-a-vis that Court. The prejudice to the defendant had been caused by an Act of State.

78. It is noted in *International Law Reports, 1951, p. 72*, that the Pakistan High Court at Dacca on 4 May 1951 arrived at a conclusion which was the reverse of the Indian decision (*Fazal Ahmed v. Abdul Bari*, *Pakistan Law Reports (1951) 1 Dacca 375*).

*Fischer v. Einhorn (1926)*  
*Supreme Court of Poland*  
*O.S.P. V, No. 211*  
*Annual Digest, 1925/1926, Case 71*

79. On 8 June 1920 the Czechoslovak Court at Trstená had given judgment against the defendant. At the time, the village in which the defendant was resident belonged to the district of that court. Later, the village was incorporated into Poland, but the Court remained on Czechoslovak territory. In proceedings for the execution of the Czechoslovak judgment, the Supreme Court held that at the time of the judgment the Court at Trstená had been the competent court. This was not changed by the subsequent incorporation of the village into Poland. The judgment must therefore be regarded as a domestic, not a foreign judgment.<sup>18</sup>

<sup>18</sup> In the case of *Fischer v. Einhorn* the Czechoslovak Court, a foreign court at the time of execution, had, at the time of the trial, had jurisdiction *rations loci*. This distinguishes this case from *Knoll v. Sobel* (paragraph 80 below), where the jurisdiction of the now foreign trial court (Vienna) had obviously been based on some ground unconnected with subsequently Polish territory.

(b) Cases where the title originates, as territory which was under the same sovereignty as the district where execution is to take place, and which has become foreign territory

*Knoll v. Sobel (1925)*  
*Supreme Court of Poland*  
*O.S.P. IV, No. 547*  
*Annual Digest, 1925/1926, Case 72*

80. A dispute between the same parties had been decided by the Court of First Instance in Vienna and confirmed by the Court of Appeal in Vienna and by the Supreme Court in Vienna in 1917. In 1924 the judgment debtor resided in Stanislawow, a city which up to 1918 had belonged to Austria, and was now in Poland. It was held that the judgment of the Vienna Court of First Instance confirmed by the higher courts in Vienna was a foreign judgment which for lack of reciprocity was not enforceable in Poland. The Austrian Court in which the judgment had originated had no jurisdiction over the territory later ceded to Poland.

*Polish State Treasury v. Kurzrock (1921)*  
*Supreme Court of Poland*  
*O.S.P. I, No. 496*  
*Annual Digest, 1919-1922, Case 52*

81. In 1915 the Courts of First and Second Instance in Vienna found for the Austrian State Treasury in a suit for the payment of certain sums owed to the Austrian military establishment. In 1921 the Polish Treasury applied to the Polish Court having jurisdiction in the district of the judgment debtor's residence for execution of the judgment and that Court granted the application.

82. The Polish Court of Second Instance dismissed the application mainly on the ground that the Polish Treasury had no title to collect debts owed to the Austrian Treasury.

83. The Supreme Court of Poland dismissed the Treasury's appeal. The judgments of the courts of first and second instance in Vienna, while in 1915 they were judgments of national courts from the point of the local court, must now be considered foreign judgments.

*State Succession (Notarial Act) Case, 1919*  
*Supreme Court of Austria*  
*Entscheidungen des Obersten Gerichtshofs in*  
*Zivilrechtesachen*  
*Vol. I (1919) No. 33, p. 115*  
*Annual Digest, 1919-1922, Case 40*

84. The parties had concluded in May 1918 in Lemberg (Lwów), then part of Austria, after World War I part of Poland, a contract of sale in the form of a deed established by a notary (*Notariatsakt*), which under Austrian law is a title for immediate execution. After October 1918 a court in Vienna ordered execution.

85. The Supreme Court dismissed the debtor's contention that the title to execution was a foreign title and execution in the Austrian Republic therefore not permissible. When the notarial deed was made, the Court said, Lemberg (Lwów) was part of Austrian territory. Relations of private law were not affected as the result of the extinction of States. Courts survived political changes. The dismemberment of the former territory

of the Austrian Monarchy could not effect any changes in the execution of validly acquired titles.

*Dominion of India v. Hiralal Bothra (1950)*  
*All-India Reporter, 1950, Vol. 37*  
*Calcutta Section, 12*

86. The question before the Court was whether after 15 August 1947 it was competent for the Court of Small Causes, Calcutta, to entertain an application for starting proceedings in execution of a decree which had been passed, before the establishment of the two independent Dominions of India and Pakistan, by a court in Jamalpur, which was now in Pakistan. The Court held that the Court in Jamalpur was a foreign Court.

87. The Indian Independence Act, 1947, provided that the law of British India existing immediately before 15 August 1947, shall, so far as applicable and with the necessary adaptations, continue as the law of each of the new Dominions. The Judge of the lower Court believed that the old Indian Code of Civil Procedure was therefore still in force in both Dominions. The High Court held that this view was not correct.

88. Since 15 August 1947 two different Codes (though identical in contents) had been in existence. Courts which were not foreign Courts before the partition of India were now foreign Courts. British India, within which both Courts involved in the case had been situated, had ceased to exist. The test for determining whether a particular Court was or was not a foreign Court in relation to another was to be ascertained and determined with reference to the law now [1950] in force and as under the altered constitutional position. In accordance with the accepted principles of international law, the Dominions of India and Pakistan were now two separate Sovereign and Foreign States.

*Golden Knitting Co. v. Mural Traders (1950)*  
*India, Madras High Court*  
*All-India Reporter, 1950, Vol. 37*  
*Madras Section, 293*

89. In this case, very similar to the case of *Dominion of India v. Hiralal*<sup>19</sup> the question was whether the District Court of Coimbatore (Dominion of India) had power to execute a decree passed before 15 August 1947 by a court in Karachi. The High Court of Madras held that the lower Indian Courts' opinion that it had the power was obviously wrong. For the reasons given by the High Court of Calcutta in *Dominion of India v. Hiralal* (with which the High Court of Madras agreed), the judgment of the Court at Karachi had become a foreign judgment.

*Van Heynsbergen v. Nederlandsche*<sup>20</sup>  
*Handelsmaatschappij (1957)*  
*District Court of Amsterdam*  
*N. J. 1957, No. 553*  
*International Law Reports, 1957, p. 76*

90. On the basis of the general principle of law that a change in the international legal status of a territory

<sup>19</sup> See paragraphs 86 to 88 *supra*.

<sup>20</sup> See the decision of the Court of Milan in *Banin v. Laviani and Ellena*, paragraphs 55 and 56 *supra*.

shall not, or shall as little as possible, infringe upon the private law relations of its inhabitants, it must be accepted that the judgment ordering the bankruptcy of B preserved its "non-foreign" character and thus retained, after the transfer of sovereignty over the Netherlands Indies on 27 December 1949, the enforceability which it possessed under Netherlands Indian Law.

*Rey v. Société commerciale pour l'équipement industriel et agricole (1959)*  
*Annuaire français de droit international (1961), p. 917*

91. After the accession of Morocco to full independence, the question of the execution of judgments was regulated by a Convention of 5 October 1957 on Judicial Assistance, *exequatur* of Judgments and Extradition. The question arose, however, which rules should apply to execution in France of judgments of Moroccan courts between the end of the French Protectorate and the entry into force of the convention. The Tribunal decided that the general statutory and case law (*règles légales et jurisprudentielles de droit commun*) should be applied, i.e., that the usual procedure of *exequatur* [of foreign judgments] was to be followed.

## CHAPTER II. STATE SUCCESSION IN RELATION TO TREATIES

### (A) The question of the succession of New States in relation to treaties

*In re J.Z. (1921)*  
*Obergericht (Court of Appeal) of the Canton of Zurich, Switzerland*  
*Blatter für zürcherische Rechtsprechung, Vol. XX, p. 23*  
*Annual Digest, 1919-1922, Case 43*

92. A Czechoslovak plaintiff in a civil action appealed against the decision of the lower court fixing a date by which he was to give security for costs, contending that Czechoslovakia continued to be a party to the Hague Convention on Civil Procedure of 1905.

93. According to information given to the Court by the Swiss Department of Justice, the Czechoslovak Republic refused to be regarded as the successor of former Austria and held that she was no party to treaties entered into by Austria-Hungary. In view of this information, it was impossible to accept the view that the Hague Convention on Civil Procedure was applicable to a citizen of Czechoslovakia.

*In re M.O. (1921)*  
*Obergericht (Court of Appeal) of the Canton of Zurich, Switzerland*  
*Blatter für zürcherische Rechtsprechung, Vol. XX, p. 354*  
*Annual Digest, 1919-1922, Case 42*

94. In a situation similar to the case summarized in paragraphs 92-93, a Polish plaintiff appealed against the order of the lower Court to give security for costs. The plaintiff relied on Art. 287 of the Treaty of Versailles, which laid down that the contracting parties should apply, as between themselves, the provisions of the Hague Convention on Civil Procedure of 1905.

95. The Zurich Court of Appeal pointed out,

however, that Poland had not been represented at the Fourth Conference concerning private international law (which drew up the Convention) and could not by unilateral declaration become a party to it (art. 27 of the Convention) unless she had been admitted to it by a new international agreement. Such an admission could not be effected by the Peace Treaty, to which Switzerland was not a party.

*Civil Procedure Convention (Galicia) Case (1919)*  
*Upper District Court of Berlin*  
*Juristische Wochenschrift, 1920, p. 393*  
*Annual Digest, 1919-1922, p. 69*

96. Notwithstanding the terms of the Hague Convention on Civil Procedure of 1905, the court required security for costs from a person domiciled in the formerly Austrian Province of Galicia, which after World War I became part of Poland, on the ground that the Austrian Monarchy had ceased to exist and that at the time of the judgment the fate of Galicia was still undecided.

97. The position would be different only if Poland could be regarded, according to the rules of international law, as the successor State of those States which were parties to the Convention and whose territories formed the present Polish State. The theory of international law pointed to the conclusion that a new State which had been formed by separation from another State derived neither rights nor obligations from the treaties entered into by the older State. The Hague Convention was not a treaty which, as to either obligatory law pointed to the conclusion that a new State territory, as, for instance, might be the case in a treaty relative to river navigation.

*Czechoslovak Co-operative Society v. Otten (1924)*  
*District Court of Rotterdam*  
*Weekblad von Het Recht, 1926, No. 11285*  
*Annual Digest, 1923-24, Case 42*

98. In the case of a Czechoslovak plaintiff against a Netherlands defendant the Court held that the Hague Convention on Civil Procedure of 1905 did not apply between Czechoslovakia and the Netherlands and the plaintiff was therefore not exempted from the requirement of depositing money into court as security for costs. Czechoslovakia was an independent State and had not retained the rights and obligations of the Austro-Hungarian Empire, which had been a party to the 1905 Convention. The signature attached to that Convention did not bind the new State formed out of part of the Empire.

*Czechoslovakia as a Party to the Hague Convention of 1902 Case (1936)*  
*Italy, Court of Appeal of Perugia*  
*Foro Umbro (1936)*  
*Annual Digest, 1935/37, p. 141*

99. It was held that Czechoslovakia was a party to the Hague Convention of 12 June 1902 to which the Empire had been a party and which Czechoslovakia had not denounced.<sup>21</sup>

<sup>21</sup> The *Annual Digest* does not state to which Hague Convention of 1902 the case refers.

*In re Ungarische Kriegsprodukten-Aktiengesellschaft*  
(1920)  
*Obergericht (Court of Appeal) of the Canton of Zurich,*  
*Switzerland*  
*Blatter für zürcherische Rechtsprechung, Vol. XX,*  
*p. 267*  
*Annual Digest, 1919-1922, Case 45*

100. In a case analogous to those relating to Czechoslovak and Polish plaintiffs (see paras. 92 to 95 *supra*), but with a Hungarian plaintiff, the Zurich Court of Appeal decided that the plaintiff was not required to give security for costs. Austria-Hungary had signed the Hague Convention on Civil Procedure of 1905 in 1908 and deposited the instrument of ratification in 1909. Both Hungary and Austria, forming the Real Union of Austria-Hungary, had had international personality and each of them was a contracting State in the international treaties concluded by the common organs. Neither Austria nor Hungary had ceased, as a result of the dissolution of the Real Union in 1918, to be a party to the Convention of 1905. No importance could be attached to the fact that the Hungarian territory had been diminished by the Peace Treaty of Trianon. The Hungarian State of 1920 was the same person of international law as that which had signed and ratified the Convention.

*Weltner v. Cassutto (1931)*  
*Court of Appeal, Trieste*  
*2 Il Foro delle Venezie 289 (1931)*

101. In a case relating to the recognition of a divorce decree emanating from a Hungarian Court, the Court decided that post-Trianon Hungary continues to be considered a party to the Hague Convention to regulate Conflicts of Laws and Jurisdiction in the Matter of Divorce and Separation of 12 June 1902.

*Del Vecchio v. Connio (1920)*  
*Court of Appeal, Milan*  
*46 Foro Italiano (I) 209, 226 (1921)*

102. The Court held that the then existing "State of Fiume" (see paragraph 1 *supra*), which arose from the dismemberment of the Austro-Hungarian Monarchy, must be considered a party to the Convention of 1902 (on divorce and separation), as successor to Hungary which was a party to the Convention, since Fiume continues to apply the Hungarian legal system and has done nothing to signify the denunciation of the Convention.

*Mrs. W. v. F.S. (1954)*  
*Court of First Instance, Amsterdam*  
*2 Nederlands Tijdschrift voor International Recht, 296*  
*(50) American Journal of International Law (1956),*  
*pp. 440-441)*

103. It was held that the Hague Convention on Civil Procedure had ceased to apply as between Germany and the Netherlands as a result of war. Its subsequent revival by agreement between the Netherlands and the Federal Republic of Germany did not affect the Saar, as the Saar was not (at the relevant time) part of the Federal Republic of Germany. Nor had France declared the Convention to be applicable to the Saar, and no

special agreement between the Netherlands and the Saar had been concluded.<sup>22</sup>

*Extradition (Germany and Czechoslovakia) Case (1921)*  
*Reichsgericht (Supreme Court of the German Reich)*  
*Entscheidungen des Reichsgerichts in Strafsachen, Vol.*  
*55, p. 284*  
*Annual Digest, 1919-1922, Case 182*

104. The accused was extradited from Czechoslovakia to Germany on the charges of larceny and of being a habitual thief. If the pre-war extradition treaty between Germany and Austria-Hungary had been applicable, the trial of the extradited person in Germany would have been governed by the conditions stipulated in that treaty. If the pre-war treaty was not applicable between Germany and Czechoslovakia, the situation was governed by the relevant rules of international law which recognize, inter alia, the so-called principle of speciality. This principle applies, the Court said, also to extradition treaties or to *ad hoc* extradition agreements except when they contain provisions to the contrary.

105. The Court held that the pre-war extradition treaty between Germany and Austria was not applicable to Czechoslovakia, although her territory was largely composed of former Austrian territory. The States which had arisen on the territories of the Austrian Empire could not be regarded as succeeding automatically to the rights and duties of that Empire. As a consequence, the principle of speciality applied and the accused could not be convicted for an offence for which he had not been extradited.

*N. v. Public Prosecutor of the Canton of Aargau*  
*(Switzerland)*  
*Swiss Federal Court*  
*Arrêts du Tribunal fédéral suisse, Vol. 79 (1953), IV,*  
*p. 49 et seq.*  
*International Law Reports, 1953, p. 363*

106. Switzerland has not concluded an extradition treaty with Czechoslovakia, the Court said; moreover, the Extradition Treaty between Switzerland and Austria-Hungary cannot, as the Federal Council stated in 1920 in reply to a request for extradition, be applied without Czechoslovakia as successor State. (B. Bl. 1921, II, 350.)<sup>23</sup>

*Re Westerling (1950)*  
*Singapore High Court*  
*(1950), 1, M.L.R. 228*  
*International Law Reports, 1950, Case 21*

107. In support of the extradition of Westerling, who was accused of the commission of crimes in Java, the Government of Indonesia contended that it had succeeded to the rights of the Netherlands Government under the Anglo-Netherlands Extradition Treaty of 1898 and the related (British) Order-in-Council of 1899.

108. The Attorney-General informed the Court on the authority of the (United Kingdom) Secretary of State

<sup>22</sup> Decided before the referendum of 23 October 1955 on the Statute of the Saar and the Franco-German Treaty on the Settlement of the Saar Question of 27 October 1956.

<sup>23</sup> This statement was not necessary for the decision of the Court. The case is reproduced here to show that the Swiss Federal Court maintained in 1953 the attitude of the Swiss Courts of the year 1921 (*supra*, paragraphs 92 et seq.)

for Foreign Affairs that Indonesia had succeeded to the rights and obligations of the Netherlands under the Treaty of 1898 and that the Treaty now applied between the United Kingdom and Indonesia. Following a long line of decisions of British courts, the High Court of Singapore accepted all the matters set out in this statement of the Executive and treated them as conclusively established. It was also established that pursuant to the Treaty of 1898 the relevant sections of the British Extradition Act, 1870, had previously been applied to Java, albeit not to Java as such but only to Java as a colony of the Netherlands.

109. Notwithstanding the conclusive character of the statement as to Indonesia's succession to the rights flowing from the 1898 treaty, the Court examined instances furnished by the dissolution of the Austro-Hungarian Empire after World War I and its effect on the Extradition Treaty between the United Kingdom and Austria-Hungary of 1873. The Court noted that after the 1914-1918 war, notices reviving the Anglo-Austrian Treaty of 1873 were given to Austria and to Hungary and an extradition treaty between the United Kingdom and Serbia made in 1900 was continued between the United Kingdom and Yugoslavia. With Czechoslovakia, however, the case nearest to that of Indonesia, a new treaty (of 11 November 1924) and a new Order-in-Council transforming the Treaty into municipal law had been made in 1926.

110. From the statement of the Executive, it would appear, the Court said, that there may be at international law somewhat unknown to other law in the nature of a *haeres viventis*. Such a successor is contemporaneously existent with his predecessor.

111. The Court granted Westerling an Order of Prohibition, i.e., it decided that he must not be extradited to Indonesia. In municipal law, it said, extradition was dependent on the existence of a treaty (in this case affirmed by the statement of the Executive) and an appropriate Order-in-Council incorporating the treaty in municipal law. This second requirement was lacking in the case of Indonesia.

*Gil v. Polish Ministry of Industry and Commerce (1923)*  
*Supreme Administrative Court of Poland*  
*O.S.P. II, No. 665*  
*Annual Digest, 1923-1924, Case 41*

112. In administrative proceedings relating to his right to carry on trade in textile goods in Lwów (at the time in that part of Poland which had formerly belonged to Austria) the appellant, a Russian national, had to prove reciprocity in this regard between Poland and Russia. The Treaty of Commerce of 1906 between Austria-Hungary and the Russian Empire declared that reciprocity was assumed to exist in fact. The appellant contended that the Treaty of Commerce continued in force between the Republic of Poland, as regards such parts as had been under Austrian<sup>24</sup> sovereignty, and the Soviet Union, and that consequently the reciprocity formerly assumed in the Treaty between Austria-Hun-

gary and Russia relieved the plaintiff of the necessity of proving reciprocity.

113. The Supreme Administrative Court dismissed the appeal. International treaties, it said, being based on the mutual consent of the contracting parties, are not binding on a State for the sole reason that part of its territory formerly belonged to one of the contracting parties. There is lack of identity of the parties to the Treaty. The Austro-Russian Treaty of Commerce of 1906 was binding neither on Poland with regard to Russia, nor on Russia with regard to Poland.

*Customs House (State Succession) Case (1922)*  
*Reichsgericht (Supreme Court of the German Reich)*  
*Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 57, p. 61*  
*Fontes Juris Gentium, A II, Vol. 1 (1879-1929)*  
*No. 261*  
*Annual Digest, 1919-1922, Case 41*

114. In a Treaty of Commerce between Germany and Austria-Hungary of 1891, renewed in 1905, the parties agreed that their respective customs houses on the frontier should, so far as possible, be established in one place to simplify proceedings. After October 1918 the régime of the common customs houses was maintained in a number of places on the German-Czechoslovak frontier.

115. The legality of the continued arrangement was challenged by a person accused of smuggling. The *Reichsgericht* decided that the conviction must stand. It was true that one of the parties to the Treaty (Austria-Hungary) had ceased to exist. This did not necessarily result in abolishing the legal position created by the Treaty. In this regard the will of the present participants was decisive. Although Czechoslovakia was not the successor of Austria-Hungary and was not bound by the Treaty, there was nothing to prevent her and Germany from maintaining the relation either by formal treaty or by tacit declarations of will. This actually happened as the result of Czechoslovakia deciding not to interfere with the activities on its territory of the Saxon<sup>25</sup> customs house. Both sides having thus manifested their wish that there should be no change either as to facts or as to law, everything has remained as it had been before from the point of view of both international law and constitutional law.

*Advanced Customs Office in Troppau (Opava) case (1932)*  
*Reichsgericht (Supreme Court of the German Reich)*  
*Entscheidungen des Reichsgerichts in Strafsachen (1932), No. 66*  
*Fontes Juris Gentium, A II, Vol. 2 (1929-1945) No. 53*

116. In a situation similar to that summarized in the preceding paragraphs the Supreme Court held that those provisions of the Treaty between Germany and Austria-Hungary concerning the facilitating of railway connexions of 14 March 1883 which related to the advanced German customs office (*vorgesobene Zollstelle*) in Troppau (Opava) in Czechoslovakia applied also between the German Reich and the Czechoslovak Republic.

<sup>24</sup> The report contained in the *Annual Digest* says here "under Russian sovereignty". It is suggested that "under Austrian sovereignty" might be correct in the context.

<sup>25</sup> Saxony was at the time one of the *Länder* of the German Reich.

*Feldman & Feldman v. Polish State Treasury (1921)*  
*Supreme Court of Poland*  
*O.S.P. I, No. 16*  
*Annual Digest, 1919-1922, Case 44*

117. The Court held that although the Austrian Monarchy had been a party to the Berne Convention relating to the international transport of goods of 14 October 1890, that Convention did not continue in force with regard to territories formerly Austrian, but now (1921) under the sovereignty of a State not a party to that Convention.

*Dabrai v. Air India Limited (1953)*  
*High Court of Bombay*  
*1954 Bombay Law Reporter 944*  
*International Law Reports, 1953, p. 41*

118. The Court held that carriage of goods by air from Karachi to Bombay in November 1947, i.e., after the partition, on 15 August 1947, of India, was "international carriage by air" within the meaning of the Warsaw Convention, 1929, and that the Convention was applicable. India, the Court said, did not sign the Convention, nor was there evidence of accession by India. The Court considered a notification by the Governor-General, under which "H.M. the King of Great Britain, Emperor of India" was described as the High Contracting Party as from February 1935, to be conclusive evidence of the matters certified.

119. The Court did not accept the opinion that the Commonwealth was a single High Contracting Party and travel within the Commonwealth therefore "inland travel". Even before 15 August 1947, India had been a distinct State with an international personality separate from the United Kingdom and His Majesty was the Contracting Party *qua* each of the component States of the Commonwealth. Pre-partition India's rights and obligations under the Warsaw Convention devolved upon the Dominions of India and Pakistan.

*Trésor Public v. Compagnie Aigle Azur (1960)*  
*Tribunal de grande instance de la Seine*  
*Revue française de droit aérien, 1960, 214*  
*(88) Journal du droit international (Clunet) (1961)*  
*p. 1104*

120. The French Treasury sued the defendant air line to recover compensation it had paid to the personal representatives of two members of the French Air Force, who had been killed in a crash, in Laos, on a flight from Saigon (Vietnam) to Vientiane (Laos) in 1953. The defendant company contended that the claim was barred under article 29 of the Warsaw Convention, the action having been brought more than two years from the date of the flight. The Treasury maintained that at the date of the flight, Laos and Vietnam had both been under French sovereignty so that the flight had been "inland transport" and not "international carriage by air" to which the Warsaw Convention applied.

121. The Court held that the flight was "international carriage by air" because the "promotion (of Vietnam and Laos) to full and complete State personality" had been recorded by the general agreements of 8 March 1949 (Vietnam) and 19 July 1949 (Laos). The Conven-

tion of 1954 merely confirmed that independence by transferring competences and services in various matters, particularly in judicial, police and security matters.

122. The Court further held that Laos and Vietnam, which had been bound by the Warsaw Convention while they were under the sovereignty of France which had ratified without any reservation as to its colonies and protectorates, remained bound after their accession to independence in the absence of any express notice of denunciation of the commitments previously entered into in their name.

*Heirs of Yurjevitch v. Egyptian Government (1930)*  
*Egypt, Mixed Court of Appeal*  
*Bulletin de législation et de jurisprudence égyptienne*  
*42, p. 430*  
*Gazette des Tribunaux mixtes d'Égypte. XX (1929-1930)*  
*Annual Digest, 1929-1930, Case 84*

123. The plaintiff claimed certain benefits for which foreign officials in the Egyptian civil service were eligible under the regulations in force at the time, provided they were nationals of a capitulatory Power. The plaintiff had been a citizen of Austria of Yugoslav origin; in 1918 his province of origin became part of Yugoslavia. Austria had renounced the rights of the régime of capitulations in the Peace Treaty of St. Germain. It was contended that this renunciation had no effect on persons who had become citizens of Yugoslavia.

124. The Court held that the rights and obligations flowing from a treaty, which is essentially personal to the contracting States, cannot be transmitted to another State. A new State built up from portions taken from previously existing States does not, as a rule, acquire any rights or obligations flowing from the treaties made by the dismembered State. Even if Austria had not withdrawn from the capitulations, a Yugoslav could only enjoy the rights and privileges flowing from treaties made by Yugoslavia. Yugoslavia was not a capitulatory country and her nationals could not take advantage of the capitulations.

*Arab Bank v. Ahmed Daoud Abou Ismail (1950)*  
*Egypt, Tribunal of Port Said (Full Court)*  
*Revue égyptienne de droit international (1951) vol. 7,*  
*p. 191*  
*International Law Reports, 1950, p. 314*

125. On 19 March 1950 the plaintiff bank obtained from the Tribunal of Sicheim (Palestine, now Jordan) a judgment against the defendant, rendered in the name of His Majesty King Abdullah of Jordan. The bank moved in the Court of First Instance, Port Said, for execution of the judgment basing itself on the Convention between Egypt and Palestine concerning the Enforcement of Judgments signed at Cairo on 12 January 1929.

126. The Full Bench of the Egyptian Court held that the Bank's application must fail. Palestine, in the sense contemplated by the Convention of 1929, no longer existed. The party with whom Egypt concluded the Convention no longer exercised any authority over Sicheim and had been replaced by another State. In virtue of the rules of public international law, the Convention had ceased to exist.

*Hanafin v. McCarthy* (1948)<sup>26</sup>

United States of America, Supreme Court of New Hampshire

(42) *American Journal of International Law* (1948), p. 499

127. The Irish plaintiffs' rights relating to real property in the State of New Hampshire, United States of America, depended on whether or not the Convention relating to the Tenure and Disposition of Real and Personal Property, signed by the United States and the United Kingdom of Great Britain and Ireland on 2 March 1899, was effective between the Irish Free State (later Eire) and the United States.

128. The Court held that no serious doubt appeared concerning the binding effect of the treaty upon Ireland as a part of the United Kingdom, one of the original contracting parties. Since the signing of the treaty, the Free State of Ireland, later Eire, had been created out of Ireland in 1921/1922. The Irish Free State took the same constitutional status in the British Commonwealth as the Dominion of Canada and other Dominions. In none of the instruments relevant to this change was the status of existing treaties expressly adverted to. No action on the part of the Irish Free State, or Eire, was called to the Court's attention which would indicate repudiation by that government of the treaty of 1899.

129. The Court accepted the view expressed by writers that "on the creation of a new state, by a division of territory, the new State has a sovereign right to enter into new treaties and engagements with other nations, but until it actually does, the treaties by which it was bound as a part of the whole State will remain binding on the new State and its subjects" and that "a State formed by separation from another . . . succeeds to such treaty burdens of the parent State as are permanent and attached to the territory embraced in the new State". The Court referred to the decision in *Techt v. Hughes*, 229 NY 222, where it had been pointed out that "until the political departments have acted, the courts, in refusing to give effect to treaties, should limit their refusal to the needs of the occasion and in determining whether a treaty survives, reach their conclusions in the light of such broad consideration as 'the dictates of fair dealing, and the honour of the nation'."

130. The Court invoked, in support of its conclusion that the Treaty was operative between Ireland and the United States, also the views expressed by the Irish, United States and British Governments that they regard the treaty of 1899 as being in force.

(B) *The principle of movable treaty frontiers*  
(*Le principe de la variabilité des limites territoriales des traités*)

*Gastaldi v. Lepage Hemery* (1927)

Italy, Court of Cassation

*Rivista di diritto internazionale*, XII (1930), p. 102

*Annual Digest*, 1927-1928, Case 61 and 1929/1930, Case 43<sup>27</sup>

131. The Italian Court of Cassation held that the Franco-Sardinian Treaty of 24 March 1760 concerning

the execution of judgments, confirmed by the Franco-Sardinian interpretative declaration of 11 September 1860, is effective as between France and Italy. It is unanimously admitted, the Court said, that an international convention with a State has full effect in regard to the new territories which it adds to its former territory and which combine to constitute the new national territory. The system of annexation, by which the unitarian Italian State was constituted, involves the automatic extension of international treaties, since the international personality of the contracting State does not change with the enlargement of its territory.

*Ivancevic, Consul General of Yugoslavia v. Artukovic Ware v. Artukovic* (1954)

United States Court of Appeals, Ninth Circuit

*Federal Reporter, Second Series*, Vol. 211F 2d, p. 565  
*International Law Reports*, 1954, p. 66

132. There was agreement by all parties to the proceedings concerning the extradition by the United States, to Yugoslavia, of one Artukovic that the changes from the "Kingdom of the Serbs, Croats and Slovenes" to the "Kingdom of Yugoslavia" in (1928) and thereafter to the "Federal People's Republic of Yugoslavia" (in 1945) were internal and political changes and did not affect the validity of any treaty which was effective under the "Kingdom of the Serbs, Croats and Slovenes". The question to be decided was therefore whether the Extradition Treaty between the United States and the Kingdom of Serbia of 17 May 1902 had survived as an effective treaty when the Kingdom of the Serbs, Croats and Slovenes appeared on the international scene in 1918/1919.

133. After a review of the relevant diplomatic and constitutional documents and the consideration of the writings of publicists on the question whether Yugoslavia was a new State lacking continuity with Serbia, or whether Yugoslavia must be regarded as enlargement of the territory of Serbia, the Court of Appeal concluded that Yugoslavia had been formed by a movement of the (Southern) Slav people to govern themselves in one sovereign nation, with Serbia as the central or nucleus nation. Great changes were brought about, but the combination was not an entirely new sovereignty without parentage. But even if it is appropriate to designate the combination as a new country, the fact that it started to function under the Serbian Constitution as the home government and under Serbian legations and consular service in foreign countries, and has continued to act under Serbian treaties of Commerce and Navigation and the Consular Treaty is conclusive proof that if the combination constituted a new country, it was the successor of Serbia in its international rights and obligations. The United States-Serbian extradition treaty of 1902 is a valid and subsisting treaty between the United States and the Federal People's Republic of Yugoslavia.

134. The Court emphasized that its decision was based on the facts, independent of their political implications. It went on to say that it was not without realiza-

<sup>26</sup> Facts and decision before the enactment on 21 December 1948 of the Republic of Ireland Act 1948, No. 22 of 1948 and before its coming into force.

<sup>27</sup> The case appears in the *Annual Digest* twice: in the volume for 1927/1928 as case No. 61, dated 3 December 1927 and in the volume for 1929/1930 as case No. 43, dated 3 December 1929. The 1927 date is correct.

tion of the high importance of such implications and noted, in particular, that the President of the United States, in recognizing the continuing validity of treaties between the United States and Serbia, had acted upon a reasonable basis of fact peculiarly within his sphere of authority.

*Kolovrat et al. v. Oregon (1961)*  
*Supreme Court of the United States*  
*United States Reports, Vol. 366, p. 187*

135. Two residents of the State of Oregon (United States) died intestate in 1953. Their only heirs and next of kin were residents and nationals of Yugoslavia. The question to be decided was whether there was reciprocity between the United States and Yugoslavia as to the right of acquiring property by inheritance. If there had been no reciprocity, the property of the deceased would, under the relevant State law, have been taken by the State of Oregon as escheated property (*bona vacantia*). The existence of reciprocity depended on the reply to the question whether the Treaty of 1881 concluded between the United States and the Prince of Serbia and containing the most-favoured-nation clause was still in effect between the United States and Yugoslavia.

136. The Supreme Court of the State of Oregon recognized and the Supreme Court of the United States confirmed that the 1881 Treaty is still in effect. The Supreme Court also pointed out (*ibid.*, p. 190, note 4) that official recognition of this conclusion can be found in the Settlement of Pecuniary Claims Agreement between the United States and Yugoslavia of 1948.

*Cases relating to the identity of post-Trianon*  
*Hungary with the Kingdom of Hungary*

137. As to the identity of the international personality of Hungary after the Peace Treaty of Trianon with the former Kingdom of Hungary as one of the two partners in the Real Union of Austria-Hungary, see the decision of the Zurich Court of Appeal in *re Ungarische Kriegsprodukten-Aktiengesellschaft* (paragraph 100 *supra*) and the decision of the Court of Appeal of Milan in *Del Vecchio v. Connio* (paragraph 102 *supra*).

*Société Lebrun et Cie v. Dussy and Lucas (1926)*  
*Court of Appeal of Brussels*  
*Pasicrisie belge, 1926, II, 189*  
 (54) *Journal du droit international (Clunet) (1927)*,  
 p. 478  
*Annual Digest, 1925-1926, Case 64*

138. The judgment debtor appealed against an order by a Belgian Court to enforce in Belgium a decision of the Court of Appeal of Colmar by virtue of the Franco-Belgian Convention on the Reciprocal Enforcement of Judgments concluded in 1899. The appellant contended that the Franco-Belgian Convention was not applicable to the territories of Alsace-Lorraine, annexed by France under the Peace Treaty of Versailles. He alleged that the Convention was based on the practical identity of the laws in force in Belgium and in France so that the provisional maintenance of the German legal system in Alsace and Lorraine ought to preclude the extension to those regions of the Treaty.

139. The Brussels Court of Appeal pointed out that it is not denied in principle that in case of annexation international treaties apply automatically to the annexed territories and that on the resumption of French sovereignty over Alsace-Lorraine the 1899 Convention *ipso facto* became applicable to those regions. If Belgium had considered that the provisional continuance in force of German laws in Alsace-Lorraine deprived her of the guarantees of the Convention, she had the right to denounce it and would not have failed to do so.

*Chemin de fer d'Alsace-Lorraine v. Levy & Co. (1926)*  
*France, Court of Cassation*  
 (53) *Journal du droit international (Clunet) (1926)*,  
 p. 989  
*Annual Digest, 1925-1926, Case 62*

140. In a case in which a consignment of goods sent after 11 November 1918, but before 10 January 1920, from near Paris to Mulhouse (in Alsace-Lorraine) was alleged to have arrived in a damaged condition, the Court of Cassation held that the Convention of Berne of 14 October 1890 relating to the international transport of goods ceased to operate as regards transport between France and Alsace-Lorraine as from 11 November 1918, on which day the Armistice Convention was concluded and on which day that territory was restored to France.<sup>28</sup>

*Espagne v. Chemin de fer d'Alsace-Lorraine (1926)*  
*Court of Colmar*  
 (54) *Journal du droit international (Clunet) (1927)*,  
 p. 725  
*Gazette du Palais, 18 February 1927*

141. The Court held that carriage of goods between Alsace-Lorraine and Germany had been, as from the date of restoration of Alsace-Lorraine, i.e. 11 November 1918, subject to the Berne Convention, to which France and Germany were both parties.

*Extension of Marriage Convention to occupied Austria*  
*Case (1939)*  
*Blätter für zürcherische Rechtsprechung, Vol. XL*  
 (1941), p. 47  
*Annual Digest, 1941-1942, p. 103*

142. The District Court of Zurich held in a decision of 10 January 1939 that the Hague Convention concerning the Conclusion of Marriages of 12 June 1902, which had been signed by Switzerland and Germany but not by Austria, applied also to Austrian nationals who had become German citizens in consequence of the annexation of Austria by Germany.

<sup>28</sup> Under article 51 of the Peace Treaty of Versailles, Alsace and Lorraine were restored to French sovereignty as from the date of the Armistice of 11 November 1918. The Treaty as such entered into force on 10 January 1920. In a decision reported in (53) *Journal du droit international (Clunet)* (1926), the Court of Bordeaux decided that the Berne Convention ceased to operate between France and Alsace-Lorraine only from 10 January 1920. See also paragraph 7 *supra* on the application of German law in Alsace-Lorraine between the conclusion of the Armistice and the entry into force of the Peace Treaty.

(C) *The question of the identity and continuity, or absence of continuity, of States in relation to treaties*<sup>29</sup>

*Continuing Validity of Resolution of German Confederation Case (1932)*

*Reichsgericht (Supreme Court of the German Reich) Deutsche Justiz, 1936, 560*

*Fontes Juris Gentium, A. II, Vol. 2 (1929-1945), No. 62*

143. The Supreme Court held that until the coming into force, in 1930, of a new Austro-German Agreement relating to mutual assistance in criminal matters, the substantive law of extradition from Austria to Prussia was governed by a resolution of the Assembly of the German Confederation of 26 January 1854, which had not adopted the principle of speciality. The law laid down in that resolution remained in force between Austria and the Members of the German Confederation also after the dissolution of the Confederation. Nor did the fundamental territorial and constitutional changes to which both Germany and Austria were subjected in 1918 and 1919 affect the inter-State regulation of 1854.

*Land Tax Immunities Case (1927)*

*German Reichsfinanzhof (Reich Tribunal in Revenue Matters)*

*"Steuer und Wirtschaft" VI, 1927*

*Annual Digest, 1927-1928, Case 56*

144. The appellant claimed that his property could not be subjected to land tax because in the Treaties of Vienna<sup>30</sup> and of Prague,<sup>30</sup> Prussia undertook to exempt the properties in question from land taxation.

145. The Tribunal held that there was no rule of international law imposing upon Germany the duty to take over the obligations incurred by Prussia. There were at least three opinions as to the duty of Germany to take over those obligations. One was that the treaties concluded by Prussia before the establishment of the North German Confederation were automatically binding upon the Reich. Another, that no such obligations devolved upon Germany *ipso jure*. The intermediate views were that these obligations passed to the Reich if they related to matters in regard to which the Reich alone was competent, or if, having regard to the purpose of the treaty, the passing of the obligation on to the Reich ought to be assumed. Even if the appellant's main contention could be sustained, there still remained the question whether international treaties may not be rendered obsolete as the result of a change of circumstances and abolished without any express rescission.

*The Sophie Rickmers Case (1930)*

*United States District Court, Southern District of New York, 45 F 2d. 413*

*Annual Digest, 1929/1930, Case 280*

146. Treaties concluded by the United States with the Hanseatic Cities, including Hamburg, in 1827, and

with Prussia in 1828, provided that vessels of those countries should be charged no higher tonnage duties than American vessels. By the Treaty of Peace between the United States and Germany of 11 November 1921, treaties not expressly revived were deemed to have lapsed. A later treaty between Germany and the United States provided again for equality with national vessels in the matter of tonnage duties. A Presidential Proclamation of 22 March 1922 suspended discriminatory duties against German ships after 11 November 1921. The owners of the *Sophie Rickmers* sued to recover the duties paid in September 1921, relying mainly on the Treaties of 1827 and 1828.

147. The Court decided that the Treaties of States which still retained a certain degree of international personality, such as the German States (after 1871), remained binding. Treaties with sovereign States which became constituent parts of the German Empire survived the foundation of the Empire.<sup>31</sup>

*Flensburger Dampfercompagnie v. The United States (1932)*

*United States, Court of Claims*

*59 F (2d) 464*

*American Journal of International Law (1932), p. 618 Annual Digest, 1931-1932, Case 38*

148. It was contended by the United States as defendant that the Treaty of 1828 between the United States and Prussia referred to in paragraph 142 *supra* and providing that no other or higher rate of duties should be imposed on vessels of Prussia than should be payable on vessels of the United States was obsolete and had been so since the formation of the German Empire in 1871. However, the Court noted that vessels from Prussia, flying the German flag, had entered the ports of the United States subsequent to 1871 without being subjected to tonnage duties or taxes as sued for in this case. This policy had at no time been interrupted except as a consequence of the outbreak of the First World War.

149. Both the Governments of the United States and of Germany had acted in the belief that the 1828 Treaty continued to be in force. The fact that Prussia had become a constituent State of an Empire was not calculated to change its status or character with respect to commercial intercourse between the two countries.

*Abdouloussen et autres (1936)*

*France, Conseil d'Etat*

*Revue générale de droit international public, Vol. 45 (1938), p. 477*

150. Residents of Madagascar of Indian origin challenged the validity of a decree issued in 1923 introducing a special tax on immigrants of Asian or African race who carry on trade in Madagascar. They contended that the decree was illegal because it was contrary to the principle of equality of taxation and because it was repugnant to a treaty of 1865 between the United Kingdom and the Kingdom of Madagascar.

151. The principle of equality of taxation, the Court held, does not exclude differential treatment to be applied to foreigners. As to the British-Madagascar Treaty, the *Conseil d'Etat*, consistently with its estab-

<sup>29</sup> See also the Reich Concordat case, Chapter VII, paragraph 464 below.

<sup>30</sup> The editors of the *Annual Digest* for 1927 and 1928, Dr. Arnold D. McNair and Dr. St. Lauterpacht (as they then were) observed that it was not clear to them which were the two treaties referred to. The Treaty of Vienna of 1864 and the Treaty of Prague of 1866 do not appear to contain any provision of this character.

<sup>31</sup> The case was also concerned with the effect of war on treaties, a subject which is outside the present study.

lished practice, declared that it did not come within its jurisdiction to evaluate the validity of, and to interpret, an international treaty. Only when the competent authority will have affirmed the Treaty's continued validity and interpreted it, will it be possible to exempt the appellants from the tax complained of.

*Bertschinger v. Bertschinger (1955)*  
*Swiss Federal Court, Civil Division*  
*Arrêts du Tribunal fédéral suisse 81 (1955) II, p. 319*  
*International Law Reports, 1955, p. 141*

152. The problem before the Court was whether a Treaty between Switzerland and the Grand Duchy of Baden of 1856 which regulated, *inter alia*, questions of private international law and the jurisdiction of courts in matters of transfers on death was still valid, considering that the Grand Duchy of Baden had become a Member State (*Land*) of the German *Reich* in 1871, that a German law of 1934 had terminated the independent sovereignty of the German *Länder*, that after the Second World War and before the creation of the Federal Republic of Germany, a *Land* Baden came into existence in the southern part of the previous territory of Baden, and that this new *Land* Baden ceased to exist in 1953 upon the merging of the *Länder* of Baden, Württemberg-Baden and Württemberg-Hohenzollern.

153. The Court stated that the political authorities are alone competent to denounce a treaty or to order its temporary non-enforcement as a measure of retorsion. Such measures of the political authorities must accordingly be applied by the courts. For the rest, however, the courts must decide independently on the applicability of treaty provisions in cases before them, even where the question at issue is not whether a treaty is applicable to the facts of the case, or how it must be interpreted, but whether the treaty is in force. The position of the political authorities is, together with the views of writers and the practice of courts and administrative bodies, of considerable interest to the Court which however must arrive at its own conclusions.

154. There is no doubt, the Court said, that the Treaty of 1856 was still in force under the Constitutions of the German *Reich* of 1871 and 1919. Writers are divided on the question whether it lapsed when the German Law of 30 January 1934 concerning the reconstruction of the *Reich* withdrew their independent sovereignty from the *Länder* and made them into simple administrative districts.

155. The continued validity of the Treaty of 1856 cannot be deduced from the principle of international law that treaties of a regional nature (i.e. treaties which apply to a certain defined area) create rights and obligations for a successor State. In contrast to such treaties as, for instance, the Agreements between Baden and Switzerland concerning railway lines in the frontier zone, navigation on the Rhine, bird hunting on frontier waters, etc., the Treaty of 1856 laid down rules of private international law for the whole territory of the contracting parties and is thus not of a regional nature.

156. It can, however, be assumed that the relevant provisions of the Treaty have remained applicable as a result of the tacit renewal of the Treaty. Whether

the Federal Republic of Germany or the *Land* Baden-Württemberg is considered to be the German contracting party is, the Court said, a question of purely academic interest.

*Shehadeh et al. v. Commissioner of Prisons, Jerusalem (1947)*  
*Supreme Court of Palestine under British Mandate (1947) 14 P.L.R. 461*  
*Annual Digest, 1947, Case 16*

157. In 1921 the "Provisional Agreement on the Extradition of Offenders" between Syria and the Lebanon on the one side and Palestine on the other was made. It was concluded between the High Commissioner of the French Republic for Syria and the Lebanon and the British High Commissioner for Palestine. In proceedings for extradition at the request of the Government of the Republic of Lebanon, the objection was raised by the persons whose extradition had been requested that the agreement made on behalf of Lebanon as a Mandated Territory was no longer effective between the Lebanese Republic and Palestine.

158. Proceeding from the uncontested principle that the form of Government prevailing before the change, whether it was despotic or democratic, monarchical or republican was immaterial, the Court said that it applied also even with regard to "that recent innovation known as Mandatory". The important question was whether "legal sovereignty" to enable it to enter into treaty negotiations was vested in the previous State. The sovereignty, insofar as it affected treaty-making power, had rested in the French Republic in the case of the Lebanon and in the Mandatory in the case of Palestine, and their duly accredited representatives could lawfully make the treaty which, unless it was abrogated, bound the successor Government.

*Re Nijdam, Deceased (1955)*  
*Administrative Court of Austria*  
*Amtliche Sammlung No. 1109 (F)*  
*International Law Reports, 1955, p. 530*

159. The court held that the pre-1938 Double Taxation Agreement between Austria and the Netherlands had not been revived after the reconstitution of an independent Austrian State.

*Austria Double Taxation Agreement Case (1956)*  
*Administrative Court of Austria*  
*Verwaltungsgerichtshof (VwGH), No. 3335/54*  
*International Law Reports, 1956, p. 213*

160. The Austrian Administrative Court held that the provisions of the 1922 Double Taxation Agreement between Austria and the former German *Reich* lost their effect as the result of the loss by Austria of her legal personality in 1938 and the subsequent introduction of German revenue law in Austria. The legal position so created was not modified when in 1945 Austria regained her legal personality.

*Infringement of Copyright (Austria) Case (1951)*  
*Supreme Court of Austria*  
*S Str., XXIV (1951), p. 106*  
*International Law Reports, 1951, Case 19*

161. In criminal proceedings instituted by an author of German nationality against an Austrian newspaper

editor for intentional infringement of the former's copyright, the accused appealed against his conviction, contending that the works of German authors were not entitled to copyright protection in Austria because Austria, after re-establishment of her independence in 1945, has failed to accede to the Berne Copyright Convention.

162. The Supreme Court noted that Austria had acceded to the Convention in 1920 and had belonged to the Berne Union also while forming part of the German *Reich*. After 1945 Austria did not at first appear in the official list of members published by the Bureau of the Union. However, in 1948, a statement by the Austrian Government was published in the official part of the publication of the Union that the Republic of Austria considered itself a member of the Union from the date of its accession in 1920. This statement was duly noted at a Union conference in 1948 and Austria unanimously (with one abstention) recognized as a Member of the Union.

163. The court held therefore that the uninterrupted membership of both Austria and Germany was established as an objective fact. Because of the doubts that had existed as to the status between the liberation of Austria and the 1948 Conference, the Supreme Court referred the case back to the trial court which was instructed to arrive at a finding as to the accused's *mens rea*.

*Application of Copyright Convention to Czechoslovakia Case (1951)*  
*Cederna v. Cya (1951)*  
*Italy, Tribunal of Florence*  
*Annali di Diritto Internazionale, IX (1951), p. 192*  
*American Journal of International Law (1955), p. 270*

164. The court held that Czechoslovakia was a party to the Berne Copyright Convention, having adhered again, with retroactive effect, after World War II. Prior to that the so-called Protectorate of Bohemia and Moravia had assumed the role of successor to Czechoslovakia and, as such, remained a party to the Convention.

### CHAPTER III. STATE SUCCESSION IN RELATION TO THE LEGAL SYSTEM OF THE PRECEDING STATE. STATE SUCCESSION AND "OBJECTIVE LAW"

165. The question whether, and to what extent, the legal system of the preceding State remains in force in ceded or annexed territory or on the territory of a newly independent state as law of the new sovereign is usually regulated by municipal legislation of the new sovereign, sometimes also in the treaty of cession or similar international instrument. The litigation in municipal courts is therefore mainly concerned with the interpretation of the municipal enactments and international conventions in question. The present chapter, and this study in general, are devoted mainly to such decisions of national courts as are based on rules which are not derived, or not derived exclusively from such international conventions and municipal enactments. Decisions of municipal courts which have a bearing on the question of the survival or otherwise of the legal system of the predecessor State under the new sovereign will also be found in other chapters of this digest.

(A) *Cases favouring the continued application of the objective law of the predecessor State, with or without modification*

*Babu s/o Kalu v. Parsram s/o Salam (1951)*  
*India, Madhya Bharat High Court*  
*The Criminal Law Journal (of India), 1954, p. 795*

166. In a criminal appeals case it was contended that on the principles of international law, in the event of State succession, the civil law of the former territorial sovereign continues in operation until new laws have been enacted. The Court held that this argument had a good deal of force. It invoked in support of this conclusion the precedents mentioned in the paragraphs which follow.

167. In the case of *Campbell v. Hall*<sup>32</sup> decided in 1774, it is stated that "If a king came to a kingdom by conquest, he may, at his pleasure, alter and change the laws of that kingdom; but, until he doth make an alteration, the ancient laws of that kingdom remain".

168. Where the territory was acquired by cession or conquest, more particularly where there was an existing system of law, it has always been considered that there was an absolute power in the Crown, so far as was consistent with the terms of cession, to alter the existing system of law, though until such interference the laws remained as they were before the territory was acquired by the Crown. (Decision of the Judicial Committee of the Privy Council, in *Edgar Sammut v. Strickland*).<sup>33</sup>

169. The Court also referred to its own decision in *Anand Balkrishna Behare v. Police Lashkar (1949)*<sup>34</sup>, where it has held that in a ceded territory the old law continues until the new sovereign enacts new laws. In accordance with the principles of international law, old institutions have a right to function until a change is enacted.

*Maricopa County Municipal Water Conservation District et al. v. Southwest Cotton Company et al. (1931)*

*United States, Supreme Court of the State of Arizona*  
 [39 *Ariz.* 65]  
*Annual Digest, 1931-1932, Case 43*

170. The area which is now the State of Arizona was acquired by the United States from the Republic of Mexico in 1848 and 1853. The broad question involved in this case was which law governed the relative rights of ownership and use of subterranean and surface waters in Arizona, particularly whether the "doctrine of prior appropriation", which was not recognized by the common law of England, was applicable to percolating subterranean waters in Arizona.

171. The Court held that the Mexican law existing in Arizona at the time of its acquisition must—in the absence of action by the United States or the State of Arizona—be presumed to continue unchanged. The Court concluded, after discussing the applicable principles of Mexican law, that the doctrine of prior appropriation did not exist under Mexican law either.

<sup>32</sup> 20 *State Tr.* 239.

<sup>33</sup> All India Reporter (1939), PC 39A.

<sup>34</sup> 1949, *Mahya Bharat Law Reports*, p. 160.

*Annexation of Crete Case (1926)*  
*Greece, Court of Cassation*  
*Thémis, Vol. 33 (1927), p. 193*  
*Annual Digest, 1925-1926, Case 69*

172. In a dispute concerning inheritance, the Court of Appeal applied the law relating to juristic persons which was in force in Crete before its annexation to Greece, without requiring the content of that law to be proved before the court (which proof would have been necessary in the case of foreign law). The Court of Cassation affirmed. In case of annexation, the existing laws of the annexed territory were regarded as the laws of the annexing State which, as successor of the State to which the annexed territory had belonged, succeeded to its legal personality. Its laws, therefore, were not foreign laws which required proof.

*Sames (Liability for Torts) Case (1924)*  
*Greece, Court of the Aegean Islands*  
*Thémis, Vol. 35, p. 294*  
*Annual Digest, 1923/1924, Case 36*

173. It was alleged that while Samos was an autonomous province of the Ottoman Empire, Turkish customs officials caused damage to the plaintiffs who, after the cession of Samos to Greece in 1913, sued the Greek State.

174. The Court held that the Greek State was substituted for the former Principality of Samos. As according to the relevant provision of the law of Samos the Principality was responsible for damage caused by its officials, the Greek State must be deemed to be responsible for the injurious act complained of.

*Soto et al. v. United States (1921)*  
*United States Circuit Court of Appeals, Third Circuit*  
*The Federal Reporter, Vol. 273, August-September 1921, p. 628*

175. The Virgin Islands, formerly the Danish West Indies, were ceded to the United States in 1917. The Act of Congress of 3 March 1917 locally known as "The Organic Act" provided that local laws in force and effect in the Islands on 17 January 1917 shall remain in force and effect in the Islands *insofar as compatible with the changed sovereignty*.

176. The District Court of St. Thomas and St. John in the Virgin Islands, after a trial conducted in accordance with the local laws as established by Denmark, found one of the appellants in this case guilty of murder and sentenced him to death; the other appellant was found guilty of being an accomplice and sentenced to imprisonment for six years

177. On appeal, the Circuit Court of Appeals came to the conclusion that the United States Congress, by the Organic Act referred to in paragraph 175, had wrought a change in the local Danish laws by providing that they remain in force only so far as they are compatible with the changed sovereignty. The change in sovereignty, the Court of Appeal said, brought to the Islands the right, guaranteed by the new sovereign, of "an accused to be confronted with the witnesses against him" and the right not to be "deprived of life, liberty, or property, without due process of law". The essential element of the latter is the right to be heard. These principles were engrafted upon the Danish law of the

Islands. Without these principles the local laws would not be compatible with the changed sovereignty. As, due perhaps to the very real difficulty of administering together two different systems of jurisprudence, these rights were not extended to the dependants in their trial before the District Court, the Court of Appeal felt compelled in the administration of individual justice to reverse the judgment of the court below and to order a new trial in harmony with the views expressed in its opinion.

*Brownell v. Sun Life Assurance Co. of Canada (1954)*  
*Philippine Supreme Court*  
*Vol. 10 (1954), p. 608*  
*American Journal of International Law (1954), p. 95*

178. One of the questions at issue in this case was the validity of United States legislation in the Philippines after independence. The court found the law in question valid in the Philippines by virtue of consent to its application clearly implied in the acts of the Executive Department of the Philippine Government and in the enactment of the Philippine Congress. The court indicated that without such consent the United States Act (known as the Philippine Property Act of 1946) would not be effective in the Philippines, but pointed out that international law does not require any special form of agreement between States.

179. In *Brownell v. Bautista* (1954) (Vol. 10 (1954), p. 846), the Supreme Court of the Philippines confirmed the principle underlying the decision in *Brownell v. Sun Life Assurance Co. of Canada*, referred to in the preceding paragraph.

*State of Madhya Bharat v. Mohantal Motilal (1956)*  
*India, High Court of Madhya Bharat*  
*International Law Reports, 1957, p. 83*

180. The accused was tried for offences under Indian Penal Statutes alleged to have been committed at the railway station at Mandsaur between November 1947, and May 1948. The Railway lands at Mandsaur had been *retroceded* to the former Gwalior State on 15 August 1947, and the Ruler of Gwalior extended by Ordinance all his laws to the retroceded territory in order to establish uniformity of law throughout his State. The court held that the Ruler, with perfect comprehension of his power, authority and jurisdiction, anxious to bring about legislative homogeneity between his pre-existing territories and the newly acquired territories, had by this Ordinance displaced the general presumption with regard to the continuance of laws of ceded territories until altered.

*X. v. Jurrisen et al. (1950)*  
*District Court of Maastricht*  
*N.J. 1951, No. 280*  
*International Law Reports, 1950, p. 82*

181. After the Second World War strips of territory were transferred by the Commission for the Western Frontiers of Germany (United Kingdom, United States, Belgium, France, Luxembourg and the Netherlands) from Germany to the Netherlands.<sup>35</sup> The ships were annexed by the Netherlands.<sup>36</sup>

<sup>35</sup> Protocol of 22 March 1949.

<sup>36</sup> Netherlands Act of 21 April 1949, *Staatsblad* No. J.180 and Royal Decree of 22 April 1949 (*ibid.*, J.181) repealed and re-enacted by the Law on Frontier Correction of 26 September 1951 (*ibid.*, No. 434).

182. In an action against three persons for taking before the annexation, a horse and a cow in a village within the annexed strip, it was held that the defendants were liable for damages calculated in accordance with German law. In matters of tort the applicable law was that of the State in which the tort was committed. Although after the frontier changes the *locus delicti* had become Netherlands territory, the introduction of Dutch law did not affect civil rights acquired under formerly prevailing law.

*In re X. (1952)*  
District Court of The Hague  
N.J. 1952, No. 599  
*International Law Reports, 1952, Case 28*

183. In Netherlands private international law, the law of the minor's nationality governs the law of guardianship; in the law of the Netherlands Indies (before the independence of Indonesia), the law of the minor's domicile applied. Before the transfer of sovereignty to Indonesia in 1949 it was generally held by Netherlands Courts that in matters involving inter-regional relations between the Netherlands and the Netherlands Indies, the principle of domicile should prevail over the principle of nationality.

184. After the establishment of Indonesia as a sovereign State, the District Court of The Hague refused to appoint a co-guardian for a minor of Dutch nationality who was domiciled in Indonesia. There was no reason to think, the court held, that the maintenance of the existing rules on the conflict of laws would be incompatible with the transfer of sovereignty or the relevant agreements. It was possible that the contents of the rules of private inter-regional law was determined by the fact that previously no separate Indonesian citizenship had existed side by side with Netherlands nationality. This did not, however, constitute a reason for setting aside the system of rules hitherto applied. It was desirable, in the absence of a definite legal principle to the contrary, as long as possible not to disrupt the continuity in the field of conflict of laws between the two countries.

(B) *Cases favouring the replacement of the objective law of the predecessor State by the law of the new sovereign*

*Case of the Demolished House in Kuševjal (1931), Yugoslavia, Court of Cassation (Sadska praksa u 1931 godini sa Zbirkom Nacelnih odluka i misljenka Opste sednice Kasacionog suda od 1931-33 godine No. 164, p. 201)*  
*Annual Digest, 1931-1932, Case 41*

185. The Yugoslav Court of Cassation held that the question whether an act committed in 1911 on Turkish territory ceded to Serbia in 1913 was a criminal offence or merely a tort (relevant for deciding whether or not a claim based on it was barred by a statute of limitation) had to be judged according to Yugoslav law, notwithstanding the fact that the alleged offence had been committed at the time of Turkish sovereignty.

*Springs of Samothrace Case (1932)*  
Greece, Court of Thrace  
*Thémis, vol. 43, p. 426*

186. According to Turkish law, which applied in the Island of Samothrace before it was ceded by Turkey

to Greece after the Balkan War, property in springs possessed of medicinal qualities belonged to the State. According to Greek law the property in springs of that nature belonged to the owner of the land.

187. The Court decided for the owner of the land. The Greek State having become subrogated to Turkey with regard to the property in the springs, the Greek law in question was fully effective in the island since its annexation.

*Cie d'assurances Rhin et Moselle (1933)*  
France, Tribunal des Conflits  
*Revue générale de droit international public*  
Vol. XLII (1935), p. 220

188. The Conflicts Tribunal decided that the principle of the separation of powers and the rule of the lack of jurisdiction of the ordinary courts of the land in matters of defects of acts of the administration applied in the three Departments of Alsace and Lorraine which had been recovered by France in 1918. The Tribunal based its decision not so much on the principle of the extension of the legislation, and in particular of the constitutional law, of the annexing state to the annexed territory, but on the express provision of the French Act of 1 June 1924 concerning the introduction of French law in the "disannexed provinces".

*L. and J. J. v. Polish State Railways (1948)*  
Supreme Court of Poland  
*Panstwo i Prawo, 3 (1948), Nos. 9-10, p. 144*  
*International Law Reports, 1957, p. 77*

189. After having stated (see paragraphs 8 to 11 *supra*) that after the German surrender in 1945 the German State lost its sovereignty over the Recovered Territories and the territories were immediately submitted to the sovereign possession and authority of the Polish State and that, as a consequence following from the very notion of State sovereignty, Polish law had immediately replaced German law, the Court went on to say that the disappearance of German law was even more understandable in regard to private law, since the provisions of law are issued solely for, and binding in, an organized social group. Such provisions cannot have an existence separate from the group formerly residing in the territory or in a situation where the group previously inhabiting the territory was subject to an obvious and evident process of dissolution.

190. The Court referred to a provision of an earlier Decree (of 30 March 1945) on the establishment of the Danzig *voivodship* (including the former Free City of Danzig and a part of pre-war Polish territory) which was to the effect that all provisions of the legislation heretofore in force, i.e. the German legislation binding in Danzig, in view of their being contrary to the system of government of the Polish democratic State, shall cease to have effect. Thus the Polish State in a most categorical way had declared all German legislation to be incompatible with the legal order which the Polish State regarded as absolutely binding. It was hardly possible to think that the same State could continue to tolerate the same provisions in another territory over which it also extended, though somewhat later, its sovereign authority. Since the same legislator had already recognized (in the *voivodship* of Danzig De-

cree) that German law was contrary to the Polish legal order, it would have been superfluous to invalidate it again.

191. The rejection of the possibility of applying German law in the Recovered Territories followed equally from the rules of the social interpretation of law under which the judge is to be guided by the group interest. The group consciousness of the Polish nation categorically objected to applying German law to Poles and legal relations between Poles. Before the entry into force of the Decree of November 1945 there were no cases where any Polish organ or court had applied in the Recovered Territories German law with respect to Poles.

192. The Court also referred to the decision of its Penal Chamber of 26 March 1946<sup>37</sup> where the Penal Chamber had stated that Polish citizens in the Recovered Territories were subject to Polish law regardless of whether it had been formally introduced therein.

193. As at the relevant time civil law legislation in force in the various territories of Poland, e.g. the law of real property, the law of succession, and family law, had not been made wholly uniform, the Court, guided by the social interest and applying the principle of teleological interpretation came to the conclusion that such provisions should be applied in the Recovered Territories as would correspond to the Polish legal system and would also approach, so far as possible, the law hitherto binding in the Territories. Best suited for these purposes was the law in force in the Western part of pre-war Poland, which included a considerable part of the old (pre-Nazi) German law.

*Callamand ès-qual. v. Zerah (1958)*  
*Cour d'Appel de Paris*  
*J.P.C. 1959, II, 270*  
*Annuaire français de droit international, 1960, p. 1003*

194. The Franco-Tunisian judicial convention (Convention judiciaire) of 9 March 1957 drew, on the judicial level, the consequences from the political independence of Tunisia and decided upon the disappearance of every French jurisdiction. For practical reasons there were some exceptions provided for in the Convention, in particular in Art. 2, which provides that "Dans toutes les matières civiles et commerciales—et à défaut de texte tunisien—le texte français en vigueur en Tunisie à la date de l'application de la présente convention continuera à être appliqué devant les juridictions tunisiennes."

195. This signified that in regard to certain subjects French pre-independence legislation had remained applicable, but only as a consequence of an act of will of the Tunisian legislator which had explicitly referred to it; it was only supplementary and transitional legislation which was applicable only until the Tunisian legislation promulgated a text on the question. Subject to these reservations, the legislation applied to all, French as well as Tunisian.

#### CHAPTER IV. STATE SUCCESSION IN RELATION TO PRIVATE RIGHTS AND CONCESSIONS

196. Because of the great number of decisions of national Courts in which principles of law relating to state succession in regard to private rights and concessions have been interpreted, formulated and laid down, i.e. for a purely technical reason, it is proposed to present the material digested in this chapter according to the "principal legal systems of the world" on which the various judgments and rulings were based. In sub-section (A) decisions based on the British constitutional system and on the English Common Law will be summarized. In sub-section (B) the case law of the Courts of the United States of America will be digested, while sub-section (C) is devoted to the legal systems based on the civil law of ancient Rome and on the administrative concepts and institutions of the Continent of Europe.

##### (A) Decisions based on the British constitutional system and the English Common Law

*Secretary of State for India v. Sardar Rustam Khan (1941), Judicial Committee of Privy Council on appeal from the Court of the Additional Judicial Commission in Baluchistan, Indian Appeals, Vol. 68 (1940/1941), p. 109, Annual Digest, 1941-1942, Case 21.*

197. The question to be decided by the Board was what effect an agreement between the Khan of Kalat and the Government of British India, called the "Treaty of 1903", had upon the rights of the respondent, who claimed title to and possession of the lands in question. It was contended that by the "Treaty of 1903" the territory where the land was situated had been ceded to the British Government; that the acquisition of territory was an act of state; that any pre-existing rights were irrelevant; that the British Government was not bound to recognize them; and that the municipal courts had no jurisdiction to try or determine the matter.

198. The Judicial Committee allowed the Government's appeal against the decision below which had been favourable to the respondent. The Board acted in accordance with the authorities to which it referred and which, following the Board's review of them, will be summarized in the following paragraphs of this study. The Board emphasized that in accordance with these authorities they have not considered whether the decision was just or unjust; politic or impolitic; and it must not be considered that they have had any material placed before them to indicate that it was, in the circumstances, either unjust or impolitic. The Board selected the following instances on the legal position that arises in such circumstances from the existing "wealth of weighty authority".

199. In *Secretary of State in Council of India v. Kamachee Boye Sahaba*<sup>38</sup> the East India Company, who had in 1855 entered into treaties with the Rajah of Tanjore not dissimilar from the treaty in the present case, had seized the whole Raj of Tanjore on the death of the last Rajah without leaving issue male. It

<sup>37</sup> N.73/46, Zbiór urzędowy, No. I and II, item 51, p. 105, *International Law Reports*, 1957 p. 81.

<sup>38</sup> (1859) 7 Moo. J.A. 476.

was held by the Judicial Committee of the Privy Council that the East India Company were possessed of sovereign powers; that they had exercised those powers not under colour of law but as acts of state, and that they and their successors could not be impleaded in any municipal court for what was so done. The result is that the property now claimed by the respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of state over which the Supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act, neither the court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. These are considerations into which the Court cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no municipal court of justice can afford a remedy.

200. In *Cook v. Sprigg*<sup>39</sup> the plaintiffs claimed to be grantees of concessions made to them by the paramount chief of Pondoland before annexation of Pondoland by the British Government. In its judgment the Judicial Committee said: "It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which municipal courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well understood rules of international law, a change of sovereignty by cession ought not to affect private property, but no municipal tribunal has authority to enforce such an obligation."

201. In *Secretary of State for India v. Bai Rajbai*<sup>40</sup> the circumstances were that in 1817 the Gaekwar had ceded the district of Ahmedabad to the British Government. In 1898 claims were made by the plaintiffs against the Government asserting permanent rights to lands within the district existing before the cession. The Judicial Committee came to the conclusion that the question entirely depended upon the extent to which the British Government had recognized pre-cession rights: "The relation in which they stood to their native sovereign before this cession, and the legal rights they enjoyed under them, are, save in one respect, entirely irrelevant matters. They could not carry on under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have as against their new sovereign were those, and only those, which that new sovereign, by agreement express or implied, or by legislation, chose to confer upon them."

202. The case of *Vajesingji Joravarsingji v. Secretary of State for India*<sup>41</sup> related to territory in Gwalior ceded to the British Government by the Maharajah Scindia by a treaty which expressly provided that each Govern-

ment should respect the conditions of existing leases. The appellants had brought a suit for a declaration that they were pre-cession proprietors of the lands in question. It was stated in the judgment: "A summary of the matter is this: when a territory is acquired by a sovereign state for the first time, that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay, more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the high contracting parties."

*Amodu Tijani v. The Secretary, Southern Nigeria* (1921)  
*Judicial Committee of the Privy Council on appeal from a judgment of the Supreme Court of Nigeria, Southern Province*  
*English Law Reports* (1921), A.C., Vol. II, p. 399

203. The Court said that in interpreting the title of the indigenous population to land, not only in Southern Nigeria, but in other parts of the British Empire, much caution is essential. In the various systems of indigenous jurisprudence there is no full division between property and possession. A very usual form of title is that of a usufructuary right which is a mere qualification of or burden on the radical or final title of the Sovereign. The title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached.

204. As the result of cession to the British Crown (in 1861) by former potentates the radical title is now (1921) in the British Sovereign. But that title is throughout qualified by the usufructuary rights of communities, rights which, as the outcome of deliberate policy, have been respected and recognized and the cession has been made on the footing that these rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupation takes place. The general words of the cession are construed as having related primarily to sovereign rights only. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners.

*Shingler v. Union Government (Minister of Mines)*, 1925  
*Supreme Court of South Africa, Appellate Div.*  
*S.A.L.R. (1925), S.C. 556*  
*Annual Digest, 1925-1926, Case 56*

205. The plaintiff, who in 1895 had been granted certain mining rights by the Government of the (at the time of the proceedings) extinct South African Republic, claimed that the Union of South Africa as successor in title to the old Republic was bound to renew the licences. The Court held that any rights to which the

<sup>39</sup> (1899) A.C. 572.

<sup>40</sup> (1915) L.R. 42. J.A. 229.

<sup>41</sup> (1924) L.R. 51. J.A. 357.

plaintiff might be entitled were against the Government of the late South African Republic and were not enforceable in law against the Union Government. The Court adduced, in support of its judgment, *inter alia*, the decision in *Cook v. Sprigg*, summarized in paragraph 200 *supra*.

*Vereeniging Municipality v. Vereeniging Estates Ltd.* (1919)

Supreme Court of South Africa — Transvaal Provincial Division

South African Law Reports, 1919, Transvaal Provincial Division, p. 159

Annual Digest 1919/1922, Case 33

206. The defendant company claimed to have the right to erect wires in the plaintiff municipality derived from a contract entered into between the Government of the late South African Republic and the company's predecessor in title.

207. The Court held, in accordance with a long line of decisions of British Commonwealth and Empire Courts, that the contract, not having been specifically recognized by the British Government after annexation, was not binding upon that Government or its successor in title. Where a person had a personal right against the Government of the South African Republic, he could not vindicate that personal right in the courts of the Transvaal Colony after annexation. He could not set up a right that he had against the extinct Government in the courts of the conqueror because the conquest is an act of state. That act of state would regulate the relationship between the conqueror and the conquered; it is not a matter that can be inquired into by the courts of South Africa. It is true that other systems of jurisprudence may take a different view, but that is the view taken by the British and South African courts and the trial court is bound thereby.

*Hoani Te Heuheu Tukino v. Aotea District Maori Land Board* (1941)

Judicial Committee of the Privy Council on appeal from the Court of Appeal of New Zealand  
English Law Reports (1941) A.C. 308

208. The appellant, the representative of Maori owners of land, challenged the constitutionality and legality of arrangements made by the Land Board in regard to their land. The appellant's contention relevant to the present study was that the New Zealand enactment under which the arrangements had been made was repugnant to the Treaty of Waitangi (1840) between the Queen of England and the chiefs and tribes of New Zealand and therefore *ultra vires* of the New Zealand legislative. By the Treaty a complete cession of all the rights and powers of sovereignty of the chiefs took place, while Great Britain confirmed and guaranteed to the chiefs and tribes and to the respective families and individuals thereof, the full exclusive and undisturbed possession of their lands, estates and properties.

209. The Board dismissed the appeal, applying the principle in *Vajesingji Joravarsingji v. Secretary of State for India* (see paragraph 202 *supra*) *Cook v. Sprigg* (see paragraph 200 *supra*) and *Sammut v. Strickland* (see paragraph 168 *supra*), and held that rights purporting to be conferred by a treaty of cession, such as the Treaty of Waitangi, could not be enforced in the courts.

*Pales Ltd. v. Ministry of Transport* (1955)

Supreme Court of Israel *Piskei-Din*, 9 (1955), p. 436

*Pesakim Elyonim*, 18 (1955), p. 304

*International Law Reports*, 1955, p. 113

210. The question at issue in this case was whether the Ministry of Transport of Israel was under an obligation to continue or to renew a concession for newspaper kiosks and bookstalls which had been granted to the appellants by a contract they concluded with the General Manager of the Palestine Railways in 1938. The Court of first instance<sup>42</sup> and the Supreme Court held that the Israel authorities were not bound by the contract. The decision turned mainly on the evaluation of the correspondence between the parties and on the interpretation of enactments of the State of Israel. However, the Justice of the Supreme Court in three different but in the result concurring opinions commented also on principles of international law.

211. Following the decisions in *Shimshon Palestine Portland Cement Factory Ltd. v. Attorney-General* (see para. 416 below) and *Sifri v. Attorney-General* (see para. 310 below), the Court proceeded from the proposition that Israel is not the successor of the Government of Palestine.

212. Upon the establishment of the State of Israel, one of the Justices stated, a new personality was created. This retains no signs of identification with the previous political body, which completely disappeared as May 14 1948, drew to its close. When the Mandate came to an end the appellant's right also came to an end. If there is doubt how far a successor State is bound by the contracts and concessions of its predecessor, how much the more is this so as regard a State which is not a successor.

213. Even if Israel was the "successor" of Mandated Palestine, another of the Justices said, even then it would not be burdened by obligations acquired in relation to any part of Palestine or its inhabitants who remained outside the boundaries of the State; but now that Israel is not the successor, how much the more is it not encumbered, except to the extent of its own volition, by rights acquired outside the present area of the State. To be precise, that is what was decided in *Shimshon v. Attorney-General*.

214. Had the Israel Legislature so desired it could have refrained from according any recognition whatsoever to any right acquired by any person during the period of the Mandate. There is no accepted rule of international law requiring an occupying State, or an emancipated State, to recognize in its domestic legislation any action performed by the previous authority — including acts creating private rights for the individual — and even if such a rule were to exist, there is grave doubt whether it would be binding upon the domestic courts as municipal law. In support of this opinion, the Justice referred to the literature on the subject (Oppenheim-Lauterpacht, I, 7th ed., p. 304; *Castren*, in *Recueil des Cours*, 78 (1951), p. 490) and to the English authorities of *West Rand Central Gold Mining Co. Ltd. v. The King*<sup>43</sup> and *Cook v. Sprigg* (see paragraph 200 *supra*). He

<sup>42</sup> See note in *International Law Reports*, 1950, p. 79.

<sup>43</sup> [1905 2 K.B. p. 391]. A summary of this decision will be found in the footnote to paragraph 238 of this study.

observed that the Israel Legislature did grant some recognition and the question to be decided reduced itself to a single point, namely, what the intention of the Legislature had been.

215. This problem is not unique to Israel, the Justice went on to say. "Every new State, or newly emancipated State, arranges these matters according to its needs and objective capability. There is no special virtue in precedents. A very vast literature — starting with Gentili and Grotius in the sixteenth and seventeenth centuries and ending with Feilchenfeld, Guggenheim and Kelsen in the midtwentieth — has been composed on the question of the legal consequences of State succession. We still have no firm rules, only a series of compilations of historical facts showing how one or other State settled these questions in practice. Therefore, in approaching the question before us, we have to decide it not on the basis of rules and precedents, but from a realistic standpoint, and to take due account of all the special features presented by that unique historical phenomenon, the establishment of the State of Israel."

*Asrar Ahmed v. Durgeh Committee, Ajmer (1946)*  
*Judicial Committee of the Privy Council, on appeal from the Court of the Judicial Commissioner of Ajmer-Merwaka (1947), All India Reporter (P.C.) I Annual Digest, 1946, Case 17*

216. The office of the secular head of a famous Mohammedan Shrine was alleged to be hereditary in the appellant's family on the basis of a grant dated 1813, and the appellant claimed a declaration to this effect.

217. The Board held that, on the cession, in 1818, of the State of Ajmer to the British Crown, whatever rights the inhabitants of that State may have against the Sovereign thereof avail them nothing against the succeeding Sovereigns. No claim could, therefore, be made against the British Government. The principle of previously decided cases (including *Vajeisingji Jaravasingji v. Secretary of State for India*<sup>44</sup>) appears to be peculiarly applicable to an office to which material benefits appertain and which had consistently been regarded as within the disposition of the sovereign power.

*Farid Ahmad and others v. Government of the United Provinces (1949)*  
*India, Court of Civil Appeal, Allahabad Indian Law Reports, Allahabad Series, 1950, p. 1188*  
*Annual Digest, 1949, Case 22*

218. On the authority of the case of *Secretary of State for India v. Bai Rajbai*<sup>45</sup> the Court said in deciding an appeal regarding the ownership of a plot of land in a territory conquered by the British Army in 1803 that, whatever rights the original owners had in the lands, came to an end after the conquest unless by an express or implied agreement the new sovereign authority had elected to respect and recognize and be bound by the previous rights.

219. However, the British did not desire to interfere with private ownerships and allowed persons to remain in possession of land which was in their possession. The Court concluded from certain reports and facts that it

may be implied that the British Government did not want to dispossess and that it recognized the old rights of the Fakirs. It was not necessary that there should be a written document executed by the sovereign authority transferring title to the occupiers.

*Dalmia Dadri Cement Company v. Commissioner of Income Tax (1954) India*  
*High Court of Patiala and East Punjab States Union (PEPSU) All India Reporter, 1955, PEPSU 3*  
*International Law Reports, 1954, p. 51*

220. In 1948 the Rulers of eight Indian States entered into a Covenant to establish the Patiala and East Punjab States Union (PEPSU). In 1938, the plaintiff company had entered into an agreement with one of the States (Jind State) which subsequently were united into PEPSU in which it was laid down that they will pay income tax at a fixed rate. On establishment of the new State, its Head introduced in its territory the Patiala Income Tax Act and the company was assessed under that Act disregarding the agreement of 1938.

221. It was held that it is not within the province of municipal courts to enforce or grant relief in respect of rights arising out of a treaty. Legislation otherwise validly made cannot be regarded as invalid or inoperative because it is not in consonance with or contravenes supposed principles of international law. The Covenant was brought into existence by the exercise of the sovereign power of the Rulers in the course of their relations with one another. It was an act of state and was not meant to be an instrument embodying the fundamental organic law or all the principles of government of the new State, and cannot in consequence acquire the status of a Constitution. As a consequence, a law otherwise validly promulgated cannot be regarded as invalid or inoperative if it ignores, or is in contravention of, something contained in the Covenant. The appellant company cannot be heard to say that the subsequent law is invalid or inoperative so far as the rights under the agreement are concerned.

222. It is not possible to say that there is any universally and uniformly recognized rule of international law to the effect that an absorbing State is bound by rights and monopolies arising out of contracts with or concessions granted by the ceding State. The writers on the subject do not seem to be unanimous or uniform in their views. Under international law, obligations of the successor State with regard to private property of private individuals, particularly land as to which title had already been perfected before the conquest or annexation, are widely different from the obligations which arise in respect of personal rights under contracts. As regards the contractual obligations of the ceding State, it is for the new State to consider and decide which of them it is prepared to recognize and which others it will repudiate. The principles of international law as enunciated by various authorities do not insist on their wholesale recognition by the conquering or annexing State.

*Mihan Sing v. Sub-Divisional Canal Officer (1954)*  
*High Court of the Patiala and East Punjab States Union (PEPSU)*  
*International Law Reports, 1954, p. 64*

223. This case also arose out of the establishment, in 1948, of the Patiala and East Punjab States Union. (See

<sup>44</sup> See paragraph 202 (*supra*).

<sup>45</sup> See paragraph 201 (*supra*).

paragraph 220 *supra*.) The Ruler of *Nabha* State, which later merged into PEPSU, had made a grant of irrigation water in perpetuity to the petitioner's father. The Court held that the Canal Officer was prohibited from demanding payment of water rates by the petitioner. The grant was a personal law made by the Ruler in favour of the petitioner's father and his successors. The general PEPSU legislation did not abrogate the personal law.

224. The general legislation of the former Covenanted States ceased to have effect, but not the personal laws relating to the rights, privileges, and property of private individuals. This, coupled with the fact that the new Sovereign did not move to demand payment of water rates from the petitioner for nearly four years after the formation of the new State, is an indication that the new Sovereign accepted the position as it was as regards the rights of the petitioner. The new Sovereign could have expressly repealed the personal law, but did not do so.

*DD Cement Company v. Commissioner of Income Tax* (1954)

*High Court of the Patiala and East Punjab State Union All India Reporter, 1955, PEPSU 3, American Journal of International Law* (1955), p. 572

225. This case, which is also concerned with the merger of eight Native States, into PEPSU (see paragraphs 220 and 233 *supra*), distinguished between obligations of a successor State as to land as to which the title has already been perfected before conquest and annexation, and obligations which arise in respect of personal rights by contracts. As to the latter, it is for the new State to consider and to decide which of them it is prepared to recognize.

*Raja Rajinder Chaud v. Mst Sukhi and others* (1956)  
*Supreme Court of India, All India Reporter, 1957,*  
S.C. 286

*International Law Reports, 1957, p. 74*

226. The Supreme Court of India decided upon a claim by the plaintiff Raja that the sovereign rights of the former independent rulers of Kangra, including rights to certain trees, had descended to him.

227. The Court held that the rights of the last independent Ruler of Kangra had come to an end with the annexation of his territory by the Sikhs (1827-28). Appellant's predecessor received from the new sovereign [the Sikh Kingdom, later replaced by the East India Company and subsequently by the British Government] the grant of a "Jagir" (a share of the produce of a district as an annuity), but the last ruler's sovereign rights passed to the Sikhs and their successors in the sovereignty.

228. The Supreme Court emphasized that the judge below had failed to appreciate the distinction between the sovereign rights of an independent Ruler and the rights of the grantee under a grant made by the sovereign Ruler. It invoked the authority of the Privy Council decision in *Vajesingji Joravarsingji v. Secretary of State for India* (see paragraph 202 *supra*). The Court concluded that the grant to plaintiff's predecessor was a grant of land revenue, not of royal rights to all pine trees.

*Virendra Singh and others v. State of Uttar Pradesh* (1954)

*Supreme Court of India, 1955, S.C.R. 415 International Law Reports, 1955, p. 131*

229. In January 1948, the petitioners were granted certain rights in land by Rulers of two States which later were merged into a Union of 35 States (Vindhya Pradesh) which confirmed the grants in 1948. In December 1949, the 35 Rulers dissolved that State and the villages concerned were absorbed into the United Provinces (Uttar Pradesh) (January 1950). In 1952 the Government of Uttar Pradesh, in consultation with the Government of India, revoked the grant, the main reason being that the rights in the land had been granted by the Rulers to their near relations *mala fide*, the Rulers thereby indirectly increasing their privy purse.

230. The Supreme Court held that the grants had passed an indefeasible title to the grantees. The petitioners were citizens of India and the action taken against them by the Government cannot be defended. No Sovereign can exercise an Act of State against its own subjects. The doctrine of Act of State was not applicable. The Indian Constituent Assembly was not a meeting of conquerors and conquered, of those who ceded and those who absorbed.

231. In its judgment, the Court emphasized that jurists held divergent views on this matter. At one extreme was the view of the Privy Council expressed in a series of cases; the Court referred *inter alia* to the cases summarized in paragraphs 199 to 202 *supra*. At the other extreme were the views expressed by the Supreme Court of the United States.<sup>46</sup> The Court also quoted from the Advisory Opinion on *Certain Questions relating to Settlers of German Origin in the Territory ceded by Germany to Poland*.<sup>47</sup>

The Court did not express an opinion on the question whether the State would have the right to set aside these grants in the ordinary Courts of the land, or whether it can deprive the petitioners of these properties by legislative process.<sup>48</sup>

*Gajjan Singh v. Union of India and others* (1955)  
*Judicial Commissioner's Court of Himachal Pradesh All India Reporter, 1956, H.P. 9*  
*International Law Reports, 1956, p. 101*

232. The judicial commissioner, following the decision of the Supreme Court of India in *Virendra Singh v. State of Uttar Pradesh* (paragraphs 229 *et seq. supra*) distinguished the decisions of the Privy Council summarized in paragraphs 199 *et seq. supra* on the ground that it was not possible for a sovereign to exercise an Act of State against his own subjects. As applied to acts of the Executive directed to subjects within the territorial jurisdiction, "act of state" had no special meaning and could give no immunity from the jurisdiction of the Court to inquire into the legality of the act.

<sup>46</sup> *Untied States v. Percheman*, 32 U.S. 51 at 86, 87 (1883); *Shapleigh v. Mier*, 299 U.S. 468 at 470 (1937). For the jurisprudence of United States Courts, see paragraphs 239 *et seq. below*.

<sup>47</sup> P.C.I.J., Series B, No. 6; A/CN.4/151, paragraphs 39 *et seq.*

<sup>48</sup> This question was considered in the case of *Maharaj Umeg v. State of Bombay and others* (See paragraphs 233 *et seq. below*)

*Mararaj Umeg Singh and others v. State of Bombay and others* (1955)  
*Supreme Court of India, All India Reporter, 1955, S.C. 540*  
*International Law Reports, 1955, p. 138*

233. The facts in this case were similar to the case of *Virendra Singh v. Uttar Pradesh* (paragraphs 229 *et seq. supra*) except that here the expropriation had taken place by legislation, not by executive action. The petitioners contended that the State of Bombay was bound by all the obligations which had been undertaken by the Dominion Government under the Agreements of Merger and Letters of Guarantee and it could not lie in the mouth of the State of Bombay to repudiate the same.

234. The Court said that this argument was not without force, but did not consider it necessary to decide this question because even assuming that the State of Bombay was bound by these obligations, the question still remained how far the petitioners were entitled to enforce these obligations against the State of Bombay. The State of Bombay invoked the Privy Council decision in *Vajesingji Joravarsingji v. Secretary of State for India*<sup>49</sup> which had been quoted with approval in *Secretary of State v. Rustam Khan*;<sup>50</sup> the Supreme Court of India did not feel called upon to pronounce upon the validity or otherwise of these contentions because Art. 363 of the Constitution of India lays down that the Courts shall have no jurisdiction in any dispute out of agreements between a Ruler of an Indian State and the Government of India.

*Indumati v. State of Saurashtra* (1955), *India, High Court of Saurashtra*  
*All India Reporter, 1956, Saurashtra 32, International Law Reports, 1956, p. 109*

235. A Covenant about the merging of States provided that the successor State would discharge the obligations of the covenanting Rulers. The Court held that Saurashtra State was bound to respect the obligation arising out of a lease. The State could not terminate that obligation by an executive order, but the State's legislative authority was not in any way curtailed by that obligation and it was open to the State to pass a law terminating the lease.

*Bapu and Bapu v. Central Provinces* (1955) *India, High Court of Nagpur, 7 April 1955*  
*All India Reporter, 1956, Nagpur 59, International Law Reports, 1956, p. 110*

236. The question before the Court was whether the predecessors of the appellants had a good title to land the history of which was traced back to the time of the succession to a Princely State of the East India Company and subsequently the British Government.

237. The Court observed that although changes of sovereignty did not normally affect private rights in property, when territory previously in the occupation and under the rule of an Indian State passed to the British Government, all rights which the State had in the land came to an end and thenceforth the grant of the British Government alone formed the root to the title.

238. It was, no doubt, true that there was every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property. The Court found no evidence, however, that the title to the disputed area rested with any private person at the date when the sovereignty of Nagpur territory passed to the East India Company in 1854. It was open to the East India Company on the ground of conquest or otherwise to annul rights of private property. The High Court of Nagpur also referred to the various English and earlier Indian decisions to which repeated references have been made in the previous paragraphs of this Chapter.<sup>51</sup>

### B. Decisions of American Courts

*Playa de Flor Land and Improvement Co. v. United States* (1945)  
*United States District Court for the Canal Force Zone, 70 F. Supp. 281*  
*Annual Digest, 1946, Case 16*

239. In an action against the United States for just compensation to be paid for the taking of lands for purposes connected with the Panama Canal the Court stressed the obligation of the successor State to respect private rights based on principles which, it said, are plain, simple and easily understood and are grounded on common honesty, right and justice. It abstracted these principles from a long line of decisions of the Supreme Court of the United States in cases regarding the validity of land titles acquired under former sovereignty, and specifically the cases wherein the treaties with Spain and France affected land titles in Texas, Missouri, Alabama, Louisiana, Georgia, and other States. The Court held that these principles were applicable to the facts in the Panama Canal case. Among the cases summarized by the District Court for

<sup>51</sup> The decision in *West Rand Gold Mining Company v. The King* (1905), 2 K.B. 391, has been referred to in this and many other decisions digested in this chapter. Although it was rendered before the period covered by this digest, a summary of it follows:

An English company alleged that before the war between the late South African Republic and Great Britain (declared on 11 October 1899), gold owned by it had been taken from it by officials acting on behalf of the Government of the Republic. The British forces conquered the Republic and annexed the whole of its territories on 1 September 1900. The Company claimed that by reason of the annexation the British Government was liable for the debts of the former Republic.

The Court stated, *inter alia*, that there is no principle of international law by which, after annexation of conquered territory, the conquering State becomes liable, in the absence of express stipulation to the contrary to discharge financial liabilities of the conquered State incurred before the outbreak of war. We can well understand, the Court said, that if by public proclamation or by convention the conquering country has promised something that is inconsistent with the repudiation of particular liabilities, good faith should prevent such repudiation. We can see no reason at all why silence should be equivalent to a promise of universal novation of existing contracts with the Government of the conquered State.

On the question of the jurisdiction of municipal courts to adjudicate claims of this type, the Court emphasized that there was a series of authorities from the year 1793 down to the present (1905) holding that matters which fall properly to be determined by the Crown by treaty or as an Act of State are not subject to the jurisdiction of the municipal Courts, and that rights supposed to be acquired thereunder cannot be enforced by such Courts.

<sup>49</sup> See paragraph 202 *supra*.

<sup>50</sup> See paragraph 197 *supra*.

the Canal Zone were those mentioned in the paragraphs which follow.

240. *United States v. Arredondo*, 6 Pet. 691, 31, U.S. 691. This case related to land in Florida ceded to the United States by Spain. The Supreme Court said that it is the usage of all the civilized nations of the world, when territory is ceded to stipulate for the property of the inhabitants. If the land in controversy was the property of the claimants before the treaty, its protection is as much guaranteed by the laws of the Republic as by the ordinances of a Monarchy.

241. In the case of *Delassus v. United States*, 9 Pet. 117, 34, U.S. 117, the plaintiff had made a contract with the Spanish authorities by which he was to acquire title to land, but the title had not yet been perfected at the time of the occupation by the United States. It was held that even an inchoate title is a kind of property which must be recognized and perfected by the United States even if there were no treaty stipulation. While the sovereign may acquire full dominion, this dominion does not divest the vested rights of individuals to property. The people change their sovereign but their right to property remains unaffected.

242. In *Mitchel v. United States*, 9 Pet. 711, 34, U.S. 771, the Supreme Court again recognized the proposition that the inhabitants of a conquered or ceded country retain all the rights as to property which are not taken from them by the orders of the conquerors or the laws of the sovereign who acquires it by cession.

243. In *Carino v. Insular Government of the Philippine Islands*, 212, U.S. 449, the question arose, when the U.S.A. took over, whether the plaintiff had any rights that the United States must respect, since the plaintiff had not complied with the Spanish administrative regulations providing for a registration of title. Whatever the law on these points may be, the Supreme Court said, every presumption is and ought to be against the Government in a case like the present. If there is doubt or ambiguity in the Spanish law, the Court ought to give the applicant the benefit of the doubt.

244. In the case of *United States v. Anguisola*, 1 Wall. 352, 17, L.Ed. 613, the Supreme Court recalled that, in passing upon the rights of the inhabitants the tribunals are directed to be governed by the stipulations of the treaty, the law of nations, the laws, usages, and customs of the former government, the principles of equity and the applicable decisions of the Supreme Court. The tribunals should not conduct their investigations as if the rights of the inhabitants depended upon the nicest observance of every legal formality. The United States have desired to act as a great nation, not seeking, in extending their authority over the ceded country, to enforce forfeitures, but to afford protection and security to all just rights which could have been claimed from the government they superseded.

*United States v. Fullard-Lee et al.* (1946).  
*United States Circuit Court of Appeal, Ninth Circuit Federal Reporter, Second Series, 156, Federal Reporter, 2d. 756*  
*Annual Digest, 1946, Case 15*

245. The Federal Government of the United States had brought suit to quiet title to an island in Hawaii.

The District Court for the (then) Territory of Hawaii decided against the Government. The Federal Circuit Court of Appeal, Ninth Circuit, confirmed the decision.

246. The facts were reminiscent, the Court of Appeals observed, of those involved in the case of *Carino v. Insular Government of the Philippines*.<sup>52</sup> The Court stressed the statement of the Supreme Court in the *Carino* case that the acquisition of the Philippines by America was not for the purpose of acquiring lands occupied by the inhabitants, but on the contrary, the Organic Act<sup>53</sup> expressly declared that property rights were to be administered for the benefit of the inhabitants.

247. Following this precedent the Circuit Court of Appeals stated that as regards Hawaii in like manner, despoilment was not the aim of annexation. It was the purpose of Congress, as expressed in the Organic Act<sup>54</sup> to leave the ceded public lands to be administered for the benefit of the people. There is in this benign programme no proper place for advantaging the United States at the expense of the inhabitants on grounds which, though having the semblance of legality, affront the sense of justice. Nothing is more at war with the United States policy than the assertion of title by the United States, in doubtful cases, to land long occupied by local inhabitants in good faith under claim of right. In such a situation the occupant is entitled to the benefit of every presumption and to have all doubts resolved in his favour.

*Amaya et al. v. Stanolind Oil and Gas Co.* (1946)  
*United States, Circuit Court of Appeals, Fifth Circuit Federal Reporter, Second Series, Volume 158 F 2d, 554*  
*Annual Digest, 1946, No. 81*

248. Article VIII of the Treaty of Guadalupe Hidalgo of 1848, by which Mexico ceded Texas to the United States provided that title of Mexican citizens to certain lands should be "inviolably respected". The Court regarded the phrase as a covenant on the part of the United States to respect thenceforth any title that Mexicans then had, or might thereafter acquire, to property within the region, but not that it would guarantee that those Mexicans would never lose their title to persons by foreclosure, sales under execution, trespasses, adverse possession and other non-governmental acts. There was nothing in the Treaty that suggested that the property of Mexican citizens would not be subjected to the valid and non-discriminatory property laws of the State of Texas.

249. The Treaty guaranteed that all Mexicans, whether presently owning or subsequently acquiring, property shall enjoy, with respect to it, guarantees as ample as those of citizens of the United States but not more. The principles of international law impose substantially the same obligation to respect property rights within annexed territory as did Art. VIII of the Treaty of Guadalupe Hidalgo. The obligation of the treaty was substantially the same as is required by international law. International law does not prohibit the successor

<sup>52</sup> See paragraph 243 *supra*.

<sup>53</sup> 32 Stat. 691.

<sup>54</sup> 48 U. S. C. A.

sovereign from subsequently enacting legislation as to title to lands.

250. The Court also referred to the Judgment of the Supreme Court of the United States in the case of *Leitensdorfer et al. v. Webb*, 20 How. 176, 61 U.S. 176, 15 L. Ed. 891, decided in 1857, discussing property rights after the acquisition, in 1846, by arms of the United States, of the Territory of New Mexico. In that case the Supreme Court had said that "by this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remain in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and Laws of the United States, or with any regulations which the conquering and occupying authority should ordain."

*Miller et al. v. Letzerich et al. Supreme Court of Texas (1932)*, 121 Tex. 248, 49 S.W. (2d) 404  
*Annual Digest, 1919-1942 (Supplementary Volume), Case 45*

251. One of the issues raised in this case was whether the legislation of the States of Texas was applicable to property rights (in this case surface water rights) which had been acquired when the present State of Texas was under Mexican sovereignty.

252. In determining the power of the Legislature of Texas to pass laws affecting surface water rights for the state generally, the Court held it necessary to consider the effect of the grants made by each sovereignty, in their relationship to the subject. Lands in Texas have been granted by four different governments, namely, Spain, Mexico, the Republic of Texas and the State of Texas. Eventually, the common law of England was introduced (in 1840).

253. It is elementary, the Court said, that a change of sovereignty does not affect the property rights of the inhabitants of the territory involved. After the revolution by which Mexico gained her independence, the Spanish civil law prevailed in connection with the decrees and statutes of the supreme government of Mexico. The Republic of Texas retained the civil law as the rule of decision. The statutes in force in the Republic of Texas before the adoption of the common law must be determined according to the civil law in effect at the time of the grants.

254. From a long line of decisions of Texas courts it is plain, the Court stated, that whatever title, rights, and privileges the inhabitants of Texas received by virtue of land grants from the Spanish and Mexican Governments, which were a part of the realty itself or were easements or servitudes in connection therewith, remained intact, notwithstanding the change in sovereignty and the subsequent adoption of the common law as a rule of decision.

*Bolshanin et al. v. Zlobin et al. (1948)*  
*United States District Court, Alaska Federal Supplement, Vol. 76 (1948), p. 281*  
*American Journal of International Law (1948), p. 735*

255. Members of the *Russian Church* at Sitka, Alaska, brought suit against the priest and Metropolitan of

the *Greco-Russian Church* in America, claiming to be the true owners of the church buildings and land by virtue of the 1867 Treaty by which Russia ceded Alaska to the U.S.A. The Treaty of Cession, Art. II, provided "that the churches which have been built in the ceded territory by the Russian Government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein". The defendants claimed title under a patent of 1914 from the United States Government.

256. The Court noted that private rights of property, whether absolute or merely equitable are not affected by a change of sovereignty (Decision of the Supreme Court in *Soulard v. United States*, 4 Pet. 511, 74 Ed. 938). But the United States has always maintained that, although a title to land that was perfect and complete at the time of the cession would be fully protected, yet as to land to which the claim rested on an imperfect or incomplete title, the legal title remained in the United States until confirmed or patented. (*Ainsa v. New Mexico and A.R. Co.* 175 US 76). The only foundation for plaintiff's claim lay in the treaty itself which, the Court held, falls far short of constituting a grant.

257. As distinguished from imperfect and incomplete titles a grant from a former sovereign needs no confirmation.

*In re Ameyund (1951) Surrogate's Court, Kings County, New York 108 N.Y.S 2d 326; 201 Misc. 547*  
*International Law Reports, 1952, Case 25*

258. The power of attorney granted before Indonesian independence to the Netherlands Consul-General in New York to represent a resident of Indonesia in probate proceedings is not affected by the change of sovereignty.

*Claim of Silbert and Mogillawaski (1961)*  
*United States Claims Settlement Commission*  
*American Journal of International Law (1962), p. 544*

259. The Commission stated that the transfer after World War II of sovereignty over previously Polish territory east of the Curzon line by Poland to the Soviet Union did not constitute a taking of the private property of individuals within the territory, and in itself did not disturb the title of private individuals to property.

### C. Decisions of Court of Civil Law Countries

*Astorga v. Fisco (1958)*  
*Supreme Court of Chile 36 Revista de Derecho, Jurisprudencia y Ciencias Sociales, II, I, 58*  
*Annual Digest, 1938-1940, Case 38*

260. Under the Treaty of 20 October, 1904, part of Bolivian territory passed from Bolivia to Chile. The petitioner sought to inscribe his title to part of a nitrate deposit situated in the ceded territory which had been approved by Bolivian authorities in 1873. The Court of First Instance rejected the application, it having been argued that the requirements of Chilean mining and inscription laws have not been complied with.

261. The Court of Appeal and the Supreme Court of Chile found for the petitioner on the ground that the titles had been granted by the Government of Bolivia at the time when the lands involved in the concession were under the jurisdiction of that Government and recognized later by the Government of Chile by virtue of the Treaty of Peace and Friendship of 20 October, 1904.

*Czario v. Valentinis (1927)*  
Italy, Court of Cassation. *Foro delle nuove provincie*,  
1927, 311-314  
*Annual Digest, 1927-1928, Case 52*

262. The Court held that the Italian State as successor in former Austrian territory became a party to a contract of lease concluded between the Austrian authorities and a private party. The Italian sovereignty having succeeded to the Austrian in the annexed territories by force of arms, it is to be assumed that the Italian State replaces the Austrian with regard to juridical relations of private law existing between the latter State and private citizens.

*Nisyros Mines Case (1952)*  
Greece, Council of State *Revue hellenique de droit international*, 7 (1954), p. 274  
*International Law Reports 1952, p. 135.*

263. In 1908, under the Ottoman Empire, the appellants' predecessor was granted the concession to exploit a sulphur mine on the island of Nisyros in the Dodecanese. The Dodecanese islands were ceded to Italy by the Treaty of Lausanne, 1923, after having been under Italian military occupation for some time. In 1933 the Italian Governor of the Dodecanese enacted on the basis of an Italian Royal Decree of 1924 a Decree-Law repealing the Ottoman Law of 1906 concerning mines, introducing, with modifications, Italian mining legislation into the Dodecanese and providing, *inter alia*, that all concessions relating to mines are *ipso facto* null and void unless it is shown that they have been regularly exploited during the period of five years immediately preceding the entry into force of the Governor's decree. This provision was to apply even in case the failure to exploit the mine was due to *force majeure* or Act of God.

264. Upon the cession of the Dodecanese by Italy to Greece under the Peace Treaty with Italy of February 1947 the Greek Administrative Tribunal for Mines found that the mines in question had not been regularly exploited between 1919 and 1945 so that the rights relating to them had ceased to exist by virtue of the Italian Governor's Decree of 1933.

265. The Council of State reversed the judgment of the Administrative Tribunal. The doctrine of international law which has developed under the influence of Western civilization recognizes that the sovereign right of a successor State is not limited to substituting its own legislation for that in force in the annexed Territory, so far as acquired rights are concerned. As soon as the annexing State has established its sovereignty over the territory, it has the right to substitute its legislation in order to achieve consistency in its legislation as a whole. Nevertheless, in legislating concerning acquired rights the successor State should be inspired by, and

act in conformity with, existing specific international conventions in force and more generally with the rules of international behaviour by which internationally recognized States are morally bound.

266. In any case where there is doubt on the question of the correct interpretation to be placed on a legal provision granting legislative power to the commander of annexed territory, that provision should be construed as being limited not only by the principles of public law of the State concerned but also as having to be in accordance with particular international conventions and, in general, with the rules of international law.

267. The Italian Decree of 1933 where it provides for the nullification of existing rights, is retroactive and does not even make an exception for the case of *force majeure*. This provision is, therefore, contrary to the 1907 Hague Convention on the Laws and Customs of War which lays down legal rules which should be applied by custom even in States which have not ratified the Conventions. It also violates the rule laid down by Article 9 of Protocol XII of the Treaty of Lausanne which provides that Italy as the successor State is subrogated in all respects with regard to the rights and obligations of Turkey vis-a-vis nationals of other signatory Powers. The Court held that in enacting the provision of 1933 the Italian Governor of the Dodecanese exceeded the power conferred on him by the Italian Royal Decree of 1924.<sup>55</sup>

*Theodorowicz v. Polish Ministry of Public Works (1923)*  
*Supreme Administrative Court of Poland Zb. W.N.T.A., I, No. 243*  
*Annual Digest, 1923-1924, Case 31*

268. Before the First World War the Austrian Ministry of Cults and Education, with the agreement of the Ministry of Finance, notified the Armenian Catholic Archbishop of Lwów<sup>56</sup> of its decision to place a building owned by the Austrian State at the exclusive and unlimited disposal of the Archbishopric. After the war the Archbishop contended that the decision of the Austrian Ministry was an administrative act which was binding upon Poland as the successor State.

269. The Supreme Administrative Court, while not denying that the Government of a State is undoubtedly bound by the principles of succession with regard to acts of its predecessor, ruled that principle cannot be applied *in extenso* where the allegiance of the territory changes. This applies *a fortiori* where the Government of a State which was the original sovereign (Poland) takes the place of a foreign Government (Austria). Many an administrative act of the foreign State might have been

<sup>55</sup> The reference by the Court to the Hague Rules of Land Warfare is due to the fact that the Italian Royal Decree of 28 August 1924, while issued at a time when Italy was already the sovereign and not only the belligerent occupant of the Dodecanese, maintained the Governor of the Dodecanese in his function and provided that he should retain all the powers exercised by him heretofore, i.e. the powers of the military commander of a belligerent occupant. The Governor's Decree-Law of 1933 was *ultra vires* of a belligerent occupant and therefore also an excess of the powers vested in the Governor in 1924.

<sup>56</sup> Before World War I in Austria; between the two world wars in Poland; now in the Ukrainian SSR.

directed against the interests of the territory. Poland must therefore have a free hand and need not recognize administrative acts or agreements of Austria, unless international treaties stipulate the contrary, which was not the case here. There was no legal basis for compelling the Polish Government by judicial proceedings to give effect to a decision of the former Austrian Government.

*Niedzielski v. Polish Treasury (1925)*  
*Supreme Court of Poland, Riv. III, 1485/26/1*  
*Annual Digest, 1925-1926, Case 53*

270. The decision was in an action arising out of a contract made with the authorities of the former Austrian Empire for work done prior to November 1918 in government buildings situated in territory ceded by Austria to Poland.

271. The Court said that in contradistinction to the older doctrine of international law, the modern law of nations no longer recognizes the private law principles of succession as applicable to the transfer of territory from one State to another. The successor State takes over the debts of its predecessor only insofar as it has expressly accepted them. No question of unjustified enrichment arises seeing that, apart from school buildings, hospitals and State forests, Poland had to pay for the properties taken over by a contribution to the cost of war to be paid to the Allied Powers.<sup>57</sup>

*Maintenance of a School in Slovakia Case (1935)*  
*Supreme Court of Czechoslovakia*  
*Collection Vazny 14785 civ.*  
*Annual Digest, 1938-1940, p. 102*

272. The Court held that the Czechoslovak State, insofar as the obligations of the Hungarian State relating to territory now part of Czechoslovakia were concerned, was not the legal successor of Hungary and was not bound by an obligation created by a private contract between the Hungarian State and a parish, by which the State undertook to contribute to the costs of the maintenance of a school.

*Struzek v. District Appeal Committee for War Cripples in Lodz (1931)*  
*Supreme Administrative Court of Poland ZC. W.N.T.A. IX (1931) No. 462A, p. 369*  
*Annual Digest, 1931-1932, Case 42*

273. The appellant, a resident of what became Polish Upper Silesia, was declared by the German military medical authorities to have lost 25 per cent of his earning capacity owing to war service in the German armed forces. A new German law concerning war pensions was issued in May 1920; a new Polish law on the same subject on 18 March 1921. A plebiscite was held in Upper Silesia on 20 March 1921. In 1922 Poland assumed sovereignty over the part of Upper Silesia assigned to it after the plebiscite.

274. In 1926 the plaintiff was re-examined by the Polish medical authorities, who reduced his pension to the amount corresponding to a permanent disability of only 10 per cent. He claimed that the obligation under-

taken by Poland in the Polish-German Convention (Geneva, 1922) which guaranteed the respect for private rights barred the reduction of his pension because the German law of 1920 prohibited reconsideration of definitely assigned pension rights.

275. The Court held that neither generally binding principles nor any single rule of international law can be found which oblige a State which takes a territory under its sovereignty to take over at the same time laws which until then had been in force there. Agreements in this field, forming special and exceptional law, must be interpreted most restrictively. The Geneva Convention of 1922 dealt partly with strictly specified rights, without mentioning war invalid pensions, and partly with private rights based on the German Civil Code. The latter was not applicable to war pensions, which belonged to the domain of public law.

*In re Hospices Civils de Chambéry et al. (1947)*  
*France, Conseil d'Etat*  
*Sirey, 1948, III, p. 39*  
*Annual Digest, 1948, Case 20*

276. Several hospitals of the region of Savoy and Nice contended, against adverse administrative decisions, that they held licences from the King of Sardinia, ruler of the area before 1860, granting them the right to dispense drugs to the public, that this right was safeguarded by the treaty of cession, and that French law could not deprive them of it.

277. The Council of State held that the necessary and immediate effect of the change of sovereignty, in the absence of any reservation in the intervening treaty, was to submit the hospitals, for the present and for the future, to the laws governing public hospitals in France, in particular to the law relating to dispensaries. The closing of the dispensaries to the public could, accordingly, be ordered, without violating the Treaty of 1860.

*Van Oostveen v. Van Oostveen and Others (1951)*  
*Supreme Court of Holland*  
*N.J. 1952, No. 291; ibid., 1953, No. 34*  
*International Law Reports, 1952, Case 26*

278. After the Second World War strips of territory were transferred from Germany to the Netherlands.<sup>58</sup> A resident of the transferred territory had, while it was part of Germany, executed an "Erbvertrag" (contract of inheritance), an institution of German law not known to Dutch law. Netherlands legislation of 1949 regulated in great detail a large number of questions of civil and criminal law of a transitional or "inter-temporal" character.

279. The *de cuius* died in 1951. It was held by the courts of all three instances that the mandatory provisions of Netherlands law providing for a *pars legitima* for the decedent's children prevailed over the rights of the widow based on the "contract of inheritance" which, though irrevocable in principle, could, because of its *mortis causa* character, vest no rights in any person prior to the death of one of the spouses.

<sup>57</sup> See the note to paragraph 345 below on the compatibility of the decision in the *Niedzielski* case with the *Silberzpic* case.

<sup>58</sup> See paragraph 181 *supra*.

## CHAPTER V. STATE SUCCESSION IN RELATION TO THE STATUS OF PUBLIC SERVANTS

*In re Kremer (1936)*

*France, Conseil d'Etat*

*Dalloz, 1936, Part 3, p. 53;*

*Sirey, 1936, Part 3, p. 90*

*Revue générale de droit international public*

*Vol. XLV (1938), p. 479*

280. Kremer was a judge of the Regional Court of Strasbourg when Alsace-Lorraine belonged to Germany. He was appointed for life with certain pension rights. In 1919 he was requested to resign his post. He acquired French nationality by the Treaty of Versailles. The *Conseil d'Etat* was called upon to decide upon Kremer's claim to a pension in respect of his services in Alsace.

281. The *commissaire du gouvernement* presented to the *Conseil d'Etat* the conclusion that with the change of sovereignty every legal nexus between the State and its functionaries immediately ceases to exist. The successor State must re-invest the officers whom it wants to retain in its service. It has an absolute and sovereign discretion to grant or to refuse retention. This is an essential prerogative of public power against which no acquired right can prevail.

282. While this is the rule deriving from the general principles of international law, treaties of cession usually provide for appropriate pensions, in the interest of the necessary continuity of social life and also in the interest of the individual inhabitants of the annexed territory. This, in the opinion of the *commissaire du gouvernement* involves a true obligation for the State and a certain right for the individual who is affected by the change of sovereignty. Kremer, he said, is entitled to reparation for the damage caused to him also because of the obligation of the successor State to assure, to the full extent that this is compatible with the exercise of its sovereign power, the protection of those who become its nationals. Such reparation granted not on the basis of a positive text but on general principles need not necessarily consist of the award of a pension. Any other means of equitable compensation can, subject to judicial review, be chosen by the State. The appellant's appointment, on recommendation of the French Government, to a position in the Saar together with a pension lower than that claimed by him appeared to be an equitable reparation for the loss he had suffered.

283. The Court agreed with the conclusions of the *commissaire du gouvernement*. While it did not express an opinion on Kremer's right to an indemnity, it accepted the general principles of international law as the source for the obligation of the French State to make reparation and agreed that the compensation the appellant had received was equitable.

*Danzig Pension Case (1929)*

*Obergericht (Superior Court) Danzig*

*Zeitschrift für ausländisches öffentliches*

*Recht und Völkerrecht, II (1931), Part 2, p. 71*

*Annual Digest, 1929-1930, Case 41*

284. The plaintiff who had been employed by the Prussian State in Danzig claimed a pension from the Free City of Danzig. The Court found in his favour.

285. The Court stated that according to international law the plaintiff's claim to a pension as established against Prussia passed to the defendant. The plaintiff's functions as an official had been limited to the territory of what became the Free City and he became its national immediately upon its creation.

286. The literature of international law, the Court went on to say, generally considered obligations with regard to pensions as administrative debts. According to rules of customary international law local administrative debts as well as general public State debts were governed by the principle that they passed to the successor State. A customary rule of international law had been developed to the effect that claims to pensions passed to the succeeding State if the claimant became a national of the succeeding State and did not opt for his former State. The fact that Article 254 of the Peace Treaty of Versailles referred to public debts only, made it necessary to apply to the obligation to pay a pension according to general principles of international law.

287. The Court found support for its conclusion that in the case of cession of parts of territory certain pension charges pass to the successor State in the provision of the Peace Treaty of Versailles (Art. 62) under which the German Government undertook to bear the expense of all civil and military pensions which had been earned in Alsace-Lorraine. Such an explicit treaty regulation was necessary only because without it the burden of this expense would, in accordance with general principles of international law, have fallen upon the successor State (France).

288. The territory of the Free City was ceded by Germany to the Allied and Associated Powers; they were to be regarded merely as trustees who undertook to establish and did establish, the Free City of Danzig. The Free City was therefore the successor State and the principles of international law in the matter of State succession applied to it.

*Saar Territory Officials Case (1925)*

*Supreme Court of Saarlouis, Saar Territory*

*Entscheidungen des Obersten Gerichtshofes und des*

*Oberverwaltungsgerichts des Saargebietes in Saarlouis,*

*March 1926, p. 2*

*Annual Digest, 1925-1926, Case 68*

289. A civil servant of a municipality in the Saar Territory, appointed for life by the Prussian Government, who had been relieved of his duties by the President of the Governing Commission of the Saar Territory claimed, *inter alia*, continued payment for life of his salary less any salary he might earn elsewhere.

290. The Court held that the Governing Commission could not be restricted in the choice of its officials by appointments made by the former Government. With the cessation of that Government, the legal basis of the appointment disappeared. There was, according to international law, no general obligation upon the successor State to take over the officials of the former State or to compensate them for the loss of their employment. The fact that writers on international law express the opinion that the successor State is bound to respect acquired rights is not decisive. For it is conceded even by those who put forward this view

that the nature of the public law in question determines which rights have to be disregarded, and that it is impossible to give effect to such private rights as are inconsistent with the public policy of the successor State. Nor is there a customary rule of international law to the effect that compensation has to be paid in such cases.

291. As to the contention that in case of cession local servants are, according to customary international law taken over by the successor State, the Court stated that the conception of "local servants" was as doubtful as the rule of international law in question.

*Pensions (Prussia) Case (1923)*

*German Reichsgericht (Supreme Court of the German Reich)*

*Fontes Juris Gentium, A, II, Vol. 1 (1879-1929), No. 286*

*Annual Digest, 1923-1924, Case 28*

292. The plaintiff had been an employee and later a pensioner of the Prussian province of Pozen (Poznan), by far the larger part of which was ceded by Germany to Poland by virtue of the Peace Treaty of Versailles. The administration of that part of the province which had become Polish stopped payment of pension to former officials who resided outside Poland, whereupon the plaintiff demanded payment from that part of the province which had remained German.

293. The German Supreme Court decided against the plaintiff. Neither a positive statutory provision nor general principles of public law justify the proposition that the German remainder of the former province continued its legal personality. The State as such continues, although large parts of its territory have been taken from it. Bodies like provinces, whose legal personality is not original, but was created by the State, do not survive radical territorial changes and the destruction of their organization caused thereby.

*Salary due by the former Government (Czechoslovakia) Case (1921)*

*Supreme Administrative Court of Czechoslovakia Collection Bohuslav 1041 adm.*

*Annual Digest, 1919-1922, Case 35*

294. A former prisoner of war, taken over into the Czechoslovak Army after his return from captivity, claimed salary for the time of his captivity. The Supreme Administrative Court dismissed his appeal.

295. Even if there were succession of the Czechoslovak State to the rights and obligations of the former State, such succession would relate only to the taking over of the appellant into the Czechoslovak Army. From this taking over there cannot be deduced any obligation of the succeeding State to pay him his claims against the former State, as it is by no means self-evident that pecuniary obligations of public law pass *eo ipso* to the so-called succeeding State. Neither does international law recognize a transference of such claims. A claim could arise only if the Czechoslovak State had expressed, in a binding manner, the will to take over either generally or under certain conditions pecuniary obligations of public law resulting from public service in the extinguished State.

*Austrian Officials in Czechoslovakia (Succession Case) (1922)*

*Supreme Administrative Court of Czechoslovakia Collection Bohuslav 1255 adm.*

*Annual Digest, 1919-1922, Case 46*

296. The appeal relating to a claim of an official of the former Austrian Ministry of Commerce for payment of salary for a certain period after the coming into existence of the Czechoslovak Republic (28 October 1918) was dismissed. The Court held that the appellant did not on 28 October 1918 become *ipso facto* an official of the Czechoslovak State. That State did not automatically enter as legal successor into the public service relationships of the old Austrian State. A public service relationship with regard to the Czechoslovak State could, as a rule, be established only by appointment by a competent Czechoslovak organ.

*Hungarian Officials (Succession) Case (1926)*

*Supreme Administrative Court of Czechoslovakia Collection Bohuslav 5435 adm.*

*Annual Digest, 1925/1926, Case 67*

297. Following previous decisions, including that in the case referred to in the preceding paragraph, the Court stated that the Czechoslovak State was not a continuation of the former Hungarian State and it did not succeed to the legal position of the former Hungarian State. The Court decided against the appellant, a former Hungarian official who after return from captivity as a prisoner of war in October 1920, was taken over into the Czechoslovak Civil Service and received his salary from the date of the establishment of Czechoslovakia (28 October 1918), but claimed arrears of his salary for the period of his captivity prior to 28 October 1918. The appellant's claim against the Czechoslovak State for the fulfilment of the obligations of the former Hungarian State could arise, the Court said, only if the Czechoslovak State had expressed the will to take over that type of obligation of the former Hungarian State.

*Hungarian Officials (Succession) Case No. II (1929)*

*Supreme Administrative Court of Czechoslovakia Collection Bohuslav 8117 adm.*

*Annual Digest, 1929-1930, Case 44*

298. The appellant was a Hungarian professor in the former Hungarian Faculty of Law at Bratislava. The Faculty was closed on 31 July 1921, and the appellant was awarded a pension from that date. He claimed a higher pension.

299. The Court dismissed the professor's appeal. The Czechoslovak State, it said, was not the successor to the Hungarian State and did not succeed *ipso facto* to the relation of service existing between the Hungarian State and its officials. The mere fact that the appellant was a Hungarian professor did not give him a cause of action against the Czechoslovak State on account of his salary or pension. The appellant could become a Czechoslovak official only as the result of an express act of the Czechoslovak State. This follows from the whole legislation<sup>59</sup> by which the Czechoslovak

<sup>59</sup> The relevant Czechoslovak legislation is summarized in *Annual Digest 1925/1926*, pp. 88-89.

State has regulated the legal status of the officials of the former Hungarian State.

*Austrian Empire (Succession) Case (1919)*  
*Constitutional Court of Austria*  
*Sammlung der Erkenntnisse des oesterreichischen*  
*Verwaltungsgerichtshofes, Vol. I (1919), No. 2, p. 5*  
*Annual Digest, 1919-1922, Case 39*

300. In a case decided on 11 March 1919, i.e., before the signature of the Peace Treaty of St. Germain-en-Laye, the Court dismissed the claim by a teacher against the Ministry of Education for payment of certain bonuses for work done from October 1917 to September 1918. In the territory of the defunct Austrian Monarchy, it said, new States have arisen which are not successors of the old State and not liable for its obligations. It is true that according to the principles of international law in cases in which a territory is ceded by one State to another or when several States arise out of one State, the States acquiring territory are bound to take over an appropriate part of the obligations in proportion to the assets which it or they have taken over. However, an international agreement is necessary to determine the extent of what each State will take over. Only after the share of the liability of the German Austrian Republic<sup>60</sup> has been determined will the plaintiff be entitled to bring an action.

*Military Pensions (Austria) Case (1919)*  
*Constitutional Court of Austria*  
*Sammlung der Erkenntnisse des oesterreichischen*  
*Verwaltungsgerichtshofes, Vol. I (1919) No. 9, p. 17*  
*Annual Digest, 1919-1922, Case 38*

301. In this case, which was also decided before the signature of the Peace Treaty of St. Germain, the Court dismissed the claim for the granting of a pension allegedly due to the plaintiff according to the military laws of the former Austrian Monarchy. The Court based its decision on an express statutory provision and added that there was no rule of international law which lays down that the new State of the Republic of Austria is liable either jointly or severally for the obligations of the former State. The distribution of the assets and liabilities of the defunct State must be decided by an international agreement between the various States which have arisen in the territory of the former Monarchy.

*Post Office Official (Austria) Succession Case (1920)*  
*Constitutional Court of Austria*  
*Sammlung der Erkenntnisse des oesterreichischen*  
*Verfassungsgerichtshofes, Vol. II (1920), No. 50,*  
*p. 95*  
*Annual Digest, 1919-1922, Case 47*

302. On 15 July 1918, i.e., before the collapse of the Austrian Monarchy, the plaintiff was retired on pension by the Imperial Royal Postal Savings Bank. After the establishment of the Republic of Austria he claimed a higher pension.

303. The Court stated that the Republic had acquiesced in the legal position of the former Monarchy

by continuing the payment of the plaintiff's pension. The Republic was not, however, the universal legal successor of the former State. It continues the relation of service of active officials of the defunct State only in regard to such officials as it has taken over individually and expressly. The plaintiff has no legal right to be taken over.

*Case of an Official invoking the Peace Treaty of St. Germain (1921)*  
*Constitutional Court of Austria*  
*Sammlung der Erkenntnisse des Verwaltungsgerichtshofes,*  
*Vol. XLV (1921), Administrative Part No. 12796*  
*Annual Digest, 1919-1922, p. 75*

304. The Austrian Administrative Court dismissed the appeal by an official of the former Monarchy who claimed that he had a right to be taken over by the Republic of Austria on the ground that, according to the Peace Treaty of St. Germain, the Austrian Republic was the universal successor of the former Monarchy. There was no provision in the treaty, the Court said, which could be interpreted to the effect that the Austrian Republic was to be regarded as the successor to the Monarchy. Whenever the Treaty intended to impose upon the Austrian Republic obligations of the Austrian Monarchy, it said so expressly. It followed that there was no universal succession.

*Ludwig v. Polish Ministry of Finance (1924)*  
*Supreme Administrative Court of Poland*  
*ZC Zb W.N.T.A. II, No. 298*  
*Annual Digest, 1923-1924, Case 43*

305. The Court dismissed the appellant's claim that his pension as an official of the Austrian Finance Administration which had been granted to him under the terms of a Polish statute of 1921 should be paid to him at the gold parity of the then Polish currency. Following a series of decisions to the same effect, the Court stated that the Polish State was not a successor State with regard to the Powers between which Poland had been partitioned, the reconstitution of Poland not having taken place on the basis of succession. The Polish State did not have the duty to fulfil obligations of those three States beyond voluntary understandings on the part of Poland and beyond treaty obligations.

*Hutnikiewicz v. Polish State Treasury (1927)*  
*Supreme Court of Poland*  
*P.P.A. 1928, 373*  
*Annual Digest, 1927-1928, Case 64*

306. The plaintiff was a State railway workman in Stryj (Galicia) until the downfall of the Austrian régime in 1918. Until May 1919 he continued to serve with the railway which was in the hands of the so-called Western Ukrainian Republic. The Polish Government, having taken over the railways, refused to employ him.

307. On his action claiming an indemnity and a pension, the Court of Appeal of Lwów decided against him. It said that although under general principles of international law the Polish Railway Administration had the duty of admitting to its service former Austrian employees if they had remained in Austrian employment until the railways were taken over by the Polish Railway administration, it was at least doubtful in the

<sup>60</sup> "Republik Deutschösterreich", the designation used before the Peace Treaties of Versailles and St. Germain were signed and came into effect.

present case whether the facts warranted the application of this rule because the plaintiff had accepted employment with the Western Ukrainian Republic.

308. The Supreme Court dismissing the further appeal, held that plaintiff's contention that Austrian sovereignty over the territory in question had lasted until May 1919 and that the Austrian Emperor had, on 18 October 1918, assigned that sovereignty to the Ukrainian National Council, was entirely baseless. Poland was bound by obligations of the former Austrian State only insofar as by international treaty she has taken them over. The Supreme Court emphasized that the statement of the Court of Appeal of Lwów as to general principles of international law was quite baseless, and that no such obligation existed either on general principles or on the basis of the stipulations of the Treaty of St. Germain.

*Kot v. Polish Ministry of Public Works*  
*Supreme Administrative Court of Poland*  
*Z.W.N.T.A. VI (1928), No. 1399, P.P.A. 1928,*  
*p. 546*  
*Annual Digest, 1927-1928, Case 63*

309. In the case of an official of the Austrian Roads Administration who had not been taken over into the service of the Polish State, the Court held that Polish authorities had the right to use their free discretion in accepting or not accepting for Polish service employees of the States responsible for the partitioning of Poland who were serving in the territories which came to Poland. Consequently, the admission of such an employee to the Polish service would require a distinct act on the part of the competent authority.

*Sifri v. Attorney-General (1950)*  
*Supreme Court of Israel*  
*Piskei-Din, Vol. 4 (1950), p. 613*  
*Pesakim Elyonim, Vol. 5 (1951/52), p. 197*  
*International Law Reports, 1950, Case 22*

310. The application for an order of *mandamus* to reinstate the applicant, an Arab civil servant of the Mandatory Government, was dismissed following the Court's ruling in *Shimshon v. Attorney-General*.<sup>61</sup> On the termination of the Mandate the officials of the former Mandatory Government possessed no right to employment by the new State of Israel which is free to appoint its officials as it thinks best, whether from the ranks of the former officials or from among those who never had served the Mandatory Government. However, an Ordinance gave the Mandatory officials a special status inasmuch as they were taken over by the new Government temporarily. Reporting for duty within a period laid down was prerequisite to acquiring the special status created by the Ordinance. The applicant had not so reported.

*Bergtal v. Schwartzman and Others (1950)*  
*Supreme Court of Israel*  
*Piskei-Din, vol. 4 (1950), p. 634*  
*International Law Reports, 1950, p. 93*

311. The applicant, a veterinary surgeon formerly in the employ of the Government of Palestine, remained in the service but was given notice of termina-

tion of employment. The Court followed the *Shimshon* case.<sup>62</sup>

312. But for the Ordinance referred to in paragraph 310 *supra*, the employment of all the officials of the Mandatory Government would have come to an end with the termination of the Mandate. The Ordinance conferred on certain officials a special status only if certain conditions were fulfilled.

313. The Government of Israel is not responsible for the debts of the Mandatory Government, and certainly there is no basis for the view that the Government of Israel took upon itself other obligations of the Mandatory Government and that it is bound to employ all the employees of that Government.

*Albohar v. Attorney-General (1950)*  
*Israel Tribunal for the Re-instatement of ex-Servicemen*  
*in their Previous Employment*  
*Pesakim Mehoziim, Vol. 5 (1951/52), p. 96*  
*International Law Reports, 1950, p. 94*

314. The Tribunal dismissed the application of an employee of the Government of Palestine for re-instatement in the equivalent department of the Government of Israel. It said that the State of Israel was not the successor of the Palestine Government. It came into being as a result of the decision and the Declaration of the Provisional Government of Israel, as an independent State which neither received nor took over the authority of the Government of Palestine. The Mandatory Government left the country without transferring its authority to any other body. Furthermore, the State of Israel was established in only part of the territory which was formerly known as the mandated territory. There is no legal nexus having its origin either in a treaty between the two countries or in international law, between the former Mandatory Government and the State of Israel.

*State of Madras v. Rajagopalan (1955)*  
*Supreme Court of India*  
*1955 S.C.R. 541*  
*International Law Reports, 1955, p. 147*

315. The Supreme Court of India examined in this case the status of the members of the pre-partition Indian Civil Service vis-à-vis the Government of the Dominion of India. It said that the question whether the Indian Independence Act, 1947, had brought about a full sovereign State for each and every purpose, was one of considerable importance and was not free from difficulty. The Court did not wish to decide that question on the present occasion.

316. The pre-partition Indian Civil Service had been at the pleasure of His Majesty and under the control of the United Kingdom Secretary of State for India. After independence the ultimate responsibility for the forming and maintenance of the conditions of service was no longer with the Secretary of State. In respect of such civil servants as were retained by the new Dominion Government the service continued to be under the Crown.<sup>63</sup> But this was only because in

<sup>62</sup> See paragraph 416 below.

<sup>63</sup> Until the coming into force of the Constitution of India of 26 November 1949.

<sup>61</sup> See paragraph 416 below.

theory the new Government of India was still to be carried on in the name of His Majesty. This was no more than a symbol of the continued allegiance to the Crown. The substance of the matter, however, was that while previously the Secretary of State's services were under the Crown in the sense that the ultimate authority and responsibility for these services was in the British Parliament and the British Government, this responsibility and authority vanished completely from and after 15 August 1947. Thus the essential structure of the Secretary of State's services was altered and the basic foundation of the contractual-cum-statutory tenure of the service had disappeared.

317. It follows that the contracts as well as the statutory protection attached thereto came to an automatic and legal termination on the emergence of the Indian Dominion.

*Amar Singh v. State of Rajasthan (1958)*  
*Supreme Court of India*  
*All-India Reporter (1958) S.C. 228*  
*Journal du droit international (Clunet), 1960, p. 1080*

318. On the integration of the Bikaner State in the State of Rajasthan the appellant who had been a District and Sessions Judge in Bikaner was appointed a civil judge. This was, the appellant claimed, a change in rank. It was not a change in emoluments, increments and conditions of service. The appellant claimed the retention of his previous rank.

319. The Court of Appeal stated that when one State is absorbed in another, whether by accession, conquest or merger, all service contracts with the prior government terminate and those who elect to serve in the new State do so on terms imposed by the new State. Even assuming that the appellant could avail himself of the guarantee in the covenant among the rulers of the merging States it only predicated that the new conditions would not be less advantageous; it did not guarantee that they would be the same or better.

*Poldermans v. State of the Netherlands (1956)*  
*Holland, Court of Appeal of the Hague (December 1955)*  
*N.J. 56, 120*  
*Supreme Court (June 1956)*  
*N.J.1959, No. 7*

320. Poldermans was a schoolmaster in the Netherlands Indies and claimed salary for the period of his internment by Japanese occupation authorities. The plaintiff contended that the "Kingdom of the Netherlands"<sup>64</sup> and the "State of the Netherlands", i.e., the *Realm in Europe* were liable.

321. The Netherlands Indies were a legal entity; its property, assets and obligations were distinct from those of the Netherlands. The obligation rested with the Netherlands Indies Government, and there was no scope for any obligation of the Kingdom as guarantor.

322. As a consequence of the transfer of sovereignty, the legal person known as the Netherlands Indies, as it had existed previously under Netherlands rule, had

ceased to exist because that particular part of the Kingdom was thereby transformed into a new State. This was not a mere change of government or of form of government. The question to what extent, by way of succession of States in this particular form, the rights and obligations of a formerly dependent territory pass to the new sovereign State under the general principles of the law of nations does not arise in the present case because the parties have regulated this matter by express agreement, under which all the rights and obligations of the Netherlands Indies were transferred to and rested in the Republic of the United States of Indonesia.

323. On further appeal the Supreme Court of the Netherlands pointed out that the terms used in the Netherlands-Indonesia Agreement made it clear that it was intended to lay down by the application of the accepted rules of international law that the Republic which succeeded to all the rights of the former Netherlands Indies should also have to bear all its obligations.

324. In the case of *Stichting tot Opeising Militaire Inkomsten von Krijgsgevangenen* (Foundation for Claiming Military Income of POW) v. *State of the Netherlands* (1955) (Hague Court of Appeal, Third Chamber, N.J. 1956, No. 12), to which reference is made in *International Law Reports 1957, p. 72*, the claims for the payment of the pay of a professional officer in the Royal Netherlands Army for the time of his captivity was rejected on grounds similar to those of the Poldermans case (*International Law Reports, 1957, p. 72*).

325. A similar conclusion was reached by the Court of Appeal of the Hague in *Van Os v. State of the Netherlands* in 1954 relating to a contract with the Netherlands Indies Government to join the Royal Netherlands Indies Army for a period of three years for services in Surinam or the Netherlands Antilles. The Royal Netherlands Indies Army was dissolved by virtue of the Transfer of Sovereignty and the Court held that the legal person of the Netherlands Indies had ceased to exist and the State of the Netherlands was not involved in the contract at all (*International Law Report, 1954, p. 77*).

## CHAPTER VI. STATE SUCCESSION IN RELATION TO PUBLIC PROPERTY AND DEBTS

### (A) Public property

*Polish State Treasury v. von Bismarck (1923)*  
*Supreme Court of Poland*  
*O.S.P. II, No. 498*  
*Annual Digest 1923-1924, Case 39*

326. In 1912 defendant's husband, whose heir she was, had concluded with the Prussian Treasury a contract for the acquisition of certain property. The defendant had been entered in the land registry and had become the owner in September 1919, i.e. after the signing (28 June 1919) but before the coming into force (10 January 1920) of the Peace Treaty of Versailles. The Polish authorities demanded the ejection of the defendant and the Courts of all three instances decided in their favour.

<sup>64</sup> The Kingdom as a whole in its capacity of former sovereign over the Netherlands Indies.

327. The Supreme Court held that the transfer of ownership to the defendant after the signing of the Peace Treaty was contrary to the stipulation and the spirit of the Treaty. The Treaty does not oblige Poland to take over obligations of the German Empire or of Prussia on account of the acquisition of Prussian State property. Whatever view one takes of State succession in general the question is not governed by any generally accepted international custom. No generally recognized international custom prescribes that a State which is the successor to another State accepts solely by reason of State succession the obligation at private law of the State which was its predecessor.

328. The Court pointed out that the fact that Poland was a State re-established after a period of partitions was a special reason which entitled the Polish Government to rely on the absence of a generally recognized international custom compelling a State in case of succession to take over the debts of its predecessor. The reconstruction of Poland constituted only a restitution of the state of affairs which had existed before the partitions. The lands in question had never ceased to form part of Poland.

*Polish State Treasury v. V. Osten (1922)*  
*Supreme Court of Poland*  
*O.S.P., I, No. 504*  
*Annual Digest, 1919-1922, Case 37*

329. In an action to compel a lessee of formerly Prussian and, after 1 November 1918, Polish State real property to give up possession of the estate the Supreme Court decided for the Treasury. It stated that Poland had become the full owner of the property under the Treaty of Versailles and not under any act of civil law. The Treaty imposes on Poland no obligation to respect the contracts of lease concluded by Prussia; the Polish Republic has therefore acquired the property free of all charges.

330. It is not necessary to decide whether international custom to the contrary might give a different legal aspect to the case, as there is no general international custom ordering a State which acquires property under an international treaty to respect contracts of lease concluded by the predecessor State, unless there is a special treaty stipulation to that effect. Once ownership had thus been acquired on the basis of an international treaty, it was henceforth governed by the civil law of the country in which the property is situated and the new owner can on the rules of civil law ask the lessee to surrender the property to him. Accordingly it must be determined whether, although the contract of lease concluded between the Prussian Treasury and the defendant is not binding on the Polish Treasury, the defendant is not, nevertheless, entitled to rely on the Civil Code in bar of the plaintiff Treasury's claim.<sup>65</sup>

*Graffowa and Wolanowski v. Polish Ministry of Agriculture and State Lands (1923)*  
*Supreme Court of Poland*  
*Zb. O.S.N. 1923, No. 30; O.S.P., III., No. 230*  
*Annual Digest, 1923-1924, Case 26*

331. Under the German occupation of the region of Warsaw during the First World War the German authorities placed certain cattle on the plaintiff's estate which the plaintiffs intended to keep as partial compensation for losses suffered. The Courts of all three instances decided, however, that the cattle had become the property of the Polish State, which *ipso facto* became owner of all German State property situated in that territory without regard to whether Poland had been at war with Germany or not. The Polish State was not responsible for the liabilities, vis-à-vis the plaintiffs, of Germany as an occupying Power.

332. The new State is not bound by the obligations of the old State on the ruins of which it had arisen or from which it has recovered a part of its territory. It does not take over obligations of that other State either in the domain of public law or in that of private law. It is a juridical person distinct from the old State, and as such, by an act of its sovereign power, it enters into possession of the public and private property of the old State, part of the territory of which it has taken over. The new State obtains its *imperium* not as a result of recognition by the older State or by other States, but as a result of having gained power over the territory and having suppressed the old power and organized the new power.

*Polish Treasury v. Heirs of Dietl (1928)*  
*Supreme Court of Poland*  
*O.S.P. VIII, No. 120*  
*Annual Digest, 1927-1928, Case 51*

333. The Supreme Court of Poland laid down in (*Graffowa v. Ministry of Agriculture* paragraph 331 *supra*) that the Polish State, the moment its independence had been restored, had by virtue of its sovereignty become possessed of all public law and private law property of the partitioning State which was situated in the territories occupied by it (Poland). In the heirs of Dietl case it added that there was no basis for excluding from such property incorporeal hereditaments, such as claims arising out of a deed executed in 1889 by which defendants' decedent undertook to erect a school for the children of his factory workmen and certain others in formerly Russian territory.

*Polish State Treasury v. District Community of Swiecie (1929)*  
*Supreme Court of Poland*  
*Zb. O.S.N.C. III (1929) No. 21*  
*Annual Digest, 1929-1930, Case 30*

334. In 1903 the Prussian State Treasury made an agreement with a District in the territory subsequently ceded to Poland by virtue of which the District was to pay to Prussia quarterly contributions towards the upkeep of a secondary school.

335. The Courts of all three instances decided that the claim of the Prussian Treasury had passed to the Polish State. Poland was not a successor of the Prussian State and for that reason had not become a party to the agreement of 1903. However, as she took advantage of the fact that the claim had passed to her, she could do so only within the limits of the agreement.

<sup>65</sup> It appears that the Court arrived at a negative reply to this question of civil law. The part of the reasoning relating to this question is not reported in the *Annual Digest*.

*Polish State Treasury v. City of Gniezno (1930)*  
*Zb. O.S.N.C., III (1930) No. 52*  
*Supreme Court of Poland*  
*Annual Digest 1929/30, Case 31*

336. In 1866 the Prussian State had concluded with the defendant (a city ceded subsequently to Poland) an agreement similar to the one which was the subject matter of the decision summarized in the preceding paragraphs 334 and 335 by virtue of which the City was to pay quarterly contributions towards the secondary school at Gniezno. The Court decided that Poland having acquired all the property and possessions of the German States situated in her territory, had acquired also the rights which the Prussian State derived from the agreement of 1886 even if this were a right to demand payments to be made to a third party, the school having a separate legal personality. The Polish State has acquired the property and possession of Prussia and Germany *modo originario*; the liabilities have not passed to it at all.

*Polish State Treasury v. Deutsche Mittelstandskasse (1929)*  
*Supreme Court of Poland*  
*Zb. O.S.N. III (1929) No. 26*  
*Annual Digest, 1929-1930, Case 33*

337. The acquisition of "all property and possessions" of the German States in the territories ceded to Poland included also a share in the capital of the defendant association. The sale of this share by the Prussian Treasury to a third party, agreed upon after the Peace Treaty of Versailles had been signed (28 June 1919), but before its entering into force was held to be invalid because under the Peace Treaty and the Armistice Convention the property was to pass to Poland within the limits which had existed on 11 November 1918.

*Polish State Treasury v. Skibniewska (1928)*  
*Supreme Court of Poland*  
*P.P.A. 1928, p. 284*  
*Annual Digest, 1927-1928, Case 48*

and

*Polish State Treasury v. Czosnowska (1929)*  
*Supreme Court of Poland*  
*Zb. O.S.N.C. III (1929), No. 207*  
*Annual Digest, 1929-1930, Case 32*

338. It was decided in these two cases that the "property and possession" which Poland had acquired include also pecuniary claims which were in a definite relationship to the acquired territory and therefore situated in that territory.

339. It was therefore held that the Polish Treasury was entitled to recover the debt owed to the Austrian Government by a farmer who during the First World War had received a government loan to buy livestock and equipment to replace those destroyed by operations of war.

340. Similarly the Polish State has acquired claims arising out of the supply by the Austrian Government, on credit, of agricultural machinery to farmers during the war.

*Polish State Treasury v. Paduchowa and others (1927)*  
*Supreme Court of Poland*  
*P.P.A., 1927, p. 310*  
*Annual Digest, 1927-1928, Case 49*

341. A claim by the Polish Treasury for the repayment of a loan obtained from the Austrian State Treasury was no longer a claim of the former Austrian State, the Polish Treasury having acquired it not under private law but by international treaty. Therefore the defendants could not set off against this claim certain claims of a different character they alleged to have against the former Austrian State. As Poland has not acquired Austrian State property as a free gift, it would be contrary to the most elementary justice if she had to pay to the creditors of the former Austrian State. As to the fact that the private creditor would suffer a loss the Supreme Court said that this was always the case whenever a debtor became insolvent.

*Knoll v. Polish State Treasury (1927)*  
*Supreme Court of Poland*  
*P.P.A. 1927, p. 312*  
*Annual Digest, 1927-1928, p. 75*

342. In 1917 the plaintiff built for the Austrian Government barracks for refugees, himself supplying building materials and labour. At the end of World War I the buildings became the property of the Polish Government.

343. It was held that the agreement of 1917 was not binding on the Polish Government as the acquisition by Poland of Austrian State property situated in Polish territory had been original (*modo originario*) not derivative.

*Zilberszpic v. Polish Treasury (1928)*  
*Supreme Court of Poland*  
*Zb. O.S.N. 1928, No. 190*  
*Annual Digest, 1927-1928, Case 55*

344. A contractor had, before World War I, concluded an agreement with the Russian Orthodox Charitable Society of Kielce (in the part of Poland then under Russian rule) to build an apartment house on land belonging to it. The land had, after the Polish insurrection, been granted to the Society by the Russian Government in 1868 and became, after 1918, the property of the Polish Treasury. The contractor's assignee sued the Polish Treasury for the money due to him which had remained unpaid.

345. The Court stated that in this case the rule against unjustified enrichment at the expense of another (*actio de in rem verso*) applied. The land alone had been the object of the grant of 1868; the building itself had never formed Russian State property; the plaintiff's assignor had spent his own money on the construction of the building without being in contractual relations with the Polish Treasury, whose property the building has now become (*superficies solo cedit*). The plaintiff can, therefore, claim from the Polish Treasury that part of his expenditure which would not exceed the increase in the value of the land which was due to the construction of the building.<sup>68</sup>

<sup>68</sup> The principles underlying this decision must be distinguished from those on which the case of *Niedzielski v. Polish*

*Attorney-General of Poland v. Serewicz (1923)*  
*Supreme Court of Poland*  
*O.S.P. II, No. 609*  
*Annual Digest, 1923-1924, Case 25*

346. On the basis of Polish statutes under which all leases of buildings purchased by the Treasury were to be dissolved on the date of the acquisition of the building by the State, the Attorney-General sought to recover possession from the defendant of an apartment in a house in Warsaw which was the property of the Polish Treasury but had formerly belonged to the Russian Treasury.

347. The Courts of all three instances decided against the Government. The Government contended that the Polish State had taken over the building from the Russian authorities by an "agreement" which brought the case within the scope of the statutes relating to leases in building purchased by the Government. The "agreement" on which the Government relied was the Treaty of Riga (1922).

348. The Court rejected this contention. The source of the passing of the building lay not in the Treaty of Riga but in the recovery of her independence by Poland and the consequent recovery of the buildings which had been Polish before the partitions, and in the taking over of buildings constructed by the Russians. The Treaty of Riga contained only a confirmation of these facts which had taken place before the conclusion of the Treaty.

*Uszycka v. Polish State Treasury (1930)*  
*Supreme Court of Poland*  
*Zb. O.S.N.C.T. (1930), No. 43*  
*G.S.W. 1930, p. 573*  
*Annual Digest, 1929-1930, Case 289*

349. The plaintiff's father had owned an estate in that part of Poland which was then under Russian rule. Following upon his participation in the Polish insurrection of 1863, the property was confiscated by the Russian State. Plaintiff brought the action to recover the estate from the Polish State. In an earlier case (*Kulakowski v. Szumkowski*) (1928)<sup>67</sup> the Court had decided in favour of the heirs of a participant in the Polish insurrection of 1863 whose property (including real property) had been confiscated by the Russian authorities and sold, in 1874, to the defendant's ancestor who had acquired the property in full knowledge of the facts at a nominal price. His acquisition of the property was not good in law, and could give him (and his heirs (the defendants)) no good title. All legislation and executive acts of the Russian Government (among them the confiscation of the

*Treasury* (paragraph 270) was decided in 1925. In the *Niedzielski* case there was a contractual debt on the part of the Austrian State to pay for work on a building which belonged to the Treasury. Such contractual debts did not, according to the jurisprudence of the Court, pass to the State acquiring territory. *Niedzielski* could not base his claim on unjustified enrichment because Poland had undertaken in the Peace Treaty of St. Germain to pay for most of the Austrian State property to the credit of the Austrian reparations account. No such obligation existed with regard to the territories which before 1918 had been part of *Russia*. In these territories the *actio de rem verso* was available in this type of case.

<sup>67</sup> *Annual Digest 1927-1928, Case 375.*

property in question) must be considered not as legal acts, but as instances of simple violence.

350. In *Uszycka's* case the Court applied the doctrine of the *Kulakowski* case also in a situation where the Polish State would have been the beneficiary of the Russian confiscation measures. It held that the Polish Treasury would be able to claim to have acquired the estate (whether *ipso jure* owing to the recovery of independence by Poland, or by virtue of the Peace Treaty with Russia) only if the estate had belonged to the Russian Treasury. But the property had never ceased to form the property of the person from whom it had been taken by the Russian authorities.

*Lempicki and Morawaka v. Polish Treasury (1932)*  
*Supreme Court of Poland*  
*Zb. O.S.N., I (1932), Part I, No. 27, p. 45*  
*Annual Digest, 1931-1932, Case 29*

351. This is another example of the application by the Supreme Court of Poland of the principle of *Uszycka's* case. After the Polish insurrection of 1831 the Russian Government confiscated the estate of a former General in the Polish forces. After the establishment of the Polish State in 1918 the general's descendants brought an action for the recovery of the estate which had been taken over by the Polish Government. The Courts of all three instances held that the plaintiffs were entitled to the estate.

352. The duty to restore to the successors of the rightful owner property confiscated by one of the partitioning Powers from a person who took part in the struggle for independence, is derived not from any law issued by the Polish State, but from the fact that the Polish nation has recovered its independence and that consequently there has come about such a change in public and private law as to cause the revival of the rights and titles of the rightful owners of confiscated property. Those relations at private law which had been illegally created by the invaders and which are inconsistent with the present state of things, fall to the ground.<sup>68</sup>

*Cases relating to the succession of Czechoslovakia to claims for unpaid taxes*  
*Supreme Administrative Court of Czechoslovakia*

353. In a series of decisions the Court found that it was a consequence of territorial sovereignty that the Czechoslovak State has collected all rates and taxes payable on Czechoslovak territory but not yet paid on the day of the State's coming into existence, and that the Czechoslovak State does not recognize the payments which were made after the decisive date to foreign authorities.

354. In the "Succession in Taxes (Czechoslovakia) Case" reported in the *Annual Digest 1925-1926* as Case 48 the appellant contended unsuccessfully that the Czechoslovak State was not entitled to collect a fee to which a claim of the former Austrian State had

<sup>68</sup> Cf. in connexion with the *Kulakowski*, *Uszycka* and *Lempicki* cases (paragraphs 349 to 252 supra) the case of the *Tyre Shipping Company v. the Attorney-General of Israel* (paragraphs 373 to 374 below) where the Supreme Court of Israel proceeded on the basis of a similar principle.

arisen before 28 October 1918 and which had been paid to the authorities of the Austrian Republic in Vienna on 29 November 1918. The Court held that since 28 October 1918 the right to collect taxes on Czechoslovak territory including taxes due before that day belonged only to that State and that, consequently, the Austrian authorities had not been competent to collect the fee.

355. In the "Succession in Taxes (Czechoslovakia) Case No. II" reported in the *Annual Digest* 1927-1928 as Case 53 the facts related to the territory of Hlučín (Hultschin) which was ceded by Germany to Czechoslovakia by virtue of the Peace Treaty of Versailles and incorporated in Czechoslovakia in January 1920. The relevant Czechoslovak Statute provided for the law of the territory to remain in force as far as was consistent with the change of sovereignty.

356. Under the German law the Czechoslovak authorities demanded from the owner of coal mines in that territory the payment of coal duty due for a certain period prior to the incorporation. The Court held that the owner of the mines had to pay the duty for the period concerned. As, however, payment to the German Treasury would be inconsistent with the change of sovereignty it was necessary that the payment be made to the Czechoslovak Treasury.

*Cases relating to the succession of Czechoslovakia to Austrian, Hungarian and Austro-Hungarian public property*  
*Supreme Court of Czechoslovakia*<sup>69</sup>

357. For the purpose of private law the Czechoslovak State cannot be considered the legal successor of the imperial and royal family in relation to the former governing dynasty's property. The private law provisions concerning the assumption of debts and liabilities, together with the taking over of a property or enterprise (Section 1409 of the Civil Code) do not apply to property acquired by the Czechoslovak Republic, which formerly belonged to the Austrian and Hungarian States and to the joint Austro-Hungarian institutions (Collection Vážny 10320 civ. and 11735 civ.).

358. If before the change of sovereignty a contract was concluded between a firm and the former Austrian State Railways for the repair of a factory sidings and rolling stock, the Czechoslovak State Railways, which performed the repair after the change of sovereignty, are entitled to claim from the firm payment for the work done. The firm is not entitled, however, to deduct the deposit made before the change of sovereignty to the Austrian authorities. Section 1409 of the Civil Code does not apply (Collection Vážny 6311 civ.).

*Schwerdtfeger v. Danish Government (1923)*  
*Denmark, Eastern Provincial Court and Supreme Court*  
*Ugeskrift for Retvaesen, 1924, pp. 64 et seq.*  
*Annual Digest, 1923-1924, Case 40*

359. In 1905 the Prussian authorities leased to the plaintiff for a period of eighteen years a farm which

formed part of the domains of the Prussian State in the Island of Als (North Schleswig). In June 1919 (several years before the expiry of the lease) at the plaintiff's request the Prussian authorities agreed to renew the lease until 1940 and a written contract to this effect was made in July 1919.

360. As a result of the plebiscite held pursuant to the Treaty of Versailles, Northern Schleswig became part of Denmark effective 15 June 1920. After the transfer of sovereignty the Danish Ministry of Agriculture refused to recognize the validity of the renewal contract. An action thereupon brought by Schwerdtfeger against the Danish Government was dismissed by the Eastern Provincial Court of Denmark. Its judgment was confirmed by the Supreme Court.

361. The Danish Government's title to the domains in Schleswig, the Supreme Court said, is a matter of public international law, not a matter of private law. It is based on Germany's cession of the territory by treaty to the Allied and Associated Powers and the transfer of it by the latter to Denmark by treaty. Although it is widely assumed that the rights attaching to immovable property should be treated as a matter of private law in cases of transfer of territory, this could not be accepted in the case of leases made with an eye on an impending transfer of territory—particularly leases contracted for the purpose of securing additional rights to the leaseholder at the expense of the successor State and thus calculated to affect or weaken the significance of the forthcoming international cession.

362. The judgment also referred to the fact that the Danish Government had explicitly reserved its freedom of action with regard to this particular class of contracts in the Final Protocol of the Treaty with Germany regarding Northern Schleswig.

*Amine Namika Sultan v. Attorney-General of Palestine (1947)*  
*Supreme Court of Palestine under British Mandate (1947), 14 P.L.R.115*  
*Annual Digest, 1947, Case 14*

363. The Treaty of Lausanne of 1923, which was made part of the law of Palestine by an Ordinance of the Mandatory Government, provides in Art. 60, *inter alia*, that the States in favour of which territory was or is detached from the Ottoman Empire shall acquire, without payment, all the property and possessions of the Ottoman Empire situated therein. The Treaty also provides that it is understood that certain defined property and possessions are included among the property and possessions acquired by the States concerned, these States being subrogated to the Ottoman Empire in regard to the property and possessions in question.

364. The Court held that there was no indication in the Treaty that the properties were being taken over subject to private claims. The term "subrogation" means that the Government of Palestine stands in the shoes of the Ottoman State only for the purpose of enabling a subject to determine in the courts of Palestine whether any particular property did pass under certain Turkish instruments. The legislative history of the Treaty of Lausanne does not support a finding that there was any agreement to give effect to private claims. The property in suit was transferred to the Government

<sup>69</sup> The summaries in paragraph 357 *et seq.* and 401 *et seq.* are based on *Rouček-Sedláček, Commentary on the Czechoslovak Civil Code, Vol. VI re: section 1409 of the Code, pp. 225 et seq.*

of Palestine without any reservation except in regard to wakfs, if any.

*Fogarty and Others v. O'Donoghue and Others (1925) Supreme Court of the Irish Free State (1926) Irish Reports, 351 Annual Digest, 1925-1926, Case 76*

365. The Government of the Irish Free State became, upon the establishment of the Free State, absolutely entitled to all the property and assets of the Revolutionary Government upon which, as a foundation, it had been established and which had been the former *de facto* Government. The court said that this conclusion followed *a fortiori* from a series of English cases which establish the proposition that if the British Government had been completely successful in crushing the revolutionary movement in Ireland it could have claimed and recovered the funds which were the subject matter of the litigation as the successor of the revolutionary Government which had collected them. How much more is the Government which succeeded to that of the Revolutionary Government (the second Dail) entitled as the lawful successor to that Government.

*Irish Free State v. Guaranty Safe Deposit Company (1927) Supreme Court, New York County 215 N.Y. Supp. 255; 127 Misc. Rep. 86 Annual Digest, 1925-1926, Case 77*

366. The New Court held that the Irish Free State succeeded to the Government of the United Kingdom of Great Britain and Ireland, the previous *de jure* Government of Ireland, not to the revolutionary organization which did not succeed in establishing a *de facto* Government. The Irish Free State cannot therefore show any derivative title to the funds in question. If any Government was entitled to these funds it was the British Government. As that Government has not claimed them the money was ordered to be returned to the original subscribers.

*Haile Selassie v. Cable and Wireless Ltd. English Court of Appeal (1938) L. R. (1939) Ch. 182 Annual Digest, 1938-1940, Case 37*

367. In December 1936, the King of Italy was recognized by the British Government as the *de facto* Sovereign of Ethiopia, while the Emperor Haile Selassie continued to be recognized as *de jure* Sovereign. In November 1938, the British Government recognized the King of Italy as *de jure* Emperor of Ethiopia and withdrew its recognition from the Emperor Haile Selassie.

368. The decision of the Court of First Instance had been given before the *de jure* recognition of the Italian conquest, while the Court of Appeal decided after that event. The Court of Appeal reversed the decision of the Chancery Division given in favour of the plaintiff and dismissed Emperor Haile Selassie's action. After the *de jure* recognition of the Italian conquest it was held that in the Courts of England the King of Italy as Emperor of Abyssinia is entitled by succession to the public property of the State of Abyssinia, and the late Emperor of Abyssinia's title thereto was no longer recognized as existent. It was further held that that right of succession is to be dated back at any rate to the date when *de*

*facto* recognition of the King of Italy as Sovereign of Ethiopia had taken place.

*Khayat v. Attorney-General (1954) Israel, District Court of Haifa Pesakim Mehoziim 9 (1954) p. 378 International Law Reports, 1955, p. 123*

369. Plaintiff's land had been requisitioned by the British Army in Palestine in 1941-1944. The Army erected buildings upon the land. In June 1948 (i.e. after the establishment of the State of Israel) the British Army confirmed that the buildings were the property of the plaintiff. The Court found for the plaintiffs in their action for a declaration that the plaintiffs as owners of the land were owners of the building. It had been argued by the Attorney-General that with the end of the Mandate (15 May 1948) the British Army lost all authority to make any agreement affecting land held by it in Israel and that at the time of the agreement with plaintiffs the British Army which remained in Israel had the status of a trespasser only.

370. The Court held that on the day of the establishment of the State no change took place as regards the right of ownership of the British Army, that in June 1948 that Army was the legal owner of the buildings in question, that at the end of the Mandate the Mandatory Government was liable to the plaintiffs for rent and reinstatement, and that this liability did not pass to the Israel Government. Whether the British Army was a trespasser or not, it was the legal owner of the buildings.

*Reingold and Others v. Administrator General (1951) Supreme Court of Israel Piskei-Din 5 (1951), p. 1180; Pesakim Elyonim 9 (1951), p. 73 International Law Reports, 1951, Case 31*

371. In 1947 the Administrator General of Palestine (an organ created by Ordinance in 1944 as "a corporation sole . . . with perpetual succession . . .") commenced proceedings against the appellants for the return of certain moneys, in connexion with the winding up of the estate of a deceased person.

372. The Court referred to its decision in *Shimshon v. Attorney-General*<sup>70</sup> according to which there was no doubt that the Mandatory Government ceased to exist without leaving anybody to succeed to its rights and duties. With it, all its departments, whatever their legal form, also ceased to exist. The conclusion was that the Administrator General appointed by the Government of Israel is not identical with the Administrator General of the Mandate with the consequence that the Administrator General of Israel cannot continue with legal transactions commenced before the establishment of the State of Israel.

*Tyre Shipping Co. Ltd. v. Attorney-General (1950) Israel, Admiralty Court Piskei-Din, vol. 4 (1950), p. 228 Pesakim Elyonim, vol. 4 (1951-1952), p. 55 International Law Reports, 1950, No. 25*

373. A vessel having some six hundred immigrants on board who were not in possession of valid entry docu-

<sup>70</sup> See paragraphs 416 *et seq.* below.

ments into Palestine was in March, 1947, seized by a British naval vessel within the territorial waters of Palestine. The vessel had, with the knowledge of her skipper, owners or agents, been used to assist in performing, or in an attempt to perform, an act regarded as illegal under the Palestine Immigration Ordinance, 1941, as amended. She was confiscated and the confiscation confirmed by the Haifa District Court in December 1947. On the termination of the Mandate of Palestine (15 May 1948) the vessel was lying at Haifa. The plaintiff company claimed to be the owners of the vessel before confiscation.

374. The Court held that the Government of Israel is not the owner. The relevant provisions of the Palestine Immigration Ordinance were repealed immediately after the establishment of the State of Israel and it was enacted that any Jew who at any time entered Palestine in contravention of the laws of the Mandatory Government shall be deemed to be a legal immigrant retroactively from the date of his entry into Palestine. From the point of view of the post-1948 law, the vessel was never engaged in any illegal enterprise; the moral as well as the legal basis of the confiscation order have gone. There being no crime and no criminal, there was no instrument used for committing a crime. The confiscation order was retroactively null and void.<sup>71</sup>

#### (B) Public debts

*Verein für Schutzgebeitsanleihen E. V. v. Conradie* (1936)

*Supreme Court of South Africa*  
*S.A.L.R. (1937) App. Div. 113*  
*Annual Digest, 1935-1937, Case 40*

375. The appellant corporation claimed from the Administrator of the Mandated Territory of South-West Africa under South African Administration the payment of capital and interest due on bearer bonds issued before World War I by the German Imperial Government on behalf of the former German colonies.

376. The Court held that the Mandated Territory of South-West Africa was not the same juristic entity as the former German South-West Africa and therefore not liable for the loans raised for the benefit of the various former German Protectorates.

377. Although German South-West Africa was called a Protectorate, it was, the Court said, in fact a colony, not autonomous but subject in all respects to control of the Reich. But the accounts and financial arrangements were nevertheless kept separate from those of the Reich so that prior to the Treaty of Versailles the Protectorate was a separate juristic entity. That entity was liable in respect of the obligations relied on by the appellant.

378. By virtue of the Peace Treaty and the Mandate German sovereignty over the territory completely disappeared. The Juristic Persona of the territory which was created by the German Government did not survive the abolition of the old authority and the substitution of the new authority of a quite different type. The change

was so complete and fundamental that so far as constitutional matters were concerned, there was at the date of the issue of the Mandate *tabula rasa*.

379. No inference contrary to the conclusion that there is no identity between the German Protectorate and the South African Mandate can be drawn from such limitations on the rights of sovereignty exercisable by the Mandatory as are expressed or implied in the terms of the Mandate or of Art. 22 of the Covenant of the League of Nations. There is no similarity between the position in which the territory formerly stood, as a colony, to the Government of the German Reich, where there was "no tutor and no ward", and its position in relation to the Mandatory Power. No support for the contrary opinion can be derived, therefore, from the argument as to the identity of a ward remaining unaffected by a change of tutor.

380. As to the question of the liability of the Mandated Territory as a *successor to*, not as *identical with*, the German Protectorate, the Court followed the principles laid down by British Courts in *West Rand Central Mining Co. v. The King* and the decisions following it.<sup>72</sup>

*Tanganyika Succession Case (1922)*

*German Reichsgericht (Supreme Court of the German Reich)*

*Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 105, p. 260*

*Fontes Juris Gentium, A. II, Vol. 1 (1879 to 1929) No. 271*

*Annual Digest, 1919-1922, Case 34*

381. Plaintiff sued the Treasury of the former German Protected Territory (colony) of German East Africa (now the independent State of Tanganyika) and the German Reich as joint debtors of the arrears of rent for property in Dar-es-Salaam, leased to the Treasury of German East Africa while that territory was under German rule.

382. The *Reichsgericht* decided that Germany was liable. It said that the decision cannot be based on considerations of private law; the constitutional and public international law aspects are decisive. When the Peace Treaty of Versailles entered into force the former colony ceased to exist and lost its legal status as a German protected territory. It was taken over, together with all its assets, by a foreign Power (England).<sup>73</sup> According to general principles of law, as a consequence of the transfer of the territory to England,<sup>74</sup> the annexing State would have become responsible for the private law liabilities of the former protected territory. However, the Treaty of Versailles expressly excluded the application of this principle. The protected territory's landed property and rights connected therewith passed to the annexing Power.

383. There have remained the Territory's rights, as well as immovable and movable property which were located in Germany and, mainly, its liabilities. It cannot be maintained, the *Reichsgericht* said, that the assets of the former Colony have now become without

<sup>71</sup> See the decisions of the Supreme Court of Poland summarized in paragraphs 349 to 352 *supra*.

<sup>72</sup> See paragraph 238 *supra* (footnote).

<sup>73</sup> The United Kingdom as Mandatory Power.

<sup>74</sup> The United Kingdom as Mandatory Power.

an owner, that the debtors have been freed of their liability, and the creditors have lost their rights owing to the disappearance of the debtors. Such a consequence would be inconsistent with what is required of a State under the rule of law. It is also incompatible with Germany's obligation to take care of an orderly winding-up of the affairs of the Territory.

384. The legal basis for the liability of the Reich is the fact that while independent economic and accounting systems for each colony had been established by German legislation, the constitutional separateness of the colonies from the Reich had, in a certain sense, been fictitious. The legal starting point is the close connexion between the Reich and the colonies, which was only covered up by the fiction of financial independence. Now, when the independence of the various Protectorate treasuries has disappeared, the necessary conclusion is, in logic and in law, to have recourse to Germany's financial responsibility which, in a sense, had only been pushed into the background.

385. Germany had in a number of cases undertaken to take over certain obligations of former East Africa, for instance, in the matter of pensions for officials and in regard to private law obligations. It was contended on behalf of the Reich that these obligations had been undertaken voluntarily for reasons of equity. The Court, however, saw in the assumption of these liabilities the express recognition and application of a general principle. The fact that the public authorities of the State have undertaken private law liabilities of East Africa cannot be justified without assuming that there were also reasons of a legal nature which prompted that course. The claim that the Reich must be free to determine which private law claims deserve consideration cannot be admitted. The defendant Reich overlooks that the Courts are called upon, and able, to decide and to examine claims with regard to their legal justification.

*S. Th. v. German Treasury (1924)*  
*German Reichsgericht (Supreme Court of the German Reich)*  
*Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 108, p. 298*  
*Fontes Juris Gentium, A. II, Vol. 1 (1879-1929) No. 323*  
*Annual Digest, 1923-1924, Case 29*

386. During World War I, as an officer of the army of German East Africa, the plaintiff had, partly in response to a proclamation by the (German) Governor of East Africa inviting deposits to assist the conduct of the military operations, deposited with the District Fund a sum of money which, after the war, he claimed from the German Reich.

387. The Court re-examined the legal questions which had been the basis of its decision of 1922 in the "Tanganyika Succession Case" (summarized in paragraphs 381 *et seq.*) and confirmed the views it had expressed earlier. Even if it could be argued that the successor state is liable to take over purely administrative debts of this description by virtue of general principles of international law, such liability would in any case extend only to debts contracted for the purpose of ordinary peaceful administration of the territory. In no case

would there be any liability on the part of the successor State with regard to debts arising out of the conduct of war or otherwise connected with the war. In the present case the plaintiff's money had been used for war purposes. According to principles of international law, the successor State cannot be asked to take over debts of this nature.

*X. v. German Reich (Return of Bail, South West Africa) Case (1926)*  
*German Reichsgericht (Supreme Court of the German Reich)*  
*Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 113, p. 281*<sup>75</sup>  
*Fontes Juris Gentium, A. II, Vol. 1 (1879-1929) No. 364*

388. This was a claim against Germany to recover a sum of money deposited by the claimant as bail with the Imperial District Court in Windhuk, German South-West Africa in 1914. The appeal was decided by a chamber of the Supreme Court different from the chamber (the III. *Zivilsenat*) which in 1922 and 1924 respectively had decided the cases summarized in paragraphs 381 *et seq.* The chamber which was seized of the 1926 case was informed by the III. *Zivilsenat* that it no longer maintains its opinion that the German Reich was responsible for liabilities originating in the peaceful administration of the former protected territories.

389. The Court, abandoning the contrary opinion expressed in the earlier judgments, relied (a) on the German statute of 1892 providing that only the property of a Protected Territory was responsible for its administrative debts; (b) on the fact that the Peace Treaty had provided that neither the Territory nor the Mandatory Power shall be charged with any debt of the German Empire or State, but had not regulated the responsibility for the territories' own and (c) that the provision of the Peace Treaty absolving the successor State of responsibility must not be interpreted extensively. The territory of South-West Africa, while subject to the guardianship (Mandate) of the Union of South Africa, continues to be the subject of its own rights and obligations and has itself remained the debtor. The fact that the Mandatory Administration was collecting the debts which had arisen before the change of sovereignty appeared to support this conclusion.<sup>76</sup>

390. The German Supreme Court pointed out that it did not express an opinion on the question whom the plaintiff could sue and did not either confirm or reject the view of the lower Court that the Mandatory Power was liable under the generally recognized principles of international law governing the question of State succession.

391. In a decision of 1929 (*Höchstrichterliche Rechtsprechung 1930, No. 419, Fontes Juris Gentium A, II, Vol. 2 (1929-1945) No. 14*) the Supreme Court, after a new examination of the question, maintained its opinion (paragraph 390 *supra*) that the German Reich

<sup>75</sup> The decision of the lower Court, the *Kammergericht* (Court of Appeal) in this case is reported in *Annual Digest, 1925-1926, No. 55*, under the title "State Succession (Windhuk in South-West Africa) Case".

<sup>76</sup> See the decision (to the contrary) of the Appellate Division of the Supreme Court of South Africa in paragraphs 375 to 380 *supra*.

was not responsible for administrative debts of the former German Protected Territories, which are unconnected with the waging of war. It extended the application of this principle to obligations arising out of other legal causes such as assumption of debt or the necessity of borrowing money ("Anleihebedürfnis").

392. The principle negating the liability of Germany was again applied in 1930, when the Supreme Court of the German Reich held that the German Treasury was not liable for debts of German South-West Africa arising out of a contract with a railway company. The obligation undertaken by the administration of German South-West Africa was held to have been a purely personal one and limited to the assets of the territory. (*Annual Digest 1929-1930*, Case 35, "South West Africa" (Succession) Case).

*Sch. v. Germany (1932)*

*Entscheidungen des Reichsgerichts in Zivilsachen, Vol. 137, p. 1*

*Juristische Wochenschrift, 1932, p. 2799*

*Fontes Juris Gentium, A. II, Vol. 2 (1929-1945)*

*Annual Digest, 1931-1932, Case 31*

393. In a suit by a holder of bonds issued before the First World War on behalf of the German Colonies as the principal debtor and guaranteed by the German Reich, the German Supreme Court held that Germany was still liable as guarantor.

394. The German Colonies, the Court said, had neither themselves been German States, nor parts of the territory of the Empire. They were regarded as "appurtenances" ("Pertinensen") of the Empire and were, by statute, recognized as capable of having independent rights and obligations. The Treaty of Versailles did not deprive the Colonies of their corporate capacity. Only their character as German Colonies had been lost. The principal debt, for which the German Empire stood surety, had therefore not been extinguished.

395. The defendant further contended that even if the principal debt has not been extinguished, Germany has ceased to be liable as surety by reason of the Colonies having been severed from the mother country. The Court did not accept the contention that it had been an implied condition of the guarantee that Empire and Colonies should be and remain connected.

*Administration of Finances v. Ornstein (1926)*

*Administration of Finances v. Stier Netti (1926)*

*Romania, Court of Cassation*

*Journal de droit international (Clunet) (1927) p. 1166*

*Annual Digest, 1925-1926, Case 54*

396. Romania is not responsible, as the result of the annexation of Bucovina, for the debts of the ceding State relating to that province, except to the extent laid down in the Peace Treaty of St. Germain. Apart from provisions of this kind, there is no universal succession by the annexing State, especially when not the whole State, but only a part of its territory, has been annexed.

*Cases relating to the Succession of Czechoslovakia to obligations to repay taxes not owed*

*Supreme Administrative Court of Czechoslovakia*

*Annual Digest, 1925-1926, p. 71*

397. In a decision of 1922 (Collection Bohuslav 850 fin.) the Court said that the legislator has recognized

the principle of the [substantive] continuity of the [municipal] legal order before and after the revolution. Rates and taxes, fees and duties under existing laws are to be paid to the Czechoslovak Treasury. It results from this continuity between the former and the new state of the law that as regards the relation between the Treasury and the taxpayer the claim of the latter for the reimbursement of a fee wrongly paid before the coming into existence of the Czechoslovak State is not affected by the revolution provided that the claim has arisen in the territory now belonging to the Czechoslovak State.

*Succession in Obligation (Fees paid in Error) Case (1925)*

*Supreme Administrative Court of Czechoslovakia*

*Collection Bohuslav 2573 fin.*

*Annual Digest, 1925-1926, Case 50*

398. The appellant demanded the reimbursement of a fee paid in error to the former Hungarian authorities before the coming into existence of the Czechoslovak State. Referring to its decision (Boh. 850 fin. (para. 397 *supra*)) the Court held that the Treasury could not refuse to reimburse a fee paid in error on the ground only that it had been paid to the former Hungarian Treasury before the coming into existence of the Czechoslovak Republic.

*Succession in Obligations (Advance Payment of Duty) Case (1928)*

*Supreme Administrative Court of Czechoslovakia*

*Collection Bohuslav 4501, fin.*

*Annual Digest, 1927-1928, Case 58*

399. In a case where a taxpayer had paid to the Hungarian authorities a sum of money on account of duty on spirits which he intended to buy, but subsequently did not buy, the Court repeated that the Czechoslovak State, by virtue of its sovereignty is entitled to collect, in accordance with the legal provisions maintained in force, all rates and taxes, fees and duties, not yet paid, but that, on the other hand, it was a consequence of that sovereignty that the Czechoslovak State is responsible to the taxpayer for claims which had accrued to them in the period prior to the revolution of 1918.

400. This state of the law was, however, as the Court pointed out, substantially altered by the Czechoslovak Act No. 156/1926 which provided that the Czechoslovak State is not responsible for obligations arising from arrangements with the former Hungarian (and Austrian and Austro-Hungarian) Governments and their organs excepting obligations expressly provided for in the Peace Treaties. [A law of 1924, authorizing the Government to take over such claims and pay for them in accordance with the provisions of that law, remained in force. Act 236/1924; Annual Digest 1925/1926, p. 72.]<sup>77</sup>

*Cases relating to the Succession of Czechoslovakia to debts of Austria, Hungary and Austria-Hungary*  
*Supreme Court of Czechoslovakia*

401. The Czechoslovak State is not liable to perform a contractual obligation of the former Austrian State

<sup>77</sup> The Supreme Court of Israel referred to this development of Czechoslovak law in *Shimson v. Attorney General* (1950); see paragraph 416 below.

to hand over factory rolling stock. The provisions of Section 1409 of the Civil Code,<sup>78</sup> obviously presuppose the transfer of property by virtue of a contract, by way of "singular succession", i.e., alienation by tradition (handing over) by the previous owner and by the taking over by the acquiring party, while in the case of the acquisition which took effect on 28 October 1918 there was neither a contract nor a transfer nor a succession. It was an original (originární, originar) as distinct from derivative, acquisition, against the will of the previous owner. (Collection Vážny 5937 civ.)

402. The Czechoslovak Treasury as the acquirer of landed property under the Peace Treaty of St. Germain is liable for obligations relating to the transferred property by virtue of Section 1409 Civil Code. By the approval of the work by the Czechoslovak provincial administrative authority, approval is given not only as far as the technical aspect is concerned, but the work is being taken over as a whole and the acquirer of the building enters into the original contract between the builder and the former Austrian Treasury (přehled rozhodnutí 1923, p. 63).

403. The Czechoslovak Treasury is liable to pay for what was delivered to it after 28 October 1918 although the order was still made by the former Austrian Treasury (Collection Vážny 3864 civ.).

404. The Czechoslovak State is liable to pay what is due to an independent contractor for work done by virtue of a contract concluded by the contractor with representatives of the former Austro-Hungarian Monarchy if it relates to a state building which as a consequence of the change of sovereignty became the property of the Czechoslovak State, even if the work was completed before the change of sovereignty (Collection Vážny 2517 civ.).

*Union of India v. Chinubhai Jeshingbai (1952)*  
*India, High Court of Bombay*  
*Indian Law Reports [1953] Bom. 113*  
*International Law Reports 1952, Case 22*

405. The sharing and distribution between India and Pakistan of the rights, property, assets and liabilities of undivided India has been regulated, under an enabling provision of the India Independence Act, 1947, by the Indian Independence (Rights, Property and Liabilities) Order, 1947. Land vested on 15 August 1947 in His Majesty "for the purposes of the Governor General in Council". . . came when situated in India under the control of the Dominion of India; land situated in Pakistan under the control of the Dominion of Pakistan. Goods, coins, banknotes and currency notes situated in the Dominion of India fell under the control of the Dominion of India.

406. If a contract concluded before 15 August 1947 was, e.g., exclusively for the purposes of the Dominion of Pakistan, it was deemed to have been made on behalf of the Dominion of Pakistan, even if the contract had been entered into by the Governor General of undivided India with a citizen of India. The actual making of the contract by the Governor General of India was immaterial. The Order introduced a legal fiction and con-

verted by that legal fiction a contract which was originally entered into by the Governor General of India to a contract for the purposes of one Dominion or the other. The Order determined not only the rights of the two Dominions *inter se*, but also the right of third parties.

*Chaman Lal Loona & Co. v. Dominion of India (1952)*  
*India, High Court of Punjab*  
*Indian Law Reports [1953] VI Punjab 233*  
*International Law Reports, 1952, Case 23*

407. Applying the Indian Independence (Rights, Property and Liabilities) Order, 1947, the Court stated that the date on which a contract (with pre-partition India) was to be performed was immaterial. If any liability under the contract subsists, the contract is alive as a chose in action. In apportioning liability regard must be had to the purpose of the contract.

408. The High Court of Punjab was of the opinion that in the particular case relating to the supply of fodder to a military farm in Pakistan, the contract was not exclusively for the purposes of Pakistan because the Joint Defence Council had the power of allocating the goods among the two Dominions. It found, therefore, for the plaintiffs. On this point its decision was reversed by the Supreme Court of India in 1957 because the High Court had not properly appreciated the distinction between the "purpose of the contract" and the "ultimate disposal of the goods". (*Union of India v. M/S. Chaman Lal Loona and Co.*, All India Reporter, 1957, S.C. 652, *International Law Reports*, 1957, p. 62).

409. Similar cases are listed and, in part, summarized in *International Law Reports* 1952, p. 129, including one where the Indian High Court of Calcutta held that under the 1947 Order where a cause of action had arisen and was pending before the partition of India, and arose wholly within the territory which after partition remained part of India, then the cause of action would continue to be exclusively against the Government of India and was not affected by the partition. [*Ramesh Chandra Das v. West Bengal*, *Indian Law Reports* [1953] 2 Cal. 249]. See also *op. cit.*, 1957, pp. 65-68.

410. In *Union of India v. Balwant Singh Jaswant Singh*, decided in 1957, the High Court of Punjab also held that when the Governor General of India in Council entered into a contract with a citizen of India in which he undertook liabilities and rights accrued to the citizen under that contract, if the contract was found to be on 15 August 1947 exclusively for the purposes of Pakistan then the contract was deemed to be a contract made by the Dominion of Pakistan. (All India Reporter [1957] Punjab 27, *International Law Reports*, 1957, p. 63).

*Lakhmi Chand v. Punjab State (1953)*  
*India, High Court of Punjab*  
*Indian Law Reports [1954] VIII Punjab 61*  
*International Law Reports, 1953, p. 91*

411. Appellant, who before the partition of India had been resident in territory now forming part of Pakistan and after the partition took up residence on Indian

<sup>78</sup> Paragraph 357 *supra*.

territory, sued the Punjab State (India) to recover goods which, before partition had, allegedly illegally, been confiscated by the Crown. Applying the Indian Independence (Rights, Property and Liabilities) Order 1947, the Court held that the Punjab (India) Government was not liable as the cause of action had arisen wholly within the territories which now formed Pakistan.

*All India Live Stock Supply Agency v. (1) Governor-General in Council (2) Dominion of India (3) Federation of Pakistan (1952)*  
*Pakistan, Chief Court of Sind, Karachi*  
*Pakistan L.R. (1952) Kar. 94*  
*International Law Reports, 1952, Case 24*

412. This was a case decided by a court of Pakistan under the Indian Independence (Rights, Property and Liabilities) Order, 1947, which was also the basis in Indian municipal law of the decisions of Indian Courts summarized in the preceding paragraphs.

413. Under an agreement entered into before 15 August 1947 with the Governor General of India (acting on behalf of the Government of undivided India), the plaintiffs had agreed to supply dairy products to a military farm near Karachi. They performed their part of the contract before partition. The Court held that the contract was for the exclusive purposes of Pakistan, that the fact that the goods had been delivered before 15 August 1947, i.e., that the contract had been "spent" was irrelevant and that therefore Pakistan was liable.

414. For other decisions of Pakistan Courts on the distribution between Pakistan and the Dominion of India of the assets and liabilities of prepartition India, see *International Law Reports, 1952, p. 131.*

*G. S. Indulkar v. State of Bombay (1959)*  
*All India Reporter (1959) Bom. 263*  
*Journal du droit international (Clunet) 1960, p. 1082*

415. Plaintiff was granted compensation for certain lands by the Ruler of Kolapur. When Kolapur was merged in the State of Bombay, it was held that the claim could not be enforced against that State. By whatever process the succession was effected, the successor State was under no liability to recognize liabilities of the former State. The merger agreement was between the Ruler and the Government of India and the State of Bombay was not a party to it.

*Shimshom Palestine Portland Cement Factory Ltd. v. Attorney-General (1950)*  
*Supreme Court of Israel*  
*Piskei-Din, Vol. 4 (1950), p. 143; Pesakim Elyonim, Vol. 9 (1951), p. 16*  
*International Law Reports, 1950, Case 19*

416. In a law suit of the applicant company against the Government of Palestine for the return of an amount of Palestine Pounds customs drawback, the Haifa District Court gave judgment in favour of the applicant on 17 February 1948. The Attorney-General for Palestine appealed. On 15 May 1948 when the State of Israel came into existence, the appeal had not yet been heard. The application for an order that the Appeal should proceed between the Attorney-General as Appellant and the Applicant as Respondent was refused. Applicant had contended, *inter alia*, (i) that if the Government of Israel collected taxes due to the Govern-

ment of Palestine, then it must also take upon itself the latter Government's debts, and (ii) that according to international law the debts of the previous Government have passed to the Government of Israel.

417. The Court held that there was no substitution of the Government of Israel for the Government of Palestine. The rejection of the argument under (i) was based on an interpretation of a municipal enactment. With regard to applicant's reliance on international law (*supra* ii) the Court proceeded from the assumptions (a) that a plaintiff in a municipal court cannot rely upon international law, and (b) that there was no rule commanding general assent in international law imposing on the State of Israel responsibility for the discharge of debts of the Mandatory Government of Palestine.

418. In regard to the proposition under (a) the Court relied on a number of decisions rendered by the superior courts of England, having regard to the facts that under the Palestine Order in Council of 1922 the general principles of English Common Law and Equity are, within certain limitations, to be applied in Palestine and that under the Israel Law and Administration Ordinance the law which was in force on 14 May 1948 was, subject to certain conditions and limitations, to remain in force.

419. The Court found that in the relationship between an Israeli company and the Government of Israel the essential elements which would justify the application of international law were lacking. The Court asked whether it could be asserted that Israel as responsible for the payment of all the debts of the Mandatory Government, even those which had been incurred during its struggle against the aspirations to bring about the whether it could be asserted that Israel was responsible for the debts due to former residents of Palestine who are not today residents of Israel. The Court pointed out that the territory of the State of Israel did not coincide with all the territory under the former Mandate and asked what the relative proportion of the obligations of the Mandatory Government which fall upon the State of Israel should be. It concluded that it clearly was not the task, nor within the capabilities of a court of law to give a reply to these questions.

420. In support of its statement concerning the differences existing on the question of the liability of a newly established or a cessionary State for the liabilities of the predecessor State the Court also referred to the award in the Ottoman Public Debt Arbitration (A/CN.4/151, paragraphs 108-109) and to the change in Czechoslovak legislation referred to in paragraph 400 *supra*.

*Pamanoekau and Tjiasemlanden and Anglo-Dutch Plantations of Java v. State of the Netherlands (1952)*  
*District Court of the Hague*  
*N. J. 1954, No. 84*  
*International Law Reports, 1952, Case 21*

421. During the Second World War the plaintiffs continued paying their bank balances to the Netherlands Purchasing Commission of New York "expressing their confidence in eventually being generously treated by the Netherlands Indies Government". After the war the Netherlands Government refused to remit to the plaintiffs the countervalue of their balances

out of the Netherlands Treasury on the ground that the debt attached to the Netherlands Indies and subsequently to the Indonesian Republic.

422. The Court held that the State of the Netherlands was not concerned with the debt. Only the Netherlands Indies were regarded as a party to the transaction. The Netherlands Indies, as a legal *persona* under private law, were legally represented in such transactions by either the Governor-General or the Minister for the Colonies. The only debtor, therefore, was the body corporate of the Netherlands Indies, first, and, subsequently, by way of succession, the Republic of Indonesia.

*Montefiore et Association nationale des porteurs des valeurs mobilières v. Colonie du Congo belge et Etat belge (1961)*

*French Court of Cassation*

*Revue générale de Droit international public, 1962, p. 656*

*Journal du droit international (1962), p. 687*

423. By Treaty of 28 November 1907 King Leopold II ceded the independent State of the Congo to Belgium. The Treaty provided that the cession included all the assets and financial liabilities of the independent State listed in an annex. However, a Belgian municipal statute of 18 October 1908 enacted the same day as the statute ratifying the cession, provided that the Belgian Congo has a legal personality distinct from that of metropolitan Belgium, that the assets and liabilities of the Colony remain separate and distinct, and that the debt service of Congolese loans remained therefore an exclusive responsibility of the Colony.

424. The French Court of Cassation quashed the decision of the Court of Appeal of Paris<sup>79</sup> which had proceeded on the assumption that the Congo Colony and Belgium had been merged. The Court of Cassation held that the Court of Appeal had misunderstood and misconstrued the clear and precise text of the Belgian statute which confirmed the distinction between the Belgian State and its colony and which provided that the colony was the sole debtor vis-à-vis the bearers of bonds of a loan floated by the independent State of the Congo in 1901.

425. The Court of Appeal whose decision was overruled by the Supreme Court had in its judgment referred to the fact that the statute appeared to contradict the Treaty of Cession, was essentially an internal measure which could not detract from the value and scope of the act of cession, which dominates the whole question and which had been accepted by the French Republic.

(C) *Responsibility for delicts and breach of contract in particular*

*Kalmár v. Hungarian Treasury (1929)*

*Supreme Court of Hungary*

*Magánjog Tára, X, No. 75*

*Annual Digest, 1929/30, Case 36*

426. In 1914 the plaintiff had been negligently wounded by gendarmes in Transylvania, then part of

Hungary, and had been awarded by the Court a life annuity. After Transylvania had been ceded to Romania, he retained his Hungarian nationality and lived on the post-Trianon Territory of Hungary. The Hungarian currency having depreciated, the Court decided for the plaintiff in his action for valorization of the annuity.

427. There is no rule, the Hungarian Supreme Court said, according to which the Successor State, i.e. Romania, is liable to pay life annuities in favour of Hungarian citizens living in the present territory of Hungary in a case where the damage originated in the territory detached by the Peace Treaty. The objection raised by the Hungarian Treasury that the administrative liabilities of the ceded territories *ipso facto* fall on the successor State is unfounded.

*Case relating to the Revalorization of Annuity awarded against Austrian Railways before World War I (1923)*

*Supreme Court of Austria*

*Entscheidungen des Obersten Gerichtshofs in Zivilrechtssachen*

*Vol. 5 (1923), No. 271, p. 666*

*Annual Digest, 1923-1924, Case 34*

428. By judgment given in 1909 the plaintiff was awarded an annuity as damages for a railway accident for which the Austrian State Railways had been held responsible. Owing to the depreciation of the currency, the plaintiff claimed a valorization of his annuity.

429. The lower Court of Innsbruck dismissed the action on the ground that the Austrian Republic could not be regarded as the successor to the Treasury of the Austrian Monarchy. The Supreme Court confirmed the judgment. It is true, it said, that according to principles of international law, if territory is transferred from one State to another or if new States arise out of an old State, the acquiring State or the new States are bound to take over an appropriate part of the liabilities of the former State. But this liability must be laid down in detail either in a statute or in an international treaty, if it is to be effective.

*Olpinski v. Polish Treasury (Railway Division) (1921)*

*Supreme Court of Poland, O.S.P.I. No. 14*

*Annual Digest, 1919-1922, Case 36*

430. In a case arising out of a railway accident which occurred in August 1918, when certain Polish territories were still under Austrian rule, the plaintiff sued the Polish Treasury, the Polish State having taken over the Austrian State Railways on its territories.

431. The Court of First Instance and the Court of Appeal gave judgment for the plaintiff, on the ground that a railway enterprise is by its nature a private undertaking, so that the Polish Treasury is responsible for the debts and obligations which form an encumbrance on the railway property. This follows, the Court of First Instance said, also from international law, viz. from the recognized principles of legal continuity and of taking over obligations localized in territories which are taken or annexed by a new State. One cannot take over assets without taking over liabilities. The debt in question was not a State debt but one of a transport enterprise, in consequence governed by the Civil Code.

432. The Supreme Court, in a decision rendered before the ratification by Poland of the Peace Treaty of St. Germain found for the defendant Polish Treasury.

<sup>79</sup> The decisions of the lower courts have been reported in *International Law Reports* as follows: Decision of the Tribunal Civil de la Seine in Vol. 1955, p. 226. Decision of the Court of Appeal of Paris in Vol. 1956, p. 191.

Since the action is directed not against the Austrian but against the Polish Treasury, the plaintiff must prove a title under which the debt has passed. The rules of civil law do not find direct application to international relations. The plaintiff would have to sue the Austrian Treasury.

*Co-operative Farmers in Tarnów v. Polish Treasury* (1923)

*Supreme Court of Poland*

*O.S.P. IV, No. 15*

*Annual Digest, 1923-1924, Case 32*

433. The plaintiff had a claim against the Austrian State Railways for damage to goods. After the establishment of Poland and the taking over, by Poland, of the Austrian State Railways, they sued the Polish Treasury, basing themselves on the provisions of section 1409 of the Austrian Civil Code,<sup>80</sup> (still applicable in that part of Poland at the time) which provides that, subject to certain conditions, he who takes over property or a business becomes liable for its debts.

434. The Supreme Court of Poland dismissed the action because the provision of the Civil Code referred to relates only to questions of private law while the Polish State took over the Austrian State railways, by taking over supreme power in the territory in question, that is, by an act of public law.

*Niemec and Niemec v. Bialobrodzic and Polish State Treasury* (1923)

*Supreme Court of Poland*

*O.S.P. II, No. 201*

*Annual Digest, 1923-1924, Case 33*

435. The plaintiffs' buildings were destroyed in 1917 by a fire allegedly caused by sparks from the engine of a passing train. At the time of the accident, the territory in question was under Austrian rule and became Polish after World War I.

436. The Courts of all three instances held that the Polish Treasury could not be held responsible for damage caused before 1 November 1918; if the fire was caused by a spark from the passing engine, the former Austrian Treasury would be responsible. Since the rules of private law are not directly applicable to legal relations of international law, the Civil Code cannot be applied by analogy. Poland is not the successor of the Austrian State. The Treaty of St. Germain settled the problem of mutual accounting and relations in a way which determines that the Republic of Austria is the exclusive representative of the Austrian Monarchy.

*Dzierzbicki v. District Electric Association of Czestochowa* (1934)

*Supreme Court of Poland*

*O.S.P. 1934, 288*

*Annual Digest, 1933-34, Case 38*

437. The lower Court (Court of Appeal of Warsaw) had found for the plaintiff in this action in respect to an accident which before the First World War had occurred through the fault of the Russian railway authorities. The Court of Appeal held that the Polish State Treasury which had taken over the whole enter-

prise of the Russian Vistula Railway thereby assumed the obligations connected with the enterprise and ought to be responsible for its debts.

438. The Supreme Court, however, found that the Polish State is entirely free of obligations which were incumbent upon any of the partitioning Powers with the exception of such obligations as the Polish State has itself assumed. In accordance with the views of the contemporary science of international law, the new State is not the legal successor of the previous State from which it took over part of the territory, and is responsible for the charges and debts only insofar as it has expressly assumed them. There is no reason for not applying this principle to the obligations of the partitioning Powers arising from the responsibility for damage and losses caused in the course of running railways. This applies both to the former Austrian and to the former Russian State Railways.<sup>81</sup>

*Sechter v. Ministry of the Interior* (1929)

*Romania, Court of Cassation*

*Jurisprudenta Română a Inaltei Curti de Casatie si*

*Justitie, Vol. XVII, No. 4 (1930), p. 58*

*Annual Digest, 1929-1930, Case 37*

439. The plaintiff had been commissioned by the governing authorities of Bessarabia (then part of Russia) to print the voting papers for the election of the Russian Constituent Assembly in 1917. In 1918 Romania annexed Bessarabia. The Romanian Courts of all three instances dismissed the plaintiff's claim that Romania as the successor to the former Russian province should pay the debt owed to him by the Bessarabian authorities.

440. International law, the Court of Cassation said, sanctioned the principle of universal succession to rights and obligations only in the case of a total annexation. With regard to partial annexation, the international practice established the rule that the question of debts should be settled by means of a direct arrangement between the States concerned. Consequently, in the absence of an arrangement between Romania and Russia, the claim could not be admitted.

*Mordcovici v. General Administration of Posts and Telegraphs* (1929)

*Romania, Court of Cassation*

*Buletinul decisiunilor Inaltei Curti de Casatie, LXVI*

*(1929); Part 2, p. 150*

*Annual Digest, 1929-1930, Case 38*

441. Bessarabia was annexed by Romania on 8 April 1918; it had been occupied by Romanian troops earlier. While the territory was under Romanian occupation a sum of money sent from a post office in Bessarabia to another place in Bessarabia never reached its destination. The sender sued the Romanian Administration of Posts and Telegraphs.

442. The Court of Cassation, reversing the decision of the lower Court, held that the annexation of Bessa-

<sup>80</sup> See paragraphs 358 *et seq. supra* and paragraph 493 below.

<sup>81</sup> In the *Annual Digest, 1933-1934, p. 89*, it is stated that the Supreme Court "Held: that the appeal must be dismissed". However, the Supreme Court did not dismiss the appeal against the judgment of the Court of Appeal, but — for the reasons summarized *supra* — quashed the decision of the Court of Appeal (*Orzecznictwo Sadów Polskich, Vol. 13, 1934, No. 288, at p. 290*).

rabia to Romania did not cause a succession of the Romanian State to the obligations of the Russian State in respect of Bessarabia. There was no legal rule laying down a universal succession on this ground. Such succession could not take place except on the basis of a convention of the two States, or, failing a convention on the strength of a declaration of the Romanian State recognizing these obligations. Neither of these conditions had been fulfilled. The succession between the two States could not be regarded as a succession in the sense of the Civil Code seeing that the Russian State, of whom payment of the debt could be demanded, still existed.

443. The Romanian Court of Cassation rendered a decision to the same effect in 1931 in the case of *Vozneac v. Autonomous Administration of Posts and Telegraphs (1931)*  
*Romania, Court of Cassation*  
*Jurisprudentia Română a Inaltei Curti de Casatie si Justitie, 1932, pp. 36-38*  
*(Annual Digest, 1931-1932, Case 30)*

## Part B: Succession of Governments

### CHAPTER VII. SUCCESSION OF GOVERNMENTS

444. In this Chapter cases of various types are digested. Some of them relate to the problems raised by the replacement of governments by revolution and similar events, i.e. the "succession of governments" in a narrower sense. In others, courts were called upon to evaluate the validity, or otherwise, of acts of governments not recognized by the Government of the *forum*, of *de facto* and of so-called puppet governments. A considerable part of the summaries which follow deal with situations created, within and outside Germany, as a consequence of activities of the Hitler regime, the annexation of Austria and the replacement of the National Socialist Government by the post-1945 governmental organizations.

*Union of Soviet Socialist Republics v. Onou (1925)*  
*English High Court of Justice, King's Bench Division*  
*Solicitors Journal (1935), p. 676*  
*Annual Digest, 1925-1926, Case 74*

445. The defendant had been appointed Russian Consul-General in London by the Russian Provisional Government (Kerensky) in 1917 and in that capacity had come into possession of certain archives and other property belonging successively or alternatively to the former Russian Imperial and Provisional Governments. The USSR Government after *de jure* recognition by the British Government claimed the delivery of the property and damages for its detention. The Court decided for the plaintiff Government.

*Gdynia Ameryka Linie v. Bogulawski (1952)*  
*England, House of Lords*  
*(1952) 2 All Eng. Law Reports, 470*  
*American Journal of International Law (1953), p. 155*

446. British recognition of the Polish Government originally established in Dublin as from midnight of July 5/6, 1945, did not retroactively invalidate action

taken by the London Polish Government in Exile awarding pay to Polish seamen, even though such action was taken after the British announcement that the London Polish Government would cease to be recognized and that the Dublin Government would be recognized. The Lords of Appeal differed as to how far recognition of the new Government might be given any retroactive effect, but agreed that it would not affect the actions of the Polish Government-in-Exile while the latter remained recognized.

*Case arising out of the purported annexation of part of Yugoslavia by Italy (1954)*  
*Court of First Instance, Milan*  
*Foro Italiano I, 1358 (1954)*  
*International and Comparative Law Quarterly (1955), p. 489*

447. In 1941, without waiting for a peace treaty, Italy annexed North West Slovenia and made it the Italian "Province of Lubiana". The Peace Treaty with Italy of 1947 provided that the frontiers of Italy shall remain those which existed on 1 January 1938 (apart from cessions by Italy). It was held that the implied declaration of the unlawfulness of the so-called annexations made by Italy after January 1938, contained in the Peace Treaty, has brought about, with the inclusion of the Peace Treaty in the Italian legal system, the invalidity and inefficacy of the rules of the Italian system relating to such annexations; and so in consequence has invalidated such status as was brought into being by the rules so abrogated.

*Socony Vacuum Oil Company Claim*  
*United States International Claims Commission*  
*International Law Reports, 1954, p. 55*

448. The Socony Vacuum Oil Company contended that the Independent State of Croatia between 1941 and 1945 carried away, or used, part of its movable property and used or otherwise interfered with its immovable property and that losses and damage resulting from such acts are compensable under the Agreement of 19 July 1948 between the Governments of the United States and Yugoslavia, as "taking by Yugoslavia of property".

449. The Commission decided against the claimant because it found that the Kingdom of Croatia was created by German and Italian forces and threat of force; that during its entire four-year life it was subject to the will of Germany or Italy and that it ceased to exist upon the retreat of the German forces. The Yugoslav Government-in-Exile was the legitimate government of Yugoslavia until it was succeeded by the present government which is now the legitimate government of Yugoslavia. Yugoslavia and Croatia may not be viewed as the same entity and the words "taking by Yugoslavia" may not reasonably be construed to embrace "taking by Croatia". The present Government of Yugoslavia has not been impressed with international responsibility for "takings by Croatia".

450. Croatia is defined by contemporary writers as a "puppet state" or "puppet government" terms which appear to be of comparatively recent adoption in the field of international law. The Commission did not rely upon contemporary expressions with respect to the non-

liability of parent states for acts of "puppet states" because Croatia had all of the characteristics of a "local *de facto* government" or "government of paramount force". The validity of the acts of a "local *de facto* government" both against the parent state and its citizens depends entirely upon its ultimate success. If it fails to establish itself permanently, all such acts perish with it. If those who engage in rebellion succeed, rebellion becomes revolution and the new government will justify its founders. If they fail, all their acts hostile to the rightful government originate no rights which can be recognized by the courts of the nation whose authority and existence have been alike assailed.

451. A "puppet state" or "local *de facto* government" such as Croatia also possesses characteristics of "unsuccessful revolutionists" and "belligerent occupants". A state has no international legal responsibility to compensate for damage to or confiscation of property by either.

452. The Commission is in complete agreement with claimant's position that a successor government under the familiar and generally accepted principle of international law is liable for the acts of its predecessor, such as the taking of property of foreign nationals. However, it finds no basis for the application of the principle to the instant question because the Government of Yugoslavia is not factually or legally a successor to the Government of Croatia.

453. The United States International Claims Commission applied the view expressed in the Socony Vacuum Oil Company Case on the status of Croatia during World War II also on two other occasions when it repeated that under recognized tenets of international law the State of Croatia cannot be held to be a predecessor government of the present Yugoslav Government (*Popp* claim case and *Versic* claim case, *International Law Reports*, 1954, p. 63).

*Galatioto v. Ochoa* (1945)  
Italy, Court of Cassation  
*Foro Italiano*, 69 (1944-46), I, 217  
*Annual Digest*, 1946, Case 18

454. After his dismissal as Duce and his escape from captivity and after the Italian Government entered into an armistice agreement with the Allies in September 1943, Mussolini established in Northern Italy, which was then under German occupation, under the aegis of Hitler a regime styled the Italian Social Republic. The Italian Court of Cassation held that enactments of a *de facto* government in enemy-occupied territory, such as the Italian Social Republic, retained their validity even after the legitimate government had recovered the territory, unless the enactments were of a purely political character or were annulled by the legitimate government.

455. The same principle was applied by other Italian Courts to sustain the binding force of judgments given by the courts set up by the Italian Social Republic (*Pisati v. Pellizari*, Court of First Instance of Brescia, 15 July 1946, *Foro Italiano*, 1947, X, 336; and a decision of the Court of First Instance of Cremona, 15 January 1946, *Giurisprudenza Italiana*, 1946, II, 113) (*Annual Digest*, 1946, p. 43). However, Italian judicial opinion was divided upon the status of the

Italian Social Republic and the effect to be attributed to its acts, as will be seen from the case of *Rainoldi v. Ministero della Guerra*, below.

*Rainoldi v. Ministero della Guerra* (1946)  
Court of First Instance of Brescia  
*Foro Italiano*, 1947, I, 151; *Foro Padano*, 1946, I, 569  
*Annual Digest*, 1946, Case 4

456. The Court decided that the Italian State was not responsible for the damage caused by a motor car employed by the army of the Italian Social Republic. There was no succession of the Italian State to the Italian Social Republic.

457. The Court indicated it may admit, although this is not universally accepted, that international law imposes upon the successor State the duty to assume the liabilities of the predecessor State both towards other States and private persons of foreign nationality and that the successor State owes a corresponding duty towards its own citizens to recognize the succession in domestic law. But, in order to establish succession of States (whether universal or partial), a State must completely absorb another State or must annex part of the territory which formerly belonged to another State. In the case of the Italian Social Republic neither form of succession exists. The Fascist Republican Government was established in Munich by a Splinter group of ex-leaders of the dissolved Fascist Party. It was only a delegated administration of the German armed forces. The Italian Social Republic was at most a group of insurgents with the status of belligerents. The territory where they operated was never that of their own State; the power which they exercised was never consolidated. The Italian declaration of war against Germany (13 October 1943) manifested that the Italian Government had no *animus derelinquendi* in respect of the invaded territories. The Republican Fascist Government did not set up a State, but only a *de facto* authority over a population which was really subject to the German military command. The legislation at present in force accords legal effects only to those acts of ordinary administration which were carried out by the so-called Italian Social Republic in the manner in which they would have been carried out by the legitimate Government.

458. In the *Annual Digest*, 1946, p. 9, reference is made, by way of contrast, to the case of *Costa v. Ministero della Guerra*, 26 March 1946, in which the Court of First Instance, Genoa, held that the members of the Government of the Italian Social Republic constituted a *de facto* government and that the legitimate Italian Government was liable for damage caused by a motor car of the Fire Brigade of the Italian Army which had been taken over by the Social Republic (*Foro Italiano*, 1947, I, 256).

*De Republick Maluku Selatan v. De Rechtspersoon Nieuw-Guinea* (1952)  
Netherlands, High Court of Justice for New Guinea  
*Nederlandse Jurisprudentie* 1953, p. 161. No. 100  
*American Journal of International Law* (1954), p. 511

459. In May 1950, the entity styled Republic of the South Moluccas shipped copra which was seized and sold by the authorities of (then) Netherlands New Guinea. In an action commenced on 8 February 1952,

the court held that the plaintiff entity was entitled to the proceeds of the sale. On the basis of the testimony of one who alleged that he was Prime Minister of the Republic of the South Moluccas which, at least until 30 October 1951, had its seat in the Island of Ceram, the court found that the plaintiff entity had established itself in April 1950, in the exercise of its right of self-determination; that it acted internally and externally as an autonomous and sovereign State; and that during a certain period of time it acted as a *de facto* independent state and therefore could not be denied legal personality. The Court further held that, as a result of the severance of the ties with the Republic of Indonesia, the plaintiff entity automatically succeeded to all the rights and powers of government, including those with respect to the native produce, and that, consequently the Republic of Indonesia or its Copra Authority retained no interest in the shipment in question.

460. The Court of Appeals of Amsterdam, in another case and after an extensive review of the facts, held that the Republic of the South Moluccas had standing to seek provisional relief in a summary proceeding, since in such a proceeding the question whether it was an existing state needed not to be conclusively determined; but that Dutch courts could not pass on the legality of acts done by the Republic of Indonesia *jure imperii*. Accordingly, the Court quashed a decree restraining a Netherlands shipping company from making its vessels available to the Republic of Indonesia for the purpose of transporting troops and supplies to the South Moluccas. (*N.V. Koninklijke Paketvaart Maatschappij v. de Repoeblik Maloekoe Salatan, Nederlandse Jurisprudentie*, 1951, p. 241, No. 129, 8 February 1951. [Note in *American Journal of International Law* (1954), p. 511])

*Cases relating to the succession of funds collected by the Revolutionary Government of Ireland*

461. In connection with the digest of decisions relating to *de facto* governments and related phenomena reference is made to the decisions in the *Fogarty* and *Garanty Safe Deposit Company* cases, see paragraphs 365 and 366 *supra*.

*Ottoman Bank v. Jabaji* (1954)  
Supreme Court of Jordan  
*International Law Reports*, 1954, p. 457.

462. A customer of the Ottoman Bank sued the Bank for the amount of the current account he had at the Jaffa branch and for the value of the articles he had deposited there during the British Mandate in Palestine. The Supreme Court of Jordan did not see any reason to interfere with the finding, of the lower court, that the failure of the Jaffa branch to transfer respondent's moneys to its Amman branch demanded before the termination of the Mandate for Palestine was a breach of the terms of the Bank's contract. The Bank was negligent insofar as it did not move the plaintiff's deposits from a place of danger to a place of safety.

463. The Court did not agree with the Bank's reliance on Jewish legislation as *force majeure*. It said "We should not recognize the legislation enacted by the unrecognized Jewish authorities as long as it harms the

interests of a subject of the Kingdom of Jordan or is against the latter's public policy . . .", the respondent is entitled "to sue for the value of his deposit as long as the Bank admits that it is prevented from delivering it to the owner because of an order of the Jewish authority (which, under the law of this Kingdom, is an illegal authority). Moreover, the Bank is in this position because of its failure to move the deposits outside the boundaries of this Authority."

*The Reich Concordat Case* (1957)  
*Bundesverfassungsgericht* (Constitutional Court of the Federal Republic of Germany)  
*Entscheidungen des Bundesverfassungsgerichts*, Vol. 6 (1957)  
No. 22, p. 309, at p. 336

464. The Constitutional Court held that the Reich Concordat concluded in 1933 between the Hitler Government and the Holy See did not lose its validity with the collapse of the National Socialist terroristic distatorship. The German Reich was one of the contracting parties. The parties aimed at a permanent settlement. The argument which alleges that the Concordat is valid only for the duration of the National Socialist régime is not convincing. The legal character of the State party has, of course, undergone a fundamental change owing to the collapse of the régime of terror. According to the prevailing opinion, which the Court shares, this did, however, not affect the continued existence of the Reich and the continuing validity of the international treaties which the Reich had entered into, excepting treaties which, because of their contents, could not be deemed to survive the National Socialist régime of violence. This is not the case in regard to the Concordat.

465. The establishment, by the Basic Law of Bonn, of a state organization on the territory of the Western Zones of Occupation has not changed anything as far as the validity of the Reich Concordat between the two contracting parties was concerned. Although for the time being the organism created by the Basic Law is limited, in its validity to part of the territory of the Reich, the Federal Republic of Germany is nevertheless identical with the German Reich. It is, as a consequence, bound by the international treaties concluded by the Reich. This applies also to treaties the subject matter of which now comes within the jurisdiction of the *Länder* (Article 123 (2) of the Basic Law of 1949).

466. The argument is not well founded that as far as the Concordat provisions relating to education are concerned, the *Länder* have become parties to it. Normally only the contracting parties have rights and obligations under a treaty. It may happen that in the case of the disappearance of a party to a treaty another entity becomes a party in its place. The party "Germany" has not, however, disappeared. The fact that legislative power with regard to educational matters is now vested in the *Länder*, is of importance only internally, within the Federal Republic. Its Constitution does not make the *Länder* parties to the school provisions of the Concordat.

467. The ruling that the German Reich did not cease to exist owing to the collapse of the Hitler Government

and that the Federal Republic of Germany is identical with the German Reich was given also in decisions of the ordinary courts of Western Germany, some of which are summarized in the following paragraphs.

*K. v. Schleswig-Holstein (1951)*  
*Bundesgerichtshof (Supreme Court of the Federal Republic of Germany)*  
*Entscheidungen des Bundesgerichtshofes in Zivilsachen, Vol. 4, No. 30, p. 266*

468. After an attack in 1942 by Allied bombers on the city of W. and the destruction of the refrigeration plant of the city's slaughter house, the refrigerator of the plaintiff's butcher's shop was requisitioned on behalf of the Reich Government, the requisitioning authority committing the Reich to replace the refrigerator. After the collapse of the Hitler régime, the plaintiff sued the *Land* Schleswig-Holstein for the delivery of a refrigerator or for the payment of compensation. The *Landgericht* in Kiel and the *Oberlandesgericht* (Court of Appeal) *Schleswig* found for the plaintiff.

469. On further appeal, the Supreme Court quashed the judgment of the Court of Appeal and referred the plaintiff to the legislative settlement of the problem which was being expected. The decision turned on the question whether the defendant *Land* was the legal successor to the German Reich.

470. This was not a case of State succession, the Supreme Court said. State succession presupposes that a new sovereignty has established itself over territories heretofore subject to another sovereignty. According to the dominant opinion, shared by the Court, the German Reich did not cease to exist, although it became incapable of acting. As the Reich still exists, the *Länder* cannot have become its successors. Whether the Reich continues to exist after the establishment of the Federal Republic it is not necessary in this case to decide, because even if this were so, the successor would be the Federal Republic itself rather than the *Länder*.

471. A *Land* can, however, be considered to be legally the successor to the Reich in situations where it has assumed, and is exercising, concrete functions of the Reich. Where the *Länder* and, since its establishment, the Federal Republic, exercise the rights and powers of the Reich, they are also responsible for its obligations. This is the case in particular if the obligations relate to branches of the Administration for which special funds have been earmarked and where the new authority has taken over both these separate funds and the appurtenant administrative structure, in which case an "organizational State succession" ("*organisatorische Staatsukzession*") has occurred.

472. As a consequence of this point of view, the Federal Supreme Court has already decided that the Federal Railways are identical with the Reich Railways. (Decision published in *Entscheidungen des Bundesgerichtshofs in Zivilsachen*, Vol. 1, 34). The principle of "organizational State succession" cannot, however, be applied in the present case as the subject does not come within the ordinary administrative tasks of the *Land* and special assets (*Sondervermögen*) for such purposes do not exist.

*S. T. v. The Land N. (1952)*  
*Bundesgerichtshof (Supreme Court of the Federal Republic of Germany)*  
*Entscheidungen des Bundesgerichtshofes in Zivilsachen, Vol. 8, No. 22, p. 169*

473. In July 1933 the plaintiff was sentenced to death by a Special Court of the Hitler régime for a crime allegedly committed in January 1933. The sentence was commuted to imprisonment for life. On 4 April 1945 the plaintiff was released. Subsequently, the criminal proceedings were reopened, the judgment of the Special Court of 1933 was quashed, the plaintiff was acquitted and it was also decided that the State is liable to compensate the plaintiff for the damage he had suffered. The plaintiff, who had received compensation in the amount of approximately DM 30,000 (\$7,500) sued the defendant *Land* for additional damages, including a claim of compensation for pain and sufferings due to ill-treatment during his imprisonment.

474. The *Landgericht Lüneburg* and the *Oberlandesgericht Celle* found for the defendant *Land* which they held not to be liable for this debt of the Reich. The Supreme Court quashed the decision of the Court of Appeal and referred the matter back to the trial court.

475. The transformation of Germany after the collapse of the Hitler Government was not State succession within the meaning of international law. The principles of international law relating to the assumption of liabilities in the case of State succession are not, or at least are not directly, applicable. But even if the principle of international law relating to State succession were applied, this would not lead to the conclusion that the defendant *Land* is liable. According to the principles of international law, only the "relating debts" (*die sogenannten "bezüglichen Schulden"*) and administrative debts pass to the Successor State. "Relating debts" ("local debts") are those which have arisen in the interest of the territory concerned (*res transit cum suo onere*) and those secured by mortgage; administrative debts are those which have their origin in the ordinary course of administration and are authorized in the budget. The obligation in issue stems from a prohibited action and from legal responsibility for it, and does not come within either the concepts of "relative debts" or of "administrative debts". It is exactly delictual obligations of this type which under the theory of international law do not *ipso facto* pass to the successor.

476. The Supreme Court found the solution to the question in analogies with private law. Who takes over assets or property is under certain conditions liable to the transferor's creditors (Section 419 of the German Civil Code). In the case of the winding up of a joint stock company, certain obligations pass to those who take over its enterprise. In such cases not the formal identity of the legal *persona* but the substantive identity of the organization and of its means and purposes is decisive. This continuity must, the Court said, prevail *a fortiori* in public life, where it is far more important for the community. Accidents, *ultra vires* decisions, violations of procedural rules and legally wrong judgments, cases of disregard for the proper care for prisoners and even their occasional ill-treatment, can and do occur in the course of the

administration of justice also when the greatest care is taken to avoid them. As the defendant *Land* has taken over the Reich's functions in the field of the administration of justice, it is on the basis of this continuity of functions (functional succession, *Funktionsnachfolge*) liable also for the Reich's debts of this type. The confidence in constitutional and legal guarantees in this field requires that they remain independent of changes in the subject exercising the function.

477. The decision was based on the consideration that the sentence of 1933, while wrong and unjust, had been passed in the forms applied by normal courts of justice. The Supreme Court did not express an opinion on the question of who is liable for acts of the Hitler régime when even the most elementary precepts were disregarded, and for ill-treatment, e.g., in concentration camps. For these cases, special legislation was required [and eventually enacted].

*Civil Service (Lower Saxony) Case (1954)*  
*Bundesgericht (Supreme Court of the Federal Republic of Germany)*  
*J. Z. 9 (1954) p. 489*  
*International Law Reports, 1954, p. 75*

478. A former Prussian civil servant and later pensioner sued the *Land* Lower Saxony for arrears of his pension. The Federal Supreme Court stated that this was a case of so-called functional succession.<sup>82</sup> The newly constituted *Land* of Lower Saxony comprised the district in which the plaintiff had performed his services to the State of Prussia (now extinct) and was therefore liable to pay the arrears of plaintiff's pension. The concept of functional succession has been developed in the jurisprudence of the Federal Supreme Court. With regard to the liability of the State for the violation of official duties, the Court had in its case law, so far as concerns the disappearance of a juridical person of public law — including the factual disappearance of such a person as a result of the legal incapacity of the whole of the German Reich — adopted as the decisive criterion, not the formal identity of the juridical person, but the substantive identity of the organization, its means and its purposes, and it has held the functional successor liable for the obligations of the functional predecessor. This principle has also been applied to liabilities resulting from contracts with civil servants where such contracts have been made by the juridical person formerly responsible in the functional sense. The result has been that the liability of the *Länder* arising from functional succession has been extended so as to include the claims of civil servants who on 8 May 1945 occupied established positions within the territory of the *Land* concerned. There was no reason to distinguish in this regard between a civil servant holding office and a civil servant in retirement.

*W.J. v. Land Niedersachsen (1955)*  
*Bundesgerichtshof (Supreme Court of the Federal Republic of Germany)*  
*Entscheidungen des Bundesgerichtshofes in Zivilsachen Vol. 16, No. 24, p. 184*

479. On 8 May 1939 the plaintiff bought from the *Land* Prussia real property which had been owned by

the publishers of a Social-Democratic newspaper and which Prussia had confiscated on the basis of the Hitler-German Act on the Confiscation of the Property of Enemies of the Nation and of the State dated 14 July 1933. In 1946/1947 the *Land* Prussia was dissolved by legislation of the Allied Control Council. The defendant *Land* Niedersachsen was established in 1946 by the merger of the former *Länder* Brunswick, Hanover, Oldenburg and Schaumburg-Lippe, of which it was expressly made the legal successor, and of parts of formerly Prussian territory.

480. The plaintiff was being sued by the owners of the confiscated property for its restitution and, in his turn, sued the *Land* Niedersachsen, demanding a declaratory judgment to the effect that the *Land* is responsible for the damage he will suffer if he will be required to make restitution of the property to the Social Democratic party.

481. The Courts of first and second instances found for the plaintiff, the Supreme Court rejected his demand. Niedersachsen was not the legal successor of Prussia. The principle of "Functional succession" which the Courts have elaborated (see paragraphs 471 and 476 *supra*) for reasons of social-policy in the interest of individuals the settlement of whose cases could not, also in the general interest, wait until a solution by statute was achieved, was an auxiliary construction which cannot, in general, be extended to claims based on private law of the type under consideration.

482. In the case of *S.H. v. Land Niedersachsen (1955)*, *Entscheidungen des Bundesgerichtshofes in Zivilsachen*, Vol. 16, No. 25, where the facts were similar to those in *W.J. v. Land Niedersachsen*, the Supreme Court again held that the defendant *Land* was not liable.

483. In 1948, i.e., before the establishment of the Federal Republic, the Court of Appeal (*Oberlandesgericht*) of Hamburg, after stating that the Reich had remained a subject of general international law, stated that claims of the former Treasury of the German Navy (*Marinefiskus*) continue to be owned by the Reich. It rejected the argument that the property of the former German armed forces had become war booty of the Allies, in which case the consequences would have been that they were vested in the British Crown. (*Monatschrift für Deutsches Reich (1949)*, p. 222; *Fontes Juris Gentium*, A, II, Vol. 3 (1945-1949)).

*German-Alsation Railway Accident Case (1954)*  
*Bundesgerichtshof (Supreme Court of the Federal Republic of Germany)*  
*J.Z. 10 (1955), p. 19*  
*International Law Reports, 1954, p. 49*

484. The plaintiff sustained personal injuries while travelling in 1942 in a train in Alsace where train services were then being operated by the Railway Administration of the German Reich. The Reich Railway Administration admitted liability. On the part of the plaintiff it was contended that the Railway Administration of the Federal Republic was identical in law with the Railway Administration of the Reich and that the former was therefore liable for the debts of the latter.

<sup>82</sup> See paragraphs 471 and 476, *supra*.

485. The Federal Supreme Court held that the defendant is not responsible for these liabilities. It is a condition of the liability of the Federal Railways that it has arisen from the operation of railway lines which form part of the assets of the Federal Railways. This does not apply to a liability which has arisen from the operation of railway lines situated outside the territory of the Federal Republic. There was no reason why the Legislature should have burdened the Federal Railways, which were able to take possession only of part of the assets of the Reich Railways with liabilities of the latter which are in no way connected with the present assets of the Federal Railways.

486. Even in cases of State succession, the liability of the new owner of the assets is by no means automatic. The concept of partial identity between the Reich Railways and the Federal Railways, as well as the concept of functional succession, presuppose that the liability in issue is one related to the assets which have been transferred.

*Germany. Collision with postal motor vehicle in Upper Silesia (1951)*  
*Court of Appeal of Cologne*  
*N.J.W. 5 (1952), p. 1300*  
*International Law Reports, 1951, Case 29*

487. In 1943 plaintiff sustained personal injuries as a result of a collision with a motor vehicle owned by the Reich Postal Administration and operating in Upper Silesia.

488. The Court of Appeal held that the Federal Republic of Germany was not liable to the plaintiff in damages. The former Supreme Court of the British Zone and the Supreme Court of the Federal Republic have previously held, with regard to the Federal Railways whose legal position is akin to that of the Federal Postal Administration that there is partial identity between the Federal Railways and the former Reich Railways, viz. personal and legal identity subject to a limitation to the territory of the Federal Republic. In view of the fact that the alleged liability of the Reich Postal Administration vis-à-vis the plaintiff arose wholly outside that territory and has no connection whatsoever with the latter, any liability of the Federal Postal Administration is out of the question.

489. Insofar as concerns identity between the Federal Republic and the German Reich, the same principles must apply. Having regard to the fact that the Federal territory as now existing only constitutes a part of the territory of the Reich as it existed when the plaintiff's alleged claim arose, the practical result of holding the Federal Republic liable for all debts of the German Reich — regardless of when and where such debts arose — would indeed be untenable. Such unlimited liability cannot simply be founded on the doctrine of identity.

*Steinberg et al, v. Custodian of German Property (1957)*  
*Israel Supreme Court*  
*Piskei-Din, II (1957) p. 426*  
*Pesakim Elyonim 27 (1957) p. 414*  
*International Law Reports, 1957, p. 771*

490. The gist of this decision of the Supreme Court of Israel sitting as a High Court of Justice is included here because of its reference to the question of the

status of German authorities. It related to a claim by Steinberg adjudicated upon by the German-Romanian Mixed Arbitral Tribunal in 1926. It is apparently correct, the Court said, that the custodian retains assets belonging to the German State, but is not clear to him if and to what extent the German State, the owner of the assets, can be identified with the German State which is the judgment debtor under the arbitral award. We cannot at all say, the Court observed, that this reasoning is false even though on the last question — that of identity of the State — the situation is equivocal. Consequently, the applicants would do well to bring their case before the competent court and prove their claim in the usual way.

491. A note in *International Law Reports, 1957*, p. 773, explains that the Supreme Court acted in this case, to some extent, as an administrative tribunal and was only concerned with the performance of his public duties by the Custodian for German property. The underlying issues of fact and law were properly for determination by the District Court.

*Jordan v. Austrian Republic and Taubner (1947)*  
*Supreme Court of Austria*  
*Annual Digest, 1947, Case 15*

492. The Supreme Court decided that the Republic of Austria is not responsible for the damage caused in 1943 by the negligence of the driver of a mail van belonging to the *German Reichspost* (Imperial Mail). In March 1938 Austria lost its independence and sovereignty as the result of its occupation by the German Reich; it recovered its sovereign rights in April 1945. From 1938 to 1945 the sovereign prerogatives in the territory of the Austrian Republic, including the administration of the postal services, were exercised by Germany. The Austrian Republic cannot be regarded as legal successor of the German Reich with regard to sovereign rights in Austrian territory.

*German Railways Case (1949)*  
*Landesgericht (Court of First Instance), Vienna*  
*O.J.Z. 4 (1949) p. 623, No. 690*  
*Annual Digest, 1949, Case 21*

493. In a suit for payment for work done during the German rule in Austria, the Court held that Austria was not liable. Section 1409 of the Austrian Civil Code (see paragraphs 358 and 433 *supra*) did not apply. The appellant would be able to succeed against the Austrian Republic only if between 13 March 1938 and 27 April 1945 he had done work which was of benefit to Austria even after 27 April 1945.

*Kleih v. Austria (1948)*  
*Supreme Court of Austria*  
*Annual Digest, 1948, Case 18*

494. The Courts of all three instances held the Republic of Austria liable in an action for payment for work commissioned by the German State Railways while Austria was incorporated in Nazi Germany. The work related exclusively to, and had been executed for, the benefit of the Austrian State Railways.

495. The Supreme Court stated that Austria was the owner of the Austrian State Railways, and that the assets of the Railways remained its property even when

it was deprived of possession by the arbitrary occupation of Austria by Germany. The Republic was restored to the full exercise of its rights. Admittedly, the German State Railways had not the intention, in commissioning the work here in dispute, to undertake it in the name of the Republic. Similarly, the plaintiff may not, in executing it, have intended to benefit the Republic of Austria. In actual fact, however, its work benefits the Republic as owner of the railway installations. The defendant admits that she utilizes the installations built by the plaintiff, but she contends that it cannot yet be said with certainty that she will have derived lasting benefit from them, for the principles governing the division of the assets of the German State Railways in Austria between Germany, Austria and the Allies, and the amount of compensation to be paid by the defendant, have not yet been settled. The claim to remuneration for work done for the benefit of another is not affected by the subsequent frustration of the benefit.

*In re Police Constable P. (1949)*  
*Supreme Court of Austria*  
*O.J.Z. 4 (1949) p. 577, No. 655*  
*Annual Digest, 1949, Case 23*

496. The contention that there is no continuity in law between the constitutional structure of the Austrian State before 1938 and that after 1949 is, the Court ruled, erroneous. The continuity of the Austrian State before the occupation in 1938 and after the liberation in 1945 cannot be seriously contested having regard to Art. I of the Declaration of Independence of 1 May 1945. Therefore, no new oath of allegiance of a police constable is necessary.

*Tax Legislation (Austria) Case (1949)*  
*Administrative Court of Austria*  
*Vw. G.H. (F) 4 (1949), p. 6*  
*Annual Digest, 1949, Case 25*

497. Doctrine and jurisprudence alike reject the view that the Republic of Austria is the legal successor of the German Reich. Both doctrine and jurisprudence are of opinion that Austrian sovereignty continued to exist during the occupation of Austria by the German Reich and that its exercise was merely in abeyance during that period. Appellant cannot off-set a customs export rebate (related to taxation only in form) against tax liabilities vis-à-vis the reconstituted Austrian State.

*Schäcke and another v. Republic of Austria (1950)*  
*Supreme Restitution Commission of Austria*  
*International Law Reports, 1950, Case 11*

498. After the incorporation of Austria in the German Reich, the German Secret State Police confiscated a factory owned by Austrian citizens. In 1939 the Ministry of Finance in Vienna sold the confiscated factory to the applicants. After the liberation of Austria in 1945,

the applicants had to return the factory to its true owners who had been deprived of their property by virtue of the discriminatory legislation of the National Socialist régime. They sued the Republic of Austria for damages for non-performance of the 1939 contract contending that Austria was the successor of the entity from whom the applicants had bought the factory. It was held that Austria was not the successor of the sub-division of the German Reich which existed on its present territory at the relevant time, i.e., the "Land" or "Reichsgau" Austria or "Ostmark".

*Austrian State Institute v. X (1958)*  
*Constitutional Court of Austria*  
*Collection (1958) No. 3324*  
*Journal du droit international (Clunet), 1962, p. 732*

499. An Austrian State Institute for testing foodstuffs was in existence at the time of the *Anschluss* in 1938; it continued its activities between 1938 and 1945 as an Institute of the German Reich. The Institute demanded the payment of fees for tests performed between April 1944 and April 1945.

500. The Constitutional Court rejected the claim on the ground that the Republic of Austria does not consider itself as being the legal successor (*Rechnachfolger, successeur juridique*) of the German Reich. For this reason, the Republic of Austria refuses to assume the liabilities of the Reich. The same conclusion must also be drawn regarding the transfer to Austria of claims of the Reich in the field of public law. General international law does not contain a rule to the effect that public law claims of this type pass to the territorial successor (*Gebietsnachfolger, successeur territorial*). To effect such a passing of the claim, a special international law title (*ein besonderer völkerrechtlicher Titel; un titre particulier de droit international*), would be required which does not exist in this case. The claim of the German Reich was located on Austrian territory, and indissolubly linked to the exercise of power by the German Reich within that territory. This claim lapsed with the collapse of this domination. So Art. 22 of the State Treaty (pertaining to the transfer of German property to Austria) cannot be applied to claims of this type.

*German Assets in Austria (1959)*  
*Administrative Court of Austria*  
*Collection No. 5096 A*  
*Journal du droit international (Clunet) (1962), p. 732*

501. By the State Treaty of 1955 the Allies transferred to the Republic of Austria only the assets which are described in the Treaty as German property and are situated in Austria. This was not a universal legal succession (*Gesamtrechtsnachfolge, succession globale*) and accordingly the Republic of Austria did not become liable for the debts of the German Reich.

# SPECIAL MISSIONS

[Agenda item 5]

## DOCUMENT A/CN.4/155

Working paper prepared by the Secretariat

[Original: English/French]  
[11 March 1963]

### Introduction

1. By resolution 1687 (XVI), adopted on 18 December 1961, the General Assembly requested the International Law Commission "to study further the subject of special missions and to report thereon to the General Assembly". The Commission accordingly decided, at its 669th meeting held on 27 June 1962, to place the question of special missions on the agenda of its next session. It was also agreed that the Secretariat should prepare a study, which it was understood would be simply a survey of the question, for the assistance of the Commission.

2. The following study consists of three parts: (i) a preliminary survey of the topic and of previous attempts to determine the law relating to diplomatic relations between States in so far as these attempts have referred to special missions; (ii) a history of the consideration of the topic by United Nations bodies, including the International Law Commission and; (iii) a short summary of a few of the main questions which the Commission might wish to decide as the basis for further work.

#### **I. Preliminary survey of the topic and of previous attempts to determine the law relating to diplomatic relations between States in so far as these have referred to special missions**

3. The custom of sending a special envoy on mission from one State to another, in order to mark the dignity or importance of a particular occasion, is probably the oldest of all means by which diplomatic relations may be conducted.<sup>1</sup> It was only with the emergence of national States on a modern pattern that permanently accredited diplomatic missions, entrusted with a full range of powers, came to take the place of temporary ambassadors sent specially from one sovereign to another. However, although the legal rules which were evolved to determine diplomatic relations between States were therefore based largely on the conduct of permanent missions, so that special missions came to seem merely a particular variant of the other, the sending of special

missions was never discontinued. During the eighteenth and nineteenth centuries such missions were frequently dispatched in order to provide suitable State representation at major ceremonial occasions, such as coronations or royal weddings, or for the purposes of important political negotiations, particularly those held at international congresses. The present century, in particular since 1945, has seen a marked increase in the number and importance of special missions due to a combination of factors, the most significant of which would appear to be the availability of rapid transport by air; the enlargement of the scope of diplomatic activities to include subjects requiring special technical knowledge; and, on some occasions, a return to the conduct of diplomatic negotiations on major issues through confidential envoys sent directly between heads of States.<sup>2</sup> Although there has been an increase in the activities of permanent missions over the same period, the additional personnel required have for the most part been found by enlarging the diplomatic corps of the country concerned. In the case of special missions, however, it has remained frequent to entrust the mission to someone from outside the normal diplomatic ranks. It is not, therefore, surprising that although for reasons of convenience Governments have in most instances agreed to receive such missions, the procedure under which they have been sent and received has often been informal, and their precise status has often left unspecified or been the object of only implicit agreement between the two States concerned.

4. In the treatises of writers, there are to be found relatively few rules or international law relating specifically to special missions, as distinct from permanent missions. The principles of international law relating to diplomatic intercourse have been based largely on the operation of permanently accredited missions. The majority of legal writers, whilst noting the existence of special missions and the occasions on which they have been sent, have not singled out for particular discussion, for example, the manner of accreditation or the enjoy-

<sup>1</sup> On the history of diplomacy see Krause, *Die Entwicklung der ständigen Diplomatie*, Leipzig (1885) and generally Potemkin, *Histoire de la Diplomatie* (3 vols.), trans. from Russian, Paris (no date).

<sup>2</sup> This practice has been particularly followed by the United States, as evidenced by the appointment by the President of the United States of "executive agents", as opposed to normal diplomatic representatives. See Wriston, "The Special Envoy", *Foreign Affairs*, January 1960, p. 219; Waters, "The Ad Hoc Diplomat: A Legal and Historical Analysis", *Wayne Law Review*, 1959-60, p. 380; and Wriston, *Executive Agents in American Foreign Relations*, Baltimore (1929).

ment of diplomatic privileges and immunities.<sup>3</sup> Moreover, although there is a considerable literature relating to the earlier practice of States in the conduct of diplomatic relations, relatively little is available regarding the detailed aspects of the dispatch of special missions in recent years. Satow's *Guide to Diplomatic Practice*,<sup>4</sup> whilst stating that ceremonial missions and their suites enjoy diplomatic immunities and privileges, points out that those sent to perform other more specialized functions must possess the quality of State representatives if they are to enjoy diplomatic privileges and immunities as of right.

5. The two collections of national legislation relating to diplomatic envoys, namely Feller and Hudson, *Diplomatic and Consular Laws and Regulation*,<sup>5</sup> and the United Nations, *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities*,<sup>6</sup> also contain little that relates specifically to special missions. The first work deals principally with the official organization of the diplomatic and consular activities of the States concerned. It would appear that the majority of the approximately seventy States covered have not provided expressly in their national legislation for the sending of special missions; where provision has been made, this has usually been no more than the mention of the power of the Executive to make the appointment and a statement that the head of the special mission need not form of the normal diplomatic corps, or that its members hold only temporary rank. The following article from the legislation of Peru may be regarded as exemplifying many of these provisions:

"The Executive Power may accredit ambassadors or ministers plenipotentiary for acts of international courtesy, for special diplomatic negotiations with foreign governments or for international congresses, but these appointments do not give the persons chosen the right to enter the diplomatic career service."<sup>7</sup>

<sup>3</sup> Hackworth, who deals with the topic at some length, is an exception. He states:

"In addition to diplomatic representatives appointed for general purposes, governments frequently designate envoys for particular purposes, such as the conduct of special negotiations and attendance at coronations, inaugurations, or other State ceremonies to which special importance is attached. In some instances the ranking diplomatic officer accredited to the country in which the ceremony is to take place is given a special designation for the occasion, and in other instances another person is designated. The designations, like the occasions giving rise to them, are always of a temporary character." (*Digest of International Law*, vol. IV, p. 412.)

"Special envoys with diplomatic rank have been accredited in various ways. In some instances they have been the bearers of autographed letters of credence addressed to the heads of foreign states . . . In [other] instances it has been necessary to telegraph the letters of credence of special envoys . . . In some instances the Department of State has merely telegraphed to the Foreign Minister of the country to which the special envoy was accredited in regard to his designation . . ." (*ibid.*, pp. 413-414).

See also *op. cit.*, at pp. 649-651.

<sup>4</sup> Satow, *Guide to Diplomatic Practice*, fourth edition, London (1956); see esp. at pp. 43; 82-83; 207-210; and 274

<sup>5</sup> Two vols., Washington (1931). The introductory notes contain a useful summary of the history of the diplomatic service of each country.

<sup>6</sup> United Nations Legislative Series, vol. VII *Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities* (1958), ST/LEG/SER. B/7, United Nations publication, Sales No. 58. V. 3.

<sup>7</sup> Article 45, Chapter XII of the Law No. 6602, of 30 March 1929. Feller and Hudson, *op. cit.*, at pp. 987-988. It may be

Similarly in the United Nations volume, the majority of States do not appear to have made express provision for special missions in the regulation of diplomatic privileges and immunities. In several cases where express legislation exists, however, it provides for customs privileges to be granted even though the persons comprising the special mission are not permanently accredited to the State concerned.<sup>8</sup>

6. In the previous attempts to codify or restate the law relating to diplomatic intercourse between States, it would appear that the majority of rules have usually been considered equally applicable to both special and permanent missions, although certain modifications based on the temporary nature of special missions, or on the limited task entrusted to them, have also been recognized. The Regulation of Vienna (1815), refers directly to special missions only in article 3, which states:

"Diplomatic envoys in extraordinary missions shall not by this fact be entitled to any superiority in rank."

Although concerned only with the classification of diplomatic agents, the Regulation has continued to be of importance and the provisions of article 3 have continued to be applied. Genet, however, notes certain cases in which special missions have been accorded precedence and comments as follows:

"In general, a person charged with a special mission has no diplomatic rank as such by virtue of the

noted that the States of Latin America form the majority of States making express provision for the sending of special missions.

<sup>8</sup> The material furnished by Belgium and Israel for inclusion in the volume in the *United Nations Legislative Series* is of interest in this regard.

*Belgium: Instruction du Ministère des Finances Concernant les Immunités Diplomatiques, 1955 (Administration des Douanes et Accises) Titre II, Chapitre V, Section 1.*

"A. Heads of diplomatic missions

"The following are distinguished:

"44 On the one hand, persons (ceremonial or etiquette envoys and ambassadors extraordinary of a non-political character) appointed to represent the Head of State abroad on certain ceremonial occasions, e.g. weddings, coronations, jubilee celebrations or funerals.

"This category also includes persons sent by a State as its diplomatic representatives on a special mission, for the purpose of conducting negotiations, or attending a conference or congress.

"This instruction will not go into further detail concerning the status of these persons; the special and temporary nature of their mission does not, for customs purposes, require more than courtesy treatment similar to that granted to members of Governments (ministers) for their luggage." *Ibid.*, at p. 36.

*Israel: Survey of the Law and Practice of Israel in the Matter of Diplomatic and Consular Intercourse and Immunities, Annexed to the Note of 2 October 1956 received from the Permanent Mission of Israel to the United Nations.*

"5 In the short period of Israel's independent existence there is perhaps little practice which is of major significance to the international law of diplomatic intercourse. The most important feature is the appearance, frequently on the basis of reciprocity, of special missions (variously styled) during the early period of the existence of the State. Before certain foreign Powers had extended to Israel *de jure* or full recognition, and occasionally even before they had extended *de facto* recognition, special missions had been established (not always on the basis of full reciprocity), occasionally being accredited to the Head of the State and occasionally to the Foreign Minister." *Ibid.*, at pp. 176-177.

special mission, although he has diplomatic status.

"Any accredited agent therefore has precedence of them in principle; in practice, however, and as a special favour, as it were, they are usually given precedence and special respect is paid to envoys in this category. 'They do not take precedence, they receive it'. *Inter se* they are classed in accordance with their actual title; among people of the same title, it is the order in which their credentials were handed over that gives them their rank."<sup>9</sup>

7. In the Regulation, however, as in subsequent attempts to codify or restate the law made by private or unofficial bodies, little is said which relates specifically to special missions. Bluntschli's draft code<sup>10</sup> states merely:

"227. When the mission has a special object, as in the case of ceremonial missions, it is completed upon the accomplishment of that object."

without otherwise distinguishing such missions from others. Fiore's draft code of 1890<sup>11</sup> specified that diplomatic agents include "persons entrusted with special missions" (article 435) and that only the head of a permanent mission may place the arms and flag of his State over his official residence (article 459). Pessoa's draft code (1911)<sup>12</sup> goes somewhat further in providing that:

"It is the right of every State to determine the class of its ministers, to give a temporary or permanent character to the mission, and to determine its personnel" (chapter II, article 113).

and that:

"The diplomatic agent charged with a special mission should show full powers in order to negotiate or conclude a treaty" (chapter II, article 116).

As regards the conclusion of a special mission he states:

"A diplomatic mission is ended:

"...  
"(b) by the termination of the negotiation, if the mission is special, or when the impossibility of concluding it becomes manifest; . . ." (chapter II, article 149).

Lord Phillimore's draft code<sup>13</sup>, placed before the International Law Association in 1926, makes the division between permanent and special missions of more central importance:

"2. A diplomatic agent may be accredited either for a particular purpose or generally for conveying or receiving communications on any matters which may arise between the two States. His stay in the

State to which he is accredited may be temporary only, being limited to the time necessary for discharging a particular purpose or particular purposes; or he may be resident minister."

He further provides that although a State may decline to receive a permanent mission, it is bound to receive a temporary one (article 3). The codification put forward by Strupp at the same session of the International Law Association<sup>14</sup> also distinguishes "envoys appointed for a special purpose" (article 1 (d)) from others, and specifies that:

"Special envoys, together with the official personnel accompanying them, enjoy the same prerogatives as permanently appointed diplomats." (article XX)<sup>15</sup>

8. The Institute of International Law, which considered the question of diplomatic immunities both in 1895 and 1929, made no provision on either occasion specifically relating to special missions.

9. The Havana Convention on Diplomatic Officers<sup>16</sup> concluded at the Sixth International Conference of American States in 1928, makes a clear distinction between envoys sent on ordinary and on extraordinary missions. Articles 2 and 3 state:

"Diplomatic envoys are classed as ordinary or extraordinary. Those who permanently represent the Government of one State before that of another are ordinary. Those entrusted with a special mission or those who are accredited to represent the Government in international conferences and congresses or other international bodies are extraordinary.

"Except as concerns precedence and etiquette, diplomatic officers, whatever their category, have the same rights, prerogatives and immunities. Etiquette depends upon diplomatic usages in general as well as upon the laws and regulations of the country to which the officers are accredited."

Section V, article 25, of the Convention provides also that:

"The mission of the diplomatic officer ends:

"...  
"3. By the solution of the matter, if the mission had been created for a particular question; . . ."

10. The Harvard Draft Convention on Diplomatic Privileges and Immunities of 1932 contains a broad definition of a "mission" as "a person or group of persons publicly sent by one state to another state to perform diplomatic functions" (article 1 (b)). The commentary states:

"The term 'mission' is used to denote the diplomatic group whatever be the permanency of its tenure or its official rank (embassy, legation, special mission) . . . The term is broad enough to include special missions of a political or ceremonial character which are

<sup>9</sup> Genet, *Traité de Diplomatie et de Droit Diplomatique*, 3 vols., Paris (1931), vol. 1, pp. 86-87.

<sup>10</sup> Bluntschli, *Le droit international codifié*, Paris 1870 (trans. Lardy). The pertinent sections are reproduced in the *Harvard Research in International Law*, 1932, pp. 144 et seq.

<sup>11</sup> Fiore, *International Law Codified and Its Legal Organization of the Society of States* (trans. Borcherd), New York, 1918. *Harvard Research in International Law*, 1932, pp. 153 et seq.

<sup>12</sup> Pessoa, *Projecto de Codigo de Direito Internacional Publico*, Rio de Janeiro, (1911). Translation in *Harvard Research in International Law*, 1932, pp. 164 et seq.

<sup>13</sup> Lord Phillimore, "Proposed Codification of the Law Regarding the Representation of States", *International Law Association, Report of the Thirty-Fourth Conference*, Vienna, 1926, pp. 399 et seq.

<sup>14</sup> Strupp, "Réforme et codification du droit international. *Projet d'une convention sur l'immunité en droit international*", *ibid.*, pp. 426 et seq.

<sup>15</sup> The substance of this article was also contained in the draft code prepared by the Japanese Branch of the International Law Association in 1926. *Ibid.*, pp. 380 et seq.

<sup>16</sup> The Convention is reproduced in United Nations Legislative Series, vol. VII, *op. cit.*, p. 419. The Convention has been ratified by the following States: Brazil, Columbia, Costa Rica, Cuba, Chile, Ecuador, El Salvador, Haiti, Mexico, Nicaragua, Panama, Peru, Dominican Republic, Uruguay, Venezuela. Chile and Peru ratified subject to reservations.

accredited to the government of the receiving state. Members of special missions probably enjoy the same privileges and immunities as do those of permanent mission."<sup>17</sup>

As authority for the latter proposition the comment refers to article 3 of the Regulation of Vienna, quoted above, and to the Havana Convention on Diplomatic Officers.

11. Whilst the various instruments and studies referred to above do not purport to reflect the actual practice of States in every particular, it is probable that they represent the position adopted by the majority of States in respect to special missions. Four broad principles at least appear to be generally recognized: (i) that, subject to consent, special missions may be sent; (ii) that such missions, being composed of State representatives, are entitled to diplomatic privileges and immunities; (iii) that they receive no precedence *ex proprio vigore* over permanent missions; and (iv) that the mission is terminated when its object is achieved.

## II. Consideration of the question of special missions by the International Law Commission and other United Nations bodies

### A. Developments before 1960

12. The history of the consideration by United Nations bodies of the topic of special missions is closely linked with that given to diplomatic relations in general. In 1952, the General Assembly requested the International Law Commission to undertake the codification of "diplomatic intercourse and immunities".<sup>18</sup> Accordingly, at its sixth session in 1954, the Commission appointed Mr. A.E.F. Sandström Special Rapporteur for the subject (A/2693, chapter V, paragraph 73). Owing to lack of time the Commission was unable to consider the matter further until 1957. In that year, at its ninth session, the Commission adopted a provisional set of draft articles relating to diplomatic intercourse and immunities, with a commentary, which was sent to Member States for their observations. At its tenth session in 1958 the Commission made a number of changes in the earlier draft in the light of the replies it had received. The 1958 draft (A/3859, chapter III), was then forwarded to the General Assembly with a proposal that it should be recommended for adoption as a Convention to Member States. This draft was accordingly considered by the United Nations Conference on Diplomatic Intercourse and Immunities, held at Vienna from 2 March to 14 April 1961, and formed the basis of the Vienna Convention on Diplomatic Relations adopted there.<sup>19</sup>

13. The 1958 draft dealt only with permanent diplomatic missions. At its tenth session in 1958 the International Law Commission accordingly suggested (*ibid.*, paragraph 51), that a study should be made by the

Rapporteur of the other forms of diplomatic relations which

"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."

### B. Twelfth session of the International Law Commission, 1960

14. When the Commission again took up *ad hoc* diplomacy at its twelfth session in 1960, its decisions related principally to the scope of the topic,<sup>20</sup> and to the extent to which its 1958 draft on permanent missions could be made applicable to special missions. As to the scope of the topic, the Commission decided first of all not to deal with the privileges and immunities of delegates to congresses and conferences.<sup>21</sup> It was explained in the Commission's report (A/4425, paragraphs 32 and 33 that the question of diplomatic conferences was linked to that of relations between States and international organizations (which the Commission had been invited to consider by General Assembly resolution 1289 (XIII) of 5 December 1958), and that the link made it difficult to undertake the subject of diplomatic conferences in isolation.

15. The Commission also decided not to distinguish between itinerant envoys and special missions.<sup>22</sup> The report explained that an itinerant envoy was a special mission vis-à-vis each of the States visited, and that there was no need for rules differing from those applicable to such missions (*ibid.*, paragraph 34).

16. As to the extent to which the 1958 draft could be made applicable to special missions, there were at the outset three different positions. One was that taken in the report of the Special Rapporteur, who stated (A/CN.4/129, paragraphs 7 and 8):

"7. Broadly speaking, it seems natural that rules relating to special features of a permanent mission which do not obtain in respect of special missions should not apply, whereas rules inspired by considerations of the similar nature and aims of the functions in question should be applied.

"8. Applying this criterion, the dividing line between the applicable and non-applicable provisions of the 1958 draft will fall between Section I, which contains, for the most part, articles having in view the special conditions of permanent missions, and Sections II, III and IV, which refer directly or indirectly to the privileges and immunities based essentially on the requirements of the diplomatic function. Sections V [on non-discrimination] and VI [on settlement of disputes] refer to the draft agreement as such, and ought, therefore, to have general application."

17. On the other hand, Mr. Jiménez de Aréchaga submitted a memorandum (A/CN.4/L.88) concluding that

"... all the provisions of the 1958 draft are relevant to special missions and should be made appli-

<sup>17</sup> *Harvard Research in International Law* (1932) at p. 42.

<sup>18</sup> General Assembly resolution 685 (VII) of 5 December 1952.

<sup>19</sup> For the text of the Convention, see United Nations Conference on Diplomatic Intercourse and Immunities, Official Records, vol. II (A/CONF. 20/1/Add 1), United Nations publication, Sales No. 62. X. 1, p. 82.

<sup>20</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 565th, 567th, 569th, 576th and 579th meetings.

<sup>21</sup> *Ibid.*, 565th meeting, paragraph 25.

<sup>22</sup> *Ibid.*, paragraph 26.

cable to them, with the proviso that article 3 (Functions of a diplomatic mission) should be interpreted as applying only within the scope of the specific task assigned to the special mission.

"The only additional provision which seems to be required in the case of special missions is one concerning termination of the mission on fulfilment of the entrusted assignment . . ."

18. The third position was that taken by Sir Gerald Fitzmaurice, who considered that all of the provisions of the 1958 draft could be applied to special missions "*mutatis mutandis*, . . . in so far as they may be applicable to the given case."<sup>23</sup>

19. After a discussion, the Commission decided to consider *seriatim* the twenty five articles of the 1958 draft which in the Special Rapporteur's opinion were not applicable to *ad hoc* diplomacy.<sup>24</sup> It was later proposed that the Commission should abandon this method of work and adopt the *mutatis mutandis* formula suggested by Sir Gerald Fitzmaurice, but this proposal was rejected by 13 votes to 6, with 1 abstention.<sup>25</sup> Some members emphasized the need for separate treatment of special missions on the ground of their difference from permanent missions. They also expressed the view that the *mutatis mutandis* formula would not sufficiently clearly maintain the distinction between *ad hoc* and ordinary diplomatic relations, and would only tend to provoke disputes about interpretation.<sup>26</sup>

20. The Commission examined one by one all of the articles in Section I of the 1958 draft, and ultimately decided that the only three — article 8 on persons declared *persona non grata*, article 9 on notification of arrival and departure, and article 18 on use of the flag and emblem<sup>27</sup> — could apply as they stood to special missions. In connexion with a number of other articles it was remarked that the principle underlying the article applied equally to special missions, but as the detailed formulation of the article was in terms of permanent missions, it could not be applied without change to *ad hoc* diplomacy.

21. It may be useful to give a brief summary of the Commission's article-by-article discussion of Section I of the 1958 draft, with, where appropriate, remarks to relate the discussion to the text of the Vienna Convention of 1961.

22. *Article 1 (definitions)*. The Special Rapporteur said that article 1 could apply to special missions, provided that a definition of them was added to it. Some members expressed the view that special missions should be dealt with in a separate part of the draft, but the Commission decided without objection that article 1 was applicable.<sup>28</sup> This view was apparently reconsidered in the Drafting Committee, however, as the article was no applied to special missions in the text ultimately adopted by the Commission (A/4425, chapter III, paragraph 38).

23. *Article 2 (establishment of diplomatic relations and missions)*. The Commission agreed that this article, being drafted in terms of permanent missions, could not apply as it stood to special missions; that decision did not however, imply that the mutual consent of the States concerned was not necessary for the sending of a special mission.<sup>29</sup>

24. *Article 3 (functions of a diplomatic mission)*. It was the general view that a special mission could perform any of the functions included in the scope of article 3 if such functions were entrusted to it by the sending State and agreed to by the receiving State. However, since a special mission had a special function rather than the whole range of functions covered by article 3, that article, as it stood, did not apply.<sup>30</sup> The views expressed by members were referred to the Drafting Committee, but in the text ultimately adopted it is stated only that a special mission is "an official mission of State representatives sent by one State to another in order to carry out out a special task".

25. *Article 4 (appointment of the head of the mission: agrément)*. The Special Rapporteur observed that in State practice the composition of a special mission might be the subject of some informal discussion prior to the sending of the mission, but there did not appear to be anything resembling a formal *agrément*. It was agreed that the procedure of acceptance by the receiving State was not always the same as the regular procedure for obtaining an *agrément*, but that the consent of the receiving State was always necessary and that it could be withheld.<sup>31</sup>

26. *Article 5 (appointment to more than one State)*. It was concluded that there was no need to make this article applicable to special missions; however, any State would be entitled to refuse to receive a special mission at any given time, and thus could object if it were unwilling that a mission should be accredited to other States.<sup>32</sup>

27. *Article 6 (appointment of the staff of the mission)*.<sup>33</sup> It was agreed that this article did not apply to special missions. It was, however, necessary for the sending State to communicate in advance to the receiving State the names of the prospective members of the special mission, and the receiving State would be entitled, under the article dealing with *personae non gratae*, to declare any of them unacceptable.<sup>34</sup> These rules would apply equally to military, naval and air attachés, who were specifically mentioned in article 6.

28. *Article 7 (appointment of nationals of the receiving State)*.<sup>35</sup> The majority of the Commission considered that article 7 need not apply to special missions; it was agreed, however, that the receiving State would be entitled not to accept one of its nationals as a member of such a mission.<sup>36</sup>

<sup>23</sup> *Ibid.*, paragraph 51.

<sup>30</sup> *Ibid.*, 567th meeting, paragraph 13.

<sup>31</sup> *Ibid.*, paragraph 29.

<sup>32</sup> *Ibid.*, paragraphs 42-43.

<sup>33</sup> Corresponding to article 7 of the Vienna Convention.

<sup>34</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 567th meeting, paragraph 60.

<sup>35</sup> Corresponding to article 8 of the Vienna Convention, which also covers nationals of third States.

<sup>36</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 567th meeting, paragraphs 64-66.

<sup>23</sup> *Ibid.*, paragraph 16.

<sup>24</sup> *Ibid.*, paragraph 31.

<sup>25</sup> *Ibid.*, paragraph 80.

<sup>26</sup> *Ibid.*, 565th meeting, paragraph 35, 38; 567th meeting, paragraphs 23, 26.

<sup>27</sup> These articles correspond to articles 9, 10 and 20 of the Vienna Convention.

<sup>28</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 565th meeting, paragraph 39.

29. *Articles 8 (persons declared persona non grata) and 9 (notification of arrival and departure).*<sup>37</sup> As observed above, these articles were considered applicable, as they stood, to special missions. The articles were somewhat elaborated at the Vienna Conference; in particular, more detailed provisions on members of families and private servants were added to the second of the two articles, and those categories are not often involved in special missions.

30. *Article 10 (size of staff).*<sup>38</sup> The majority of the Commission found it unnecessary to apply this provision to special missions; the principle of consent underlying the acceptance of the special mission would cover all practical considerations relating to its size.<sup>39</sup>

31. *Article 11 (offices away from the seat of the mission).*<sup>40</sup> This article was considered to deal with a question affecting specifically permanent missions, and hence not to be applicable to special missions.<sup>41</sup>

32. *Article 12 (commencement of the functions of the head of the mission).*<sup>42</sup> The Special Rapporteur's view was that though this article and the following one did not, as they stood, apply to special missions, articles 12 and 13 should be mentioned as provisions which could, on occasion, serve for them; the date of commencement, though less important than in the case of permanent missions, might occasionally be of consequence.<sup>43</sup> Accordingly, the Special Rapporteur proposed a provision stating that "Articles 12 and 13 shall apply where appropriate in the circumstances"<sup>44</sup> The Commission decided, however, by 6 votes to 1, with 5 abstentions, to omit the provision.<sup>45</sup>

33. *Article 13 (classes of heads of mission).*<sup>46</sup> It was observed in the Commission that heads of special missions were frequently very high officials, and were also often drawn from outside the diplomatic service. As has been said above, the Special Rapporteur proposed that article 13 should apply to special missions "where appropriate in the circumstances", but this proposal was rejected by the Commission.

34. *Article 14 (classes of heads of mission).*<sup>47</sup> The Special Rapporteur stated that this article, which requires the agreement of the States concerned on the class to which their heads of mission belong, concerned only permanent missions, since it dealt with the question of reciprocity. After a discussion in which several members agreed that the class of the head of a special mission was subject to the agreement of the receiving State, the majority concluded that the article should not be made applicable.<sup>48</sup>

35. *Article 15 (precedence).*<sup>49</sup> The Special Rapporteur said that the article was not applicable to special missions as it stood, but that its provisions might serve some purpose whenever, for example, a number of special missions were sent simultaneously by several countries on a ceremonial occasion; he therefore proposed that the article should be dealt with in the same manner as articles 12 and 13. The Commission agreed to this proposal.<sup>50</sup> No reference to article 15, however, was included in the text ultimately adopted by the Commission.

36. *Article 16 (mode of reception).*<sup>51</sup> The Commission concluded that, though the article as it stood, requiring a uniform procedure for reception of heads of mission of each class, was not applicable to special missions, its intention should be taken into account in the general formula to be embodied in the clauses concerning special missions.<sup>52</sup> The text ultimately adopted by the Commission made no reference to article 16, though that text was intended to be subject to article 44<sup>53</sup> on non-discrimination.

37. *Article 17 (chargé d'affaires ad interim).*<sup>54</sup> The consensus of the Commission was that the article was inapplicable to special missions, and that, as regards the replacement of the head of a special mission, the official ranking immediately below him could not — if he did not have full powers — be automatically presumed to take over the conduct of the affairs of the mission.<sup>55</sup>

38. *Article 18 (use of flag and emblem).*<sup>56</sup> As has been noted above, the Commission concluded that this article applied to special missions.

39. The Commission referred to its Drafting Committee the question of the applicability of Sections II (*diplomatic privileges and immunities*), III (*conduct of the mission and of its members towards the receiving State*) and IV (*the end of the function of a diplomatic agent*) of the 1958 draft. After an article-by-article examination, it was found that there was no occasion to exclude the application of any of those articles to special missions, even though it would be only in exceptional circumstances that some of them could apply.

40. At the close of the discussion of *ad hoc* diplomacy, two members expressed dissatisfaction with the work of the Commission on the subject.<sup>57</sup> They regretted that the Commission had not had time to examine the whole subject in detail, which was what was necessary for practical purposes since the general principles were not at issue.

41. The Commission adopted the following three draft articles (A/4425, chapter III, part II):

<sup>37</sup> Corresponding to articles 9 and 10 of the Vienna Convention.

<sup>38</sup> Corresponding to article 11 of the Vienna Convention.

<sup>39</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 567th meeting, paragraph 77.

<sup>40</sup> Corresponding to article 12 of the Vienna Convention.

<sup>41</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 569th meeting, paragraph 3.

<sup>42</sup> Corresponding to article 13 of the Vienna Convention.

<sup>43</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 569th meeting, paragraph 4-6.

<sup>44</sup> *Ibid.*, 577th meeting, paragraph 1.

<sup>45</sup> *Ibid.*, paragraph 9.

<sup>46</sup> Corresponding to article 14 of the Vienna Convention.

<sup>47</sup> Corresponding to article 15 of the Vienna Convention.

<sup>48</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 569th meeting, paragraph 31.

<sup>49</sup> Corresponding to article 16 of the Vienna Convention; article 17 of the Convention requires the chief of mission to give notification of the order of precedence of the diplomatic staff of the mission.

<sup>50</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 569th meeting, paragraph 36.

<sup>51</sup> Corresponding to article 18 of the Vienna Convention.

<sup>52</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 569th meeting, paragraph 45.

<sup>53</sup> Corresponding to article 47 of the Vienna Convention.

<sup>54</sup> Corresponding to article 19 of the Vienna Convention.

<sup>55</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 569th meeting, paragraph 56.

<sup>56</sup> Corresponding to article 20 of the Vienna Convention.

<sup>57</sup> *Yearbook of the International Law Commission, 1960*, vol. I, 577th meeting, paragraphs 13 and 14

## 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 end when the tasks entrusted to it have been carried out.

*C. Developments since 1960*

42. In its report to the General Assembly (*ibid.*, chapter III, paragraph 36), the Commission suggested that the three draft articles should be referred to the forthcoming United Nations Conference on Diplomatic Intercourse and Immunities, in order that they might be embodied in any convention the Conference adopted. The Commission stated that, owing to shortage of time, it had been unable to give the matter prolonged study and that the three articles formed only a preliminary survey for the consideration of Governments attending the Vienna Conference.

43. By resolution 1504 (XV) of 12 December 1960, the General Assembly decided, on the recommendation of the Sixth Committee, that the draft articles should be referred to the Vienna Conference so that they might be considered along with the draft articles on diplomatic intercourse and immunities adopted by the International Law Commission in 1958.

44. The Vienna Conference decided, at the second plenary meeting<sup>58</sup> held on 3 March 1961, to refer the question of special missions to the Committee of the Whole. At the 23rd meeting, held on 21 March 1961, the Committee of the Whole set up a Sub-Committee<sup>59</sup> to study the subject of special missions. In its report<sup>60</sup> to the Committee of the Whole the Sub-Committee stressed the importance of the subject referred to it. The Committee noted, however, the statement of the International Law Commission that the three draft articles constituted only a preliminary survey, and also

<sup>58</sup> United Nations Conference on Diplomatic Intercourse and Immunities (Vienna 2 March - 14 April 1961), Official Records, vol. I (A/CONF.20/14), United Nations publication Sales No. 61. X. 2, summary record of the second plenary meeting, paragraph 12.

<sup>59</sup> *Ibid.*, summary record of the 23rd meeting of the Committee of the Whole, paragraph 70. The Sub-Committee was 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.

<sup>60</sup> *Ibid.*, vol. II (A/CONF.20/14/ADD.1), United Nations publication Sales No. 62.X.1, doc. A/CONF.20/C.1/L.315.

stressed that the articles had not, owing to lack of time, been submitted to Governments beforehand for their comments. The Sub-Committee further noted that the draft articles did little more than indicate which of the rules on permanent missions applied to special missions and which did not. The Sub-Committee considered that, whilst the basic rules might be the same, it could not be assumed that this would be so in every case or in all respects. The Sub-Committee therefore concluded that, although the draft articles provided an adequate basis for discussions, they were unsuitable for inclusion in a final convention without extensive and time-consuming study, which could only properly take place after a complete set of rules on permanent missions had been approved. In view of the short time available to the Sub-Committee in which to carry out such a study, of for its results to be considered by the Committee of the Whole and by the Conference itself, the Sub-Committee determined that it should recommend to the Committee of the Whole that the Conference should refer the question of special missions back to the General Assembly; it was suggested that the Assembly should recommend to the International Law Commission the task of further study of the topic in the light of the Convention to be established by the Conference. After the Sub-Committee's recommendation had been adopted by the Committee of the Whole<sup>61</sup> the Conference, at its fourth plenary meeting on 10 April 1961, accordingly adopted a resolution<sup>62</sup> recommending to the General Assembly of the United Nations that it refer the question back to the International Law Commission.

45. At its 1018th plenary meeting, held on 27 September 1961, the General Assembly referred the "Question of Special Missions" to the Sixth Committee, which discussed it at its 731st meeting held on 15 December 1961. In its report to the General Assembly<sup>63</sup> the Sixth Committee 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. At its 1081st meeting held on 18 December 1961, the General Assembly acting on the recommendation of the Sixth Committee adopted resolution 1687 (XVI) which is set out in full below.

*"Question of Special Missions"**"The General Assembly,*

*Recalling* the 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 the twelfth session,

*Noting* the resolution on special missions adopted by the United Nations Conference on Diplomatic Intercourse and Immunities at the 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."

<sup>61</sup> *Ibid.*, vol. I, summary record of its 39th meeting on 4 April 1961, paragraph 60.

<sup>62</sup> *Ibid.*, vol. II, doc. A/CONF.20/10/ADD.1, resolution I.

<sup>63</sup> *Official Records of the General Assembly, Sixteenth Session, Annexes*, vol. III, agenda item 71, doc. A/5043, paragraphs 9 and 10.

46. The Commission accordingly decided at its 669th meeting on 27 June 1962 to place the question of special missions on the agenda of its next session.

### III. Questions to be decided in connexion with further work

47. It may be inferred from the reference by the General Assembly of the topic of special missions back to the International Law Commission that the whole question could be examined afresh, and that in its re-examination the Commission need not regard itself as bound by the decisions taken in 1960. If this is the case, it may be helpful to set out a few of the main questions which should be decided as a basis for further work.

48. *The scope of the topic.* As has been pointed out above (paragraph 14), the Commission in 1960 decided not to deal with the privileges and immunities of delegates to congresses and conferences. This decision was taken because of the link existing between the question of diplomatic conferences and that of relations between States and international organizations. The latter question is on the provisional agenda of the Commission's fifteenth session, and the Special Rapporteur on that topic will presumably deal with diplomatic conferences convened by international organizations. In international practice, however, not all conferences are convened by such organizations, and some are still called by the Governments of individual States. The Commission may wish to consider whether to take up the question of conferences convened by States, and, in the event of an affirmative decision, to decide how that question may best be dealt with.

49. On the one hand, it may be considered that the problems of all conferences, no matter how they are convened, are closely analogous, and that it would be simplest that they should all be dealt with together by a single Special Rapporteur. On the other hand, if

conferences are convened by international organizations, they are generally covered by special or general agreements on privileges and immunities between the organization concerned and the host country, whilst if they are convened otherwise, there is usually no such agreement; this consideration might lead to the conclusion that it would be preferable to treat the latter kind of conference as part of the topic of special missions.

50. In 1960 the Commission also decided to cover itinerant envoys in its draft, on the ground that the mission of an itinerant envoy constituted a special mission vis-à-vis each of the States visited. The Commission may wish to consider whether to reaffirm this decision.

51. *The form of the draft.* The Vienna Convention on Diplomatic Relations will inevitably form an important part of the basis for the work on special missions. The question arises, however, whether the draft on special missions should be an independent, self-contained instrument, repeating any provisions of the Convention which are held to be applicable to special missions; or whether it should take the form of a protocol subsidiary to the Convention, which would refer to whatever of the latter's provisions are applicable and would contain specific provisions on special missions only to the minimum extent necessary. The answer to this question depends mainly on how far special missions are different in nature from the permanent missions dealt with in the Convention. It may be recalled in this connexion that in 1960 the Commission took the view that, of the eighteen articles in Section I of its 1958 draft, only three could apply as drafted to special missions, whereas all the other twenty-seven articles could apply to special missions, though some only in exceptional circumstances. The changes in the 1958 draft made by the Vienna Conference of 1961 do not seem to have essentially altered the problem of application to special missions, but the problem should obviously now be reconsidered.

# RELATIONS BETWEEN STATES AND INTER-GOVERNMENTAL ORGANIZATIONS

[Agenda item 6]

## DOCUMENT A/CN.4/161 and Add.1

First report by Mr. Abdullah El-Erian, Special Rapporteur

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## I. Introduction

### A. Preliminary remarks

1. By its resolution 1289 (XIII) of 5 December 1958, the General Assembly invited the International Law Commission to consider the question of relations between States and inter-governmental 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".<sup>1</sup>
2. At its eleventh session in 1959, the International Law Commission took note of the resolution and decided to consider the question in due course (A/4169, paragraph 48).
3. At its fourteenth session in 1962, the Commission decided to place the question on the agenda of its next session. It appointed the present writer as Special Rapporteur, and requested him to submit a report on this subject to the next session of the Commission (A/5209, paragraph 75).

### B. The French delegation's draft resolution and the discussion in the Sixth Committee

4. In the course of the consideration by the Sixth Committee, during the thirteenth session of the General Assembly in 1958, of chapter III (diplomatic intercourse and immunities) of the report of the International Law Commission covering the work of its tenth session, the representative of France submitted on 27 October 1958 a draft resolution whereby the General Assembly would request the Commission to include in its agenda the study of the subject of relations between States and international organizations.<sup>2</sup> In support of this request, it was stated in the preamble that:

" . . . the development of international organizations, and in particular of the United Nations, and its specialized agencies, has increased the number and scope of the legal problems arising out of relations between the organizations and States, whether or not they are members of those organizations"; that "the existence of special conventions on the subject merely emphasizes the need for codification of the rules contained therein", and that "the search for solutions, which remain undetermined, to problems arising out of relations between States and organizations would contribute to the progressive development of international law in a field which has assumed great practical importance . . ." <sup>3</sup>

5. The French delegation's draft resolution referred to paragraph 52 of the report of the International Law Commission covering the work of its tenth session (A/3859) which reads:

"Apart from diplomatic relations between States, there are also relations between States and international organizations. There is likewise the question

of the privileges and immunities of the organizations themselves. However, these matters are, as regards most of the organizations, governed by special conventions."

6. A revised draft later (on 6 November 1958) submitted by the representative of France referred further to paragraph 51 of the International Law Commission's report on its tenth session, which refers to *ad hoc* diplomacy and in particular to diplomatic conferences. The operative part of the draft was also revised to provide that the General Assembly would request the Commission to give further consideration to the questions of relations between States and international organizations, in the light of the current study of diplomatic intercourse and immunities and of *ad hoc* diplomacy, and in the light of the discussion in the Assembly.<sup>4</sup>
7. In introducing his draft resolution, the representative of France stated at the 569th meeting of the Sixth Committee on 28 October 1958 that:

" . . . one of the most characteristic phenomena of the present time was the development of international organizations of a permanent character as opposed to the temporary arrangements coming under the heading of '*ad hoc* diplomacy'. The development of permanent international organizations presented a number of legal questions, which were only partially solved by the special, bilateral conventions by which most of them were governed. It was necessary, therefore, not only to codify those special conventions but also to work out general principles which would serve as a basis for the progressive development of international law on the subject . . ." <sup>5</sup>

8. Later, the representative of France orally amended the operative part of his draft resolution to request the International Law Commission to give further consideration to the question of relations between States and international organizations at the appropriate time and after the study of diplomatic intercourse and immunities, consular intercourse and immunities and *ad hoc* diplomacy had been completed, in the light of the results of that study and of the discussion in the General Assembly (A/4007, paragraph 20).

9. The representative of France also accepted a suggestion by the representative of Greece that the draft should specify that the international organizations in question were inter-governmental (*ibid.*, paragraph 21).

### C. General Assembly. Resolution 1289 (XIII)

"The General Assembly,

"Taking note of paragraph 51 of the report of the International Law Commission covering the work of its tenth session (A/3859 and Corr.1), which refers to *ad hoc* diplomacy and, in particular, to diplomatic conferences, and of paragraph 52 of the same report, which refers to relations between States and international organizations,

"Considering the importance and development of international organizations,

"Considering the observations made by Governments as the twelfth and thirteenth sessions of the

<sup>1</sup> Official Records of the General Assembly, Thirteenth

<sup>2</sup> *ibid.*, document A/C.6/L.247.

Session, Annexes, agenda item 56, document A/4007.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*, document A/C.6/L.427/Rev.1.

<sup>5</sup> *ibid.*, Sixth Committee, 569th meeting, para. 22.

General Assembly, particularly on the question referred to in paragraph 52 of the report, "Invites the International Law Commission to give further consideration to the question of relations between States and inter-governmental 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 discussions in the General Assembly."

#### D. Purpose of this study

10. This report is intended primarily as a preliminary study of the scope of the subject of "Relations between States and inter-governmental organizations", and the approach to it. It is, therefore, a reconnaissance rather than a definitive study.

11. Its purpose is to present a broad outline of the questions to be considered in connexion with the external relations of international organization and the legal problems they give rise to.

12. This report will first trace the evolution of the concept international organization. A second section will review the attempts to codify the international law concerning the legal status of international organizations and related problems. The third section will present in broad outline a detailed division of the subject with a view to defining and identifying the various legal questions which should be included in it.

## II. The evolution of the concept of international organization

### A. HISTORICAL DEVELOPMENT

13. Institutional co-operative plans and experiences between politically independent entities go far back in history, at least to ancient Greece. But the modern concept of international organization is the outcome of a century and a half of evolution in the co-operative practice of States in response to a rapidly changing world. The industrial revolution, through its impact on production, communication and commerce, increased the independence of the different parts of the world to an unprecedented degree. But at the same time, it progressively made available to man means of destruction which resulted in total war.

14. The partial accommodation to specific new needs paved the way for similar accommodation to similar future needs, and rendered the novel forms of co-operation more common and acceptable in international relations.

15. The evolution of co-operative forms of State practice took two parallel paths:

(1) An evolution from the stage of *ad hoc* temporary conferences which are convened for a specific purpose and which come to an end once the subject-matter is agreed upon and embodied in an international agreement, to the stage of permanent international organizations with organs that function permanently and meet periodically.

(2) An evolution from the level of purely administrative unions, each specializing in one kind of inter-

national activity of a basically technical character, to that of general international organizations whose scope of activities, though predominantly political, extends to all aspects of international co-operation, i.e. economic, social, technical, etc.

16. Two immediate tributary sources of present-day international organizations can be traced:

#### 1. The conference system

17. For several centuries, European States used to call an international conference in the aftermath of a war to reach an agreement on territorial changes and adjustments which resulted from it and to prepare a peace treaty sanctioning the new situation.

18. Some such peace conferences constitute landmarks in the history of international law, such as those of Westphalia (1648) and Utrecht (1713). But in the nineteenth century their importance acquired new dimensions and they extended their scope beyond that of peace settlements.

19. (a) *The Congress of Vienna and the Concert of Europe systems*: The Vienna settlement of 1815 is particularly relevant to international organization, and in many ways. The preceding conferences had aimed at establishing peace, but the Vienna Conference aimed, in addition, at the maintenance of peace within the new European system it had established.

"It was considered by its leading participants as the forerunner of a series of regular consultations among the great powers which would serve as board meeting for the European community of nations."<sup>6</sup>

20. This scheme did not function except for the period from 1815 to 1822, during which four conferences took place. These revealed enough differences between the policies of the great powers to render such a system unworkable. But the technique of diplomacy by conference, outside the narrow case of peace settlements, whenever the European system was endangered, established itself as a basic feature of the century extending from 1815 to 1914. It is sufficient to mention a few examples such as the Paris Conference of 1856, the London Conferences of 1871 and 1912-13, the Berlin Congresses of 1878 and 1884-85, and the (Algeciras) Conference of 1906, to realize the great importance of this new technique.<sup>7</sup>

21. The Congress of Vienna system was accompanied by what became known as the Concert of Europe. It first appeared in the Treaty of Chaumont of 1814, in which the parties undertook to act "*dans un parfait concert*". Then it merged into the Vienna system and survived it after 1822. It was neither a formal nor an institutional arrangement. But it operated according to certain principles, the most important of which was the special status of the great powers who assumed the position of "self-appointed guardians of the European community and executive directors of its affairs".<sup>8</sup> They legislated on behalf of this community, basically to the small Powers, and admitted nations to this "exclusive club". Thus they recognized the independence

<sup>6</sup> Inis Claude, Jr., *Swords into Plowshares, The Problems and Progress of International Organization*, p. 23 (2nd ed. rev.) (New York, 1959).

<sup>7</sup> *ibid.*, loc. cit.

<sup>8</sup> *ibid.*, p. 25.

of Greece and Belgium in 1830 and declared in the Treaty of Paris 1856 that the Sublime Porte (of the Ottoman Empire) was admitted "à participer aux avantages du droit public et du concert européen".

22. The political conference system which prevailed in nineteenth century European politics was a step forward towards the stage of international organization, but did not reach it. It did not develop "permanently functioning institutions". Conferences were sporadic rather than periodic. They were "the medicine of Europe rather than its daily bread".<sup>9</sup> But they increased the awareness of States of the need for new means of international co-operation and of the possibilities of multilateral or quasi-parliamentary diplomacy.

23. (b) *Multilateral Treaties*: Another innovation of the Congress of Vienna was the technique of multilateral treaty. Up to that time, this technique was unknown. When a peace settlement included several States, the end result was a series of bilateral treaties between different pairs of parties. This was the case in the Peace of Westphalia. It was also the case of the Paris Treaty of 30 May 1814 which was composed of seven separate treaties, each between France and an allied Power, although they were identical in their content. Thus, even when the content was identical, these treaties were legally separate.

24. The Final Act of the Congress of Vienna was, for the first time, signed by all of the parties to the Congress, and bound all the other bilateral treaties issuing from it into "one common transaction". The evolution of the multilateral treaty culminated in the Paris Treaty of 1856 which took the initial form of a multilateral treaty without passing through the bilateral treaties stage.<sup>10</sup>

25. The multilateral treaty was soon extended in scope beyond the collective settlement into the legislative field. Law-making treaties (*traités-lois*) soon made their appearance, also within the framework of international conferences. They included general rules of international law, thus asserting their role as an important source of that law (e.g. the appendix to the Final Act of the Congress of Vienna concerning the rank of diplomatic agents). The also extended beyond the strictly narrow traditional subjects of international law to regulate certain efforts at international co-operation in the humanitarian and social fields such as the suppression of the slave trade, which was dealt with in several multilateral conventions from the Final Act of the Congress of Vienna to the General Act of the Anti-Slavery Conference at Brussels in 1890.

26. The relevance of multilateral treaties to international organizations is so obvious as not to need to be mentioned. Suffice it to say that they provided the means for their creation.

27. (c) *The Hague Peace Conferences*: The 19th century witnessed an ascending trend in favour of arbitration. This trend began with the Jay Treaty of 1794

and continued throughout the 19th century to culminate in the two Hague International Peace Conferences of 1899 and 1907.

28. These two Conferences, though fitting in the conference patterns described above, deserve some attention because of their special contribution to the concept of international organization. The contribution lies in two of their features. The first is the scope of international activities envisaged by the regulations ensuing from them. They used the technique of multilateral conventions to introduce more adequate regulations of the basic problems of international relations, namely those of peace and war.<sup>11</sup> They thus anticipated the major field of activity of the general international organizations which succeeded them. While they did not establish compulsory arbitration, they provided States with a standing arbitration machinery should they decide to use one; while they did not prohibit war, they tried to humanize it and limit its damage. The conventions which ensued exemplify international legislation as a principal source of international law better than most. They were "divorced from the immediate problems raised by particular wars or disputes" and were "concerned with international problems in abstract" and with institution building. They, thus, established

"... the precedent that collective diplomacy should be oriented toward such matters as the codification and further development of important branches of international law, the formulation of standing procedures for the peaceful settlement of disputes, and the promotion of the principle that pacific solutions should be sought by disputants and might properly be urged and facilitated by disinterested parties".<sup>12</sup>

29. The second element in the contribution of the Hague Conferences to the development of international organization is their orientation towards universality. While the first Conference was attended by only twenty-six States, mainly European, the second Conference was attended by forty-four States including most of the Latin-American republics,<sup>13</sup> in addition to some Asian Powers.

30. A third potential contribution might be added. The Conferences of 1899 and 1907 showed the possibility of periodic meetings.<sup>14</sup> This possibility was discussed in the second Conference which recommended:

"The assembly of a third Peace Conference, which might be held within a period corresponding to that which has elapsed since the preceding Conference, at a date to be fixed by common agreement between the Powers..."<sup>15</sup>

But the proposed third conference was never convened as a result of the outbreak of the First World War.

31. (d) *The Pan-American System*: The conference system was also resorted to on a regional level in the

<sup>9</sup> Sir Alfred Zimmern, *The League of Nations and the Rule of Law, 1918-1935* (London, 1936).

<sup>10</sup> See Guggenheim, *Contribution à l'Histoire des Sources du Droit des Gens*, 94 Recueil des Cours de l'Académie de Droit International de la Haye 1, pp. 70 et seq., (1958 II); Lachs, *Le Développement et les Fonctions des Traités Multilatéraux*, 92 Recueil des Cours 229, pp. 237 et seq. (1957 II).

<sup>11</sup> For a brief description of these conventions, see Oppenheim, *International Law*, vol. I, p. 58 (8th ed by Lauterpacht) (London, 1955); Nussbaum, *A Concise History of the Law of Nations*, pp. 217, 227-229 (2nd ed. rev.) (New York, 1954).

<sup>12</sup> Claude, *op cit.*, p. 30.

<sup>13</sup> *Id.* at p. 29.

<sup>14</sup> Linden Mander, *Foundations of Modern World Society*, p. 594 (London, 1941).

<sup>15</sup> J.B. Scott, *The Reports to the Hague Conferences of 1899 and 1907*, p. 216 (Oxford, 1917).

Pan-American system. In 1826, a conference of American Republics was held in Panama under the influence of Bolivar, but did not yield tangible results.<sup>16</sup> The Pan-American system took shape, however, since the Washington Conference of 1889. Since then, several conferences have been held at somewhat regular intervals, usually of five years,<sup>17</sup> culminating in the establishment of the Organization of American States in 1948. Since the inception of the movement, a Bureau was created which acquired progressively more extensive functions. At the Buenos Aires Conference of 1912, the Conference adopted the titles of the Union of American Republics for itself and the Pan-American Union for the Bureau.

32. The periodic character of these conferences contributed in several ways to the techniques of international organization:

1. The conferences were not convened at the initiative of any one State, but the time and place of each were decided by the previous one.

2. The agenda of each conference was prepared by the governing body of the standing administrative organ, the Pan-American Union.

3. A greater possibility existed to undertake preparatory work before each conference than in the case of *ad hoc* conferences.

4. The periodic character made possible the development of more elaborate and formal procedural arrangements.<sup>18</sup>

### 2. International administrative unions

33. The second tributary source of present-day international organizations is the phenomenon of international administrative unions which appeared in the 19th century, especially in its second half. These were permanent agencies dealing with non-political technical international activities. They were called forth by the increasing complexity and interaction of technical, economic, social and cultural activities at the international level.

34. (a) *International river commissions*: The Final Act of the Congress of Vienna proclaimed in articles 108-117 the principle of freedom of navigation on international rivers (rivers separating or traversing several States) for all States.<sup>19</sup> This proclamation which responded to a felt need arising from the intensification of commercial and economic activities led to the appearance of a new type of international machinery in the form of river commissions.<sup>20</sup> Thus, the Convention of Mannheim of 1868 between the riparian States of the Rhine created the Central Commission for the Navigation of the Rhine, which was composed of one representative of each riparian State. The function of

the Commission was to control the observance of the rules of the convention, its decisions were taken by unanimity and its powers were limited to recommending measures to riparian States for incorporation into their municipal law.<sup>21</sup> Moreover, it had jurisdiction over certain categories of legal disputes concerning individuals.<sup>22</sup> The European Danube Commission created by the Peace Treaty of Paris 1856 was given extended powers both as to the control and policing of navigation and as to the public works it could undertake to secure the navigability of the Danube estuaries.<sup>23</sup>

35. (b) *Other administrative unions*: A host of other administrative unions in many fields appeared as need arose. Thus, the Universal Telegraphic Union was established in 1865, and the International Bureau of Telegraphic Administration was established and located at Berne as its central organ. The General Postal Union was established in 1874, also with its Bureau in Berne. (The International Bureau of Industrial Property in 1883 and of Literary Property in 1886; the International Convention on Railway Freight Traffic in 1890; the International Radio Telegraphic Convention in 1906; the Convention on the Creation of an International Office of Public Health in 1907; etc.)<sup>24</sup>

36. Such unions had, in general, two organs:

1. Periodical conferences or meetings of the representatives of member States, whose decisions required usually the unanimity of votes;

2. A permanent secretariat, a Bureau, which assumed the administrative tasks.

37. These unions contributed to the concept of international organization a most important factor, namely the institutional element. Their permanent character which was secured through their standing organ, the Bureau, provided the threshold between the technique of the conference and that of the organization. Moreover, in some of them, the rules of unanimity and "no treaty obligation without ratification" were being pushed aside.<sup>25</sup> Finally, they contributed to the awareness of States "of the potentialities of international organizations as a means of furthering an interest common to numerous States without detriment to that of any concerned".<sup>26</sup>

### B. DEFINITION OF INTERNATIONAL ORGANIZATIONS

38. It is possible to classify the different definitions of international organizations found in the literature on the subject into three categories. The first tends to assimilate or integrate the phenomenon of international organization into the traditional classical patterns of international law. The second projects our present understanding of the phenomenon retrospectively to cover certain earlier experiences, thus explaining the past by the present. The third undertakes to isolate and emphasize the element or elements of internatio-

<sup>16</sup> Harold Vinacke, *International Organization*, pp. 98-99 (New York, 1934).

<sup>17</sup> Washington 1889; Mexico City 1901; Rio de Janeiro 1906; Buenos Aires 1910 Santiago 1923; Havana 1928; Montevideo 1933; Lima 1938; Panama 1939; Havana 1940; Rio de Janeiro 1942; Chapultepec 1945; Rio de Janeiro 1947; Bogotá 1948.

<sup>18</sup> Vinacke, *op cit.*, p. 153.

<sup>19</sup> Oppenheim, *op cit.*, p. 467; Nussbaum, *op cit.*, p. 186.

<sup>20</sup> See generally J.P. Chamberlain, *The Regime of the International Rivers, Danube and Rhine* (New York, 1923); Radovanovitch, *Le Danube et l'Application du Principe de Liberté de la Navigation Fluviale* (Paris, 1925).

<sup>21</sup> Reuter, *Institutions Internationales*, p. 189 (3rd ed 1962) [cited hereinafter as Reuter, *Institutions*].

<sup>22</sup> *Id.*, p. 191.

<sup>23</sup> *Id.*, p. 190; Nussbaum, *op cit.*, p. 191.

<sup>24</sup> Nussbaum, *op cit.*, pp. 198 and 213.

<sup>25</sup> Claude, *op cit.*, p. 39.

<sup>26</sup> 1 Hyde *International Law, chiefly as interpreted and applied by the United States*, p. 131 (2nd ed. rev.) (Boston, 1947).

nal organizations which are considered by the different authors in this category to be essential for them to be so considered.

39. It is not surprising that early definitions were of the first category which tried to explain the new phenomenon of international organization deductively in terms of the classical patterns of international law.

40. One of the earliest and most influential points of view belonging to this category is that of *Anzilotti* who characterized international organizations as collective (or common) organs of States, a concept which he defined as follows:

“Sont organes collectifs ceux qui sont institués par plusieurs Etats ensemble et dont la déclaration de volonté est rapportée par le droit international à une collectivité de sujets et, comme telle, rendue la présupposition de conséquences juridiquement déterminées.”<sup>27</sup>

He also specified that:

“L'institution d'organes collectifs présuppose un accord entre Etats . . .”<sup>28</sup>

41. *Anzilotti* distinguishes between international conferences where the wills expressed by representatives of States remain separate and do not merge, though they may meet in an agreement, and collective organs where a common will emerges and is attributed to all States which have the organ in common.<sup>29</sup> This distinction may appear to be admitting the separate entity of the collective organ by emphasizing the existence of only one will, namely that of the collective organ. In fact, it does not. True, there is only one will, that of the collective organ, but it is not a separate will of the organ, it is the common will of the States whose organ it collectively is.<sup>30</sup> The phenomenon of international organization is explained in terms of organs (or representatives, agents) of States and treated as such side by side with diplomatic agents in the same chapter of the *Cours*. Although the institutional forms are dealt with by *Anzilotti*, they are treated as new modalities of the system of complex (collegiate) organs and not as a new phenomenon in itself. The emphasis is on the treaty aspects and the organ character of international organizations rather than on the institutional element.<sup>31</sup>

42. Another definition which explains international organizations in terms of pre-existing traditional international law is that of *Kelsen*, which reads as follows:

<sup>27</sup> *Anzilotti, Cours de Droit International*, p. 283 (French translation by Gidel) (Paris, 1929).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id.*, p. 284.

<sup>30</sup> The difference between the two points of view is of little value as long as unanimity is required. But once votes are taken by majority the collective organ theory becomes less convincing. See Reuter, *Principes de Droit International Public*, 101 *Recueil des Cours*, p. 93 (1961 IV).

<sup>31</sup> *Anzilotti* even objected to the term “international organization”. M. O. Hudson wrote in this respect: “The term ‘international organization’ was never precisely defined in this connexion (advisory proceedings before the P.C.I.J.); in 1924 Judge *Anzilotti* referred to it as an unhappy expression which had been adopted to avoid mention of the ILO, and he sought to have the term defined, but refrained from pressing this proposal in 1926 because he thought difficulties could be avoided so long as the initiative rested with the Court.” Hudson, *The Permanent Court of International Justice 1920-1942, A Treatise*, p. 400 (New York, 1943).

“An organized international community is constituted by a treaty which institutes special organs of the international community for the pursuance of the purposes for which the community has been established. This community is an ‘international’ community; it has not the character of a State . . . [it] is an international organization. In contradistinction to a federal State, it is a confederation of States.”<sup>32</sup>

43. This definition emphasizes the conventional basis of international organization and distinguishes its separate organs from those of the member States, but it does not mention the separate entity of the organization, and as such does not go far beyond *Anzilotti*. Moreover, it explains it in terms of “confederation”, although the two phenomena of confederation of States (and for that matter, other kinds of unions of States) and international organization are different in terms of both their historical process and setting and their purpose. A confederation of States is usually a first step towards the creation of a federal or even unitary State, while an international organization simply provides a framework for international co-operation between States without being necessarily envisaged as a stage towards the establishment of a union of States.

44. *Kelsen* admits that historically they are different, but considers that:

“there is no essential difference between these confederations [the German Confederation 1815-1866, the Swiss Confederation and the USA before the last two became federal States in 1848 and 1787 respectively] and other organized communities of States (international organizations) which are not centralized as to form a federal State.”<sup>33</sup>

45. It is interesting to note that the three confederations he mentioned did lead to new federal or unitary States. His definition fails to bring forward the distinctive character of international organizations.

46. An example of the second category of definitions which projects retrospectively our present understanding of the phenomenon of international organization, to include earlier experiences which set themselves to perform functions similar to those of present-day international organizations though by different means, is that provided by *Stanley Hoffmann*. He defines the term international organization as:

“toutes les formes de la co-opération entre les états, tentant à faire régner par leur association un certain ordre dans le milieu international, créés par leur volonté et fonctionnant dans un milieu dont les états sont les personnes juridiques majeures.”<sup>34</sup>

47. This definition, which is based on the purpose and object of international co-operation, does not take into account its institutional aspects and the legal forms it takes and the procedures it follows. It is devised to

<sup>32</sup> *Kelsen, Principles of International Law*, p. 172 (New York, 1952). *Guggenheim* provides a similar definition. He treats international organizations under the subject of “fédération internationale” and defines the latter as: “Une communauté conventionnelle où la législation et l'exécution des normes juridiques sont confiées, du moins en partie, à des organes particuliers et non aux organes étatiques créateurs de la fédération”. I *Guggenheim, Traité de Droit International Public*, p. 236 (Genève, 1953).

<sup>33</sup> *Kelsen, op cit.*, p. 172.

<sup>34</sup> *Hoffmann, Organisation Internationale et Pouvoirs Politiques des Etats*, p. 12 (Paris, 1954).

accommodate efforts at international co-operation from the Concert of Europe to the United Nations, explaining the past in terms of the present, and maintaining that, politically speaking, the differences between the two are unimportant. This last assumption is by no means fully corroborated. Moreover, because the definition does not take into account the legal technicalities and goes beyond them to the politically significant elements, it cannot be relevant for legal purposes.

48. The third category of definitions proceeds inductively to isolate and emphasize certain aspect or aspects of international organizations which are considered by the respective authors in this group as being the essential ones. These include the purpose of the organization, its conventional basis, its permanent character, its having its own organs separate from those of member States, its possession of a separate juridical personality, or a combination of these.

49. *Chaumont* defines an international organization as:

“ Une réunion de personnes, représentant générale-ment des Etats, qui exercent, au sein d’organes constitués d’une manière régulière et durable, certaines fonctions d’intérêt international.”<sup>35</sup>

50. This definition emphasizes the institutional element and the purpose of international organizations, but it does not take into consideration its conventional basis and is wide enough not to exclude non-governmental organizations, which are not international organizations in the proper legal sense of the word.<sup>36</sup>

51. *Madame Bastid* defines international organizations as:

“ des groupements d’Etats qui reposent sur un traité et qui présentent une certaine stabilité ”.<sup>37</sup>

This definition mentions the conventional basis and the stable character of international organization, but not its institutional element nor its separate entity, although it can be said that at least the institutional element is assumed in the stable character.

52. *Reuter*, after warning that:

“ Une définition est licite à la condition de renoncer à y attacher des conséquences juridiques strictes ”,<sup>38</sup>

defines international organization by defining the two component words of the term:

“ En tant qu’*organisation* il ne peut que s’agir dun groupe susceptible de manifester d’une manière permanente une volonté juridiquement distincte de celle de ces membres.

“ En tant qu’*organisation internationale*, ce groupe est d’une manière normale, mais non exclusive, formé d’Etats.”<sup>39</sup>

53. Thus, he emphasizes the elements of permanence and a separate will as expressions of the distinct and independent character of the international organization vis-à-vis its member States. Permanence is used in the sense of a continuous functioning of the organs of the

organization, which permits it to assert a certain degree of independence of its members. But the most important element is the will of the organization, separate from the wills of the members States, which is expressed legally in terms of an independent juridical personality. To be politically significant, this separate will has, however, to express a certain political power and to be formulated according to the majority principle.<sup>40</sup> The *international* element of the definition presumes the conventional basis of the organization, which is also presumed, but more as a constitution than as a treaty, by the *organization* element of the definition.

54. Several definitions are provided by the Anglo-American literature.<sup>41</sup> Hyde, in discussing international co-operation, provides the following definition:

“ Some manifestations of international co-operation appearing in the course of the Nineteenth Century and early in the Twentieth, assumed the form of international organizations *established by treaty for the fulfilment of certain international tasks.*”<sup>42</sup>

He gives as examples several administrative unions and the so-called American International Union.<sup>43</sup>

55. This definition mentions the conventional basis and the purposes of international organization but does not take into consideration either the institutional element or the separate entity of the organization. At least the latter omission can be explained by the fact that the definition was formulated in connexion with the pre-First World War examples.

56. Hudson provides in his case-book a definition by John D. Hickerson which reads:

“ The international organization . . . emerges from a simple decision of national governments to deal with a particular subject in concert — or through multilateral diplomacy rather than in a series of separate negotiations — or through bilateral diplomacy. *Whenever the basic decision to act in concert produces an institution for common action, an international organization is created.*”<sup>44</sup>

57. This definition mentions only the institutional element. The conventional basis can be presumed. But the separate entity is not taken into consideration.

58. Both Brierly and Sir Gerald Fitzmaurice provided a definition of international organization in their reports on the law of treaties to the International Law Commission.

Brierly’s definition is (A/CN.4/23, article 2):

“ An international organization is an association of States with common organs which is established by Treaty.”

It emphasizes the conventional basis and the institutional element, but not the separate entity of the organization. It is similar to Kelsen’s definition, and although

<sup>40</sup> *Id.*, p. 196.

<sup>41</sup> The USSR Academy of Sciences (Institute of State and Law) textbook on international law includes a chapter (VIII) on international organizations contributed by S.B. Krylov (English edition, Moscow, 1939). But this chapter does not contain a definition of international organizations. Neither Oppenheim’s treatise nor Brierly’s introductory book includes such a definition.

<sup>42</sup> 1 Hyde, *op. cit.*, p. 131.

<sup>43</sup> *Ibid.* (note 32).

<sup>44</sup> Hudson, *Cases and Other Materials on International Law*, p. 27 (3rd ed., St. Paul, 1951).

<sup>35</sup> Chaumont, *L’O.N.U.*, p. 5 (3rd ed., Paris, 1962).

<sup>36</sup> See *infra*, para. 63.

<sup>37</sup> (Mme) Bastid, *Droit des Gens* Principes généraux, p. 329 (Université de Paris, Institut d’Etudes politiques) (Lectures 1056-1957, mimeographed).

<sup>38</sup> Reuter, *Institutions*, p. 195.

<sup>39</sup> *Ibid.*

it includes all in international organizations, it does not exclude other associations of States.

59. Sir Gerald Fitzmaurice provides the following definition (A/CN.4/101, article 3):

“The term ‘international organization’ means a collectivity of States established by treaty, with a constitution and common organs, having a personality distinct from that of its member States, and being a subject of international law with treaty-making capacity.”

60. This definition, by using the enumerative method, gathers all the essential elements (which have been also derived from Reuter’s definition): the conventional basis, the institutional element and the separate entity of the organization. The separate entity is expressed in three different ways: a personality distinct from that of the member States, the quality of subject of international law and the treaty-making power. This elaboration can be explained by the fact that the definition is given in the context of the law of treaties. The separate personality of the organization does not imply necessarily the treaty-making power. But the mention of the treaty-making power necessitates the mention of its condition precedent, namely the quality of subject of international law.

### C. CLASSIFICATION OF INTERNATIONAL ORGANIZATIONS

61. Several classifications of international organizations have been proposed. These classifications can, in turn, be classified into those pertaining to the membership of international organizations and those pertaining to their function. But before dealing with these two categories, two other classifications have to be examined.

1. *The classification of international organizations into temporary (or ad hoc) and permanent organizations*

62. This classification, which is adopted by certain writers,<sup>45</sup> does not seem warranted. Temporary conferences are not international organizations in the sense which emerges from the definitions surveyed above, though they were a historical stage leading to international organizations proper. They lack the institutional element. Although periodic conferences can develop certain aspects of this element, they still lack an entity separate from those of the participating States, which is a necessary element for an international organization.

2. *The classification of international organizations into public (inter-governmental) and private (non-governmental) organizations*<sup>46</sup>

63. Private international organizations, in spite of the great importance of some of them and the role envisaged for them in the Charter of the United Nations (Article 71), are not international organizations in the proper sense. Their members are not States, and they

are not created by a treaty, though some of them may be mentioned in or assigned certain functions by treaties. The Charter does not qualify them as international, but simply as non-governmental organizations, in Article 71. But it uses the term international organization without qualification in the same Article as well as in the Preamble to indicate public international organizations. So do Articles 66 and 67 of the Statute of the International Court of Justice. But Article 34 of the same Statute uses the term “public international organisation”.

### *Classification of international organizations according to membership*

1. *According to the scope of membership: universal and regional organizations*

64. A universal organization is one which includes in its membership all the States of the world. This is not the case of any past or present international organization yet. Thus, it may be more accurate to use the terms “universalist” suggested by Schwarzenberger<sup>47</sup> or “of potentially universal character” used in the treatise of Oppenheim.<sup>48</sup> The French term “à avocation universelle”<sup>49</sup> conveys the same meaning as these two terms, which is that while the organization is not completely universal, it tends towards that direction. This was partially the case of the League of Nations and is, in a much broader sense, the case of the United Nations, especially after 1955, and the specialized agencies.

65. The United Nations Charter, in spite of devoting a whole chapter to regional arrangements, does not provide a definition of them. At the San Francisco Conference, the Egyptian delegation proposed that the following definition of regional arrangement should be introduced into the Dumbarton Oaks Proposals:

“There shall be considered as regional arrangements organizations of a permanent nature grouping in a given geographical area several countries which, by reason of their proximity, community of interests or cultural, linguistic, historical or spiritual affinities, make themselves jointly responsible for the peaceful settlement of any disputes which may arise between them and for the maintenance of peace and security in their region, as well as for the safeguarding of their interests and the development of their economic and cultural relations.”<sup>50</sup>

This definition was rejected by Committee III/4 as being too restrictive.<sup>51</sup> In the absence of a definition, there is much debate concerning the extent to which the concept of regional arrangements can be stretched.<sup>52</sup> But, up to the present, the Security Council has not formally recognized any organization as possessing this quality.

<sup>47</sup> Schwarzenberger, *loc. cit.*

<sup>48</sup> Oppenheim, *op. cit.*, p. 370.

<sup>49</sup> Bastid, *op. cit.*, p. 329; Rousseau, *Droit International Public*, p. 180 (Paris, 1953); Reuter, *Institutions*, p. 202.

<sup>50</sup> XII UNCTOC p. 850.

<sup>51</sup> *Ibid.*, p. 701.

<sup>52</sup> Goodrich and Hambro, *Charter of the United Nations; Commentary and Documents*, p. 311 (2nd ed., Boston, 1949); Kelsen, *Recent Trends in the Law of the United Nations*, p. 918 (London, 1951).

<sup>45</sup> Schwarzenberger, *A Manual of International Law*, vol I, p. 227 (4th ed., London 1960); USSR Academy of Sciences, *op. cit.*, p. 320 (Krylov qualifies the permanent organizations, however, as “organizations in the full sense of the word”. *Ibid.*)

<sup>46</sup> *Ibid.*

66. Regional organizations can co-operate with the Economic and Social Council in their quality of international organizations under Article 71. This has been done by the Organisation of American States, especially in connexion with the activities of the Economic Commission for Latin America, and by the League of Arab States.

67. It is to be noted that the regional subsidiary organs of universal organizations, such as the regional economic commissions of the Economic and Social Council and the regional offices of the World Health Organization are not regional organizations in the above sense.<sup>53</sup> As sub-divisions of universal organizations with a regional sphere of activities, they do not have the independent character as international which is possessed by regional organizations.

2. *According to the procedure of admission to membership: organizations with automatic procedures and organizations with regulated procedures of admission*<sup>54</sup>

68. An organization with an automatic procedure of admission is one the admission to which depends solely on the will of the prospective member. This was the case of the Universal Postal Union, up to 1947, and it is still the case of the specialized agencies as regards the admission of States which are already Members of the United Nations.

69. Organizations with regulated procedures of admission are those which prescribe certain conditions for admission, whether these are objective conditions laid down in their constitutions (Article 1, para. 2 of the Covenant of the League of Nations and Article 4 of the Charter of the United Nations), or a discretionary decision of an organ of the organization (article 4 of the Statute of the Council of Europe).

70. Three observations are warranted in this regard:

(a) Even when admission is subject to the fulfilment of objective conditions, the element of political discretion cannot be practically eliminated.<sup>55</sup>

(b) The universal character of an organization receives its practical application in its attitude as regards the admission of new members.

(c) The automatic or regulated character of the procedure of admission is a matter of degree. They are hardly any organizations with a completely automatic procedure of admission.

#### *Classification of international organizations according to function*

1. *According to the scope of activities: general and specialized international organizations*

71. The general international organization is one whose jurisdiction covers the whole fabric of international relations. It is basically interested in the political problems, but its activities extend to other fields as well, e.g. economic, social and technical. Oppenheim emphasizes the comprehensive character of its scope of activities in defining it as

<sup>53</sup> Reuter, *Institutions*, p. 203.

<sup>54</sup> See generally, Reuter, *op. cit.*, pp. 204-205.

<sup>55</sup> See advisory opinion of the International Court of Justice on Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter), ICJ Reports, 1958, pp. 57-115.

“an association of States of potentially universal character for the ultimate fulfilment of purposes which, in relation to individuals organized in political society, are realized by the State”.<sup>56</sup>

72. The general character is not limited to universal organizations. A regional organization can be general if its scope of activities is global within its region. But it is true that the universality of membership is important to enable the organization to fulfil the comprehensive tasks described by Oppenheim. Moreover, there is an inherent trend in general universal organizations to increase both the universality of their membership and the comprehensive character of the scope of their activities. This has led some authors to speak of the movement “from geographic to ‘functional’ universality”<sup>57</sup> or “universality by subject-matter”<sup>58</sup> in the United Nations.

73. A specialized organization is one which has a specific limited object and purpose, such as the specialized agencies which succeeded the 19th and early 20th century administrative unions. This specific object can be economic, cultural, technical, social or humanitarian.

2. *According to the division of power: legislative, administrative and judicial organizations*

74. If we consider the functions of international organizations as public functions, it becomes possible to classify them into judicial, executive or administrative and legislative or quasi-legislative organizations. Sometimes all these functions are undertaken by different organs of the same organization, e.g., the United Nations.<sup>59</sup>

3. *According to the extent of authority and power of the organization vis-à-vis States: policy-making, operative and supra-national organizations*

75. The policy-making or deliberative organization is, according to one author, that which is “wholly confined to the development of international policies through adoption of resolutions and making recommendations to member governments and depending wholly on governments for the implementation of policy”.<sup>60</sup> The operative organization is that which has “administrative operative responsibilities independent from the governments which created [it]. The governments’ delegates lay down the policy but the organization would have the funds and the powers to carry them out without relying upon governments to do so”.<sup>61</sup> The first category includes general international organizations, whether universal or regional, while the second includes many of the specialized organizations.

76. In the second category, the organization has a real power of its own which can be exercised without being substituted for that of the State.<sup>62</sup> The functions of the organizations in this category can be either of the

<sup>56</sup> Oppenheim, *op. cit.*, p. 370.

<sup>57</sup> Nincic, *The Evolution of the United Nations*, in *Institute of International Politics and Economy, New Trends in International Law: Conference Materials*, p. 34 at p. 40 (Belgrade, 1961).

<sup>58</sup> Bartos, *The Characteristics of the New Trends in International Law*, *ibid.*, p. 7 at p. 17.

<sup>59</sup> Schwarzenberger, *op. cit.*, p. 227.

<sup>60</sup> Leonard, *International Organization*, p. 41 (New York, 1951).

<sup>61</sup> *Ibid.*

<sup>62</sup> Reuter, *Institutions*, p. 201.

management or of the control type.<sup>63</sup> The managing or operational organization is run as an enterprise such as the International Bank for Reconstruction and Development. The organization exercising control usually does so in connexion with an international convention or conventions, for example the International Labour Organization.

77. The supra-national organizations are organizations which replace governments in the exercise of sovereign powers legislation, adjudication or the ultimate use of coercion in a direct way over the populations and territories of member States without having, in doing this, to pass through their own governments.

78. The most important examples of this category are the European communities which are possessed of direct, if limited, legislative, executive and adjudicative powers.

79. Supra-national organizations lie on the outer limit of international organizations and on the border of federalism.<sup>64</sup> They are, hybrids which draw both on international law and municipal public law in their functioning techniques. As such, they are subject to the law of international organizations, but not in an exclusive way.<sup>65</sup>

80. It is to be noted that there is an inverse proportion between the actual power and authority of an organization on the one hand and the degree of its general and universal (and consequently heterogeneous) character on the other.

81. The preceding classifications are not exhaustive. They are sufficient, however, to illustrate the intricacies of the subject, especially if certain legal consequences are attached to them.

### III. Review of the attempts to codify the international law relating to the legal status of international organizations

#### A. GENERAL REMARKS

82. The legal incidents of the external relations of international organizations with States, which may be generally referred to as "the law of the legal status of international organizations", have not been the subject of comprehensive attempts of codification. This is due to the comparatively recent character of this branch of international law.

83. The inclusion in the Charter of the United Nations in 1945 of the provisions of Articles 104 and 105<sup>66</sup>

<sup>63</sup> *Ibid.*, *loc. cit.*

<sup>64</sup> *Ibid.*, p. 20.

<sup>65</sup> The term "supra-national" is useful in emphasizing the greater powers delegated by member States to organizations of such a character, than those assigned to other types of international organizations. It is not, however, altogether accurate inasmuch as it may create the erroneous impression that they are no more inter-State (inter-étatique) organizations with all the legal consequences which such characterization entails.

<sup>66</sup> These Articles provide that the United Nations "shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the . . . fulfilment of its purposes", and that "representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization".

marked a decisive point of departure<sup>67</sup> in the development of that new branch.

84. Pursuant to Article 105, paragraph 3, of the Charter<sup>68</sup>, the General Assembly approved on 13 February 1946 a "Convention on the Privileges and Immunities of the United Nations"<sup>69</sup> which elaborated on the legal capacity, privileges and immunities of the Organization and the privileges and immunities of the representatives of Members, the officials of the United Nations, and experts on missions for the United Nations. This Convention served as a prototype for and greatly helped in the drafting of a number of conventions between the United Nations, the specialized agencies or regional organizations and States.

85. Another decisive point was marked by the recognition by the International Court of Justice in its Advisory Opinion of 11 April 1949 on "Reparation for injuries suffered in the service of the United Nations"<sup>70</sup> that:

"The Organization was intended to exercise and enjoy, and is in fact exercising and enjoying, functions and rights which can only be explained on the basis of the possession of a large measure of international personality and the capacity to operate upon an international plane . . . it is a subject of international law and capable of possessing international rights and duties and has capacity to maintain its rights by bringing international claims. . . ."

86. This section will review the efforts of codification in relation first to the specific question of international immunities, and secondly, to the other aspects of the subject of the legal status of international organizations.

#### B. INTERNATIONAL IMMUNITIES

87. Long before the appearance of general international organizations (the League of Nations and the United Nations), constitutional instruments establishing international river commissions and the administrative unions in the second half of the nineteenth century contained treaty stipulations to which the origin of immunities and privileges of international bodies can be traced.<sup>71</sup> Examples are to be found in treaties establishing the European Danube Commission and the International Congo Commission, as well as the Permanent Court of Arbitration, the proposed International Prize Court and the Court of Arbitral Justice set up

<sup>67</sup> C. Wilfred Jenks, *International Immunities*, p. 12 (London, 1961).

<sup>68</sup> Article 105, paragraph 3, reads: "The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

<sup>69</sup> For text, see Annex to General Assembly resolution 22 A (I). See also United Nations *Treaty Series*, vol. 1, pp. 15-32; and United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations (ST/LEG/SER. B/10), United Nations publication Sales No. 60.V.2.

<sup>70</sup> "Reparations for injuries suffered in the service of the United Nations", Advisory Opinion, *I.C.J., Reports* 1949, p. 174.

<sup>71</sup> Jacques Secretan, "The Independence Granted to Agents of the International Community in their relations with National Public Authorities", in 26 *British Year Book of International Law*, (1935), pp. 59-65.

under the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes.<sup>72</sup>

88. However, as stated by an authority on "international immunities":

"Historically, the present content of international immunities derives from the experience of the League of Nations as developed by the International Labour Organisation when submitted to the test of wartime conditions, reformulated in certain respects in the ILO-Canadian wartime arrangements, and subsequently reviewed by the General Assembly of the United Nations at its first session in 1946. . . ." <sup>73</sup>

### 1. *The League of Nations*

#### (a) *Constitutional provisions*

89. Article 7, paragraph 4 of the Covenant of the League of Nations provided that:

"Representatives of the Members of the League and officials of the League when engaged on the business of the League shall enjoy diplomatic privileges and immunities."

Paragraph 5 provided that:

"The buildings and other property occupied by the League or its officials or by representatives attending its meetings shall be inviolable".

90. Article 19 of the Statute of the Permanent Court of International Justice provided that:

"The Members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities."

#### (b) *Treaty provisions*

91. Detailed arrangements concerning the privileges and immunities of the League of Nations were worked out in agreements between the Secretary-General of the League and the Swiss Government. The "Modus Vivendi" of 1921 as supplemented by the "Modus Vivendi" of 1926<sup>74</sup> granted the League immunity from suit before Swiss courts except with its express consent, recognized the inviolability of the archives of the League and of the premises in which the services of the League were installed, granted exemption from customs to League property and complete fiscal exemption to bank assets and securities, and accorded to

<sup>72</sup> In 1922 the French Government informed the Central Commission of the Navigation of the Rhine "qu'en raison du caractère de celle-ci, les représentants à cette commission, ainsi que ses agents, voyageant pour son service, bénéficieraient à l'avenir des mêmes facilités que s'ils jouissaient des immunités diplomatiques". See Guenter Weissberg, "The International Status of the United Nations", p. 143, also Francis Ray, "Les Immunités des Fonctionnaires Internationaux", in 23 *Revue de Droit International Privé* (1928), p. 253.

<sup>73</sup> Jenks, *op. cit.*, p. 12.

The "Modus Vivendi" of 1921 was embodied in a letter of 19 July 1921 from the Head of the Federal Political Department of the Swiss Government to the Secretary-General of the League of Nations on behalf of the Secretariat of the League and also of the International Labour Office.

The "Modus Vivendi" of 1926 was submitted to the Council of the League for approval. For an account of the negotiations which led to the conclusion of these two Agreements, see Martin Hill, *Immunities and Privileges of International Officials, The Experience of the League of Nations*, pp. 14-23 (Washington, Carnegie Endowment for International Peace, 1947).

officials of the League personal inviolability and immunity from civil and penal jurisdiction which varied according to different categories of officials.

92. At the suggestion of the Council of the League of Nations, the Permanent Court of International Justice entered into negotiations with the Netherlands Government which resulted in the Agreement of 1928, whereby effect was given to Article 19 of the Statute of the Court. The Agreement, which was given the title of "General Principles and Rules of Application Regulating the External Status of the Members of the Permanent Court of International Justice", was approved by the Council of the League on 5 June 1928.<sup>75</sup> The Agreement confirmed the assimilation of members of the Court and the Registrar to heads of diplomatic missions, all enjoying not only the diplomatic privileges and immunities but also the "special facilities" granted to heads of missions. A distinction was made, however, between the Judges and the Registrar, the former alone being granted the "prerogatives which the Netherlands authorities grant, in general, to heads of missions." <sup>76</sup>

#### (c) *The League Committee of Experts for the Progressive Codification of International Law*

93. This Committee was established by a decision of the Council of the League of Nations on 11 December 1924 "to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realisable at the present moment. . . ." <sup>77</sup>

94. The list as finally drawn up by the Committee at its third session in 1927 included the subject of diplomatic privileges and immunities for which a sub-committee was appointed which consisted of Mr. Diena, who acted as Rapporteur, and Mr. Mastny. On the basis of a report by Mr. Diena,<sup>78</sup> which stressed the difference between League officials and diplomatic agents, the Committee expressed the view that "it is not certain that an absolute identity of privileges and immunities should be established between diplomats proper and the categories just mentioned. It seems possible that the difference of circumstances ought to lead to some difference in the measures to be adopted." <sup>79</sup>

95. The whole subject of diplomatic privileges and immunities including those of League officials was, however, not included in the three subjects which the Assembly of the League decided at its eighth session in 1927 to retain as possible topics for codification at the First Conference for the Codification of International Law.<sup>80</sup>

#### (d) *Status of the International Labour Office in Canada during World War II*

96. When a nucleus of the staff of the International Labour Office was transferred from Geneva to Montreal in 1940, an arrangement defining in certain respects

<sup>75</sup> *Official Journal*, 1928, pp. 985-987.

<sup>76</sup> Hill, *op. cit.*, p. 51.

<sup>77</sup> This decision was taken in pursuance of a resolution adopted by the Assembly of the League. League of Nations Document C. 196. M. 70. 1927. V.

<sup>78</sup> *Ibid.*, p. 85.

<sup>79</sup> *Ibid.*, loc. cit.

<sup>80</sup> These three topics were: nationality, the responsibility of States and territorial waters.

the status of the Office and its staff in Canada had to be worked out. This arrangement was embodied in a Canadian Order in Council of 14 August 1941. The Order recognizes "that by Article 7 of the Covenant of the League of Nations and Article 6 of the Constitution of the International Labour Organisation, the International Labour Office as part of the organization of the League enjoys diplomatic privileges and immunities". It grants to "members of the international administrative staff" of the Office immunity from civil and criminal jurisdiction, subject to waiver by the Director. Other members of the staff enjoy this immunity "in respect of acts performed by them in their official capacity and within the limits of their functions", likewise subject to waiver by the Director. These other members are expressly made subject to the jurisdiction of the Canadian courts in respect of acts performed in their private capacity. Salaries paid by the Office to the permanent members of its staff are exempted from "all direct taxes imposed by the Parliament or Government of Canada, such as income tax and National Defence Tax".<sup>81</sup>

## 2. The United Nations and the specialized agencies

### (a) Constitutional provisions

97. Article 105 of the United Nations Charter provides that:

"1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.

"2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.

"3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of this Article or may propose conventions to the Members of the United Nations for this purpose."

98. Article 19 of the Statute of the International Court of Justice provides that:

"The members of the Court, when engaged on the business of the Court, shall enjoy diplomatic privileges and immunities."

Article 32, paragraph 8 provides that the salaries, allowances and compensations (received by the members of the Court, the President, the Vice-President, the judges chosen *ad hoc* under Article 31) shall be free of all taxation.

99. Constitutional instruments of the specialized agencies usually contain stipulations which provide in general terms that the organization will enjoy such privileges and immunities as are necessary for the fulfilment of its purposes, that representatives of members and officials of the organization will enjoy such privileges and immunities as are necessary for the independent exercise of their functions. These constitutions usually provide also that such privileges and immunities will be defined in greater detail by later agreements (Article 40 of the Constitution of the International

Labour Organisation, Article XV of the Constitution of the Food and Agriculture Organization of the United Nations, Article XII of the Constitution of the United Nations Educational, Scientific and Cultural Organization, Articles 66-68 of the Constitution of the World Health Organization, Article 27 of the Convention of the World Meteorological Organization, Article 60 of the International Civil Aviation Convention, Article 50 of the Convention on the Intergovernmental Maritime Consultative Organization, Article XV of the Statute of the International Atomic Energy Agency).<sup>82</sup> However, the constitutions of some specialized agencies define themselves in some detail the scope of the privileges and immunities of the organization (the Articles of Agreement of the International Monetary Fund, the International Bank for Reconstruction and Development and the International Finance Corporation).<sup>83</sup>

### (b) *The Preparatory Commission of the United Nations*

100. This Commission instructed the Executive Secretary to invite the attention of the Members of the United Nations to the fact that, under Article 105 of the Charter, the obligation of all Members to accord to the United Nations, its officials and the representatives of its members all privileges and immunities necessary for the accomplishment of its purposes, operated from the coming into force of the Charter and was therefore applicable even before the General Assembly made the recommendations or proposed the conventions referred to in paragraph 3 of Article 105.<sup>84</sup>

101. It recommended that "the General Assembly, at its first session, should make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of Article 105 of the Charter, or propose conventions to the Members of the United Nations for this purpose". It transmitted for the consideration of the General Assembly a study on privileges and immunities, and, as "working papers", a draft general convention on privileges and immunities and a draft treaty to be concluded by the United Nations with the United States of America, the country in which the headquarters of the Organization were to be located. It considered that the details of the prerogatives to be accorded to members of the International Court of Justice should be determined after the Court had been consulted, and that until further action had been taken "the rules applicable to the members of the Permanent Court of International Justice should be followed". It recommended that the privileges and immunities of specialized agencies contained in their respective constitutions should be reconsidered and negotiations opened "for their co-ordination" in the light of any convention ultimately adopted by the United Nations.<sup>85</sup>

102. The documents of the Preparatory Commission were studied by the Sixth Committee of the General Assembly at the first part of its First Session in January-February 1946. The following resolutions concerning

<sup>82</sup> For these texts, see United Nations Legislative Series, Legislative texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, Vol. II (1961). (ST/LEG/SER.B/11, United Nations publication sales No. 61.V.3)

<sup>83</sup> *Ibid.*

<sup>84</sup> Report of the Preparatory Commission of the United Nations, document PC/20.

<sup>85</sup> *Ibid.*, pp. 60-74.

<sup>81</sup> Hill, *op. cit.*, p. 93. For text of the Canadian Order in Council of 1941, see *ibid.*, Annex IV, pp. 203, 204.

the privileges and immunities of the United Nations were adopted by the General Assembly:

1. A resolution relating to the adoption of the General Convention on Privileges and Immunities of the United Nations, to which the text of the convention is annexed.

2. A resolution relating to negotiations with the competent authorities of the United States of America concerning the arrangements required as a result of the establishment of the seat of the United Nations in the United States, together with a draft convention to be transmitted as a basis of discussion for these negotiations.

3. A resolution on the privileges and immunities of the International Court of Justice.

4. A resolution on the coordination of the privileges and immunities of the United Nations and the specialized agencies.<sup>86</sup>

(c) *Treaty provisions*

(i) *General conventions*

103. A General Convention on the Privileges and Immunities of the United Nations (hereafter referred to as the General Convention) was approved by the General Assembly on 13 February 1946 and was in force on 1 October 1962 for seventy-four States.<sup>87</sup> In accordance with the provisions of this Convention, the United Nations and its property and assets enjoy immunity from every form of legal process, the premises of the United Nations are inviolable and the property and assets of the United Nations are immune from search, requisition, confiscation, expropriation or any other form of interference, whether by executive, administrative, judicial or legislative action. The United Nations is also exempt from all direct taxes and customs duties and its publications are exempt from prohibitions and restrictions on imports and exports. The Convention accords to representatives of Member States privileges and immunities generally enjoyed by diplomatic envoys, such as immunity from legal process, inviolability of all papers and documents, exemption from immigration restrictions and alien registration and the right to use codes for their communications. Officials of the United Nations are immune from legal process in respect of acts performed by them in their official capacity, and are exempt from taxation on the salaries and emoluments paid to them by the United Nations. They are immune from national service obligations as well as from immigration restrictions and alien registration. The Convention also accords certain immunities for "experts on mission for the United Nations".<sup>88</sup>

104. A Convention on the Privileges and Immunities of the Specialized Agencies<sup>89</sup> (hereafter referred to as

the Specialized Agencies Convention) was approved by the General Assembly on 21 November 1947 and was in force on 1 October 1962 for thirty-nine States.<sup>90</sup> This Convention follows closely the terms of the General Convention, with a small number of significant variations.<sup>91</sup> The Convention is applicable, subject to variations set forth in a special annex for each agency the final form of which is determined by the agency concerned, to nine designated specialized agencies, namely the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the UNESCO, the International Civil Aviation Organization, the International Monetary Fund, the International Bank for Reconstruction and Development, the World Health Organization, the Universal Postal Union, and the International Telecommunication Union, and any further agency subsequently brought into relationship with the United Nations in accordance with Articles 57 and 63 of the Charter.<sup>92</sup> Accordingly, the Convention has been applied to the World Meteorological Organization, the Intergovernmental Maritime Consultative Organization and the International Finance Corporation. An Agreement on the Privileges and Immunities of the International Atomic Energy Agency was approved by the Board of Governors of the Agency on 1 July 1959, which "in general follows the Convention on the Privileges and Immunities of the Specialized Agencies".<sup>93</sup>

(ii) *Headquarters agreements*

105. The General Conventions are supplemented by headquarters agreements between the United Nations and specialized agencies on the one hand and States in whose territory they maintain headquarters on the other hand. Headquarters agreements have been concluded by the United Nations with the United States of America and Switzerland, by the International Civil Aviation Organization with Canada, by UNESCO with France, by the Food and Agriculture Organization with Italy, by the International Atomic Energy Agency with Austria, and by the International Labour Organization, the World Health Organization, the World Meteorological Organization, the International Telecommunication Union, and the Universal Postal Union with Switzerland.<sup>94</sup>

(iii) *Special agreements*

106. The Repertory of the Practice of the Organs of the United Nations contains in its section on Articles 104 and 105 of the Charter a synoptic survey of special agreements on privileges and immunities of the United Nations, classifying them in the following categories:<sup>95</sup>

<sup>90</sup> See footnote 87 above.

<sup>91</sup> Jenks, *op. cit.*, p. 5.

<sup>92</sup> See Francis Wolf, *Le Droit aux privilèges et immunités des institutions spécialisées reliées aux Nations Unies*, Université de Montréal, 1948, cited in Jenks, *op. cit.*, p. 5, footnote 34.

<sup>93</sup> See the Preamble of the Agreement, International Atomic Energy Agency Document INFCIR/9/Rev.1, of 21 December 1959.

<sup>94</sup> United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Legal Status, Privileges and Immunities of International Organizations, Vol. I (1959) and Vol. II (1961).

<sup>95</sup> *Repertory of the Practice of the Organs of the United Nations*, vol. V (1955).

<sup>86</sup> Texts reproduced in Hill, *op. cit.*, Annexes VI-IX, pp. 224-247.

<sup>87</sup> Information on the status of this Convention and the number of States which had acceded thereto by 1 October 1962 was made available to the Special Rapporteur through the kindness of the Treaty Section of the Office of Legal Affairs of the United Nations.

<sup>88</sup> For a summary of the provisions of this Convention, see *Repertory of the Practice of the Organs of the United Nations* (ad Article 105, paragraphs 1 and 2), vol. V, New York, 1955.

<sup>89</sup> United Nations *Official Records of the General Assembly*, Second Session, document A/519.

1. Agreements with non-member States.
2. Agreements with Member States:
  - (a) Agreements complementary or supplementary to the General Convention;
  - (b) Agreements applying the provisions of the General Convention in cases where Members have not yet acceded to the Convention;
  - (c) Agreement specifying the nature of privileges and immunities to be enjoyed by certain United Nations bodies in host countries.
3. Agreements concluded with Member or non-member States by United Nations principal or subsidiary organs within their competence:
  - (a) Agreements on the operation of the relief programme for Palestine refugees;
  - (b) Agreements concerning the activities of the UNICEF in Member or non-member States;
  - (c) Agreements concerning technical assistance;
  - (d) Trusteeship agreements.

107. Jenks gives a detailed enumeration of these special agreements classifying them in the following categories:<sup>96</sup>

1. Host agreements (examples: agreements concluded by the World Health Organization for its regional offices with Egypt, France and Peru, and by the International Labour Organisation for its Field Offices with Mexico, Peru, Turkey and Nigeria).

2. Agreement relating to Special Political Tasks (examples: agreement concluded by the United Nations with Korea on 21 September 1951, agreement concluded by the United Nations with Egypt on 8 February 1957 concerning the United Nations Emergency Forces).

3. Technical assistance and supply agreements.

4. Agreements concerning particular meetings (example: the agreement of 17 August 1951 between the United Nations and France relating to the holding in Paris of the Sixth Session of the General Assembly).

### 3. Regional organization

108. Constitutional instruments of regional organizations also usually contain provisions relating to the privileges and immunities of the organization. Examples:

(a) Articles 103-106 of the Charter of the Organization of American States signed at Bogota on 30 April 1948;

(b) Article 40 of the Statute of the Council of Europe of 5 May 1949;

(c) Article 14 of the Pact of the League of Arab States of 22 March 1945;

(d) Article XIII of the Charter of the Council for Mutual Economic Assistance signed at Sofia on 14 December 1959;

(e) Article XIV of the Protocol for the Implementation of the African Charter of Casablanca signed at Cairo on 5 May 1961;

(f) Article 40 of the Charter of the Inter-African and Malagasy States Organization, adopted in principle at Lagos in January 1962.

109. These constitutional provisions have been implemented by general conventions on privileges and immu-

nities<sup>97</sup> which were largely inspired by the General Convention of the United Nations and the specialized agencies conventions. A number of headquarters and host agreements were also concluded by regional organizations with States in whose territory they maintain headquarters or other offices.

### C. OTHER ASPECTS OF THE LEGAL STATUS OF INTERNATIONAL ORGANIZATIONS

110. Unlike the question of privileges and immunities of international organizations, the other aspects of the subject of external relations between States and international organizations have not received adequate regulation either in the form of international conventions (treaty law) or national legislation (statute law). Some of these aspects, however, were considered and solutions for their regulation were sought by the League of Nations, private authorities and the United Nations.

#### 1. *The League of Nations*

*The work of the League Committee of Experts for the Progressive Codification of International Law on Procedure of International Conferences*<sup>98</sup>

111. At its first session held at Geneva (meeting of 8 April 1925), the Committee of Experts for the Progressive Codification of International Law adopted, among others the following resolution:

"(g) The Committee appoints a Sub-Committee (consisting of M. Mastny, as Rapporteur, and M. Rundstein) to examine the possibility of formulating rules to be recommended for the procedure of international conferences and the conclusion and drafting of treaties, and what such rules should be."<sup>99</sup>

112. The Rapporteur submitted a report containing two lists of the subjects to be examined in respect of procedure of international conferences and conclusion and drafting of treaties.<sup>100</sup>

The part of the report which relates to the procedure of international conferences can be summarized as follows:

1. The Rapporteur divides the rules "which usually govern the procedure of international conferences into two categories:

The first category includes a series of rules which are left to the free choice of the States and their representatives taking part in the conference.

As regards this category it is impossible to say that a custom exists in the legal sense of the term, as the rules are purely formal and can constantly be changed at the discretion of the participating States.

<sup>97</sup> Examples: Agreement on Privileges and Immunities of the Organization of American States, opened for signature on 15 May 1949; General Agreement on Privileges and Immunities of the Council of Europe, signed at Paris on 2 September 1949; Protocole sur les Privilèges et Immunités de la Communauté européenne du charbon et de l'acier, signed at Paris, 18 April 1951; Convention on the Privileges and Immunities of the League of Arab States approved by the Council of the League of Arab States on 10 May 1953; Convention concerning the juridical personality, privileges and immunities of the Council for Mutual Economic Assistance, signed at Sofia on 14 December 1959.

<sup>98</sup> See above paragraphs 93-95.

<sup>99</sup> League of Nations Document C. 47 M. 24. 1926 V.

<sup>100</sup> *Ibid.*, C. p. D. I. 32 (I).

<sup>96</sup> Jenks, *op. cit.*, pp. 7-11.

The category of rules is based on usage followed without "opinio necessitatis".

This second category, on the other hand, includes certain rules which from the legal point of view are merely the application of certain fundamental principles generally recognized as forming part of existing international law (customary law, "opinio necessitatis").

2. He then poses the question "What such rules should be" and states:

"It is necessary first of all to decide on what basis regulation should be established.

"Three solutions suggest themselves:

"(1) Regulation of procedure containing only rules common to all types of conferences;

"(2) Detailed regulation of the procedure of a certain type of conference;

"(3) Adoption in a convention of certain general principles which should be observed by States when conferences are held, irrespective of the special nature of such conferences."

3. In examining these three types, the Rapporteur emphasizes that "For the purposes of codification, it would perhaps be necessary to establish certain distinctions. In the first place, a distinction might be made between conferences planned and organized by the League of Nations and held under its auspices, and all conferences unconnected with the League.

"A further distinction should be made between political conferences and non-political conferences (administrative, economic, social, etc.).

"From the legal point of view, a distinction should be made between conferences on international conventional law (codification conferences) and special conferences (conferences settling particular relations between the contracting States).

"Lastly, according to the character of the representatives, a distinction should be made between diplomatic conferences (diplomatic agents) and technical conferences (experts)".

4. The Rapporteur concludes by favouring the third alternative "which contemplates the adoption, by means of conventions, of certain general principles of procedure for all international conferences irrespective of their special character," and states that "Codification in this last sense should be confined:

"(a) to the generally recognized principles of substantive international law (customary law);

"(b) to the general rules as regards form consecrated by usage;

"(c) to the positive rules of conventional legislation with a view to obviating the difficulties to which disputed questions may give rise (conventional law)."

## 2. Work by private authorities

### (a) *Fiore's draft code, 1890*

113. Articles 81 and 82 and commentary:<sup>101</sup>

"81. The status of a person in international society may be claimed by legal entities personified by reason of

<sup>101</sup> Pasquale Fiore, *International Law Codified and its Legal Sanction* or the Legal Organization of the Society of States. Translation from the 5th Italian Edition by Edwin M. Borchard, p. 116 (New York, 1918).

a well-defined purpose of international interest. This status is limited to the States which have recognized them as persons and given them the right to acquire certain privileges, which they must exercise and enjoy in order to fulfil the international mission for which they were created.

"82. The international personality of legal entities must, in principle, be considered as limited to the exercise of the international rights granted to them, and it cannot have any effect on states which have not recognized these entities as international juridical persons.

"The condition of legal persons according to international law is similar to that of legal persons under the civil law. The individuality of these two classes of persons which, as we have said elsewhere (rule 56), must be considered as an essential condition of their existence, depends on the personification which proceeds from the purpose by reason of which legal entities that are not persons *jure proprio*, acquire personality. Legal persons must be considered individualized in consequence of a legal fiction and become persons by virtue of the act granting them the capacity to operate, to bind themselves and to be considered the subjects of rights."

114. Article 748 and commentary:<sup>102</sup>

"748 Any State which enjoys rights of sovereignty must be deemed capable, in principle, of concluding a treaty and thus contracting legal obligations and acquiring rights with respect to the other contracting party, subject, however, to the limitation set forth in rule 739.

"This capacity, furthermore, may be possessed by associations to which international personality has been attributed (see rule 81) within the limits, nevertheless, of the purposes for which personality was recognized and is considered as subsisting.

"The International Congo Association, to which international personality was attributed for the limited purpose for which it was formally recognized, was regarded as capable of concluding treaties, and has concluded several, including one with Italy, 9 December 1884.

"The Customs Association of the German States, known as the *Zollverein*, had the power to and did conclude, in its own name, several treaties, until it lost its international personality by the establishment of the German Empire.

(b) *Report of Sir John Fischer Williams on "The Status of the League of Nations" to the thirty-fourth Conference of the International Law Association (Vienna, 1926)*

115. Following are excerpts from the report of Sir John Fischer Williams on "The Status of the League of Nations" to the thirty-fourth Conference of the International Law Association held at Vienna in 1926:

"... My submission is e.g. ... that the authors of the League, consciously or unconsciously, built a more novel and a more subtle construction (than a confederation of States). They were making a step forward in International Law: they were constructing, for the first time on any great scale, a thing in International Law analogous to the body corporate in municipal law. They were creating a subject of rights and duties of limited and definite scope of a nature different of the subjects of

<sup>102</sup> *Ibid.*, p. 329.

rights and duties which alone — or almost alone — had hitherto been recognized.”

“ . . . . I assume that the conditions for the attribution of legal personality to a collectivity are the possession by the collectivity of rights and duties which are peculiar to itself, and are not rights and duties of the *personae*, natural or collective, who are members of corporators of the collectivity.”

“ . . . . The League has what is called an “action” (art. 2) which is effected “through the instrumentality” of an Assembly, a Council and a permanent Secretariat. Now an “action” is surely the outward and visible sign of a personality (the manifestation of a will).”

“ . . . . Again, the permanent Secretariat is composed of the servants of the League (art. 6). With whom are their contracts of service? Not surely with the individual members of the League or of the Council; their contractual relations are with the League itself. . . . ”<sup>103</sup>

“ . . . . Ownership of property by the League seems at any rate to be currently accepted by the Governments interested. . . . ”

“ . . . . Similarly, the provisions as to the internal constitution of the League are more easily reconcilable with the conception of a permanent body with a personality of its own than of a loose association without corporate existence. The League is not a group of particular States; it is a body corporate with possibly changing corporators. . . . ”

“ . . . . Again, the League has ‘Mandatories’ who act on its behalf (art. 22 par. 2), not on behalf of the members of the League. . . . ”

“ . . . . On some points the action of the League may be determined by a majority vote (art. 4, 5, 15 & 26) . . . . an indication that we have not before us a mere congeries of separate units, but a single body with a common will. . . . ”

“ . . . . in the Treaty of Versailles . . . . two passages are striking: Art 49 of the Treaty makes the League a trustee (of the government of the Saar Valley), Art. 102 confers on the League the status of a guardian or protector (of the Free City of Danzig). . . . ”

### 3. The United Nations

*Resolution of the General Assembly of the United Nations on “Permanent Missions to the United Nations”, 3 December 1948*

116. Resolution 257 A (III):

“ *The General Assembly,*

“ *Considering that, since the creation of the United Nations, the practice has developed of establishing, at the seat of the Organization, permanent missions of Member States,*

“ *Considering that the presence of such permanent missions serves to assist in the realization of the purposes and principles of the United Nations and, in particular, to keep the necessary liaison between the Member States and the Secretariat in periods between sessions of the different organs of the United Nations,*

“ *Considering that in these circumstances the generalization of the institution of permanent missions can be foreseen, and that the submission of credentials of permanent representatives should be regulated,*

“ *Recommends*

“ 1. That credentials of the permanent representatives shall be issued either by the Head of the State or by the Head of the Government or by the Minister of Foreign Affairs, and shall be transmitted to the Secretary-General;

“ 2. That the appointments and changes of members of the permanent missions other than the permanent representative shall be communicated in writing to the Secretary-General by the head of the mission;

“ 3. That the permanent representative, in case of temporary absence, shall notify the Secretary-General of the name of the member of the mission who will perform the duties of the head of the mission;

“ 4. That Member States desiring their permanent representatives to represent them on one or more of the organs of the United Nations should specify the organs in the credentials transmitted to the Secretary-General, “ *Instructs* the Secretary-General to submit, at each regular session of the General Assembly, a report on the credentials of the permanent representatives accredited to the United Nations.”

*The rules of procedure of the General Assembly of the United Nations and their impact upon the development of organization and procedure of diplomatic conferences*

117. Out of the rules of procedure worked out by the different organs of the United Nations and the specialized agencies, grew a substantial body of rules and regulations concerning the organization and procedure of diplomatic conferences which have become known as “multilateral” or “parliamentary” diplomacy.<sup>104</sup>

118. Special mention should be made of the preparatory work on the “method of work and procedure” of the United Nations Conference on the Law of the Sea. This work was undertaken by the Secretariat of the United Nations with the advice and assistance of a group of experts in implementation of paragraph 7 of General Assembly resolution 1105 (XI) which reads as follows:

“ [The General Assembly]

“ Requests the Secretary-General to invite appropriate experts to advise and assist the Secretariat in preparing the Conference, with the following terms of reference:

“ (b) To present to the Conference recommendations concerning its method of word and procedure, and other questions of an administrative nature . . . ”

119. The report submitted by the Secretary-General<sup>105</sup> pursuant to this request contained “Provisional Rules of procedure” which, for the most part, followed the standard pattern of the rules of procedure of the General Assembly. They were adopted<sup>106</sup> by the United Nations First and Second Conferences on the Law of the Sea in

<sup>104</sup> See Philip C. Jessup, *Parliamentary Diplomacy, an examination of the legal quality of the rules of procedure of organs of the United Nations*, 89 *Recueil des Cours*, pp. 185-319 (1956 I).

<sup>105</sup> See *United Nations Conference on the Law of the Sea, Official Records*, vol. I: Preparatory Documents, United Nations publication, Sales No. 58.V.4, vol. I, pp. 172-175, document A/CONF.13/11.

<sup>106</sup> *Ibid.*, vol. II; Plenary meetings, pp. xxxi *et seq.*

<sup>103</sup> Report of the thirty-fourth Conference of the International Law Association, Vienna, 1926, pp. 675-695.

1958 and 1960<sup>107</sup>, as well as the Conference on Diplomatic intercourse and immunities in 1961<sup>108</sup> and the Conference on Consular Relations in 1963, with a limited number of appropriate significant variations.

#### D. THE INTERNATIONAL LAW COMMISSION

120. A number of questions of international law relating to the status of international organizations were considered by the International Law Commission in connexion with its consideration of the subjects: selection of topics for codification, the law of treaties, the law of the sea, State responsibility, and diplomatic intercourse and immunities.

##### 1. *In connexion with the selection of topics for codification*

121. Article 18 of the Statute of the International Law Commission provides that "the Commission shall survey the whole field of international law with a view to selecting topics for codification . . .". Pursuant to the resolution of the General Assembly 175 (II) of 21 November 1947, the Secretary-General submitted to the International Law Commission a memorandum (A/CN.4/1/Rev.1) entitled "Survey of International Law in Relation to the Work of Codification of the International Law Commission, Preparatory work within the purview of 18, paragraph 1, of the Statute of the International Law Commission".

122. In surveying international law in relation to codification, the memorandum of the Secretary-General begins with a section on the topic of "Subjects of International Law" in which one finds the following references to international organizations:

"The question of the subjects of international law has, in particular in the last twenty-five years, ceased to be one of purely theoretical importance, and it is now probable that in some respects it requires authoritative international regulation. Practice had abandoned the doctrine that States are the exclusive subjects of international rights and duties."

"Account must be taken of the developments in modern international law amounting to a recognition of the international personality of public bodies other than States. The international legal personality of the United Nations, of the specialized agencies established under its aegis, and of other international organizations, calls for a re-definition of the traditional rule of international law in the matter of its subjects. That legal personality is no longer a postulate of scientific doctrine. It is accompanied by a recognized contractual capacity in the international sphere and, as with regard to the right to request an advisory opinion of the International Court of Justice, by a distinct measure of international procedural capacity."

123. The topic of "subjects of international law" was among the twenty-five topics which the International Law Commission reviewed consecutively in the course of its first session in 1949. The Commission did not,

<sup>107</sup> See *Second United Nations Conference on the Law of the Sea, Official Records* United Nations publication, Sales No. 60.V.6, pp. xxviii et seq.

<sup>108</sup> See *United Nations Conference on Diplomatic Intercourse and Immunities, Official Records*, vol. I, United Nations publication, Sales No. 61.X.2, pp. xxiii et seq.

however, include it, in the provisional list of fourteen topics selected for codification which it drew up.<sup>109</sup>

##### 2. *In connexion with the subject of the law of treaties* (a) *Report of the first Special Rapporteur (Brierly)* (A/CN.4/23)

124. In his "Draft convention on the law of treaties", Brierly included a number of provisions concerning international organizations in relation to:

1. Use of the term "treaty" (article 1 a);
2. Use of the term "an international organization" (article 2 b);
3. Capacity to make treaties (article 3);
4. Constitutional provisions as to the exercise of capacity to make treaties (article 4. 1 and 3);
5. Exercise of capacity to make treaties (article 5);
6. Authentication of texts of treaties (article 6 c);
7. Acceptance of treaties (article 7);
8. Acceptance by signature (article 8);
9. Acceptance by means of an instrument (article 9);
10. Reservations to treaties (article 10);
11. Entry into force and entry into operation of treaties (article 11. 2).

125. He explains his reasons for including in the draft articles provisions concerning international organizations as follows (*ibid.*, paragraph 26):

"This draft differs from any existing draft in recognizing the capacity of international organizations to be parties to treaties. That capacity was not indeed denied by the Harvard Convention which, however, arbitrarily excluded from its scope any agreement to which any entity other than a State was a party. In so far as concerned the agreements of international organizations, this attitude was adopted 'because of their abnormal character and the difficulty of formulating general rules which would be applicable to a class of instruments which are distinctly *sui generis*'. It is now, however, impossible to ignore this class of agreement or to regard their existence as an abnormal feature of international relations.

"For the International Court of Justice has observed, of the United Nations, that 'the Charter has not been content to make the Organization created by it merely a centre for harmonizing the actions of nations in the attainment of these common ends (Article 1, paragraph 4). It has equipped that centre with organs, and has given it special tasks. It has defined the position of the members in relations to the Organization . . . providing for the conclusion of agreements between the Organization and its members. Practice — in particular the conclusion of conventions to which the Organization is a party — has confirmed this character of the Organization . . .'. The difficulty of finding rules common to the treaties of States and to those of international organizations is, moreover, not insuperable."

##### (b) *Report of the second Special Rapporteur (Lauterpacht)* (A/CN.4/63)

126. In his draft articles on the law of treaties which he submitted to the International Law Commission, Lauterpacht in article 1 defines treaties as:

" . . . agreement between States, including organiza-

<sup>109</sup> Report of the International Law Commission on the work of its first session (A/925, paragraphs 15 and 16).

tions of States, intended to create legal rights and obligations of the parties ”

127. In the commentary to this article, he states that the expression “ organizations of States ” is intended as synonymous with the expression “ international organizations ” for which he suggests the following definition:

“ . . . entities which are created by treaty between States, whose membership is composed primarily of States, which have permanent organs of their own, and whose international personality is recognized either by the terms of their constituent instrument or in virtue of express recognition by a treaty concluded by them with a State ”.

128. He formulated his draft articles in a general form, on the basis of the definition he gives in article 1, which includes States and international organizations. Some of the provisions of his draft make specific mention of international organizations. Thus article 7 provides that “ a State or organization of States may accede to a treaty . . . ”.

(c) *Report of the third Special Rapporteur (Fitzmaurice) (A/CN.4/101)*

129. Like his two predecessors, Fitzmaurice formulated his draft “ articles of Code ” on the law of treaties on the basis of extending their scope to include treaties of international organizations. Thus article 3, paragraph 3, provides that:

“ The provisions of the present code relating to the powers, rights and obligations of States relative to treaties, are applicable, *mutatis mutandis*, to international organizations, and to treaties made between them, or between one of them and a State, unless the contrary is indicated or results necessarily from the context.”

130. He included in his 1956 draft specific provisions relative to international organizations with regard to:

1. Definition of terms (article 3 b);
2. Exercise of the treaty-making power (article 9, paragraph 2 b);
3. Drawing up of the text of the treaty at an international conference (article 15, paragraph 1);
4. Establishment and authentication of the text of the treaty through incorporation in a resolution of an organ of an international organization (article 18, paragraph 1 c);
5. Accession to a treaty the text of which is embodied in a resolution of an international organization (article 34, paragraph 5).

(d) *Report of the present Special Rapporteur (Waldock) (A/CN.4/144)*

131. In the introduction to his first report on the law of treaties submitted to the International Law Commission in 1962, which had instructed him in 1961 to re-examine the work previously done in this field by the previous Special Rapporteurs and by the Commission, Waldock discusses the scope of the subject in relation to treaty making by international organizations. He refers to the decision of the Commission in 1951, which was reaffirmed in 1959, to leave aside for the moment the question of the capacity of international organizations to make treaties, to draft its articles on the law of treaties with reference to States only, and, to examine later whether they could be applied to international organiza-

tions as they stood, or whether they required modifications. He takes exception to this view and points out that:

“ 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 of treaties and, unless it is unavoidable, it seems better not to postpone all consideration of treaty-making by international organizations until some comparatively distant date, by which time the Commission will have dealt with many other matters not very closely related to this part of the law of treaties.”

132. He included in his draft a number of provisions relative to international organizations with regard to:

1. Definition of the term “ international agreement ” (article 1 a);
2. Capacity to become a party to treaties (article 3, paragraph 4);
3. Adoption of the text of a multilateral treaty drawn up at an international conference convened by an international organization or an international organization (article 5, paragraph 1 d and c);
4. Authentication of the text of a treaty through its incorporation in a resolution of an international organization (article 6, paragraph 1 c);
5. Procedure of ratification in the case of a multilateral treaty adopted in an international organization (article 11, paragraph 3 c);
6. Participation in a treaty by accession in the case of a multilateral treaty drawn up in an international organization or at an international conference convened by an international organization (article 13, paragraph 2 d);
7. Consent to reservations and its effects in the case of a plurilateral or multilateral treaty which is the constituent instrument of an international organization, (article 18, paragraph 4 c);
8. Objection to reservations and its effects in the case of a treaty which is the constituent instrument of an international organization (article 19, paragraph 4 d);
9. The depositary of multilateral treaties in the case of a treaty drawn up within an international organization or at an international conference convened by an international organization (article 26, paragraph 2 a).

(e) *Position taken by the International Law Commission at its fourteenth session in 1962*

133. The present Special Rapporteur on the law of treaties informed the International Law Commission, on presenting his first report at the beginning of its fourteenth session, that he had prepared for submission to the Commission at a later stage in the session a final chapter on “ the treaties of international organizations ” (A/CN.4/144, introduction, paragraphs 10 and 11).

134. In preparing its provisional draft articles on the law of treaties (Part I, Conclusion, entry into force and registration of treaties) in 1962, the Commission retained in general the provisions relating to the treaty-making capacity of international organizations, as well as those relating to treaties of States which are drawn up in an international organization or at an international conference convened by an international organization as suggested by the Special Rapporteur.

135. As regards the general question of treaties of international organizations, the Commission reaffirmed its decisions of 1951 and 1959 "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" (A/5209, paragraph 21). At the same time the Commission stated that:

"... (it) 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."

3. *In connexion with the subject of the law of the sea: supplementary report submitted by the Special Rapporteur (François) on "The right of international organizations to sail vessels under their flags" (A/CN.4/103)*

136. The general problems involved in the operation of ships registered with an international organization and flying its flag were discussed at the request of the United Nations by the International Law Commission in the course of its seventh session in 1955.

137. The discussion related to article 4 of the Commission's provisional articles concerning the regime of the high seas (A/2934, chapter II), which provides that:

"Ships possess the nationality of the State in which they are registered. They shall sail under its flag and, save in the exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction in the high seas."

138. After the adoption of article 4 of the Commission's provisional articles concerning the regime of the high seas, the Chairman of the Commission read to the Commission a letter from Mr. C. A. Stavropoulos, Legal Counsel of the United Nations, relating to the flag and registry of ten fishing vessels owned by the United Nations (the United Nations Korean Reconstruction Agency). In this letter, Mr. Stavropoulos thought it desirable that the Commission's provisional articles concerning the régime of the high seas should at least not exclude the possibility of registration by an international organization of its own ships. At the same time, he called the Commission's attention to the questions of jurisdiction and of the law applicable aboard vessels under international registration.

139. The Commission considered the question raised in Mr. Stavropoulos' letter at its eighth session in 1956 on the basis of a supplementary report by Mr François, the Special Rapporteur (A/CN.4/103). In this report, Mr François divided the questions involved into three categories:

1. those connected with the possibility of the United Nations or other international organizations owning vessels;
2. those relating to the flag, registration, nationality and protection of vessels owned by the United Nations or other international organizations; and
3. Those concerning the law applicable to such vessels and the persons and chattels aboard.

He then pointed out that no doubt could exist regarding the question whether the United Nations and all international organizations of comparable capacity had or had not the right to own ships. He also noted that "no difficulty can arise over the question whether the United Nations may register the ships it owns with a particular State and have them fly the flag of that State". As regards the question whether an international organization has the right to register the ships with itself, i.e., the system of an international organization registration, he found the legal status of an international organization ship not registered with a State highly problematical. He summarized the problems which such a situation creates as follows:

(i) The flag of an international organization cannot be assimilated to the flag of a State for the purposes of the application of the legal system of the flag State, especially with regard to the civil and criminal law applicable aboard ship;

(ii) The inability of an international organization "to offer the same guarantees as States for the orderly use of the seas".

As a solution for the problem, he suggested that the following proposals may be taken into consideration (*ibid.*, paragraph 9):

- " 1. The Members of the United Nations recognize a special United Nations registration which entitles the ship to fly the United Nations flag and to special protection by the United Nations;
- " 2. The Secretary-General of the United Nations is authorized to conclude, as the need arises, a special agreement with one or more of the Members by which these Members allow the vessels concerned to fly their flag in combination with the United Nations flag;
- " 3. The Members of the United Nations undertake in a general agreement to extend their legislation to ships concerning which a special agreement between them and the Secretary-General, as referred to in paragraph 2, may have been concluded, and to assimilate such ships to their own ships, in so far as that would be compatible with the United Nations' interests;
- " 4. The Members of the United Nations declare in the same general agreement that they recognize the special agreements between the Secretary-General and other Members of the United Nations, referred to in paragraph 2, and extend to the United Nations all international agreements relating to navigation to which they are a party."

140. The Commission was unable to take a decision on this question. It took note of these proposals, and decided to insert them in its final report on the Law of the Sea in 1956 "since it regards them as useful material for any subsequent study of the problem" (A/3159, chapter II, commentary to article 29).

4. *In connexion with the subject of State responsibility: report of the first Special Rapporteur (García-Amador)*

141. In his report on State responsibility (A/CN.4/96, chapter IV, section 13), Mr. García-Amador discusses the question of "the responsibility imputable to international organizations". He distinguished bet-

ween three cases in which the responsibility of international organizations may arise:

(i) responsibility towards officials or employees or towards persons or legal entities having contractual relations with the organization;

(ii) responsibility for acts or omissions on the part of the organization's administrative organs, or in respect of injury arising from its political or military activities;

(iii) responsibility for damage to third parties (indirect responsibility). He qualifies this classification by stating that:

" This classification will doubtless be improved upon when an exhaustive study is made of the practice, although the latter is not as yet developed to allow a complete systematic analysis of the rules and principles which govern the responsibility of international organizations. Meanwhile, however, the above classification may serve as the point of departure for a future and more elaborate study " (*ibid.*, paragraph 84).

5. *In connexion with the subject of diplomatic intercourse and immunities: report of the Special Rapporteur (Sandström) on ad hoc diplomacy*

142. When, at its tenth session in 1958, the International Law Commission elaborated its final text of " draft articles on diplomatic intercourse and immunities ", the Commission confined the scope of the draft to diplomatic relations between States and decided to leave aside for the moment relations between States and international organizations (A/3859, chapter III, paragraphs 51 and 52).

143. The Commission's draft dealt only with permanent diplomatic missions. It was pointed out, however, in the introductory remarks that " diplomatic relations also assume the forms that might be placed under the heading of " *ad hoc* diplomacy " covering itinerant envoys, diplomatic conferences and special missions sent to States for limited purposes " (*ibid.*).

144. However, the Commission, considering that these forms of diplomacy should also be studied in order to bring out the rules of law governing them, requested the Special Rapporteur on diplomatic intercourse and immunities to make such a study and to submit his report at a future session.

145. In his report on *ad hoc* diplomacy (A/CN.4/129), Mr. Sandström classifies *ad hoc* diplomatic relations into two categories:

(i) Diplomatic relations by means of itinerant envoys and special missions;

(ii) Diplomatic congresses and conferences.

He includes in his proposed articles relating to congresses and conferences a number of provisions concerning international organizations. Article 1 (c) defines the " delegation " to a congress or conference as:

" the person or body of persons representing at the congress or conference a State, or an organization having international status, taking part in the congress or conference, and the auxiliary staff of such person or body of persons ".

Other provisions embody rules relating to delegates declared *persona non grata* (article 3 of chapter II of Alternative I), organization of conferences and con-

gresses (article 5), immunities and privileges of the congresses and conferences and the delegations (articles 7 and 8).

146. The Commission considered the question of *ad hoc* diplomacy at its twelfth session in 1960. It decided to confine the scope of the topic to special diplomatic missions between States, and not to deal with the privileges and immunities of delegates to congresses and conferences. The Commission stated in its report that the question of diplomatic conferences was linked to that of relations between States and international organizations, and that the link made it difficult to undertake the subject of diplomatic conferences in isolation (A/4425, chapter III, paragraphs 32 and 33).

6. *In connexion with the work of the Sub-Committees on State Responsibility and on the Succession of States and Governments*

147. In concluding this recapitulation of the work of the International Law Commission and the position it took on a number of questions which come within the scope of the subject of relations between States and international organizations, reference should also be made to the work of the two Sub-Committees which the Commission set up in 1962 to define the scope and approach of its future work on the topics of State responsibility and the succession of States and Governments respectively (A/5209, chapter III, paragraphs 47, 54 and 62).

148. In the working paper submitted by Mr. Ago, Chairman of the Sub-Committee on State Responsibility,<sup>110</sup> the scope of the concept of international responsibility is defined as " responsibility of States and responsibility of other subject of international law ". When the Sub-Committee met in January 1963, it decided to suggest " that the question of the responsibility of other subjects of international law, such as international organizations, should be left aside " (A/CN.4/152, footnote 2)

149. In the working paper submitted by Mr. Lachs, Chairman of the Sub-Committee on the Succession of States and Governments,<sup>111</sup> the question of " succession between international organizations " figures as one of the headings contained in the broad outline of the topic. When the Sub-Committee met in January 1963, it made a distinction between " succession in respect of membership of international organizations " (which is considered as succession of States) on the one hand, and " succession between international organizations " (which it considered as succession of international organizations) on the other. In the report which it prepared at the end of its meeting session in January 1963, reference is only made to " succession in respect of membership in international organizations " (A/CN.4/160, paragraph 13).

IV. Preliminary survey of the scope of the subject of the legal status of international organizations

A. THE INTERNATIONAL PERSONALITY OF INTERNATIONAL ORGANIZATIONS

150. The Advisory Opinion of the International Court of Justice of 11 April 1949 on the " Repara-

<sup>110</sup> A/CN.4/SC.1/WP. 6 of 2 January 1963.

<sup>111</sup> A/CN.4/SC.2/WP. 7.

tions for Injuries suffered in the Service of the United Nations", marked an important stage in the development of the legal status of international organizations, and in more ways than one. In that Advisory Opinion, the Court found unanimously that the United Nations possessed a large measure of "international personality", and stated that:

"It must be acknowledged that [the Organization's] Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged.

"Accordingly, the Court has come to the conclusion that the Organization is an international person. That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State . . . What it does mean is that it is a subject of international law and capable of possessing international rights and duties . . ." <sup>112</sup>

151. The significance of this dictum can only be seen in its true dimensions when one recalls the controversial character which the concept of the international personality of international organizations assumed in the classical doctrine of international law and the fundamental change it has undergone in recent years. As a corollary to the traditional view regarded States only as the sole subjects of the international legal system, the international personality of international organizations had first been denied by a number of writers. An illustration of this school of thought is the statement by Neumever in 1924 that:

"Il nous sera donc permis de répéter l'antithèse que, d'après le droit actuel, les unions seront des personnes morales de droit local ou qu'elles ne le seront pas du tout" <sup>113</sup>

152. A number of writers, who first adhered to the classical view, soon found themselves under the practical needs of the developing international organizations making gradual but steady concessions in favour of the doctrine that international organizations possess a measure of international personality. Anzilotti is frequently cited as a noteworthy example of changing concepts in this domain. In 1904 he regarded it as "inconceivable that there should exist subjects of international rights and duties other than States". However, in 1929, he cautioned against the mistake of affirming that States alone can be subjects of international law.<sup>114</sup> The gradual change in the concept of the international personality of international organizations may also be discerned by comparing the guarded pronouncement of McNair on the status of the League of Nations in 1928 with the categorical pronouncement on the same subject by Lauterpacht in 1955. Thus, McNair in the fourth edition of Oppenheim states the following:

"The League appears to be a subject of international

law and an international person side by side with the several States . . . not being a State, and neither owning territory nor ruling over citizens, the League does not possess sovereignty in the sense of State sovereignty. However, being an international person *sui generis*, the League is the subject of many rights which, as a rule, can only be exercised by sovereign States" <sup>115</sup>

Lauterpacht states in the eighth edition of the same work that "the predominant opinion was that the League of Nations . . . was a subject of international law" <sup>116</sup>

153. A parallel change of concepts is to be found in Soviet literature of international law. In 1947, Krylov stated in his lectures at the Hague Academy of International Law that:

"Les organismes internationaux ne sont pas non plus sujets du droit international . . . On ne saurait estimer être de véritables sujets du droit international les nombreux organismes administratifs de caractère international . . ." <sup>117</sup>

In his treatise on international law published in 1956, Tunkin states the following:

"There are not universally recognized norms establishing legal status of all international organizations".

"At the same time international law does not preclude that this or that international organization may be given a certain measure of international personality. The scope of this personality is determined with regard to each particular international organization by a treaty by which the organization has been created."

"The general participation of States in a particular international organization, which possesses an international personality under its statute, or when the international personality of the international organization has been recognized not only by its members but also by other States, makes such international organization a generally recognized subject of international law" <sup>118</sup>

## B. LEGAL CAPACITY AND TREATY-MAKING CAPACITY OF INTERNATIONAL ORGANIZATIONS

154. Article 104 of the United Nations Charter obligates each Member of the United Nations to accord to the Organization within its territory "such legal capacity as may be necessary for the exercise of its functions".

155. The Convention on the Privileges and Immunities of the United Nations of 1946 <sup>119</sup> elaborated on the meaning of Article 104 as follows:

<sup>115</sup> Oppenheim-McNair, *International Law*, Vol. I, p. 321 (fourth edition, 1928).

<sup>116</sup> Oppenheim-Lauterpacht, *International Law*, Vol. I, p. 384 (eighth edition 1955).

<sup>117</sup> S. Krylov, *Principes du Droit des Gens*, Recueil des Cours, 1947 (I), p. 484.

<sup>118</sup> G. Tunkin, *Fundamentals of Contemporary International Law*, pp. 17, 18 and 19 (Moscow, 1956), in Russian. The English translation of the passage quoted from this work was made available to the Special Rapporteur through the kindness of the author. See also in the same trend an English summary of an article by R.L. Borov, "The Legal Status of the United Nations Organization" in *Soviet Yearbook of International Law*, 1959, pp. 240-242.

<sup>119</sup> For text see sources cited in footnote 69 *supra*.

<sup>112</sup> "Reparations for Injuries suffered in the Service of the United Nations", Advisory Opinion, I.C.J., Reports, 1949, p. 179.

<sup>113</sup> K. Neumever, "Les Unions Internationales", 2, *Revue de Droit International, de Sciences Diplomatiques, Politiques et Sociales* (1924), p. 357.

<sup>114</sup> Quoted by G. Weissberg, *The International Status of the United Nations*, p. 3 (New York, 1961).

" The United Nations shall possess juridical personality. It shall have the capacity:

" (a) to contract;

" (b) to acquire and dispose of immovable and movable property;

" (c) to institute legal proceedings. "

156. The constitutional instruments and conventions on the privileges and immunities of the specialized agencies and of a number of regional organizations contain provisions regarding the legal capacity of these organizations which vary as to phraseology but are similar in meaning.

157. By the International Organizations Immunities Act of 29 December 1945, the United States of America recognized international organizations coming within the terms of the Act, and to the extent consistent with the instrument creating them as possessing the capacity " (i) to contract; (ii) to acquire and dispose of real and personal property; (iii) to institute legal proceedings ".<sup>120</sup> By the " Interim Arrangement on Privileges and Immunities of the United Nations " between the United Nations and Switzerland of 11 June and 1 July 1946, the Swiss Government " recognizes the international personality and legal capacity of the United Nations ".<sup>121</sup>

158. The constituent instruments of international organizations do not in general contain a general authorization for the organization to conclude treaties, but many of them authorize it to conclude treaties of a certain type. The United Nations Charter specifically authorizes the Organization to conclude agreements with Member States on the provision of military contingents (Article 43), and with specialized agencies bringing them into relationship with the United Nations (Article 63). Articles 77 *et seq.* and 105 (3) have been interpreted as authorizing the conclusion of trusteeship agreements and conventions on privileges and immunities with Member States respectively.<sup>122</sup> Notwithstanding these provisions, the United Nations has concluded a great number of other treaties, both with States and with international organizations. In fact, in the years after the Second World War the practice of international organization with regard to their activities in the field of the law of treaties has grown extensively.<sup>123</sup> It is to be noted also that international organizations whose constitutions do not authorize the conclusion of any kind of treaties have, none the less, concluded treaties with States (headquarters agreements) and with other international organizations (on co-operation).<sup>124</sup>

<sup>120</sup> See L. Preuss, " The International Organizations Immunities Act ", *American Journal of International Law*, vol. 40, pp. 332-345.

<sup>121</sup> United Nations *Treaty Series*, vol. 1, p. 164.

<sup>122</sup> See F. Seyersted, " United Nations Forces ", *British Yearbook of International Law* 1961. For a detailed classification of the agreements relating to privileges and immunities, see paragraph 105 above.

<sup>123</sup> For a detailed account of this practice, see J.W. Schneider, " Treaty-making Power of International Organizations ", Geneva, 1959; B. Kasme, " La Capacité de l'Organisation des Nations Unies de conclure des Traités ", Paris, 1960.

<sup>124</sup> Seyersted, *op cit.*, p. 450. For a comprehensive study of headquarters agreements, see P. Cahier, " Etudes des Accords de Sièges conclus entre les Organisations Internationales et les Etats où elles résident ", University of Geneva, Institut Universitaire de Hautes Etudes Internationales, 1959.

159. The precise extent of the legal capacity of international organizations and in particular their capacity to conclude treaties has proved a controversial matter. Some writers adhere to the restrictive theory of " less delegated powers " according to which the capacity of international organizations is confined to such acts or rights as are specified in their constitutions. Others advocate the theory of " implied or inherent rights ". As we shall see, when we deal in the next paragraphs with the capacity of international organizations to espouse international claims, the International Court of Justice has taken cognizance of the fact that the capacities of the United Nations are not confined to those specified in its constitution. Thus, in the Advisory Opinion on " Reparation for Injuries suffered in the Service of the United Nations ", the Court stated:

" Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties ".<sup>125</sup>

Similarly, in its Advisory Opinion on " Effects of Awards of Compensation made by the United Nations Administrative Tribunal ", the Court pointed out that the Charter contains " no express provision for the establishment of judicial bodies or organs and no indication to the contrary ", but held that capacity to establish a tribunal to do justice as between the Organization and the staff members " arises by necessary intentment out of the Charter ".<sup>126</sup>

#### C. CAPACITY OF INTERNATIONAL ORGANIZATIONS TO ESPOUSE INTERNATIONAL CLAIMS, PROCEDURAL CAPACITY, FUNCTIONAL PROTECTION

160. In its Advisory Opinion of 11 April 1949 on the " Reparations for Injuries suffered in the Service of the United Nations ", the International Court of Justice found unanimously that the United Nations possessed an international personality with capacity to bring international claims against Member and non-Member States, and that such claims could be brought for direct injuries to the Organization, i.e. " damage caused to the interests of the Organization itself, to its administrative machine, to its property and assets, and to interests of which it is the guardian ".<sup>127</sup>

161. There was a division of opinion in the Court, however, concerning " the capacity of the United Nations, as an Organization " to bring an international claim for indirect injury, i.e. to espouse the claim for damages for injury caused to its agents or to persons entitled through him. The majority opinion began by stating that the rule of diplomatic protection did not either exclude or justify by itself the rule of functional protection, and that it was " not possible, by a strained use of the concept of allegiance, to assimilate the legal bond which exist[ed] under Article 100 of the Charter,

<sup>125</sup> " Reparation for Injuries suffered in the Service of the United Nations ", Advisory Opinion, I.C.J., Reports, 1949, p. 179.

<sup>126</sup> " Effects of awards of compensation made by the United Nations Administrative Tribunal ", Advisory Opinion of 13 July 1954, I.C.J., Reports, 1954, pp. 56-57.

<sup>127</sup> " Reparation for Injuries suffered in the Service of the United Nations ", Advisory Opinion, I.C.J., Reports, 1949, p. 180.

between the Organization on the one hand, and the Secretary-General and the staff on the other, to the bond of nationality existing between a State and its nationals".<sup>128</sup> Then, in the silence of the Charter, it proceeded to examine the applicability of the criterion of implied powers to the question at hand in the following way:

"Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties . . .

"In order that the agent may perform his duties satisfactorily, he must feel that protection is assured to him by the Organization, and that he may count on it. To ensure the independence of the agent, and, consequently, the independent action of the Organization itself, it is essential that in performing his duties he need not have to rely on any other protection than that of the Organization . . . In particular, he should not have to rely on the protection of his on State. If he had to rely on that State, his independence might well be compromised, contrary to the principle applied by Article 100 of the Charter . . . [I]t is essential that whether the agent belongs to a powerful or to a weak State; to one more affected or less affected by the complications of international life; to one in sympathy or not in sympathy with the mission of the agent — he should know that in the performance of his duties he is under the protection of the Organization. This assurance is even more necessary when the agent is stateless.

"Upon examination of the character and functions entrusted to the Organization and of the nature of the missions of its agents, it becomes clear that the capacity of the Organization to exercise a measure of functional protection of its agents arises by necessary intendment out of the Charter . . .

"In claiming reparation based on the injury suffered by its agent, the Organization does not represent the agent, but is asserting its own right, the right to secure respect for undertakings entered into towards the Organization".<sup>129</sup>

162. The dissenting judges challenged this interpretation on several grounds:

(i) That "[t]he exercise of an additional extraordinary power in the field of private claims has not been shown to be necessary to the efficient performance of duty by either the Organization or its agents";<sup>130</sup>

(ii) That "the bond between the Organization and its employees does not have the effect of expatriating the employee or of substituting allegiance to the Organization for allegiance to his State";<sup>131</sup>

(iii) That "nationality is a *sine qua non* to the espousal of a diplomatic claim on behalf of a private claimant";<sup>132</sup> and

(iv) That "to affirm, in the Court's opinion, a right of the Organization to afford international protection to its agents as an already existing right, would be to introduce a new rule into international law and — what is more — a rule which would be concurrent with that of diplomatic protection which appertains to every State vis-à-vis its nationals".<sup>133</sup>

163. The recognition of the right of functional protection raises several problems to which the Advisory Opinion does not bring a solution. One problem is that of the reconciliation between the State's right of diplomatic protection and the Organization's right of functional protection. The majority opinion, after recognizing the possibility of such a competition, states that "there is no rule of law which assigns priority to the one or the other, or which compels either the State or the Organization to refrain from bringing an international claim", and that it "sees no reason why the parties concerned should not find solutions inspired by goodwill and common sense".<sup>134</sup>

164. Another problem arising from the recognition of the right of functional protection is that concerning the arbitral or judicial instance which can ultimately be seized by the Organization in its exercise of the functional protection. Whenever there is an arbitration clause covering the situation, such as those included in agreements between the Organization and States concerning its privileges and immunities, the problem does not arise. Only in the absence of such a clause does it become relevant. In such a case, a paradox arises, however, from Article 34, paragraph 1, of the Statute of the International Court of Justice which stipulates that "only States may be parties in cases before the Court". According to this stipulation, international organizations including the United Nations, of which the Court is the "principal judicial organ", are barred from appearing before it as parties, even when they are in a legal situation similar to that of States such as that of being a claimant for direct or indirect injury against a State. Originally, the purpose of this Article was to exclude individuals from bringing claims against States before the Permanent Court of International Justice.<sup>135</sup> However,

"[w]hen a proposal was made to the 1929 Committee of Jurists that Article 34 be amended to provide that the League of Nations might be a party before the Court, President Anzilotti expressed the view that the text of Article 34 did not 'prejudice the question whether an association of States could, in certain circumstances, appear before the Court', and that 'if the League possessed a collective personality in international law, Article 34 would not exclude it from appearing before the Court'".<sup>136</sup>

The fulfilment of the condition laid down by Anzilotti, i.e. the possession of an international personality by the international organization, has been unequivocally recognized by the Advisory Opinion quoted above. Some authors go so far as to consider that Article 34, para-

<sup>128</sup> *Ibid.*, p. 182.

<sup>129</sup> *Ibid.*, pp. 182-184.

<sup>130</sup> Dissenting Opinion by Judge Hackworth, *ibid.*, p. 196 at p. 198.

<sup>131</sup> *Ibid.*, p. 201.

<sup>132</sup> *Ibid.*, p. 202; Judge Winiarski associated himself with the views expressed by Judge Hackworth, *ibid.*, p. 189; the dissenting opinions of Judges Badawi and Krylov raise similar arguments to those of Judge Hackworth, *ibid.*, p. 205 and p. 217 respectively.

<sup>133</sup> *Ibid.*, p. 217 (dissenting opinion of Judge Krylov).

<sup>134</sup> *Ibid.*, pp. 185-186.

<sup>135</sup> Hudson, *The Permanent Court of International Justice 1920-1942, A Treatise*, p. 186 (New York, 1943).

<sup>136</sup> *Ibid.*, p. 187, citing Minutes of the 1929 Committee of Jurists (League of Nations Doc. C.166.M.66, 1929.V), pp. 59-60.

graph 1, of the Statute does not bar the United Nations from bringing claims before the Court, as it can be assimilated to States for that purpose and in such a situation.<sup>137</sup> Others, without going so far, advocate the revision of the Statute in this direction.<sup>138</sup>

165. The limits of functional protection are not yet precisely defined. The Advisory Opinion envisaged the case of the United Nations and based its recognition of the capacity of this Organization to exercise functional protection partly on its universal character and the general scope of its activities. Even in the case of the United Nations, it has left some of the questions unanswered. The conditions and limits of the recognition of the same capacity in the case of other international organizations have yet to be laid down.

166. There are other situations, aside from the existence of a functional link, where it is conceivable that an international organization exercises a role similar to that exercised by States for their citizens in diplomatic protection. This can be the case in connexion with the population of a territory put under the direct international administration of an international organization, e.g. in the proposed plan for Trieste which did not materialize; in the case of West Irian during the transition period, etc. In some respects, this is also the case of the international protection of refugees by international agencies.<sup>139</sup>

#### D. PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IUS LEGATIONUM AND DIPLOMATIC CONFERENCES

167. One of the most developed branches of the subject of the legal status of international organizations is that relating to privileges and immunities. "The law governing international immunities no longer consists primarily of a general principle resting on the questionable analogy of diplomatic immunities; it has become a complex body of rules set forth in detail in conventions, agreements, statutes and regulations".<sup>140</sup> The treaty and statute law has been supplemented by a considerable body of case law.

168. As we have seen in the previous chapter, the greatest bulk of codification of the law relating to the legal status of international organizations was devoted to international immunities. Reference has also been made to the efforts of both the League of Nations and the United Nations to codify the rules relating to international conferences and Resolution 257 (III) of the General Assembly of the United Nations concerning "Permanent Missions to the United Nations".<sup>141</sup> We shall therefore concentrate our attention here on a

<sup>137</sup> e.g., Eagleton: "It would not be unreasonable or illogical for the Court to hold, if opportunity presented, that the word 'states' was used in the sense of 'international legal persons' and that consequently, international organizations having legal personality could be allowed to appear before the Court". Eagleton, "International organization and the Law of Responsibility", 76 *Recueil des Cours*, p. 323 at p. 418 (1950 I); Weissberg, *The International Status of the United Nations*, p. 200 (London, 1961).

<sup>138</sup> Eagleton, *op. cit.* p. 418; see also all the authorities cited in Weissberg *op. cit.*, p. 200, note 136.

<sup>139</sup> See in general, Weis, *The International Protection of Refugees*, 48 *American Journal of International Law*, p. 193, especially pp. 218 ff (1954).

<sup>140</sup> Jenks *op. cit.*, p. xxxv.

<sup>141</sup> See paragraph 116 above.

number of problems which have, a special bearing upon and are likely to be encountered in any future work in the codification of privileges and immunities of international organizations and the other aspects of the law of diplomatic relations in its application to international organizations.

#### 1. *The place of customary law in the system of international immunities*

169. The majority of writers state that, unlike the immunities of inter-State diplomatic agents, international immunities have been regulated almost exclusively by conventional law, and that international custom has not yet made any appreciable contribution in that branch of law. A number of writers acknowledge, however, that "a customary law appears to be in the process of formation, by virtue of which certain organizations endowed with international personality may claim diplomatic standing for their agents as of right",<sup>142</sup> and speak of "l'existence d'une véritable coutume internationale ou en tout cas d'un commencement de coutume . . .".<sup>143</sup>

#### 2. *Uniformity or adaptation of international immunities?*

170. The regime of international immunities is based at present on a large number of instruments whose diversity causes practical difficulties to States as well as to international organizations. It is of great practical importance to all national authorities concerned with customs, emigration etc. that the provisions are the same for all or most international officials: "From the standpoint of an international organization conducting operations all over the world there is a similar advantage in being entitled to uniform standards of treatment in different countries."<sup>144</sup> However many writers qualify their enthusiasm for the objective of uniformity by pointing out to the need for adaptation of immunity to function in particular cases.

#### 3. *Problem of accreditation of representatives to international organizations*

171. The problem of accreditation of representatives to the United Nations was discussed at the third session of the General Assembly. "It was then generally understood that even the term 'credentials' was out of place because it tended to give the impression that the United Nations was a State . . ." <sup>145</sup> The General Assembly adopted on 3 December 1948 resolution 257 (III) on permanent missions to the United Nations <sup>146</sup> recommending that credentials of members of such missions "shall be transmitted to the Secretary-General". Many writers on international immunities have interpreted this provision as implicitly ruling out the requirement of agreement.<sup>147</sup>

<sup>142</sup> L. Preuss, "Diplomatic Privileges and Immunities of Agents invested with functions of an international interest," *American Journal of International Law*, vol. 25 (1931), p. 695.

<sup>143</sup> J. F. Lalive, "L'immunité de Juridiction des Etats et des Organisations Internationales", 84 *Recueil des Cours* (1953), p. 304. See on this question Weissberg, *op. cit.*, pp. 142-146.

<sup>144</sup> Jenks *op. cit.*, p. 149.

<sup>145</sup> General Assembly Official Records (3rd session) part I, Sixth Committee, p. 624.

<sup>146</sup> See paragraph 116 above.

<sup>147</sup> L. Gross, "Immunities and Privileges of Delegates to the United Nations", *International Organization*, vol. XVI, Summer 1962, p. 491.

## E. MISCELLANEOUS

1. *Responsibility of international organizations*

172. The continuous increase of the scope of activities of international organizations is likely to give new dimensions to the problem of responsibility of international organizations. The Agreement concluded between Indonesia and the Netherlands concerning West New Guinea (West Irian), of which the General Assembly of the United Nations took note at its 1127th plenary meeting on 20 September 1962, gave the Organization its first practical case of administering a territory with the attending legal consequences comparable to State responsibility on a territorial basis.

173. The International Conference on Civil Liability from Nuclear Damage (Vienna, April-May 1963), which prepared a Convention on Civil Liability for Nuclear Damage, adopted a resolution recommending "that the International Atomic Energy Agency . . . establish a standing committee composed of representatives of the Governments of fifteen States with the following tasks . . .

- "(c) to study any problems arising in connexion with the application of the Convention to a nuclear installation operated by or under the auspices of an inter-governmental organization, particularly in respect of the 'Installation state as defined in Article I (of the Convention)'." <sup>148</sup>

2. *Recognition of international organizations*

174. The problem of recognition arises in respect of international organizations of regional or limited scope. With regard to the universal organizations (the United Nations and the specialized agencies,) there is substantial support for the submission that they enjoy international personality on an objective basis. Thus one of the findings of the International Court of Justice, in its Advisory Opinion on "Reparation for Injuries suffered in the Service of the United Nations", was that:

"fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone . . ." <sup>149</sup>

3. *Succession between international organizations*

175. International organizations being a relatively recent phenomenon, many of the legal problems pertaining to their status are not yet subject to a settled practice. Succession between international organizations is one of these problems. The problem is simple when the membership of the two organizations is identical or when the membership of the new organization is wider than that of the old one. It becomes more complicated in the case where some of the members of the old organization do not take part in the new one.

176. In the few instances where the problem of suc-

cession arose, it was settled by an agreement between the two organizations concerned. Such was the case of the different agreements between the United Nations and the League of Nations <sup>150</sup> based upon the Interim Arrangements which were signed at the same time as the United Nations Charter

177. Where certain functions are entrusted to the old international organization by international agreements other than its constitutional instrument, "it is desirable that [the constituent instruments of the successor organization] should embody an undertaking whereby members of the body being created agree to the transfer thereto of the functions, powers, rights and duties vested in the old body by instruments to which they are parties. Failing such action the continued execution of such instruments may be prevented or impeded when the old body ceases to exist, and it is the consent of the individual parties to the instruments conferring functions, powers, rights or duties, rather than that of the old body, which is necessary in order to avoid this result." <sup>151</sup>

This precaution was taken in the case of the International Court of Justice. Article 36, paragraph 5, of its Statute stipulates that:

"Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms".

## Conclusion

## A. BROAD OUTLINE

178. In the light of the foregoing review of attempts to codify the international law relating to the legal status of international organizations and the preliminary survey of its scope, the subject may be classified into the following self-contained and closely related groups of questions:

I. First group—the general principles of international personality, which would include:

1. Definition of the concept of the international personality of international organizations;
2. Legal capacity;
3. Treaty-making capacity;
4. Capacity to espouse international claims.

II. Second group—international immunities and privileges, which would include:

1. Privileges and immunities of international organizations;
2. Related questions of the institution of legation in respect to international organizations;
3. Diplomatic conferences.

III. Third group—special questions:

1. The law of treaties in respect to international organizations;

<sup>150</sup> United Nations Treaty Series, vol 1, pp. 109, 119, 131, 135 (1946).

<sup>151</sup> C. W. Jenks "Some Constitutional Problems of International Organizations", XXII British Yearbook of International Law p. 11 at p. 69 (1945).

<sup>148</sup> International Atomic Energy Agency, Document CN-12/48.

<sup>149</sup> I.C.J. Reports 1949, p. 174.

2. Responsibility of international organizations;
3. Succession between international organizations.

#### B. METHOD OF WORK AND APPROACH TO IT

179. Upon a consideration of the relevant provisions of the Commission's Statute, and of the general directives to rapporteurs on other topics, and in particular, in connexion with the work of the two Sub-Committees on State Responsibility and the Succession of States and Governments, the Rapporteur wishes to make the following two recommendations to the Commission:

1. The work of the Commission on the subject of relations between States and inter-governmental organizations should proceed in the order outlined in the previous paragraph;
2. The work of the Commission on this subject should concentrate on international organizations of universal character (the United Nations system), and prepare its drafts with reference to these organizations only and examine later whether they could be applied to regional organizations as they stood or whether they required modifications.

**DOCUMENT A/CN.4/L.103**

**Scope and order of future work on the subject of relations between States and inter-governmental organisations:  
Working Paper by Mr. Abdullah El-Erian, Special Rapporteur**

[Original: English]  
[11 July 1963]

**A. BROAD OUTLINE**

1. In the light of the review of attempts to codify, the international law relating to the legal status of international organizations and the preliminary survey of its scope, as contained in the first report on relations between States and inter-governmental organizations (A/CN.4/161), the subject may be classified into the following groups of questions:

I. First group — General principles of juridical personality of international organizations, which would include:

1. Legal capacity;
2. Treaty-making capacity;
3. Capacity to espouse international claims.

II. Second group — International immunities and privileges, which would include:

1. Privileges and immunities of international organizations;
2. Related questions of the institution of legation in respect to international organizations and;
3. Diplomatic conferences.

III. Third group — Special questions

1. The law of treaties in respect to international organizations;
2. Responsibility of international organizations, and
3. Succession between international organizations.

**B. SCOPE OF THE DRAFT ARTICLES**

2. The Commission should concentrate its work on this subject first on international organizations of universal character (the United Nations system) and prepare its draft articles with reference to these organizations only, and examine later whether they could be applied to regional organizations as they stood or whether they required modification.

The study of regional organizations raises particularly a number of problems, e.g., recognition by and relationship with non-member States, which would require the formulation of particular rules peculiar to these organizations.

**C. ORDER OF PRIORITIES**

3. A distinction has to be made between the question of the juridical personality and immunities and

privileges of international organizations and the other aspects of the subject of relations between States and international organizations.

Consideration of these other aspects, namely, the law of treaties in respect to international organizations, responsibility of international organizations and succession between international organizations, should be deferred to a future stage in the work of the Commission when it will have completed or made substantial progress in its work on these topics in relation to States. Furthermore, it will be a matter for future consideration by the Commission whether these aspects could be taken up more appropriately in connexion with its work on the subjects of the law of treaties, State responsibility and succession of States, rather than in connexion with its work on the subject of relations between States and international organizations.

4. The question of the juridical personality and immunities and privileges of international organizations may be divided into two parts:

I. First part — General principles of juridical personality of international organizations, which would include:

1. Legal capacity;
2. Treaty-making capacity, and
3. Capacity to espouse international claims.

II. Second part — Immunities and privileges of international organizations, which would include:

1. Immunities and privileges of international organizations as bodies corporate;
2. Immunities and privileges of officials of international organizations, and
3. Immunities and privileges of representatives to international organizations and other related questions of the institution of legation in respect to international organizations.

**D. FORM OF THE DRAFT ARTICLES**

5. While the Special Rapporteur aims provisionally at preparing a group of draft articles which might provide the basis of a draft convention, further consideration has to be given to whether the draft articles on the part concerning the juridical personality of international organizations would more appropriately take the form of an expository code rather than that of a draft convention.

# REPORT OF THE COMMISSION TO THE GENERAL ASSEMBLY

## DOCUMENT A/5509 \*

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

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

#### CHAPTER I

##### Organization of the Session

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

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

##### A. MEMBERSHIP AND ATTENDANCE

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

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

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

#### B. OFFICERS

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

*Chairman:* Mr. Eduardo Jiménez de Aréchaga

*First Vice-Chairman:* Mr. Milan Bartos

*Second Vice-Chairman:* Mr. Senjin Tsuruoka

*Rapporteur:* Sir Humphrey Waldock

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

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

#### C. AGENDA

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

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

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

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

## CHAPTER II

### Law of Treaties

#### A. INTRODUCTION

##### *Summary of the Commission's proceedings*

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

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

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

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

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

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

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

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

12. As stated in paragraph 18 of its report for 1962<sup>5</sup>, the Commission's plan is to prepare a draft of a further group of articles at its session in 1964 covering the application and effects of treaties. After all its three drafts on the law of treaties have been completed, the Commission will consider whether they should be amalgamated to form a single draft convention or whether the codification of the law of treaties should take the form of a series of related conventions. In accordance with its decision at its previous session, the Commission has provisionally prepared the present draft in the form of a second self-contained group of articles closely related to the articles in part I which have already been transmitted to Governments for their observations. The present draft has therefore been designated "The Law of Treaties — Part II." At the same time the Commission decided, without thereby prejudging in any way its decision concerning the form in which its work on the law of treaties should ultimately be presented, that it would be more convenient not to number the present group of articles in a new series, but to number them consecutively after the last article of the previous draft. Accordingly, the first article of the present group is numbered 30.

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

#### *The scope of the present group of draft articles*

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

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

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

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

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

## B. DRAFT ARTICLES ON THE LAW OF TREATIES

### *Part II. — Invalidity and termination of treaties*

#### *Section I: General provision*

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

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

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

*Commentary*

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

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

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

*Commentary*

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

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

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

(2) One group of writers<sup>7</sup> maintains that international law leaves it to the internal law of each State to determine the organs and procedures by which the will of a State to be bound by a treaty shall be formed and expressed; and that constitutional laws governing the formation and expression of a State's consent to a treaty have always to be taken into account in considering whether an international act of signature, ratification, acceptance, approval or accession is effective to bind the State. On this view, internal laws limiting the power of State organs to enter into treaties are to be considered part of international law so as to avoid, or at least render voidable, any consent to a treaty given on the international plane in disregard of a constitutional limitation; the agent purporting to bind the State in breach of the constitution is totally incompetent in international as well as national law to express its consent to the treaty. If this view were to be accepted, it would follow that other States would not be entitled to rely on the authority to commit the State ostensibly possessed by a Head of State, Prime Minister, Foreign Minister, etc., under article 4; they would have to satisfy themselves in each case that the provisions of the State's constitution are not infringed or take the risk of subsequently finding the treaty void. The weakening of the security of treaties which this doctrine entails is claimed by those who advocate it to be outweighed by the need to give the support of international law to democratic principles in treaty-making.

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

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

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

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

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

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

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

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

(7) A third group of writers<sup>11</sup> considers that international law leaves to each State the determination of the organs and procedures by which its will to conclude treaties is formed, and is itself concerned exclusively with the external manifestations of this will on the international plane. According to this view, international law determines the procedures and conditions under which States express their consent to treaties on the international plane; and it also regulates the conditions under which the various categories of State organs and agents will be recognized as competent to carry out such procedures on behalf of their State. In consequence, if an agent, competent under international law to commit the State, expresses the consent of the State to a treaty through one of the established procedures, the State is held bound by the treaty in international law. Under this view, failure to comply with internal requirements may entail the invalidity of the treaty as domestic law, and may also render the agent liable to legal consequences under domestic law; but it does not affect the validity of the treaty in international law so long as the agent acted within the scope of his authority under international law. Some of these writers<sup>12</sup> modify the stringency of the rule in cases where the other State is actually aware of the failure to comply with internal law or where the lack of constitutional authority is so manifest that the other State must be deemed to have been aware of it. This compromise solution, which takes as its starting point the supremacy of the international rules concerning the conclusion of treaties, does not present the same logical difficulties as the compromise put forward by the other group. As the basic principle, according to the third group, is that a State is entitled to assume the regularity of what is done within the authority possessed by an agent under international law, it is logical enough that the State should not be able to do so when it knows, or must in law be assumed to know, that in the particular case the authority does not exist.

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

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

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

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

support a solution based upon the position taken by the third group. The international jurisprudence is admittedly not very extensive. The *Cleveland* award<sup>13</sup> (1888) and the *George Pinson* case<sup>14</sup> (1928), although not involving actual decisions on the point, contain observations favouring the relevance of constitutional provisions to the international validity of treaties. On the other hand the *Franco-Swiss Custom* case<sup>15</sup> (1912) and the *Rio Martin* case<sup>16</sup> (1924) contain definite decisions by arbitrators declining to take account of alleged breaches of constitutional limitations when upholding the validity respectively of a protocol and an exchange of notes, while the *Metzger* case<sup>17</sup> contains an observation in the same sense. Furthermore, pronouncements in the *Eastern Greenland*<sup>18</sup> and *Free Zones*<sup>19</sup> cases, while not directly in point, seem to indicate that the International Court will not readily go behind the ostensible authority under international law of a State agent — a Foreign Minister and an Agent in international proceedings in the cases mentioned — to commit his State.

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

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

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

<sup>13</sup> Moore, *International Arbitrations*, vol. 2, p. 1946.

<sup>14</sup> *United Nations Reports of International Arbitral Awards*, vol. V, p. 327.

<sup>15</sup> *Ibid.*, vol. XI, p. 411.

<sup>16</sup> *Ibid.*, vol. II, p. 724.

<sup>17</sup> *Foreign Relations of the United States* (1901), p. 262.

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

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

<sup>20</sup> H. Blix, *op cit.*, chapter 20.

<sup>21</sup> H. Blix, *op. cit.*, p. 267.

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

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

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

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

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

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

### *Article 32. — Lack of authority to bind the State*

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

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

#### *Commentary*

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

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

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

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

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

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

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

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

#### Article 33. — Fraud

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

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

#### Commentary

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

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

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

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

<sup>26</sup> See Moore, *Digest of International Law*, vol. 5, p. 719.

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

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

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

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

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

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

#### Article 34. — Error

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

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

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

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

#### Commentary

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

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

(3) The effect of error was, however, discussed in the *Eastern Greenland* case before the Permanent Court of International Justice, and again in the *Temple* case before the present Court. In the former case<sup>28</sup> Norway contended that, when asked by the Danish Ambassador to say that Norway would not object to the Danish Gov-

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

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

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

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

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

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

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

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

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

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

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

<sup>29</sup> *Ibid.*, p. 92.

<sup>30</sup> *I.C.J. Reports*, 1961, p. 30.

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

<sup>32</sup> *P.C.I.J.*, Series A, No. 11.

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

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

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

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

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

*Commentary*

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

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

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

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

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

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

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

*Commentary*

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

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

<sup>34</sup> McNair, *op. cit.*, pp. 207-209.

<sup>35</sup> Harvard Law School, *op. cit.*, pp. 1155-1159.

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

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

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

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

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

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

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

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

*Commentary*

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

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

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

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

<sup>37</sup> See McNair, *op cit.*, pp. 213-214.

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

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

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

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

### Section III: Termination of treaties

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

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

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

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

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

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

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

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

#### Commentary

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

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

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

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

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

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

(5) In some cases, a multilateral treaty which is subject to denunciation or withdrawal does provide for the termination of the treaty itself, if denunciations or withdrawals should reduce the number of parties below a certain figure. For example, the Convention on the Political Rights of Women<sup>39</sup> provides that it "shall cease to be in force as from the date when the denunciation which reduces the number of the parties to less than six becomes effective". In some cases the minimum number of surviving parties required by the treaty to keep it alive is even smaller, e.g., five in the case of the Customs Convention on the Temporary Importation of Commer-

cial Road Vehicles<sup>40</sup> and three in the case of the Convention Regarding the Measurement and Registration of Vessels Employed in Inland Navigation.<sup>41</sup> In other, perhaps less frequent, cases a larger number is required to maintain the treaty in force. Clearly, provisions of this kind establish what is really a resolutive condition and, as paragraph 3 (b) states, the treaty terminates when the number of parties falls below the specified minimum.

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

#### *Article 39. — Treaties containing no provisions regarding their termination*

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

#### *Commentary*

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

<sup>41</sup> *Ibid.*, pp. 72-73.

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

<sup>39</sup> *United Nations Treaty Series*, vol. 193, p. 135, art. 8.

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

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

(2) In principle, the answer to the question must depend on the intention of the parties in each case, and the very character of some treaties excludes the possibility that the contracting States could have intended them to be open to unilateral denunciation or withdrawal at the will of an individual party. Treaties of peace and treaties fixing a territorial boundary are examples of such treaties. Many treaties, however, are not of a kind with regard to which it can be said that to allow a unilateral right of denunciation or withdrawal would be inconsistent with the character of the treaty; for the normal practice today in the case of most categories of treaties is either to fix a comparatively short period for their duration or to provide for the possibility of termination or withdrawal. No doubt, one possible point of view would be that, since the parties in many cases do provide expressly for a unilateral right of denunciation or withdrawal, their silence on the point in other cases must be interpreted as excluding such a right. Some authorities,<sup>43</sup> basing themselves on the Declaration of London of 1871 and certain State practice, take the position that an individual party may denounce or withdraw from a treaty only when such denunciation or withdrawal is provided for in the treaty or consented to by all the other parties. The Declaration of London and the State practice in question, however, relate to peace treaties or other treaties designed to establish enduring territorial settlements, in other words, to treaties where an intention to admit a right of unilateral denunciation or withdrawal is excluded by the character of the treaty. In many other types of treaty the widespread character of the practice making the treaty subject to denunciation or withdrawal suggests that it would be unsafe to draw the conclusion from the mere silence of the parties on the point that they necessarily intended to exclude any possibility of denunciation or withdrawal. For this reason a number of other authorities<sup>44</sup> take the position that a right of denunciation or withdrawal may properly be implied under certain conditions in some types of treaties, and more especially in commercial treaties and in treaties of alliance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Commentary*

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

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

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

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

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

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

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

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

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

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

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

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

*Commentary*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) The other parties by common agreement either:

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

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

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

(a) The unfounded repudiation of the treaty; or

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

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

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

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

*Commentary*

(1) The great majority of writers<sup>48</sup> recognize that the violation of a treaty by one party may give rise to a right in the other party to abrogate the treaty or to suspend the performance of its own obligations under the treaty. A violation of a treaty obligation, as of any other obligation, may give rise to a right in the other party to take non-forcible reprisals and the reprisals may properly relate to the defaulting party's rights under the treaty. Opinion differs, however, as to the extent of the right to abrogate the treaty and the conditions under which it may be exercised. Some writers,<sup>49</sup> in the absence of effective international machinery for securing the observance of treaties, are more impressed with the innocent party's need to have this right as a sanction for the violation of the treaty. These writers tend to formulate the right in unqualified terms, giving the innocent party a general right to abrogate the treaty in the event of a breach.<sup>50</sup> Other writers are more impressed with the risk that a State may allege a trivial or even fictitious breach simply to furnish a pretext for denouncing a treaty which it now finds embarrassing.<sup>51</sup> These writers tend to restrict the right of denunciation to "material" or "fundamental" breaches and also to subject the exercise of the right to procedural conditions.<sup>52</sup>

(2) State practice, although not lacking<sup>53</sup> does not give great assistance in determining the true extent of this right or the proper conditions for its exercise. In many cases, the denouncing State has decided for quite other reasons to put an end to the treaty and, having alleged the violation primarily to provide a pretext for its action, has not been prepared to enter into a serious discussion of the legal principles involved. The other party has usually contested the denunciation primarily on the basis of the facts; and, if it has sometimes used language appearing to deny that unilateral denunciation is ever justified, this has usually appeared rather to be a protest against the one-sided and arbitrary pronouncements of the denouncing State than a rejection of the

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

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

<sup>50</sup> See Oppenheim, *op. cit.* p. 947.

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

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

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

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

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

(4) International jurisprudence has contributed comparatively little on this subject. In the case of the *Diversion of Water from the River Meuse*,<sup>55</sup> Belgium contended that, by constructing certain works contrary to the terms of the Treaty of 1863, Holland had forfeited the right to invoke the treaty against it. Belgium did not claim to denounce the treaty, but it did assert a right, as a defence to Holland's claim, to suspend the operation of one of the provisions of the treaty on the basis of Holland's alleged breach of that provision, although it pleaded its claim rather as an application of the principle *inadimplenti non est adimplendum*. The Court, having found that Holland had not violated the treaty, did not pronounce upon the Belgian contention. In a dissenting opinion, however, Judge Anzilotti expressed the view<sup>56</sup> that the principle underlying the Belgian contention is "so just, so equitable, so universally recognized that it must be applied in international relations also". The only other case that seems to be of much significance is the *Tacna-Arica Arbitration*.<sup>57</sup> There Peru contended that by preventing the performance of article 3 of the Treaty of Ancon, which provided for the holding of a plebiscite under certain conditions in the disputed area, Chile had discharged Peru from its obligations under that article. The Arbitrator,<sup>58</sup> after examining the evidence, rejected the Peruvian contention, saying:

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

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

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

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

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

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

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

<sup>55</sup> *P.C.I.J.*, Series A/B, No. 70.

<sup>56</sup> *Ibid.*, p. 50; cf. Judge Hudson, pp. 76-77.

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

<sup>58</sup> President Coolidge.

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

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

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

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

#### **Article 43. — Supervening impossibility of performance**

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

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

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

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

#### *Commentary*

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

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

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

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

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

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

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

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

#### *Article 44. — Fundamental change of circumstances*

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

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

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

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

**3. Paragraph 2 above does not apply:**

**(a) To a treaty fixing a boundary; or**

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

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

#### *Commentary*

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

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

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

true that the Court has not yet committed itself on the point. In the *Free Zones* case,<sup>60</sup> having held that the facts did not in any event justify the application of the doctrine, the Permanent Court expressly reserved its position. It observed that it became unnecessary for it to consider "any of the questions of principle which arise in connexion with the theory of the lapse of treaties by reason of change of circumstances, such as the extent to which the theory can be regarded as constituting a rule of international law, the occasions on which and the methods by which effect can be given to the theory, if recognized, and the question whether it would apply to treaties establishing rights such as that which Switzerland derived from the treaties of 1815 and 1816". On the other hand, it can equally be said that the Court has never on any occasion<sup>61</sup> rejected the principle and that in the passage just quoted it even seems to have assumed that the doctrine is to some extent admitted in international law.

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

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

Detailed examination of this State practice is not possible in the present Report.<sup>67</sup> Broadly speaking, it shows a wide acceptance of the view that a fundamental change of circumstances may justify a demand for the termination or revision of a treaty, but also shows a strong disposition to question the right of a party to denounce a treaty unilaterally on this ground. The most significant indications as to the attitude of States regarding the principle are perhaps to be found in statements submitted to the Court in the cases where the doctrine has been invoked. In the *Nationality Decrees* case the French Government contended that "perpetual" treaties are always subject to termination in virtue of the *rebus sic stantibus* clause and claimed that the establishment of the French protectorate over Morocco had for that reason had the effect of extinguishing certain Anglo-French treaties.<sup>68</sup> The British Government, while contesting the French Government's view of the facts, observed that the most forceful argument advanced by France was that of *rebus sic stantibus*.<sup>69</sup> In the case concerning *The Denunciation of the Sino-Belgian Treaty of 1865*, China invoked, in general terms, changes of circumstances as a justification of her denunciation of a sixty-year-old treaty, and supported her contention with a reference to Article 19 of the Covenant of the League of Nations.<sup>70</sup> This Article, however, provided that the Assembly of the League should "from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable", and the Belgian Government replied that neither Article 19 nor the doctrine of *rebus sic stantibus* contemplated the unilateral denunciation of treaties. It further maintained that there could be no question of China's denouncing the treaty because of a change of circumstances unless she had at least tried to obtain its revision through Article 19; that where both parties were subject to the Court's jurisdiction, the natural course for China, in case of dispute, was to obtain a ruling from the Court; and that if she did not, she could not denounce the treaty without Belgium's consent.<sup>71</sup> In the *Free Zones* case<sup>72</sup> the French Government, the Government invoking the *rebus sic stantibus* principle, itself emphasized that it does not allow unilateral denunciation of a treaty claimed to be out of date. It argued that the doctrine would cause a treaty to lapse only "lorsque le changement de circonstances aura été reconnu par un acte faisant droit entre les deux Etats intéressés"; and it further said: "cet acte faisant droit entre les deux Etats intéressés peut être soit un accord, lequel accord sera une reconnaissance du changement des circonstances et de son effet sur le traité, soit une sentence du juge international compétent s'il y en a un".<sup>73</sup> Switzerland, emphasizing the differences of opinion amongst writers in regard to the principle, disputed the existence in international law of any

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

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

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

<sup>63</sup> *Lucerne v. Aargau*; *Canton of Thurgau v. Canton of St. Gallen*; *Hooper v. United States*.

<sup>64</sup> *In re Lepeschkin*; *Stransky v. Zivnostenska Bank*.

<sup>65</sup> *Canton of Thurgau v. Canton of St. Gallen*.

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

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

<sup>68</sup> P.C.I.J., Series C, No. 2, pp. 187-188.

<sup>69</sup> *Ibid.*, pp. 208-209.

<sup>70</sup> *Ibid.*, No. 16, I, p. 52.

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

<sup>72</sup> *Ibid.*, Series A/B, No. 46.

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

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

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

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

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

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

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

<sup>74</sup> *Ibid.*, Series C, No. 58, pp. 463-476.

<sup>75</sup> *Ibid.*, pp. 136-143.

<sup>76</sup> E/CN.4/367, p. 37.

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

<sup>78</sup> C. Rousseau, *op. cit.*, p. 586.

equivalent to *rebus sic stantibus* provisions.<sup>79</sup> The principle has also been invoked sometimes in regard to limited treaties as, for instance, in the resolution of the French Chamber of Deputies of 14 December 1932 expressly invoking the principle of *rebus sic stantibus* with reference to the Franco-American war debts agreement of 1926.<sup>80</sup> The Commission accordingly decided that the rule should be framed in the present article as one of general application, though for obvious reasons it would seldom or never have relevance for treaties of limited duration or for treaties which are terminable upon notice.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Commentary*

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

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

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

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

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

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

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

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

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

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

*Commentary*

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

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

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

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

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

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

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

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

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

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

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

(a) Waived the right; or

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

*Commentary*

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

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

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

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

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

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

<sup>84</sup> *I.C.J. Reports, 1959*, p. 6.

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

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

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

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

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

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

*Commentary*

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

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

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

(3) The phrase treaty "drawn up within an international organization", which also appears in certain articles of part I, covers treaties, such as the international labour conventions, the texts of which are drawn up and adopted by an organ of the organization concerned, but not treaties drawn up "under the auspices" of an organization in a diplomatic conference convened by the organization. The latter category of treaties, in the opinion of the Commission, is as fully subject to all the provisions of the present part as are general multilateral treaties drawn up in conferences convened by the States concerned. Admittedly, there are a few treaties, like the Genocide Convention<sup>87</sup> and the Convention on the Political Rights of Women,<sup>88</sup> which were drawn up "within" an organization but the application of which is not particularly affected by the law of the organization. As, however, the present article does not exclude these treaties from the application of the provisions of section III, but only makes the application of those provisions subject to the law of the organization concerned, it was not considered necessary to qualify the phrase "drawn up within an organization" for the purposes of the present article.

*Section V: Procedure*

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

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

<sup>87</sup> United Nations *Treaty Series*, vol. 78, p. 277.

<sup>88</sup> United Nations *Treaty Series*, vol. 193, p. 135.

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

#### Commentary

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

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

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

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

#### Commentary

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

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

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

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

#### Article 51. — Procedure in other cases

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

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

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

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

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

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

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

#### Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Commentary*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Commentary*

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

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

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

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

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

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

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

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

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

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

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

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

#### *Commentary*

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

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

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

### CHAPTER III

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

18. On the recommendation of the Sixth Committee, the General Assembly, at its 1171st meeting, held on 20 November 1962, adopted the following resolution<sup>92</sup>:

“ *The General Assembly,*

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

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

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

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

<sup>92</sup> Resolution 1766 (XVII).

<sup>89</sup> Signed at Brussels on 25 May 1962.

<sup>90</sup> Article 65, *United Nations Treaty Series*, vol. 213, p. 252.

<sup>91</sup> E.g., Genocide Convention.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

29. When the problem of extending the right to participate in closed League of Nations treaties was taken up in the Sixth Committee, certain delegations — Australia, Ghana and Israel<sup>99</sup> — joined together in introducing a draft resolution designed to achieve this ob-

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

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

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

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

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

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

32. Some representatives considered that the fact

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

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

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

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

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

<sup>100</sup> See protocols mentioned in paragraph 28 above.

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

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

#### PROTOCOL OF AMENDMENT

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

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

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

#### THE THREE-POWER DRAFT RESOLUTION

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

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

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

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

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

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

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

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

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

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

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

#### ALTERNATIVE SOLUTION

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

#### CONCLUSIONS

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

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

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

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

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

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

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

#### CHAPTER IV

##### Progress of work on other questions under study by the Commission

##### A. STATE RESPONSIBILITY: REPORT OF THE SUB-COMMITTEE

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

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

<sup>102</sup> See annex I to the present report.

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

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

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

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

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

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

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

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

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

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

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

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

<sup>103</sup> See annex II to the present report.

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

### C. SPECIAL MISSIONS

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

63. With regard to the scope of the topic, the members agreed that the topic of special missions should also cover itinerant envoys, in accordance with its decision at its 1960 session.<sup>104</sup> At that session the Commission had also decided<sup>105</sup> not to deal with the privileges and immunities of delegates to congresses and conferences as part of the study of special missions, because the topic of diplomatic conferences was connected with that of relations between States and inter-governmental organizations. At the present session, the question was raised again, with particular reference to conferences convened by States. Most of the members expressed the opinion, however, that for the time being the terms of reference of the Special Rapporteur should not cover the question of delegates to congresses and conferences.

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

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

### D. RELATIONS BETWEEN STATES AND INTER-GOVERNMENTAL ORGANIZATIONS

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

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

## CHAPTER V

### Other decisions and conclusions of the Commission

#### A. CO-OPERATION WITH OTHER BODIES

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

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

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

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

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

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

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

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

<sup>105</sup> *Ibid.*, para. 25.

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

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

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

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

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

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

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

#### D. DELAY IN THE PUBLICATION OF THE YEARBOOK

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

#### E. REPRESENTATION AT THE EIGHTEENTH SESSION OF THE GENERAL ASSEMBLY

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

# ANNEXES

## ANNEX I

### DOCUMENT A/CN.4/152

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*Preliminary point: Definition of the concept of the international responsibility of the State*<sup>2</sup>

*First point: Origin of international responsibility.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Problems of participation in the international wrongful act.

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

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

Self-defence;

State of necessity.

*Second point: The forms of international responsibility*

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

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

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

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

## APPENDIX I

### INTERNATIONAL LAW COMMISSION

#### Sub-Committee on State Responsibility

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

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

#### *Organization of work*

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

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

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

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

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

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

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

<sup>5</sup> These summary records and memoranda are reproduced in appendix I and appendix II below.

<sup>6</sup> These working papers are reproduced in Appendix II below.

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

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

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

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

*It was so agreed.*

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

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

*It was so agreed.*

The CHAIRMAN invited comments on the question of summary records.

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

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

*It was so agreed.*

#### *State responsibility*

The CHAIRMAN invited discussion on the subject of State responsibility.

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 3.55 p.m.

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

#### *State responsibility (continued)*

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

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

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

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

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

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

He referred to the discussions which had taken place in the Second Committee of the General Assembly at its seventeenth session on the subject of permanent sovereignty over natural wealth and resources. The many amendments which had been submitted to the draft resolution prepared by the Commission appointed to study that subject<sup>7</sup> showed that views differed widely on questions which might at first sight have appeared uncontroversial.

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

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

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

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

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

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

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

The Nürnberg judgement<sup>8</sup> had shown that it was possible to hold a head of State criminally liable for crimes against humanity. That criminal liability had been acknowledged even in the case where a ruler had acted in the exercise of his constitutional powers. Lastly, a clear distinction should be drawn between the responsibility attaching to the State in the internal political sphere in respect of its acts and the international responsibility of that State for those same acts. The two types of responsibility were governed by different rules of law and were justiciable in different courts.

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

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

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

The Sub-Committee might do well to discuss the present legal nature and scope of diplomatic protection. The right to give diplomatic protection to nationals abroad was recognized in article 3 of the Vienna Convention on Diplomatic Relations, 1961.<sup>9</sup> Similarly, the right of consular protection would no doubt be recognized by the Convention on consular relations to be prepared by the forthcoming Vienna Conference of 1963. Moreover, the protection of nationals abroad had been recognized by many recent general agreements by which the States concerned had established special machinery, including in some cases arbitration courts, for dealing with matters arising out of injuries to aliens.

Referring to the remarks by Mr. Paredes, he considered that the subject of the criminal responsibility of the State was more of theoretical than of practical importance. Many writers, such as Dumas<sup>10</sup> and Pella, had considered the question of the possible criminal liability of the State; in fact, as early as 1895, Professor de Martens had broached the subject. He did not, however, think that a discussion of the topic would be in its place in a draft intended to be submitted to over one hundred States; the draft should contain material from which those States could immediately deduce practical consequences.

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

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

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

<sup>10</sup> See bibliography annexed to Mr. Ago's working paper, *infra*.

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

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

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

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

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

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

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

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

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

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

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

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

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

Mr. Ago's paper somewhat artificially stressed the distinction between the international law of State responsibility and the law relating to the treatment of aliens. He could not agree with some of the statements contained in that paper; for example, neither the draft prepared by the Institute of International Law in 1927<sup>12</sup> nor the Hague draft of 1930<sup>13</sup> contained anything which was outside the subject of State responsibility. The same was true of the Harvard draft of 1929;<sup>14</sup> although it was true that that draft employed the term "responsibility" in more than one sense, for the most part it correctly treated State responsibility as a secondary obligation, having its source in the non-observance of a primary obligation under international law.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 12.25 p.m.

*Summary record of the fourth meeting*

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

*State responsibility (continued)*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The meeting rose at 12.5 p.m.

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

*State responsibility (continued)*

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

*Preliminary point*

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

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

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

*It was so agreed.*

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

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

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

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

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

*First point: origin of international responsibility*

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

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

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

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

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

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

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

*Paragraph (1) was approved.*

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

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

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

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

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

*Paragraph 2(a) was approved.*

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

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

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

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

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

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

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

*The Chairman's suggestion was adopted.*

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

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

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

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

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

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

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

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

Mr. BRIGGS supported Mr. Jiménez de Aréchaga.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

*It was so agreed.*

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

<sup>16</sup> ICJ Reports, 1949.

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

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

*Paragraph 3 was approved.*

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

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

*Paragraph 4 was approved.*

*Second point: consequences of international responsibility*

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

*It was so agreed.*

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

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

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

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

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

Mr. TUNKIN agreed.

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

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

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

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

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

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

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

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

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

*It was so agreed.*

The meeting rose at 12.15 p.m.

## APPENDIX II

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

#### THE DUTY TO COMPENSATE FOR THE NATIONALIZATION OF FOREIGN PROPERTY

*submitted by Mr. E. Jiménez de Aréchaga*<sup>1</sup>

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

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

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

<sup>18</sup> ICJ Reports 1951.

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

## Part I

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

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

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

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

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

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

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

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

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

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

<sup>4</sup> Foighel, "Nationalization", 1957, pp. 120-123.

<sup>5</sup> I.C.J. Reports, 1952, p. 106.

<sup>6</sup> Publication referred to in footnote 2 above, p. 529.

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

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

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

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

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

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

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

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

<sup>8</sup> Publication referred to in footnote 2 above, p. 541.

<sup>9</sup> *Ibid.*, p. 542.

<sup>10</sup> U.S. *Department of State Bulletin*, 1953, vol. 29, p. 358.

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

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

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

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

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

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

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

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

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

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

(4) *The global compensation agreements*

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

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

<sup>11</sup> Series A, No. 7, pp. 32-33.

<sup>12</sup> Schwarzenberger, *International Law*, vol. I, third ed. pp. 206-74.

<sup>13</sup> Foighel, *op. cit.*, p. 60.

<sup>14</sup> Publication cited in footnote 2, p. 527.

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

<sup>16</sup> Konst Katzarov, *Théorie de la Nationalisation*, Neuchâtel, 1960, p. 421.

<sup>17</sup> Katzarov, *op. cit.*, p. 438.

<sup>18</sup> *Op. cit.*, p. 452.

<sup>19</sup> *Op. cit.*, pp. 453, 455, 456.

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

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

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

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

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

24. Mexico also reached global compensation agreements with the United States in 1943<sup>25</sup> and with the United Kingdom and the Netherlands<sup>26</sup> in respect of the nationalization of land and of oil investments.

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

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

and which have taken wide nationalization measures, have made and accepted "inter se" claims for compensation in respect of properties belonging to their nationals which had been nationalized in other countries applying the same economic policies. Thus on 29 March 1958, an agreement was signed between Poland and Czechoslovakia in which both parties declare "settled as well as liquidated all monetary claims and other proprietary obligations of the legal subjects of one contracting party towards the ... other contracting party". Such settlement includes "all obligations of the Polish State in connexion with claims which arise out of measures taken up pursuant to Polish nationalization, expropriation or any other legal provision depriving of or restricting rights of ownership by which Czechoslovak properties, rights and interests on the present territory of the Polish People's Republic were affected". A reciprocal provision makes the same settlement for Polish properties nationalized in Czechoslovakia. A similar treaty, dated 11 February 1956, was entered into between Yugoslavia and Czechoslovakia, providing: "By this treaty are also settled and liquidated: (a) all obligations of the Czechoslovak State in connexion with claims arising out of Czechoslovak measures of nationalization, expropriation or other measures limiting or depriving of rights of ownership to which Yugoslav properties, rights and interests were subjected in Czechoslovakia up to the day of the signature of this treaty." A reciprocal provision makes the same settlement for Czechoslovak properties nationalized in Yugoslavia. And on 24 March 1961 a treaty between Czechoslovakia and Romania for the settlement of outstanding financial and property questions was ratified. This treaty liquidates and settles "monetary and all other claims of ... Czechoslovak legal and physical persons against the Romanian State", as all analogous Romanian claims against Czechoslovakia<sup>28</sup>.

27. These treaties also adopt, in most other essential points, the traditional rules as to nationality of claimants and the relevant dates of the measures of dispossession and even the drafting technique is very similar to that of the lump-sum agreements. The treaties referred to in the preceding paragraph imply the recognition by the signatory States of the fact that the nationalization measures they have adopted, affecting foreign owners, give rise to a legal obligation to compensate. The obligation to pay compensation is confirmed by such treaties because they expressly speak of "claims arising out of measures of nationalization". The fact that both contracting parties waive their mutual claims for compensation only reaffirms this principle. Such mutual waiver is nothing else but another type of the global settlement which has become so customary since 1945<sup>29</sup>.

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

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

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

<sup>23</sup> *American Journal of International Law*, 1934, Supp. p. 10.

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

<sup>25</sup> U.S. Department of State Bulletin, 1943, p. 230.

<sup>26</sup> United Nations Treaty Series, vol. 3, p. 13 and vol. 6, p. 55.

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

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

<sup>29</sup> Drucker, *loc. cit.*, pp. 251 and 907.

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

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

### Part II

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

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

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

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

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

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

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

35. The right of private ownership cannot be considered today as a general principle of law recognized in the domestic forum by all civilized States. A cursory glance at comparative law on the question shows that such a principle has no longer that degree of generality which is required to constitute an international law rule. It is true that some statements by judicial or arbitral organs may be invoked in support of the rule<sup>33</sup>, but, as Foighel points out, the decisions in question were made in and belong to a period when liberal economy was the only recognized economic system in the leading States. Respect for vested rights in municipal law, and the uniformity of the economic systems of the leading countries in so far as their views of private property were concerned, were simply the pre-condition for the assumption of the existence in international law of a maximum of protection for vested rights<sup>34</sup>.

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

<sup>31</sup> Saxon Mills, *op. cit.*, p. 12.

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

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

<sup>34</sup> Foighel, *op. cit.*, p. 53.

<sup>30</sup> Wortley, B. A. *Expropriation in Public International Law*, 1959, p. 126.

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

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

37. In view of the impossibility of basing the rule on a general principle of law recognized by every civilized State, the attempt has been made to circumscribe that foundation of the rule, and the rule itself, to the relations amongst sharing a similar system of respect for private property. Bindschedler says: "The principle of protection of foreign properties was born in a world in which private relations, and the flow of men and capitals, constituted an essential of international relations: such a movement is not possible except with the guarantees and good faith of the interested Governments. Autarchic States, or those which tend to autarchy, such as the Soviet Union and its satellites, as well as other States where an exacerbated nationalism is in force, may disregard those points of view; or rather, such points of view are determining their actions, since their objective is precisely to exclude foreign investments and limit relations with foreigners to official relations. Their denial of the principle of protection for private property does not originate in general consequences before which they withdrew. But the negative conception of those States which, to a certain extent, withdraw themselves from the international society cannot have effect, in those domains in which they cease to cooperate, on the development of the law which regulates the relations in the interior of that same open international society"<sup>36</sup>

38. However, this attempt at segregating a particular section of the international community where the duty to compensate for the nationalization of foreign-owned property would continue to be in force, on the ground of respect for private property, does not correspond to reality and is devoid of any practical interest.

39. As previously indicated, even those States which do not admit the private ownership of the means of production, have recognized in practice a duty to compensate for the nationalization of foreign property, not only in their relations with "capitalist" States, but also in their mutual relations. This shows that it continues to be necessary to find a legal foundation for the existing rules which would apply to all States, in accordance with general international law. It does not correspond to fact to say either that communist States withdraw from the inter-State economic community or from international trade or that they refuse radically to make or accept foreign investments.

40. Furthermore, such an attempt to restrict the foundation of the rule, and thereby, the rule itself, to a limited group of States sharing the same economic system, deprives such rule of any practical interest and turns the duty under examination into a potestative one. If such a rule became inapplicable to those States denying the private ownership of the means of production, a safety-value would be open for any Government wishing to evade the obligations here examined. It would be sufficient for that purpose to state the nationalization measures are adopted in furtherance of an economic policy which rejects the private ownership of the means of production.

(3) *The principle of unjust enrichment as the legal foundation of the obligation to compensate*

41. The preceding discussion leads to the inescapable conclusion that it is necessary to find a different legal foundation for the obligation to compensate for large-scale nationalizations affecting foreign-owned property. Contemporary international practice shows also that the claiming State, when formulating its claims, when reaching global compensation

agreements and waiving rights or claims of its nationals, is in fact exercising powers of its own, and is not acting as mere representative or "diplomatic protector" of claims and interests of its nationals. States have attributed themselves large powers of disposition and settlement with respect to individual claims, relegating to a later stage, governed by municipal law, the distribution of any funds which may be obtained in the compensation agreements as "quid pro quo" for the cancellation of the individual claims. Under municipal law, it is even conceivable that no distribution is made to the affected individuals or companies, without any responsibility being incurred thereby under international law. This confirms that a substantial modification of the traditional principles concerning diplomatic protection and the international responsibility of States for the taking of foreign-owned property, has taken place in connexion with large-scale nationalization measures, and also indicates that the rules in force must be grounded on different principles.

42. The principle which may constitute the legal foundation of the conduct of States in this matter is the principle of unjust enrichment. If no compensation was granted, then the nationalizing State would be enriching itself unjustly, not so much at the expense of foreign individuals or companies, but really at the expense of a foreign State considered as a whole and as another and different political and economic unity. Through the unilateral exercise of its sovereign power to nationalize, a State would be depriving a foreign community of the wealth represented by the investments made and thereby would be taking undue advantage of the fact that economic resources proceeding from another State had penetrated its territorial sphere.

43. This legal foundation of the international duty to compensate for the nationalization of foreign-owned property may have important repercussions on the "quantum" of the compensation due. The extent and scope of compensation would be determined by the enrichment obtained by the nationalizing State rather than measured, as it is traditionally done now, by the loss or impoverishment suffered by the affected foreign individual.<sup>37</sup> It might become legitimate to take into account whether and in what measure the nationalized properties represent additional assets for the economy of the nationalizing State.

44. Considerations of such a nature seem to have been taken into account in the negotiation of global compensation agreements. The statement of the Swiss Federal Council relative to the agreement with Poland dated 25 June 1949, which provides the best account yet published of negotiations leading to this type of agreement, declares that Poland acknowledged her duty to pay compensation for the nationalized property of aliens but that she attached a limitation to this duty: compensation was to be paid only for those investments which had benefited the Polish economy. The Swiss report implies that in the end the valuation of nationalized Swiss property was based on the value which any particular asset had for the Polish State.<sup>38</sup> It may be considered that these reasons also explain why compensation is denied for "goodwill" or "business reputation", since this element normally does not constitute an enrichment for the State in a nationalized economy. There is a complete absence of any reference to goodwill or business reputation in any of the post-war compensation agreements.<sup>39</sup> By the same token, "lucrum cessans" or the loss of future profits of an enterprise is not included in the compensation.<sup>40</sup> Likewise, the measures which originate a duty to compensate are those which determine a transfer of rights or interests in favour of the nationalizing State or any of its agencies. As Bindschedler indicates, measures

<sup>35</sup> *Yearbook of the International Law Commission*, 1960, vol. I, 568th meeting, para. 42.

<sup>36</sup> *Op. cit.*, pp. 198-9.

<sup>37</sup> *Legal Aspects of Foreign Investment*, Friedmann and Pugh, editors, Chapter 41, by A.A. Fatouros, pp. 723 and 729.

<sup>38</sup> G. White, *Nationalization of Foreign Property*, London, 1961, pp. 223-224.

<sup>39</sup> White, *op. cit.*, p. 49.

<sup>40</sup> Bindschedler, *op. cit.*, p. 247 and note.

such as the suppression of slavery of the total suppression, for reasons of general policy, of a detrimental or inconvenient industrial or commercial activity, are not subject to compensation. The reason may well be that in those cases no enrichment is gained by the State, although a loss may be incurred by the foreign owner.<sup>41</sup>

45. The fact of basing the duty to compensate on the principle of unjust enrichment also explains some of the solutions adopted in the global compensation agreements concerning the effectiveness of the payment. Effectiveness refers to the possibility of the immediate utilization of the indemnity. With respect to the possibility of the free transfer of any funds abroad, most global compensation agreements deal differently with those cases in which the nationalized funds have originated in a foreign State, and those in which the foreigner acquired the funds in the country, by succession or marriage, for instance.<sup>42</sup> In the Netherlands-Czechoslovakia agreement of 4 November 1949, the compensation was transferable into Netherlands currency to the extent to which the nationalized property represented a capital increment to the Czechoslovak Republic, a provision which occurs in several of these agreements.<sup>43</sup> A capital increment was taken to mean any investment made by a Netherlands subject through the transfer of gold, guilders or other foreign exchange which was freely convertible at the time of transfer, and accumulated profits arising from such investments. Movable property introduced into Czechoslovakia also constituted a capital increment. In general, payment in the currency of the claimant State was granted only where it was considered by the nationalizing State that a comparable benefit had accrued to them at the time of the original investment.<sup>44</sup>

(4) *Unjust enrichment as a general principle of law recognized by civilized nations*

46. In an arbitral decision issued in 1931 it is stated "that the theory of unjust enrichment as such has not yet been transplanted to the field of international law as this is of a juridical order distinct from local or private law".<sup>45</sup>

47. However, a cursory examination of comparative law shows that the principle of unjust enrichment is today generally, with differences of detail, by all municipal legal systems, whether they belong to common law or to civil law countries. It is expressly embodied in the German, Swiss, Italian, Japanese, Austrian, Turkish, Spanish and Latin-American civil codes. The French, Belgian and Dutch courts have recognized and applied the principle, despite the absence of a specific provision in the Napoleonic Code.<sup>46</sup> The United States Restatement on Restitution provides in article I that "a person who has been unjustly enriched at the expense of another is required to make restitution to the other".<sup>47</sup> This action "in rem verso" is also recognized in Canada and is the law of the Province of Quebec.<sup>48</sup> In the English law, "the various actions for moneys delivered and received 'quantum meruit', constructive trust etc. constitute the elements of a principle of enrichment".<sup>49</sup> The Civil Code of the USSR in sections 399-401 recognizes this same principle<sup>50</sup> as does Polish law.<sup>51</sup>

<sup>41</sup> *Ibid.*

<sup>42</sup> Bindschedler, *op. cit.*, p. 270.

<sup>43</sup> White, *op. cit.*, p. 200.

<sup>44</sup> White, *op. cit.*, p. 241 and examples there indicated.

<sup>45</sup> Dickson Car Wheel Co. v. Mexico, General Claims Commission R.I.A.A., vol. IV, p. 676.

<sup>46</sup> Dalloz, 92.1.596.

<sup>47</sup> Restatement on Restitution, Section 1. See Dawson, "Unjust Enrichment: A Comparative Analysis", 1951.

<sup>48</sup> Baxter, "Unjust Enrichment in the Canadian Common Law and in Quebec Law", *The Canadian Bar Review*, Oct. 1954, p. 855.

<sup>49</sup> Friedmann, *Legal Theory*, p. 392 and O'Connell, "Unjust Enrichment" in *American Journal of Comparative Law*, 1956, pp. 2 *et seq.*

<sup>50</sup> Gsovsky, *Soviet Civil Law*, vol. II, pp. 202-207.

<sup>51</sup> A. Ohanowicz, *l'azione d'indebito arricchimento nel diritto civile polacco*, Riv. Dir. Comm. 1961, p. 328.

48. In fact, all the main legal systems, ancient and modern, have found it necessary to provide relief, in a greater or lesser degree, in order to prevent unjust enrichment. Fundamentally, there is nothing new in the idea of unjust enrichment; it is almost as old as justice.<sup>52</sup> Any civilized system, as Lord Wright has insisted,<sup>53</sup> must recognize the equities of the case and impute to the party enriched an obligation to restore the benefit or its economic equivalent.

49. This principle has also gained recognition in international law. Huber in his arbitration on the British claims against Spain, relating to the Spanish Zone in Morocco, applied this doctrine in a case which referred to the payment of rentals for the use of a property of a British subject by the Spanish authorities. In disposing of the contention that a lease cannot be presumed, and that without a lease agreement there can be no obligation to pay rent, Huber stated "it is a generally recognized principle that obligations 'quasi ex-contractu' may arise from unilateral acts. The prolonged occupation of an immovable property by the authorities, without the consent of the owner, without an expropriation procedure and without excuse of military necessity, certainly constitutes a sufficiently extraordinary fact which has all the characteristics which allow to deduce from it obligations 'quasi ex-contractu' at the charge of the authorities and in favour of the owner".<sup>54</sup>

50. Finally, in the Lena Goldfield arbitration, the tribunal declared that "when a foreign company, at the request of a foreign government, has invested capital, work and technical capacity in the development of a mining industry, the expropriation of such property without indemnity constitutes an unjust enrichment of the expropriating government at the expense of the foreigner."<sup>55</sup>

*Part III — Conclusions*

51. As the question of compensation for nationalization is surveyed, the first impression may be one of conflicting claims in the statements of various States; some of them claiming adequate, prompt and effective compensation while others deny, on various legal grounds, any obligation to compensate. But after this discussion subsides, the observer cannot fail to be impressed with the fact that States, mainly interested in maintaining or re-establishing their currents of trade and in receiving or making foreign investments, do usually reach after a time practical agreements.

52. In such agreements, those States which contend that compensation must be adequate and prompt settle for what they may consider inadequate and delayed indemnization, and those States which deny any liability to pay do compensate in fact, taking into account, to an extent compatible with their financial capacity, the interests of foreign States.

53. This long-range trend is reflected in the now prevailing practice of the global or "lump-sum" compensation agreements, which show that the classical picture of the responsibility of a State towards a foreign individual or a foreign company has been changed. The affected individual disappears from the international scene, and he only reappears, if at all, before national organs.

54. This treaty practice has become so widespread that more than fifty of such bilateral agreements have entered into force since the war. Included in this figure are agreements between States which do not accept the private ownership of the means of production, but which have found it necessary to settle all obligations of one State against the other for the measures of nationalization affecting rights and

<sup>52</sup> Baxter, *op. cit.*, p. 881.

<sup>53</sup> *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* (1943) A.C. 32 at p. 61.

<sup>54</sup> R.I.A.A., vol. II, p. 682.

<sup>55</sup> See Nussbaum A., "The Arbitration between the Lena Goldfield and the Soviet Government", *Cornell Law Review*, 1950-51, pp. 31 *et seq.*

interests of nationals of one of the parties in the territory of the other.

55. It might be possible to infer certain conclusions from this established treaty practice as to the existence, foundation and scope of a duty to compensate for the nationalization of foreign-owned property.

56. The apparent disagreements in this field may be more of philosophical approach or of legal foundation than of the actual practice and conduct of States. It is evident that it is not possible to assume the existence in general international law of a rule providing for the respect of private property, when obviously this is not a general principle of law recognized now by all civilized States.

57. The possibility of finding and establishing the existence of a certain duty to make a certain compensation — as revealed by the widespread treaty practice — might be based on a different legal ground, namely, on the principle prohibiting unjust enrichment, which all civilized legal systems recognize and accept.

58. This different legal ground of the unjust enrichment of one State at the expense of another might have important repercussions on the scope and extent of the duty to compensate, as well as on the effectiveness of the payment. The compensation that the nationalizing State would have to pay would be assessed on the basis of its gain and not on the basis of the alien's loss, and the free transfer of the indemnity would depend on the extent of that State's own enrichment.

#### AN APPROACH TO STATE RESPONSIBILITY

*submitted by Mr. Angel Modesto Paredes*<sup>56</sup>

The law on the international responsibility of States should be fundamentally revised in line with modern ideas regarding the conduct of States, the main novel features of which include the following:

1. The traditional legal principle which exempted collective entities from all criminal liability has been superseded; criminal liability can now be imputed not only to the public representative directly responsible for the injury but also to the entity in whose name he acted. This explains the large number of cases in which rulers have been put on trial by reason of their official acts, even where they had performed these acts in the exercise of their constitutional powers, and the cases in which sanctions have been ordered against the States concerned. It should be noted that the sanctions in question comport the idea of punishment; they do not represent the mere use of force to impose a particular conduct, as in the case of war or action short of war, such as the breach of diplomatic relations.

2. There is a tendency to hold the country which is considered guilty answerable collectively. This is demonstrated not only by the proposition accepted in the various international Charters that an unjustified armed attack against any of the member States is deemed to be an attack upon all, but also by the function entrusted to international bodies of safeguarding the peace and security of members against any conduct or action which may threaten them. This involves a risk for the nations, in that these international bodies may claim excessive powers and invade the domain reserved to the exclusive domestic jurisdiction of States. Another question may well be asked: if a country is deliberately excluded against its will from a particular organization of States, is that country bound by the decisions of that organization and can sanctions be legally applied to that country?

3. In our time, the content of international co-operation has acquired a very special significance, in contrast to the traditional isolation upheld by the former legal postulates of sovereignty and individualism. There is no need for a formal agreement between nations for these to be entitled to mutual co-operation, for that co-operation is implicit in the recognition of identical ends and means for all mankind. As a result, what were formerly considered as purely moral duties are now effectively acquiring a legal character; this happens sometimes hesitatingly and in the form of assistance given without obligation but these situations contain the seeds of future developments.

*Firstly:* From the foregoing it follows that there are acts and omissions for which a State is answerable both civilly (reparation) and penally, in the same manner as an individual who causes an injury to another person.

Special importance attaches, in this connexion, to matters relating to the fundamental rights of peoples enumerated in the [author's draft] agreement on "The exclusive domestic jurisdiction of States", from which the following rules can be deduced:

1. No one may supplant the government of a people in the exercise of its constitutional functions; any infringement of this rule involves the responsibility both of those who carried out the wrongful act and of those who, being able to resist, tolerated the act.

No agreement, pact or act of compliance can be pleaded in justification of such acts.

Collective assistance can be requested or offered only if the legitimate authority declares itself not competent to discharge its duties, and provided always that no other body claims that competence.

2. An international juridical person possessing full capacity may neither contract nor consent to surrender any part of its exclusive jurisdiction; any agreement entered into to this effect should be deemed to be void and inoperative.

If a government finds that its duties are beyond its means, it should apply to the international organizations of which it is a member for assistance out of the resources of those organizations.

3. Any international juridical person which obstructs the free constitutional development of another thereby commits a violation of international law and is responsible for the injury caused, both civilly (reparation), and, where applicable, criminally as well.

4. The adoption of a particular political system and the choice of the persons to apply it are domestic matters which admit of no outside interference; a country disturbed by such interference may accordingly apply to the international organization responsible for the peace and security of nations.

The object of this application is to cause the intervention to cease, and not to provoke it; accordingly, no individual or collective disturbing action will be permitted and the responsibility for any such action will be imputable to all those who contributed to it.

5. The international economic policy of every government should be conducted by that government itself; however, agreements relating to common markets, mutual benefits, systems of co-operation and preferential treatment are lawful, provided that such agreements do not imply economic warfare, unfair competition or unjust prejudice to others.

6. Prejudicial economic conduct decided upon or carried out unlawfully by a people or a group of peoples against another people, may be impugned by the latter people as punishable aggression.

7. An economic blockade may be ordered only by the competent international organization, as the sanction for an offence duly proved and declared as such by the competent court, or as a means of compelling an international juridical person to carry out duties that may be legitimately imposed upon it, likewise through the agency of the competent collective organ.

<sup>56</sup> Originally circulated as mimeographed document ILC/(XIV)/SC.1/WP. 2 and Add. 1.

8. Fiscal matters are within the exclusive domestic jurisdiction of the State, and no other international legal entity has any power to supplant the administrator competent to handle State funds.

9. No foreign authority may, either on its own decision or with the consent or even at the request of the government of a country, collect taxes or constitute mortgages or pledges on that country's public revenues or carry out in these matters any other act on behalf of the State. Notwithstanding any treaty provisions to the contrary, the aggrieved party has the right to lodge a complaint with the competent international organ.

10. The supervision and protection of private individuals in a country is the primary duty of its government, and that government may be neither supplanted nor assisted by any other in the fulfilment of that duty; a State may, however, give a guarantee regarding the extent and manner in which it will carry out its obligations towards private individuals.

11. Any injured person may, by virtue of such a guarantee, enter a claim with the competent foreign authorities within the limits and in the form agreed in the relevant treaty.

Rules of competence for the court will be laid down at the time of its establishment and its procedure will be set forth in its statute.

12. In the drafting of the statute of the court of private claims, the protection of private individuals will be taken primarily into account, subject to due regard for the right of governments to stability.

13. An alien living in any territory whatsoever is under the protection of the national authorities and enjoys the same rights and privileges as a national but is subject to the same burdens, both in so far as the alien's personal status permits.

No alien may enjoy a privileged position, and any claim made on his behalf must be strictly subject to the application of the rules of law.

Claims by aliens will be dealt with by the same courts as deal with claims by other inhabitants of the country.

Likewise, any complaint by an alien in the international sphere will be dealt with by the judges who deal with those of nationals.

*Secondly:* In this century, offensive and defensive alliances have been replaced by a more extensive and durable co-operation between States, which has led to the establishment of international organizations, whether world-wide or regional like the Organization of American States. These organizations propound the following principles in particular:

(a) Common aims for all member States, and common means to achieve those aims. Neither the diversity of races nor that of levels of culture, nor the different political systems constitute an obstacle in that respect. These principles are placed above and beyond any temporary agreements, since the United Nations is prepared to entertain claims by non-member States which are prepared to accept its procedures.

(b) Peace and joint prosperity can be achieved by means of the understanding between men. This fundamental concept utterly refutes the propaganda according to which the Western and Eastern political systems are so irreconcilable that they cannot co-exist in the world to-day.

(c) Disagreements between men give rise to alarm, insecurity and war, the results and ultimate consequences of which do not affect merely those directly and immediately concerned but reach very much further and constitute, to use the words of the San Francisco Charter, a "threat to international peace and security".

(d) It is therefore in the interest of all to avoid conflicts and to try to settle them speedily.

(e) In consequence of the foregoing, it is an established contemporary rule of conduct that an aggression against any of the member States is deemed to be an aggression against all of them.

(f) For this reason, the main organs of these organisations

are ready to protect members against such risks. However, peaceful methods and efforts to reach agreement must first be exhausted before any means of coercion are used.

(g) Accordingly, certain powers of adjudication have been established at various levels of jurisdiction.

(h) One of the consequences of the foregoing is that many risks are involved, particularly the risk that a particular conduct may be imposed upon a State which is not a member of the organization, on the pretext that there is a threat to the member States or to international peace and security. This is a delicate question which requires very thorough study, lest these prerogatives be exercised in defiance of justice and law.

These doctrines have given rise to a new system of restraint on States, which leaves behind the methods of ordeal by justice exclusively practised previously and replaces it by a judicial system for the enforcement of the rule of law. At present, in international matters, powers of adjudication have been established, with various branches and levels of jurisdiction, so that it is safe to assert that in international matters, as in national matters, no one may take the law into his own hands.

The complexity and novelty of the subject require a thorough examination of the problems which it involves, in order to discern the appropriate and direct relationship between the question to be settled and the jurisdiction of the judge competent to deal with it; it is necessary in this respect to avoid as far as possible all confusion in matters of jurisdiction and to assert the competence of the judiciary to correct where necessary any injustice which may arise from political exigencies. For these reasons, we suggest the establishment of a judicial body based on the following principles:

1. A court to deal with constitutional matters at the international level:

(a) The first duty of the court will be to determine whether a particular question is an international matter or a matter within the exclusive domestic jurisdiction of the State concerned;

(b) If the matter is recognized as being within the exclusive national jurisdiction, the court will so inform the international organization dealing with the case, so that organization should abstain;

(c) If several States are involved in the problem under discussion, the court will render a decision indicating the international organ competent to deal with it;

(d) If the case does not involve matters at the national constitutional level but at the international level, the court will likewise determine the competent organ.

2. A court or division of the court, to deal with administrative questions.

The court will, in the first place, at the request of any of the parties concerned, determine the legal nature of the dispute and, if appropriate, refer it to the national authorities.

If the case is found to involve international administrative matters, the court will, at the request of a party having a legitimate interest determine the authority having jurisdiction in the matter.

3. A division of the court will deal with fiscal matters pertaining to the functioning of the international organization concerned.

4. A fourth division of the court will consider and adjudicate upon the civil reparation which may be due in respect of an injury caused by one international juridical person to another.

If an international organ imposes a fine or some form of civil reparation, the party affected may apply to the judicial authority established under this article for a ruling on the question of the jurisdiction of the organ in question.

If the ruling is that there was no jurisdiction, there will be no obligation to pay reparations. On the other hand, if the jurisdiction is upheld, the court may not pronounce upon the amount of damages or upon other aspects of the decision which was competently rendered.

5. No international penal sanction may be applied without a decision of the international criminal court:

- (a) The court will have exclusive jurisdiction to deal with certain penal matters;
- (b) The court will have preventive jurisdiction with respect to other aspects of the offence; and
- (c) The court may and should review the more severe sanctions imposed by other international organs.

6. Claims against States submitted by private individuals to international organs will be dealt with by another judicial body and by different methods.

*Thirdly:* Duties relating to co-operation between States

*Whereas:*

the new meaning of international co-operation follows from the recognition of the inter-dependence of peoples for the purpose of the achievement of their objectives and the fulfilment of their destiny;

the equal objectives and destinies reflect the needs of the human race, which are substantially the same for all;

the said objectives are accordingly best achieved through ventures undertaken by the nations acting in common;

such action may take the form of: (a) assistance and actual support; (b) the avoidance on the part of Governments of acts capable of causing harm to other peoples; (c) the prohibition of any positive prejudice to others; and, (d) responsibility for omissions which cause prejudice;

the protection to be accorded to a nation needing it, without placing that nation in a position of dependency, can only be given through the collective action of the body representing a community;

a Government may not, even in the legitimate exercise of its powers, cause prejudice to any other international person without incurring the obligation to make reparation, unless it can be proved that the action was unavoidable for the purpose of safeguarding its own needs and that all possible precautions were taken to cause no harm or as little harm as possible to others;

if there is intent to cause prejudice, the act shall give rise to a claim for reparation, even if it is not punishable in itself; omissions may be malicious or culpable; malicious, if the injury was foreseen and the action necessary to prevent it was not taken, with intent to cause the injury; and culpable, if there is failure to take the necessary precautions, through inattention or negligence.

Now therefore the High Contracting Parties proclaim the following

#### DUTIES OF STATE SOLIDARITY:

*Article 1.* Any damage occasioned to one State concerns and affects the others.

*Article 2.* If the damage is a result of a natural phenomenon, such as earthquakes, floods and other great disasters, nations are under an obligation to provide relief.

*Article 3.* This relief shall be provided through an international commission of permanent officials appointed for the purpose, to be known as the Relief Commission.

*Article 4.* The Commission shall inform each State of the amount of its contribution.

*Article 5.* After a Government has been notified of its contribution it shall be responsible for sending the contribution to the Commission, which shall transmit it to the victim.

*Article 6.* Duties between States also arise out of their respective geographical positions and out of the inter-dependence resulting from the configuration of the terrain, as happens in the case of international inland waterways and proximity to a sea.

*Article 7.* The circumstances referred to in the preceding article imply many prohibitions and mutual responsibilities.

*Article 8.* International trade implies duties of mutual respect and the prohibition of unfair competition.

*Article 9.* No person, whether individually or jointly with

others, is free to use assets owned in common by all in ways which are prejudicial to others.

*Article 10.* Prejudicial use may occur in the following ways: either because the property is used for a purpose different from that for which it is, by its nature, intended; or because it is exploited inconsiderately and in a way liable to exhaust its resources; or because it is used in a way which is harmful to the user and to others. Anyone proposing to sterilize the atmosphere of a region in such a way as to prevent or impede the biological development of that region would be guilty of the first offence; the mass destruction of the resources of the sea or the use of such resources in an imprudent and unregulated manner come under the second heading; atomic explosions, with all the evils they involve, are examples of the third case.

*Article 11.* Any person who attempts to change the use of an asset which is *res communis omnium*, or who deprives others of the use of part of that asset, may be forbidden, either temporarily or permanently, to enjoy or use the asset in question, upon proof of the act or acts imputed to that person. In addition, the person concerned shall be liable for compensation for the damage caused.

*Article 12.* Natural resources which are *res communis omnium* shall be exploited under international control and regulation. The control organ shall be competent to judge violations and to impose penalties.

*Article 13.* No person may involve himself or others in avoidable dangers, even on the pretext of scientific research. In the latter case, the authorization of the organ to which such authority has been given shall be required, and it shall be given on the basis of a circumstantial report from competent technicians.

*Article 14.* Any person who performs such an act regardless of an express prohibition, or who does not apply for authorization to carry it out or does not act as he has been instructed to, shall be prosecuted for the commission of an international offence or shall be liable to any penalties resulting from it and shall be responsible for compensation for any injury caused.

*Article 15.* Any person who causes prejudice to another by acts permitted and carried out under the terms of the authorization shall be responsible for the value of the damage, even though the acts were authorized.

*Article 16.* Omissions, in the international field, may be malicious or culpable.

*Article 17.* An omission is malicious if there has been failure to carry out a duty positively imposed by a treaty, a convention, or any other legal instrument; an omission is culpable if it conflicts with the mutual security which States owe to one another; for instance, if one State is aware of imminent danger threatening another and does not inform that State, that is a culpable omission.

#### WORKING PAPER

*prepared by Mr. André Gros*<sup>57</sup>

The International Law Commission has decided that the members of the Sub-Committee on State Responsibility should submit to the Secretariat memoranda on the main aspects of the subject.

In the light of the first general debate in the Commission and in order to facilitate the Sub-Committee's initial proceedings, it seems essential to specify rapidly the general conditions for the work to be done in the Sub-Committee.

It is now apparently accepted that the Commission considers it possible to examine the problem of State responsibility by taking into consideration judicial precedents and diplomatic practice bearing on cases of responsibility concerning the treatment of aliens, without, however, making of something which

<sup>57</sup> Originally circulated as mimeographed document A/CN.4/SC.1/WP.3.

is only a part of international law the sole source of State responsibility. This basic concept being established, it seems to me that the study of State responsibility might be conducted in the following manner:

### I. General definition of the law of responsibility

While there can be no question of writing a theoretical treatise on responsibility, agreement must be reached on the general aspects of this problem of law. Personally, I would say that, as in any legal system, responsibility in international law has two aspects:

(1) It is a claim for redress against an act which has resulted in an injury.

(2) This claim, in order to be validly made and maintained, has to fulfil certain conditions.

While these two aspects may be distinguished for the purposes of the study, it should be borne in mind that this distinction reflects an academic definition and that these two elements are inseparably connected in constituting the law of State responsibility. Agreement on the machinery for making an international claim would be useless if there was no agreement on the general rules of substance concerning such claims. The existence of these two aspects of the law of responsibility and the connexion between them are perfectly clear in the domestic law of responsibility in every State.

Thus, in French private law, article 1382 of the Civil Code laid down a rule which has become widely known:

"Any human act resulting in injury to another person imposes, on the person whose wrongful act resulted in the injury, a duty to make reparation for it."

This article specifies the "source" of responsibility; as to the machinery for obtaining redress, it consists in the procedures established by the rules of French private law. The Sub-Committee might thus consider whether there was, in international law, an equivalent to this "source" of responsibility which is defined in the various systems of private law. There is a category of cases of State responsibility in which this analogy with private law is all the more justified in that these cases involve persons and the State protecting those persons lays claim to a certain treatment or to reparation on their behalf, even if, as the Permanent Court of International Justice says, in doing so the State acts by invoking its own right. This is the classic theory of diplomatic or consular protection on behalf of a State's nationals (see the Vienna Convention of 1961, article 3, and article 4 of the draft articles on consular relations adopted unanimously by the International Law Commission in 1961). The claim bears on the violation of an interest or the violation of a right, to use the actual words of the texts prepared by the Commission. Protection based on the violation of a right implies a theory of the Commission. Protection based on the violation of the international responsibility of the State. This may be studied and defined.

In a study of this general definition, the essential rule of State sovereignty naturally cannot be disregarded, and there is no question of recognizing a right of intervention by foreign States in the domestic affairs of a State, but it is self evident that all States engage in diplomatic and consular protection of their nationals and, as I have just noted, the two major conventions prepared by the Commission itself recognize this right of protection. That, therefore, can be regarded as a first topic of study, the outcome of which should be a definition of the general conditions, and of the limits, of the international responsibility of the State.

### II. Other problems which should be examined

It seems unnecessary, with a view to beginning the general debate in the Sub-Committee, that each member should state definitively, in his memorandum, the method of discussion he envisages. Personally, I consider that the order in which the various points listed below are discussed is not of major importance. What is needed is a general outline, but any of the aspects in question may be studied first.

Given this indication of method, it seems that the problems to be examined are:

A. Subjects of law in international responsibility (who bears the international duty?);

B. Scope of the international duty (kinds of duties, procedures for disciplining);

C. The problem of the elements of guilt;

D. Machinery:

(a) the condition of nationality;

(b) exhaustion of local remedies.

These notes are intended solely to facilitate the opening of the debate in the Sub-Committee and the preparation of general directives for the Special Rapporteur who will be responsible for drafting the report.

## WORKING DOCUMENT

prepared by Mr. Senjin Tsuruoka<sup>58</sup>

### I. INTRODUCTION

#### Working Method

1. A State which infringes a right of another State by an act or omission contrary to international law incurs responsibility for restoration of the right infringed or for reparation in respect of the injury caused. That is the principle of State responsibility as established in international law. It is easy to see that such a principle, once it is formulated in clear and comprehensive terms, in its many aspects, will be the more effective in forestalling breaches of international obligations and consequently in ensuring the rule of international law. I am glad the International Law Commission is now able to undertake the codification of this important branch of international law.

2. I think we must turn first of all to the question of the method or organization of the work of the International Law Commission, for in my view this is of greater importance in the codification of State responsibility than in the codification of other topics.

I would suggest to the International Law Commission:

(a) that it undertake first the codification of "State responsibility for injury to the person or property of aliens" (hereinafter referred to as "State responsibility *stricto sensu*") and that it then proceed to codify the general principles governing all aspects of State responsibility in the broad sense of the term;

(b) or (and this is a variation of my proposal above) that it undertake the codification of State responsibility both *stricto sensu* and *lato sensu* at the same time.

What is important, in my view, is that the International Law Commission should not omit to codify the system of State responsibility *stricto sensu* and that it should devote its efforts to that end before giving special attention to other individual branches of the law of responsibility *lato sensu*.

Some of the reasons which have led me to adopt the view I have just mentioned are set out in paragraphs 3, 4, 5 and 6 below. At the same time I shall venture to draw the attention of the International Law Commission to a number of points. I hope that it will bear them in mind when it codifies the general principles governing State responsibility *lato sensu*.

3. In considering the method of work to be adopted in the codification of State responsibility, I have been guided by two considerations: respect for the spirit of the United Nations Charter (Article 13, paragraph 1 a) and the Statute of the

<sup>58</sup> Originally circulated as mimeographed document A/CN.4/SC.1/WP.4.

International Law Commission, and concern to make the work of the Commission as fruitful as possible.

Let us note in passing, although everyone is aware of it, that the International Law Commission, as an organ of the United Nations General Assembly, has the task of ensuring the progressive development of international law and working on its codification. It is neither an international legislative body nor an academic institution. Its essential purpose is not to renew international law or to establish a purely theoretical legal system. On the contrary, its work should result from research into the rules of positive international law. It should establish a legal system better adapted to the new conditions of international life, but in conformity with positive international law. In other words, it must not be over-bold in its innovations yet must contrive to meet the new needs of the international community, whilst harmonizing the legitimate interests of all members of that community.

With these concerns as my point of departure, I soon found myself confronted by certain salient features which characterize the law of State responsibility. I shall mention them in the pages which follow.

4. State responsibility *lato sensu* is entailed by failure in many ways to fulfil various international obligations. Its aspects, characteristics and mechanisms vary almost infinitely according to the different kinds of failure in question and the variety of the circumstances in which the failure occurs. Furthermore, since in practice State responsibility is most often understood as the duty to make reparation for injuries caused, it cannot be denied that the presence or absence of reparation sometimes decides the question whether or not the responsibility itself can be said to exist. In short, the system of State responsibility *lato sensu* covers a vast field of international law and is highly complicated.

It will therefore be agreed that it would be an arduous undertaking to try to pick out from this vast and complex field the general principles applicable to all aspects of State responsibility *lato sensu*. Still greater difficulties would be encountered if the attempt were made, as it must be, to invest the principles thus isolated not just with theoretical but with real and practical value.

5. If this is true for the codification of the principles embracing all branches of the law of State responsibility, there is one which is well suited to codification; it is that governing the law of State responsibility in the matter of injuries caused to the person or property of aliens. What is more, the codification of the latter will help to meet the pressing needs of the world economic situation. It will have the further effect of greatly facilitating the task of codifying the law of responsibility *lato sensu*, the advantage of which will be all the greater since the difficulties in the way of such a task are considerable.

But why and how does the system of State responsibility *stricto sensu* lend itself so well to codification?

We should first of all point to the great number of precedents, above all in the practice of international tribunals, and the wealth of literature accumulated in the course of history. We should also mention the existence of important works on codification in this branch. In particular it is significant that nearly all the work done so far on the codification of State responsibility relates only to State responsibility *stricto sensu*. It is certainly neither by simple oversight nor by chance that such works have been restricted to this one area of State responsibility; on the contrary, it shows that throughout its history the notion of the law of State responsibility has grown up almost exclusively around the question of the protection of the person or property of aliens. And this subject is still such a burning issue in modern international life that State responsibility in this matter has finally come to be regarded not only as the prototype or kernel of State responsibility but also as the very synonym for it.

In the light of these facts, once we admit that the International Law Commission has no other task than to ensure the progressive development and codification of international

law, and that in the way I explained above (see paragraph 3), it will not be disputed that the system of responsibility *stricto sensu* has all the prerequisites for codification. It will also be agreed that the Commission would do well to undertake work specially devoted to this topic. Finally, it will be recognized that the Commission can hardly codify the law of State responsibility *lato sensu* without constant reference to it.

But there is more. Codification of the law concerning the protection of aliens will meet the needs of the international community, the common responsibilities and interdependence of which are becoming daily more pronounced, above all as a result of progress in communications. In particular, it will facilitate economic and technical co-operation between the developing countries and the industrialized nations by giving greater security to the men and property sent abroad for that purpose.

In addition, we cannot pass over in silence another not inconsiderable advantage, to which I referred just now, from which the Commission will be able to benefit: the fact that there are quite a few codification projects, both official and private, bearing on the law of State responsibility. And they do not date back so very far. Moreover, the Commission has its own documents: six reports on the matter submitted by its Special Rapporteur, Dr. F. V. García Amador.

Moreover, a comparison of this sector of the law of State responsibility with other sectors of the same body of law shows even more clearly how much better suited to codification it is than the others.

Of course, no one denies the importance of the questions that arise in connexion with different types of State responsibility which result from violations of principles or rights recognized under international law, such as the principles of the territorial integrity and the political independence of States, the right of peoples to self-determination, and the right of States to work their natural resources. I believe also that the general principle of State responsibility formulated at the very beginning of this report (paragraph 1 above) applies to these different aspects of the question. Leaving aside that general principle, however, legal rules governing these various aspects of State responsibility do not exist at the present stage on the development of international law, in a sufficiently concrete, specific form for suitable codification. If, therefore, in spite of these unfavourable conditions the Commission should attempt the task of codification in this sector, it would be forced to establish a great many new rules. In so doing, it might well exceed the terms of reference laid down in its Statute, since it would then no longer be dealing with the progressive development or codification of international law. That is not true, however, in the case of the codification of the law of State responsibility *stricto sensu*.

I trust that I have now sufficiently explained my main reasons for putting forward the proposal contained in paragraph 2 above.

6. Before concluding this section of my paper, however, I should like to express the hope that, if the International Law Commission should begin its work with the codification of the general principles governing all aspects of State responsibility:

- (a) it will not depart unduly from established usage and practice and will be cautious in making innovations;
- (b) it will recognize the fact that the law of State responsibility for injuries caused to the person or property of aliens is a rich source of material for the codification of the general principles governing State responsibility *lato sensu*;
- (c) it will also recognize that the codification of the aforementioned general principles should be supplemented by the codification of the law of responsibility *stricto sensu*;
- (d) the members of the Commission will not seek to gain special advantages for any given State or group of States from the work of codification but, on the contrary, will try to harmonize the legitimate interests of all States.

7. I should like to make a further point. Like Sir Humphrey Waldock, I deplore the "decline of the optional clause" (Statute of the International Court of Justice, Article 36, para-

graph 2). However excellent the work of the International Law Commission may be and however many States may accept it, the principles laid down will be ineffective and may even remain inoperative so long as guarantees for their strict application do not exist. I earnestly hope that, in order to provide the international community with such guarantees, the Commission will undertake a study, as soon as possible, of the means of strengthening the system of judicial procedure. Consideration could be given, for example, to the possibility of encouraging acceptance of the optional clause of the Statute of the International Court of Justice and to the necessity of setting up international tribunals.

## II. GENERAL PRINCIPLES GOVERNING THE LAW OF STATE RESPONSIBILITY

8. In this section of my paper, I intend to deal with certain questions which, in my opinion, will call for discussion by the International Law Commission when it codifies the general principles governing State responsibility. Needless to say, I shall confine myself, at this preliminary stage of the Commission's work, to observations of a general nature leaving details on one side. The questions to which I shall address myself may be grouped as follows:

- (1) The juridical nature of State responsibility;
- (2) The constituent elements of State responsibility:
  - (a) the legal capacity of States incurring responsibility;
  - (b) the wilful act and fault (*culpa*);
  - (c) injury to legal interests;
- (3) Exoneration from responsibility;
- (4) Extinguishment of responsibility previously incurred.

9. The juridical nature of State responsibility is a subject which has been extensively discussed by the authorities. There is general agreement that the juridical nature of the responsibility resulting from breaches of international obligations is similar to that of civil responsibility under municipal law. When a State commits an act which is contrary to a rule of international law, the question which normally arises is that concerning the restoration of the right infringed or of reparation for the injury sustained. In other words, what is usually involved is a responsibility on the part of the State which has caused injury to the legal interest of another State to make reparation for that injury. Of course, it sometimes happens that a breach of an international obligation constitutes an act punishable under international law, as in the case of a crime under municipal law. In such cases, the breach goes beyond the scope of relations between the two States which, respectively, caused and sustained the injury, and the State which caused the injury incurs penal responsibility similar to that under municipal law. It should be noted in that connexion that there is an increasingly pronounced tendency to regard certain types of State responsibility as being penal in nature. This reflects a new development in the international community. Since the Second World War, the latter has tended to centralize certain types of jurisdiction, as is strikingly demonstrated by some provisions of the United Nations Charter. It is held by some, for example, that a breach of international obligations which affects the fundamental rights of the State is to be regarded as a violation of the general interest of the international community as a whole. In such cases, from the point of view of the general interest of the international community as a whole, there is considerable justification for saying that, quite apart from the question of civil responsibility arising between the States directly concerned, there are some grounds for the imposition of a sanction. It should be noted at the same time, however, that, at the present stage of its development, the structure of the international community is not yet so well organized that State responsibility can, as a general rule, be dealt with in these terms.

In my opinion, the International Law Commission should confine itself to stating that, generally speaking, State responsibility is of a juridical nature similar to that of civil responsi-

bility under municipal law and that, in certain exceptional cases, it entails the imposition of a sanction.

10. Consideration of the constituent elements of State responsibility should relate, in the first place, to the commission of an act which is unlawful under international law. The breach or non-performance of the rules of international law normally arises out of an act or omission which are contrary to the material standards of that body of law. I should be noted that such acts or omissions must, in particular, be contrary to international obligations in force between the State committing the act or omission and the State injured thereby. Consideration should next be given to the legal capacity of the State which committed the act or omission. In the case of a State of limited capacity, the imputability of the act or omission should be decided in terms of the delegated powers. In some cases of this nature, there is a form of delegated responsibility within the framework of those powers.

11. The State is a body corporate. Hence, an unlawful act by a State is in reality an act or omission by an individual which is deemed to be the unlawful act of the State whose responsibility is involved. The question of the imputability of responsibility to a State by reason of an act committed by an individual is one which needs clarification. Normally, an act committed by the agent of a State constitutes an act of that State. Thus, a State incurs responsibility for any act committed by one of its agents acting within the real or apparent limits of his competence. That is true irrespective of whether the agent in question is the Head of State, the Head of Government, the Minister for Foreign Affairs or some other person belonging to the legislative, judicial or administrative organs.

12. Does the State incur international responsibility for the action of a private person and, if so, to what degree? That is a subject of controversy among the authorities and of uncertainty in practice. But what is certain is that the State is bound to some extent to prevent any action by a private person likely to cause injury to aliens on the territory in which it exercises its sovereignty. The rule applies both in the case of an individual and in the case of a group. Consequently, the State incurs international responsibility for an injury caused by the act of an individual if it does not exercise due diligence to prevent such an action. The degree of diligence which it should exercise, I believe, is that which may be expected of a civilized State.

13. Anyone who infringes the right of another by an intentional act or negligence is required to repair the injury sustained. That is a general principle of private law recognized throughout the civilized world.

But how can it be introduced, in a modified form, into the law of State responsibility? The question is not a simple one. According to traditional notions, since the intentional act or negligence is regarded as a constituent element of international responsibility, the principle of *culpa* is the basis for international responsibility. In my opinion, however, in international law, the principle of *culpa* should be examined from a somewhat different point of view from that of municipal law. In international law, the question of due diligence is not necessarily related to the notion of negligence. International responsibility may sometimes arise from the mere fact that injury has been caused. In some cases, therefore, we would have to recognize an objective responsibility related to the injured right.

But I do not go so far as to say that the principle of responsibility without fault recognized in some national laws should be generally recognized in international law. The subject would require scrutiny by the International Law Commission.

14. It is a precondition of State responsibility that there must be an injured interest of a subject of international law and that that interest must have been injured as a result of an act committed by another subject of international law. The question of the injured legal interest arises primarily on the bilateral level, between the State committing the injury and

the State sustaining it. The injury is usually of a material nature. But, in some instances, injuries of a non-material nature may also involve State responsibility. For example, State responsibility is involved if the State offends the honour of another State. On the other hand, I find it difficult to speak of State responsibility deriving from a non-observance of general international law which does not cause any real injury.

15. Even if a State has caused injury to the legal interests of another State by an act normally regarded as unlawful, it is exonerated from responsibility for that act if the State sustaining the injury has waived the right to claim reparation or if the act in question was carried out in circumstances justifying the exercise of the right of self-defence or the right of reprisal.

16. A State discharges its responsibility resulting from its violation of an international obligation by making good the injury caused. The methods of discharging responsibility or releasing itself from such responsibility vary according to the injured interests and to the circumstances in which the illegal act was committed. As a general rule, responsibility is discharged by one of the following methods or by several of them combined: restoration of the *status quo ante*, reparation of the injury sustained, apologies and punishment of the offender. The question which of those methods is applicable in a given case is determined by the juridical nature of the injured interest; the State sustaining the injury is not entirely free in its choice of the means of asserting its right. Moreover, the amount of the reparation or compensation should be commensurate with the injury sustained.

17. The recent development in the ideas of jurists on the question of subjects of international law will necessitate some changes in the traditional theories concerning the matter. The question will arise with respect to the active and passive subjects of responsibility. But account should be taken of the fact that in positive international law, in its present state of development, private persons and international organizations are not in the same position as the State, so far as international responsibility is concerned, unless so recognized in an international agreement. I am inclined to think that, in that connexion, the International Law Commission would be well-advised to deal primarily with the State and to refer only incidentally to the other subjects of international law.

### III. STATE RESPONSIBILITY WITH REGARD TO THE TREATMENT OF ALIENS

18. In part I of this paper, I explained why the International Law Commission should not fail to undertake the codification of the law of State responsibility for injury caused to aliens. I also pointed out that there are a number of draft codifications, both official and private, covering this subject matter. Moreover, I think there is general agreement on the important factors to be clarified. I shall therefore confine myself here to presenting a rapid sketch of the essential features which those various drafts have in common. I shall also draw attention to certain new developments in that branch of law.

19. In many cases that have occurred in international practice and precedents, I believe the principle of the nationality of the party bringing the claim has been recognized as an established principle of international law. But there is some uncertainty regarding the scope of its application and its tenor, and hence a thorough study should be made in order to work out adequate standards.

20. Greater difficulties are encountered in defining the notion of "nationality", which constitutes a preliminary question in diplomatic protection. The nationality of a juridical person endowed with an international structure, the applicability of the theory of the "genuine link", the protection of stateless persons — all these questions are still to be clarified.

21. The meaning to be attributed to the so-called "Calvo" clause and its scope should also be discussed in detail, because there is confusion and uncertainty on the subject both in the writings of learned authors and in the practice of international tribunals where those questions are arousing new interest owing to the recent expansion of trade and communications between States.

22. The significance of the waiver of the right to bring a claim or the meaning of the waiver of diplomatic protection is a relatively new problem. Such problems have arisen primarily in connexion with property settlements following the First and Second World Wars. But, in my view, the juridical scope of such clauses still remains to be defined.

23. In the municipal law of many States a distinction is made between two categories of responsibility: responsibility to repair or indemnify an injury caused by a wrongful act of an official of the State, that is, an act performed outside the scope of his competence, and responsibility to indemnify a loss sustained as a result of a measure of expropriation or nationalization, that is, a measure authorized by law. I feel that caution should be exercised before adopting such a distinction in international law. I think it particularly important to maintain a fair balance between the various interests involved if such a distinction should be accepted.

24. Finally, before concluding this paper, I should like to dwell for a moment on the criticism that the customary rules governing State responsibility which have been developed in connexion with matters relating to the protection of the person and property of aliens are merely a product of the capitalist and imperialist system. Consequently, they are not acceptable to States which have adopted other systems.

It is not my intention to refute that argument here. But one thing seems certain: the customary rules in question, as applied at the present time, constitute a neutral juridical system. They form a juridical machinery which functions independently of political coloration.

Furthermore, all the members of the international community are required to respect the international law in force; that law applies to old States as well as to newly-independent States.

Neither changes in the political system of a State nor the emergence of an independent State can have the legal effect of destroying the juridical value of the international law in force. To maintain the contrary is to run the risk of destroying the stability of the legal order which should prevail in the international community.

The progressive development of international law should be encouraged. But in order to ensure that development, it is important to recognize the value of the international law in force, as established by agreement and by practice, for it is the very basis for development.

#### WORKING PAPER

prepared by Mr. Mustafa Kamil Yasseen<sup>59</sup>

The Sub-Committee on State Responsibility has to deal with a problem of method and planning. It has to determine the proper approach to the topic "State responsibility", the scope of the International Law Commission's task in the matter as defined in General Assembly resolution 799 (VIII) and the manner in which the Commission should proceed, and the main divisions of the topic.

#### *The scope of the Commission's task*

According to resolution 799 (VIII) the subject to be discussed is the international responsibility of States, and the

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Commission's task would not seem to be limited to any particular aspect or aspects of that responsibility to the exclusion of others. In my opinion, the first step must be to define the general theory of responsibility. That theory exists. Its application in practice has yielded uneven results; it has proved more fruitful and effective in certain fields of international relations than in others. But that is no reason for denying that it exists or that certain principles have a general scope transcending the particular case of responsibility to which they are applied. State responsibility should therefore be considered as a whole.

There are some, however, who think that the law of responsibility should be dealt with piecemeal and that it is preferable to consider first the international responsibility of States for injury to the person or property of aliens. I do not find that argument convincing; the method they propose might complicate matters. The codification of the law of responsibility in a limited field of international relations might invest particular solutions with an importance which they do not really possess. Furthermore, responsibility for injury to aliens does not seem to me to be a topic that can readily be codified at the present time. While it is true that there exist numerous precedents in this field, they are far from being unanimous; the conflicting doctrines on many fundamental issues are too well known to need mentioning. The positions of States in this matter differ widely and are firmly held. In the present period of the liquidation of the colonial regime and the correction of certain privileged situations obtained under that regime, it is difficult to ensure a calm atmosphere for working out a generally accepted code of law. Our era of rapid evolution, or, rather, of revolution, is in my opinion the least favourable for the defining of general rules capable of governing these matters which are directly affected by this rapid evolution. These questions encompass an infinite number of slightly differing cases which require flexible solutions; these should be based first and foremost on the idea of justice, the principle of State sovereignty over natural resources and wealth, and the economic and social conditions prevailing in certain societies.

The interests of States are sometimes too conflicting in this field, and it would not seem an easy matter to find a compromise solution on certain points, particularly with regard to agreements which might be described as unequal, often imposed under the pressure of difficulties encountered by the community concerned and mortgaging its future even after independence.

What can be noted is a growing tendency to confirm the sovereignty of States over their national resources.

In my opinion, therefore, the best approach to the law of State responsibility is first to define the general theory. That theory may have to be adapted to some extent in its application in the different areas of international relations, and this, too, should be a task for the International Law Commission.

#### *The main divisions of the topic*

The first step must be to consider the general theory of State responsibility; for this purpose the following questions must be studied:

1. *The unlawful act.* This is the failure to carry out an international obligation, in other words a departure from a rule of international law, irrespective of its source (treaty, custom). It should be stressed here that the unlawful act may be one of commission or of omission.

Although fault seems, in principle, to constitute the basis of State responsibility, the question whether that responsibility may in exceptional cases be based to some extent on risk should also be considered.

2. *The injury.* It should be noted that moral injury is also a factor to be considered; it is desirable, however, to study the conditions in which State responsibility could result in moral injury.

3. *The cause and effect relationship.* It is an essential

condition of responsibility that the injury must be caused by the unlawful act. It is desirable here to take up the problem of indirect injury.

4. *Reparation.* Under this heading, the nature of the reparation, its forms in the international sphere and, above all, the role of moral reparation should be studied. Consideration should be given to the scope of *restitutio in integrum* and to the question whether the injured party or the party committing the unlawful act may opt freely between *restitutio in integrum* and other forms of reparation. It is especially important to decide whether reparation should also include loss of earnings.

5. *The subjects of responsibility.* The party committing the unlawful act is the active subject; the injured party is the passive subject. According to positive law the subject (active or passive) must be a State.

It is arguable, however, that in consequence of the evolution of the notion of the individual as a subject of law he should be regarded as a direct subject of responsibility and able, as such, to institute proceedings in international tribunals.

Without wishing to enter into the substance of the question, I think it hardly tenable to advance this proposition as a general rule of international law. There is no reason, however, why the notion of the individual as a passive subject of responsibility should not be accepted in certain cases, exceptionally, by virtue of a special rule of law.

6. *Excuse; ground for limitation of or exoneration from reparation of the injury.* The problem here is to define the grounds which excuse an act and deprive it of its unlawful character: self-defence, and even *force majeure* in general, and the case of necessity.

The grounds for the limitation of or exoneration from reparation have to be defined. Thus, the effect of fault on the part of the injured party, the effect of the waiver of the claim, and the possibility of laying down a time limitation extinguishing the obligation to make reparation must all be studied.

Once the general theory of responsibility has been defined, it will be possible to study its application in particular areas of international relations, but we should not confine ourselves to responsibility for injuries to aliens; that question is important, but there are others equally and even more important in our time. The priority to be given to these questions may be considered at a later stage.

#### WORKING PAPER

*prepared by Mr. Roberto Ago*<sup>60</sup>

At its first meeting on 21 June 1962, the Sub-Committee on State Responsibility of the International Law Commission decided that for its second series of meetings, from 7 to 16 January 1963, which was to be devoted to the organization of the Sub-Committee's work and to determining the main points to be considered, especially in relation to the general aspects of State responsibility, the members of the Sub-Committee should if possible prepare some working papers describing what they regarded as the fundamental aspects of the subject.

Two working papers, one by Mr. Jiménez de Aréchaga and one by Mr. Paredes, were submitted to the Sub-Committee at its June meeting. Recently, another working paper, prepared according to the criteria laid down by the Sub-Committee, was sent in by Mr. Gros.

Now I venture to submit to the members of the Sub-Committee these few pages, whose sole purpose is to summarize some general considerations on the subject of the international

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responsibility of the State, at least some of which I have previously expounded orally in the Commission, and to draw attention particularly to certain points which I think ought to receive priority in any attempt to codify the international law on the subject. I also attach to this short paper a bibliography of works from the legal literature of several countries concerning specifically State responsibility or some of its aspects, for I believe that, especially in the case of less recent works or articles in periodicals, an indication of the place and date of publication might sometimes help the members of the Sub-Committee in their research. To avoid making this bibliography unnecessarily long, I have not mentioned the numerous text books and general treatises on international law, almost all of which contain chapters, and sometimes very long ones, on State responsibility; and I also apologize in advance for the gaps and omissions which the members of the Sub-Committee will certainly notice in my list of specialized works.

## I

If there is any branch of general international law the codification of which is particularly desirable, and even necessary, it is surely that dealing with the international responsibility of States. Few questions recur so frequently in disputes between States as those relating to responsibility; in few subjects are the repercussions of the development of international law in every other respect felt so automatically as in that of responsibility; few chapters of international law are regarded with so much interest, and sometimes concern, by States, and particularly by new States; and in no branch of international law; perhaps, is the fundamental requirement that the law should be clear and certain felt so greatly as in that of State responsibility.

At the same time, the codification of the international law concerning State responsibility is unquestionably a particularly difficult undertaking.

It might of course be argued that the material available in this field is exceptionally abundant. Cases of State responsibility are very frequent in international practice, most international arbitral awards or judicial decisions have touched upon problems of responsibility either directly or indirectly, and furthermore, jurists have devoted many studies to the international responsibility of the State, and some of these studies are regarded as among the most searching and famous in the whole body of learned writing on international law.

This imposing mass of material and research does not, however, always facilitate the task of clarifying the principles governing the subject, firmly tracing the main lines of the concept of international responsibility and clearly determining the circumstances and consequences of such responsibility. Furthermore, despite the exceptional quantity of the available material as a whole, the fact remains that this material is concerned chiefly with particular points and aspects, while many others, on the contrary, have been only very incompletely explored and not very fully described.

For example, a great deal has been written on the problem of the responsibility of the State for acts of private persons or for acts of organs performed outside their competence; much has been said about the aspect of the responsibility arising out of the action of judicial bodies, and particularly about the definition of denial of justice; many pages have been devoted to responsibility for damage caused during uprisings or civil wars; and scholars have discussed amply the opposition between the idea of an objective responsibility and that of responsibility by reason of fault, and have debated the determination of such concepts as indirect responsibility and the exhaustion of local remedies. Nevertheless, the research done into other no less important subjects has not been sufficient. There is a lack of balance due to the fact that while some parts of the subject have been elucidated, others have been left in obscurity. What is more, the numerous studies

on particular points are not accompanied by an equally large number of general studies of the international responsibility of the State assigning to each element its true place in a systematic whole.

One point in particular seems to me to deserve further emphasis in this connexion, even though it has been the subject of very relevant comment by several members of the International Law Commission during the preliminary discussions on the topic. Many of the best known and most penetrating individual or collective studies carried out in the field of international responsibility, and, in general, several of the tentative and draft codifications so far produced on the subject, have dealt with State responsibility only in the limited sector where this responsibility arises out of injury caused in the territory of the State to the person or property of aliens and in the related field of the diplomatic protection of injured aliens by their national State.

It was not the only consequence of this approach that some at least of the aspects stressed were held to be special features of responsibility within the sector mentioned rather than truly general characteristics of international responsibility, and that some confusion has occasionally arisen in this connexion: the most obvious, and actually the virtually inevitable consequence of this partial approach has been that people have endeavoured simultaneously—as though the principles involved were *ejusdem generis*—to determine rules which genuinely relate to responsibility and other rules which rather constitute fundamental standards and sometimes even principles of international arbitral or judicial procedure.

A very clear illustration of this will be found in the conclusions of the sub-committee of the League of Nations Committee of Experts for the Progressive Codification of International Law. A first article providing that international responsibility can only arise out of the violation, by the State, of an international duty established by treaty or by a customary rule, is followed by other articles laying down the obligations of the State for the judicial protection of aliens or for their protection in case of a riot. The same approach will be found in the Lausanne draft (1927) of the Institute of International Law, in the drafts prepared by the Association of International Law of Japan in 1926, by the American Institute of International Law in 1927, by the International Commission of Jurists of the Conference of American States in 1928, and in the very well-known draft convention prepared in 1929 by the Harvard Law School for the first Conference for the Codification of International Law held in 1930. To give only one example, in the Harvard draft the rule that the State must provide the same judicial protection for aliens as for its own citizens appears side by side with the provisions defining the specific aspects of the violation of the rules of law and the consequences thereof. The same arrangement is noticeable in the six very learned, well documented and very remarkable reports submitted to the International Law Commission by Mr. F. V. García Amador, its distinguished special Rapporteur, which deal, side by side, with the typical problems of responsibility (e.g. the distinction between different categories of wrongful international acts, or the determination of the duty to make reparation and the various forms of reparation) and with the problems relating rather to the definition of the duties of States in the treatment of aliens and also, particularly in the earlier reports, with the obligations of the State regarding the protection of human rights.

For such a juxtaposition of questions belonging to intrinsically separate categories we should certainly not blame the learned jurists or the institutions which prepared the reports cited above and others. It was the more or less inevitable consequence of the fact that, when the subject matter assigned for study or placed on the agenda was defined, a division was not made "horizontally" between the rules of substance laying down the international rights and duties of States in the various fields and the aspects and consequences of the violation, by States, of the obligations deriving from these rules; instead, the division was made "vertically", the subjects being classi-

fied according to sector. This explains why even in a study which was to deal merely with the question of responsibility in relation to a particular sector it became almost inevitable to determine, in addition, the content of the rules of substance whose violation one meant to discuss; this happened particularly in the case of ill-defined and often controversial rules such as those relating precisely to the duties of States regarding the treatment of aliens.

As a result, however, the border line between two distinct fields of law tended inevitably to become somewhat blurred. A more precise definition of the duties imposed by international law on States regarding the treatment of aliens is no doubt a most important objective; but whoever wishes to attain this objective ought to proceed by a direct route, not by a circuitous one, in connexion with the determination of rules relating to international responsibility for wrongful acts. Also, as partial study, undertaken by sectors, of problems of responsibility cannot provide a true view of the whole of the subject. The international responsibility of the State is a situation resulting not only from the violation of particular international obligations, but from the infringement of any international obligation, whether established by rules covering a specific matter or by other rules. To achieve such a general view, complete and at the same time free of all extraneous matter, appears to be the indispensable condition for any useful effort of codification in this field.

I do not wish to imply that certain specific aspects of responsibility, in cases where the obligations violated by the State concern the treatment of aliens, may be neglected and should not receive due prominence. Even less do I wish to appear to be suggesting that the very valuable material and experience gathered concerning this aspect of international responsibility should not be utilized to the full. My point is merely that any discussion of international responsibility should take into account the whole of responsibility and nothing but responsibility.

Besides, this subject by itself is beset by a good many difficulties and controversial points; there is no need to add others arising out of the much debated subject of the law relating to aliens or out of any other branch of international law, however important. For example, nobody can deny the present importance of the principles concerning the maintenance of peace and the protection of the sovereignty and territorial integrity of States against any undue interference. But the determination of the rules relating to that subject is likewise a separate undertaking, which should be approached by a direct and independent route, not indirectly in conjunction with an attempted definition of rules concerning responsibility, for otherwise the difficulties peculiar to one field will be added to those of another and, above all, the disadvantages of a study of responsibility by separate sectors, as criticized by me, will recur.

Here, too, I hasten to add that I do not wish to give the impression of thinking that every distinction between the violation of certain rules and the violation of others is immaterial for the purpose of the consequent responsibility, or of believing that the consequences of the infringement of a rule essential to the life of the international community should not be much serious than those arising out of lesser infringements. I believe, on the contrary, that logically this must be so. Once again, what I wish to emphasise is merely that the consideration of the contents of the various rules of substance should not be an object in itself in the study of responsibility, and that the contents of these rules should be taken into account only to illustrate the consequences which may arise from an infringement of the rules.

It seems to me, in conclusion, that the International Law Commission acted wisely in deciding that the general and necessarily uniform aspects of State responsibility should be studied first; the Sub-Committee should therefore strictly adhere to this decision when selecting the various points to be considered. In my view, only in this way can we hope, step by step, to accomplish a difficult task, which is essential both

for the definition and clarification of existing rules and for the development to be aimed at in several respects.

## II

Turning now more specifically to the main points which should be considered under the heading of the general aspects of the international responsibility of the State, I believe that the Sub-Committee should concentrate mainly on two basic points: firstly, the definition of the acts which give rise to the international responsibility of the State, that is to say international wrongful acts and the component parts and different types of such acts, etc.; and, secondly, the consequences of international responsibility. These two fundamental points might be examined in the manner outlined below, though I should add that my suggestions are tentative and provisional and by no means aspire to exhaust the subject.

*Preliminary point* — Definition of the concept of *international responsibility*.

Responsibility of States and responsibility of other subjects of international law.

*First point* — *Origin of international responsibility*

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

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

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

(b) *Subjective element*: imputability to a subject of international law of conduct contrary to an international obligation. Questions relating to imputation. Problem of the capacity of the State to commit an international delinquency. Relationship between this capacity and the capacity to act. Limits. Imputation of wrongful act and of responsibility.

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

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

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

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

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

International wrongful acts and omissions. Possible consequences of the distinction, particularly so far as *restitutio in integrum* is conserved.

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

Problems of participation in the international wrongful act.

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

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

Self-defence.

A State of necessity.

*Second point—Consequences of international responsibility*

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

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

(3) *Sanction*. Individual sanctions provided for in ordinary international law. Reprisals and their possible role as a sanction for an international wrongful act. Questions relating to war. Collective sanctions. The United Nations system.

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## THE SOCIAL NATURE OF PERSONAL RESPONSIBILITIES

*Working paper prepared by Mr. Angel Modesto Paredes*<sup>61</sup>

In every process of imputing responsibility for an act to a person it is possible to consider two aspects: the psychological (that is to say, the decision attributed to the person concerned) and the sociological (that is to say, the social consequences of the act).

<sup>61</sup> Originally circulated as mimeographed document A/CN.4/SC.1/WP. 7.

### I. Psychological responsibility

The agent's psychological responsibility arises out of his clear recognition of the relations affected and out of his will to act in the way in which he in fact acted. Accordingly, the simultaneous existence of the following requirements or elements are evidence of his intention to produce the full consequence of his act: an accurate discernment of the outcome and of the objects comprised in the judgement as to the relations between the subject and the act—a judgement which may regard those relations good, indifferent or bad; and a will which, aware of those relations, translates the intent into action.

The absence or partial absence of one or more of these elements implies the absence, or the existence only in a diminished degree, of the efficacy of the decision, and hence a modification of the agent's responsibility (the consequence of the act decided upon and performed). If the plan was vague, or if judgment was impaired, or if the volition flagged, then the gravity of the offender's responsibilities will be affected in like measure. It may be asserted that the degrees of psychological imputability constitute a vast scale of differentiation, as varied, perhaps, as the personality of the agents.

The foregoing concords with the philosophical view that, if a man chooses evil he does so through an error of appreciation and not through a propensity of the will, and that the prevalence of right conduct will be the immediate result of the enlightenment of truth. This principle is erroneous, for it ignores the circumstantial attributes of each of the factors; in the first place, the social value attaching to the object may not coincide with the individual's assessment of it, with the consequence that a conflict of values arises; secondly, the agent's judgement may be at fault, in that he overestimates the worth of what is his own and in doing so underestimates the worth of what belongs to others; and thirdly, he may suffer from some innate or acquired perversity, accounted for by many social factors and in particular by the collapse of ethical standards at times of transition, when ethical standards have not yet been replaced by well-defined and firmly-rooted social precepts.

The will as the impulse behind conduct and behind the choice of means to give effect to that conduct is weakened by various circumstances of everyday occurrence; sometimes by purely organic, nervous or intellectual inner tensions; or it may crumble under the impact of external causes or of outside wills to which we submit either because duty so requires or because they overpower us; sometimes weakness and submission reach such a point that there can be no question of any freedom or spontaneity of will on the part of the person who performs the act, but rather of the replacement of one will by another.

It is thus seen that personal decisions lose a good deal of their autonomy and certainty, and only in a limited way can the act or behaviour be said to have been willed deliberately by the person to whom it is attributed. It follows that a truly voluntary act and a genuinely independent decision are the rarest things in real life.

But if our analysis has led us to this whittling away of the individual's responsibility, what can we say about collective acts and the responsibilities for such acts?

First, we should inquire: To whom can the decisions affecting the conduct of collective persons be traced?

By reason of the very nature of the extremely grave and complex decisions taken daily in every community, it is difficult to consult each of the associated individuals, and impossible in the case of a large political community like the State. Consequently, so far as knowledge and judgement are concerned, the group has to be represented, as a rule, by individuals who act for it, i.e. by authorized agents; this is the correct concept of public office. It is those who govern who have direct knowledge of a matter and form judgements concerning it. Not infrequently, moreover, they are empowered to take the relevant decisions, or the decisions are taken on behalf of the State by various public servants appointed for

the purposes. The result takes the form of public acts performed by associated persons. The process thus breaks down into the actions of many agents—sometimes individuals and sometimes groups—who intervene at different stages.

Let us take the case of a census. Specialists in ethnography have realized that the basis for any sound administration is the recognition of the country's human and economic conditions, and, they call upon the government to carry out a census. The government acknowledges the justice of the request and decides to put it into effect: it makes available the necessary human and material resources and appoints census committees to conduct the census with the aid of the population.

However, there are cases and aspects in which the intervention of the group as such at various stages of conduct is manifest. Let us assume the case of the twofold referendum—the "initiative" advocating the adoption of a law or other measure, and the subsequent consultation for its approval or rejection. In the history of the small nations there have been governments which relied on a continuous succession of referendums, and even today this practice is resorted to at times when the issue at stake is of great moment, the organized political forces being to some extent by-passed by an appeal to the public, as was done recently in France by de Gaulle, with excellent results from the point of view of his policy. Apart from this, there are the ordinary popular elections prescribed by democratic constitutions for certain purposes, such as the appointment of executives.

In this way, many decisions in the life of a State are reached by this process, and it becomes necessary to determine what person or persons bear the responsibility for what has been done; for we know that at the various stages in a particular action the executive or the public may play a part and take a decision. And the characteristics we have noted at the various stages of the decision-making process are the variables which the nature of the decision imposes on the participants. For example, a people may have a sufficient awareness of a matter when it decides in favour of it, without achieving the fullness of knowledge of a very gifted individual. The judgements which a people forms are often sensible even though the people lacks the knowledge and wisdom to be expected of a distinguished executive; the generosity of will of a nation can never equal in quality the wisdom of a just man.

It would be necessary to carry out very penetrating research to define precisely the field of influence of the persons taking part and the consequences attributable to each of their acts; we do not propose to do this here, except in a very restricted field—with a view to the application of our findings to the international responsibilities of States.

For this purpose, we must first ask ourselves: Did the agent act within his term of reference, or did he exceed them? If he acted within his terms of reference, then it is his principal who is bound by the act; if he exceeded them, the principal is not bound. In the present context we are concerned with the first of these two situations.

But if the principal is committed, does this mean that the agent is relieved entirely of his responsibility? Not in every case; both may be answerable, though as we shall see, the consequences are not the same for both.

In the case where the injury is occasioned by the decision of the agent acting within the limits of his terms of reference, the question arises whether the act was indispensable for the defence of the State's overriding interests.

(a) If the act, though not indispensable, was useful to the country, then the State has a direct responsibility, and the official who ordered the act has a subsidiary responsibility;

(b) if the act was neither necessary nor useful, then the official is answerable, the State's responsibility being only subsidiary.

If the damage was unavoidable in the safeguarding of matters of paramount importance to the people's highest aspirations, then the idea of the governing body's fault vanishes

and is replaced by the responsibility of the State, though this is subject to qualification by many circumstances (e.g. self-defence, state of necessity) which diminish the wrongfulness of the act.

If, on the other hand, the official acted *ultra vires*, usurping functions not vested in him, then, because in so doing he did not act as his people's representative and hence could not commit that people, the responsibility is his, and his alone.

### II. *The requirements of equity*

From another point of view, responsibility is grounded in ethics or equity: whoever causes an injury, even unintentionally, has a duty to make good the injury. In this sense, the risk is the same for individuals and for nations.

This is in line with the traditional theory of quasi-delict, but goes further by reason of the extension of the social system of co-operation among men. It is a kind of morality evolved in the doctrine—and infrequent in practice—which nowadays blends and mingles the usefulness and the duty of assistance: the damage sustained by any one affects all others. The idea owes its origin to the recognition of the identity of needs and ends for mankind and to the competition for means in a limited market.

Mere equity would require reparations, in cases where the injury done to another is due to our negligence in the performance of an act which it was our duty to perform, or to our carelessness, lack of skill or inexperience, or where we have derived some advantage from another's prejudice. But the solidarity which modern life imposes also requires us to give assistance further afield.

### III. *Social rules*

In any organized human society the association cannot subsist unless its members are mutually answerable for their acts and conduct towards each other. The complete autonomy of each is compatible only with absolute isolation. Hence there are both advantages and duties for the participants, in that the different social limitations on behaviour have their counterpart on the one hand in the greater solidarity and in common benefit and, on the other, in interdependence, which implies many responsibilities.

Perhaps the isolation in which nations lived in the past—so long as they were not impelled to action by the desire to dominate others—and the deceptive prospect of self-sufficiency pursued by some great Powers enabled them to exist without rules governing responsibility, albeit with the ever-present risk that their differences would be settled by war. But if peace is the aim and if war is to be abolished, the world needs a system of responsibilities which are legally enforceable, in other words judicial process and judicial decision. This means a system relying on courts possessing the necessary competence.

If this is what effective peace means, then the association of peoples is bound to be strengthened and to prosper if the law is recognized as the sole formula of co-existence above the transience and violence of political rivalries.

These, then, are the relationships to be considered: in the modern world, the peoples can live in plenty through a partnership for extracting the maximum yield from natural resources; partnership means the carrying on of competing activities having one or many purposes; any competition involves the danger of rivalry, disagreement about means or at least about the part which each should play; hence it becomes indispensable to regulate conduct, through rules governing action, requiring each one to do his duty, and this means in effect that each is held answerable for his acts. If his conduct conforms with what is agreed upon or just, the person is called responsible; if he departs from that conduct, he is called to order by the means available to society.

In our analysis of the various aspects of responsibility, we started with psychology, which is concerned with individual intention, in other words with the acts decided upon and

carried out by the individual—subjective reality—and finished with the actual event and its social implications—objective responsibility, which in the final analysis is nothing other than the discipline of the members of an association.

### IV. *The determination of responsibility and penalties in law*

As far as those responsible are concerned, the remedy for injuries caused takes the form of financial reparation and of penalties ordered for the purpose of punishing the wrongful conduct; the object is to enforce conduct conforming to law.

But what should be the attributes of the penalties in order to be styled legal?

So long as no true society of nations had been organized, one could not speak of a stable legal system governing their reciprocal relations, except in the rare cases where parties took their disputes to the established international courts. The usual remedy for whoever considered that he had suffered prejudice or that his claims were neglected consisted of recourse to force, and more particularly to war. One metaphysical philosophy, it is true, maintained that God rewarded the just cause with victory. But a superficial reading of history shows the hollowness of such metaphysics. Often, victory was won by fortuitous circumstances, and at other times the issue was decided by the preparations for war and by the volume and quality of the forces, which reminds us of the cynical popular saying that God gives victory to the good when they are more numerous than the wicked. There remained the mere moral sanction of public opinion, which is so vacillating and uncertain, or the supposed judgement of history.

What is so novel and remarkable about international relations in our time is the *possibility* of establishing courts adjudicating according to law on the conduct of peoples and holding responsible those causing an injury, theoretically even the most powerful State.

And so we discern the idea taking shape that all Powers have a duty to abandon policies based on selfish interests and instead to apply the policy based on law which is required by justice and equity. We are still far from protecting and satisfying such needs, when questions fundamental for States are at issue, particularly among the great Powers; but there can be no doubt that important advances have been made which are bound to culminate in a better system of relationships, with full confidence, among the disputants, in the rectitude and wisdom of the judge.

It should, however, be pointed out that the effective establishment of international courts ought to be preceded by a clear conception and statement of the reciprocal rights and duties of nations, the precise definition of the character and scope of those rights and duties. This is what is meant by the theory of fundamental and derived rights and duties: delimiting the proper sphere of the exclusive jurisdiction of States; defining with certainty what the principle of non-intervention implies and adhering firmly to this definition; organizing the high courts and providing them with the strongest guarantees of independence and respect for their opinions and with the necessary means for enforcing their decisions.

### V. *Subjects of international responsibility*

As explained earlier in this paper, the responsibility for governmental acts at the international level may attach to the public officials who decided upon or executed the injurious acts, or also to the people which consented to the acts.

The Nürnberg trials and other later trials, in so far as they are not to be regarded as acts of vengeance, gave prominence to two important legal concepts: firstly, officials who, acting in the name and on behalf of a people, perform acts of cruelty—even if in so doing they act within the limits of their functions—are answerable for the injury caused; and secondly, crimes which show evidence of depravity on the part of those committing them can be tried and punished without the need for a pre-existing law. Both aspects merit careful study, though in view of our present purpose, we cannot examine them at this stage.

We also know that the people itself is answerable—in some circumstances directly and as a principal, and in others, indirectly. In the first case, in order that the people may be held responsible, certain acts, apart from any referendum, must have been performed, even though the acts are initiated and carried out by the appropriate official. And as regards the second case, indirect responsibility arises from any act decided upon by a competent authority.

What is the true rationale of this responsibility?

Of the three aspects of responsibility which we have mentioned—psychological, ethical and social—it can be said that in the normal course of the exercise of public functions, the last two primarily and directly involve the State, whereas the first involves the official concerned.

Where the intent or purpose is reprehensible or the conduct depraved, one tries to correct and counteract them by exerting an influence on the person. The object is the psychological betterment of the offender, which is sought by means of personal penalties. To correct his anti-social propensities, efforts are made to discipline the subject's conduct. In this very particular and very special instance, however, the setting is international and the subjects are States, though the analogy with individual conduct is not wholly excluded, since history has known countries which in their psychological make-up have been persistently militarist, aggressive or interventionist, irrespective of the regime in power. In one of my works I spoke of international bullying, and that is what must be done away with. In these very special cases of which I am speaking, then, the personal penalties intended to amend conduct might be applied to States, even though they are really meant for individuals. But if they are to be applied to peoples, it must be borne in mind that the penalties will affect guilty and innocent alike, and everything possible should be done to protect the innocent. Furthermore, the enforcement measures applied should be of various kinds.

Where the responsibility is founded in equity, and in cases of sociological responsibility, the remedy is a claim to financial compensation, and this can be easily satisfied by the State. Besides, this compensation is in conformity with the reparation claimed; injury caused unintentionally or harm caused as a result of adverse circumstances must be compensated.

War as a means of coercion should be generally outlawed and force should be used only as a last resort, after all other methods have failed.

Lastly, no penalty of any kind should be imposed without a decision by the competent court.

#### *General principles of international responsibility*

1. Imputation is the judgement attributing an act or occurrence to a specific person.
2. Responsibility implies an imputation and the obligation to repair the damage caused.
3. International responsibility differs in nature from responsibility under municipal law.
4. There is an active subject of responsibility, who may

claim reparation, and a passive subject, who has the duty to make reparation.

5. Both the active subject and the passive subject may be collective or individual.

6. Responsibility attaches to the passive subject where any of the following circumstances exist:

- (a) if he intentionally committed the act, or if he conceived and planned it, whether or not he participated in its execution (psychological responsibility);
- (b) if he caused injury to another person, even unintentionally (responsibility in equity);
- (c) if the responsibility is the result of the risks, rivalry and conflicts inherent in life in society and of the solidarity and co-operation among associates (sociological responsibility).

7. Responsibility gives rise to punitive and civil damages.

8. Punitive damages are applicable primarily to the social disturbance caused by the event and their main object is to check the anti-social impulses of the offender.

Civil damages relate to the material damage caused.

9. Individual persons or entities may be jointly or severally responsible for a particular act, in varying forms and degrees.

10. Ordinarily, the officials who order and prepare the commission of punishable acts incur criminal liability, and the people concerned is liable for the civil damages for the act imputable to it.

11. Exceptional cases of the criminal responsibility of States are those in which their habitual—or at least their frequently repeated—conduct shows a tendency towards aggression and violence which disturbs normal international relations.

Once this tendency has been established by a long succession of events, the State in question will be held responsible for any recurrence of its unlawful acts.

12. Penalties consist of measures of constraint directed against the person or property of the offenders.

13. Where States are involved, constraint of persons should be avoided as far as possible.

14. War may be resorted to only in extreme cases, in the case of persistent refusal to submit, and only by decision of a competent court, to be carried into effect by the international executive agency established for this purpose.

15. Any judgement concerning international responsibility should answer the following questions:

- (a) who were the individuals who should be held responsible for the decision taken?
- (b) in what capacity did the individuals in question act:
  - (a) as administrative authorities or as private persons?
  - (b) in the first case, did they or did they not act within their constitutional powers?
- (c) was the international person lawfully represented for the purpose of the decision?
- (d) did the injury occur in consequence of a state of necessity?
- (e) was the injury not necessary or useful for the State?

ANNEX II

DOCUMENT A/CN.4/160 and Corr. 1

**Report by Mr. Manfred Lachs  
Chairman of the Sub-Committee on Succession of  
States and Governments  
(Approved by the Sub-Committee)**

[7 June 1963]  
[Original : English/French]

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**Report by Mr. Manfred Lachs, Chairman of the Sub-Committee on the Succession of States and Governments**

**(Approved by the Sub-Committee)**

1. The International Law Commission, at its 637th meeting on 7 May 1962, set up the Sub-Committee on the Succession of States and Governments, composed of the following ten members: Mr. Lachs (Chairman), Mr. Bartos, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The Commission, at its 668th meeting on 26 June 1962, took the following decisions with regard to the work of the Sub-Committee:<sup>1</sup>

"(1) The Sub-Committee will meet at Geneva on 17 January 1963, immediately after the session of the Sub-Committee on State Responsibility, for as long as necessary but not beyond 25 January 1963;

"(2) The Commission took note of the Secretary's statement in the Sub-Committee regarding the following three studies to be undertaken by the Secretariat:

"(a) A memorandum on the problem of succession in relation to membership of the United Nations,

"(b) A paper on the succession of States under general

multilateral treaties of which the Secretary-General is the depositary,

"(c) A digest of the decisions of international tribunals in the matter of State succession;

"(3) The members of the Sub-Committee will submit individual memoranda dealing essentially with the scope of and approach to the subject, the reports to be submitted to the Secretariat not later than 1 December 1962 to permit reproduction and circulation before the January 1963 meeting of the<sup>1</sup> Sub-Committee;

"(4) Its chairman will submit to the Sub-Committee, at its next meeting or, if possible, a few days in advance, a working paper containing a summary of the views expressed in the individual reports;

"(5) The Chairman of the Sub-Committee will prepare a report on the results achieved for submission to the next session of the Commission."

2. In accordance with these decisions, the Sub-Committee met at the European Office of the United Nations on 17 January 1963. As the Chairman of the Sub-Committee, Mr. Lachs, was prevented by illness from being present, the Sub-Committee unanimously elected Mr. Erik Castrén as Acting Chairman. The Sub-Committee held nine meetings, and ended its session on 25 January 1963. It was decided that the Sub-Committee would meet again, with the participation of the Chairman, Mr. Lachs, at the beginning of the fifteenth session of the International Law Commission in order to approve its final report. The Sub-Committee approved its final

<sup>1</sup> Official Records of the General Assembly, Seventeenth Session, Supplement No. 9 (A/5209 and Corr 1), para. 72.

report at its 10th meeting held on 6 June 1963, during the fifteenth session of the International Law Commission, with the participation of the Chairman, Mr. Lachs, and all its members.

3. The Sub-Committee had before it memoranda submitted by the following members:

- Mr. Elias (ILC(XIV)/SC.2/WP.1 and A/CN.4/SC.2/WP.6);
- Mr. Tabibi (A/CN.4/SC.2/WP.2);
- Mr. Rosenne (A/CN.4/SC.2/WP.3);
- Mr. Castrén (A/CN.4/SC.2/WP.4);
- Mr. Bartos (A/CN.4/SC.2/WP.5).

The Chairman, Mr. Lachs, also submitted a working paper (A/CN.4/SC.2/WP.7) which summarized the views expressed in the foregoing memoranda. The Sub-Committee decided to take Mr. Lachs' working paper as the main basis of its discussion.

4. The Sub-Committee also had before it the three following studies prepared by the Secretariat:

The succession of States in relation to membership in the United Nations (A/CN.4/149 and Add. 1);

The succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150 and Corr. 1).

Digest of decisions of international tribunals relating to State succession (A/CN.4/151).

5. The Sub-Committee discussed the scope of the topic of succession of States and Governments, the approach to be taken to it and the directives which might be given by the Commission to the Special Rapporteur on that subject. Its conclusions and recommendations were as follows:

### I. The scope of the subject and the approach to it

#### A. SPECIAL ATTENTION TO PROBLEMS IN RESPECT OF NEW STATES

6. There is a need to pay special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II. The problems concerning new States should therefore be given special attention and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter.

7. Some members wished to indicate that special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources; others thought such an indication superfluous, in view of the fact that these principles are already contained in the United Nations Charter and the resolutions of the General Assembly.

#### B. OBJECTIVES

8. The objectives are a survey and evaluation of the present state of the law and practice on succession, and the preparation of draft articles on the topic having regard also to new developments in international law in this field. The presentation should be precise, and must cover the essential elements which are necessary to resolve present difficulties.

#### C. QUESTIONS OF PRIORITY

9. The Sub-Committee recommends that the Special Rapporteur, who should be appointed at the fifteenth session of the International Law Commission, should initially concentrate on the topic of State succession, and should study succession of Governments in so far as necessary to complement the study of State succession. Within the field thus delimited, the Sub-Committee's opinion is that priority should be given to the problems of succession in relation to treaties.

#### D. RELATIONSHIP TO OTHER SUBJECTS ON THE AGENDA OF THE INTERNATIONAL LAW COMMISSION

##### (a) Law of treaties

10. The Sub-Committee is of the opinion that succession in respect of treaties should be dealt with in the context of succession of States, rather than in that of the law of treaties.

##### (b) Responsibility of States, and relations between States and inter-governmental organizations

11. The fact that these subjects are also on the agenda of the International Law Commission calls for special attention in order to avoid overlapping.

##### (c) Co-ordination of the work of the four Special Rapporteurs

12. It is recommended that the four Special Rapporteurs (on succession of States and Governments, on the law of treaties, on State responsibility and on relations between States and inter-governmental organizations) should keep in close touch and co-ordinate their work.

#### E. BROAD OUTLINE

13. In a broad outline the following headings are suggested:

- (i) Succession in respect of treaties
- (ii) Succession in respect of rights and duties resulting from other sources than treaties
- (iii) Succession in respect of membership of international organizations.

14. The Sub-Committee was divided on the question whether the foregoing outline should include a point on adjudicative procedures for the settlement of disputes. On the one hand, it was argued that the settlement of disputes was in itself a branch of international law, which was extraneous to the branch relating to the succession of States and Governments to which the Commission had been asked to give priority. On the other hand, other members, stressing that the outline was only a list of points to be examined by the Special Rapporteur, expressed the view that the Special Rapporteur should be asked to consider whether some particular system for the settlement of disputes should be an integral part of the regime of succession.

#### F. DETAILED DIVISION OF THE SUBJECT

15. The Sub-Committee was of the opinion that in a detailed study of the subject the following aspects, among others, will have to be considered:

##### (a) The origin of succession:

Disappearance of a State;  
Birth of a new State;  
Territorial changes of States.

##### (b) Ratione materiae:

Treaties;  
Territorial rights;  
Nationality;  
Public property;  
Concessionary rights;  
Public debts;  
Certain other questions of public law;  
Property, rights, interests and other relations under private law;  
Torts.

##### (c) Ratione personae:

Rights and obligations:  
(i) Between the new State and the predecessor State;  
(ii) Between the new State and third States;  
(iii) Of the new State with respect to individuals (including legal persons).

##### (d) Territorial effects:

Within the territory of the new State;  
Extra-territorial.

## II. Studies by the Secretariat

16. The Sub-Committee decided to request the Secretariat to prepare, if possible by the sixteenth session of the Commission in 1964:

(a) An analytical restatement of the material furnished by Governments in accordance with requests already made by the Secretariat;

(b) A working paper covering the practice of specialized agencies and other international organizations in the field of succession;

(c) A revised version of the digest of the decisions of international tribunals relating to State succession (A/CN.4/151), incorporating summaries of the relevant decisions of certain tribunals other than those already included.

17. The Sub-Committee noted the statement by the Director of the Codification Division that the Secretariat would submit at the earliest opportunity the publication described under paragraph 16 (a) above, that it would publish the information requested under 16 (b) as soon as it could be gathered, and that the request under 16 (c) would be given earnest consideration, in the light of the availability of the decisions in question.

## III. Annexes to the report

18. The Sub-Committee decided that the summary records giving an account of the discussion on substance, and the memoranda and working papers by its members mentioned in paragraph 3 above, should be attached to its report.<sup>2</sup>

### APPENDIX I

#### INTERNATIONAL LAW COMMISSION

##### Sub-Committee on Succession of States and Governments

##### SUMMARY RECORDS OF THE 3RD, 4TH, 5TH, 6TH AND 7TH MEETINGS

##### SUMMARY RECORD OF THE THIRD MEETING

(Thursday, 17 January 1963, at 10.30 a.m.)

##### ORGANIZATION OF WORK

Mr. LIANG, representative of the Secretary-General, welcomed the members of the Sub-Committee on behalf of the Secretary-General and informed them that he had received two telegrams from Mr. Lachs, Chairman of the Sub-Committee, expressing regret at his inability to attend the meeting owing to a sudden serious illness.

He therefore called for nominations for the office of Acting Chairman.

Mr. BRIGGS nominated Mr. Castrén.

Mr. TUNKIN seconded the nomination.

*Mr. Castrén was elected Acting Chairman and took the chair.*

The ACTING CHAIRMAN thanked the members for his election and suggested that he should send, on behalf of the Sub-Committee, a telegram to Mr. Lachs wishing him a speedy recovery.

*It was so agreed.*

The ACTING CHAIRMAN drew attention to the working papers submitted by members of the Sub-Committee.<sup>3</sup>

He invited comments on the subject of the organization of the Sub-Committee's work.

The first point to be decided was the number and schedule of meetings.

The second question was that of observers. The missions of two countries had informally inquired whether they could send observers to the meetings of the Sub-Committee. Similar inquiries had been received in respect of the meetings of the Sub-Committee on State Responsibility but that Sub-Committee had decided, in view of the informal and preliminary nature of its proceedings, that observers would not be admitted.

The third question was that of the distribution of summary records. It was possible that the Secretariat would receive requests for the provisional or final summary records of the Sub-Committee from members of the International Law Commission who were not members of the Sub-Committee, and also from delegations. Accordingly, it was desirable to decide to what extent those requests could be met. The Sub-Committee on State Responsibility had decided that the provisional summary records of its meetings should be restricted to members only, but that the final versions of the records giving an account of the discussions on substance should be attached to its report.

Mr. TUNKIN proposed that, on all three points, the Sub-Committee should follow the same course as the Sub-Committee on State Responsibility. The situation was absolutely the same for both Sub-Committees.

Mr. ELIAS supported that proposal.

Mr. BRIGGS also supported Mr. Tunkin's proposal, with the qualification that members of the International Law Commission who were not members of the Sub-Committee should be welcomed to attend the meetings as observers.

Mr. EL-ERIAN supported Mr. Tunkin's proposal with the qualification suggested by Mr. Briggs.

The ACTING CHAIRMAN said that if there were no objection, he would consider that the proposal by Mr. Tunkin, as amended by Mr. Briggs, was unanimously approved by the Sub-Committee.

*It was so agreed.*

##### SUCCESSION OF STATES AND GOVERNMENTS

The ACTING CHAIRMAN invited debate on the procedure to be followed by the Sub-Committee.

Mr. TUNKIN said that the Sub-Committee on State Responsibility had been able to adopt a report which included an outline of the future study of the topic because it had had before it a paper from its Chairman containing a draft outline; in fact, that draft outline had been adopted by the Sub-Committee with only a few amendments and incorporated into its report.

In view of the absence of the Chairman, he suggested that the present Sub-Committee should confine its work to a discussion of the documents submitted by its members and any problems of succession of States that members might wish to raise.

He further suggested that the Sub-Committee should re-convene early during the next session of the International Law Commission. The Chairman would be asked to prepare a draft report, including an outline of the subject, which report would be considered by the Sub-Committee when it re-convened. The Sub-Committee would then be able to approve the Chairman's report (as had been done by the Sub-Committee on State Responsibility) and submit it to the full Commission early in the latter's next session.

Mr. ELIAS said that the Sub-Committee should not confine its work during the present series of meetings to a mere general discussion. It should consider the outline of the topic of the succession of States and Governments, bearing in mind that it was called upon to define the scope of that topic and report thereon to the International Law Commission.

<sup>2</sup> These summary records, memoranda and working papers are reproduced in appendix I and appendix II below.

<sup>3</sup> Reproduced in Appendix II *infra*.

Perhaps the Sub-Committee could meet a few days before the opening of the Commission's next session.

Mr. ROSENNE said that he sympathized with the views expressed by both Mr. Tunkin and Mr. Elias. He understood, with regret, that the Chairman would be unable to participate at all in the present series of meetings. The Sub-Committee would nevertheless have to carry its deliberations to the stage of a draft report, the final adoption of which could be left until the Sub-Committee re-convened early in the session of the International Law Commission. He hoped that by then the Chairman would be able to attend.

He recalled the difficulties which had arisen regarding the holding of Sub-Committee meetings during the last session of the Commission, because some members had to combine their duties in the Commission with membership in other United Nations bodies meeting concurrently at Geneva. That situation might well arise again.

He added that, whereas the Sub-Committee on State Responsibility would be able to report to the Commission well in advance of the next session, the present Sub-Committee would only be able to report early in that session. Nevertheless, the Commission would still be able to consider the reports during its session and fulfil its mandate to report to the General Assembly on both subjects in time for the Assembly's next session.

Mr. TABIBI said that the course suggested by Mr. Tunkin would probably not delay the work of the Sub-Committee. Members could exchange views on the subject of the succession of States and Governments, and a preliminary report could be prepared which would be transmitted to the Chairman, together with the summary records of the Sub-Committee's meetings. The Chairman would then be able to report to the full Commission, in accordance with the latter's decision.

Mr. EL-ERIAN said that Mr. Tunkin's suggestion was most practical. He agreed with Mr. Elias that the Sub-Committee should not confine its work to a general discussion; it would advance the work as far as possible but it could not finalize it, in view of its terms of reference, which required that the Chairman should report to the full Commission.

Mr. LIU said it might perhaps be premature to discuss at that stage the form which the report would take. The immediate task of the Sub-Committee was to explore the topic of the succession of States and define the scope of the subject. The Sub-Committee had before it a number of valuable working papers and Secretariat documents. On the basis of the discussion on those documents, either the Acting Chairman or the Chairman, if he had by then sufficiently recovered, could prepare a report to the International Law Commission.

Mr. TUNKIN said that the Chairman's absence presented no practical difficulties. The Sub-Committee could proceed to discuss the problem of State succession as a whole and attempt to reach agreement on certain points; on that basis the Chairman could then prepare a draft report which the Sub-Committee could adopt at a meeting to be held early during the next session of the Commission.

The ACTING CHAIRMAN said that the Sub-Committee would be in a better position to take a final decision on the matter at a later stage in the discussion. In his opinion, the Sub-Committee should prepare a provisional draft report, which, as Mr. Tunkin had suggested, would serve as a basis for the final draft report to be prepared by the Chairman.

Mr. BRIGGS agreed that the Sub-Committee should wait until later in its session before taking any decision as to the type of report which it would submit. He hoped that it would try to reach at least tentative conclusions on certain questions, such as, for example, whether the study of State succession should be kept separate from that of the succession of Governments. The Chairman could then use those conclusions in preparing its own draft report, which, as Mr. Tunkin had said, should then be formally approved by the Sub-Committee.

Mr. BARTOS said he understood that the Sub-Committee would shortly have before it the working paper which the Chairman had prepared on the subject and which would be very important for its work. Under the Sub-Committee's terms of reference (A/5209, chapter IV, para. 72) its Chairman would also serve as its rapporteur. Any interim draft prepared by the Sub-Committee, therefore, would be subject to amendment by the Chairman, who would then prepare his own report. That report, after approval by the Sub-Committee, would also constitute the latter's report to the Commission.

Mr. LIANG, representative of the Secretary-General, drew attention to three studies prepared by the Secretariat: (1) The succession of States in relation to membership in the United Nations (A/CN.4/149); (2) Succession of States in relation to general multilateral treaties of which the Secretary-General is the depositary (A/CN.4/150); and (3) Digest of decisions of international tribunals relating to State succession (A/CN.4/151). He explained that those studies did not call for any substantive discussion by the Sub-Committee but were intended merely for reference purposes.

Mr. ROSENNE said that he realized that the Secretariat papers in question did not relate directly to the Sub-Committee's main tasks, although they impinged upon it. He suggested that the Sub-Committee might devote some time to an exchange of views concerning the type of material which the Secretariat should in future be asked to produce.

The meeting rose at 11.30 a.m.

## SUMMARY RECORD OF THE FOURTH MEETING

(Friday, 18 January 1963, at 3.15 p.m.)

### SUCCESSION OF STATES AND GOVERNMENTS (*continued*)

The ACTING CHAIRMAN invited the Sub-Committee to continue its discussion.

Mr. BRIGGS said that the complexity of the task confronting the Sub-Committee was well indicated in the working paper prepared by the Chairman, Mr. Lachs. He expressed the fear that if the Sub-Committee were to embark upon a general debate, no two members would be talking about the same thing. He agreed, therefore, with Mr. Rosenne and Mr. Tabibi that in the interests of a more orderly discussion it would be better to start with specific questions, for example whether the succession of States should be dealt with separately from the succession of Governments.

Mr. TUNKIN agreed that the Sub-Committee should concentrate on practical problems in its discussion with a view to producing a useful draft report.

Mr. ELIAS shared the view that the Sub-Committee should confine itself to specific questions and should first discuss whether State succession should be taken up separately from the succession of Governments. It could then discuss the form in which its final conclusions should be expressed — whether as general rules or in an international convention.

Mr. BARTOS said that the systematic working paper prepared by the Chairman would provide a good basis for the discussion. As had been suggested by the previous speakers, the Sub-Committee should avoid any general debate and concentrate on such specific problems as the distinction between the succession of States and the succession of Governments.

The ACTING CHAIRMAN agreed that the approach suggested by the speakers offered a sound plan for the organization of the Sub-Committee's work and that the Chairman's working paper would undoubtedly provide a useful basis for the discussion.

Mr. TUNKIN said that, as the Chairman had indicated in his working paper, the problem of State succession could be

approached in various ways. Whereas the Sub-Committee on State Responsibility had considered only general principles, the present Sub-Committee might have to go further and consider specific matters. In that connexion, he agreed that the Sub-Committee should deal first with the question of the succession of States; actually, it was States and not Governments which possessed rights under international law. The Sub-Committee should not, however, close the door altogether to the possibility of discussing in that connexion also the problem of the succession of Governments, if the need should arise, for it was not entirely clear as yet how the two subjects could be separated.

With regard to the scope of the study to be undertaken, he thought that it would have to include the question of the succession of States in respect of general multilateral treaties, that being one of the most important parts of the subject. It would also be difficult to avoid the question of succession in respect of membership in international organizations. But the Commission should put specific emphasis on the problems of succession arising out of the attainment of independence by former colonies; those problems were of particular interest to the new States, and the Commission should show its awareness of their importance.

It had been indicated in the various working papers that the Sub-Committee should, in its study, be guided primarily by the existing practices of States. As Mr. Bartos had pointed out in his paper, however, those practices had to be interpreted with caution, since some of them had been imposed by metropolitan States on new and weak States and might lead the Sub-Committee astray if taken as typical examples.

He stressed the importance of being guided by those general principles which constituted the very core of contemporary international law, with due regard for the logical sequence in which they had evolved. It was necessary, however, to distinguish clearly between substantive rules of international law and the specific rules relating to State succession. The Sub-Committee would be acting correctly if it followed the example of the Sub-Committee on State Responsibility and drafted an outline programme of work which could serve as the basis for instructions to be given to the future special rapporteur on the subject.

With regard to the form which the Commission's draft should ultimately take, he said it was premature to reach a decision, but the experience of the Commission had shown that the draft articles drawn up by a special rapporteur should be as short as possible and formulated with a view to the drafting of a convention rather than a code.

Mr. BARTOS said that the general rules of international law should not be regarded as a sort of static dogma; they had developed with the evolution of the international community. They had, in particular, been modified by the Charter of the United Nations.

In his memorandum he had drawn attention to that point, which was illustrated, in regard to the topic of the succession of States, by the emergence of a large number of new States as a result of the process of decolonization. Admittedly, cases of State succession could arise otherwise than in consequence of the formation of newly independent States, but that phenomenon provided a clear example of the need to bring old principles into line with new developments.

He noted that all the working papers devoted special attention to the problems relating to the newly independent States. The same was true of the excellent Secretariat documents which were before the Sub-Committee.

Turning to the Chairman's memorandum and to the first question raised in the outline therein contained, he said that the questions of State succession and governmental succession were in fact inseparable. The issue of the continuity of the State, i.e. governmental succession, could also arise in regard to new States and remained of interest in contemporary international law.

The question of the continuity of the State—in other

words whether a State continued to be bound by the acts of a former government notwithstanding the changes which had taken place—could arise not only in regard to treaties but also in regard to actual situations (*situations de fait*), in particular as to frontiers. For example, was an event having legal implications (*un fait juridique*) (such as the drawing of the McMahon line in the Himalayas by former rulers) actually binding upon the States concerned?

Another interesting example was provided by the frontier between China and the USSR near Lake Baikal. In that case the USSR relied on a Protocol signed by the Russian and Chinese Empires in the last decade of the nineteenth century; the case was not one of succession to sovereignty but of succession to possession, itself implying the exercise of sovereignty.

He agreed that the Sub-Committee should work on the basis of the plan contained in the Chairman's paper.

Mr. EL-ERIAN agreed with Mr. Bartos that State succession and governmental succession were inseparable. The future special rapporteur on the topic would have to deal with the succession of Governments, at least in connexion with the succession of States.

The purpose of such an approach would be twofold. First, to enable the special rapporteur to delimit more precisely the scope of State succession. Second, to enable him to draw upon material which would be denied to him if he confined his attention to State succession.

However, the Sub-Committee should clearly realise that the connexion between State succession and governmental succession existed only at the preliminary stage. Sooner or later the two questions would have to be divided and studied separately. There were precedents for the division of a subject in the course of its study by the International Law Commission; for example, the study of consular relations had been severed from that of diplomatic relations, and the law of the sea had been divided into several component parts.

Turning to the question of other topics related to State succession, he agreed with Mr. Tunkin that succession to treaties should be included in the study of the topic of succession of States rather than in that of the law of treaties.

With regard to the topic of the relations between States and inter-governmental organizations (for which he had been appointed Special Rapporteur) and its connexion with that of the succession of States for the purpose of membership in such organizations, he would draw a distinction between two questions. The first was that of the succession between inter-governmental organizations—such as the succession of the United Nations to the League of Nations—which came within the scope of the topic of the relations between States and inter-governmental organizations. The second question was that of succession of States in the membership to such organizations, a question which belonged to the topic of State succession.

He thus drew attention to the fact that questions like that of succession between international organizations, which related to the legal position of such organizations, i.e. their external relations, raised problems which bore on relations between States and international organizations rather than problems of State succession.

Turning to the question of the approach to the subject of State succession, he agreed on the need to deal with the general principles, which he construed in the same manner as Mr. Bartos and, in particular, as including the principles of the United Nations Charter.

He also supported the view, put forward in the scholarly paper by Mr. Bartos and also emphasized in the Chairman's paper, that special treatment should be given to problems arising out of the emancipation of the newly independent States.

A further question arose: Should the objective be the codification or the progressive development of international law? In that connexion, he said that the General Assembly had

clearly indicated in its debates on the question of future work in the field of international law during the fifteenth and sixteenth sessions that more emphasis should be given to progressive development. That desire of the General Assembly had special force in regard to State succession, since it was admitted that the customary law on the subject was, as had been pointed out in a number of the working papers, uncertain in some of its aspects and incomplete as a whole.

He reserved the right to comment on the Chairman's paper at a later stage.

Mr. BRIGGS agreed with the view, expressed in Mr. Tabibi's working paper, that any recommendations upon which the Sub-Committee might agree should be firmly based on State practice.

He supported Mr. Tunkin's suggestion that the draft on State succession should take the form of terse and brief articles of the type usually included in a convention.

He inclined to the view that the results of the Commission's labours should be embodied in a convention, to be approved at an international conference such as that held at Vienna in 1961. More than half of the States at present Members of the United Nations had not been in existence when the rules on State succession had come into being: those States were entitled to an opportunity to consider those rules at an international conference, where they could be adapted and even supplemented by new rules as necessary.

As to whether the objective should be codification or progressive development, he thought it would be premature at that stage to take a decision.

Turning to the question whether State succession and governmental succession should be treated as one topic or as two, he pointed out that the two were already divided: they concerned two distinct legal situations. It was true that the problem sometimes arose whether a new entity was a new State or a new government. For example, when Italy had replaced Sardinia, the question had been debated whether a new State had come into being and whether the problems which arose were those of State succession and not of governmental succession. In the modern international community, he was sure that no Government of a new State of Asia or Africa would agree to be regarded as merely a new Government which had replaced the former colonial authority.

The problems of State continuity, in other words those of governmental succession, arose frequently in connexion with the international responsibility of the State, for they related to the responsibility of a State for the acts of past Governments.

For those reasons, he thought that a distinction should be drawn between State succession and governmental succession. He noted the suggestion, mentioned in the Chairman's paper, that the latter question should be studied "in connexion with" State succession. He was not at all certain of the meaning of that suggestion; he agreed with Mr. Tunkin that governmental succession should be studied as much as was needed for an understanding of State succession; care should be taken, however, not to pursue two objects at the same time. He had been interested by Mr. El-Erian's remark that State succession and governmental succession would have to be divided sooner or later, and thought that the division should be made at an early rather than a late stage.

Referring to part II, section 1 D of the Chairman's outline, he said that the principle of self-determination had been at the origin of the appearance of all the States which had emerged in the last two centuries, such as the United States of America. He agreed, naturally, that the study of State succession should take particular account of the interests and needs of the newly independent States.

On the question of succession of States in relation to treaties, he found very valuable the Secretariat document on the subject (A/CN.4/150). He had also been much impressed by the paper submitted by Mr. Bartos.

His own views in that respect had changed somewhat. Some fifteen or twenty years previously, he had considered that the matter of succession to treaties belonged to the law of treaties, but he now concurred with the view, so ably put forward by Mr. Bartos, that the matter should be studied in conjunction with State succession.

Mr. ELIAS said that, since the Sub-Committee had had an opportunity of hearing the views of those members who had not submitted papers, it should close the general discussion. At its next meeting, it should confine itself to deciding how to approach the problem of succession of States and succession of Governments; in his view, the Sub-Committee should suggest that the future special rapporteur should concentrate on the topic of the succession of States and consider the succession of Governments only to the extent to which it would help him to elucidate the subject. Once a firm decision had been reached on that point, the Sub-Committee should consider the extent to which the implications of State succession for treaties should be dealt with under the heading of State succession rather than under that of the law of treaties.

Mr. TABIBI agreed that, owing to shortage of time, the Sub-Committee should try to reach a decision on the basis of the Chairman's paper and of those points on which general agreement was likely. Nevertheless, he thought that the general discussion should not yet be closed: he for one would wish to comment further on the memoranda submitted by members and by the Secretariat.

Mr. ROSENNE thought it was premature to reach a decision. A consensus might well emerge if the discussion was continued. It was already apparent that the members of the Sub-Committee were virtually unanimous in thinking that the treaty aspects of succession should be dealt with in the context of the law of succession rather than in that of the law of treaties. Nevertheless, it would be desirable to devote some attention to considering what precisely had to be included in the law of treaties in the context of the topic of the succession of States. For example, could there be succession to the signature of a treaty as opposed to succession to a treaty that had actually come into force, in view of the decision reached by the Commission at its 14th session with regard to the legal effects of signature? And to what extent was it possible for a new State to make reservations to existing treaties in the context of the general law on reservations?

With regard to the problem whether the Sub-Committee was called upon to deal with one topic or with two, or with a combination of both, he said that a decision should be postponed for several days until some of the other problems had been considered. He noted, for example, that in document A/CN.4/150 the Secretariat had not made a distinction between instances of succession which on closer analysis might be found to be cases of succession of Governments; examples were Lebanon, Jordan and Morocco. The Secretariat had been quite right; but that demonstrated the danger of too rapid a decision on the main issue. Moreover it was significant that, in its resolution 1686 (XVI) the General Assembly had referred to "the topic" (in the singular) of succession of States and Governments.

Mr. LIU said that he was inclined to regard the succession of States and the succession of Governments as one topic; the emphasis, however, should be on the study of the former, since what rules could be formulated on the succession of Governments were vague and were certainly related to the succession of States.

Mr. ELIAS, supplementing his earlier remarks, said that it had not been his intention to suggest that the discussion should be closed at once but that, in view of the limited time at its disposal, the Sub-Committee should confine itself as from that meeting to considering whether the succession of States and the succession of Governments should be treated together or separately.

The ACTING CHAIRMAN said that a decision with regard to the closure of the general discussion would be taken at the next meeting.

The meeting rose at 5.10 p.m.

## SUMMARY RECORD OF THE FIFTH MEETING

(Monday, 21 January 1963, at 3 p.m.)

### SUCCESSION OF STATES AND GOVERNMENTS (*continued*)

The ACTING CHAIRMAN, speaking as a member of the Sub-Committee, said that he shared some of the views expressed in the valuable working paper submitted by Mr. Bartos. That working paper dealt exclusively and very thoroughly with the question whether, and to what extent, new States were bound by pre-existing treaties relating to their territory; it would be of great value both to the future Special Rapporteur and to the Commission itself. The two documents submitted by Mr. Elias also contained very valuable suggestions for the Special Rapporteur and for the Commission when the real work of codification began. Those documents drew attention to a number of important new problems which deserved thorough consideration.

The working paper submitted by Mr. Tabibi very appropriately stressed that the problem of State succession should be dealt with on the basis of the general practice of States. However, the difficulty of the matter lay in the fact that the practice of States was not always uniform. In that respect, he agreed with Mr. Tabibi that the Commission should not devote much attention to theoretical issues but should focus its attention on territorial re-organization accompanied by a change of sovereignty.

Like Mr. Tabibi, he believed that the main task of the Commission should be to examine the succession of States and not the succession of Governments.

Mr. Tabibi, like Mr. Bartos, thought that the Commission should first consider whether new States were bound by treaties entered into by their predecessors; he appeared to give, in principle, a negative answer to that question.

The working paper submitted by Mr. Rosenne dealt with a broad range of subjects. In the first place, Mr. Rosenne appeared to think that the succession of States and the succession of Governments should be treated as a single topic, for the reason (among others) that the attainment of independence had sometimes taken technically the form of a change of Government. Yet, even in that case a new State in fact came into being, and consequently the problem was essentially one of State succession. Actually, there was no reason why the two aspects of the question should not be studied jointly, but the problems of State succession were much more important and urgent than those of governmental succession.

With regard to the form which the codification of the subject would take, Mr. Rosenne (in paras. 5 and 6 of his paper) rejected that of a convention and favoured the formulation of a set of general principles or, alternatively, of a set of model rules. In support of that view, Mr. Rosenne had stated that many of the problems of State succession were of a bilateral character, that the number of non-successor States directly affected was small and that other States would not be sufficiently interested in concluding a general international convention on the question. There was some force in those arguments but he (Mr. Castrén) believed that third States would be interested in the formulation of general rules on so important a subject as State succession, because they might be affected in future by the problem. Naturally, any general international convention on the question should be sufficiently flexible to cover at least the majority of the various possible cases.

Mr. Rosenne further suggested (para. 8) that consideration should be given to possible differences between a successor Government and foreign individuals affected by State succession, and recommended judicial settlement in such cases. Admittedly the question was an important one, but the problem involved was vast and difficult and was, moreover, connected with State responsibility.

Mr. Rosenne had made a number of suggestions (para. 10) regarding the exclusion of certain questions which belonged to the realm of municipal law. There would no doubt be an advantage in limiting the scope of the very broad subject of State succession, and he (Mr. Castrén) had perhaps gone too far in his own working paper in suggesting the study of all questions relating to the legal status of the local population coming under the territorial and personal jurisdiction of the new State. However, it was not possible to exclude such questions as nationality; in addition, the new sovereign had a duty to respect human rights in its relations with the local population.

So far as the law of treaties was concerned and its connexion with State succession, Mr. Rosenne had drawn attention to a number of important problems which needed to be solved (paras. 12 *et seq.*). The first was whether the succession to treaties should be dealt with by the Commission in the context of its work on the law of treaties or as part of the subject of State succession. In his own paper he (Mr. Castrén) had indicated that both courses were possible, while showing a preference for the second one. Of course, it would be very difficult to draw a clear line of demarcation between the two subjects and, for that reason, the two Special Rapporteurs concerned should work in close contact.

As indicated by Mr. Rosenne, the Commission should arrive at a clear formulation on the question how new States could become parties to multilateral treaties and members of international organizations. There already existed some practice in the matter, but it was not uniform. Another question which arose was that of the legal effects of a general agreement between the new State and the former metropolitan State on the question of maintaining in force various treaties formerly rendered applicable to the territory of the new State; Mr. Bartos had dealt with that question in his working paper, and he (Mr. Castrén) believed that it was possible to find an acceptable solution to that problem.

With regard to economic rights, he agreed with Mr. Rosenne (paras. 19-22 of his paper) that it would be desirable to classify the agreements which constituted the legal basis for the exercise of economic activities by aliens before the new State's attainment of independence. There existed a very real difference between the case of an alien whose rights were based on an international convention and an alien whose rights were based on administrative action taken under municipal law. It was also necessary, when examining questions relating to concessions and to the respect due to the rights of private individuals, to bear in mind that they were connected with the topic of State responsibility.

The question of the public debt of a territory which had become independent was also a problem of State succession (Mr. Rosenne's paper, para. 23).

In his conclusions Mr. Rosenne suggested that the Sub-Committee might make recommendations to the Commission relating to the appointment of a Special Rapporteur, to his precise terms of reference and to the time schedule for the progress of the work. He agreed in principle with Mr. Rosenne but thought that those questions should be postponed and dealt with only in the final report of the Sub-Committee.

The Chairman's working paper constituted an excellent analysis of those of the other members. The suggestions it contained were generally acceptable, and he suggested that the Chairman's paper should be taken as a basis of the Sub-Committee's detailed discussion, as soon as the general discussion was concluded.

He thanked the Secretariat for the three excellent studies concerning matters connected with the topic of State succession. In particular, the Secretariat had provided information on recent practice in the matter of succession to treaties, which was very important because the study of State succession would probably begin with that question. As the work on the topic of State succession advanced, however, further documents would be needed relating to the attitude of the new States to the obligations of the predecessor States other than those arising from treaties, in such matters as public debts, concessions and nationality. Information was needed on all the problems connected with the process of the attainment of independence. Of course, the future Special Rapporteur could obtain such information directly from governments and official documents, but he suggested that the already difficult task of the Special Rapporteur would be made easier if the Secretariat could undertake that research work.

Mr. TABIBI said that, after reading the valuable working papers submitted by members, he had been confirmed in the view that the topic of State succession was a difficult and complicated one, because of the many political, economic and human factors involved. It constituted, however, a new and challenging field of study and one which was of great contemporary importance in view of the changes taking place in the world.

He had emphasized in his own working paper that the study of State succession should be based on State practice. He agreed that undue emphasis on State practice might involve some dangers because the former colonial Powers had, in past practice, imposed some of the solutions. However, the general rules of international law were inadequate to provide the answer to all the problems involved; in any event, many of those rules had also been formulated in the past by former colonial Powers. His conclusion on that point was similar to that of Mr. Bartos, namely that due attention should be paid to the principles of the United Nations Charter and to the practice and principles of the United Nations—in particular, the principle of self-determination—and the extent to which the general rules of international law had been modified by the Charter, principles and practice of the United Nations.

In the consideration of the general principles of the topic of State succession, two types of problems called for attention. The first were the problems of the newly independent nations; the second were those of third States. It was essential to bear in mind both types of problems, for the former colonial Powers had signed treaties which affected third States.

Turning to the various theories mentioned by Mr. Bartos in his paper, he said that he favoured the *tabula rasa* theory, which took into account the will of the people concerned. The other theories were not suited to present circumstances. Mr. Bartos had given, in connexion with the theory of option, the example of the Peace Treaties of 1946; however, those treaties had been imposed on the defeated Powers by the victorious Powers, which had thus been able to impose upon the vanquished the system of option in question. As to the system embodied in the theory of a period of reflection (Mr. Bartos's paper, section IV), he could not agree to any suggestion that the Secretary-General should merely fulfil the duties of a post office; the Secretary-General should be able to examine whether a declaration relating to the validity of treaties affected other Members of the United Nations.

As to the possible forms of the codification of the international law relating to State succession, he favoured a draft convention rather than a code; a convention would be more acceptable to States and would prove a more effective means of codifying the international law on the subject.

With regard to the question of the separation of the subject of governmental succession from that of State Succession, he referred to his own memorandum. On that point, he had understood Mr. Tunkin as having suggested as a compromise that the future Special Rapporteur on the topic of State succession should make passing references to governmental

succession, as necessary. But surely the question of governmental succession was an important one, and the Special Rapporteur would find it necessary to devote attention to it.

With a view to avoiding overlapping, he agreed with the suggestion contained in the Chairman's working paper that there should be close co-operation between the Special Rapporteurs on the topics of State succession, State responsibility and the law of treaties.

Mr. Rosenne had referred in his working paper (para. 14) to "dispositive treaties" or treaties creating local obligations, regarding which it was sometimes asserted that they subsisted despite changes of sovereignty; the reference was to international treaties and treaty settlements which defined and delimited international frontiers, and Mr. Rosenne had indicated that "this theory has obvious practical advantages". He could not agree with M. Rosenne on that point; the theory in question had no practical advantages, was unnecessary and was moreover contrary to the will of the people affected by such treaties. The majority of the territorial treaties which would be covered by such a theory had been imposed upon the people concerned against their will; the frontiers drawn by those treaties had been drawn under the influence of colonial Powers. The issue was an important one because the territories affected were sometimes larger in area than that of some Member States of the United Nations.

Referring to the memorandum prepared by the Secretariat (A/CN.4/149) on the subject of the succession of States in relation to membership of the United Nations, he said the memorandum reproduced the text of the legal opinion of 8 August 1947 given by the Assistant Secretary-General for Legal Affairs on the subject of the admission of Pakistan to membership of the United Nations. That legal opinion envisaged the situation of both India and Pakistan in the light of the succession to all treaty rights; the new Dominion of India was regarded as continuing to possess all the treaty rights and obligations of the pre-existing State of India; the territory which had broken off from India, i.e. Pakistan, was regarded as a new State and was considered as not taking over the treaty rights and obligations of the old State. The issue, as thus presented, was not limited to the question of membership of the United Nations. The question of membership was viewed as consequential to the broader issue of succession to treaty rights and obligations.

That was true not only of the legal opinion to which he had referred, but also of the action taken by the General Assembly and the Security Council in the matter of the admission of Pakistan.

In that connexion, he had been surprised to see that the Secretariat document to which he had referred reproduced (in para. 5) the text of an agreement as to the devolution of international rights and obligations upon the Dominions of India and Pakistan. That agreement was one of the strangest in the history of international law. He failed to see how the new Dominion of India could confer upon Pakistan, i.e. a part of its territory seceding from it, rights under treaties relating to the territory of the State of India, rights which affected third parties. It was equally strange for Pakistan, i.e. the seceding portion of India, to confer upon the new Dominion of India rights which affected third parties.

Mr. ROSENNE said, with reference to the proposed separation of the subject of the succession of States and that of the succession of Governments, that there was a danger that the Commission might create inequalities and artificial distinctions if it decided to treat the practical problems arising out of the independence of new States as if they were exclusively problems of State succession. There was a distinction in law between former colonial territories which had been formally annexed by the colonial State and those which had not been so annexed. The latter included the old-fashioned kind of protectorate, as well as the two modern phenomena of the Mandated and Trust Territory. The special

legal position of such territories had been considered by the Permanent Court of International Justice and by the present International Court of Justice in a number of cases, and that jurisprudence could not be lightly discarded.<sup>4</sup> The problem had been very well expressed by Mr. Bartos in his working paper when he had stated that the Sub-Committee should devote its attention mainly to the question of succession of States and Governments raised by the birth and creation of new States through the application of the principles of self-determination of peoples embodied in the United Nations Charter. In such a context, any attempt to set aside the question of the succession of Governments as not relevant would create more difficulties than it would solve. What should be excluded from a study of the succession of Governments, however, was the consideration of questions not directly relevant to the creation of new States, such as the status of Governments which had come into power by revolutionary or unconstitutional means and also some Governments, such as that of the present Republic of South Africa, which had come into power by constitutional means but which had undergone an elaborate series of changes during the past forty years, where the change of government had not led to the creation of a new State. Secondly, all questions of governmental succession relating to insurgents should be excluded, and so should, thirdly, all questions relating to matters of State responsibility arising out of a change of government. Nor should the Sub-Committee be concerned with any problems of recognition. What it should concern itself with was the problem of changes of government, whether constitutional or not, which led directly to independence accompanied by membership in the United Nations. That point could be covered by adding another heading under part II, section 3 B, sub-paragraph (a) of the Chairman's working paper, which would refer to succession originating in the termination of a protectorate, mandate or trusteeship agreement.

He was not clear about the interpretation of the heading of section 1 C of part II of the Chairman's paper, which read: "In favour of giving priority to the topic of succession of States and studying succession of Governments in connexion with it." He preferred the wording used by Mr. Tunkin, who had said that the succession of Governments should be studied "when the need arose". He noted also that Mr. Tunkin had said that it would be premature for the Sub-Committee to reach any decision at the present time concerning the final form in which its conclusions would be expressed. However, he agreed with Mr. Tunkin that the draft articles should be terse, and in a form suitable for ultimate incorporation in a convention.

So far as the form of the final text was concerned, he maintained an open view at the moment, with the understanding that, if in the final text the progressive development of the law of the succession of States and Governments predominated over its codification, the Commission, under its Statute, would have no choice but to recommend the conclusion of a convention. Lastly, he hoped that the Sub-Committee would find time to discuss the types of working paper which the Secretariat should be asked to produce.

Mr. LIANG, representative of the Secretary-General, said that the Secretariat had informed the Commission at its last session that it would furnish it and its Sub-Committees with certain working papers. Three of those documents (A/CN.4/149, 150 and 151) were already before the Sub-Committee, and a fourth study containing an analysis of national court decisions concerning State succession was in the course of preparation. He regretted that in view of the Secretariat's heavy schedule of work, including the preparation of the forth-

coming Vienna conference, it would be unable to assume any additional tasks before the Commission's next session.

Mr. ROSENNE explained that he had not expected the Secretariat to prepare any more documents before the Commission's next session but had referred only to the work to be done by it during the next twelve months.

Mr. ELIAS proposed, in the interests of a more orderly discussion, that the Sub-Committee should proceed to consider the Chairman's working paper point by point.

Mr. EL-ERIAN supported that proposal.

*It was so agreed.*

Mr. BRIGGS said, with reference to part I (preliminary remarks) of the Chairman's paper, that the problems concerning new States should be given "special attention" rather than "special treatment".

With reference to part II section 1 (Succession of States and Governments: one or two topics?), he proposed that paragraph C should be revised along the lines suggested by Mr. Tunkin to include the following phrase: ". . . that the Sub-Committee recommends that the Special Rapporteur should initially give priority to the topic of State succession, while considering the succession of Governments in so far as needed to throw light on State succession".

Mr. ELIAS said that he would prefer the phrase "should concentrate on" to the phrase "give priority to".

Mr. BRIGGS accepted that amendment.

Mr. ROSENNE said that he might accept the phrase "that the Special Rapporteur should initially concentrate on", but since two different topics were involved, he was afraid that the second part of Mr. Briggs's amendment, namely the phrase "to throw light on", would lead to confusion.

Mr. BRIGGS said that in formulating his amendment he had acted under the impression that Mr. Rosenne was satisfied with the wording suggested by Mr. Tunkin for paragraph C. He also noted that Mr. Rosenne, when referring to those cases of the succession of Governments which he would exclude from consideration, had excluded almost everything and had said that the Sub-Commission should concern itself with the problem of changes of Government, whether constitutional or not, which led directly to independence accompanied by membership in the United Nations. To him that seemed to be an example of State succession. In dealing with the subject, the special rapporteur would have to consider the practical implications of both kinds of succession.

Mr. ELIAS thought that Mr. Briggs's suggestion was an adequate solution, since it merely indicated to the special rapporteur the lines on which the Sub-Committee was thinking; it would be open to the rapporteur at any time to depart from the Sub-Committee's suggestions if he thought it necessary. He also criticized Mr. Rosenne's reference to the case of the Republic of South Africa as illustrating a kind of Government succession that ought to be excluded from consideration; surely, the *Robert E. Brown Case*<sup>5</sup> was a significant landmark in international law.

Mr. LIU said that the wording proposed by Mr. Briggs, as amended by Mr. Elias, was acceptable to him.

Mr. ROSENNE proposed that Mr. Briggs's amendment should be revised to read ". . . recommends that the Special Rapporteur should initially concentrate on the topic of State succession and also the problem of succession of Governments".

<sup>4</sup> As instances cf. the cases of the Mavrommatis Palestine Concession, Tunis and Morocco Nationality Decrees, United States Nationals in Morocco and the various South West Africa cases.

<sup>5</sup> Robert E. Brown claim, American and British Claims Arbitration Tribunal, in *British Year Book of International Law*, 1924, pp. 210-221; also in *American Journal of International Law*, XIX (1925), pp. 193-206.

Mr. TUNKIN said he preferred Mr. Briggs's original text, as amended by Mr. Elias.

Mr. BARTOS supported the amendment of Mr. Briggs, but reserved the right to comment further on the matter after the presentation of subsequent arguments.

Mr. ROSENNE said that he would agree provisionally to the proposed amendment, although he was not entirely satisfied with it.

Mr. ELIAS proposed, as a compromise, that part II, section 1, of the Chairman's working paper should be left unchanged and that Mr. Briggs's amendment, together with the other suggestions made during the debate, should be included at the end of it. That would enable those who were not members of the Sub-Committee to know what other views had been expressed, while all the members themselves could feel that their points of view would be available to the future special rapporteur.

The ACTING CHAIRMAN said that, so far as the records were concerned, the Sub-Committee would follow the same procedure as the Sub-Committee on State Responsibility.

Mr. TABIBI said that to mention all the alternatives in the report might cause confusion; it would be best if the different points of view were explained in the records, although some indications should be given in the report.

Mr. TUNKIN thought that it would be preferable if the preliminary remarks were included in the section entitled "The scope of the subject"; an injunction to the Special Rapporteur to pay particular attention to the problems arising out of the accession of new States to independence would then be included in his instructions.

Mr. BARTOS, supported by Mr. BRIGGS and Mr. EL-ERIAN, suggested that the words "and of the principles of the United Nations Charter" should be added after the words "in the light of contemporary needs" in the passage entitled "preliminary remarks".

The ACTING CHAIRMAN said that, in the absence of objection, the suggestions made by Mr. Tunkin and Mr. Bartos would be adopted. Section 1 D could then be deleted.

He then invited the Sub-Committee to consider part II, section 2 (Delimitation of the topic) and noted that the subject matter of paragraph A (a), "Law of treaties" had already been discussed at some length by the Sub-Committee.

Mr. TUNKIN thought that the Commission should go further than the Chairman had done in that paragraph and should state positively that it was of the opinion that the subject of succession in respect of treaties should be dealt with in the context of State succession.

Mr. ROSENNE said that, in that case, the best course would be to delete the last two sentences of paragraph A(a).

*It was so agreed.*

The ACTING CHAIRMAN suggested that sub-paragraphs (b) and (c) of section 2 A should be considered together.

Mr. EL-ERIAN said that the recommendation to the three Special Rapporteurs in sub-paragraph (c) was equally applicable to the Special Rapporteur on the topic of relations between States and inter-governmental organizations, who should therefore be mentioned.

*It was so agreed.*

Mr. TUNKIN said that, with regard to responsibility (sub-paragraph (b)), the only problem was to avoid overlapping. That could be achieved by co-ordination between the Special Rapporteurs: but since what was being drafted was a programme of work for the future Special Rapporteur on succession of States, the wording would have to be reformulated in the draft report in clear-cut terms, on the same lines as in the report of the Sub-Committee on State responsibility.

The ACTING CHAIRMAN agreed that the same formulation as that used by the Sub-Committee on State responsibility should be employed.

He then asked the Sub-Committee to consider section 2B (Exclusion of certain issues) in the Chairman's report.

Mr. BARTOS said that, while in principle he could accept sub-paragraph (a), he had certain reservations with regard to (b) and (c). He fully agreed that all matters falling within Article 2(7) of the Charter were outside the scope of international law in the ordinary sense; but there were certain questions in connexion with the succession to sovereign rights which could not be regarded *ipso facto* as being purely domestic during the period of transition. There were some matters that had an international law aspect. Moreover, it might not merely be a question of relations between former subjects of the metropolitan Power and the Government; it might be a question of aliens in general.

Mr. BRIGGS agreed. He was not convinced that all the items in (b) and (c) should be excluded from the study. Reference had been made to matters which appeared to fall essentially within the domestic jurisdiction of States under Article 2(7) of the Charter and thus to be outside the scope of a state of international law; but some of those matters were not so clearly excluded. As Feilchenfeld had suggested in his *Public Debts and State Succession* (1931), the jural relations sought to be continued by theories of State succession were predominantly jural relations under municipal, not international, law, and the problem was therefore to determine whether international law required a succeeding State to assume or revivify the municipal law obligations of its predecessor. Before approving the suggestions made in sub-paragraphs (a), (b) and (c) the Sub-Committee should certainly devote more time to considering whether there were any rules of international law which required a succeeding State to assume the municipal law obligations of its predecessor.

With regard to (a), it had frequently been held, notably by the Permanent Court of International Justice in the *German Settlers case*<sup>6</sup> and by courts in the United States that, in the case of a territorial transfer, the old law survived a change of sovereignty until it was formally changed. Though that statement might reflect practice, it concealed an ambiguity, since the laws which continued in operation derived their character as positive law from the fact that they were regarded by the new State as rules of its own law.

The ACTING CHAIRMAN suggested that the examples quoted in (a), (b) and (c) might be omitted.

Mr. ELIAS said that the examples in question were based on an assumption that had been disputed earlier in the Sub-Committee when it had endeavoured to delimit the scope of succession of States and of Governments. If it was accepted that all subjects such as changes of government, whether by revolution or by constitutional or unconstitutional means, were outside the scope of the topic, then the examples would be pertinent. But once the validity of that assumption was challenged, a reference to the examples would merely hamper the Special Rapporteur in his work. Moreover, unless he was allowed to examine those topics, he would not know to what extent they ought to be excluded from the study. Care had to be exercised in making reference to Article 2(7) of the Charter since, when it had been invoked, it had often led to difficulties: for instance, it had been cited by the Government of the Republic of South Africa in support of its policy in South West Africa and even in South Africa itself.

Mr. TUNKIN said that, regardless of any argument in favour of retaining or deleting section 2B (a), (b) and (c), the

<sup>6</sup> Advisory opinion of the PCIJ in the case of the *Settlers of German Origin in Territory ceded by Germany to Poland*, Series B, No. 6.

Sub-Committee could not very well begin by saying what should be excluded from the study. What the Chairman had written was merely a recapitulation of suggestions made by members in their papers. In his view the whole of paragraph B should be omitted.

Mr. ROSENNE agreed that that would be the best course.

Mr. LIU observed that the reference to Article 2(7) of the Charter was irrelevant, since the intention of Article 2(7) was to preclude the United Nations from taking action in matters lying within domestic jurisdiction; it made no attempt to define what was in the sphere of international law and what was in the sphere of domestic jurisdiction.

*Section 2B was deleted.*

The ACTING CHAIRMAN invited the Sub-Committee to consider section 3 (Division of the topic). He recalled that it had already been decided to include (a) "succession in respect of treaties" and to exclude (d) "succession between international organizations".

Mr. EL-ERIAN suggested that the order of sub-paragraphs (b) and (c) should be reversed.

*It was so agreed.*

Mr. BARTOS proposed the deletion of the words "concerning individuals" which appeared within brackets in sub-paragraph (e). The sub-paragraph dealt with succession in respect of rights and duties resulting from sources other than treaties and applied to relations between States in general. The words in brackets would limit the scope of the Special Rapporteur's work.

*It was so agreed.*

Mr. ELIAS inquired what was intended by sub-paragraph (e).

Mr. ROSENNE said that it was desirable that consideration should be given to the question how far specific proposals for the settlement of disputes were an integral part of the system to be evolved by the Commission for the topic of succession. The question should be studied by the Special Rapporteur even if he were to reach a negative conclusion.

Mr. TUNKIN said that the different means of settling disputes constituted a separate subject: the introduction of such a topic would merely complicate matters.

Mr. ROSENNE said that, if the majority wished to delete sub-paragraph (e), he wished it to be placed on record that he was opposed to such a decision.

The ACTING CHAIRMAN noted that, if a sub-heading was deleted by the Sub-Committee, that did not mean that the Special Rapporteur would be precluded from studying the point covered by the sub-heading in question.

Mr. ELIAS said that it was surely not intended that a set of articles was necessarily to be regarded as incomplete if no machinery was established for the settlement of disputes. The sub-paragraph should be deleted.

Mr. BRIGGS said that, while he agreed that the subject should not be made more complicated, he thought that sub-paragraph (e) should be retained. He could visualize situations in which a recommendation with regard to special adjudicative procedures might be very appropriate. The Special Rapporteur should be left free to deal with the point.

Mr. BARTOS also thought that the sub-paragraph should be retained. There had certainly been cases in the past where special judicial machinery had been established to settle disputes arising out of territorial changes and State succession: the Charter did not exclude such methods of settling disputes, which were in conformity with United Nations practice. Under the League of Nations system too, disputes had been settled by arbitral and other special tribunals; it was not always possible for the parties to go to the expense of taking a case before the International Court of Justice.

Mr. TUNKIN said that a question of principle was involved. The Sub-Committee should be clear in its own mind about what it was trying to do. It was engaged in drafting an outline for the codification of the particular branch of international law dealing with the succession of States, and there was no point in confusing the issue by introducing a topic which formed a separate and distinct branch of international law.

The meeting rose at 6 p.m.

## SUMMARY RECORD OF THE SIXTH MEETING

(Tuesday, 22 January 1963, at 10 a.m.)

### MESSAGE FROM THE CHAIRMAN

The ACTING CHAIRMAN read a telegram just received from the Chairman, thanking the Sub-Committee for its wishes for a speedy recovery and stating that he would appreciate receiving the Sub-Committee's draft and recommendations.

### SUCCESSION OF STATES AND GOVERNMENTS (*continued*)

The ACTING CHAIRMAN invited the Sub-Committee to continue its debate on part II, section 3A (e) of the Chairman's working paper.

Mr. ROSENNE said that the document which the Sub-Committee was preparing would, if the International Law Commission accepted it, constitute guidance for the future Special Rapporteur on the topic of State succession, without committing him, or the other members of the Commission as to substance.

If, therefore, it was agreed that the outline for the study of the topic should contain a reference to the question of adjudicative procedures for the settlement of disputes, the effect would be merely to invite the Special Rapporteur to bear mind the question of such procedures and to consider whether, in particular, procedures other than those of existing organs such as the International Court of Justice were in any way relevant to the topic of State succession.

He recalled that the International Law Commission had on many occasions drawn attention in its past drafts to the question of adjudicative procedures for the settlement of particular types of disputes. It had, for example, included a provision on the settlement of certain types of disputes in its draft on nationality including statelessness.<sup>7</sup> In the draft articles on the conservation of the living resources of the sea, the Commission had embodied provisions for a special type of machinery for the settlement of disputes;<sup>8</sup> a more general type of provision had also been included in the draft articles on the continental shelf<sup>8</sup> and both provisions had been incorporated into the results of the work of the first Conference on the Law of the Sea (1958).<sup>9</sup>

He thought that the Commission would have to envisage the problem of State succession in its totality, and hence it was appropriate for it to consider the question of the settle-

<sup>7</sup> Draft convention on the elimination of future statelessness, and draft convention on the reduction of future statelessness: provision for judicial settlement in article 10 of both conventions, see report of the International Law Commission on its 5th session, chapter IV (A/2456, in *Yearbook of the International Law Commission, 1953*, vol. II, United Nations publication Sales No. 59.V.4, vol. II).

<sup>8</sup> See report of the International Law Commission on its 8th session, chapter II (A/3159, in *Yearbook of the International Law Commission, 1956*, vol. II, United Nations publication, Sales No. 1956.V.3, vol. II).

<sup>9</sup> *United Nations Conference on the Law of the Sea, Official Records*, vol. II, annexes (A/CONF.13/38), United Nations publications Sales No. 58.V.4, vol. II.

ment of disputes. The decision whether provisions on the subject should be included in the final text to be adopted on the basis of the Commission's own proposals was perhaps a political one; indeed, it might well be that, on the basis of the material submitted by the future Special Rapporteur, the Commission itself would reach the conclusion that the question of the settlement of disputes was not an integral part of the topic of State succession.

He agreed with Mr. Bartos that the reference to the procedures for the settlement of disputes was not intended to refer to any particular existing procedure. There were in effect a variety of organs for the settlement of particular types of disputes arising out of State succession; those disputes might in some cases involve two States and in others a State and a private individual.

Mr. EL-ERIAN expressed doubts regarding the advisability of including, particularly at the preliminary stage, any reference to the question of procedures for the peaceful settlement of disputes.

The Sub-Committee's task was to delimit the topic of the succession of States and Governments. Accordingly, it should confine its deliberations to the content of that topic, i.e., the substantive law of State succession, and should not enter into the question of machinery for the implementation of those substantive rules of law.

It was as yet uncertain whether the final draft on the topic of State succession would take the form of a draft convention or that of a restatement of the law on the subject. He therefore urged the Sub-Committee not to engage at that stage in work on a question which would be normally covered in the final clauses of a draft convention.

His view was borne out by the experience of the International Law Commission itself. He seemed to recollect that, during the Commission's discussion of one of the concluding articles of the late Mr. Scelle's draft on arbitral procedure,<sup>10</sup> Mr. François had pointed out that, if the provision then under discussion (concerning the settlement of disputes as to the meaning of the arbitral award) were to be included in the draft, it might well become a habitual clause (*clause de style*) to which governments would automatically make a reservation; the effect would be to hinder rather than to advance the cause of pacific settlement of disputes.

It was true that in the Geneva Conventions on Fishing and Conservation of the Living Resources of the High Seas and on the Continental Shelf (1958) certain provisions on the settlement of disputes had been included. The reason for their inclusion had been that those particular Conventions, as distinct from the other two 1958 Geneva Conventions, contained an element of progressive development which had been accepted by a number of countries only on condition that a particular machinery for the settlement of disputes was embodied in the appropriate Convention.

He recalled that, at its most recent (seventeenth) session the General Assembly had adopted its resolution 1815 (XVII) in which it had included among the principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations the "principle that States shall settle their international disputes by peaceful means". In its operative procedural paragraph, the resolution included the principle of pacific settlement of disputes among the three topics which were to be given priority study by the Assembly at its next session. As pointed out by Mr. Tunkin, it was thus clear that the question of the pacific settlement of disputes was another important branch of international law, which should be kept distinct from the topic of State succession.

The ACTING CHAIRMAN noted that there was a fairly even division of opinion among the members of the Sub-Committee on the question whether the outline for the study of State succession should or should not include a reference to procedures for the settlement of disputes. It would be preferable not to put the question to the vote, but instead to record that division of opinion in the Sub-Committee's draft report. For his part, he saw no harm in suggesting that the future Special Rapporteur might take into consideration the question of the settlement of disputes; the Special Rapporteur would not be under any obligation to propose a rule on the subject, but if he saw fit to do so, it would be for the full Commission to decide whether a clause on the settlement of disputes should be included in the draft on State succession.

Mr. TUNKIN found the Acting Chairman's suggestion acceptable as far as the draft report was concerned; when the Sub-Committee reconvened in May, it would decide the question in connexion with its final report.

The problem under discussion was an important one; if the Sub-Committee were to decide to recommend that the Special Rapporteur should study the question of the pacific settlement of disputes, the Special Rapporteur would be under an obligation to deal with a matter which, in his (Mr. Tunkin's) view, was extraneous to the subject.

Mr. ELIAS said he would prefer the matter to be decided by a vote.

The ACTING CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed to adopt the course suggested by Mr. Tunkin.

*It was so agreed.*

The ACTING CHAIRMAN invited the Sub-Committee to consider part II, section 3B of the Chairman's outline, dealing with the "detailed division of the subject".

Mr. BRIGGS suggested that section 3B should be left substantially unchanged: it provided a satisfactory table of contents for the study of the topic of State succession. In that regard, he pointed out that the criteria mentioned under subparagraphs (a), (b) and (c) were not mutually exclusive.

He had no objection to the suggestion made by Mr. Rosenne at the previous meeting that a reference should be introduced to the termination of a protectorate, mandate or trusteeship, but thought that those cases were covered by the expression "birth of a new State".

Mr. ELIAS said he had no objection to the retention of sub-paragraphs (a), (b) and (c), but thought that the material contained in sub-paragraph (d) was already substantially covered by sub-paragraph (b) of paragraph A entitled "Broad outline".

Mr. BARTOS agreed that the criteria specified in subparagraphs (a), (b) and (c) were not mutually exclusive; it was impossible to carry out an analysis on that basis without inter-relating the various sets of criteria.

He stressed that the Chairman, in the outline contained in his working paper, had merely intended to catalogue the various criteria which had been put forward; it had not been the Chairman's intention to express a definite view on the choice between those criteria.

He urged that all the material contained in the Chairman's outline should be retained; he suggested that the Sub-Committee should, rather than delete anything, make it clear that the enumerations in the various sub-headings were not exhaustive and that further points could be added in future. That result could be achieved by introducing into the opening sentence an expression such as "in particular".

He found very interesting Mr. Rosenne's suggestion that sub-paragraph (a) should contain a reference to the question of the termination of a protectorate, mandate or trusteeship agreement. Such a reference would not, however, exhaust all the important cases which might arise; he was thinking, in particular, of the re-emergence of a State. For example, the

<sup>10</sup> A/CN.4/113, in *Yearbook of the International Law Commission, 1958*, vol. II, United Nations publication Sales No. 58.V.1, vol. II.

disappearance of Ethiopia as a result of successful military action had been more or less acknowledged by the League of Nations; when Ethiopia had later regained its independence, the question had arisen what had been its status in international law during its temporary disappearance from the international scene.

As far as protectorates were concerned, he drew attention to the well established doctrine in international law, acknowledged by the practice of international courts, that a protected State was a semi-sovereign State, and as such possessed in some measure a legal personality in international law. With reference to sub-paragraph (d), he drew attention to the existence of guarantor States, which were neither "States directly concerned" nor "third States".

The ACTING CHAIRMAN said that the valuable points made by Mr. Bartos and other speakers would come to the attention of the Special Rapporteur through the summary records of the meetings.

Mr. LIANG, representative of the Secretary-General, said he was somewhat puzzled by the use of the term "criteria" in the opening sentence of paragraph B, a paragraph which in fact spelled out the details of the subject matter of the future report on the topic of the succession of States and Governments.

Furthermore, it was not quite clear what exactly was the purport of the preposition "by" (in the English text) which was used in (a), (b) and (c), apparently to connect the opening words "several criteria are offered" to "the origin of succession", "the source of rights and obligations" and "territorial effects" respectively.

The points to which he had drawn attention could be dealt with by redrafting. In addition it would perhaps be desirable to rearrange the order of the various sub-paragraphs. Sub-paragraph (a), dealing with the origin of succession, would be appropriate as the opening paragraph, and should be followed by two sub-paragraphs dealing respectively with *ratione personae* questions (sub-paragraph (d)) and *ratione materiae* questions (sub-paragraph (b)).

A final sub-paragraph along the lines of (c) would deal with "effects".

Mr. EL-ERIAN expressed misgivings about the wisdom of including in the outline any detailed references to the various ways in which new States came into being, and to the question whether certain particular States were "new" or not. He noted the suggestion by Mr. Briggs that a formerly protected State might, on the termination of the protectorate, be considered as a new State; in fact, the International Court of Justice, in its decision in the case concerning rights of nationals of the United States in Morocco, had held that Morocco was a State in protectorate relationship with France: the external aspects of its independence had been suppressed during the protectorate but Morocco had retained its personality as a State in international law.<sup>11</sup>

He also reserved his position regarding the examples given in the Secretariat documents. He realized that those documents were not before the Sub-Committee at that stage; he would, therefore, have ample opportunity of discussing them in the International Law Commission before which they would be formally placed at its next session.

Mr. TUNKIN agreed with the doubts expressed by the representative of the Secretary-General. There was some overlapping between the headings in paragraphs A and B; the explanation was that the Chairman had had no intention of setting forth a programme of work but merely of recapitulating the various points raised by members in their working papers. It was for the Sub-Committee to draft a programme of work; in doing so it would inevitably have to choose from the Chairman's working paper those points which it considered

appropriate for inclusion and arrange them in proper order.

In particular, he agreed with Mr. Elias that sub-paragraph (d) of paragraph B was largely covered by the sub-headings in paragraph A.

Mr. TABIBI agreed with Mr. Tunkin's remarks and with those of the representative of the Secretary-General. The defects to which attention had been drawn could be removed by redrafting.

In the redrafting of the section, he urged that the suggestion by Mr. Bartos should be taken into account and that it should be clearly stated that the enumerations were not exhaustive. In that manner, it would be possible to add further points that might later come to the attention of the Commission in its work.

Mr. TUNKIN suggested that the Sub-Committee should at that stage confine its work to an examination of the various items in paragraph B, to see whether any should be deleted and whether any further points should be added. It should be left to the Chairman to rearrange the material for submission to the Sub-Committee when it reconvened in May.

Mr. BRIGGS, while agreeing that such terms as "criteria" and "source" had not perhaps been well chosen, said that the outline set forth in paragraph B provided a satisfactory sketch of the questions which any Special Rapporteur would have to consider. He therefore agreed with Mr. Bartos that none of the items which the Chairman had considered relevant should be deleted but that the Sub-Committee should, if it thought appropriate, add further items to the list.

He agreed that the various sub-headings of paragraph B were necessarily inter-related. It would be precisely the task of the Special Rapporteur to work out all the inter-relationships in question.

Mr. ROSENNE drew attention to the use in sub-paragraph (b) of the term "servitudes", a term which had been the subject of much criticism and which he did not find suitable at that stage of the development of international law.

With regard to sub-paragraph (d), he pointed out that it dealt with two entirely different sets of rights: firstly, rights as between two States, and secondly, rights as between a State and an individual.

The ACTING CHAIRMAN said that the term "servitude" had probably been used by the Chairman in order to refer to territorial treaties.

Mr. BARTOS said that the Chairman, in using that term, had probably been thinking of such cases as the régime established for the navigation on the Danube.

In some cases the particular status described as a "servitude" had been established by treaty; in others, it was the result of geographical circumstances. He referred in that connexion, to the efforts made at the Geneva Conference on the Law of the Sea, 1958, by the representatives of landlocked countries to establish the principle that their countries were entitled to the benefit of a servitude which would give them access to the sea through the territory of other States. That idea had a definite tendency to become part of positive international law.

Other examples could be cited, such as the respective rights of Egypt and the Sudan in the Nile waters and the respective rights of India and Pakistan with regard to the Indus.

The fact that questions of "servitudes" often created acute problems on the emergence of new States was an argument in favour of the inclusion of a reference to that point. In spite of the objections which had been made to the term, he found its use appropriate in international law, as a convenient one to describe the type of situation to which he had referred.

Mr. LIU proposed that the first sentence in paragraph B should be redrafted to read: "The following subjects are suggested ..." and that the word "by" at the beginning of each of the sub-paragraphs should be deleted.

<sup>11</sup> *Rights of United States Nationals in Morocco; I.C.J. Reports, 1952.*

Mr. BARTOS suggested that the word "criteria" might be replaced by "aspects".

Mr. ROSENNE said that he would not insist on including the termination of a protectorate, mandate or trusteeship agreement as one of the origins of succession.

The ACTING CHAIRMAN said that it had been suggested that the formation of unions of States and the dissolution of such unions might be included under sub-paragraph (a).

Mr. BRIGGS and Mr. ELIAS thought that that addition was not necessary.

The ACTING CHAIRMAN said that no further changes in sub-paragraph (a) appeared necessary.

Mr. ELIAS and Mr. TUNKIN thought that sub-paragraph (b) could be left unchanged.

Mr. ROSENNE said that sub-paragraph (b) might be included under the general heading of "*ratione materiae*" suggested by Mr. Liang.

The ACTING CHAIRMAN said that the term "property" was too general; reference should be made to both private and public property.

Mr. TUNKIN thought that a general reference to property was sufficient.

Mr. BARTOS suggested that the expression "property and interests" might be used, although he did not insist on it.

The ACTING CHAIRMAN said that the consensus appeared to be that the word "property" by itself be retained.

Mr. BRIGGS pointed out that sub-paragraph (b) contained no reference to public debts and private rights. Those matters might come under the heading "contracts in general" or even partly under the heading of "property".

The ACTING CHAIRMAN said that he would agree to the inclusion of a reference to public debts but not to a reference to private rights. He suggested that the reference to public debts might be inserted after the heading of "property".

Mr. ELIAS said that in that case the words "in general" after "contracts" should be omitted.

Mr. ROSENNE proposed that under the heading "public law", administrative and nationality problems should be treated separately, since the distinction between them was clear-cut and since nationality problems, in particular, deserved special study.

Mr. ELIAS suggested that the phrase "especially in relation to nationality problems" might meet his point.

Mr. LIU proposed the deletion of the words "administrative and" in the parenthesis after "public law".

The ACTING CHAIRMAN agreed to that proposal, since he also believed that the two topics should be treated separately. With respect to the next heading, "torts", he noted that there was no objection. With respect to sub-paragraph (c), he thought that the special rapporteur should study both effects within the territory of the State concerned and extra-territorial effects.

Mr. ROSENNE agreed that sub-paragraph (c) might be retained, but pointed out that there be three kinds of territorial effects: (1) effects in the newly independent State, (2) effects in the former metropolitan State, (3) effects in third States.

The ACTING CHAIRMAN, referring to sub-paragraph (d), said that Mr. Bartos had earlier mentioned a category of States which were neither "States directly concerned" nor "third States".

Mr. BARTOS said that it might suffice if the record referred to the existence of an intermediate category of States.

The ACTING CHAIRMAN, in reply to a question by Mr. ELIAS, explained that the nationality problems referred

to after "public law" in sub-paragraph (b) included all those concerning the status of the population of the territory, whereas the treatment of that population would be the subject of the third heading of sub-section (d).

Mr. LIANG, representative of the Secretary-General, said that one problem arising in connexion with the third and fourth headings of sub-paragraph (d) was the possession of nationality, whereas in sub-paragraph (b) it might be a question of whether nationality had or had not been retained.

Mr. ELIAS said that, without wishing to press the point, in his opinion the two sub-sections were imprecise and overlapped in that respect.

The ACTING CHAIRMAN said that the future special rapporteur would obviously have to avoid overlap with the topic of State responsibility; for that purpose all the rapporteurs should maintain contact with each other. Meanwhile, the Sub-Committee could adopt sub-paragraph (d) provisionally.

He invited debate on part III (The approach to the subject).

Mr. BRIGGS said, with reference to section 1 of part III of the Chairman's paper, that he did not understand the statement: "there are no general agreements on State succession and even the international customary law on it is defective." Did that mean that the existing law was incomplete or merely that the writer did not like it? He suggested that the statement should be replaced by the phrase in the section heading: "evaluation of the present state of the law on succession". As it stood, the statement was misleading; it was for the future rapporteur to determine the extent to which agreement had been reached.

The ACTING CHAIRMAN supported that view.

Mr. LIU suggested that section 1 might be omitted altogether.

Mr. TABIBI said that sections 1 and 2 might be combined, or, alternatively, that they might be amalgamated with the "Preliminary remarks" at the beginning of the paper.

Mr. BARTOS said that he was unwilling, as a matter of general principle, to delete any part of section 1, since the sub-Committee had a duty to indicate the various points which, in its opinion, should be covered by the study. After all, the work would involve a combination of codification and progressive development of international law. The rules of international law were subject to change according to circumstances, but the Sub-Committee should determine the existing state of affairs to the best of its ability. If it found that those rules were not universally applied, it could state that there was "uncertainty" regarding them, but it should not say that there was no general agreement on the subject.

Mr. ELIAS proposed that the words "point of departure" should be deleted in the heading of section 1, which should be revised to read "survey and evaluation of the law of State succession from the point of view of (a) customary international law (b) treaty rights and obligations (c) State practice."

It might then be added that the study of those three aspects could be divided into two parts, one relating to the period before and the other to the period after the beginning of the Second World War.

Such a solution would avoid the necessity of beginning the section with a value judgement that might be controversial.

Mr. ROSENNE agreed with Mr. TABIBI that the matters in question should be mentioned at the very beginning of the document. He would suggest that the expression "point of departure" should be retained and that the wording should be "taking as the point of departure a survey and evaluation of the present state of the law and practice on succession, the objective is the elaboration of detailed replies to the question: 'to what extent is the successor State bound by the obligations of its predecessors, and to what extent is it to benefit from its rights?' This is necessary because of the many uncertainties which have recently come to light."

Mr. ELIAS said that if his suggestion was taken into account, he would propose that the quotations in section 2 should be omitted and their content rephrased as a guide to the Special Rapporteur, who should be told that the study should be limited and precise and should cover the essential elements which were necessary for the establishment of acceptable principles on State succession.

Mr. BRIGGS said that he was prepared to accept Mr. Rosenne's proposal with the exception of the latter part. He thought that it would be better to say the the objective was a survey and evaluation of the existing state of the law and practice on succession and the preparation of draft articles on the law of State succession.

Mr. TABIBI said that in fact there was little difference between the various suggestions. The objective should be placed first, for emphasis; it should be followed by a text based on the proposals made by Mr. Rosenne and Mr. Elias. With a view to guiding the Special Rapporteur, it would be advisable to add to the end of Mr. Rosenne's text a statement that the Special Rapporteur's work should be limited and precise and should cover the essential elements necessary for the creation of rules in the field of State succession.

Mr. TUNKIN said that there were three questions to be settled in connexion with the approach to the subject. The first was, what aspect should be dealt with first. After the different problems to be studied had been listed, an indication might be given that the Special Rapporteur should first deal with a specific problem and stress certain aspects of it. The second question was that of the ultimate aim: whether a treaty, a draft convention or a code should be prepared. The Sub-Committee might suggest that the Special Rapporteur should prepare his draft article in conventional language, as was generally agreed. Thirdly, there was the question of the criteria or principles which should guide the Special Rapporteur. In that connexion the Sub-Committee should indicate that the Special Rapporteur should be guided by the fundamental principles of modern international law, especially by the principles of the Charter, and that existing practice should be taken into account.

He had an open mind on the question whether section 1 should be placed at the beginning of the document; if it was, then all matters connected with the approach to the problem should also be placed at the beginning.

Mr. ROSENNE said that the difficulty confronting the Sub-Committee arose from the fact part III dealt with two separate things: the approach to the general question of succession and the approach to specific subjects arising out of the law of succession. The term "objective" should be interpreted to mean the purpose of the study of the entire topic; the question of the approach to particular aspects of the topic should be dealt with separately elsewhere in the paper.

Mr. TUNKIN said that the approach to particular problems could not be decided at that stage. For instance, section 3(b) contained the words "the principle of respect for . . . vested rights". He would be quite unable to agree that the "principle" of vested rights should appear under "guiding criteria". It was admittedly one of the problems which the Special Rapporteur ought to study, but not as a "principle". It was in fact impossible to say in advance that the Special Rapporteur should accept a particular principle; it was necessary to study the problem first and then to formulate principles.

He thought that the formulation suggested by Mr. Rosenne might be accepted because it was phrased in more general terms, although he considered the reference to "the many uncertainties which have recently come to light" to be unnecessary.

Mr. LIU said that a general statement of the reasons why such a study had to be made should be placed at the beginning of the draft. He did not disagree with the substance of sections 1 and 2 of part III either as they stood or as it was

proposed to amend them; but they definitely belonged to the introductory part.

Mr. TUNKIN's point about "vested rights" could be met if the "principles" enumerated in section 3 (a) and (b) were merely enumerated as subjects for study and not worded in such a way as to be directives to the Special Rapporteur.

Mr. ROSENNE said that he accepted the amendment proposed by Mr. Briggs. He also agreed to the omission of the passage in his proposed text concerning "the many uncertainties which have recently come to light". He accepted Mr. Elias's proposal that section 2 should be included in an amended form. The only question remaining was the actual formulation of the single text of sections 1 and 2, where his text differed from that proposed by Mr. Elias.

Mr. ELIAS said he would no insist on his text. With regard to Mr. Briggs's suggestion (that one of the objectives should be the preparation of draft articles on the law of State succession), he thought that the reference to draft articles should come under a separate numbered heading.

Mr. BARTOS said that section 4 of part III was not in the appropriate place since its contents had nothing to do with the approach to the subject. In the instructions to the Special Rapporteur, it should be stated that he should start from the principles of positive law on the matter, as modified by existing practice and by the evolution of the international community. The heading of the section should not read "codification or progressive development" as the Chairman's paper put it, but "codification and progressive development". In Article 13 of the Charter and in the Statute of the Commission codification and progressive development were mentioned in juxtaposition and were not regarded as being separate. It was essential that the Sub-Committee should specify that the draft articles should be based on the existing state of international law and take international practice into account: they should conform to the realities of the modern age.

Mr. BRIGGS said that it had been his impression that the Sub-Committee had not yet considered whether the draft articles to be prepared by the Special Rapporteur were to be in the form of codification or were to constitute progressive development of international law. Once the Special Rapporteur had submitted the draft articles, the Commission could decide whether codification of existing law was sufficient and, if not, how far it was insufficient.

Mr. TUNKIN said that codification and progressive development could not be separated. Under its Statute the Commission was expected not only to codify but also to develop international law. There was no need to give any directives in the matter: each Special Rapporteur was necessarily guided by the Statute of the Commission.

The ACTING CHAIRMAN suggested that the authors of the various proposals in connexion with sections 1 and 2 of part III should confer with a view to working out an agreed draft in time for the next meeting of the Sub-Committee.

The meeting rose at 1 p.m.

## SUMMARY RECORD OF THE SEVENTH MEETING

(Wednesday, 23 January 1963, at 10 a.m.)

### SUCCESSION OF STATES AND GOVERNMENTS (*continued*)

The ACTING CHAIRMAN recalled that the Sub-Committee had agreed on the following formulation for the paragraph of its draft report which dealt with the scope of the subject:

"There is a need to pay special attention to problems of succession arising as a result of the emancipation of

many nations and the birth of so many new States after World War II. The problems concerning new States should therefore be given special treatment, and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter."

Mr. BRIGGS suggested that, in the second sentence, the words "special treatment" should be replaced by "special attention".

*It was so agreed.*

The ACTING CHAIRMAN invited the Sub-Committee to consider the paragraph of the draft report concerning objectives, as proposed by Mr. Elias and Mr. Rosenne. That paragraph would replace sections 1 and 2 of part III of the Chairman's working paper and would read:

"The objective is a survey and evaluation of the present state of the law and practice on succession as the point of departure for the preparation of draft articles on the topic. The presentation should be limited and precise, and must cover the essential elements which are necessary to resolve present difficulties."

Mr. ELIAS, on behalf of the sponsors of the paragraph, amended the first sentence so as to replace the words "as the point of departure is" by "with a view to".

Mr. LIANG, representative of the Secretary-General, pointed out that it was not altogether appropriate to say that the presentation of draft articles should be "limited"; it would be more appropriate to say that the presentation should be precise and, perhaps, that the scope of the study should be limited.

Mr. BRIGGS agreed with the representative of the Secretary-General. He, too, found the second sentence imprecise. As he recalled, the Sub-Committee had agreed, on the suggestion of Mr. Tunkin, that the draft articles should be drafted in precise terms, along the lines of the articles of a convention.

Mr. BARTOS also agreed with the representative of the Secretary-General and said that it had been agreed by the Sub-Committee that the draft articles should be formulated in precise terms.

Mr. ELIAS suggested, in the light of these remarks, the deletion of the words "limited and" in the second sentence.

*It was so agreed.*

Mr. BRIGGS said that the second sentence could be further improved by specifying that it was the "presentation of the draft articles" which should be precise.

Mr. ROSENNE objected that it was not only the draft articles, but also the commentary, which should be precise and should cover the essential elements to overcome present difficulties:

Mr. BRIGGS did not press the point.

Mr. LIU said that, as it stood, the first sentence appeared to limit the objective to "a survey and evaluation of the present state of the law and practice on succession". He was not at all certain of the necessity to lay down any objective for the Special Rapporteur, but if any such objective were to be laid down, it should certainly not be limited to a survey and evaluation of the present state of the law.

The ACTING CHAIRMAN suggested that, in order to meet that point, the first sentence should be revised to read:

"The objectives are a survey and evaluation of the present state of the law and practice on succession and the preparation of draft articles on the topic."

Mr. ELIAS supported that suggestion, on the understanding that that redraft would serve to indicate that the Special Rapporteur would not only deal with the codification of the existing law but also make suggestions for its improvement.

*The Acting Chairman's suggestion was adopted.*

The ACTING CHAIRMAN invited the Sub-Committee to resume its consideration of section 3 of part III (The approach

to the subject) of the Chairman's working paper. At the previous meeting doubts had been expressed about the advisability of retaining any part of sub-sections (a) and (b). He suggested that the heading "Guiding criteria", which was perhaps somewhat inappropriate, and the opening sentence, should be omitted in any case.

Mr. TUNKIN pointed out that the questions mentioned in sub-paragraphs (a) and (b) were already covered by passages of the draft report already approved by the Sub-Committee.

Sub-paragraph (a) was covered by the reference to "the principles of the United Nations Charter" in the second sentence of the opening paragraph of the draft report which dealt with the scope of the subject. And so far as sub-paragraph (b) was concerned, he said it would be altogether inappropriate to lay down as one of the "guiding criteria" for the Special Rapporteur the "principle of respect for economic rights, private or vested rights". If the Sub-Committee made such a recommendation it would in effect be touching on substance.

He urged that all points which related to substance should be left out. The Chairman had mentioned them in his paper because of his duty to make an analysis of the various points raised in the member's working papers. The Chairman had not intended to suggest that all those points should be included in the outline to be adopted by the Sub-Committee as part of its report.

Mr. BRIGGS said that he was largely in agreement with Mr. Tunkin. He suggested that the bulk of part III should not be included in the draft report. The only points which he suggested should be retained were the following:

First, a reference to "private rights" at the end of the list under the heading *ratione materiae* in part II on the "scope of the subject". No value judgment would be expressed; the inclusion of those words would merely have the effect of indicating that private rights other than property should also be considered.

Second, a reference to the question of the time factor (sub-paragraph (c)), which he felt would be useful.

Mr. ROSENNE found himself largely in agreement with Mr. Tunkin regarding the deletion of the bulk of part III. However, the whole of section 3 could well be omitted. The question of the time factor, mentioned in sub-paragraph (c), would inevitably come to the notice of the Special Rapporteur.

Some reference should be included, possibly immediately after the opening paragraphs of the material part of the draft report, to the Sub-Committee's discussion on the subject of codification or progressive development (part III, section 4 of the Chairman's working paper) and on the related question of the form which the Commission's final draft would take (section 6). It was, of course, for the full Commission to decide on those questions, but its conclusion would depend on the survey and evaluation of the present state of the law and practice in the matter of State succession. He was by no means certain that, once the survey and evaluation had been made, the existing law should be found as unsatisfactory as had on occasion been suggested.

He suggested that, at an appropriate place in the Sub-Committee's report, a passage should be introduced stating that, in the study of State succession, priority should be given to the question of succession to treaties. It was generally agreed that succession to bilateral and multilateral treaties was by far the most urgent aspect of succession at present.

Mr. ELIAS agreed that the bulk of part III should be omitted. In particular, he agreed with Mr. Rosenne that the question of the time factor mentioned in section 3(c) would as a matter of course be dealt with by the Special Rapporteur along with other matters of substance; it was therefore unnecessary to mention it in the Sub-Committee's draft report. That question had arisen mainly because of the special case of Tanganyika.

He hesitated to support the proposal of Mr. Briggs for including "private rights" under the heading of *ratione materiae*. He considered that "property", "contracts", "concessionary rights", "torts" and "public debts" covered all private rights.

The ACTING CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed not to include in the draft report any part of either (a) or (b) of section 3 of the Chairman's paper.

*It was so agreed.*

Mr. ROSENNE said that he had not had in mind the specific case of Tanganyika when he had originally raised the question of the time factor. The point which he had wished to stress was that, if the rules on State succession were to be regarded as transitional, the question would arise how long the transitional period should last.

Mr. BRIGGS said that, although he had not been altogether satisfied with the reply given by Mr. Elias, he would not press for the inclusion of a reference to "private rights".

With regard to section 3 (c), he said that the question of the time factor was, in fact, material, and he was not at all thinking of the specific case of Tanganyika.

In that connexion, he noted the passages from the advisory opinion of the Permanent Court of International Justice in the case of the Settlers of German Origin in territories ceded to Germany by Poland (1923), quoted in paragraphs 41 and 42 of the Digest of decisions of international tribunals relating to State succession prepared by the Secretariat (A/CN.4/151). To those quotations he wished to add the following passage from that same advisory opinion:

"The general question whether and under what circumstances a State may modify or cancel private rights by its sovereign legislative power, requires no consideration here".

In that particular case, the Permanent Court of International Justice had not needed to go into that general question, because of the existence of the Minorities Treaty of 1919<sup>12</sup> binding the State concerned. However, the question had arisen whether, immediately after succession, a State could cancel private rights by sovereign legislation. The question of the time factor was therefore a very real one, an deserved consideration.

Mr. TABIBI said that if the contents of sub-paragraph (c) were to be retained in any form, it was necessary to include a reference to third States; succession did not affect only the new State but also third States.

The ACTING CHAIRMAN said that it appeared to be generally agreed that sub-paragraph (c) should be dropped altogether. If there was no objection, he would consider that the Sub-Committee agreed to that course.

*It was so agreed.*

Mr. TABIBI said that a reference to the principle of self-determination in both its economic and political aspects, was essential. It was a fundamental principle of the United Nations and had been recognized, in particular, through the adoption of article 1 of the draft Covenants on Human Rights. Its importance was all the greater because many peoples had still to achieve self-determination.

It was essential that any Special Rapporteur on the topic of State succession should place particular emphasis not only on political self-determination but also on economic self-determination. In that connexion, he cited the example of the Congo, which had achieved political self-determination but had not attained full economic independence. In regard to economic independence, General Assembly resolution 1314 (XIII) on the subject of permanent sovereignty over natural resources was particularly relevant.

For those reasons, he suggested that a specific reference to economic and political self-determination should be introduced into the opening paragraph of the material part of the draft report.

Mr. TUNKIN supported Mr. Tabibi's proposal and suggested that in the second sentence of the relevant paragraph of the draft report, after the words "the principles of the United Nations Charter", a phrase along the following lines should be added:

"and especially the principles of self-determination and sovereignty over natural resources".

Mr. BRIGGS said that he could not support that proposal. He would, however, be prepared to accept the inclusion of a reference to self-determination in the section concerning "Origin of succession". All States had come into being through the exercise of the right of self-determination, with or without struggle, with or without the consent of the mother country.

Mr. EL-ERIAN said that he understood and shared Mr. Tabibi's concern for the inclusion of a reference to the principle of self-determination both in its economic and in its political aspects. He thought, however, that the principle would be covered by the existing reference to the principles of the United Nations Charter in general. Those principles included self-determination of peoples, sovereign equality of States and equal rights of nations.

Mr. BRIGGS and Mr. ELIAS agreed with Mr. El-Erian and said that the second sentence of the relevant paragraph of the draft report might be left as it stood.

The ACTING CHAIRMAN said that a reference to "the principles and resolutions of the United Nations" might perhaps cover the point which had been raised. However, he noted that there appeared to be general agreement not to change the text of the second sentence of the paragraph in question in the draft report. The different views expressed by members would be recorded in the summary records and, if there was no objection, he would consider that the Sub-Committee agreed not to make any change in that paragraph.

*It was so agreed.*

The ACTING CHAIRMAN invited comments on part III, section 4 of the Chairman's paper, entitled "Codification or progressive development". In his view, codification was not enough: there should be some new rules based on contemporary practice. The Sub-Committee might perhaps indicate that the Special Rapporteur could propose new rules if he saw fit.

Mr. TUNKIN thought that there was no need to include any reference to the matter in the draft report. Every Special Rapporteur should make concrete proposals which might be codification or progressive development, in accordance with the Commission's Statute.

Mr. LIANG, representative of the Secretary-General, said that in no task undertaken by the International Law Commission had it been decided in advance that the work to be done should constitute codification or development or even both. It was only after the work had been completed that the Commission had said that certain parts of it dealt with progressive development or codification; and even then the Commission had not always followed that course. In the case of the draft on the continental shelf,<sup>13</sup> the Commission had indicated that much of it was progressive development. In the case of the draft on the conservation of the living resources of the sea,<sup>14</sup> there were many elements of legislation in the machi-

<sup>13</sup> Report of the International Law Commission on its 5th session (A/2456), in *Yearbook of the International Law Commission, 1953*, vol. II, United Nations publication, Sales No. 59V.4, vol. II.

<sup>14</sup> Report of the International Law Commission on its 7th session (A/2934), in *Yearbook of the International Law Commission, 1955*, vol. II, United Nations publication, Sales No. 60V.3, vol. II.

<sup>12</sup> Hudson: *International Legislation*, vol. I, pp. 285 *et seq.*

nery devised for the conservation of the living resources of the sea.

Mr. EL-ERIAN, while agreeing with Mr. Liang that it had not been the practice of the Commission to give any indication at the preliminary stage, thought that the topic of State succession was a special case. It was generally agreed that it was one of the least developed branches of international law. Moreover, General Assembly resolution 1686 (XVI) concerning the future work of the Commission placed special emphasis on the progressive development of international law. It was true, however, that the subject was covered by the statement in the draft report that "the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter".

Mr. BARTOS said that, for the reasons he had given at the previous meeting, he considered that section 4 of part III of the Chairman's paper should be deleted.

Mr. ROSENNE said that, although he had been in favour of retaining sections 4 and 6, he was now convinced that it would be premature to include any reference to codification or progressive development.

*Section 4 was deleted.*

The ACTING CHAIRMAN asked the Sub-Committee to comment on section 5 (Treaties).

Mr. TUNKIN thought that the Sub-Committee should adopt Mr. Rosenne's suggestion that a definite indication should be given in the draft report that the problem of succession in relation to treaties should be given priority.

Mr. ELIAS suggested that a passage to that effect should be included under "miscellanea".

The ACTING CHAIRMAN suggested that the whole of section 5 should be omitted and a reference to the need to give priority to succession in relation to treaties should be made in the concluding paragraph.

*It was so agreed.*

The ACTING CHAIRMAN noted that no decision had been reached on Mr. Briggs's proposal that private rights should be included under the heading *ratione materiae* in the passage of the draft report dealing with the division of the subject. He suggested that the word "property" should be qualified by the words "public or State". Contracts, concessionary rights and other private rights could then appear together on one line.

Mr. BRIGGS said that he was far from certain that all private rights were property rights: indeed, he was convinced that they were not. His view was that private rights were one of the items that the Special Rapporteur should bear in mind.

Mr. ROSENNE said that the list under *ratione materiae* confused questions concerning relations between States and questions of relations between States and individuals. It could be left to the Acting Chairman to rearrange it; his own view was that the proper order should be, first, pure questions of States and inter-State relationships; second, nationality as such; third, the remainder.

After further discussion, Mr. BARTOS, agreeing with Mr. Rosenne, suggested that the order should be: treaties; territorial servitudes; nationality; State or public property; concessionary rights; public debts; property, rights, interests and relationships governed by private law; torts.

Mr. Rosenne said that, while agreeing with Mr. Bartos, he was not clear whether the last item referred to international or to domestic torts. If it was intended to refer to domestic torts, the word should be dropped because it was covered by Mr. Bartos's phrase regarding relations governed by private law.

The ACTING CHAIRMAN thought that it would be advisable to retain the reference to torts.

*Mr. Bartos's suggestion was adopted.*

The ACTING CHAIRMAN invited the Sub-Committee to consider part III, section 6 of the Chairman's paper — "The form of the final work of the Commission on the subject". It would perhaps be best, as Mr. Tunkin had suggested, not to take a final decision with regard to the form of the final work but to recommend that the Special Rapporteur should draft his rules in the form of short articles.

Mr. BRIGGS agreed. There was already a reference to the preparation of the articles in the draft report. The matter was one for the Commission to decide.

Mr. BARTOS thought that it would be inadvisable to make no reference at all to the matter. He would suggest that the existing section 6 should be replaced by a statement that the matter was one for the Commission to decide.

*Mr. Bartos's suggestion was adopted.*

The ACTING CHAIRMAN inquired whether the Sub-Committee had any comments to make on part IV (Miscellanea) of the Chairman's paper.

*Part IV, section A was deleted.*

Mr. LIANG, representative of the Secretary-General, referring to section B (a) and (b), said that a Secretariat paper analysing and collating the replies from governments would be ready in time for the next session of the Commission. A paper covering the practice of specialized agencies and international organizations in the field of succession was being prepared and would perhaps be ready in time for the Commission's next session.

Mr. ROSENNE said that, now that the Sub-Committee had concluded its consideration of the Chairman's paper, he wished to make some observations on document A/CN.4/151. It was a useful document so far as it went, but he thought that it should be revised and expanded. The sources referred to in paragraph 1 omitted a good many which might be taken into consideration in a revised version. Useful material could be culled from the *Recueil des décisions des tribunaux arbitraux mixtes*; from the reports of the several conciliation commissions established under the Peace Treaty with Italy of 1947;<sup>15</sup> the decisions of the United Nations Tribunal for Libya established under General Assembly resolution 388 (V); the decisions of the tribunal sitting at Coblenz under the Bonn-Paris agreements relating to the Federal Republic of Germany; those of the tribunal under the London agreement with regard to German foreign debts; and possibly from the reports of the administrative tribunals of the United Nations and the International Labour Organisation.

Perhaps it would be possible for the Secretariat to prepare a revised document in time for the Commission's 1964 session.

Mr. LIANG, representative of the Secretary-General, said that careful consideration would be given to the suggestion, depending on the availability of the sources.

*The Sub-Committee decided that the words "who should be appointed at the fifteenth session of the Commission" should be inserted after the words "The Sub-Committee recommends that the Special Rapporteur ..." in the relevant paragraph of its draft report.*

The meeting rose at 12.45 p.m.

## SUMMARY RECORD OF THE EIGHTH MEETING

(Thursday, 24 January 1963, at 10.20 a.m.)

### CONSIDERATION OF DRAFT REPORT

The ACTING CHAIRMAN drew attention to the draft provisional report and invited members to consider it paragraph by paragraph.

<sup>15</sup> United Nations Treaty Series, vol. 49.

*Paragraphs 1 to 4*

Mr. ELIAS asked whether the draft report, when completed, would be submitted to the Commission or to the Chairman. In the latter case, would the Chairman then submit it to the Commission or would final action by the Sub-Committee be necessary?

Mr. BRIGGS said that the draft report, when submitted to the Commission by the Chairman, would be the report of the Sub-Committee.

Mr. ROSENNE said that at the Sub-Committee's third meeting on 17 January 1963 Mr. Tunkin had suggested that the Chairman should be asked to prepare a draft report which would be considered by the Sub-Committee when it reconvened. The Sub-Committee would then be able to approve the Chairman's report and submit it to the full Commission early in the latter's next session. At the same meeting Mr. Bartos had said that any interim draft prepared by the Sub-Committee would be subject to amendment by the Chairman, who would then prepare his own report. That report, after approval by the Sub-Committee, would also constitute the latter's report to the Commission. In those circumstances, could not the heading be simply "draft report" instead of "draft provisional report" and could not that report be then issued as a mimeographed Secretariat document?

Mr. LIANG, representative of the Secretary-General, said that the present report, as had been the case with the report of the Sub-Committee on State Responsibility, would in its final form be the report of the Sub-Committee to the Commission. The only doubt that could arise would be concerning the exact manner of its presentation. It was normal United Nations practice to issue a document such as that now before the Sub-Committee as a "draft report"; upon submission to the parent body the word "draft" would be deleted. Accordingly, he suggested that the word "provisional" was unnecessary.

*It was so agreed.*

*Paragraph 1 was approved.*

Mr. ROSENNE drew attention to the last sentence in paragraph 2: "It was decided that the Sub-Committee would meet again during the fifteenth session of the International Law Commission in order to approve its final report with the participation of Mr. Lachs, the Chairman". He suggested that it be revised to read "early in the fifteenth session".

Mr. LIANG, representative of the Secretary-General, suggested that the sentence be revised to read: "It was decided that the Sub-Committee would meet again, with the participation of Mr. Lachs, its Chairman, at the beginning of the fifteenth session of the International Law Commission in order to approve its final report".

*Mr. Liang's suggestion was adopted.*

*Paragraph 2, as amended, was approved.*

*Paragraph 3 was approved without comment.*

Mr. ROSENNE drew attention to the first part of the first sentence in paragraph 4: "The Sub-Committee held a general discussion of the scope of the subject of succession of States and Governments. . .". He recalled that both the General Assembly, in its resolutions, and the Commission had always referred to the "topic" of succession of States and he proposed that the text be revised accordingly.

*It was so agreed.*

Mr. BRIGGS, supported by Mr. ELIAS, proposed that the first part of that sentence should be revised to read: "The Sub-Committee discussed the scope of the topic of succession of States . . .".

*It was so agreed.*

*Paragraph 4, as amended, was approved.*

## PART I: THE SCOPE OF THE SUBJECT AND THE APPROACH TO IT

*Section A: Special attention to problems in respect of new States*

Mr. LIANG, representative of the Secretary-General, drew attention to the second and third sentences of paragraph 5, reading: "The problem concerning new States should therefore be given special attention, and the whole topic should be viewed in the light of contemporary needs and the principles of the United Nations Charter. Some members wished to indicate that special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources; others thought such an indication superfluous, in view of the reference to the principles of the Charter". Since the matters referred to in the last sentence were the subject of General Assembly resolutions as well, he suggested that the sentence should be made a separate paragraph and that the final phrase should be revised to read: ". . . in view of the principles of the Charter and the resolutions of the General Assembly".

Mr. TABIBI said that the passage as drafted did not sufficiently reflect the great importance of certain other principles, besides those contained in the Charter, such as the principle expressed in General Assembly resolution 1803 (XVII) concerning permanent sovereignty over natural resources. He proposed, therefore, that the words "Some members wished to indicate that . . ." at the beginning of the sentence should be deleted, so that the sentence would begin with the words "Special emphasis should be given to the principles of self-determination and permanent sovereignty over natural resources. . .". The rest of the sentence could then be revised accordingly.

The ACTING CHAIRMAN said that not all members could agree to such a formula.

Mr. BRIGGS did not think that the future special rapporteur on State succession should be given instructions to give special emphasis to the principles of self-determination and permanent sovereignty over natural resources.

Mr. LIANG, representative of the Secretary-General, suggested that the third sentence should be included as a separate paragraph, as he had indicated before, but that the final phrase should be revised to read: ". . . in view of the fact that these principles are already contained in the Charter of the United Nations and in resolutions of the General Assembly".

*Mr. Liang's suggestion was adopted.*

*Paragraph 5, as amended, was approved.*

*Section B: Objectives*

*Paragraph 6 was approved without comment.*

*Section C: Questions of priority*

Mr. ROSENNE wished to comment on paragraph 7, which read: "The Sub-Committee recommends that the Special Rapporteur, who should be appointed at the fifteenth session of the International Law Commission, should initially concentrate on the topic of State succession, and should study succession of governments in so far as necessary to throw light on State succession. Within the field thus delimited, the Sub-Committee's opinion is that priority should be given to the problems of succession in relation to treaties, both multilateral and bilateral". He objected to the expression "in so far as necessary to throw light on" and proposed that it be replaced by the phrase "in so far as necessary to meet the objectives set forth above".

Mr. EL-ERIAN said it was his understanding that any study of succession of governments should be only supplementary to the study of State succession.

Mr. ELIAS proposed that the phrase should be revised to read: "in so far as necessary to complement the study of State succession".

*It was so agreed.*

Mr. ELIAS questioned, with respect to the final phrase of the paragraph, whether it was desirable to define the types of treaties to which priority should be given in the study of State succession; he therefore proposed the deletion of the words "both multilateral and bilateral".

*It was so agreed.*

*Paragraph 7, as amended, was approved.*

*Section D: Relationship to other subjects on the agenda of the International Law Commission*

*Paragraphs 8 and 9 were approved without comment.*

*Paragraph 10 was approved with a drafting change.*

*Section E: Division of the topic*

*Paragraph 11 was approved with drafting changes.*

*Section F: Detailed division of the subject*

The ACTING CHAIRMAN invited the Sub-Committee to consider paragraph 12, taking sub-paragraphs (a) to (d) successively.

*Sub-paragraph (a) was approved without comment.*

Mr. BARTOS suggested the introduction of the words "certain other questions of public law", immediately below "public debts".

*Sub-paragraph (b) was approved with that amendment.*

Mr. LIANG, representative of the Secretary-General, found the terminology used in sub-paragraph (c) somewhat ambiguous. In particular, the expression "States directly concerned", used in the first heading, was probably intended to refer to the new State and to the former metropolitan State.

In the second heading, the expression "other States" was used in the sense of "third States", the more apt expression used in the last heading.

Mr. BARTOS agreed with the representative of the Secretary-General. The expression "States directly concerned" could cover, for example, guarantor States. He cited the examples of the former territory of Tangier and the former Free State of Trieste to show that the expression "States directly concerned" could refer to States other than those actually affected by the transfer of territory or sovereignty.

Moreover, he found the expression "former metropolitan State" unsatisfactory. It would not cover, for example, a case such as that of the United Arab Republic and Syria. He suggested that the expression "predecessor State" should be used.

The ACTING CHAIRMAN said that, if there were no objection, he would consider that the Sub-Committee agreed to replace, in the first heading, the expression "States directly concerned" by "the new State and the predecessor State".

*It was so agreed.*

Mr. ROSENNE proposed that the second heading, reading "rights and obligations towards other States" should be replaced by "rights and obligations between the new State and third States".

*It was so agreed.*

Mr. BRIGGS criticised the drafting of the third heading ("rights and obligations of nationals of the former metropolitan States"). The apparent intention was to refer to persons who retained the nationality of the former metropolitan State after the emergence of the new State. The drafting did not make that clear.

Mr. ROSENNE suggested that the heading in question should be redrafted along the following lines: "rights and obligations of new States towards persons who have retained the nationality of the predecessor State".

Mr. LIU drew attention to the problem existing in many new States of certain categories of residents who had been treated as part of the local population by the former metropolitan State but who, on the new State's achieving independence, had not acquired the nationality of either the new State or the former metropolitan State. They sometimes became nationals of a third State.

Mr. BRIGGS proposed that both the third heading and the fourth ("rights and obligations of nationals of third States") should be replaced by a single heading along the following lines:

"rights and obligations of the new State with respect to individuals".

That language would cover all individuals, regardless of nationality.

Mr. ROSENNE proposed the insertion at the end of the text proposed by Mr. Briggs of the words "including juridical persons", in brackets.

*The proposal by Mr. Briggs, as amended by Mr. Rosenne, was approved.*

*Sub-paragraph (c) was approved subject to drafting changes.*

*Sub-paragraph (d) was approved with a drafting change.*

*Paragraph 12 as a whole, as amended, was approved, subject to drafting changes.*

## PART II: STUDIES BY THE SECRETARIAT

### Paragraph 13

Mr. ELIAS proposed that paragraph 13 should be amended to read "The Sub-Committee decided to request the Secretariat to prepare ..."

*It was so agreed.*

*Paragraph 13, as amended, was approved.*

### Paragraph 14

The ACTING CHAIRMAN said that the word "suggestion" in the fourth line of paragraph 14 should be replaced by the word "request" in view of the amendment of paragraph 13.

Mr. LIANG, representative of the Secretary General, suggested that the second line should be altered to read "that the Secretariat would submit at the earliest opportunity the publication described under (a) above".

*It was so agreed.*

*Paragraph 14, as amended, was approved.*

### Paragraph 15

Mr. ELIAS proposed that the opening words of paragraph 15 should be redrafted to read "The Sub-Committee decided that the summary records ..... would be attached to this report".

*Paragraph 15, as amended, was approved.*

Mr. ROSENNE proposed that a further paragraph should be inserted, preferably after paragraph 3, stating that the three papers (A/CN.4/149, 150 and 151) prepared by the Secretariat had been made available to the Sub-Committee.

*It was so agreed.*

The meeting rose at 12.30 p.m.

## SUMMARY RECORD OF THE NINTH MEETING

(Friday, 25 January 1963, at 10 a.m.)

### ADOPTION OF THE SUB-COMMITTEE'S DRAFT REPORT

(A/CN.4/SC.2/R.1)

The ACTING CHAIRMAN invited the Sub-Committee to consider the draft report (A/CN.4/SC.2/R.1). He drew

attention to a mistake in paragraph 15 (b): the word "certain", which was erroneously placed at the beginning of the eighth line, should be moved to the previous line and inserted before "other questions of public law".

Mr. ELIAS drew attention to two further mistakes: in the English text of paragraph 15(c) the words "with respect of individuals" should be corrected to read "with respect to individuals" and in paragraph 15(d), the word "concerned" should be deleted after "new States".

The ACTING CHAIRMAN said the appropriate corrections would be made.

Mr. ELIAS proposed that the title of paragraph 13 "E. Division of the topic (a) Broad outline" should be amended to read: "E. Broad outline".

*It was so agreed.*

The ACTING CHAIRMAN suggested that, in paragraph 15(a), the word "existing" should be deleted from the heading "territorial changes of existing States".

*It was so agreed.*

Mr. ELIAS proposed that the adjective "private" should be inserted before "property" in the penultimate line of paragraph 15(b).

Mr. BRIGGS proposed that the whole line should be amended to read:

"Private property, rights, interests and other relations under private law".

*Mr. Briggs's proposal was adopted.*

Mr. ROSENNE asked whether it was appropriate for the Sub-Committee to request the Secretariat to prepare certain documents as indicated in paragraph 16. Perhaps the Sub-Committee should recommend that the Commission should make that request.

Mr. LIANG, representative of the Secretary-General, said that, from the point of view of the Secretariat, paragraph 16 could remain as drafted; he was inclined to believe that the Sub-Committee was entitled to address requests to the Secretariat.

Mr. LIU noted the expression "discussion on substance" which was used in paragraph 18; perhaps a better expression could be found since the Sub-Committee had not dealt with the substance of the topic of State succession.

Mr. ROSENNE thought the reference in paragraph 18 was to the substance of the matter referred to in the Sub-Committee and not to the substance of State succession.

Mr. LIU did not press the point.

*The draft report as a whole, as amended, was adopted.*

The ACTING CHAIRMAN said that a copy of the draft report, as adopted, would be forwarded to the Chairman, whose absence had been regretted by all.

He thanked the members for their co-operation, which had made it possible for the Sub-Committee to do useful preparatory work. He hoped that, when the Sub-Committee reconvened at the beginning of the next session of the International Law Commission, it would be possible to complete the report in one or two meetings.

Mr. BRIGGS expressed regret at the absence of the Chairman, Mr. Lachs, and paid a tribute to the successful and impartial manner in which the Acting Chairman had conducted the work of the Sub-Committee. He also expressed appreciation for the work of the Secretariat, and in particular the representative of the Secretary-General.

Mr. TABIBI associated himself with the tributes to the Acting Chairman and to the Secretariat. In view of a certain anxiety which had in the past been expressed regarding the technical services provided by the European Office, he wished to place on record his appreciation of the high quality of the

services provided for the Sub-Committee, with special reference to the summary records.

Mr. ROSENNE, Mr. LIU, Mr. BARTOS and Mr. ELIAS associated themselves with the remarks of the previous speakers.

Mr. EL-ERIAN, also associating himself with those remarks, noted that the fruitful work of the Sub-Committee represented an encouraging new experience in the methods of work of the International Law Commission.

The ACTING CHAIRMAN thanked all the members for their kind words and said that he looked forward to meeting them when the Sub-Committee reconvened in May 1963.

The meeting rose at 11.5 a.m.

## SUMMARY RECORD OF THE TENTH MEETING

(Thursday, 6 June 1963, at 3.45 p.m.)

### APPROVAL OF THE SUB-COMMITTEE'S FINAL REPORT TO THE INTERNATIONAL LAW COMMISSION

The CHAIRMAN, after thanking Mr. Castrén for the able way in which he had functioned as Acting Chairman during his absence, said that the Sub-Committee's present task was to approve its final report to the Commission and at the same time to discuss the studies which it had requested the Secretariat to prepare.

Mr. BRIGGS, Mr. CASTREN and Mr. ELIAS pointed out that the Sub-Committee's draft report, adopted at its ninth meeting on 25 January 1963, had been based on the working paper submitted by the Chairman. The Sub-Committee should, therefore, hear the comments of the Chairman on its draft report before proceeding to approve its final report.

Mr. TABIBI, after associating himself with the remarks of the previous speakers, pointed out that the Sub-Committee had not yet decided whether the outline for the study of State succession should or should not include a reference to adjudicative procedures for the settlement of disputes; that was a question on which the Commission itself might take a decision. With respect to the Sub-Committee's final report, he said that for technical reasons it would be rather difficult to revise the draft report, but that the summary records containing any new views might be appended to it.

Mr. ROSENNE, supported by Mr. TUNKIN, proposed that the Sub-Committee should consider its draft report paragraph by paragraph, with a view to approving it as its final report to the Commission. In that way, the studies requested of the Secretariat could be discussed in connexion with the relevant paragraphs of the draft report.

*It was so agreed.*

*Paragraphs 1-6*

*Paragraphs 1-6 were approved without comment.*

*Paragraph 7*

Mr. TUNKIN said that there appeared to be a certain discrepancy between the French and the English texts of the first clause: the former read "*Certains membres ont voulu que le rapport souligne la nécessité de mettre l'accent sur les principes de l'autodétermination . . .*", whereas the latter read "Some members wished to indicate that special emphasis should be given to the principles of self-determination . . .". Exactly by whom was that emphasis to be given?

The CHAIRMAN suggested that since the emphasis was presumably to be given by the Special Rapporteur, the French text should be revised to read "*qu'on souligne . . .*".

*It was so agreed.*

*Paragraph 7, as amended in the French text, was approved.*

*Paragraph 8*

The CHAIRMAN said that he had certain doubts concerning the formulation of that paragraph, since some members thought that the objectives should include not only a survey and evaluation of the present state of the law and practice on succession but also a reference to the progressive development of the law.

Mr. ROSENNE said that it had been the general understanding that the Special Rapporteur would have the necessary discretion in that respect.

Mr. TUNKIN, supported by Mr. CASTREN, said that the paragraph should include some mention of the progressive development of international law on the subject, since otherwise it might be interpreted to mean that members of the Sub-Committee were not entirely in agreement on that point.

Mr. BRIGGS said that such an addition would be quite appropriate, although he personally was satisfied with the paragraph as it stood.

The CHAIRMAN suggested that the phrase "having regard to new developments in international law in this field" should be added to the first sentence.

*It was so agreed.*

*Paragraph 8, as amended, was approved.*

*Paragraphs 9-13*

*Paragraphs 9-13 were approved without comment.*

*Paragraph 14*

Mr. ROSENNE said that at the sixth meeting he had initiated the discussion of the question whether the outline should include a point on adjudicative procedures for the settlement of disputes; although opinion in the Sub-Committee had been divided, the views of members were clear from the summary records and the Special Rapporteur would undoubtedly bear them in mind.

The CHAIRMAN said he inclined to the view that the question of the settlement of disputes constituted a separate chapter in itself, but he would not wish to influence the Sub-Committee.

Mr. TUNKIN agreed that that question constituted a separate subject of international law; in his opinion, those who thought that it should be included in the outline were too much influenced by Anglo-American legal practice based on judge-made law. In order to expedite the Sub-Committee's work, however, he proposed that the paragraph should be allowed to stand as it was.

Mr. CASTREN supported that proposal.

Mr. BRIGGS also supported the proposal but wished to make it clear that those who had expressed the view that the Special Rapporteur should be asked to consider the inclusion of the question of the settlement of disputes had not been thinking of the compulsory jurisdiction of the International Court.

The CHAIRMAN suggested that paragraph 14 should be retained with the exception of the last sentence.

*It was so agreed.*

*Paragraph 14, subject to the drafting change suggested by the Chairman, was approved.*

*Paragraph 15*

Mr. EL-ERIAN, Mr. TUNKIN, Mr. BRIGGS and Mr. ROSENNE suggested that the reference to territorial servitudes should be deleted, since the idea of servitudes was foreign to international law.

Mr. ELIAS suggested that the phrase might be changed to read "territorial servitudes or rights"; in any case the Special Rapporteur would be free to delete the reference if he saw fit.

Mr. BARTOS thought a reference to the subject should be retained, for an important question was involved which arose in international law and which would have to be dealt with, though perhaps the terminology might be changed.

Mr. TABIBI, supported by Mr. CASTREN, proposed that the phrase should be changed to "territorial rights".

*It was so decided.*

*Paragraph 15 as amended was approved.*

*Paragraph 16*

The CHAIRMAN said that in addition to the three studies mentioned in paragraph 4, the Secretariat had completed a fourth study, consisting of a digest of decisions of national courts relating to succession of States and Governments (A/CN.4/157), since the Sub-Committee's last meeting.

Mr. TABIBI suggested that in view of the importance of the analytical restatement of the material furnished by Governments, the deadline for replies should be extended.

Mr. BRIGGS considered that the actual texts of the replies were even more important than the analysis and hoped that they would be included in the document.

Mr. ELIAS and Mr. ROSENNE suggested that the Secretariat should be asked to send Governments a reminder.

*It was so agreed.*

*Paragraph 16 was approved.*

*Paragraph 17*

*Paragraph 17 was approved subject to drafting changes.*

*Paragraph 18*

Mr. ROSENNE regretted the inclusion of paragraph 18, as it was completely at variance with what had been decided in the plenary session. Unfortunately, the decision by the Sub-Committee on State Responsibility to publish the summary records and working papers had left the Sub-Committee on Succession little choice. However, the latter Sub-Committee's work was somewhat different in that questions of substance had been discussed to the very end of its session, as in the discussion of territorial rights in the current meeting. Accordingly, annex I should include the summary records of the 8th, 9th and 10th meetings, which the Chairman and the Secretariat could be asked to make as short as possible.

Mr. BARTOS said that when the Sub-Committee had discussed the question in January it had decided to follow the same procedure as the Sub-Committee on State Responsibility. That decision could, of course, be reconsidered, but he thought it had been a wise one. He agreed with Mr. Rosenne that the summary record of the current meeting should also be annexed to the report. With regard to the memoranda and working papers, there was nothing secret about them; they had been circulated to universities and institutions and they might be of use to students. Accordingly he considered that the Sub-Committee should abide by paragraph 18, and he proposed that it should be approved.

*Paragraph 18 was approved.*

Mr. BRIGGS, supported by Mr. EL-ERIAN proposed that the Sub-Committee should approve the final report, as amended, as a whole and submit it with its annexes to the Commission and request the Chairman to inform the Commission accordingly.

*It was so decided.*

The meeting rose at 4.50 p.m.

## APPENDIX II

## Memoranda submitted by members of the Sub-Committee

DELIMITATION OF THE SCOPE  
OF "SUCCESSION OF STATES AND GOVERNMENTS"Submitted by Mr. T. O. ELIAS<sup>1</sup>

## Synopsis of Chapters

1. (i) Analysis of the concept of "Succession of States and of Governments". Consider *Luther v. Sagor* (1921) 1KB 456; 3KB 532; *Haile Selassie v. Cable & Wireless Ltd.* (1936). No. 2, Ch. 132; The Tinoco Concessions 1923 (See AJIL, Vol. 18, 1924, p. 147) — an arbitral award by Taft, C.J., between Great Britain and Costa Rica.
  - (ii) *Universal v. partial* succession (e.g. dismemberment, cession, incorporation in a federal State, attainment of independence).
  - (iii) Inference from (i) and (ii): International rights and obligations attach to *States*, not to Governments. A State's identity is not affected by a mere change of government, whether as to form or as to personnel.
  - (iv) Where there is a union of two States, sometimes difficult to say which is the annexor or whether there has been a simple merger of their separate identities in a new State; e.g. Italy (see *Gastaldi v. Lepage Hemery*, Annual Digest, 1929-30, Case No. 43). Turkey (see *Ottoman Debt Arbitration*, Annual Digest, 1925-26, Case No. 57).
  - (v) Succession in the field of international organizations.
2. Main headings for detailed consideration of the subject:
 

The legal effects of succession on —

    - (a) Treaties,
    - (b) Contracts (e.g. debts, concessions),
    - (c) Torts (i.e. civil wrongs or delicts), and
    - (d) State property.
  3. (a) *Treaties*:
    - (i) Distinction sometimes drawn in international practice between *political* treaties (e.g. treaties of alliance) and *dispositive* treaties (e.g. treaties of neutralisation)? Both do not pass on succession.
    - (ii) *Quaere*: whether treaties of commerce, extradition, etc. continue to be binding after the extinction of the predecessor State. The majority view is that there is no succession in such cases (Oppenheim, *International Law*, vol. I, 8th edn., p. 159).
    - (iii) The principle of *Res transit cum suo onere* applies to render valid treaties relating to boundary lines, river navigation, etc.

(b) *Contracts*:

    - (i) Whether succession occurs as a result of cession, annexation or dismemberment, there is *prima facie* a duty on States to respect the acquired *proprietary, contractual or concessionary* rights of private individuals? (See, e.g. Oppenheim, *op. cit.*, pp. 161-2). *Per contra*: *West Rand Central Gold Mining Co. v. The King* (1905) 2KB 391, "... The conquering sovereign can make any conditions he thinks fit respecting the financial obligations of the conquered country, and it is entirely at his option to what extent he will adopt them." This is a highly controversial proposition.
    - (ii) *The Permanent Court of International Justice* on the matter: *The German Settlers in Poland*, Advisory Opinions, No. 6, Series B; Hudson World Court Rep. 207: *Mavrommatis Palestine Concessions*, Judgment No. 5, Series A, Hudson *op. cit.*, p. 297.
  - (iii) *The Peter Pazmany University* (1933), Series A/B, No. 6; Hudson *op. cit.*, p. 311. Effect of annexation upon the public debt of the State annexed: e.g. *Italy*, in respect of the annexation of Lombardy from Austria in 1860; *Prussia*, in respect of the annexation of Schleswig-Holstein from Denmark in 1866.
  - (iv) *Quaere*: Is an annexing State bound to assume the public debt of the annexed State incurred by the latter in the course of waging war against its conqueror?
  - (v) In regard to concessionary contracts, no general rule of succession can be laid down. Each case must be considered on its merits (Oppenheim, *op. cit.*, p. 162).
- (c) *Torts*:
- (i) Apart from issues as to denial of justice, exhaustion of local remedies, etc., there is no general liability for the delicts or civil wrongs of an annexed or extinguished State but there may be for *liquidated* damages.
  - (ii) The Anglo-American Pecuniary Claims Tribunal's decision in *The Robert E. Brown Claim Case* (See BYIL, 1924, pp. 210-221), on the annexation by Great Britain of the South African Republic, which resulted in certain gold-mining losses to an American citizen.
  - (iii) This case was followed by the same tribunal in *No. 84 of The Hawaiian Claims* (see AJIL, 1926, Vol. 20, pp. 381-2).
- (d) *State property*:
- (i) Annexation entails the passing of the property in such things as the former government's bank balance, public buildings and undertakings (e.g. transport, public utilities) to the annexing or successor State.
  - (ii) e.g., Britain handed over the Confederate cruiser *Shenandoah* to the U.S. Government after the Civil War. Also *U.S. of America v. Prioleau* (1865) 35LJ Ch. 7.
  - (iii) But the Mixed Commission appointed by The Treaty of Washington, 1871, held that the United States of America was "not internationally liable for the debts of the Confederacy, or for the acts of the Confederate forces". (Moore, *Digest*, i, §, 22, p. 60).
4. *Succession in the field of international organizations*:
  - (i) When an international organ is dissolved and another is established to perform similar or even identical functions — e.g. the United Nations replacement of the League, ICJ of PCIJ, WHO of International Sanitary Bureau. Mandates Commission replaced by the Trusteeship Council: *Status of South West Africa* (1950) (Advisory Opinion of ICJ) Reports; p. 136? But see *Anglo-Iranian Oil Company* (1951) for the ruling of the Vice-President of the Court that certain functions of the PCIJ did not devolve upon the ICJ.
  - (ii) Consider (a) Yearbook of the International Court of Justice 1952-3, p. 45; (b) Fitzmaurice in BYIL, Vol. 29, 1952, p. 8.
5. *Succession on the attainment of political independence by former dependencies*
  - (i) Regarding certain members of the British Commonwealth, see O'Connell in BYIL, Vol. 26, 1949, pp. 454-463.
  - (ii) A. B. Keith: *The Theory of State Succession with Special Reference to English and Colonial Law*, 1907.

<sup>1</sup> Originally circulated as mimeographed document ILC/(XIV)/SC.2/WP.1.

- (iii) E. H. Feilchenfeld: Public Debts and State Succession, 1931.
- (iv) Sir Cecil Hurst: State Succession in Matters of Tort: 5 BYIL, 1924.
- (v) F. B. Sayre: Change of Sovereignty and Concessions: 12 AJIL, 1918, p. 182.
- (vi) A. S. Hershey: The Succession of States: 5 AJIL, 1911.
- (vii) J. W. Garner: De Facto Government and State Succession: 9 BYIL, 1928.
- (viii) Wilkinson: The American Doctrine of State Succession (1934).

A SUPPLEMENT TO ITEM 5 OF THE NOTE  
ON SUCCESSION OF STATES AND GOVERNMENTS

Submitted by Mr. T. O. ELIAS<sup>2</sup>

1. Is the traditional law governing State succession in general adequate to cover State succession in consequence of colonial independence?

Existing rules and past State practice are not necessarily inapplicable, but a different if deeper kind of legal analysis and adaptation is called for. A *juristic*, rather than a *political*, solution to the contemporary problem of State succession must be provided without avoidable delay.

2. (a) The older Dominions of the British Commonwealth (particularly Canada, Australia and New Zealand) share with the newer the one characteristic that they all became, at independence, parties to a large number of United Kingdom treaties by devolution; but, whereas inter-governmental treaties were gradually extended to them, over the years, by the tacit consent of the other contracting parties, there can be no presumption of any tacit consent in the case of the newly independent Dominions in Africa and Asia, precisely because there has been little or no time for this to be tested.

(b) In this respect, Latin American experience may be likened to that of the older British Dominions, and there has been time for practice to crystallise.

3. (i) The theory of *universal succession* cannot fit the case of the newly independent States because

- (a) some at least of the treaties supposedly taken over are of the "personal", rather than the "territorial" type, and therefore pertain solely to the metropolitan Powers concerned;
- (b) there have been criticisms, in the ex-colonial countries, of the attempted devolution of treaty rights and obligations through the more or less informal exchange of notes or letters between a plenipotentiary of the metropolitan Power and the head of government of the colony at independence. Thus the treaties have frequently not been studied and publicly discussed by the colonial legislatures before their automatic "inheritance". Indeed, it has been said that "these agreements are models of evasive draftsmanship".

N. B.: The earlier practice of attempting to devolve treaty rights and obligations upon States members of the British Commonwealth by means of United Kingdom statutes has also been criticized.

- (c) sometimes, as in the ex-Belgian Republic of the Congo, there may have been no formal settlement of the issues of State succession, which is thus left to be implied from the mere fact of independence.

Consider Katanga and the Union Minière. Has Katanga an international personality? Has it acquired rights and

obligations of State succession separate and distinct from any which the Republic of the Congo might be deemed to have "inherited" direct from Belgium?

- (d) in the case of French ex-colonies in Africa and Asia, the situation at independence was rendered extremely fluid by the concept of the new French Community which at first had control of the external relations of these territories.

Of course, a series of subsequent agreements have placed the legal situation on probably the same footing as with the British ex-colonies.

*Note:* The Treaty of Rome contained provisions for the continued associate membership of the European Economic Community of the former colonies of France and Belgium. There is attached to it a list of such territories. The whole exercise is not strictly one of State succession as such.

- (a) some of the treaties may devolve upon the new States at independence, while others clearly do not. An empirical approach to each treaty is the surest guide. Ordinary canons of statutory interpretation cannot be applied without reference to the surrounding circumstances both at the time of the making of the treaty by or with the metropolitan Power and at the moment when it is sought to enforce it against a newly independent State e.g.:

- (i) the House of Lords has held that the expression "High Contracting Parties" in the Warsaw Convention refers only to the actual signatories to it. How, then, can a newly independent State of Great Britain be said to have inherited such a convention under a theory of universal succession?

- (ii) when the United Kingdom Government ratified the Counterfeiting Convention, which was expressly limited to the States that participated in the preceding Conference, some of her colonies had become independent, while others became so only afterwards. The first category might accede or succeed to this Convention, but the second category of new States could not.

3. (ii) A study of the *Status of Multilateral Conventions* of the United Nations shows that many newly independent Members States accept the principle of "automatic" succession to such conventions, especially if they are of a humanitarian character.

4. Former Trust (or Mandated) Territories furnish yet another illustration of the inadequacy of the existing rules governing State succession.

Problems arising generally similar to those of the ex-colonies, but dissimilar because of the legal implications of the withdrawal of "the protective umbrella" not only of the mandatories but also of the United Nations on their attainment of independence.

Consider Palestine (so far as relevant, now Israel), Togo, Camerouns, and Tanganyika; also the peculiar position of South West Africa and the South African Government's claim that it is already an integral part of its territory. Any possibility of State succession in respect of South West Africa? If finally integrated with South African Republic, the old rules should cover the case. If not, then the new rules, about to be formulated ought to apply to it, as to the other trust territories.

5. The practice (or lack of it) of certain ex-Protectorates like Morocco, Tunis and Syria must be examined to see what lessons it may hold for the modern principles of State succession now under study. e.g.

- (a) Morocco, but not Tunis, accepted the Road Traffic Convention in virtue of France's signature as the protector State.

- (b) Morocco and Tunis were held by the P.C.I.J., in the *Nationality Decrees in Tunis and Morocco Case*, to be

<sup>2</sup> Originally circulated as mimeographed document A/CN.4/SC.2/WP.6.

bound by treaties contracted by them before they came under French protection. In strict legal theory ought to be bound by treaties specifically entered into on their behalf by France as the protector State.

(c) Compare the practice of Malaya, a protectorate under the British until attainment of independence in 1957.

6. State succession issues may also arise when former colonial territories have, prior to independence, been subjected by the metropolitan Powers to leases and international servitudes in favour of other sovereign States.

(i) The leased military bases in the British West Indies, of which the Chaguaramas in Trinidad is the best known, present peculiar problems of their own. In the absence of any express treaty provisions, a tripartite negotiation between the British, the American and the Trinidad Governments has been going on for some two years now.

*N. B.*: It is significant that the United States Government has declared its stand to be that, on the attainment of independence by the respective West Indian Colonies concerned, all military base leasehold agreements must be negotiated anew.

(ii) Despite the current revolution in Cuba, the Guantanamo Naval Base Agreement with the United States of America has not been expressly repudiated.

7. (i) The scope and variety of the problems posed by the new States and by contemporary international practice emphasize the urgent need for an objective and analytical re-appraisal of the law of State succession today. The alternative to the rule of law in this sphere is chaos. There could be an all too easy recourse to the plea of the doctrine of the *clausula rebus sic stantibus*.

(ii) Already, a theory is being advocated to the effect that independence puts an end to all the treaty obligations previously assumed by the metropolitan Powers on behalf of the newly independent States. This is as difficult to accept as is the equally controversial theory of universal succession.

(iii) There can be no valid substitute for a close and painstaking study and analysis of the policies and practices of the newly independent States and of the attitude of the Secretary-General of the United Nations, as the depositary, to these matters.

#### Examples:

- (a) India has not made an official list of treaties to which she regards herself as having "succeeded" at independence.
- (b) Nigeria has also not made any list of those of the 234 treaties to which she is supposed to have "succeeded" at independence. This has been because the texts of only some 169 treaties are so far available to her.
- (c) Ghana has submitted to the United Nations the selected list of the treaties to which she regards herself as having "succeeded": see Summary of the practice of the Secretary-General as depositary of multilateral conventions (ST/LEG/7), p. 60, foot note 57. It is to be noted that she has not limited the devolution clause to multilateral treaties, but it is not clear whether bilateral treaties are also covered by this clause.
- (d) Wherever there is a devolution clause, the Secretary-General of the United Nations has due regard to the policies and attitudes of the successor States concerned in following the provisions of such a clause.

The practice of the Secretariat is first to ascertain whether the treaty contains a territorial application clause and whether it was in fact applied to the particular colony before independence, next to send to every new Member State of the United Nations an up-to-date list of all multilateral treaties deposited with it in accordance with the Charter and to which the relevant metropolitan Power was a party prior to the Member State's inde-

pendence. The latter is thereby invited to declare its attitude to such treaties. It is noteworthy that no new State has so far accepted the invitation.

*N. B.*: If the treaty does not contain a territorial application clause or where it can be shown that despite the inclusion of such a clause the treaty was never in fact applied to the colony prior to independence, the United Nations Secretariat does not normally refer it to the new Member State for a declaration, as it assumes that the latter is not a successor State under the treaty.

But, in regard to the *Convention on the Privileges and Immunities of the United Nations*, the Secretary-General's assumption (and decision) that it is of application in all colonies was called in question by Morocco which denied that it had "succeeded" to this Convention in virtue of France's participation as protector State. Tunis and Malaya have, however, accepted the Secretary-General's ruling.

(iv) Special attention should be paid to the legal effects of devolution clauses upon third parties to the treaties in question.

(a) The great question here is surely to determine when lack of protest on the part of other States parties to a treaty can be taken to imply their *tacit consent*:

The I.C.J. held in the *Reservations to the Genocide Convention Case* that the reservations became part of the Convention by the tacit consent of the other parties to it.

(b) But this doctrine of tacit consent should not be carried too far.

(c) Civil law systems are more apt than Anglo-Saxon ones to accept novation of a contract by implication or stipulation for the benefit of third parties.

(v) Does a presumption in favour of State succession in the case of newly independent States make for legal continuity and international order, rather than the opposite theory of non-succession?

With proper qualifications and exceptions, the former offers a more rational basis for the continued integrity of international law and the facts of international life.

#### MEMORANDUM ON THE TOPIC OF SUCCESSION OF STATES AND GOVERNMENTS — AN OUTLINE OF METHOD AND APPROACH TO THE SUBJECT

Submitted by Mr. Abdul H. TABIBI<sup>3</sup>

State succession in general is a thorny subject and that is why the literature of international law offers divided and sometimes confusing principles, but, nevertheless, lawyers tend to regard the State as eternal, and, in their view, the death of a State is regarded as an exception.<sup>4</sup>

We must admit that in our day the law and function of treaties has greatly changed and this change is obvious during the last century. The treaty law surpassed the customary international law because the customary international law did not save the world from the horror of two world wars and both the League and the United Nations were established on the basis of treaties; the Charter of the United Nations is the new instrument of positive international law. In the law of treaties a new field has emerged, the law of State succession. World War II brought a number of frontier changes and many nations in Asia and Africa and other parts of the world achieved independence to assume new obliga-

<sup>3</sup> Originally circulated as mimeographed document A/CN.4/SC.2/WP.2.

<sup>4</sup> R. W. G. DeMuralt, *The Problem of State Succession with Regard to Treaties*.

tions in the expanding community of nations. A number of frontier and territorial changes took place by force or by agreement, new circumstances were created to find the effects of treaty concluded by nations before and after the territorial changes or the effects of treaties after secession. Annexation, fusion with other States, entry into federal union, dismemberment of partition and finally separation or secession, make it indeed necessary to study the question of codification of the law of State succession, and Governments, particularly on the basis of the practices of State, and priority must be given to its consideration in the work of International Law Commission.

In a world in which all the desirable habitable territory belongs to one nation or another and the expansion of one State means the waning of another, it is of prime importance that some device should and must be found, accepted and applied to equitably solve the serious problems of personal and public rights and obligations that arise, and to bring nations in close co-operation who are in feud and disagreement.<sup>5</sup>

The solution of such problems cannot be left to the mercy of the strong nations or the bargaining of military Powers. As in private law this problem has found solution, it is much more important to find means and devices for the solution of this important question.

Many writers in the past, despite the importance and the challenging character of the problems raised as a result of change in the shape of the State, referred to this important area only to pass quickly to other subjects—but from the work of the publicist of international law three main theories of State succession can be found, namely the theory of universal succession, a doctrine taken from Roman law and based on the analogy of the State to a private individual, and influence of this doctrine can be found in the thinking of many authorities from the time of Grotius to the present day. When this theory was considered in international law it led to another doctrine that a State had a “personality” composed by, unity of territory, population, and political organization. The second doctrine which was developed by Huber differs from the Roman concept and is based on the theory of “continuity or universal succession”. But there is no doubt that the third theory which is supported very strongly by Keith, and which he describes with the term “singular succession” because of its analogy to that doctrine in early Teutonic private law, is supported by many others.

There is no doubt, however, that these three theories give different results on application, for, as Wilkinson believes, a State could apply any one or all three theories in different cases or at different times. But the best solution and validity to the acceptance of any of these theories should be based on the general practice of States.

#### *Approach to the question*

The International Law Commission should try not to be confused with doctrine, but should search devices on the basis of the practice of States. The term “State succession” should not be used too vaguely or loosely, but it should concentrate on territorial re-organization accompanied by a change of sovereignty. In my view it is more wise to separate the subject of succession of States from the succession of Governments. The International Law Commission should draw a distinction between the State and its Government, as Willoughby states in his “Fundamental Concept of Public Law” that by the term State is understood the political person or entity which possesses the law-making right. By the term Government is understood the agency through which the will of the State is formulated, expressed and executed.<sup>6</sup>

In governmental changes there are no shifts of boundaries,

<sup>5</sup> Herbert A. Wilkinson, *The American Doctrine of State Succession*.

<sup>6</sup> W. W. Willoughby, *Fundamental Concepts of Public Law*, chapter V, p. 49.

no transfer of sovereignty, and therefore, the effects of governmental transformations are usually different.<sup>7</sup> That is why in the first meeting of the Sub-Committee on Succession of States and Governments on 10 May 1962 I had the honour to propose that the study of State succession should be made separately from the subject of succession of Governments, the latter being an important question in itself, for which study is necessary and priority should be given.

The scope of the study of State succession should be limited and precise, and must cover the essential elements which are necessary for the creation of practical devices to solve the present difficulties arising out of the result of colonialism and imposition of territorial and boundary changes which are contrary to the will of the inhabitants and contradictory to the principle of self-determination.

The most important question on which the Commission should concentrate is whether new States are bound by the treaties of their predecessors and whether a party to the treaty is obliged to be under the same obligation towards the successor States who have come with new obligations and a clean slate to the world. Although the answer to this question in the view of almost all general publicists of international law is negative, it is necessary to establish basic principles on this subject to be applied universally. It is important that these devices should be studied on the basis of those treaties of a “personal” nature because the treaty falls to the ground at the same time as the States. This question is particularly important because of the faith of many treaties concluded by colonial Powers and now the aftermath of independence creates many problems which should be solved.

In conclusion, we might say that now there is sufficient material available regarding the practice of States to make it possible to find positive devices of law on the subject of succession to treaty rights and obligations. It is also necessary for any special rapporteur who deals with the subject to avoid general theories on the subject of State succession—instead, to search on the main road, as Hall believes,<sup>8</sup> which is the “personality of the State”, changed conditions and the will of the contracting parties about the right of succession. There are other factors which should be examined for the purpose of the formulation of legal rules.

#### WORKING PAPER

Submitted by Mr. Shabtai ROSENNE<sup>9</sup>

#### I. Introduction

1. Pursuant to the decisions of the Sub-Committee and of the Commission at its 14th Session, this paper indicates some tentative views regarding the approach to and scope of the subject, thus amplifying my remarks during the Commission's 634th meeting.<sup>10</sup>

2. The Commission has so far refrained from taking any decision on whether what General Assembly resolution 1686 (XVI) terms “Succession of States and Governments” consists of one or of two questions. Some elucidation of this aspect now seems necessary. In so far as earlier official work on the codification of international law has attempted any differentiation, it appears that what has been denominated the “so-called succession of Governments” has been described as concerning itself with “the rights and obligations of a Government which

<sup>7</sup> H. A. Wilkinson, *The American Doctrine of State Succession*, p. 17.

<sup>8</sup> *International Law*, eighth edition, 1926, p. 114.

<sup>9</sup> Originally circulated as mimeographed document A/CN.4/SC.2/WP. 3.

<sup>10</sup> See *Yearbook of the International Law Commission*, 1962, vol. I.

has been successful in a civil war with respect to rights and obligations of the defeated *de facto* Government" and "with the affirmation of the principle which is well recognized, that the obligations of a State continue notwithstanding any changes of government or of the form of government of the State in question".<sup>11</sup> (*Survey of international law in relation to the work of codification of the International Law Commission*, memorandum submitted by the Secretary-General (A/CN.4/1 Rev.1), para. 47). That memorandum stresses that any attempt to codify the rules governing this latter principle would not be feasible without a parallel attempt to qualify some such rules as that the obligations in question must have been validly contracted, or that their continuation cannot be inconsistent with any fundamental changes in the structure of the State accompanying the revolutionary change of government. Recognizing that any attempt to formulate such principles and their qualifications would raise "problems of great legal and political complexity", the memorandum, nevertheless, did not see in that any decisive argument against including the topic within the scheme of codification.

3. On the other hand, both the Commission in its report on the work of its first session (A/925, paras. 15 and 16) and the General Assembly in resolution 1686 (XVI) paragraph 3 (a), referred to the "topic of Succession of States and Governments" [my emphasis]. The debates preceding resolution 1686 (XVI) may support a view that the General Assembly regarded this item as constituting a single topic, or at least that it wished the International Law Commission to initiate work on a single topic which would combine relevant elements of the two traditional headings of succession. This may be regarded as having been confirmed at the seventeenth session of the General Assembly.<sup>12</sup>

4. This approach, which avoids technical, and probably artificial, differentiations, is seen as appropriate to contemporary requirements. The necessity for some measure of general legal regulation arises above all from the problems generated by the emancipation and independence of territories and peoples, in nearly all parts of the world, which have achieved their independence after the Second World War. The technical manner and the formal process by which this independence has been achieved vary. In some instances the acquisition of independence may have taken the form, technically, of a change of government, such change being the product of due constitutional process or not, as the case may be. In others, the process of emancipation and independence of colonial territories has clearly created a new international personality. In some cases the transition was peaceful, in others it was accompanied by the use of force and acts of warfare, sometimes with and sometimes without the co-operation of the metropolitan State. There are even to be found instances in which the transfer of power took place in more than one step, leading perhaps to the phenomenon of double succession (Mali). Common to the process in all types of emancipation and independence is the fact that as one of the consequences of the achievement of independence, the political, social, economic and cultural aims of the State change: and in the light of that, the prospect of a successful outcome for a project of codification based upon technical distinctions between succession of States and succession of Governments may be taken to be problematical. For the urgency demonstrated by the General Assembly is to be

<sup>11</sup> This quotation is used for purposes of exemplification only: it is doubtful if "Succession of Governments" need be concerned only with the Government which has been successful in a civil war. Probably an expression such as "change of regime" would be more apt.

<sup>12</sup> Note that at the seventeenth session of the General Assembly (1962) an attempt was made, in the three-Power draft resolution (A/C.6/L.501) to redefine the topic as "State Succession", but this was not adopted by the Sixth Committee in its resolution on the report of the International Law Commission covering the work of its fourteenth session (A/C.6/L.503). See General Assembly resolution 1765 (XVII) of 20 November 1962.

found precisely in the far-reaching practical consequences of independence, and not in the purely legal difficulties occasioned by the distinction between succession of States, and succession of Governments, as rubrics in the formal exposition of the rules of international law. The conclusion therefore is that for present purposes — though only for present purposes — the traditional distinction is not relevant, and that the Sub-Committee should propose to treat the topic of succession primarily in the context of those contemporary needs which have arisen as a consequence of the magnificent progress of emancipation.<sup>13</sup>

5. It is also necessary to consider at this early stage, even if only in a preliminary and a tentative manner, the form in which the work of codification is to be consummated. Despite the very strong tendency which has been manifested in recent years to consummate all the work of codification by general multilateral conventions concluded in conferences of plenipotentiaries convened under the auspices of the General Assembly, the question arises whether this would be the most appropriate form for regulating the codification of this topic. In this regard, several factors appear to be relevant. It is likely that close study of the material to be made available to the Commission in response to the circular note recently sent to Governments<sup>14</sup> will disclose that many of the acute problems are essentially bilateral and not altogether suitable for regulation by means of a general multilateral convention. Secondly, with perhaps relatively few and isolated exceptions, and dependent upon what will be accepted as the proper scope of the topic (see para. 10 below), in all probability it will be found that while the number of "successor States" (i.e. the States which have achieved their independence since the Second World War) may reach the figure of nearly fifty, the number of non-Successor States having direct concrete interest in the matter is relatively small, being limited (except, perhaps, as regards general multilateral treaties) to the former metropolitan States on the one hand, and the few non-metropolitan States whose nationals were widely engaged in economic enterprises in the former dependent territories, on the other. In these circumstances it may be questioned whether other States will be sufficiently concerned to warrant an assumption of their willingness to participate actively in any universal international conference convened with the object of concluding a general international convention on the topic.<sup>15</sup> Thirdly, in many cases it will, it is believed, be found that the practical problems have been regulated by bilateral arrangements, and in these circumstances the project of codification would be reduced to the formulation of a series of residual rules operative only in the absence of specific stipulation.

6. The following alternatives could be considered:

(a) The Commission could draw up a set of general principles representing its consensus on the matter, for submission to the General Assembly. Precedents of such a character can be found in some of the earlier work of the Commission.

(b) The Commission could submit to the General Assembly a set of model rules, not intended to be combined into a general international convention, which could guide States in their dealing with concrete problems. Such model rules, which would be fuller than principles, could deal in some detail with the different types of problems which call for regulation.

7. Whatever method is followed, it seems essential that the Commission should take the initiative for the preparation of

<sup>13</sup> For these — and other — reasons the question arises whether the term "succession" itself is appropriate.

<sup>14</sup> Report of the Commission covering the work of its fourteenth session (A/5209), para. 73.

<sup>15</sup> The small participation in the Conference on the Elimination or Reduction of Statelessness comes to mind as an instance of a project of codification and progressive development which, important though it is, did not attract universal interest.

an adequate and reliable survey of contemporary State practice. Material for this will undoubtedly be forthcoming from the replies of Governments to the circular note. However, mere republication of this material, as it is received, in the *United Nations Legislative Series* would not be sufficient. A comprehensive analytical restatement of that material, together with the material which has been promised by the Secretariat, could constitute a reliable and objective guide to current practice of considerable practical value. A precedent for such a compilation exists in the Secretariat's *Commentary on the Draft Convention on Arbitral Procedure* (A/CN.4/92).<sup>16</sup>

8. In view of the fact that questions of succession frequently give rise to differences not only on the inter-governmental level but also in the relations of the successor Government with foreign individuals, and that the settlement of such differences may itself occasion political difficulties and international tension, the question arises to what extent should adjudicative procedures be regarded as essential for this aspect of the law and international relations, and what type of procedures would be suitable.

### II. Scope of the topic

9. Two factors at least cause difficulties in defining the scope of the topic. The first is that in one sense it can be said that the topic of succession impinges on a great number of the institutes of contemporary international law. The second (which is related) is that very little attempt has been made in the past by Governments and others, urging priority treatment for the topic, to indicate what in their view should be included within its scope.

10. It might be useful, before considering the scope of the work to be undertaken, to investigate what may legitimately be *excluded* from its scope. Guidance on this appears in Article 2, paragraph 7, of the Charter itself, namely matters which are essentially within the domestic jurisdiction of a State. The effect of identifying and applying the concept of domestic jurisdiction would be, broadly speaking, to exclude all questions appertaining to the legal relationships between the new State and its nationals when those relationships are a continuation of identical relations previously subsisting between the former Government of the dependent territory and the same individuals who were then subjects of that Government. (On the other hand, their exclusion would not necessarily apply in the case of aliens.) Questions analogous to succession may arise in those relationships. However, these are not questions of succession under international law. An exclusion of this nature would cover a vast area of relationships to which considerable attention is devoted in the literature, but the relevance of which to general international law is not always self-evident. These questions include, for instance, such matters as: (a) the effect of the emancipation on the domestic legal system itself; (b) questions of purely private law rights and obligations between the individual, formerly a subject of the metropolitan Power, and the independent Government, as well as those anchored in domestic constitutional law; (c) the rights of officials of the former government who became nationals of the new State; (d) the status of various transactions concluded prior to independence, which were and remain governed exclusively by domestic law, such as contracts, internal debts, tax liabilities, franchises granted to persons who have become nationals of the new States; (e) torts, etc. It is difficult to see why such matters come within the scope of any international regulation of the question of succession. In this connexion, attention may be drawn to leading decisions of the Supreme Court of Israel in *Shimshon Palestine Portland Cement Factory Ltd. v. the Attorney-General*, *International Law Reports*, 1950, p. 72 and *Sifri v. Attorney-General*, *ibid.*, p. 92.

11. A broad exclusion of that nature would leave for examination matters which under general international law

do not come within the scope of the principle of domestic jurisdiction. For practical purposes, it is believed that this examination can for the present be limited to questions connected with: (a) the law of treaties; (b) the economic rights of nationals of foreign States; and (c) certain miscellaneous questions, especially some aspects of the public debt.

### III. The Law of Treaties

12. The first, and from the point of view of method, perhaps the principal, question that arises in connexion with succession and the law of treaties, is whether the Commission is to deal with it in the context of its work on the law of treaties, or not. One of the previous Special Rapporteurs on the law of treaties included some provisions relating to succession in the scope of the law of treaties<sup>17</sup> but it appears that our present Special Rapporteur on the law of treaties has not yet expressed any firm opinion on the matter beyond his general remarks at the Commission's 630th meeting.<sup>18</sup>

13. In considering this question, regard must be had to the draft articles on the law of treaties prepared by the Commission at its 14th session,<sup>19</sup> and to certain guiding lines which the Commission then adopted. Of particular significance is that the Commission has apparently eschewed attempts to classify treaties by reference to their subject-matter, with, however, two major exceptions, namely the general multi-lateral treaty (as defined in article 1 of the 1962 draft) and the constitution of international organizations (referred to in article 3 of the same draft). But when the literature, and the practice, of succession are examined, it will be found that the classification of treaties from the point of view of their subject-matter and their operation may come to occupy a more prominent role: at least there will be found a well-marked tendency to make the automatic transmission of treaty obligations by operation of law from the former sovereign to the new sovereign depend upon a purported classification of treaties.

14. For instance, it is sometimes asserted that what are frequently called "dispositive treaties" or treaties creating local obligations subsist despite change of sovereignty. The reference here is to international treaties and treaty settlements which define and delimit international frontiers. This theory has obvious practical advantages despite its theoretical awkwardness, in so far as it is intended to give effect to the certainty, stability and finality of agreed frontiers. However, closer inspection of the various types of treaties cited as illustrations for the theory shows that often they go further than to determine and delimit frontiers, and lay down detailed regulations for the regime applicable to frontier traffic and relations of the population of the frontier area, rights to or over different natural features constituting the frontier and even rights exercisable over the territory of another State remote from the frontier area, etc. The Sub-Committee, it seems, should consider the problem which this theory attempts to answer. If the Commission persists in its unwillingness to base its codification of the general law of treaties on a system of treaty classification founded upon the subject-matter and operation of treaties, the question will arise whether, in dealing with succession, some other legal basis does not exist which would in practice achieve the same results as regards the stability of the frontiers

<sup>17</sup> Sir Gerald Fitzmaurice, first report on the law of treaties (A/CN.4/101), article 6; second report on the law of treaties (A/CN.4/107), article 17, section I A (i), and see paragraph 95 of his commentary on that provision; on the relations between succession and the termination of the treaty by operation of law through application of the principle of *rebus sic stantibus*, see *ibid.*, article 21(3); fourth report on the law of treaties (A/CN.4/120), articles 2(1) (c), 6, 21, 28; fifth report on the law of treaties (A/CN.4/130), articles 15, 27, dealing with the transmission of treaty rights and duties by operation of law.

<sup>18</sup> See *Yearbook of the International Law Commission*, 1962, vol. I.

<sup>19</sup> See *ibid.*, vol. II, pp. 161 *et seq.*

<sup>16</sup> United Nations publication. Sales No. 1955.V.1.

as is sought to be achieved by the theory of the perpetuation of the dispositive treaties, but which at the same time would not come into conflict with the Commission's attitude towards the general law of treaties.

15. The approach adopted by the Commission in 1962 for the general law of treaties could facilitate separate treatment of the problem of succession and treaties. For instance, the Commission's proposals on the matter of participation in treaties, contained in articles 8 and 9 of its 1962 draft, may be found to have practical consequences as regards succession. Thus the question whether new States are to be regarded as automatically parties to general multilateral treaties and to multilateral treaties not of a general character in the sense of paragraph (6) of the commentary to articles 8 and 9 of the draft articles which had been applicable to their territory prior to independence is likely to become a problem which can be solved by administrative means such as are envisaged in paragraph (10) of that same commentary.<sup>20</sup> It is believed that the Commission would perform a valuable service were it able to clarify the law and the procedures to govern this aspect. Similar considerations may be found to be present as regards the issue of membership in international organizations. Since 1955, all newly created States have on their request been almost automatically admitted into the United Nations, and hence become eligible for membership in the specialised agencies; and if this policy is continued, the type of problem which arose for example in connexion with the membership of India and Pakistan in the United Nations will be plainly exceptional and for that reason probably not suitable for general regulation.<sup>21</sup>

16. The Secretariat has undertaken to prepare a working paper on the succession of States under general multilateral treaties of which the Secretary-General is the depositary. The question arises whether this would be sufficient, and it is suggested to request the Secretariat to expand the scope of its paper by including material relating to the practice followed by the specialized agencies, and if possible of other international organizations and of Governments which are depositaries of international treaties.<sup>22</sup> Furthermore, there is believed to exist a certain amount of bilateral practice on this question which may also be relevant. An example is seen in the recent Note dated 9 December 1961, from the Prime Minister of Tanganyika to the Secretary-General, and that dated 2 July 1962 from the Government of the United Kingdom, both of which were circulated to Member States through the Secretariat of the United Nations.<sup>23</sup>

17. But the real problem regarding the law of treaties seems to lie in a different direction. It is usual, though not invariable, as part of the process of emancipation, for the metropolitan State and the authorities of the new State to agree that the new State shall be bound by the international agreements to which the former dependent territory was party prior to its emancipation, in accordance with the terms of each individual treaty. Such a blanket formula has several immediate consequences. First, it attempts to place the whole of the problem of the succession of the new State to previously existing

treaty rights and duties on a basis of treaty law, and thereby to make reliance on general international law unnecessary. Against this, on the other hand, it gives rise to many difficulties in practice, as the Government of Israel had occasion to point out in a reply which it submitted to the Commission in 1950.<sup>24</sup> Further instances of difficulties were given by our colleague, Mr. Elias, at the Commission's 629th meeting.<sup>25</sup> The problems—raising in a peculiar way the question of *pacta in favorem tertii* and *in detrimentum tertii*—requiring further elucidation seem to include the following:

(a) How far is the usual blanket type of stipulation merely a bilateral matter between its contracting parties, and how far is it capable of constituting *prima facie* assumption of treaty obligations by the new State in its relations with other States, not parties to that bilateral transaction? Does it embrace treaties which the metropolitan State concluded on its own account, by virtue of its own sovereignty, and those which the metropolitan State simply extended to the dependent territory, by virtue of a territorial application clause, as distinct from treaties which the metropolitan State concluded in the name of the dependent territory? Both from the theoretical point of view and from the practical point of view these distinctions seem to be of considerable significance.

(b) How far does that type of stipulation confer on the new States the right to insist upon the observance of the treaties to which the stipulation refers by the other party or parties to those treaties, such parties themselves remaining strangers to the transaction in which the blanket stipulation was included?

(c) To what extent are the other parties to a given treaty entitled to rely upon such a blanket stipulation (to which they themselves are strangers) in their legal relations with either the former metropolitan State or with the newly emancipated State? This is probably the most crucial aspect which the Commission will have to elucidate.

(d) Does the blanket stipulation operate in the same manner for multilateral and for bilateral treaties?

(e) What is the position where no such blanket stipulation exists?

The solution to the above problems may be closely connected with the conclusions which the Commission will reach on the relevant general aspects of the law of treaties.

18. Such indications—they are not exhaustive—of the special character of the problems posed by the succession for the law of treaties suggest that, should the Commission decide to consider the question of succession and treaties otherwise than as part of its general work on the law of treaties, a sufficient number of problems exist for which a coherent programme of work could be produced. However, should the Commission proceed in that way, obviously full co-ordination will have to be maintained between the Special Rapporteur on this aspect of the law of succession and the Special Rapporteur on the law of treaties, and the point of departure to be adopted in connexion with succession to treaties must be consistent with the Commission's general conceptions on the law of treaties.

#### IV. Economic rights of nationals of foreign States

19. *Ratione personae*, a distinction exists between aliens (in the newly independent States) who are nationals of the former metropolitan State, and aliens who are nationals of

<sup>20</sup> In this connexion, attention is drawn to the discussion in the 748th to 752nd meetings of the Sixth Committee, and General Assembly resolution 1766 (XVII) of 20 November 1962.

<sup>21</sup> The particularity of that solution seems to be implicit in the report of the Sixth Committee on the question. *Official Records of the General Assembly, Second Session (1947)*, First Committee, p. 582 (A/C.1/212).

<sup>22</sup> Particular importance is believed to attach to a full description of the practice of the International Labour Organisation and the World Health Organization in this regard. On the existence of special considerations "which give international Labour Conventions a more durable character than treaty engagements of a purely contractual character", see *The International Labour Code, 1951*, vol. I (1952) p. xcvi.

<sup>23</sup> Since some members of the Sub-Committee may not be familiar with this correspondence, the text of it is included in the annex to this Working Paper.

<sup>24</sup> Document A/CN.4/19, *Yearbook of the International Law Commission, 1950*, vol. II, pp. 206-18, especially paragraphs 19 to 28. For a fuller account of the considerations which found expression in that reply, see Rosenne, "Israel et les Traités internationaux de la Palestine", *Journal du Droit International*, 77 (1950), p. 1140.

<sup>25</sup> See *Yearbook of the International Law Commission, 1962*, vol. I.

third States. From the aspect of the root of title, a distinction exists between economic rights of aliens resulting from activities conducted on the basis of an international treaty concluded between the metropolitan State and a third State, for example a treaty of establishment, the terms of which were applicable to the dependent territory, and economic rights of aliens resulting from activities conducted on the basis of direct agreement, such as a concession, between the Government of a former dependent territory and the foreign economic interests. The Commission will have to examine all these aspects.

20. As far as concerns economic activities of aliens conducted on the basis of international agreements, the future legal status of those activities and the extent of the rights of the aliens claiming them would appear to stand or fall according as the newly independent State is legally bound by the stipulations of the international treaty in question. That being so, this aspect would not appear to call for special treatment. On the other hand, if the caducity of the international treaty, followed by the lapse of particular rights previously enjoyed by aliens, leads to the abandonment of tangible assets in the territory of the new State, the question which arises for examination is whether and to what extent and under what conditions the successor State ought to make compensation for those assets.

21. As far as concerns concessions, it may be recalled that, as in the case of international treaties, so also in the case of concessions it is frequent for the authorities of the successor State to agree formally with the previous metropolitan Government in a blanket provision to recognise the validity of all subsisting concessions in accordance with their terms for their unexpired duration. Such a blanket provision may well give rise to legal problems not dissimilar from those which arise in connexion with the law of treaties. Much may depend on the circumstances of the negotiation of such a blanket provision. Furthermore, a question may exist of the initial validity of the concession in the light of the international agreements (if any) which determined the status of the dependent territory and the rights and duties of the metropolitan State over it. Practice shows that this aspect may be of particular significance when the concessions or other privileges were granted while the territory was under some form of international protection such as that inherent in the Mandates and Trusteeships systems, or, possibly, in the provisions of Chapter XI of the Charter relating to non-self-governing territories. Cf. para. 29 of the Report of the Committee on Information from Non-Self-Governing Territories (A/5215), Official Records of the General Assembly, Seventeenth Session, Suppl. No. 15 (1962).

22. In this connexion, the real problem which the Commission will have to examine thoroughly concerns the extent of the widely held theory that there exists in international law a general principle of respect for private rights, and the implications of that theory for the problem of succession. As Kaeckenbeek has pointed out,<sup>26</sup> apart from international obligations accepted by the State as such under a treaty or otherwise, the question when the legislature should overrule vested rights or capitulate before them is always and exclusively a question of policy, of public interest, which the State alone is competent to decide. "And we must not forget that almost every social change . . . plays havoc with some vested rights". The Commission would be performing a valuable service, the implications of which may well extend beyond the law of succession as such, were it to succeed, after careful analysis of the conflicting interests involved, in effecting a just balance

between the necessity for maintaining a measure of stability such as the principle of respect for private right embodies, and the necessity for a regulated change such as is implicit in that very political process which leads first to the political independence of the new State and then to its economic independence. This problems is in evidence in the documents of the Commission on Permanent Sovereignty over Natural Resources (documents in the A/AC.97/. . . series) and the activities of the Economic and Social Council related thereto.

#### V. Miscellaneous

23. Among the miscellaneous questions, that of the disposal of the external public debt of a new State is of importance in so far as it is not covered by bilateral agreement between the new State and the former metropolitan State. The external public debt, by which is meant loans floated in foreign markets, has to be kept distinct from the internal public debt which, under the principles suggested in paragraph 10 above, is not a matter regulated by general international law.

24. It seems clear that in the same way that the question of succession and treaties stands in close relation to the Commission's work on the law of treaties, so does the codification of the other aspects of succession stand in some relationship with other items being considered by the Commission and by other competent organs of the United Nations. For instance, some of the problems discussed in section IV of this working paper have a connexion with some aspects of the problem of responsibility of States,<sup>27</sup> while others are undoubtedly similar to questions which have been debated in the General Assembly and in the Economic and Social Council and its competent subsidiary organ in connexion with the agenda item of sovereignty over natural resources. It seems that the Sub-Committee is called upon to determine concretely the relationship between the topic of succession and these other related topics, and the priorities to be accorded. It also has to be considered for how long after independence the transitional rules of the topic of succession can legitimately endure. Keeping in mind provisions such as Article 2, paragraph 1, and Article 78, of the Charter, it would appear that, once the transition to independence has been effected and the purely economic consequences of the regime of dependency fairly liquidated, new States stand on exactly the same basis as "old" States under general international law with regard to any measures they may be entitled to adopt in order to ensure that political independence shall be accompanied by economic independence and that each State may freely use its own natural resources for the betterment of the condition of its own citizens.

#### VI. Conclusions

25. The conclusions of this working paper are that in order to decide on the scope of an approach to the topic, the Sub-Committee has to examine the following questions:

(a) For present purposes, does the Commission have to codify two distinct topics — succession of States and succession of Governments — or can it combine the relevant elements into a single topic of succession of States and Governments (paragraphs 2 - 4)?

(b) In what form will the work of codification be consummated (paragraphs 5 - 7)?

(c) The settlement of disputes (paragraph 8).

(d) The exclusion of matters governed by domestic law, from the scope of the topic, and the consequent limitations of its scope (paragraphs 9 - 11).

(e) On the law of treaties:

<sup>26</sup> "The Protection of Vested Rights in International Law", *British Year Book of International Law*, 17 (1936), 1, at p. 15. For other references, see my article "The Effect of Change of Sovereignty on Municipal Law" in *British Year Book of International Law*, 27 (1950), at p. 281, footnote 3. See also Mr. García Amador's fourth report on international responsibility (A/CN.4/119).

<sup>27</sup> There are other areas in which the topic of succession impinges on aspects of the topic of State responsibility, for instance the impact of State succession as regards nationality on the so-called nationality of claims rule, from the point of view of the claimant State.

(i) Is this aspect to be treated as part of the law of treaties or separately (paragraphs 12-14 and 18)?

(ii) Particular questions relating to succession to various types of multilateral treaties (paragraphs 15 and 16).

(iii) The legal consequences of the blanket stipulation between the new State and the former metropolitan State regarding the continuation in force of treaties — multilateral and bilateral — formerly applicable to the territory of the new State (paragraph 17).

(f) On the question of economic rights:

(i) The classification of the legal basis under which the economic activities of aliens were conducted prior to the achievement of independence and the conclusions to be drawn therefrom (paragraphs 19 and 20).

(ii) Questions of concessions and the nature and extent of the principle of respect for private rights (paragraphs 21 and 22).

(g) The question of the public debt of the former dependent territory (paragraph 23).

(h) The relationship of the Commission's work on succession with:

(1) its work on the topic of responsibility of States, and  
(2) other relevant work being undertaken by other organs of the United Nations (paragraph 24).

(i) Recommendations to the Commission regarding:

(1) the appointment of a Special Rapporteur; (2) his precise terms of reference, and (3) the time schedule for the progress of the work.

#### *Annex*

#### 1. FROM THE PRIME MINISTER OF TANGANYIKA TO THE SECRETARY-GENERAL OF THE UNITED NATIONS (9 December 1961)

Your Excellency,

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

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

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

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

Tanganyika may, on a basis of reciprocity, rely as against Tanganyika on the terms of such treaty.

It would be appreciated if Your Excellency would arrange for the text of this declaration to be circulated to all Members of the United Nations.

I have the honour, etc.

2. FROM THE PERMANENT REPRESENTATIVE OF THE UNITED KINGDOM TO THE SECRETARY-GENERAL OF THE UNITED NATIONS (2 July 1962)

Your Excellency,

I have the honour by direction of Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland, to refer to the Note dated the 9th of December, 1961, addressed to Your Excellency by the then Prime Minister of Tanganyika, setting out his Government's position in relation to international instruments concluded by the United Kingdom, whose provisions applied to Tanganyika prior to independence.

Her Majesty's Government in the United Kingdom hereby declare that, upon Tanganyika becoming an independent Sovereign State on the 9th of December, 1961, they ceased to have the obligations or rights, which they formerly had, as the authority responsible for the administration of Tanganyika, as a result of the application of such international instruments to Tanganyika.

I am to request that this statement should be circulated to all Members of the United Nations.

I have the honour, etc.

#### THE SUCCESSION OF STATES AND GOVERNMENTS THE LIMITS AND METHODS OF RESEARCH

Submitted by Mr. Erik CASTREN<sup>28</sup>

When the International Law Commission of the United Nations considered whether to include in its programme problems concerning the succession of States and Governments — which may here be referred to under the common name of "international (legal) succession" — and the further problem which aspects should then be investigated, in what way and in which order, practically all members of the Commission participating in the discussion agreed that these questions are important and that their solving is rather urgent. As to the limitation of the topic and the manner of its examination differing opinions were, however, expressed both in the Commission and in the Sub-Committee set up to prepare an investigation of these questions. Doubts were even expressed in the Commission as to the very existence of international succession. If these doubts were justified, then the task of the Commission would be solved simply by a presentation of this negative opinion. It is, however, hard to believe that the General Assembly would have recommended a study of this problem and that the Commission would have included it in the original programme if so meagre a result had been intended.

Several studies, some of an extensive and others of a more restricted nature, have been written on international succession, and in these the concept and nature of this legal institute have been studied, and different theories and ideas presented either to support or to contest its existence. Where international succession is understood to signify some kind of a general transfer of rights and duties between international persons regardless of their will, a firm stand must be taken against it. On the other hand, it has to be admitted that State practice, which at least in some respects has to be regarded as of equi-

<sup>28</sup> Originally circulated as mimeographed document A/CN.4/SC.2/WP.4.

valent standing to customary law, admits the principle that the successor State may make use of certain rights which previously belonged to its predecessor in relationship with other States and human beings, and further that the successor is also partly bound by the duties of the predecessor State. It is of negligible importance whether these rights and duties are interpreted as being transferred to the successor State or whether independent rights and duties similar to those belonging to the predecessor State are in question. The main thing is that there is a right or a duty based either on international customary law or on some treaty. The boundaries for international succession dealing with States—which may be called State succession—are however uncertain, there are no general agreements on State succession and even the international customary law on it is defective.

As far as *Governments* are concerned, the new Government may in general, in accordance with international law, derive rights from the international acts of the predecessor Government, while it is also bound to respect the treaties made on behalf of that State and its international agreements in general. Difficulties do arise, however, when a Government has gained power by unconstitutional means and especially during an insurrection or a civil war, when there may be several governments, and also at the end of such an exceptional period.

It is always possible to speak of an international succession when rights and duties are transferred from one international person to another. But State succession in a more restricted sense, which is now the question nearest at hand, signifies legal problems arising in connexion with *territorial changes*. Territorial changes are still possible, although it must be said that even general international law nowadays prohibits the acquiring of territory from other States by means of a war or by other forcible acts. It is possible to exchange territories, for example in connexion with the defining of boundaries or by means of voluntary cessions against monetary or other compensation. States may also form among themselves different types of unions of States, while, on the other hand, unions of States may dissolve. Trust territories, colonies and even some parts of the mother country may gain independence. Changes of territory are manifold, and the legal problems of succession vary accordingly. The most noticeable difference lies between two main cases, when a State (*a*) disappears completely from the international scene and (*b*) loses only a part of its territory. But if the loss of territory is considerable, it may mean the dissolution or end of the State, and a great loss of territory may also have a practical bearing on the ability of the State to discharge its international obligations (*clausula rebus sic stantibus*). State succession may also have extraterritorial effects, as has been pointed out by some members of the Commission. In so far as the attitude of third States in regard to the legal effects of territorial changes is not considered, the following two cases are nearest to the question at issue: (*a*) the fate of State-owned property situated outside the territory of the State (in a third country) at the time of the fall of the State and (*b*) the effect of the change of territory on the nationality of its citizens resident in a third country. When State succession is investigated, attention should also be directed to the difference between such cases on the one hand, dealing only with mutual relations of States, and, on the other hand, such cases in which there is on the one side an individual, for whom the nationality (or the absence of it) may also have an importance. In general, States do not have duties in international law in relation to individuals excepting foreigners, but the position of a foreign State and its national, who, for instance, is the creditor of another State, is also different, which results from the fact (among others) that the State even in private law relationships is, on account of its power, in a more advantageous position than the private individual. And if the private person is, in addition to this, under the territorial supremacy of the successor State, this may also have a weakening effect on that individual's legal position.

In one meeting of the Sub-Committee it was suggested that, by reason of the extent of the problem of international succes-

sion, some questions belonging to it should at least temporarily be left aside, which solution seems sensible and expedient. Following this principle of elimination, it would seem that questions of the succession of governments could be postponed for the time being for the following reasons. Some of these questions are rather clear, as for instance that a change of government does not affect the identity of the State nor its international personality. Other questions, such as the position of an insurgent government, may be too complicated, for the doctrine differs even in regard to some of the main questions, and State practice varies greatly. In all these questions problems dealing with the responsibility of States—for instance, how the new government must treat international obligations which the predecessor government has incurred by exceeding its powers—must be faced; these problems are intended to be separately studied within the Commission. In addition, it must be taken into account that in the Commission's future programme of work the question of the recognition of Governments (and States) already appears separately. Lastly, questions concerning the succession of Governments are not as important as many problems relating to State succession. It has, on the other hand, also been pointed out in the Sub-Committee that problems of the succession of Governments and States have such a close connexion that a real difference between them cannot be drawn. It is, however, not clear if this is so, but if it is, the former should be studied in connexion with the latter.

At the Commission's session the possibility was even mentioned of the succession to a state of war. Such special cases, which are based on a situation contrary to international law, ought to be left outside a legal investigation.

Instead it is possible to think of the study of international succession being extended so as to cover the problem whether membership in an international organization may be based on the membership of another State (the predecessor or mother country)—this is, in fact, connected with the problem whether the rights and duties based on a treaty are transferable—and the problem whether there exists a succession, and, if so, in what way, between international organizations (the dissolved and the newly created). In this respect the Secretariat of the United Nations has already promised to provide the Commission with material. A certain amount of practice has already occurred, although no customary law can here be spoken of. The question may have a considerable practical importance. The latter part of it, i.e., the succession between international organizations, is quite distinct and it may thus be studied either simultaneously with the problem of State succession or subsequently to it.

The limitation of the problem concerning international succession and the method of dealing with it depend greatly on whether it is the intention to draft a mere collection of legal rules (a code) or an international treaty. Both approaches can be defended but perhaps weightier reasons speak for the latter solution. These reasons are to a great extent the same as those which made the Commission, in regard to the problem of treaties, change from a code to a treaty-basis. A treaty has naturally considerably greater practical importance, and by means of a treaty it is easier to bring new States more extensively within the confines of international law, as they themselves can participate in the drafting of the new principles and rules. The codification of the problems of State succession in the form of a treaty may, nevertheless, cause special difficulties, because the questions have a strong political character, and because established practice, as has been mentioned, is to a great extent lacking. Because of this it is perhaps necessary to be satisfied with a treaty or several treaties, which allow many exceptions and far-reaching reservations and which present several alternatives, sometimes mere recommendations; this method has been used before. Because of the differences between the problems and in order to promote the establishment of treaty relationships it is probably more suitable to draft several treaties. In these treaties one has to try to create, as far as possible, some uniformity instead of the present varied

practice and to establish the most important principles protecting certain rights. Thus it is not enough to rest content with a mere codification, but the creation of new, expedient rules must be pursued. If the form of a treaty is chosen, this means, among other things, that the Commission must not complicate the treaty drafts with theoretical views and declaratory statements, the correct place for which is the report of the rapporteur and the comments on the draft treaty. The Commission must also limit itself to the study of primarily new cases, although in the light of the teachings of history, cases such as gaining independence since the end of the Second World War, transfers of territory and the formation and dissolution of unions of States. The Commission must be in closer contact than usual with the Governments and respective international organizations in order to obtain from them the necessary material and in order to know how they approach the proposals planned, because of the wide implications and difficulties of the question it may perhaps be necessary for the Sub-Committee which has been established to continue its activity even during the intervals of the Commission's sessions, but in such a way that the independent position and responsibility of the rapporteur is preserved.

It has already been pointed out that the problem of international succession is connected with many other important fields of international law, such as State responsibility. Therefore a problem to be solved is where the limits should be drawn so as to avoid encroaching on other and wider questions. As to the order of investigation there are several different possibilities, because the division can be made in many different ways. It would seem most appropriate to follow the example of those theorists who would make the main division on a material basis, that is, according to what kind of rights and duties are in question. But within the confines of each group of topics the next division must be made dependent on whether there is a case of complete destruction of the State or only a partial loss of its territory. In addition, the extra-territorial effects of succession have to be dealt with when the need arises. In accordance with what has been said above one could begin with the effects of territorial changes on treaties, which would make a suitable continuation, or perhaps completion, of the present main study of the Commission. It is naturally possible to deal with questions of the succession of treaties in connexion with the law of treaties, but it seems as if they rather belonged to the confines of the institute of succession, and this seems to be also the opinion of the present and some previous rapporteurs of the Commission who dealt with the legal problem of treaties. When investigating succession to treaties, special attention should be paid to the nature of the treaties, i.e., whether they are personal or territorial. In this connexion the extensive and controversial problem of international servitudes should be dealt with, even if it should not perhaps be treated too extensively. When investigating treaties the question should also be dealt with from the point of view of the State which has acquired new territories in the first place on the basis of the principle of movable treaty boundaries, which principle, however, is not unconditional. Difficult problems can appear in regard to the treaties establishing and dissolving unions of States.

The fate of State-owned property in connexion with territorial changes makes up the next group of questions. Even here, different situations must be investigated taking into account the nature and extent of the territorial changes. The location of the property and its nature (public and financial property) must also be taken into attention, although in actual practice this distinction is not made when deciding the fate of the property.

Particularly far-reaching and difficult problems are connected with the question what stand to take with regard to the economic obligations of State towards other States and individuals. There are different opinions on this among the theorists, and State practice has varied greatly in different times and countries. Theorists often try to derive some legal rules from general principles of law, in which quite commonly the duty

to respect the so-called acquired rights is spoken of, but in actual practice the political and expedient aspects of the questions are usually decisive. When a State disappears it is especially important that the successor State undertakes certain responsibilities for the clearance of the debts and other economic obligations of its predecessor. The territory is transferred with its servitudes: *res transit cum suo onere*; but if there are several successor States, great difficulties may arise in agreeing on the basis of the division of debts and encumbrances. If there has been some State-owned property as security for the debts, this security should be respected, and if the newly-independent State has had financial autonomy, it ought to be responsible for its debts continuously. Some debts, such as war debts and those which have been regarded as damaging the State acquiring the territory, are not in general carried over. This is also the case with claims for damages based on those actions of the predecessor State which have been deemed to be contrary to international law. On the other hand, administrative debts, such as the wages and pensions of officials, should always be respected. Concessions may be abolished or their conditions changed only in exceptional cases, and then the losses involved must be compensated for.

As has been already pointed out, the citizens of the successor State — either old or new — are, in regard to these as well as to many other questions, in a worse position than foreigners and foreign States, in so far as the home State can in general treat them at will, unhindered by international law, presuming always that general human rights are not violated. When State succession is investigated one meets very often, both when treating the debts of the State and also in the cases mentioned below, the same problems which appear in the treatment of aliens, which in its turn is closely connected with the problem of State responsibility. The duties of the successor State as to the aliens resident in the new territory and to their economic interests there are nearest regulated by the general rules concerning the treatment of aliens. If it is once agreed that the (limited) protection of the property and other so-called acquired rights belong to the principles governing the treatment of aliens, then, so long as the rights arose legally, it is immaterial how and in the jurisdiction of which State they arose. The cancellation of rights can also take place under certain circumstances even if these rights have been granted by the State concerned. On the other hand, it is possible to consider that in a case of this kind there must be particularly strong grounds to justify the modification of the contracts and the cancellation of the rights.

Accordingly a territorial change has in general the most noticeable effect on the legal position of the indigenous population which comes under the territorial and personal supremacy of the new territorial Power. But in regard to this problem of nationality several problems may already appear, for example concerning those people who at the time of the territorial change are abroad and who do not return to their home State, while the right of option, as far as it is admitted, is by itself quite a difficult problem. In general it is held that the successor State has a free hand to arrange conditions within the new territory even to the extent of incorporating it into its existing domains, which leads to a complete change in the legal and in the administrative and judicial institutions. The handling of pending legal and administrative cases creates difficult problems. Their handling may be interrupted and begun anew, but in general retroactive actions should be avoided, and it is not always even possible to undo what has already been done. State practice varies greatly in regard to all these questions, and it would be good if at least some leading principles could be adopted in this matter.

When the Commission begins, in due course, to investigate the above-mentioned extensive and complicated questions, perhaps in the order mentioned above, attention must — as has already been said — be paid once again to the necessity of trying to avoid going too far into such common problems as for instance those concerning the recognition of Governments and the responsibility of the State especially in regard

to the treatment of aliens. How this limitation is to be made, is, for the time being, difficult to say. The Commission should, as has also been mentioned before, investigate new cases, because the treaty drafts to be proposed can gain acceptance only if they are based on present State practice. But in planning treaty rules their compliance with present international law and its most important principles, a part of which have been expressed in the Charter of the United Nations, must be observed. Because practice is not uniform and because differences of opinion are possible even in regard to the principles governing State succession, the Commission will apparently have to suggest many new principles, which is likely to make its task more difficult and to make the creation of a treaty binding the different States equally difficult. To begin with one should perhaps be satisfied with partial solutions between a limited number of States, but even such a result ought to be regarded as satisfactory.

#### WORKING PAPER

Submitted by Mr. Milan BARTOS

The writer considers that the Sub-Committee, while not neglecting the general rules governing the subject under study, should devote its attention mainly to the question of succession of States and Governments raised by the birth and creation of new States through the application of the principles of self-determination of peoples embodied in the United Nations Charter. As a contribution to the study of this question, he submits the following considerations and suggestions to the Sub-Committee.

#### *General considerations*

One of the questions arising out of the succession of States is that of the fate, and prolongation of the validity, of international treaties concluded by States whose sovereign rights or territories are transferred to a new State. The doctrine of successor States, built up over the centuries, played a particularly important part in connexion with the unification of Germany and Italy in the nineteenth century, and the Versailles Treaty system, especially the treaties relating to the succession of Austria-Hungary and the Ottoman Empire. Many writers see in these cases the confirmation of the rules derived from the emancipation of the Latin American States and consider that, on the basis of these treaties and of practice, it is possible to establish the definitive rules of public international law on the succession of States, or rather on the prolongation of treaty relations when there is a change in sovereignty over a territory.

Whether what takes place is the creation of new States, or secession, or emancipation, it is important in practice to determine the position of third States as regards their rights and duties *vis-à-vis* the new sovereign Power in the territory to which the treaty with the former sovereign State applies; but it is even more important to determine the material and legal status of the independent or emancipated State. For the question whether all ties with the partners of the former sovereign Power are broken or whether certain particular treaty relations subsist is not a matter of indifference to that State either. The absolute repudiation of such treaty relations by the new State would appear at first sight to ensure that there will be no acceptance of passive succession, i.e. acceptance of unfavourable treaties which may have been concluded by a foreign master without regard to the needs or interests of the liberated territory and its population. Such a situation, however, would put the newly created State in difficulties, at least for a time, for it would have no treaty relations with

other States, perhaps not even its neighbours, with the consequence that even its frontiers, transit requirements, water supply, use of waterways, etc. could be called in question. On the other hand, if the old rule is maintained that treaties termed *traités internationaux réels*—i.e. treaties relating to the status of the territory, to territorial servitudes and to privileges granted with regard to investments—continue in force, then the right of self-determination and the unrestricted sovereignty of the emancipated people is challenged once more, as, consequently, is also the inalienable right of that people to the sources of its national wealth. All these treaties may have settled certain questions in a manner at variance with the views of the people whose right to self-determination has found expression in its emancipation; consequently, if such treaties are recognized as remaining in force, the question arises whether the people concerned have really gained their freedom, or whether these treaties do not represent the vestiges of colonialism and the basis for what is now called “neo-colonialism”—one of the phenomena contrary to the principle of decolonization which, deriving as it does from the right of self-determination, has become one of the guiding principles of the international practice established by the will of States within the framework of the United Nations. Here, as in many other branches of public international law, traditional rules must necessarily be intermingled with modern concepts; or rather it is necessary to bring these traditional rules into accord with the principles of the United Nations Charter and with the gradual evolution resulting from its development and application.

This paper is confined to the problem of the continuance of the treaty relations of newly created States and emancipated territories under treaties entered into by the Power which formerly exercised sovereignty over the territory; attention must accordingly be drawn to two groups of treaties. The first comprises treaties concluded in its own name by the former sovereign Power and applied in accordance with general principles to all the territories under its control, or expressly rendered applicable to the territory in question by virtue of the colonial clause incorporated in such treaties. The second group comprises treaties concluded by the former sovereign Power acting in the name of the territory now emancipated, either as the administering authority of a trust territory or as the protecting Power or other high authority for a dependent territory. Some jurists seek the key to a practical solution in this division into two groups. They recognize that the newly-created State is entitled to consider treaties in the first group as applying solely and exclusively to the former sovereign Power; with the termination of its authority over the territory, the contractual bond was also dissolved, and hence these treaties do not concern the new sovereign Power; in other words, the validity of the treaties with respect to the territory in question ceased with the extinction of the former master's sovereign rights over that territory. In certain cases, the supporters of this view refuse to recognize any transfer of the treaty relationship to the new sovereign Power, i.e. to the newly-created State, with the transfer of sovereignty over the territory. This theory makes it possible for the new State to decline to accept the succession except with *beneficium inventarii*, but it may also place it in a difficult position *vis-à-vis* third States, with which its relations will not be regulated by treaty, since third States will no longer have the same obligations in regard to its subjects as when they were considered to be subjects of the former sovereign Power. This situation has very unfortunate consequences for workers from an emancipated State employed in a third State: it deprives them of all the rights they enjoyed as subjects of the colonial Power with which the third State had treaty relations. As to the second group of treaties, it is claimed that they are directly binding on the territory, that is to say on the State newly established in the territory, since these treaties were concluded in the name of the territory by an administering authority empowered to act in its name. However, the population of the territory, i.e. the people who exercised the right of self-

<sup>29</sup> Originally circulated as mimeographed document A/CN.4/SC.2/WP.5.

determination and set up the new State, were not consulted. And even consultation would be no guarantee that such treaties were drawn up in conformity with their wishes and interests and with the principles on which their right of self-determination is based. The writer considers it justifiable to maintain, as do most of the States set up by the peoples of emancipated colonies, that the difference between these two groups of treaties is only apparent, and that in both cases the treaties were concluded in the exercise of its own will and authority by the former sovereign Power, which was alien to the liberated people, even if it had a mandate from the international community to administer and represent the territory.

To these two groups of treaties, the writers who defend the interests of the former sovereign Power add a third group, comprising treaties concluded with third States by the local government of the territory which has now been liberated and become an independent sovereign State, but under the aegis of the former sovereign Power, i.e. of the colonial master or administering authority. It is held that the local government represented the territory and its population, and that the Power exercising sovereignty over the territory merely added its authority to the will of the representatives of the territory to conclude a treaty, thus enabling it to have international effect. The writer considers it justifiable to reject this group of treaties as necessarily surviving the rule of the former sovereign Power, for it is certain, or at least probable, that the dependent government was not in a position to make any valid assessment of the interests of the population of the territory and to dissociate them from the interests of the colonial master or administering authority, or at least from its influence, on which the granting of authority depended. Consequently, this group of treaties will not be discussed separately here.

In the writer's opinion, the treaties in force at the time when a territory is emancipated form an indivisible whole and must be brought into harmony with the law of the newly-created State and with the right of its people to self-determination. They must not stand in the way of the liberation and sovereign will of the emancipated people and cannot bind it for the future. But in practice, the States created after the Second World War in the course of the struggle for national liberation and the action taken by the United Nations to implement the right of self-determination and decolonization, have not all adopted the same solution to the problem of their position in regard to international treaties and other obligations left behind by the former master of the territory, whether conqueror or administrator. They all agree that the old rules of public international law on succession to treaty relations cannot be applied, or cannot be applied in their entirety, to the new situation, in which the territorial problem is not to be settled by the principle of legitimate possession of the territory, but by the principle of the right of peoples to self-determination. Broadly, it may be said that there are four theories covering the situation that has arisen.

### I. *Theory of the tabula rasa*

The first and most radical theory is based on the principle that the emancipation of a territory and the creation of a new sovereign State produces a *tabula rasa* situation as regards treaty relations, so that the new State is not generally bound by former ties and does not inherit any contractual obligations. The former sovereign Power did not act in the name of the population, but by virtue of its colonial or administrative authority; hence, all the effects of the treaty ceased with the termination of that authority. This theory seems to be closest to the concept of the right of self-determination; the act of emancipation would eliminate all traces of colonialism. The advocates of this theory claim that it presents no danger for third States, since they can establish treaty relations with the new sovereign Power if they reach agreement with it to conclude new treaties or extend former ones. However, this theory meets with objections from various quarters — even

from those who defend the interests of the emancipated territory. Third States maintain that under former treaties they acquired certain rights in good faith and even that legal situations were created to their advantage and that of their inhabitants, whereas they now suddenly find themselves in an unregulated, if not an illegal, situation. The more moderate objectors observe that the *tabula rasa* can have no effect, at least on established legal situations, which must be respected in accordance with the treaties with the former sovereign Power that were in force when the new State was created. This view is certainly not without foundation and practical importance; but there is also no denying that these allegedly legally established situation, mainly concessions and the right to settle and work (which are acts of colonization) granted by the former sovereign Power to foreign States, to corporate bodies set up under their private law (generally large companies) and to their nationals, often represent a burdensome colonial heritage detrimental to the economic freedom of the emancipated State. Consequently, this provisional respect allegedly due to rights acquired by virtue of former treaties is also a dangerous influence for self-determination and one that cannot be uniformly regulated. It is for this reason that the advocates of the *tabula rasa* theory propose examining whether the legal situations established are, or are not, compatible with the right of the liberated people to self-determination. It is difficult to establish objective criteria for settling this question. Every people knows what it wants. It is precisely because the objective criteria are uncertain, that it is for the newly-created State to decide for itself whether, and to what extent, it will respect rights deriving from treaties in force at the time of its emancipation. This subjective act of itself deprives these rights of their contractual nature and provides a new basis for them — an ephemeral and precarious concession by the new sovereign Power, which may reverse its decision to tolerate such situations in its territory. The *tabula rasa* theory also deprives the newly created State of protection for its rights and interests and those of its citizens in the territory of third States where they previously enjoyed a certain guaranteed legal status based on treaties concluded between third States and the former sovereign Power. This is only logical, since a treaty cannot create rights for the benefit of one party only. Even less tenable is the view of certain defenders of the emancipated States' interests, that the *tabula rasa* principle must not be interpreted in an absolute sense. According to that view, a new State can release itself from treaty provisions which are not consistent with its emancipation or with the right of its people to self-determination, but can leave in force those treaty provisions which it does not regard as a continuation of colonialism. A treaty, however, forms a single whole, and either it remains in force under changed conditions or it ceases to be in force; otherwise, the emancipated State would be in a more favourable position than a third State which was a party to the treaty.

### II. *Right of option concerning the validity of treaties*

Another theory is that the new State has the right to choose among the treaties it inherits, i.e. it has the right to declare which contractual relations, or rather which treaties, it proposes to keep in force. Treaties not remaining in force would not be mentioned in the declaration. It is assumed that the new State is entitled to make a positive choice, a treaty ceasing to be in force *ipso facto* by the mere fact of not being maintained in force. This system is not unknown in the practice of international law. The peace treaties drafted at the Paris Conference of 1946 contain a provision along these lines for the benefit of the victorious Powers, which had the option of maintaining certain treaties with the vanquished Powers in force, while the others ceased to be in force automatically on the expiry of the time-limit for the option. In theory, this practice is considered to be based on the will of the parties (recognition by the vanquished Power expressed in the peace treaty and option exercised by the Power enjoying the advantage). It is, however, very difficult to draw any analogy with

this system. The question arises why certain contracting parties should be placed in a less favourable position than the new State, and why they should passively accept the choice of the new State as a legal fact on which their treaty relations depend. The position is quite different where a peace treaty is concerned; in that case the vanquished State accepts, by signing the treaty, the obligation to respect the choice. The supporters of this theory rightly argue that the former sovereign Power was not able to bind the new sovereign Power and that the new State, in accordance with its people's right to self-determination, is alone competent to judge whether treaties previously concluded conform with its interests, in other words, whether it wishes to assume the obligations imposed by those treaties. But this is not the foundation of the right of option. The supporters of this theory also rely on United Nations practice with respect to multilateral treaties, which is that the Secretariat receives from the new State a declaration of the obligations it accepts under treaties formerly applied to its territory, thus maintaining the continuity of the treaty relations. It must be particularly stressed that this United Nations practice applies to multilateral treaties to which all States, or at least all States Members of the United Nations, can accede. New States submit such declarations to the Secretary-General, or some other depositary, usually on admission to the United Nations. Bilateral and plurilateral treaties, which are not open to accession, cannot be compared to these treaties, so that this Secretariat practice cannot contribute to creating an obligation for the other contracting parties to accept the right of new States to exercise an option. Attention must nevertheless be drawn to certain features of this practice of new States within the framework of the United Nations. They consider, first and foremost, that they are continuing the treaty relations established by the former sovereign Power, i.e. maintaining the continuity of the validity of the treaty. The United Nations Secretariat, in its capacity of depositary, transmits their declarations to the States parties to the treaty. The present writer does not know whether any State party to a treaty has observed that this is not continuation of the treaty relationship, but accession by the new State. The question whether continuity must be legally recognized and the treaty considered valid for the new State by virtue of the treaty relationship with the Power formerly exercising sovereignty over the territory, may be important in fact. If it is a matter of confirming treaty obligations with retroactive effect from the date on which the new State was created, hence *ex tunc*, is this confirmation generally necessary? And what becomes of treaties not so confirmed? Does this mean that, from the time when the new State is created until the time when the confirmatory declaration is deposited, the old treaty remains in force for the new State, or that the treaty is *in suspensa* for that State, but is given retroactive effect by the act of confirmation? The latter interpretation would mean that the right of option really exists for new States, at least in the case of open multilateral treaties. However, although no comments to that effect have been made to the Secretariat—or at least none have come to the writer's knowledge—in practice it is held by some that there is no continuity of the validity of the old treaty; the new declaration represents accession to the open treaty, the act of accession being based not on the former treaty relationship, but on the new capacity of the emancipated State, as a State or even as a Member of the United Nations, and on the nature of the treaty itself, to which all States, or all States Members of the United Nations can accede. It seems that the Universal Postal Union has accepted this view and has, in all such cases, applied the procedure for the admission of a new State and its accession to the Universal Postal Convention. The writer has been unable to establish whether, in the interval between the creation of the new State and the admission of the territory in question, the latter is considered as a territory to which the contractual régime of the Universal Postal Union applies. According to the information available it is a *de facto* rather than a *de jure* relationship, i.e. the universal régime is applied in postal relations, but the new State cannot be considered

as having a contractual relationship under the International Postal Conventions as a whole. It appears from the foregoing that there is no real justification for the doctrine that the new State has a right of option regarding the treaty relations to be applied to its territory by virtue of treaties concluded by the former sovereign Power, for that doctrine would give the new State a privileged position compared with the other contracting party and thus upset the principle of equality of the contracting parties. Conversely, if equality of the contracting parties is to be guaranteed, the right of option must be granted not only to the new State, but also to the other contracting party. There would, in reality, no longer be a right of option, but the possibility of express or tacit prolongation of treaty relations. This is, in fact the third theory, which will be discussed later.

Attention must also be drawn to a further variant of the doctrine of option. Its advocates raise the question of the divisibility of treaties: the treaties concluded by the former sovereign Power often contain provisions which are useful to the new State and its population, though they contain other provisions which are not in conformity with its interests, with the object of self-determination or with the situation of the newly independent State. It is held that the new State can maintain those parts of a treaty which provide for normal relations between States and reject those parts which bear the mark of colonialism or are at variance with normal contractual relations between equals. This trend is undoubtedly consistent with the principles deriving from the Charter and the policy of the United Nations; but it would be impossible, in law, to recognize this special kind of option, which would give the new State twofold discretionary powers. The first would be the right of option itself, of which no more need be said, since the matter was examined in the previous paragraph. The second would be the right of the new State to maintain only certain parts of the former treaty. This would only upset the balance between the contracting parties even further, since not all the unfavourable provisions necessarily bear the stamp of the colonial heritage; in treaty relations there are often clauses which represent a sort of compensation for the privileges granted under other provisions. It is obvious that such clauses could only be revised by agreement between the contracting parties and, in case of agreement, with the tacit consent of the other contracting party. It is no longer a matter of exercising the right of option, but of confirming and modifying the former treaty relationship, i.e. the conclusion of a new treaty modifying the old one, and the question whether the former treaty continues in force or a new treaty relationship is created is of no importance in this case.

Another important question which arises in practice in connexion with the exercise of the new State's option, even where open multilateral treaties are concerned, is whether, when making a declaration by which the former treaty is kept in force with legal continuity, the new State can qualify its declaration by withdrawing or adding reservations to the treaty whose continuation in force is confirmed. The writer sees no difficulty as regards the withdrawal or reservations made by the former sovereign Power concerning the application of the treaty to the territory now represented by the new State. Reservations to treaties can be withdrawn or revoked by the contracting party concerned. As regards continuity, however, the question still arises. The treaty relationship subsists, but the present writer considers that in such cases the reservation ceases to be effective when the declaration of withdrawal is submitted to the depositary, not when the new State is created. The withdrawal of the reservation takes effect in accordance with the rules governing the legal effect of such declarations, and does so at the time of notification. This means that third States would not be obliged to accord to the new State, and to its subjects, the rights kept in abeyance by the reservation during the interval. The situation is much more difficult, however, if the new State formulates a reservation which was not made by the former sovereign Power. There is no doubt that such a reservation affects the

substance of the obligations under the treaty, and that in this case what happens is not that the former treaty relationship is confirmed but that a new one is established. In any event, from the date when the reservation is formulated, in other words from the date on which it takes effect, the new State must be considered to have acceded to the treaty subject to that reservation. The reservation will, in any case, take effect *ex nunc*. But what happens if objection is made to the reservation? Must the new State be considered to have confirmed the former treaty relationship, which will then take effect with respect to that State regardless of the fate of the reservation? Or, conversely, must its declaration be considered to constitute an acceptance of, or accession to, the treaty, as the case may be, with the proviso that the condition contained in the reservation forms an integral part of the declaration of accession, so that the new State is entitled to make its accession to the treaty conditional on the fate of the reservation, in so far as it does not itself withdraw the reservation if it is not accepted? In the absence of a consistent practice in the matter, it is difficult to express a definite opinion without examining specific cases. In practice, however, the right of new States to formulate necessary reservations is recognized in principle, provided that the pre-existing treaty relationship is confirmed. The majority of States do not consider this confirmation to be an act prolonging the treaty relationship, but treat it as equivalent to accession and permit the new State to avail itself of the right to make reservations, although the time-limit for their formulation (as specified in the treaty) has expired. This is justified by the fact that the new State was unable to exercise its right to formulate reservations within the specified time-limit, for the simple reason that it did not exist at the time. The fact that the right was not exercised by the former sovereign Power is not considered decisive, since its interests and acceptance of the full scope of the treaty obligations were not necessarily in accordance with the interests and views, or even with the needs and circumstances, of the new State. This tolerance is consistent with respect for the right of self-determination of the people of the new State and with the desire to see the greatest possible number of States participate in multilateral agreements aiming at universality, even if such participation is limited by the conditions of the reservation; of course, the reservation must be admissible, or compatible with the object and purpose of the treaty.

### III. Theory of continuity with right of denunciation

The third theory is much simpler. It is based on the idea that there is general succession of the new State and its government organs to the former sovereign Power and its government. The object of this approach is to prevent the new State from being left without any treaty relations with third States, which might, in certain circumstances, place it in an illegal position. It is considered, however, that the new State is not thereby left without any remedy, since that State and the other contracting party can denounce treaties they do not wish to maintain in force, acting under the provisions of the inherited treaties and within the normal time-limits for denunciation. Two periods can be distinguished in regard to a treaty which is denounced: the first runs from the creation of the new State to the expiry of the period of notice for denunciation, when denunciation begins to take effect; the second starts when denunciation takes effect. During the first period, the treaty is presumed to be in force and nothing can change that presumption. Denunciation does not prove that the treaty is not in force; it rather confirms that it is in force, but will cease to be so when denunciation takes effect. In the second period, the treaty ceases to have effect, but this cessation is *ex nunc*, i.e. from the time when the denunciation became effective, and not *ex tunc*, from the time when the new State was created. The opposite view, namely that denunciation takes effect *ex tunc*, is a return to the doctrine of option, but of option in a negative sense, by which some new States have tried to explain the effect of their denunciation of inherited

treaties. This would mean only one thing: that the new State has an option to set aside some of the existing treaties. The writer does not believe that this is the case, but considers that according to this theory all existing treaties remain in force. This view has met with a very serious well-founded objection, namely that it is not consistent with the creation of the new State resulting from the exercise of the right of self-determination. Even assuming that the new State wishes to maintain treaty relations with the former partners of the Power which formerly exercised sovereignty over its territory, there is no doubt that there are provisions in the old treaties, and even whole treaties, which are not consistent with the political position and status of a new independent State. This is also true of certain so-called statutory provisions governing the territory and of certain so-called "real" or local provisions. Can the former partner demand, after the creation of the new independent State, that that State observe provisions which are at variance with its status as an independent State? The writer considers justified and legally well-founded the attitude of certain new States which, while recognizing the existing treaty relationship in principle, refuse in exceptional cases to consider themselves bound by treaties which are at variance with general contractual obligations, and he believes that they are entitled to refuse to recognize the validity of such treaty provisions. These provisions have lapsed, that is to say they are no longer in accord with international relations and they cease to be valid without it being necessary to invoke the *rebus sic stantibus* clause. From this point of view, there are still certain situations that are not clear, and although they are being gradually clarified, it is not without difficulty or resistance from third States which benefit by treaty provisions of this kind. However, this process of settlement and clarification is tending in practice towards adaptation of the treaty relationship to the principles of the United Nations and respect for the independence of the new State, i.e. in the direction of the newly created situation, provided, of course, that the Government of the new State is resolute and capable of defending the interests of its people.

### IV. Right to a period of reflection

The fourth theory is only a modification of the third. It is the theory put forward by the Government of the Republic of Tanganyika in a general declaration communicated to the Secretary-General of the United Nations. In that declaration, Tanganyika recognizes the validity of all the treaty obligations accepted for its territory by the former sovereign Power, but limits the duration of its own resultant obligations to the next two years. In practice, this is an invitation to the other contracting parties to settle their treaty relations bilaterally with the Government of Tanganyika within two years, unless they wish the declaration to have, with respect to them, the effect of a general denunciation of all the treaties in question. This declaration also constitutes a communication from the Government of Tanganyika signifying that, after two years, it will exercise an option regarding the multilateral treaties it wishes to maintain in force. This theory of the "period of reflection" (as the writer called it during a discussion in the International Law Commission) is open to criticism on several points. Is Tanganyika not reserving the right to consider all the treaties as being extended for two years from the date of its declaration, without authorizing its treaty partners to make necessary and desired denunciations before the expiry of that period? The writer does not believe that Tanganyika can impose such an alternative or force the other contracting parties to maintain treaty relations with it against their will. The question then arises whether Tanganyika, by this declaration, has taken over obligations deriving from treaties which must be regarded as incompatible with its new status. In the writer's opinion, this declaration does not validate so-called "absolving treaties", since they are invalid not by reason of the will of the contracting parties, but by reason of objective circumstances. Lastly, it has been openly asked whether, in the case of multilateral treaties, there can be provisional accession or provisional maintenance in force, and even if that is possible, what will

become of treaties in respect of which Tanganyika, within two years of its declaration, neither confirms that it will remain a contracting party, nor notifies its denunciation in order to render them ineffective with regard to itself. It has also been asked whether Tanganyika is entitled to denounce these treaties within the prescribed time-limit for denunciation, with effect before two years have elapsed since the date of the declaration, thus reducing the period during which it has undertaken to observe the contractual obligations taken over.

#### V. Other possibilities

There can be no doubt that other theories could be developed regarding the fate of the treaties in force when a new State is created. The International Law Commission has heard statements explaining the difficulties of new States in regard to the fate of existing treaties and their doubts about applying the legal rules on the succession of States where new States have been created within the framework of the legal system instituted by the United Nations Charter and the general lines of United Nations policy on the liquidation of colonial regimes. Their views have not been explained in detail, but it has been made clear that many rules of so-called traditional law are incompatible with present conditions and that it is necessary, by codifying the rules of international law on the succession of States and Governments without delay, to settle cases of conflict between the aspiration of new States and the claims of the treaty partners of the former sovereign Powers that the new States must at all costs respect the treaty obligations existing when they gained their independence, regardless of how the treaty provisions affect the newly created state of affairs and the exercise of the right of self-determination.

#### General conclusions

It is agreed that this is one of the most immediate problems of public international law. The writer is deeply convinced that it must be solved by combining the rules of traditional international law with rules based on modern concepts. Rules must therefore be formulated in a spirit of progressive development of international law, which will certainly make it necessary to revise some old ideas and work towards other institutions of contemporary international law and international practice, which require that purely legal arguments be brought into line not only with the present tendency to create new States, but also with the tendency to eliminate all relics of colonialism. In other words, the whole approach must be in the spirit of the policy of decolonization, but a policy of decolonization which spares the new States the difficulties of a dearly-bought emancipation.

In this connexion, one of the difficulties of the new States arises from the fact that at the time of their emancipation, most of them concluded a series of treaties with the former sovereign Power, on whose attitude the date on which emancipation would take effect often depended. These treaties are partly the price of freedom paid to the former master, but they also contain provisions benefiting third parties, i.e. provisions relating to the obligations of the new State towards the treaty partners of the former sovereign Power. Both kinds of provision are designed to safeguard established rights, or their continued existence under the future regime of independence of the emancipated territory. These provisions are not only legal or economic in character; in some cases, they are political or even military (compulsory accession to certain treaties or political groups, federation of States, military alliances, bases for armed forces). The question seriously arises whether these treaties have any binding force for the newly created States. Admittedly, they were concluded as a result of political negotiations, though some of them were stipulated before the proclamation of independence and signed after it (but generally before the withdrawal of the former master's troops); yet it is difficult to consider them as representing freely accepted international treaty obligations, or their signatories as the genuine representatives of the new sovereign State and its

people. (In several cases experience has confirmed that these so-called transitional governments were organs of the former masters, or represented a group of genuinely national forces chosen by the former masters to return the power to them, thus uniting their interests with those of the new ruling group.) Disputes concerning the binding force of this kind of treaty arise after independence has been established for some time, when the new regime has grown stronger and the administration of the State has passed into the hands of genuine representatives of the people. In practice, these disputes often arise when the exhilaration of independence is over and people begin to consider the price paid for it and the demands by which the beneficiaries of the treaties seek to continue a disguised form of colonial exploitation and influence. The emancipated State then invokes the incompatibility of the treaty provisions with the principles of the United Nations Charter governing relations between States and with the position of a sovereign State enjoying equality of rights. The beneficiaries of the provisions, on the other hand, claim that each of these treaties was freely negotiated without any physical pressure, and is not a treaty inherited from the former sovereign Power, but a new treaty concluded with the representatives of the independent State. Consequently, they demand full application of the treaty in accordance with the principle *pacta sunt servanda*. The writer does not consider that the fate of these treaties must be decided in an absolutely uniform manner and that they must be declared invalid *a priori*. He believes that they belong to a special class, and must be regarded as voidable treaties—that the whole of such treaties, or some of their provisions, can be attacked if it is shown that they are incompatible with the status of the new independent State and that they represent the continuation of a special, inequitable influence for the benefit of the former sovereign Power or of third States which have abused their power and influence. In the writer's opinion, these treaties should be regarded as being suspended by reason of an objection by the State threatened, and the question of their validity should be decided by the International Court of Justice or a political organ of the United Nations. Such treaties form a special class which should not be overlooked.

This paper has only one purpose: to show that the creation of new States by virtue of the right of self-determination has raised a new problem of international law, which consists in examining, in the light of United Nations principles, the fate of international treaties applying to a liberated territory up to the time of its emancipation, and effectively placing the new State in a position of complete political, economic and social independence *vis-à-vis* the former colonial Power or trusteeship authority.

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#### WORKING PAPER

Submitted by Mr. Manfred LACHS<sup>30</sup>

1. By a decision taken at its fourteenth session (A/5209, para. 72) the International Law Commission requested the members of the Sub-Committee to prepare individual memoranda which were meant to facilitate the discussion at its meeting to be held between 17 and 25 January 1963.

2. These memoranda were intended to deal "essentially with the scope of and approach to the subject" of succession of States and Governments.

3. The present writer was entrusted with the task of preparing "a working paper containing a summary of the views expressed in the individual reports".

He received memoranda from the following members of the

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<sup>30</sup> Originally circulated as mimeographed document A/CN.4/SC.2/WP.7.

Sub-Committee: Mr. Milan Bartos, Mr. Erik Castrén, Mr. T. C. Elias, Mr. Shabtai Rosenne and Mr. Abdul H. Tabibi.

The present working paper constitutes therefore an attempt to summarize the views presented in these five papers.

### I. Preliminary remarks

There seems to be common agreement among the authors of the memoranda as to the need of paying special attention to problems of succession arising as a result of the emancipation of many nations and the birth of so many new States after World War II. It is therefore suggested that the problems concerning new States be given special treatment and that the whole topic be viewed in the light of contemporary needs. Where differences do arise they concern issues of proportion and emphasis. There seems to be little doubt that this chapter has a special bearing on the approach to the whole problem as reflected in the memoranda.

### II. The scope of the subject

#### 1. Succession of States and Governments: one or two topics? Question of priority

The problem was touched upon during the preliminary discussion in the Commission and is further developed in the papers submitted.

The following views should be recorded:

##### A. In favour of dividing the two topics and of postponing the treatment of that concerning the succession of governments

Reasons:

- (a) Some of the problems involved in the latter are clear (for example, identity and personality of the State), while some others are too complicated (for instance, insurgent Governments);
- (b) The latter topic is linked with the issues of responsibility and recognition which will be dealt with separately;
- (c) The problem is not one of primary importance.

##### B. In favour of treating both issues as a single topic

Reasons:

- (a) The General Assembly regarded both as constituting one topic, or "at least wished the International Law Commission to initiate work on a single topic which would combine relevant elements of the two traditional headings of succession";
- (b) In recent developments, particularly the creation of so many independent States, the technical distinction between succession of States and succession of Governments "may be taken to be problematical".

##### C. In favour of giving priority to the topic of succession of States and studying succession of Governments in connexion with it

This procedure is suggested by way of a compromise and concession to those who claim that the two topics have a close connexion with each other.

##### D. In favour of concentrating on issues of succession of States as the result of the application of the principle of self-determination

This proposal is supported by the claim that a great number of new and hitherto unknown problems have been posed by the creation of new States by virtue of the principle of self-determination contained in the Charter of the United Nations, and that they require urgent solution.

#### 2. Delimitation of the topic

##### A. Relationship to other subjects on the agenda of the International Law Commission

###### (a) Law of treaties

It is pointed out that succession in respect of treaties could be dealt with as part of the report on the law of treaties (the Special Rapporteur on the law of treaties has not expressed any definite views on the subject). It seems, however, that the common view is in favour of including it in the topic of succession. At the same time it is indicated that the approach of the International Law Commission to the law of treaties would facilitate the treatment of the subject (mention is made *inter alia* of articles 8 and 9 of the 1962 draft). But it is also suggested that the classification of treaties, which the International Law Commission so far has been unwilling to accept, becomes of importance.

###### (b) Responsibility

The fact that this subject is also on the agenda of the International Law Commission calls for special attention in order to avoid overlapping.

###### (c) Co-ordination of the work of the three Special Rapporteurs

In view of the above it is recommended that the three Special Rapporteurs (on the law of treaties, on responsibility and on succession) keep in close touch and co-ordinate their work.

##### B. Exclusion of certain issues

Attention is drawn to the need to eliminate a series of subjects, thus leaving them outside the scope of the study to be undertaken. Particular reference is made to those which are covered by Article 2, paragraph 7, of the Charter of the United Nations. The following subjects are mentioned, among others:

- (a) the effect of the creation of a new State on the domestic legal system itself;
- (b) question concerning rights and duties based on private or public law, in the relationship between individuals, formerly subjects of the metropolitan Power, and the new Government;
- (c) contracts, torts, internal debts, tax liabilities and franchise concerning persons who have become nationals of the new State.

#### 3. Division of the topic

##### A. Broad outline

In a broad outline the following headings are suggested:

- (a) Succession in respect of treaties;
- (b) Succession in respect of membership of international organizations;
- (c) Succession in respect of rights and duties resulting from other sources than treaties (concerning individuals);
- (d) Succession between international organizations;
- (e) Adjudicative procedures for the settlement of disputes.

##### B. Detailed division of the subject

Several criteria are offered, on the whole those traditionally used:

- (a) by the origin of succession:
  - disappearance of the State;
  - birth of a new State;
  - territorial changes of existing States;
- (b) by the source of rights and obligations:
  - treaties;
  - property;
  - contracts in general;
  - concessionary rights;
  - servitudes;

public law (administrative and nationality problems);  
torts;

(c) by territorial effects:

within the territory of the State concerned;  
extra-territorial;

(d) *ratione personae*:

rights and obligations between the States directly concerned;  
rights and obligations towards other States;  
rights and obligations of nationals of the former metropolitan States;  
rights and obligations of nationals of third States.

### III. *The approach to the subject*

#### 1. *The point of departure — evaluation of the present state of the law on succession*

This is clearly stated in one of the memoranda:

“there are no general agreements on State succession, and even the international customary law on it is defective”.

#### 2. *The objective*

Elaboration of detailed replies to the question: to what extent is the successor State bound by the obligations of its predecessor, and to what extent is it to benefit from its rights?

A very general indication of how this is to be achieved can be found in the formula: “that it should be limited and precise and must cover the essential elements which are necessary for the creation of practical devices to solve the present difficulties”.

#### 3. *Guiding criteria*

These are of the essence, as it is upon them that the direction of the future work depends. The following are mentioned:

(a) Primary consideration should be given to the principle of self-determination and the interests of the newly-born States.

(b) The principle of respect for economic rights, private or vested rights, and its effect on succession. Within a more general consideration: the relationship between change and stability.

(c) The place to be given to the time-factor: how long do the effects of succession operate after the acquisition of independence? How long do they limit the freedom of action of the new State?

#### 4. *Codification or progressive development*

There seems to be common agreement that some of the old principles should be revised in the light of recent developments. In this connexion several suggestions are made: among them an empirical and flexible approach is advocated “as a rational basis for the continued integrity of international law and the facts of international life”.

#### 5. *Treaties*

Special attention is paid to succession problems resulting from treaties.

##### A. *Universal and singular succession*

Many objections are raised against universal succession for both theoretical and practical reasons. It is pointed out, with reference to recent practice, that many of the treaties in question are even unknown to the new countries, some of them are labelled as “models of evasive draftsmanship”, while in other cases extremely complicated and confused situations have been created (the case of the Congo and Katanga is offered as illustration).

The negation of treaty succession on the one hand releases the new State from burdensome obligations, but at the same time deprives it of many rights from which it might have

wished to benefit. On the other hand, it is argued that the maintenance of many of the territorial treaties may amount to depriving the new States of their rights of self-determination, including the right to dispose freely of their natural resources.

Some of the memoranda raise important issues of principle and detail, and offer definite suggestions of solutions.

##### B. *Type of treaties*

(a) treaties concluded by the old sovereign on behalf of all the territories under his jurisdiction or applied to the territory in question by virtue of the colonial clause,

(b) treaties concluded by the old sovereign acting on behalf of the territory in question as its trustee, protector etc.

(c) treaties concluded by the local administration of the territory which has achieved independence, but acting under the auspices of the metropolitan power.

The memorandum in question rejects any differentiation between these types of treaties, suggesting that all of them have one thing in common: the fact that they were concluded by the former sovereign who was an outsider.

(d) It assimilates to them also a fourth type of treaty — treaties between the old sovereign and the new State concluded on the eve of the latter's acceding to independence or immediately after it (they deal mainly with economic, political and military questions).

In this connexion four approaches are mentioned:

(a) the theory of the *tabula rasa* — the new State is not bound by any treaty and inherits no contractual obligation,

(b) the theory of the right of option concerning the validity of the treaties in question (an analogy is drawn with the provisions of the Peace Treaties of 1946, and the United Nations practice with regard to multilateral treaties),

(c) the theory of continuation with the right of denunciation,

(d) the theory of the right for a time limit for reflection (the recent case of Tanganyika is quoted in this connexion).

Positive and negative elements of each of them are recorded.

##### C. *The effect of the prima facie assumption of the treaty by the new States*

The question is raised of the extent to which the usual blanket formula accepted by the new State binds it with regard to agreements of the former Sovereign.

These are some of the more important problems submitted in the memoranda.

#### 6. *The form of the final work of the Commission on the subject*

The memoranda contain in this respect some tentative proposals which are worth recording.

##### A. *Multilateral treaty*

The advantage of adopting this solution is stressed in view of its greater practical importance and the facilities it offers in bringing the new States into the confines of international law.

B. *Several treaties* providing for alternative texts or containing recommendations only. Suggested as an alternative in view of the difficulties *one multilateral treaty* may present, namely the political character of the issues involved, and the lack of established practice.

##### C. *Set of principles or model Rules as a guide for States, to be approved by the General Assembly.*

This solution is backed by the following considerations:

(a) most of the problems are of a bilateral character and “not altogether suitable for regulation by means of a general multilateral convention”;

(b) the number of interested States is limited: about 50 successor States on the one hand, and a few former metropolitan States on the other;

(c) practical problems are being settled by bilateral agreements, thus reducing codification to a series of residual rules.

#### IV. *Miscellanea*

The memoranda contain some other suggestions and recommendations. Those which require mention concern the future work of the International Law Commission in this field:

A. The Sub-Committee should continue even after the Special Rapporteur is selected;

B. Apart from the documents already submitted the Secretariat should be requested to prepare:

(a) an analytical restatement of the material which will be forthcoming from replies of Governments;

(b) a working paper covering the practice of specialized agencies and other international organizations in the field of succession.

## CHECK LIST OF DOCUMENTS REFERRED TO IN THIS VOLUME

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/925	Report of the International Law Commission covering the work of its first session, 12 April - 9 June 1949	<i>Official Records of the General Assembly, Fourth Session, Supplement No. 10; also published in Yearbook of the International Law Commission, 1949</i>
A/2693	Report of the International Law Commission covering the work of its sixth session, 3 June - 28 July 1954	<i>Official Records of the General Assembly, Ninth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1954, vol. II</i>
A/2934	Report of the International Law Commission covering the work of its seventh seventh session, 2 May - 8 July 1955	<i>Official Records of the General Assembly, Tenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1955, vol. II</i>
A/3159	Report of the International Law Commission covering the work of its eighth session, 23 April - 4 July 1956	<i>Official Records of the General Assembly, Eleventh Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1956, vol. II</i>
A/3859 and Corr.1	Report of the International Law Commission covering the work of its tenth session, 28 April - 4 July 1958	<i>Official Records of the General Assembly, Thirteenth Session, Supplement No 9, also published in Yearbook of the International Law Commission, 1958, vol. II</i>
A/4007	Report of the Sixth Committee [concerning the International Law Commission's report on its tenth session]	<i>Official Records of the General Assembly, Thirteenth Session, Annexes, agenda item 56</i>
A/4169	Report of the International Law Commission covering the work of its eleventh session, 20 April - 26 June 1959	<i>Official Records of the General Assembly, Fourteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1959, vol. II</i>
A/4425	Report of the International Law Commission covering the work of its twelfth session, 25 April - 1 July 1960	<i>Official Records of the General Assembly, Fifteenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1960, vol. II</i>
A/5209 and Corr.1	Report of the International Law Commission covering the work of its fourteenth session, 24 April - 29 June 1962	<i>Official Records of the General Assembly, Seventeenth Session, Supplement No. 9; also published in Yearbook of the International Law Commission, 1962, vol. II</i>
A/CN.4/1/Rev.1	Survey of international law in relation to the work of codification of the International Law Commission, preparatory work within the purview of article 18, paragraph 1, of the Statute of the International Law Commission: memorandum by the Secretary-General	United Nations publication, Sales No.: 1948. v. 1 (1)
A/CN.4/23	Law of treaties: report by J. L. Brierly, Special Rapporteur	<i>Yearbook of the International Law Commission, 1950, vol. II</i>
A/CN.4/63	Law of treaties: report by H. Lauterpacht, Special Rapporteur	<i>Yearbook of the International Law Commission, 1953, vol. II</i>
A/CN.4/87	Law of treaties, second report by H. Lauterpacht, Special Rapporteur	<i>Yearbook of the International Law Commission, 1954, vol. II</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/92	Commentary on the Draft Convention on Arbitral Procedure adopted by the International Law Commission at its fifth session. Prepared by the Secretariat	United Nations publications, Sales No.: 1955. V. 1
A/CN.4/96	International responsibility: report by F. V. García Amador, Special Rapporteur	<i>Yearbook of the International Law Commission, 1956, vol. II</i>
A/CN.4/101	Law of treaties: report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Ibid.</i>
A/CN.4/103	Régime of the high seas and régime of the territorial sea: Supplementary report by J. P. A. François, Special Rapporteur, on the right of international organizations to sail vessels under their flags	<i>Ibid.</i>
A/CN.4/107	Law of treaties: second report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Yearbook of the International Law Commission, 1957, vol. II</i>
A/CN.4/115 and Corr.1	Law of treaties: third report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Yearbook of the International Law Commission, 1958, vol. II</i>
A/CN.4/119	State responsibility: International responsibility: fourth report by F. V. García Amador, Special Rapporteur	<i>Yearbook of the International Law Commission, 1959, vol. II</i>
A/CN.4/120	Law of treaties: fourth report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Ibid.</i>
A/CN.4/129	<i>Ad hoc</i> diplomacy: report by A. E. F. Sandström, Special Rapporteur	<i>Yearbook of the International Law Commission, 1960, vol. II</i>
A/CN.4/130	Law of treaties: fifth report by Sir Gerald Fitzmaurice, Special Rapporteur	<i>Ibid.</i>
A/CN.4/144	Law of treaties: first report by Sir Humphrey Waldock, Special Rapporteur	<i>Yearbook of the International Law Commission, 1962, vol. II</i>
A/CN.4/147	Question of special missions (General Assembly resolution 1687 (XVI): working paper prepared by the Secretariat	<i>Ibid.</i>
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>Ibid.</i>
A/CN.4/150 and Corr.1	Succession of States in relation to multilateral treaties of which the Secretary-General is the depositary: memorandum prepared by the Secretariat	<i>Ibid.</i>
A/CN.4/151	Digest of decisions of international tribunals relating to State succession: study by the Secretariat	<i>Ibid.</i>
A/CN.4/152	Report by Mr. Roberto Ago, Chairman of the Sub-Committee on State Responsibility (approved by the Sub-Committee)	See this volume, p. 227
A/CN.4/154	Resolutions of the General Assembly concerning the law of treaties: memorandum prepared by the Secretariat	See this volume, p. 1
A/CN.4/155	Special missions: working paper prepared by the Secretariat	See this volume, p. 151
A/CN.4/156 and Add.1 - 3	Second report on the law of treaties, by Sir Humphrey Waldock, Special Rapporteur	See this volume, p. 36
A/CN.4/157	Digest of decisions of national courts relating to succession of States and Governments: study prepared by the Secretariat	See this volume, p. 95
A/CN.4/159 and Add.1	Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations (General Assembly resolution 1766 (XVII)): Note by the Secretariat	Mimeographed
A/CN.4/160	Report by Mr. Manfred Lachs, Chairman of the Sub-Committee on Succession of States and Governments (approved by the Sub-Committee)	See this volume, p. 260
A/CN.4/161 and Add.1	Relations between States and intergovernmental organizations: first report by A. El-Erian, Special Rapporteur	See this volume, p. 159
A/CN.4/162	Question of extended participation in general multilateral treaties concluded under the auspices of the League of Nations: report by Sir Humphrey Waldock, Special Rapporteur	See chapter III of the report of the International Law Commission on its 15th session.
A/CN.4/L.28	Law of treaties: text of articles tentatively adopted by the Commission at its third session	<i>Yearbook of the International Law Commission 1951, vol. II, pp. 73 and 74</i>
A/CN.4/L.88	Memorandum by Mr. Jiménez de Aréchaga in explanation of his proposal concerning <i>ad hoc</i> diplomacy (A/CN.4/L.87)	<i>Yearbook of the International Law Commission, 1960, vol. II</i>

<i>Document</i>	<i>Title</i>	<i>Observations and references</i>
A/CN.4/L.103	Relations between States and intergovernmental organizations: working paper by A. El-Erian, Special Rapporteur	See this volume, p. 186.
A/CN.4/SC.1/WP.6	Working Paper prepared by Mr. Roberto Ago [concerning the subject of State responsibility]	Incorporated in document A/CN.4/152, Annex II, which is published in the present volume as an annex to the Commission's report on its 15th session
A/CN.4/SC.2/WP.7	Working Paper submitted by Mr. Manfred Lachs [concerning the subject of the succession of States and Governments]	Incorporated in document A/CN.4/160, Annex II, which is published in the present volume as an annex to the Commission's report on its 15th session
A/C.6/L.498	List of multilateral agreements concluded under the auspices of the League of Nations in respect of which the Secretary-General of the United Nations acts as depositary and which are not open to new States by virtue of their terms or of the demise of the League: Working paper prepared by the Secretariat	<i>General Assembly, Official Records, Seventeenth Session, Annexes, agenda item 76</i>
A/C.6/L.504/Rev.2	Draft resolution submitted by Australia, Ghana and Israel	<i>Ibid.</i>





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